

April 1995

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### Recommended Citation

Marianne L. Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases - Freedom: Constitutional Law*, 70 Chi.-Kent L. Rev. 1123 (1995).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss3/9>

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# A QUESTION OF JUSTICE: AFRICAN-AMERICAN LEGAL PERSPECTIVES ON THE 1883 *CIVIL RIGHTS CASES*\*

MARIANNE L. ENGELMAN LADO\*\*

## INTRODUCTION

“The colored people of the United States feel to-day as if they had been baptized in ice water,” an outraged T. Thomas Fortune, editor of the *New York Globe*, wrote on October 20, 1883.<sup>1</sup> A few days earlier, the Supreme Court had declared the first two sections of the Civil Rights Act of 1875 unconstitutional. The Civil Rights Act had guaranteed all citizens equal access to places of public accommodation, such as inns, railroads, and theaters, and had provided for enforcement in federal court.<sup>2</sup> Fortune was not alone in expressing a strong reaction to the Court’s decision. During the ensuing weeks, the *Civil Rights Cases* were denounced, debated, and discussed in meetings<sup>3</sup> and in newspapers,<sup>4</sup> among the small number of African Americans admitted to the bar and among those without formal legal training. For the majority of African-American political leaders, religious figures, and editors, whose thoughts have been preserved in printed form, the Court’s opinion was a profound disappointment, the probable end of an era in which some hope had remained that the federal government would provide legal protection of the rights of citizenship.

\* The author wishes to thank Luke Charles Harris, Walter Murphy, Jennifer Hochschild, Andrew Koppelman, and, especially, Albert Raboteau for their advice and encouragement.

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1. T. Thomas Fortune, *The Civil Rights Decision*, N.Y. *GLOBE*, Oct. 20, 1883, at 2, reprinted in LESLIE H. FISHEL, JR. & BENJAMIN QUARLES, *THE NEGRO AMERICAN: A DOCUMENTARY HISTORY* 315 (1967).

This Article contains numerous quotations from newspaper articles in the 1880s. All original spellings and capitalizations have been retained to reflect the intent of the authors.

2. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883).

3. See, e.g., *The Colored People of Kansas*, *ARK. MANSION*, Dec. 22, 1883, at 1 (quoting a report from the *Detroit Plaindealer* regarding a “largely attended meeting” of African Americans in Kansas); Resolutions of Civil Rights Congress, 1883, Adopted at the Civil Rights Mass Meeting Held at Lincoln Hall in Washington D.C. (Oct. 22, 1883), in 2 *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 658-59 (Herbert Aptheker ed., 1951) [hereinafter Resolutions].

4. See, e.g., October and November editions of the *New York Globe*, *Arkansas Mansion*, *Cleveland Gazette*, *People’s Advocate* (Washington, D.C.), and the *State Journal* (Harrisburg, Pa.).

This Article examines what the voices of black America said in 1883 about a variety of jurisprudential issues. The Article draws upon responses to the *Civil Rights Cases* to examine the range of African-American opinions on the origin and nature of both law and rights; the authority and jurisdiction of the courts and Congress; constitutional meaning and interpretation generally, and as to the Reconstruction Amendments in particular; and judicial discretion, its limits, and the deliberative process. Section I provides a brief summary of the *Civil Rights Cases*. Section II presents the vast and varied array of African-American responses to the *Cases*. Section III focuses on *Justice and Jurisprudence*,<sup>5</sup> a heartfelt and lengthy legal argument against the *Cases* and other matters involving construction of the Thirteenth and Fourteenth Amendments. The Article concludes with an analysis of the general themes and commonalities appearing in the record of African-American perspectives on the law in the years following Reconstruction.

### I. THE CIVIL RIGHTS CASES

By the time the Supreme Court heard and decided the *Civil Rights Cases*, the national government had largely abandoned the cause of civil rights.<sup>6</sup> The Supreme Court had already frustrated the intentions of the Reconstruction Republicans by striking down or limiting the main body of civil rights law.<sup>7</sup> Given both the negligible chance of vindication in federal court, as well as the general climate of intimidation and intolerance, it is little wonder that by 1883 few blacks were bringing suit under the Civil Rights Act.<sup>8</sup> Many viewed the law

5. BROTHERHOOD OF LIBERTY, JUSTICE AND JURISPRUDENCE: AN INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS (Philadelphia, J.B. Lippincott Co. 1889) (hereinafter *JUSTICE AND JURISPRUDENCE*). The Brotherhood of Liberty was a group of African-American activists.

6. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 586-87 (1988).

7. See generally RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO* 105-25 (Collier Books 1965) (1954).

8. The Court's delay in issuing a ruling on the *Cases* created uncertainty about the law and may have discouraged additional litigation. See Valeria W. Weaver, *The Failure of Civil Rights 1875-1883 and Its Repercussions*, 54 J. NEGRO HIST. 368, 369-70 (1969).

Despite the general acknowledgment of the Act's impotency in the face of white prejudice and disinterest, many African Americans continued to press for redress under its terms. See, e.g., A NEGRO ATTORNEY TESTIFIES AGAINST SEGREGATED TRAVEL, 1883, S. REP. ON LABOR AND CAPITAL, testimony, vol. iv, at 382 (1883), in *BLACK PROTEST: HISTORY, DOCUMENTS AND ANALYSES 1619 TO THE PRESENT* 163-64 (Joanne Grant ed., 1968) (statement of J.A. Scott of Birmingham, Alabama, reporting on discriminatory treatment of African Americans by the railroads and complaints made to the railroad commission in 1883). Even as late as 1883, complainants were still bringing suit pursuant to the Act to challenge segregatory policies and practices. See, e.g., N.Y. *GLOBE*, Aug. 25, 1883, at 2 (reporting on a decision sentencing a restaurateur to a

as a dead letter.<sup>9</sup> The Court's pronouncement in the *Civil Rights Cases* nevertheless confirmed in official terms the effective death of the Act.<sup>10</sup> As a columnist for the *Cleveland Gazette* wrote in late October, "The Civil Rights bill lingered unconsciously nearly nine years and died on the 15th of October, 1883, without a struggle. Although its death was not wholly unexpected, it was, after all, a great shock to the colored race and occasioned a profound feeling throughout the country."<sup>11</sup>

Four of the five cases jointly considered by the Supreme Court in the *Civil Rights Cases* were criminal prosecutions for denial of hotel and theatre privileges on the basis of race, color, or previous condition of servitude.<sup>12</sup> The fifth was a civil action brought by Richard and Sallie Robinson after a conductor on the Memphis and Charleston Railroad refused to allow Mrs. Robinson passage in the ladies' car because "she was a person of African descent."<sup>13</sup> The constitutional validity of the first two sections of the Act was at issue in all five cases.<sup>14</sup>

\$500 fine or thirty days in jail for refusing to serve a man of color); N.Y. *GLOBE*, Sept. 29, 1883, at 2 (reporting on and opposing an offer of compromise made by the Texas railroads by which the railroad would furnish equal but separate accommodations); *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1 (discussion of *Laport v. St. L., L.M. & N. Ry.*, a suit brought under Arkansas's statute for the forcible eviction of an African-American woman from a first class car).

9. See FONER, *supra* note 6, at 556; Hon. John P. Green, *Civil Rights: Deep Game Being Played by Arthur Politicians—What Next?*, CLEV. GAZETTE, Oct. 20, 1883, at 2 (arguing that the Civil Rights Act was of no practical utility in the South, where "it was never true that a colored man could get any accommodations equal with those given to the whites in that section"); Resolutions of National Convention at Louisville, September 1883, *quoted in Equal Rights*, ARK. MANSION, Oct. 27, 1883, at 1 ("It should be remembered that at the National Convention at Louisville we pronounced the civil rights amendments a dead letter in which the supreme court has only concurred."). African Americans were not alone in their recognition of the inefficacy of the Act. See, e.g., *Civil Rights Cases Decided*, N.Y. TIMES, Oct. 16, 1883, at 4 (suggesting that the decision was unlikely to have much of an impact, since the Act had never been enforced).

10. As Albert P. Blaustein and Robert L. Zangrando wrote, "The Civil Rights Cases of 1883 confirmed the fact that the national government was officially abandoning the Negro to the caprice of state control." *CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY* 283 (Albert P. Blaustein & Robert L. Zangrando eds., 1968). By removing any semblance of federal protection for the rights of African Americans, the *Civil Rights Cases* and a number of other cases from this time ushered in and made possible the era of Jim Crow. *Id.*; LOGAN, *supra* note 7, at 114-18; HAROLD M. HYMAN & WILLIAM M. WIECK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875*, at 498-500 (1982).

11. *Xenia—Numerous Notes—Politics—Civil Rights*, CLEV. GAZETTE, Oct. 27, 1883, at 2.

12. The Civil Rights Cases, 109 U.S. 3, 4 (1883) (syllabus of the Court) (United States v. Stanley (hotel accommodations), United States v. Ryan (theatre privileges), United States v. Nichols (hotel accommodations), and United States v. Singleton (theatre privileges)).

13. *Id.* at 4-5.

14. Section 1 of the Civil Rights Act of 1875, which was entitled "An Act to Protect all Citizens in their Civil And Legal Rights," provided:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amuse-

The Court held, first, that the Fourteenth Amendment protects against interference with rights held by citizens only if perpetrated by instrumentalities of the state. In Justice Bradley's words: "Individual invasion of individual rights is not the subject matter of the amendment."<sup>15</sup> The Court concluded that since the Fourteenth Amendment prohibited only discriminatory actions by the state, congressional authority was limited to "corrective legislation," or the prohibition of state violations of constitutional rights.<sup>16</sup> The actions of private individuals were subject only to state civil rights laws. To rule otherwise, the Court maintained, would be to allow Congress to supersede state power to regulate the private relations "between man and man."<sup>17</sup> According to the Court, the Fourteenth Amendment did not authorize Congress to forbid discriminatory practices by owners and operators of accommodations, conveyances, or places of amusement.

Neither did the Thirteenth Amendment authorize the Act.<sup>18</sup> While the Court recognized Congress's "right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents,"<sup>19</sup> Justice Bradley's opinion rejected the argument that denial of access to an inn, conveyance, or theatre constituted a badge or incident of slavery.<sup>20</sup> The Court found that the right to freedom established by the Thirteenth Amendment did not include "the social rights of men and races in the community."<sup>21</sup>

Justice Harlan was the sole member of the Court to dissent. He criticized the majority for construing the Amendments so as to defeat the ends for which they were adopted.<sup>22</sup> In a passage much quoted by African-American newspapers, he wrote:

Constitutional provisions adopted in the interest of liberty, and for the purpose of securing, through the national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and

ment; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335, 336 (1875). Section 2 set applicable civil and criminal penalties for violation of the law. See Civil Rights Act of 1875, ch. 114, § 2, 18 Stat. 335, 336 (1875).

15. The Civil Rights Cases, 109 U.S. at 11.

16. *Id.* at 13-14.

17. *Id.* at 13.

18. *Id.* at 20-25.

19. *Id.* at 21.

20. *Id.* at 23-24.

21. *Id.* at 22.

22. *Id.* at 26.

which they supposed they had accomplished by changes in their fundamental law.<sup>23</sup>

Harlan argued, further, that the majority had departed from rules of interpretation that require “that full effect be given to the intent with which [constitutional provisions] were adopted.”<sup>24</sup>

More specifically, he protested the Court’s narrow interpretation of the requirements of freedom under the Thirteenth Amendment. Since the institution of slavery rested upon the inequality of those held in bondage, “their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.”<sup>25</sup>

Justice Harlan’s discussion of Congressional authority under the Fourteenth Amendment also starkly contrasted with that of the majority’s. Harlan argued that Section 5, the Enabling Clause,<sup>26</sup> granted Congress the authority to enforce all provisions of the Fourteenth Amendment, not merely those clauses interpreted to prohibit only discriminatory state action. The affirmative grant of citizenship to all persons born or naturalized in the United States, made explicit in the amendment’s first section,<sup>27</sup> secured for the freeman the rights of citizenship. Thus, he asserted, the amendment conferred upon Congress the authority to enact legislation of a direct character to enforce those rights.<sup>28</sup> He contrasted the Court’s decision to deny Congress the power to enforce civil rights when individuals violate the civil rights of others with the Supreme Court’s previous willingness to grant Congress the power to enforce a slaveowner’s right to recover his slave on claim.<sup>29</sup>

With tragic prescience, Harlan commented that the Court’s interpretation of the Reconstruction Amendments would enter the nation upon a regrettable era in constitutional law, “when the rights of freedom and American citizenship cannot receive from the nation that

23. *Id.*; see also *The Civil Rights Decision: The Dissenting Opinion of Mr. Justice Harlan*, PEOPLE’S ADVOCATE (Washington, D.C.), Nov. 24, 1883, at 2; *Our Opinions of Justice Harlan’s Views*, ARK. MANSION, Dec. 1, 1883, at 1.

24. *The Civil Rights Cases*, 109 U.S. at 26.

25. *Id.* at 36.

26. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

27. Section 1 of the Fourteenth Amendment provides in part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

28. *The Civil Rights Cases*, 109 U.S. at 50.

29. See, e.g., *id.* at 33-34, 53.

efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master."<sup>30</sup>

## II. REACTIONS AND RESPONSES

In North and South, African Americans reacted to the Court's decision with shock and profound dismay. An account of the immediate response to an announcement of the decision made at an opera-house in Atlanta, Georgia is telling: "[T]he quietude of the colored gallery was noticeable. Not a note of applause came from those solemn rows of benches; their occupants were dum-founded. The feeling of the colored people to-day is deep . . . ."<sup>31</sup> Many African-American speakers, writers, and editors found the *Cases* reminiscent of *Dred*

30. *Id.* at 57. As noted above, Harlan had strong words for the Court's method of constitutional construction and resultant failure to give effect to the intended meaning of legislation enacted in the exercise of the powers granted to Congress. *Id.* at 27, 52. Harlan also refuted the Court's positions that the activities prohibited by the Act do not meet the requirements of state action, *id.* at 42, and that the rights encompassed by the Act were "social rights," *id.* at 59.

Harlan's views effectively prevailed more than eighty years after the *Civil Rights Cases*. In response to the growing movement for civil rights in the 1950s and 1960s, Congress passed the Civil Rights Act of 1964, 78 Stat. 243 (1964), the Second Title of which strongly resembled the Act ruled unconstitutional in the *Cases*. Title II guarantees all persons "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (1988). Places of public accommodation include inns, restaurants, and places of public amusement, provided that the operation of the establishment at issue affects interstate commerce. 42 U.S.C. § 2000a(b) (1988). In two cases, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Court avoided direct conflict with precedent by holding Title II constitutional as an exercise of Congress' power to regulate commerce, the ground left open by the majority in the *Civil Rights Cases*. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 280 (Douglas, J., concurring) (agreeing with the Court's decision based on the Commerce Clause, but arguing that the Fourteenth Amendment authorizes Congress to prohibit racial discrimination in places of public accommodation and is a better basis for the decision). The central holding of the *Civil Rights Cases*—i.e., that the Thirteenth and Fourteenth Amendments did not authorize Congress to regulate private acts of discrimination—was finally laid to rest in a line of cases considering the constitutionality and construction of other provisions of the Civil Rights Acts of 1964 and the Civil Rights Act of 1968. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968) (holding that the Enabling Clause of the Thirteen Amendment empowered Congress to prohibit all discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities.); *United States v. Guest*, 383 U.S. 745, 782-83 (1966) (Brennan, J., concurring in part and dissenting in part) ("I acknowledge that . . . an aspect of the *Civil Rights Cases* [has] declared that Congress' power under § 5 is confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited State laws and State acts . . . .' I do not accept—and a majority of the Court today rejects—this interpretation of § 5.")

31. *The Civil Rights Decision: Divided Feeling in Atlanta on the Vexed Question*, N.Y. TIMES, Oct. 18, 1883, at 1. The *Times* report captured the considerably divergent feelings the Court's ruling engendered along the color line in Atlanta. Whereas the announcement had been met by silence in the gallery, there was a "wild scene" in the white section of the audience, where "men stood on their feet and cheered and ladies gave approving smiles." *Id.*

*Scott*,<sup>32</sup> in that the *Cases* echoed the notion that African Americans had no rights whites were bound to respect.<sup>33</sup> Many were also quick to point out that one of greatest ironies of the Court's ruling was its inconsistency with *Dred Scott*. Whereas in *Dred Scott* the Court had upheld Congressional power to protect and enforce the property rights of slave-owning citizens,<sup>34</sup> in the *Civil Rights Cases*, the Court denied Congress the power to protect the rights of citizenship and referred African Americans to the states for redress. This, despite the passage of constitutional amendments explicitly intended to expand congressional authority to protect rights. While some, like John Mercer Langston, optimistically spoke of the day when liberty would prevail, others expressed bitterly that the recent grant of citizenship, a grant hard earned in wartime, had proved hollow.

### A. Meetings and Speeches

T. Thomas Fortune, editor of the *New York Globe*, reported that “[f]rom Maine to Florida,” the colored people of the United States “are earnestly discussing the decision of the Supreme Court . . . . Public meetings are being projected far and wide to give expression to the common feeling of disappointment and apprehension for the future.”<sup>35</sup> On November 20, the Washington correspondent to the *Arkansas Mansion* likewise wrote, “The recent civil rights decision of the supreme court has been a prolific topic here, and some of our colored population are a good deal exercised.”<sup>36</sup> Indeed, meetings were held

32. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

33. See, e.g., Frederick Douglass, *The Civil Rights Case, Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall in Washington, D.C. (Oct. 22, 1883)*, in *NEGRO SOCIAL AND POLITICAL THOUGHT 1850-1920: REPRESENTATIVE TEXTS* 298-306 (Howard Brotz ed., 1966); Henry McNeal Turner, *Letter to the Editor of the New York Voice (Jan. 4, 1889)*, in *RESPECT BLACK: THE WRITINGS AND SPEECHES OF HENRY McNEAL TURNER* 65, 66 (Edwin S. Redkey ed., 1971) [hereinafter *RESPECT BLACK*] (“Talk about the ‘Dred Scott’ decision; why it was only a mole-hill in comparison with this obstructing Rocky Mountain to the freedom of citizenship.”); *Civil Rights*, *ARK. MANSION*, Nov. 10, 1883, at 1.

34. *Dred Scott*, 60 U.S. (19 How.) at 452 (indicating that Congress had the power and duty of “guarding and protecting the owner in his rights”). The Court interpreted the Constitution as recognizing the primacy of a master’s rights of property and as delegating to the government in express terms the power to protect such property rights. *Id.* at 451-52. The vaulted position of property rights led to the Court’s central holding, that Congress lacked authority to ban slavery from the territories and that such prohibitions against slavery worked to deprive citizens of their property in violation of due process.

35. Fortune, *supra* note 1, at 315; see also *Civil Rights—Opinions of the Press—and Leading Men of the Country*, *ARK. MANSION*, Nov. 17, 1883, at 1 (excerpt from the *Arkansas Dispatch* stating, in part: “The colored people in many places are holding indignation meetings because the United States [S]upreme [C]ourt decided the civil rights bill unconstitutional.”).

36. *Washington Letter*, *ARK. MANSION*, Dec. 1, 1883, at 1. The Washington correspondent had reported in late October that “in several cities throughout the country the colored citizens



in Washington, New York, Philadelphia,<sup>37</sup> Pittsburgh,<sup>38</sup> Cleveland,<sup>39</sup> St. Louis,<sup>40</sup> Chicago,<sup>41</sup> Columbus,<sup>42</sup> Louisville,<sup>43</sup> Springfield, Missouri,<sup>44</sup> Birmingham,<sup>45</sup> Norwich, Connecticut,<sup>46</sup> and in Texas.<sup>47</sup>

The *Civil Rights Cases* “were greeted with an indignant rally in Philadelphia almost as big as those which had celebrated [the passage of the Act] eight years before.”<sup>48</sup> One meeting of African Americans in Texas, which was called to express indignation over the Court’s ruling, created more than a stir. The *Topeka Tribune* reported that after participants had driven out two “bullying” white men who attempted to interrupt the meeting, chaos ensued: “[M]ore whites rushed in and were promptly repulsed—some cowardly justice of the peace hurriedly telegraphed the governor of a ‘nigger uprising’; this good soul ordered out the whole state militia to put down—a public meeting which would not be intruded.”<sup>49</sup> Most gatherings ended more peace-

had called indignation meetings to denounce the Civil Rights decision.” *From Washington*, ARK. MANSION, Oct. 27, 1883, at 1.

37. See, e.g., ROGER LANE, WILLIAM DORSEY’S PHILADELPHIA AND OURS: ON THE PAST AND FUTURE OF THE BLACK CITY IN AMERICA 12 (1991) (citing THE TIMES, Oct. 18, 1883).

38. See John W. Anderson, et al., *Pittsburgh: Personals—A Civil Rights Mass Meeting—Politics*, CLEV. GAZETTE, Nov. 3, 1883, at 2.

39. See *Civil Rights—The Harmonious and Enthusiastic Mass Meeting at Halcyon Hall Last Monday Evening*, CLEV. GAZETTE, Nov. 3, 1883, at 2.

40. See *Our Western Letter—Civil Rights Mass Meeting of St. Louis Colored Citizens, at Which Hon. J. Milton Turner Orates*, CLEV. GAZETTE, Dec. 1, 1883, at 4.

41. “*The Devil or Ben Butler*”, N.Y. TIMES, Oct. 26, 1883, at 1 (reporting with disapproval on the remarks of Rev. W. Polk who, at a meeting in his Chicago church, denounced the decision as an insult to the race and advised African-American voters to give their allegiance to the party that would give African Americans their rights).

42. *State Capital—Gleanings from Columbus—The Supreme Court’s Decision Still the Leading Topic—Colored Men Call a Meeting*, CLEV. GAZETTE, Oct. 27, 1883, at 1.

43. African Americans in Louisville held more than one meeting. See *Address to the Colored People of Louisville*, ARK. MANSION, Oct. 27, 1883, at 1; *Civil Rights—Opinions of the Press—and Leading Men of the Country*, ARK. MANSION, Nov. 17, 1883, at 1; *The Colored People of Kansas*, ARK. MANSION, Dec. 22, 1883, at 1 (reporting on a meeting in Kansas and the resolutions adopted for presentation to Congress).

44. *Better Than the Civil Rights Bill*, N.Y. TIMES, Nov. 1, 1883, at 4 (reporting on a “colored mass-meeting” that convened on October 30, during which “appeals were made for ‘united action and earnest demands for the rights’ of the race”).

45. See *Colored Citizens of Birmingham on the Civil Rights Decision*, HUNTSVILLE GAZETTE (Alabama), Nov. 17, 1883, at 2; *State News*, HUNTSVILLE GAZETTE (Alabama), Nov. 10, 1883, at 2.

46. See *Insisting on Their Rights—The Colored Citizen’s Convention of the State of Connecticut*, STATE J. (Harrisburg, Pa.), Jan. 5, 1884, at 2; *A Movement for Civil Rights*, STATE J. (Harrisburg, Pa.), Dec. 15, 1883.

47. For discussion of additional meetings, see, e.g., ARK. MANSION, Nov. 3, 1883 (mass meeting of African Americans in Keokuk resolved to ask Iowa’s legislature to adopt the sections of the Civil Rights Bill declared unconstitutional by the Court); *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1 (coverage of Illinois convention).

48. LANE, *supra* note 37, at 12 (citing the THE TIMES, Oct. 18, 1883).

49. ARK. MANSION, Nov. 17, 1883, at 1 (excerpt from *Topeka Tribune* (Kansas)). See also *News and Notes*, HUNTSVILLE GAZETTE (Alabama), Nov. 3, 1883, at 3 (reporting as erroneous

fully. A mass meeting in Birmingham, Alabama, produced a series of resolutions condemning the decision and declaring that to deprive African Americans of the enjoyment of the right to equal accommodations is to “conflict with a right . . . common to all men.”<sup>50</sup> Those assembled appointed five men to a committee to present grievances to the railroads in Alabama and to request a plan to ensure that African Americans enjoy as good accommodations as any other race when paying the same fare.<sup>51</sup>

Prominent lawyers such as John Mercer Langston spoke out against the Court’s decision and hailed Justice Harlan’s dissent. “Not within the memory of the oldest inhabitants,” the *New York Globe* reported, “has ever before so large, refined and highly representative an audience assembled to hear any man as the one that greeted the Hon. John Mercer Langston.”<sup>52</sup> On Friday, October 19, Langston, then U.S. Consul General to Haiti, delivered a lecture entitled “Status of the Colored American, His Relationships and His Duties” to a standing-room-only crowd in Washington, D.C.’s First Congregational Church.<sup>53</sup> Langston was joined on stage by other African American leaders, including Frederick Douglass and Blanche K. Bruce, ex-Senator from Mississippi and then-Register of the U.S. Treasury. The event was ushered by students at Howard University’s School of Law, of which Langston had been the first dean.<sup>54</sup> Langston argued that the postwar amendments authorized the Civil Rights Act. Specifically, he contended that the Act had merely explained preexisting rights and provided for their protection. He denied that the Court

an initial press dispatch suggesting that a mob of 500 African Americans in Milan County, Texas, had threatened havoc).

50. *Colored Citizens of Birmingham on the Civil Rights Decision*, HUNTSVILLE GAZETTE (Alabama), Nov. 17, 1883, at 2.

51. *Id.*

52. *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. GLOBE, Oct. 27, 1883, at 2.

53. *Id.*; *Civil Rights Law—The Harmonious and Enthusiastic Mass Meeting at Halcyon Hall Last Monday Evening*, CLEV. GAZETTE, Nov. 3, 1883, at 2 (an extract from Hon. John Mercer Langston’s Great Lecture). The *Globe* reported that people began to congregate in front of the church two hours before doors were to open and, by seven o’clock, more than a thousand persons stood ready to enter. *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. GLOBE, Oct. 27, 1883, at 2. See also descriptions of the event in Jesse Lawson, *The Civil Rights Demonstration*, N.Y. GLOBE, Nov. 3, 1883, at 2.

Langston also spoke about the *Cases* to an audience in New York. See *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 10, 1883, at 1 (excerpt from coverage by the *Southwestern Christian Advocate*).

54. Jesse Lawson, *The Civil Rights Demonstration*, N.Y. GLOBE, Nov. 3, 1883, at 2.

could legitimately deprive African Americans of the legal mechanisms necessary to preserve their citizenship.<sup>55</sup>

“The Supreme Court would seem desirous of remanding us back to that old passed condition,” Langston stated, finding absurd the Court’s relegation of protection for civil rights to the states.<sup>56</sup> “We need and demand protection, and if States should not protect us against abuse, against insults, against violation of our rights, Congress should and must.”<sup>57</sup> The Thirteenth and Fourteenth Amendments, Langston continued, were precisely intended to authorize such protection, and, in accordance with the authority granted by the amendments, the Civil Rights Act had provided aggrieved individuals a means of redress. To those who counseled African Americans to wait for the states to act, he responded, “How long must we wait for change of public opinion, and how long must we wait for State action to give us our rights . . . ?”<sup>58</sup>

Langston compared the history of people of African descent in the United States to the Biblical story of the Exodus from Egypt. He noted that the founding documents of the nation—i.e., the Declaration of Independence, the Articles of Confederation, and the Constitution—contained no language discriminating against colored persons in awarding the privileges of citizenship. When the Constitution was ratified, he argued, African Americans voted for the ratification. “There came a time, however,” he continued, “when those arose who knew not Joseph.”<sup>59</sup> Just as the new rulers of Egypt had enslaved the Hebrews, so too the new country debased, disenfranchised, and discriminated against African Americans. Emancipation was granted as a war measure, but emancipation meant more than an absence of slavery. “As we walked out of slavery, we walked into citizenship.”<sup>60</sup> The Thirteenth Amendment was ratified to secure the rights of the freedmen: “Out of slavery we have passed, as stated, into American citizenship, a good deal like coming out of the land of Egypt into a promised land, one flowing with milk and honey.”<sup>61</sup>

Langston recounted how the Civil Rights Law of 1866 had been enacted to guarantee the colored man the rights essential to citizen-

55. *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. *GLOBE*, Oct. 27, 1883, at 2.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

ship, including the rights to contract, and, also, to buy, sell, hold, convey, and transfer property. Finally, the Fourteenth Amendment had been ratified to eliminate all doubt that the rights of African Americans were to be clearly defined and protected.<sup>62</sup>

He then turned to the content of the Civil Rights Act and the Court's recent decision. Before reading the text of the Act, he noted three established principles that would guide his discussion: first, that all persons born or naturalized in the United States are citizens of both the United States and of the state in which they reside; second, that neither Congress nor any state can make any law to abridge rights belonging to any class of citizens; and third, that

All acts of either of the bodies named must be in conservation and protection of the rights of the citizen, and when doubt may rise as to the constitutionality of an act passed for such purpose such doubt should be given in favor of the rights in question, especially where the intent of the law is plain.<sup>63</sup>

Langston argued that the language of the Act, and especially of its preamble,<sup>64</sup> was unambiguous and carefully crafted, and was intended to protect the already established rights of citizenship. "This law then," he stated, "seems to be simply a declaratory statute explanatory of existing rights. It does not create our rights; it simply defines and explains them."<sup>65</sup> Most importantly, the law furnished a means of redress against violations. Thus, he contended, the Court should have resolved any doubt in favor of the rights of citizenship.<sup>66</sup>

"How is it possible," Langston asked, "for the Supreme Court . . . to have reached the conclusion that the civil Rights Act, under the circumstances, is unconstitutional?" He answered, "This is incomprehensible."<sup>67</sup> The Court had ignored the "doctrine of the 13th and 14th

62. *Id.*

63. *Id.*

64. The preamble stated:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all whatever nativity, race, color or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore . . .

*Id.* at 4 (quoting the Civil Rights Act of 1875).

65. *Id.* Langston also stated, more specifically, that the Civil Rights Act was passed pursuant to the Fourteenth Amendment, with the following purposes:

first, as declaratory of the Civil Rights of the colored people of the country, already made free and citizens of the United States; secondly, to correct the abusive and illegal treatment of such class of our citizens by the people of the various States of the Union; and thirdly to provide them adequate means of redress and protection as such citizens.

*Id.*

66. *Id.*

67. *Id.*

Amendments” and the “logic and law of the Civil Rights Acts of 1866 and 1875. . . .”<sup>68</sup> He then thanked the Court for at least limiting the reach of its decision. Langston noted that federal protection within the District of Columbia and the territories continued, since the *Cases* limited federal protection only within the jurisdiction of the states. Langston also indicated that the Court had sustained, “[b]y implication at least,” common law protections that are enforceable in state court and, upon further Congressional action, that would be enforceable in federal court.<sup>69</sup>

What, then, was the condition of African Americans after the Court’s decision? “My colored friends, let us not despair,” Langston advised, “We are complete citizens, entitled to the full measure of privileges and immunities as such.”<sup>70</sup> Although the Court had left African Americans without redress in federal court, except where violations occurred in the District of Columbia or federal territories, it had recognized the correctness of common law doctrines and the duty of the states to enforce their application.<sup>71</sup>

African Americans gathered in Louisville, Kentucky on October 19 and listened to another address condemning the decision and exhorting the audience to action. The speaker called upon “the colored citizens in every town and city in the state to assemble in public meetings at once” in order that their views on the *Cases* be clearly and promptly set forth.<sup>72</sup> This speaker asked African Americans in Kentucky to adopt a number of propositions, including, first, that the post-war constitutional amendments established the citizenship of African Americans, “which in so far as law is concerned means the same to every man without distinction or discrimination upon any account whatever.”<sup>73</sup> Second, every citizen is entitled to his civil rights by “the fundamental laws of the government,” laws that could not be repealed by the Supreme Court, nor by any of its decisions.<sup>74</sup> Thus, as citizens, African Americans could not be deprived of their civil rights by the Court’s ruling. Third, state courts, the means of enforcing civil rights

68. *Id.*

69. Langston considered common law rights to encompass the rights to contract and to bind the other party to the contract. This includes, “[t]he simplest common law rights of which we have any knowledge, the right to go upon railroad cars and be accommodated, where [we] have first-class tickets to enable us to ride in first-class cars.” *Id.*

70. *Id.*

71. *Id.*

72. *Address to the Colored People of Louisville*, ARK. MANSION, Oct. 27, 1883, at 1. The *Mansion* does not identify the speaker.

73. *Id.*

74. *Id.*

suggested by the Court, had always existed but were ineffectual. Congress enacted the Civil Rights Act precisely because of the laxity of the states. Fourth, although there existed increased support for civil rights generally, and although advancements “in intelligence, wealth and deportment” made by African Americans would lessen the need for civil rights legislation in the future, nonetheless such advancements were not a prerequisite to equal citizenship, and legislation remained necessary to protect rights against “unjust forces.”<sup>75</sup> Lastly, the speaker called for a national organization of African Americans to publicize the names of common carriers and other public accommodations that did not discriminate on the basis of race and to encourage all African Americans to patronize these establishments.<sup>76</sup>

Frederick Douglass delivered a speech about the *Cases* at a well-attended mass meeting held at Lincoln Hall in Washington, D.C. on October 22, 1883.<sup>77</sup> The *Cleveland Gazette's* Washington correspondent reported on the crowd gathered at Lincoln Hall: “There was no standing room—there was scarcely breathing room. Stage and floor were alike crowded. There were over 2,000 persons inside the doors and double that number turned reluctantly away.”<sup>78</sup> James M. Gregory presided over and addressed the meeting, which was also attended by various African-American and white leaders, including Blanche K. Bruce, Richard T. Greener (professor and, later, dean of Howard’s law department), the Rev. Francis Grimke, and Robert G. Ingersoll.<sup>79</sup> Before Douglass’s speech, the assembly unanimously adopted resolu-

75. *Id.*

76. *Id.*

77. Douglass, *supra* note 33, at 298. The text of Douglass’s speech was reprinted and discussed in a number of African-American newspapers. See, e.g., *Civil Rights Decision—An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall*, CLEV. GAZETTE, Oct. 27, 1883, at 1. Some papers, including the *Huntsville Gazette* (Alabama) and the *Cleveland Gazette* had even printed advance notices of the meeting. See *Civil Rights Decision: Views of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2 (reporting that invited speakers included Fred Douglass, Col. Ingersoll, Rev. Dr. Raskin, Judge Shellarbarger, Jeff Chandler, and Judge Riddle); *Colored Men Disappointed: The Civil Rights Decision Regarded as a Step Backward*, N.Y. TIMES, Oct. 17, 1883, at 4; CLEV. GAZETTE, Oct. 20, 1883, at 2. In its October 20 issue, the *Huntsville Gazette* also printed Douglass’s initial statement on the decision:

It is contrary to the Declaration of Independence, contrary to the spirit of Christianity, contrary to the spirit of the age, and, as I think, in violation of the Fourteenth and Fifteenth Amendments, and tends directly to make the colored people of the country an aggrieved class, and to weakening [a] spirit of patriotism.

HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2. Douglass’s speech is also reprinted in 4 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 392 (1955).

78. *Civil Rights Decision—An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall*, CLEV. GAZETTE, Oct. 27, 1883, at 1.

79. *Id.*

tions affirming the duty of citizens to respect judicial decisions, calling for the adoption of state measures to protect civil rights, and advising the immediate organization of civil rights associations throughout the country, "through which proper agitation and earnest work for our cause may be inaugurated and carried out."<sup>80</sup>

Though Douglass spoke after the Court had handed down its judgment, he had not yet seen the full text or the dissenting opinion. Douglass and his audience already knew, however, that the Court had invalidated the Civil Rights Act and, without having read the fine print, Douglass felt that "[f]ew events in our national history" surpassed the Supreme Court's decision in "magnitude, importance and significance."<sup>81</sup> He compared the significance and thrust of the decision to the effort to force slavery on the soil of Kansas, the enactment of the Fugitive Slave Law of 1850, the repeal of the Missouri Compromise, and the *Dred Scott* decision. The Court's judgment in the *Cases* represented something other than a statement of principle or an interpretation of text; the decision reflected the values of the nation and stood in contradiction to the founding principle of liberty. Douglass stated, "I look upon it as one more shocking development of that moral weakness in high places which has attended the conflict between the spirit of liberty and the spirit of slavery from the beginning . . . ."<sup>82</sup>

Although Douglass urged the gathering to respond to the decision without bitterness and advocated patient reform over violent revolution, he argued that the duties of the citizenry and their government are reciprocal. "[W]hile the people should frown down every manifestation of levity and contempt for those in power, it is the duty of the possessors of power so to use it as to deserve and to insure respect and reverence."<sup>83</sup> And whereas governments are established to secure the rights of human nature and to protect the weak and defenseless from oppression, the Court's ruling denied the federal government the very powers necessary to pursue these ends.<sup>84</sup>

Douglass read aloud the first section of the Fourteenth Amendment. Although he stated that he was disinclined to discuss the constitutionality of the Court's decision, he proceeded with an analysis of

80. *Id.*; Resolutions, *supra* note 3, at 659.

81. Douglass, *supra* note 33, at 298.

82. *Id.*

83. *Id.* at 299.

84. *Id.* at 301. In view of the decision and the federal government's "utter destitution of power" to protect citizens against violation of their rights, Douglass asked "what right have we to call ourselves a Nation . . . ?" *Id.*

the Court's role within the constitutional framework and an examination of inconsistencies in the Court's constitutional interpretation. He praised the nation's constitutional structure and, more specifically, the distribution of powers among branches of the federal government. The Supreme Court is, wisely, "the autocratic point in our National Government," the branch with the "Supreme power of the Nation," Douglass stated, "and their decisions are law."<sup>85</sup> The Court's judges, Douglass continued, "live, and ought to live, an eagle's flight beyond the reach of fear or favor, praise or blame, profit or loss. No vulgar prejudice should touch the members of that Court anywhere. Their decisions should come down to us like the calm, clear light of Infinite justice."<sup>86</sup> Yet, the power of the Court to invalidate acts of Congress should be exercised only under the most conclusive circumstances, particularly when the law in question is "in favor of liberty and justice."<sup>87</sup> Such a law "ought to have had the benefit of any doubt which could arise as to its strict constitutionality."<sup>88</sup> To the contrary, Douglass argued, the Court's decision had not been compelled by the force of precedent or, more specifically, by the Constitution itself, but, instead, reflected the Court's lack of commitment to the protection of human rights. The Court could have followed prior methods of constitutional interpretation and found the Act constitutional.<sup>89</sup>

Douglass discussed inconsistencies in the Court's method of construing the Constitution and complained of "this sudden and causeless reversal of all the great rules of legal interpretation by which this Court was governed in other days."<sup>90</sup> For example, whereas the Court had once relied on the intention of the framers to support its defense of the slave trade and the Fugitive Slave Law, the Court now "utterly ignored and rejected the force and application of object and intention as a rule of interpretation."<sup>91</sup> The Court now viewed the Fourteenth

85. *Id.* at 300.

86. *Id.*

87. *Id.* In this regard, Douglass also told his audience, "[W]e cannot . . . overlook the fact that . . . this decision has inflicted a heavy calamity upon seven millions of the people of this country, and left them naked and defenceless against the action of a malignant, vulgar, and pitiless prejudice." *Id.* at 301.

88. *Id.* at 300.

89. *Id.* at 304-05.

90. *Id.* at 303.

91. *Id.* Douglass argued that the framers of the Fourteenth Amendment had intended to prohibit discriminatory acts and not to make application of the Amendment contingent on the instrument of discrimination. "What does it matter to a colored citizen that a State may not insult and outrage him," Douglass asked, "if a citizen of a State may?" *Id.* at 305. Whether the State or its members commit the act, Douglass continued,

The effect upon him is the same, and it was just this effect that the framers of the Fourteenth Amendment plainly intended by that article to prevent. . . . [They] meant



Amendment and the Act without regard to the broad and liberal spirit in which they were enacted.<sup>92</sup> Underlying the Court's change in position was not principle untouched by prejudice, but, instead, the continuing spirit and power of slavery. Douglass charged that the Court applied different rules of interpretation in order to achieve the particular outcomes that the Justices found acceptable, and he concluded, "Where slavery was strong, liberty is now weak."<sup>93</sup>

Douglass then turned to the symbolic value of the Court's action. While some had downplayed the importance of the decision, feeling that the Civil Rights Act was already lifeless, Douglass argued that the law "though dead, did speak."<sup>94</sup> The Act had appealed to the best instincts of the American people and had declared that all Americans were equal citizens. He lamented, "The Supreme Court has hauled down this flag of liberty in open day, and before all the people . . ."<sup>95</sup>

to protect the newly enfranchised citizen from injustice and wrong, not merely from a State, but from the individual members of a State. [They] meant to give him the protection to which his citizenship, his loyalty, his allegiance, and his services entitled him, and this meaning, and this purpose, and this intention, is now declared . . . void . . .

*Id.*

92. *Id.* at 305.

93. *Id.* at 304. "In the dark days of slavery," Douglass stated, the Court allowed the intention of the framers to guide interpretation, even if, in the process, the plain language of the Constitution and the benefits of liberty were sacrificed as a result. *Id.* at 303-04. "O for a Supreme Court of the United States which shall be as true to the claims of humanity as the Supreme Court formerly was to the demands of slavery!" *Id.* at 304.

94. *Id.* at 305.

95. *Id.* In the final portion of his speech, Douglass defended the Civil Rights Act against those who argued that it protected social, not civil rights. Douglass distinguished between civil rights and social equality and, in the final passage of his speech, Douglass argued, "If [the civil rights bill] is a Bill for social equality, so is the Declaration of Independence, which declares that all men have equal rights; so is the Sermon on the Mount, so is the Golden Rule . . ." *Id.* at 306. For more on Douglass's distinction between civil rights and claims for social equality, see John W. Anderson et al., *Pittsburgh: A Strong Civil Rights Argument from the Keystone State—The Atlanta Constitution Roughly Handled*, CLEV. GAZETTE, Nov. 24, 1883, at 2 (text of Douglass's address to the 1883 national convention). For further discussion of the distinction, see also MAURINE CHRISTOPHER, *BLACK AMERICANS IN CONGRESS* 59 (1976) (discussing views of Rep. John R. Lynch); Richard H. Cain, *A Speech on the Civil Rights Bill*, in CARTER G. WOODSON, *NEGRO ORATORS AND THEIR ORATIONS* 328, 329 (1925) (speech by Rep. Cain before the Congress); T. Thomas Fortune, *Civil Rights and Social Privileges*, 2 A.M.E. CHURCH REV. 119, 128-31 (1885); John R. Lynch, *A Speech on the Civil Rights Bill*, in *NEGRO ORATORS AND THEIR ORATIONS*, *supra*, at 356, 363-67 (speech by Rep. John R. Lynch before Congress).

Douglass again discussed the *Cases* in April 1888, during a historic address delivered at a Washington celebration of the twenty-sixth anniversary of emancipation in the District of Columbia. Frederick Douglass, *I Denounce the So-Called Emancipation as a Stupendous Fraud, Speech Before a Gathering in Washington D.C. Celebrating the Twenty-Sixth Anniversary of Emancipation* (Apr. 16, 1888), in *THE VOICE OF BLACK AMERICA: MAJOR SPEECHES BY NEGROES IN THE UNITED STATES, 1797-1971*, at 520 (Philip S. Foner ed., 1972) [hereinafter *VOICE OF BLACK AMERICA*] (reprinted from *WASH. NAT'L REPUBLICAN*, Apr. 17, 1888). The true object of government, Douglass contended, "is to protect the weak against the encroachments of the strong, to hold its strong arm of justice over all the civil relations of its citizens and to see that all have an equal chance in the race of life." *Id.* at 531. Instead, however, in the case of African-

An assembly “of ladies and gentlemen” in Cleveland discussed the *Cases* and adopted resolutions that mirrored those ratified by the meeting at Lincoln Hall.<sup>96</sup> In recognition of the inadequacy of entrusting protection of civil rights to either the common law or the good will of white citizens, the gathering resolved to organize civil rights groups throughout the country and to petition the President to recommend Congressional action to protect the civil rights of African Americans.<sup>97</sup>

“Monday evening, November 19, Mercantile Library Hall was the center of attraction to a major portion of the colored populace of St. Louis,” the *Cleveland Gazette* reported.<sup>98</sup> A standing-room-only crowd of men and women convened to discuss the decision. After electing officers to guide the deliberations and listening to some preliminary remarks, the assembly, which included “a goodly share of white as well as colored citizens,”<sup>99</sup> heard an address by J. Milton Turner, who denounced the decision and branded the Court’s conclusion as fallacious. Speaking further, he reminded his audience “that the Supreme court was but the servant of the people of these United States, and that the sovereign will of the people must be obeyed.”<sup>100</sup> In order to make their voices heard and, thus, to remedy the situation, he urged African Americans to cast their ballots to call the Republican party to task.<sup>101</sup>

American citizens, the national government “tacitly protects the strong in its encroachments upon the weak.” *Id.* Douglass repeated his belief that the federal government had the power to protect the rights of citizenship. “If it has not this right,” he stated, “it is destitute of the fundamental quality of a government.” *Id.* at 562.

96. *Civil Rights—The Harmonious and Enthusiastic Mass Meeting at Halcyon Hall Last Monday Evening*, CLEV. GAZETTE, Nov. 3, 1883, at 2.

97. *Id.* Like the resolutions passed by the Washington assembly, the resolutions adopted in Cleveland included provisions stating that it was the duty of all citizens, without respect to party lines, to ensure that the full and equal protection of the laws is afforded all without regard to race, color, or previous condition of servitude, and that African Americans should support the political party that gave force and meaning to previous pledges for the protection of civil rights. The resolutions adopted in Cleveland also stated, “That the progress of the colored American citizen in morals, education, frugality, industry, and general usefulness, as a man, and as a citizen, makes it a part of sound policy and wisdom to maintain and protect him in the enjoyment of the fullest and most complete rights of citizenship.” *Id.*

98. *Our Western Letter—Civil Rights Mass Meeting of St. Louis Colored Citizens, at Which Hon. J. Milton Turner Orates*, CLEV. GAZETTE, Dec. 1, 1883, at 4.

99. *Id.*

100. *Id.*

101. *Id.* Turner also took occasion to argue against school segregation in Missouri. Turner suggested that African Americans bring a test case to challenge refusals to admit African-American children to white schools, a practice that ran afoul of Missouri’s own law establishing separate schools for children of African descent only where their number was equal to or greater than fifteen. *Id.*

African Americans in Norwich convened several meetings to discuss the *Cases* and to fix a course of action.<sup>102</sup> At a gathering in early December, those assembled appointed a committee, which subsequently issued a call to African Americans across Connecticut to hold local meetings and send delegates to a state convention in Norwich in order to consider the “ways and means to secure civil rights for all citizens regardless of race, color, or previous condition.”<sup>103</sup>

At the end of December, a state convention of African Americans gathered in Norwich to discuss the Court’s decision. Although some of the speakers intoned words of uplift, suggesting to the gathering that they held within themselves the power to command respect, the body resolved that the Fourteenth Amendment was intended to ensure the protection of civil rights.<sup>104</sup> The resolution focused on the amendment’s grant of the rights of citizenship:

That the fourteenth amendment of the constitution confers the right of citizenship upon all persons born or naturalized in the United States and subject to the jurisdiction thereof. It was the special purpose of this amendment to insure to members of the colored race the full enjoyment of civil and political rights.<sup>105</sup>

The convention resolved to support any legislation to supplement the Constitution’s guarantees of equal rights and the privileges and immunities of citizenship.<sup>106</sup>

Approximately 150 African-American delegates from across Ohio gathered in Columbus on December 22, 1883, to consider, generally, “the educational, moral, civil, and political interests of the colored race, and particularly the question of the equal rights of the

102. A correspondent to the *State Journal* of Harrisburg, Pennsylvania, reported that the meetings were addressed “by influential colored men and by leading Republicans, who failed to inspire confidence that the Republican Party is doing its duty by the race.” *A Movement for Civil Rights*, STATE J. (Harrisburg, Pa.), Dec. 15, 1883; see also *A Movement for Civil Rights*, N.Y. TIMES, Dec. 10, 1883, at 5.

103. *A Movement for Civil Rights*, STATE J. (Harrisburg, Pa.), Dec. 15, 1883. The *State Journal* reported that Walter H. Burr, “a well-known and eloquent colored man” from Norwich, was the leader of the movement. *Id.*; see also *A Movement for Civil Rights*, N.Y. TIMES, Dec. 10, 1883, at 5.

104. *Insisting on Their Rights: The Colored Citizen’s Convention of the State of Connecticut*, STATE J. (Harrisburg, Pa.), Jan. 5, 1884. Speakers included the convention’s chairman, Walter H. Burr of Norwich, Major Delaney of South Carolina, Mr. Claggert of Hartford, and George Jeffries of Meriden, whose remarks included the following comment: “The legislature may pass laws till doomsday telling the people to respect you, but it cannot enforce such laws, for the virtue within you must command for you respect. The success of civil rights is within you.” *Id.*

105. *Id.*

106. *Id.*; see also *Insisting on Their Rights: The Colored Citizens’ Convention of the State of Connecticut*, N.Y. TIMES, Dec. 31, 1883, at 5.

colored people of the South."<sup>107</sup> Participants included a number of ministers and professional men.<sup>108</sup>

### B. *Additional Comments by the Leadership*

In the period immediately following the Court's decision, only two African Americans remained in Congress, James E. O'Hara, from North Carolina,<sup>109</sup> and South Carolinian Robert Smalls.<sup>110</sup> Both served in the House. O'Hara proposed a constitutional amendment to lay the foundation that the Court had found lacking in the *Cases*.<sup>111</sup> Recognizing the poor prospects for passage, O'Hara then proposed to amend a bill concerning interstate commerce by including a requirement that interstate passengers be treated without discrimination and assigned accommodations according to the purchase price of the tickets:<sup>112</sup> "[A]ny person or persons having purchased a ticket to be conveyed from one State to another, or paid the required fare, shall receive the same treatment and be afforded equal facilities and accommodations as are furnished all other persons holding tickets of the same class without discrimination."<sup>113</sup> On the House floor, O'Hara explained that his amendment would require railroads to provide a person who purchased a ticket for interstate travel "the *same* facilities, privileges, accommodations, and advantages" as other persons holding the same class of ticket.<sup>114</sup> O'Hara argued that Congress had not only

107. STATE J., Dec. 29, 1883, reprinted in *THE BLACK PRESS, 1827-1890: THE QUEST FOR NATIONAL IDENTITY* 173 (Martin E. Dann ed., 1971) [hereinafter *THE BLACK PRESS*].

108. *Id.* at 173. An article appearing in the *State Journal* of Harrisburg, Pennsylvania one week later reported: "The recent decision of the Supreme Court annulling the Civil Rights bill, as well as the murder of colored men at Danville, Virginia, are the principal reasons for the assembling of the [Ohio] convention . . ." *Id.*

109. James Edward O'Hara, an attorney, won a seat in Congress in the election of 1882, was reelected to a second term in 1884, and left Congress in 1887 after an electoral defeat. CHRISTOPHER, *supra* note 95, at 152-56.

110. Robert Smalls, a hero of the Civil War, served a number of terms in Congress. He was first elected to represent South Carolina's Third District in 1874. Although Smalls was not in Congress at the time that the Court delivered its decision in the *Civil Rights Cases*, he was again elected in 1884, this time to represent the Seventh District, and served until the election of 1886, when Democratic efforts to disenfranchise African Americans successfully denied Smalls in his final bid for reelection. *Id.* at 38-54.

111. H.R. Res. 92, 48th Cong., 1st Sess. (1884) (introduced by Rep. O'Hara and referred to the Committee on the Judiciary). A number of O'Hara's white colleagues also introduced bills to address the gap in federal protection left by the *Cases*. See, e.g., S. 15, 48th Cong., 1st Sess. (1884); H.R. 2043, 48th Cong., 1st Sess. (1884); H.R. 2694, 48th Cong., 1st Sess. (1884).

112. CHRISTOPHER, *supra* note 95, at 153-54.

113. 16 CONG. REC. H296-97 (1884).

114. *Id.* at H297 (emphasis added).

the power but also an imperative duty to protect citizens from discrimination.<sup>115</sup>

Robert Smalls supported O'Hara's proposal and opposed an attempt to attach a provision that would have allowed separate but equal accommodations.<sup>116</sup> In turn, O'Hara criticized the hypocrisy of those in Congress who opposed congressional protection of civil rights on the ground that statutes in their home states already outlawed discrimination: "If the gentlemen mean what they say, that it is the idea and the firm conviction of every man . . . to accord to all men their rights and privileges," O'Hara suggested, then there would be no need to attach the rider.<sup>117</sup> He contended, "When gentlemen come here and say the words 'without discrimination' should be stricken from my amendment, it shows a deliberate purpose to discriminate."<sup>118</sup>

Bishop Henry McNeal Turner of the African Methodist Episcopal Church discussed the Court's decision during an interview in St. Louis in late October.<sup>119</sup> *The Arkansas Mansion* reported that Bishop

115. *Id.* O'Hara cited the many Court decisions upholding congressional authority to regulate commerce to support his contention that the Constitution granted Congress the power to legislate against discrimination in the conduct of interstate commerce. *Id.* O'Hara further argued that if Congress had the authority to protect and provide for the care of "dumb brutes," or property being transported by rail, it also held the power to "give voice and expression to the protection of the rights of American colored citizens." *Id.* at H297; *see also id.* at H317.

116. *Id.* at H316 (statement of Rep. Smalls) (arguing that while African Americans would not object to riding in separate cars if the cars were of the same character as those provided whites, congressional sanction of separate accommodations would allow the railroads to continue providing inferior "Jim Crow" cars and treating African Americans with disrespect); *see also* CHRISTOPHER, *supra* note 95, at 154.

In the aftermath of the *Cases*, Smalls took a number of other actions to create or reinforce protections against discrimination. For example, Smalls attempted to attach to a bill a rider that would have required operators of all eating places in the District of Columbia to provide service without regard to color. *Id.* at 49.

117. 16 CONG. REC. H317 (1884).

118. *Id.* The House approved O'Hara's amendment by a vote of 134 to 97, *id.* at H297 (vote on amendment offered by Rep. O'Hara), but weakened and transformed its provisions as it moved through Congress. *See, e.g., id.* at 320 (debate over a substitute rider offered by Rep. Breckinridge). Ultimately, the Interstate Commerce Act of 1887 forbade the railroads "to make or give any undue or unreasonable preference or advantage to any particular person . . . or to subject any particular persons . . . to any undue or unreasonable prejudice or any disadvantage of any respect whatsoever." CHRISTOPHER, *supra* note 95, at 155. It further established that carriers that charged some passengers higher fares than others for like services would be guilty of "unjust discrimination." *Id.*

119. The interview was originally published in the *St. Louis Globe-Democrat* and was reprinted in the *Arkansas Mansion* and the *Christian Recorder*. RESPECT BLACK, *supra* note 33, at 60. In 1893 Turner issued *The Barbarous Decision of the Supreme Court Declaring the Civil Rights Act Unconstitutional, etc.*, a pamphlet containing the decision, the dissent and his own critical remarks about the *Cases*. Turner reissued the pamphlet with his comments on the Court's ruling in *Plessy v. Ferguson* in 1896 under the title *The Black Man's Doom*. *Id.* at 60.

The *Arkansas Mansion* described Turner as one of two African Americans, along with Frederick Douglass, who held the implicit confidence of the African-American population. ARK. MANSION, Nov. 24, 1883, at 1.

Turner's views on the subject were "very strong" and in "an excitable tone."<sup>120</sup> When asked, whether, in light of the Supreme Court's ruling that the Act was unconstitutional, he wanted the government to protect civil rights in violation of the constitution, Turner answered, "No. But had the Negro not been involved, it would not have been so unconstitutional."<sup>121</sup> He argued that the postwar amendments had put the status of African Americans explicitly in the hands of Congress. The amendments were ratified by the states "with that distinct understanding."<sup>122</sup>

In comments that presaged defenses of affirmative action programs a century later, Turner argued, further, that the Court's decision would leave African Americans in a subordinate position.<sup>123</sup> The contention that the Court's decision simply left African Americans with the same protections as whites was spurious: "We, of course, object to this on the ground that as yet things are not even. We are not as educated as white men; we are not as rich; we are not as strong in character; we are not as numerous; and altogether we are not as well prepared to protect ourselves."<sup>124</sup> Turner analogized African-American requests for legal protection of their rights to industry's desire for tariffs. "[F]or what is tariff but a protection to a class who confess themselves not to be as strong as another class?"<sup>125</sup>

In November, Turner outlined his areas of disagreement with the Court's ruling.<sup>126</sup> First, the decision unsettled and repoliticized the civil status of African Americans in the United States, a turn of events that could lead to bloodshed.<sup>127</sup> Next, because the decision rendered the national government powerless to protect African Americans in

120. *Turner on the Civil Rights*, ARK. MANSION, Oct. 27, 1883, at 1.

121. *Id.*

122. *Id.* Moreover, Turner stated, congressional opponents of the Amendments had specifically argued that the changes would equalize the white and black races, evidencing their knowledge of the impact these amendments would have. Turner also argued that "any constitution that does not embody the will of the people ought to be abolished." *Id.* In stripping the amendments of their meaning, the Supreme Court pit itself, the will of a few men in Washington, against the popular will, against "every man who voted for Grant or Greely, for both of their platforms . . . ." *Id.*

123. *Civil Rights*, ARK. MANSION, Dec. 22, 1883, at 1.

124. *Id.*

125. *Id.*

126. Henry McNeal Turner, Open Letter to Prof. B. K. Sampson (Nov. 6, 1883), in *RESPECT BLACK*, *supra* note 33, at 61-62 (reprinted from the *Memphis Appeal*) (an open letter to B. K. Sampson chastising Sampson for advocating passivity in the face of the Court's ruling); see also *The Civil Rights Decision: Bishop Turner's Bitter Letter to Prof. B. K. Sampson*, N.Y. TIMES, Nov. 9, 1883, at 5; N.Y. TIMES, Nov. 9, 1883, at 4 (unsympathetically reporting on Bishop Turner's wrath).

127. Turner, *supra* note 126, at 61-62. Turner argued that the establishment of civil rights should be distinguished from issues of party politics. "Instead of being a political issue," he

their freedom, it also destroyed the reciprocal relationship between the nation and its African-American citizens. The decision, thus, "absolves the allegiance of the negro to the United States."<sup>128</sup> Finally, Turner reiterated his disagreement with the Court's interpretation of the Fourteenth Amendment: "The argument that the States have the right to fix [the African American's] civil status," he argued, "is a farce."<sup>129</sup>

At the annual meeting of the Arkansas conference of the American Methodist Episcopal church, held on Nov. 21, Turner, the presiding officer, spoke of the Court's decision in religious terms. Turner closed his Bible, grasped a copy of the decision, scanned the document with an eye of disgust, and, then, "in tones bitter and burning," declared, "that the almighty disposer of all events . . . who marks with an undeviating attention and a retributive hand . . . the turpitude of those who profess to govern, will see to it that the oppressors of a poor and despised people, will in due time have their portion meted out to them."<sup>130</sup> Turner viewed the *Civil Rights Cases* as pivotal, for the Court had essentially announced that the national government was renegeing on its pledge to protect the civil rights of African Americans, and he condemned the decision on numerous occasions.<sup>131</sup>

wrote, "[civil rights] involves existence, respect, happiness and all that life is worth." Turner criticized the Court for allowing politics to interfere with the recognition of rights. *Id.* at 61.

128. *Id.* at 62. Turner had first made this point back in October: "[The decision] absolves the negro's allegiance to the general government, makes the American flag to him a rag of contempt instead of a symbol of liberty. It reduces the majesty of the nation to an aggregation of ruffianism . . . and literally unties the devil." *Turner on the Civil Rights*, ARK. MANSION, Oct. 27, 1883, at 1.

129. Turner, *supra* note 126, at 62. Turner argued that it was the national government, not the states, that had granted citizenship, and was intended to protect the rights of citizenship:

[T]he States did not free the negro, the States (as such, I mean) did not make him a citizen, the States did not give him the elective franchise . . . but the United States did it all, and now this decision sends us back to the States to get our Civil Rights, for the white people of the respective States to decide whether we shall be treated as people or dogs.

*Id.*

130. *A.M.E. Conference: Second Day's Proceedings*, ARK. MANSION, Nov. 24, 1883, at 1.

131. See generally RESPECT BLACK, *supra* note 33, at 60.

The *Huntsville Gazette* reported that the *Civil Rights Cases* had made Bishop Turner into a "strong secessionist." According to the *Gazette*, Turner stated, "Any loyal negro should be hung dead by the neck," a position with which the paper disagreed. ARK. MANSION, Nov. 24, 1883, (excerpt from *Huntsville Gazette*). Indeed, in an article published in the *A.M.E. Church Review*, Turner offered more strong words about the Court's ruling:

Since the Supreme Court of the United States . . . sold out at public auction seven millions of my race, and wickedly, cruelly and infernally turned us over to the merciless vengeance of the white rabble of the country, a crime more infamous in its character than was ever charged upon the devil . . . , I have given the status of the country very little consideration politically or otherwise . . . .

*The Democratic Return to Power*, A.M.E. CHURCH REV., Jan. 1885, at 246-47 (contribution by Bishop H.M. Turner, D.D., LL.D., Bishop of the 5th Episcopal District, A.M.E. Church); see

In 1889, Turner again recapitulated his views in an essay for publication in the *New York Voice*.<sup>132</sup> He, first, accused the Court of allowing racial prejudice to interfere with its legal judgment. The images of African Americans intermingling with whites and associating on equal terms in hotels, theaters, and parlor-cars “completely blinded the eyes of the [eight], at other times, learned judges,” Turner asserted.<sup>133</sup> Next, he cited with approval passages of Justice Harlan’s dissent criticizing the majority for employing methods of interpretation that were “too narrow and artificial.”<sup>134</sup>

Indeed, argued Turner, Congress intended the Civil Rights Act of 1875 to give effect to the Thirteenth Amendment, in part by asserting that African Americans “shall be treated like other men, in all places the conduct of which is regulated by law,” and that “he shall in no way be reminded by partial treatment, by discrimination, that he was once

also Henry McNeal Turner, *The Force Bill*, reprinted in RESPECT BLACK, *supra* note 33, 81-82 (reprinted from CHRISTIAN RECORDER, Aug. 28, 1890) (Turner explains that he left the Republican party after seeing that “it did not intend to remedy that hell-born decision which the Supreme Court of the United States issued, taking away our civil rights.”).

Despite Turner’s tone of disgust and alienation, in May 1884, he was working actively in support of a civil rights bill then before Congress. In an interview with the *Baltimore American*, Turner stated that African Americans across the country had been cursing the Supreme Court Justices since the announcement of the decision. Although Turner stated that he, himself, had never prayed against the Justices, he had asked God “to reorganize the court as speedily as is consistent with His will,” and he believed that his prayers would be answered. *Colored Men of Mark—Bishops of the A.M.E. Church*, N.C. REPUBLICAN, May 22, 1884 (quoting an interview with the *Baltimore American*). Turner also discussed at some length the indignities faced by African Americans traveling by railroad and steamboat and described specific incidents of discrimination. “The railroad companies compel us to buy first-class tickets and then oblige us to ride in smoking cars[.]” Turner stated, “[and it] matters not how well dressed we are or how intelligent or refined.” *Id.* See also *The Colored Man’s Hope—Bishop Turner’s Prophecy of a Nation in Africa—The Present Wrongs and Indignities in the South*, STATE J. (Harrisburg, Pa.), May 17, 1884 (covering the same interview).

132. Turner, *supra* note 33, at 63. Turner wrote in the essay that since the day of the pronouncement of the *Cases*, no other civil subject had received more of his study. *Id.* at 63. Indeed, the *Cases* remained on Turner’s mind when, in 1893, he addressed the National Council of Colored Men, a body of more than six hundred delegates that met in Cincinnati in response to Turner’s call. Bishop Henry McNeal Turner, Justice or Emigration Should be our Watchword, An Address Before the National Council of Colored Men in Cincinnati (Nov. 1893), reprinted in part in VOICE OF BLACK AMERICA, *supra* note 95, at 561. Turner began his speech, which focused on the degradations visited on African Americans and the need for a plan to obtain justice, with a brief assessment of the position of African Americans in the United States. “We have been inhabitants of this continent for 273 years,” he stated, “and a very limited part of the time we were citizens—I mean from the ratification of the Fourteenth Amendment of the national Constitution, until the Supreme Court of the United States, October 15, 1883, declared that provision of the Constitution null and void, and decitizenized us.” *Id.* at 563.

133. Turner, *supra* note 33, at 66.

134. *Id.* at 67. Turner devoted a lengthy section of his essay to Harlan’s discussion of Constitutional interpretation, focusing, particularly, on Harlan’s argument that the Court had departed from the rule of interpretation giving full effect to the intent with which constitutional provisions were adopted. *Id.*



a 'chattel,' a 'thing.'"<sup>135</sup> He stated, "[T]he gentlemen in Congress who voted for [the] act of 1875 understood full well the condition of our country, as did the powers amending the Constitution abolishing slavery. The intention was to entirely free, not to partly liberate."<sup>136</sup> Turner felt it beyond dispute that the Thirteenth Amendment empowered Congress to legislate for the eradication of not only the institution of slavery itself, but also its badges and incidents.<sup>137</sup>

Finally, Turner defended the Civil Rights Act itself. "Was this law just?" he asked. "Did this law violate the principle which should be foremost in every hall of legislation—hurt no one, give unto every man his just due?"<sup>138</sup> In contrast to the Court's decision, which "doomed seven million human beings and their posterity to 'stalls' and 'nooks,' denoting inferiority," the Act had "attempted to protect them from American barbarism and vandalism."<sup>139</sup> Although his interpretation of the postwar amendments clearly relied on a belief that they were intended not just to enact abstract principles of fairness into law but to enfranchise African Americans, in particular, Turner insisted that his was not a request for favoritism: "I ask no rights and privileges for my race . . . which I would not contend for on behalf of the white people were the conditions changed, or were I to find proscribed white men in Africa where black rules."<sup>140</sup>

African-American lawyer and teacher George B. Vashon also condemned the decision.<sup>141</sup> The "eight gentlemen of the Supreme Bench" had overlooked "the spirit of the law" and dabbled with its wording.<sup>142</sup> "They nurse and cherished errors of expression and trample on the will of the people."<sup>143</sup> Vashon charged that the Court had

135. *Id.* at 68.

136. *Id.*

137. *Id.* at 68-69. Turner again referred to Harlan's opinion: "Mr. Justice Harlan rightly says that the Thirteenth Amendment intended that the white race should have no privilege whatsoever pertaining to citizenship and freedom . . ." *Id.* at 68.

Turner further argued that limiting the jurisdiction of federal courts to those cases in which the states passed laws prohibiting African Americans from enjoying particular privileges and rights was absurd and contravened the authority granted Congress by the Thirteenth Amendment. To Turner, the Supreme Court was sanctioning actions that continued to place the badge of slavery on persons of African descent by saying, "For if they (the Negroes) come to us for redress, we will talk about the autonomy of the State must be held inviolate, referring them back to you for satisfaction." *Id.*

138. *Id.* at 64.

139. *Id.* at 67.

140. *Id.* at 69.

141. Geo. B. Vashon, *Another View of the Decision: Further Legislation Declared Necessary*, N.Y. GLOBE, Nov. 3, 1883, at 1 (letter to the editor from George B. Vashon).

142. *Id.*

143. *Id.*

either constrained themselves with technicalities or, worse, had become “the voluntary exponents of a most degraded prejudice.”<sup>144</sup> The Civil Rights Act had been necessary to guarantee civil treatment and the need for federal protection would continue for as long as racial majorities and minorities came into contact in the United States. “[A]s long as there is a possibility of the Negro, the Indian or the Mongolian coming in contact with the whites of America,” Vashon argued, “there is a necessity for some law, more than the latter’s ‘wee, small voice’ of conscience, to keep brute force within the bounds of decency.”<sup>145</sup>

Blanche K. Bruce called the decision “unfortunate” and believed it contrary to “the people’s will.”<sup>146</sup> “[I]t is, in my opinion,” Bruce stated, “the revival of Calhoun’s theory of State rights.”<sup>147</sup>

Ex-Governor of Louisiana P.B.S. Pinchback added his voice to those speaking publicly about the *Cases*. Pinchback argued that even without the protection of the 1875 Act, the common law protected civil rights. If denied the privileges of citizenship on account of color, African Americans at least retained the right to seek redress in state court.<sup>148</sup>

Although former South Carolina Congressman Robert Brown Elliott initially denounced the Court’s action and compared it to the *Dred Scott* decision, he subsequently called the judgment a blessing in disguise.<sup>149</sup> Elliott contended that the lesson to be learned was that the negro “must strike out boldly for himself, and must rely largely upon his own efforts to win the confidence and respect of his white fellow-citizens.”<sup>150</sup> In a statement of upbeat tenor, Elliott suggested that African Americans would “sweep forward with the advancing tide of humanity.”<sup>151</sup> In the South, Elliott stated, the two races “will in time, learn fully to sympathize with and to respect each other.”<sup>152</sup>

John T. Cook, an African-American collector of taxes, reacted to the decision with calm. Ultimately, Cook believed, the standing of African Americans would be measured by their desire for education

144. *Id.*

145. *Id.*

146. *Civil Rights Decision: Views of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2.

147. *Id.*

148. *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 10, 1883, at 1.

149. R. B. Elliott, *The Correct View of the Situation*, ARK. MANSION, Nov. 24, 1883, at 1.

150. *Id.*

151. *Id.*

152. *Id.*

and mental culture, and, thus, the decision would have little impact—"except, perhaps," Cook allowed, "in localities where ignorance prevails."<sup>153</sup>

### C. Newspaper Coverage

African-American newspapers<sup>154</sup> comprehensively covered the Supreme Court's decision, and the *Cases* were the subject of news columns, letters of opinion, and editorials. On October 27, the *People's Advocate*, a paper published in the nation's capital, announced that it was presenting brief extracts of articles about the Court's decision from other African-American newspapers. "These more than any other utterances," the *Advocate* suggested, "reflect colored sentiment with regard to this last emanation from our court of high resort."<sup>155</sup> While the papers, their editors, and their columnists attributed varied significance to the *Cases*, and differed in their predictions of the decision's impact, the High Court's action dominated late October and, for some, November papers.<sup>156</sup> The papers quoted at length both the majority opinion and Justice Harlan's dissent. The periodicals also covered, to varying degrees, speeches and meetings during which the *Cases* were discussed. For example, coverage by the *New York Globe* included reports on community reactions,<sup>157</sup> statements by John Mercer Langston,<sup>158</sup> George Vashon,<sup>159</sup> and Republican orator Robert In-

153. *Civil Rights Decision: Views of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2.

154. This section is based largely on a review of those African-American newspapers published in 1883 that have been preserved on microfilm. The discussion draws most heavily from the extensive collection of African-American papers contained in the Negro Newspaper Microfilm Series.

For information on the role played by the black press in communicating information and advancing both a response to white racism and an assertion of African-American identity, see THE BLACK PRESS, *supra* note 107, at 11-23; Bess Beatty, *Black Newspapers: Neglected Source for the "New South"*, 43 NEGRO HIST. BULL. 60 (1980); see also THE BLACK PRESS, *supra* note 107, at 23-30 (bibliographic sketches of prominent editors).

155. PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883. The *Advocate* stated: "Much difference of opinion [among the extracts] is manifested; this was to be expected. All, however, regard it as of no little political importance. Some are despondent; others are hopeful and more determined to battle for the right." *Id.*

156. The *Huntsville Gazette*, and most papers, treated the *Cases* as the most newsworthy item of mid-October. In other papers, discussion of the *Cases* dominated the news sections for months. The *Arkansas Mansion* outwardly denied the importance of the case yet devoted a tremendous proportion of its space to articles related to the Court's decision.

157. See N.Y. GLOBE, Nov. 3, 1883 (reporting, briefly, that in the aftermath of the decision, 500 colored men had taken arms in Austin).

158. *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. GLOBE, Oct. 27, 1883, at 2.

159. Geo. B. Vashon, *Another View of the Decision: Further Legislation Declared Necessary*, N.Y. GLOBE, Nov. 3, 1883, at 1 (letter to the editor from George B. Vashon).

gersoll,<sup>160</sup> among others,<sup>161</sup> and discussions of the impact of the decision.<sup>162</sup> T. Thomas Fortune, the editor of the *New York Globe*, editorialized,<sup>163</sup> offered analysis of the Court's opinion,<sup>164</sup> and endorsed the dissent.<sup>165</sup> The *Globe* quoted from both texts<sup>166</sup> and printed correspondence about the decision,<sup>167</sup> including a letter from the Attorney General,<sup>168</sup> although the paper admittedly published only a fraction of the mail it received on the subject. On November 3, the *Globe* reported that its offices had been "flooded" with correspondence on the *Cases*: "We have really been paralyzed by the abundance of strong, manly protests and apprehension for the future which has reached us in the form of correspondence . . ." The paper asked forgiveness for its inability to make space for many of the letters.<sup>169</sup>

160. *The National Capital: Colonel Ingersoll Delivers Another Eloquent Lecture on the Subject of Civil Rights—Mr. Evarts on the Decision of the Supreme Court—Odd Fellows' Celebration—Swindling Pension Attorneys—Personal Notes*, N.Y. GLOBE, Nov. 10, 1883, at 1. Ingersoll's speech was subsequently published, along with introductory remarks by Frederick Douglass, in pamphlet form. N.Y. GLOBE, Nov. 24, 1883, at 3.

161. See, e.g., N.Y. GLOBE Oct. 20, 1883, at 2 (statement of Algernon S. Sullivan).

162. See, e.g., *Civil Rights in New York*, N.Y. GLOBE, Dec. 29, 1883, at 2 (stating, "the men who cater to the popular amusement and accommodation of the public [in New York City] are making a decided effort to abridge the rights and immunities of citizens of this State on the strength of the recent decision of the Supreme Court"). In light of the Court's decision and its immediate impact—i.e., emboldening those who would discriminate against African Americans and discouraging African Americans from seeking redress for such insults—Fortune devoted his editorial column on December 29 to the publication and discussion of New York State's civil rights law, "An Act to Provide for the Protection of Citizens in Their Civil and Public Rights." *Id.* Fortune reminded readers that though the Court had denied Congress the power to protect civil rights, the decision "did not deny that citizens of the United States were not each and severally entitled to enjoy the same civil and political rights." *Id.* While Fortune condemned the Court for remanding the protection of the rights of citizenship to the states, he believed that African Americans should seek recourse in the courts of the State of New York, a state that held the citizen liable for "infractions upon private rights and vested rights." *Id.*

163. See, e.g., Fortune, *supra* note 1; *Between Two Fires*, N.Y. GLOBE, Oct. 27, 1883, at 2; *Mr. Justice Harlan's Opinion of Civil Rights*, N.Y. GLOBE, Nov. 24, 1883, at 2.

164. See Fortune, *supra* note 1, at 315; *Between Two Fires*, N.Y. GLOBE, Oct. 27, 1883, at 2; *Civil Rights in New York*, N.Y. GLOBE, Dec. 29, 1883, at 2.

165. See *Mr. Justice Harlan's Opinion of Civil Rights*, N.Y. GLOBE, Nov. 24, 1883, at 2.

166. *The Civil Rights Bill: The Supreme Court Declares its Two Principal Sections Unconstitutional*, N.Y. GLOBE, Oct. 20, 1883, at 2; *The National Capital: The Able and Exhaustive Opinion of Mr. Justice Harlan in the Civil Rights Cases—The Authors' Carnival—Dr. Grimke's Sermon on Luther—Col. Ingersoll on The Glob—Official and Personal Intelligence*, N.Y. GLOBE, Nov. 24, 1883, at 1.

167. See, e.g., *America's Degradation: The Impotency of the Government to Protect its Citizens at Home*, N.Y. GLOBE, Dec. 29, 1883, at 2 (letter from "Republican"); John W. Ewing, *The Words of Sumner: Equality Not Found in Equivilants*, N.Y. GLOBE, Nov. 3, 1883, at 1 (letter to the editor in which Ewing argues, in the wake of the *Civil Rights Cases*, against acceptance of proposals for separate but equal accommodations); J. D. Powell, Jr., N.Y. GLOBE, Oct. 27, 1883, at 3.

168. *The Rights of Negroes: A Letter from Attorney-General Brewster—The Only Remedy for Grievance—A Reply from an Advocate of Separation*, N.Y. GLOBE, Oct. 27, 1883, at 1.

169. N.Y. GLOBE, Nov. 3, 1883, at 2.

Other papers also devoted significant amounts of space and editorial attention to the *Cases*. The *Cleveland Gazette*, a paper devoted to "education, equality and progression," ran articles relating to the Court's decision throughout the fall of 1883.<sup>170</sup> Among the excerpts,<sup>171</sup> editorials,<sup>172</sup> and reports printed by the *Gazette*<sup>173</sup> were stories about meetings called by African Americans in the region to

170. See CLEV. GAZETTE, Oct. 20, 1883, Oct. 27, 1883, Nov. 3, 1883, Nov. 10, 1883, Nov. 24, 1883, Dec. 1, 1883, Dec. 8, 1883, Dec. 15, 1883, Jan. 5, 1884.

171. *Civil Rights Law: Declared Unconstitutional by the Supreme Court*, CLEV. GAZETTE, Oct. 20, 1883, at 2.

172. *Id.*; CLEV. GAZETTE, Nov. 17, 1883, at 2 (responding to a Pittsburgh *Chronicle* editorial advising patience); see also *Our Washington Letter: Judge Mills' Decision in a Civil Rights Case—The National Convention—Personals*, CLEV. GAZETTE, Aug. 25, 1883, at 1 (containing an editorial on a lower court decision in an earlier test of the Civil Rights Act).

173. See, e.g., *The Civil Rights Bill: An Indignant Citizen Expresses His Views on the Repeal of this Famous Bill*, CLEV. GAZETTE, Oct. 20, 1883, at 2 (letter to the editor signed from B); *Civil Rights Decision—An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall*, CLEV. GAZETTE, Oct. 27, 1883, at 1; *Civil Rights Decision: Colonel Robert G. Ingersoll's Speech in Lincoln Hall, Washington, D.C., Oct. 22*, CLEV. GAZETTE, Nov. 10, 1883, at 1 (lengthy excerpt from Colonel Ingersoll's address); *Discrimination*, CLEV. GAZETTE, Nov. 10, 1883, at 2 (reporting, "E.F. Brown . . . , editor of the *Indianapolis World*, has sued an Indianapolis man for \$5,000 damages for ejecting him from a restaurant" and suggesting, "Now we will see how common law regards the Negro."); *Gleanings from Columbus: Political—Civil Rights—Society Gossip—A Marriage*, CLEV. GAZETTE, Oct. 20, 1883, at 2 (reporting that the decision had created "considerable interest among our colored brothers"); Hon. John P. Green, *Civil Rights: Deep Game Being Played by Arthur Politicians—What Next?*, CLEV. GAZETTE, Oct. 20, 1883, at 2; *The National Capital—Civil Rights*, CLEV. GAZETTE, Dec. 15, 1883, at 1 (discussing congressional action proposed in response to the *Cases*, including a resolution authorizing a constitutional amendment and a bill offered by African-American Congressman James E. O'Hara); *Notes and Comments*, CLEV. GAZETTE, Nov. 10, 1883, at 2 (covering a "large meeting of prominent colored citizens held at Memphis, Tenn.," during which addresses were made and resolutions adopted "expressive of a desire to secure the State enactment of the Civil Rights bill"); *Pittsburgh: Civil Rights Discussed*, CLEV. GAZETTE, Jan. 5, 1884, at 1 (comparing oppression of African Americans in the United States with British tyranny over Ireland and arguing that history teaches both countries "that the security and strength of a government depends upon the just and equal protection it affords each and every one of its subjects"); *That Supreme Court*, CLEV. GAZETTE, Nov. 10, 1883, at 2; *Wilburforce: Civil Rights Ably Discussed by Prof. B.F. Lee and Our Able Correspondent—Personals*, CLEV. GAZETTE, Nov. 3, 1883, at 2 (arguing that neither court decisions nor the neglect of political parties could crush the manhood implanted in each individual and reporting on B.F. Lee's opinion that the Act was constitutional and the Court's decision unjust and illegal); *Xenia—Numerous Notes—Politics—Civil Rights*, CLEV. GAZETTE, Oct. 27, 1883, at 2; CLEV. GAZETTE, Oct. 20, 1883, at 2 (report on a meeting to be held in Washington and short comments on the *Cases*); CLEV. GAZETTE, Oct. 27, 1883 (including excerpts from the Harrisburg *State Journal* and the *News*, and brief comments by or about Colonel Robert G. Ingersoll, John Mercer Langston, Justice Harlan, the impact of the decision on the policies of hotel-keepers and railroads, indignation meetings, and the Supreme Court); CLEV. GAZETTE, Nov. 3, 1883 (excerpts from the Columbus *Dispatch* and the *Press*), at 2.

discuss the *Cases*<sup>174</sup> and coverage of the erosion of civil rights that followed in the wake of the decision.<sup>175</sup>

A column presenting the views of John P. Green, an African-American legislator in Ohio, appeared in the *Cleveland Gazette's* first issue covering the decision. Green warned the readership of the potential impact of a Court willing to use its power to prejudice and jeopardize the interests of African Americans.<sup>176</sup> Green first discussed the limited power of the law. In the South, Green argued, the Act had had little practical effect because whites simply disregarded its terms. While African Americans fared better in the North, Green suggested, improved treatment may have occurred anyway, without the benefit of a law on the subject. In sum, where prevailing sentiment allowed the enforcement of a civil rights law, the existence of the law was likely unnecessary.<sup>177</sup>

Nevertheless, Green viewed the Court's decision with apprehension. While the practical effect of declaring the Civil Rights Act unconstitutional might be circumscribed, the ruling stood as precedent. Green proposed that the Court had essentially announced itself ready to interfere with the legal status of the former slave population: "Will not the next question be raised under the Thirteenth or Fourteenth amendments? And is it not barely possible that the next decision will be that [other protections] are unconstitutional and void?"<sup>178</sup>

Green speculated that party politics supplied the underlying motive for the Court's reversion to the doctrine of states' rights and

174. CLEV. GAZETTE, Oct. 27, 1883, at 2 ("Indignation meetings have been held in Indianapolis, Cincinnati, Columbus, Springfield, Washington and numerous other places the past week."); John W. Anderson, et al., *Pittsburgh: Personals—A Civil Rights Mass Meeting—Politics*, CLEV. GAZETTE, Nov. 3, 1883, at 1 (reporting that "[a] large meeting of the colored citizens of the two cities was held at Franklin Street School-house on last Thursday evening for the purpose of denouncing the recent decision," that the speakers included prominent men such as "Barks, Smith, Johnson, Jones, Carson, and Delphey," and that the discussion included arguments against discrimination and for the Republican Party); *Civil Rights—The Harmonious and Enthusiastic Mass Meeting at Halcyon Hall Last Monday Evening*, CLEV. GAZETTE, Nov. 3, 1883, at 2; *A Mass Meeting*, CLEV. GAZETTE, Oct. 27, 1883, at 2; *Our Western Letter—Civil Rights Mass Meeting of St. Louis Colored Citizens, at Which Hon. J. Milton Turner Orates*, CLEV. GAZETTE, Dec. 1, 1883, at 4; *State Capital—Gleanings From Columbus—The Supreme Court's Decision Still the Leading Topic—Colored Men Call a Meeting*, CLEV. GAZETTE, Oct. 27, 1883, at 1.

175. See, e.g., *Railroads in Texas Take Advantage of That Outrageous Decision*, CLEV. GAZETTE, Oct. 27, 1883, at 2. The *Gazette* also reported on public accommodations that announced that they would continue to serve African Americans. See CLEV. GAZETTE, Oct. 27, 1883, at 2 (reporting on decisions by hotel-keepers in Forest City, as well as the policy of the American House, to which the paper answered, "Bravo!").

176. Hon. John P. Green, *Civil Rights: Deep Game Being Played by Arthur Politicians—What Next?*, CLEV. GAZETTE, Oct. 20, 1883, at 2.

177. *Id.*

178. *Id.*

abandonment of one of the very features that had most distinguished the Republican party. Green credited the Republicans with construing the Constitution "as being sufficiently broad and elastic to save the Union and guarantee to every citizen his rights of citizenship."<sup>179</sup> Under this construction, Green argued, it had become possible to raise, equip, and send off armies, to issue greenback currency, and to reconstruct the states. With the *Civil Rights Cases*, however, the Republican Court now lapsed into the Democratic position, that such acts were unwarranted by the Constitution.<sup>180</sup>

John W. Anderson, J.C. Delphey, and Joseph Evans submitted the *Cleveland Gazette's* "Pittsburgh" column. The authors disparaged those debating the legality of the Court's decision in narrow, technical terms:

[O]ur mind is not walled up by Kent, our judgment bound by legal technicalities, nor our heart petrified by Blackstone. We may not be able to trace that imaginary line where the *lex scripta* of constitutional power and the *lex non scripta* of what is right and just, blend and harmonize, but we do know what is right and what is wrong.<sup>181</sup>

179. *Id.*

180. *Id.* A letter to the editor signed *B.* appeared next to the views of John P. Green and expressed similar sentiments. *B.*, *The Civil Rights Bill: An Indignant Citizen Expresses His View on the Repeal of this Famous Bill*, CLEV. GAZETTE, Oct. 20, at 2. *B.* expressed outrage and indignation, calling the Court's judgment "one of the greatest outrages that ever came from the Supreme bench," and declaring it "worse than the Dred Scott decision." *Id.* *B.* believed that the Court's conclusions were the consequence of bias, rather than deliberation. The Court had defied the principles of Abraham Lincoln, Garrison, Sumner, Grant, and Sherman, and, instead, had bowed to Calhoun and the Confederates. *Id.*

*B.* argued, further, that whereas judicial interpretation should be true to the letter and spirit of the law, the Court's decision conflicted with the terms and intent of the amendments: "[T]he constitution ought to be sustained and mean just what it says. If it says justice and equality to all American citizens it should *mean* that, and if it is intended as a protection, by *it* we expected to be protected . . ." *B.* advocated a constitutional amendment to place congressional authority to protect civil rights beyond the reach of "biased Judges and traitors." *Id.*

Green again spoke of the *Civil Rights Cases* during an address to a national convention of African Americans held in Pittsburgh in May 1884. John P. Green, *These Evils Call Loudly for Redress, An Address Before Delegates to a Pittsburgh Convention Examining the Problems of Black America* (May 1884), reprinted in part in VOICE OF BLACK AMERICA, *supra* note 95, at 499. Green elaborated on the difference between claims for social equality, which could not be realized through legislation, and civil rights, which were subject to legal enactment. "[T]he worst phase of . . . iniquity does not consist in the fact that the colored American is, at home, a social pariah, whose very touch is shunned," he stated, referring to the ubiquitous effects of social prejudice. *Id.* at 502. "[I]t lies deeper than this, and becomes oppressive," he continued, "when met in the commercial world, obstructing our progress and keeping us poor." *Id.* In the latter case, prejudice intervened to rob African Americans of civil rights. Paradoxically, stated Green, not only were African Americans subject to the deleterious effects of social prejudice, but, as a result of the *Cases*, Congress lacked the authority to legislate protection for civil rights as well. *Id.* at 503.

181. John W. Anderson et al., *Pittsburgh: A Strong Civil Rights Argument from the Keystone State—The Atlanta Constitution Roughly Handled*, CLEV. GAZETTE, Nov. 24, 1883, at 2.

“It does not require law books,” the writers continued, “to satisfy the intelligent mind as to what is just and what is unjust.”<sup>182</sup> And by any reckoning, the Court’s ruling that the Civil Rights of Act of 1875 was unconstitutional was unjust.<sup>183</sup>

The true test of the Act’s goodness, the Pittsburgh correspondents argued, flowed from its effects. The Act protected African Americans from “the prejudice of the hour,” and never operated to the detriment of others.<sup>184</sup> In contrast, the Court’s decision “lets loose the dogs of cruel prejudice to prey upon a long suffering and persecuted people. It is a decision which no sophistry can palliate, no reason justify.”<sup>185</sup> Similarly, the authors criticized the idea, proposed in defense of the decision, that the basic rights of citizenship established by constitutional amendment remained intact, for its emptiness, or lack of practical consequence:

What is the practical value of these legislative enactments if there is no executive force behind them, no penalty attached to their violation? What good or use are our rights of citizenship as long as there is a cruel and wicked prejudice standing between us and the enjoyment of them. These constitutional amendments “availeth me nothing . . . .”<sup>186</sup>

The establishment of a right was meaningless, they argued, unless the right could be enforced.

The Pittsburgh correspondents argued that it is the object of government to protect citizens’ rights to life, liberty, and the pursuit of happiness. Otherwise, in accordance with the dictates of humanity and the Declaration of Independence, the government is a failure.<sup>187</sup>

The *Huntsville (Alabama) Gazette*, while somewhat less vociferous in tone than the *Globe* and the *Cleveland Gazette*, also covered the *Cases* as the major news story of the time.<sup>188</sup> The paper reported

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* Presaging the rationale for judicial protection of minority rights expounded nearly a century later, the authors wrote, “You cannot with impunity tramp upon the rights of the few.” *Id.* The authors’ argument for the protection of the rights of African Americans was based not only on a concern for protection of minorities, generally, but also on the belief that African Americans, in particular, were making demands commensurate with their right: African Americans were, after all, asking the government to protect “those who stood by it and defended it in the dark days of the rebellion.” *Id.*

186. *Id.*

187. *Id.*

188. Edited by Charles Hendley Jr., the *Huntsville Gazette* covered local and national news, issues of science and industry, and local events, including robberies, deaths, and meetings.

The *Cases* received front page coverage on Oct. 20, 1883. *The Civil Rights Act: The United States Supreme Court Declares the Act Unconstitutional, Justice Harlan Alone Dissenting—The Law Reviewed*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 1.



on the case and the dissent and printed portions of both the Act and the decision.<sup>189</sup> The *Gazette's* Mobile correspondent, whose byline read "Onus," devoted his November 3 column in large part to discussion of the *Cases*. Onus wrote, "Since my last letter the mind of the Nation has been disturbed in consequence of a judicial injury inflicted upon the colored race . . ." <sup>190</sup> According to the column, although the Act had had little practical consequence, in view of the difficulty of obtaining judgments in the inferior courts, nevertheless its terms had symbolic value and provided for oversight by courts that were removed from local prejudices. The Act had given African Americans a "feeling of satisfaction," that even if suits were unsuccessful, "there was a court of last resort that would give consideration to the intention as well as the letter of the law."<sup>191</sup>

Additional coverage in the *Gazette* included reports on Frederick Douglass's views about the *Cases*,<sup>192</sup> and, among other letters and reports about the subject,<sup>193</sup> articles about a Birmingham meeting called to discuss the decision<sup>194</sup> and a series of resolutions passed by Birmingham citizens.<sup>195</sup>

The *People's Advocate*, a newspaper published weekly in Washington, D.C., and filled with snippets of scientific information, medical advice, poems, historical stories, and other items of interest, also devoted considerable attention to the case.<sup>196</sup> The *Advocate* printed re-

189. *Id.*; *The Civil Rights Decision: Text of the Dissenting Opinion as Delivered by Justice Harlan*, HUNTSVILLE GAZETTE (Alabama), Nov. 24, 1883, at 2.

190. Onus, *Mobile: The Civil Rights Decision. Business Looking Up. Other Notes of Interest*, HUNTSVILLE GAZETTE (Alabama), Nov. 3, 1883, at 3.

191. *Id.*

192. *Civil Rights Decision: Views of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2.

193. See, e.g., *Civil Rights Decision: Views of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2 (containing initial reactions by ex-Senator Bruce, John T. Cook, ex-Senator Lyman Trumbull, and Frederick Douglass); *News and Notes*, HUNTSVILLE GAZETTE (Alabama), Nov. 3, 1883, at 3 (excerpts from coverage by the *Chattanooga Times*, *Montgomery Advertiser*, the *World*). In its December 8 coverage of a speech by President Arthur, the paper added the comment, "In view of the recent Civil Rights Decision and consequent events and discussion his manly words in behalf of Civil Rights for the colored citizens will endear him to the whole race." *President Arthur's Message*, HUNTSVILLE GAZETTE (Alabama), Dec. 8, 1883, at 2.

194. *State News*, HUNTSVILLE GAZETTE (Alabama), Nov. 10, 1883, at 2. Relying on information published by the *Birmingham Age*, the *Gazette* reported that a large number of representative African Americans had met in Birmingham to express the sentiments of African Americans on the Act and the Court's decision. According to this version of events, resolutions were passed denouncing both the decision and the Act itself, the latter "as a deception to the colored people." *Id.*

195. *Colored Citizens of Birmingham on the Civil Rights Decision*, HUNTSVILLE GAZETTE (Alabama), Nov. 17, 1883, at 2.

196. See, e.g., *PEOPLE'S ADVOCATE* (Washington, D.C.), Oct. 20, 1883, Oct. 27, 1883, Nov. 3, 1883, Nov. 10, 1883, Nov. 17, 1883, Nov. 24, 1883. Under the direction of C.A. Lemar, its busi-

ports, letters, analyses, and excerpts of the decision.<sup>197</sup> Coverage included a column under the byline “Le Duke,” for example, which focused primarily on the consequences of the decision, that is, “[t]he humiliations, the mental agony, the actual deprivation, the galling, burning and unjustifiable insults” African Americans in the District of Columbia and across the South receive at the hands of the prejudiced and revengeful.<sup>198</sup> While technically the decision may have been in accordance with law, the columnist argued, the Court should have taken account of the consequences of its action.<sup>199</sup> “The rules of construction were ample enough to have accepted the law constitutional upon the ground of manifest intent,” Le Duke contended.<sup>200</sup>

ness manager and financial agent, the *People's Advocate* was less overtly political than Fortune's *New York Globe* or Smith's *Gazette*.

197. PEOPLE'S ADVOCATE, Oct. 20, 1883, at 2 (praising Justice Harlan); PEOPLE'S ADVOCATE, Oct. 20, 1883, at 2 (praising Bob Ingersoll for speaking out); PEOPLE'S ADVOCATE, Oct. 27, 1883, at 1-2 (reporting on a convention in Illinois, which produced resolutions regarding the decision, commenting on Robert Ingersoll's speech, a paper given by G.H. Richardson at a literary society, and the meeting at Lincoln Hall addressed by Frederick Douglass, and excerpting from the *Echo*, *Standard*, *Mobile Gazette*, *Virginia Star*, *American Citizen* of New Orleans, La., and *Huntsville Gazette*); PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 3, 1883, at 2 (commenting on the decision, generally, the reaction to the *Cases* by the International Railroad of Texas and the responsibility of Northern capitalists, and the abdication of responsibility by the Republican party, among other related topics); *Argus*, *Stand by the Party*, PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 3, 1883, at 1; *Bethel Literary*, PEOPLE'S ADVOCATE, Oct. 20, 1883, at 2 (reporting that a paper on the ruling would be read at a literary meeting); *Bethel Literary: What Shall We Do?*, PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 17, 1883, at 2; *The Civil Rights Decision*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883 (reporting on the effect of the decision on national politics); *The Civil Rights Decision—The Dissenting Opinion of Mr. Justice Harlan*, PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 24, 1883, at 2 (lengthy description of and excerpts from the dissent); *The Decision*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883, at 2 (description of and excerpts from both the Act and the Court's decision); Rev. J. C. Embry, *The Exigent Duty*, PEOPLE'S ADVOCATE (Washington, D.C.), Dec. 15, 1883, at 2 (letter to the editor, expressing the view that although whites repudiate their covenant with African Americans in sentiment and practice, escape from the United States is not a practical solution); I. B. B., *Our Nebraska Letter*, PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 17, 1883, at 2; Le Duke, *Bob Ingersoll*, PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 10, 1883, at 1; Le Duke, *Make Yourselves Independent*, PEOPLE'S ADVOCATE (Washington, D.C.), Nov. 3, 1883, at 1; *Some Corrections*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883, at 2.

198. Le Duke, *Civil Rights*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883, at 1.

199. If, having considered the effect of removing legal restraints upon evil, members of the Court had still been inclined to declare the Act unconstitutional, Le Duke wrote, “they merit the condemnation of all christendom.” *Id.*

200. *Id.* The column argued, further, that African Americans had earned the protections due citizens. Le Duke asked, rhetorically, why the Court had refused to shield African Americans from scorn and prejudice: “Is it because we have shed no blood in defense of our country? Are we waiting in fidelity?” *Id.* To the contrary, Le Duke wrote, African Americans had developed a strong record of participation in the American political system, of defense of the nation, and of self-improvement. *Id.*

Coverage by the *Arkansas Mansion*<sup>201</sup> was lengthy and included reports on and segments from the decision and the dissent,<sup>202</sup> editorial analyses,<sup>203</sup> the statements of leaders such as Henry McNeal Turner,<sup>204</sup> and paragraphs from news articles which had appeared in other papers across the country.<sup>205</sup> The *Mansion* printed a letter from Attorney General Brewster,<sup>206</sup> as well as a report that railroads could legally impose segregation in accordance with the Court's action,<sup>207</sup> the comments of African-American lawyer J.D. Lewis,<sup>208</sup> a compari-

201. The *Mansion*, a newspaper devoted to self-help and temperance, generally printed articles on local, national, and international news, in addition to announcements, advertisements, and information relating to the temperance movement. The editorial position of the paper was solidly Republican and often critical of *Globe* editor T. Thomas Fortune, the editor of the *Savannah Echo*, and others who vacillated in their support for the Republican party.

202. *Civil Rights: Important Decision by the United States Supreme Court—The Thirteenth and Fourteenth Amendments Defined as to the Rights of Colored People*, ARK. MANSION, Oct. 20, 1883, at 1 (containing a report on and summary of the Court's decision, as well as Justice Harlan's dissent; and the text of the first two sections of the Act); *Our Civil Rights Held Inviolable*, ARK. MANSION, Nov. 3, 1883, at 1; *Our Opinion of Justice Harlan's Views*, ARK. MANSION, Dec. 1, 1883, at 1.

203. See *Equal Rights*, ARK. MANSION, Oct. 27, 1883, at 1; see also *Equal Rights*, ARK. MANSION, Nov. 3, 1883, at 1; *Equal Rights*, ARK. MANSION, Nov. 10, 1883; *Equal Rights*, ARK. MANSION, Nov. 17, 1883, at 1; *Equal Rights*, ARK. MANSION, Nov. 24, 1883, at 1; *Our Opinion of Justice Harlan's Views*, ARK. MANSION, Dec. 1, 1883, at 1.

204. *Turner on the Civil Rights*, ARK. MANSION, Oct. 27, 1883, at 1; ARK. MANSION, Dec. 22, 1883, at 1.

205. ARK. MANSION, Oct. 27, 1883, at 1 (excerpt from the *Louisville Commercial*, stating that the Court's decision afforded the Democratic party the opportunity to prove itself to African Americans by passing state civil rights bills); *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1 (excerpts from the *Globe Democrat*, *Cincinnati Afro-American*, *Defiance* (Athens, Georgia)); *Civil Rights—Opinions of the Press*, ARK. MANSION, Nov. 3, 1883, at 1 (excerpts from the *Arkansas Gazette*, *Arkansas Democrat*, *New York Globe*, the *Boston Hub*, *Indianapolis Leader Gate City Press*, *People's Advocate*, *Springfield Review* (Ohio), *Louisville Bulletin*, *Kentucky Republican*, *New Orleans American Citizen*, *Detroit Plaindealer*, *Chicago Conservator*, *Cincinnati Afro-American*); *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 10, 1883, at 1 (excerpts from the *Southwestern Christian Advocate*, *Brinkley Argus*, *New York Tribune*, *Philadelphia Times*, *Arkansas Methodist*); *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 17, 1883, at 1 (excerpts from the *Loneke Democrat*, *Chattanooga Colored American*, *Hot Springs Sentinel*, *Arkansas Dispatch*, *Galveston News*, *New York World*, *Paris Laborer* (Texas), *Savannah Echo*, *Florida News*, and the *World* (Indianapolis)).

206. *The Rights of Negroes: A Letter from Attorney-General Brewster—The Only Remedy for Grievance*, ARK. MANSION, Nov. 3, 1883, at 1. Brewster's letter responded to correspondence from J.W. Niles, an Arkansan advocate of racial separation. Niles had detailed grievances of the African American population, including efforts by the state to prevent African Americans from purchasing public lands, oppressive fines, and cruel punishments inflicted upon trifling pretexts. The Attorney General expressed sympathy for the plight of the African-American citizens of Arkansas and suggested that, indeed, the impediments under which they labored violated the United States Constitution. Nevertheless, the United States had no power to interfere to provide relief. Neither did the United States Congress have power to legislate on these subjects. "The remedy has been placed by [the] constitution in your own hands—i.e., by appeal from the judgments of the state courts to the supreme court of the United States." *Id.*

207. ARK. MANSION, Nov. 3, 1883, at 1.

208. *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1.

son of *Dred Scott* and the *Civil Rights Cases*,<sup>209</sup> and a variety of other reports, letters, and opinions.<sup>210</sup>

These newspaper reports suggest that discussions of the *Civil Rights Cases* among African Americans continued well after much of the nation had turned to other matters. Legislative, judicial, and political activities within African-American communities that followed in the wake of the Court's decision also continued. The Court's decision remained on the agenda, for example, when the Colored National Executive Committee met in Louisville on December 20, 1883. The Colored National Executive Committee was a group of African-American leaders that included ex-Governor P.B.S. Pinchback, then serving as surveyor of the Port of New Orleans; A.M. Dumond, a naval officer in the Port of New Orleans; Col. W. Pledger, collector of Customs in Atlanta, Georgia; historian George W. Williams of Massachusetts; and Judge George L. Ruffin of Massachusetts. Frederick Douglass joined the meeting and specifically suggested that the Committee endorse Justice Harlan's opinion.<sup>211</sup>

209. ARK. MANSION, Nov. 10, 1883, at 1.

210. Coverage included, for example, a report from Galveston, Texas concerning a decision by the International Railroad to neither treat African Americans as equals nor establish separate coaches. A company spokesman stated that, instead, the railroad could now make African Americans take whatever seats the railroad desired. *The Color Line Railroads*, ARK. MANSION, Nov. 3, 1883, at 1; see also ARK. MANSION, Nov. 10, 1883, at 1 (excerpt from *Florida News*, reporting on the reaction of Hon. Thomas V. Gibbs); ARK. MANSION, Nov. 17, 1883, at 1 (report on an interview with Colonel Robert Ingersoll and letters concerning the need for civil rights legislation in Arkansas); *Address to the Colored People of Louisville*, ARK. MANSION, Oct. 27, 1883, at 1 (reporting on the gathering in Louisville, Kentucky); I.B. Atkinson, ARK. MANSION, Nov. 10, 1883 (letter to the editor agreeing with the Mansion's editorial position); *Bob Ingersoll, on Justice Harlan's Dissenting Opinion*, ARK. MANSION, Dec. 8, 1883, at 1; *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1 (reporting on civil rights laws in Arkansas and Kentucky); *Civil Rights*, ARK. MANSION, Dec. 22, 1883, at 1 (coverage of a letter written by Bishop Turner on the subject of the decision); *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 10, 1883, at 1 (excerpts include statements by John Mercer Langston, Colonel A. J. Dumont, P.B.S. Pinchback, and Colonel James Lewis); *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 17, 1883, at 1 (excerpts include statements by J.S. Hinton and Georgia Senator Brown, who announced that, as head of the Georgia railroad syndicate, he would enforce a policy of segregation, South Carolina Senator Wade Hampton and the "ultra ex-rebel" from Georgia, Hamburg Butler); *The Colored People of Kansas*, ARK. MANSION, Dec. 22, 1883, at 1 (reporting on resolutions adopted by a meeting of African Americans in Kansas for presentation to Congress); *Col. W.A. Pledger, of Ga.—His Answer to an Afro-American Reporter—On the Civil Rights Bill*, ARK. MANSION, Dec. 1, 1883, at 1; *A Texan's Opinion of the Effect Civil Rights Will Have*, ARK. MANSION, Dec. 15, 1883, at 1 (letter from Alfred Scott, an African American who served in the Louisiana legislature, declining comment on the "abstract ideas" governing the Court's reasoning, but arguing that the decision would have the effect of eliminating the "bug-bear of social equality" from political debate and fraternization between the races in the South); *Washington Letter*, ARK. MANSION, Dec. 1, 1883, at 1.

211. *Louisville National Executive Committee*, STATE J. (Harrisburg, Pa.), Dec. 29, 1883 (excerpt from the *Vindicator*).

Moreover, despite the unavailability of remedies once offered by the Civil Rights Act, African Americans continued to pursue their claims in federal forums<sup>212</sup> as well as state courts.<sup>213</sup> In March 1885, the *New York Freeman* reported that "colored citizens are thoroughly alive to the importance of obtaining their civil rights."<sup>214</sup> According to the report, African Americans had "an almost breathless interest" in a case before a local court that had been brought against the managers of a skating rink.<sup>215</sup> African Americans had recently met to express indignation at violations of civil rights, and had appointed a committee to carry out a series of resolutions. The committee, in turn, had appeared before a legislative committee and presented a draft bill to protect civil rights.<sup>216</sup>

African Americans in a number of states agitated for new state legislation to protect civil rights or, where civil rights laws were already on the books, argued against their repeal.<sup>217</sup> In addition, the African-American press continued to report on and press for Congressional efforts to circumvent the High Court's ruling.<sup>218</sup>

African-American newspapers also continued to cover specific incidents of discrimination, creating a record of some of the many indignities suffered by African Americans, the very types of insults that the Act had been intended to prohibit.<sup>219</sup> Most papers did not assume

212. In June 1887, for example, the *Western Cyclone*, edited and published by George S. Sanford in Nicodemus, Kansas, reported on the status of complaints filed with the Inter-State Commission, which regulated the railroads. *The Inter-state Commission: A Colored Man's Complaint of Discrimination*, W. CYCLONE, June 10, 1887. One complainant, William H. Council, claimed that he had been forcibly ejected from a first-class car after having paid for a first-class ticket, and requested an award of \$25,000 damages and such other relief as the Commission might deem proper. The Commission ordered the Georgia Central Railroad to answer Council's complaint. The defendants in two other cases, the Chicago, Milwaukee & St. Paul Railroad and the Union Pacific Railroad, had recently filed answers, both denying the Commission's jurisdiction to grant relief. *Id.*

213. See, e.g., *No Violation of Civil Rights*, VA. STAR, Sept. 21, 1994 (reporting on the ruling of Bloomington, Illinois Circuit Court Judge Tipton, in a case brought by African Americans who were refused soda water at a soda fountain, that the state public accommodations law "did not apply to a druggist or any one keeping a soda fountain," and that such businesses "might choose the persons with whom they wished to do business. . .").

214. N.Y. FREEMAN, Mar. 7, 1885.

215. *Id.*

216. *Id.*

217. See, e.g., STATE J. (Harrisburg, Pa.), Dec. 15, 1883 (reprinting an article that originally appeared in the Charleston, South Carolina *News and Courier* that advised members of state legislature against repeal of stringent state law).

218. See, e.g., STATE J. (Harrisburg, Pa.), Dec. 15, 1883.

219. See, e.g., *The Color Line in the South*, STATE J. (Harrisburg, Pa.), Jan. 19, 1884 (excerpt from the *Harlem Sentinel* concerning, first, three African Americans who were compelled to move to a second class rail car, despite having paid full fare, and, second, an African American couple ejected from a place of entertainment in West Point, despite the woman's white appearance).

that, with the ruling in the *Civil Rights Cases*, these incidents were no longer newsworthy.<sup>220</sup>

#### D. Editorials

T. Thomas Fortune reflected on the hollow promises offered by the law and the hypocrisy of the Court's decision: In what position did the *Civil Rights Cases* leave African Americans? He answered, Simply this—we have the ballot without any law to protect us in the enjoyment of it; we are declared to be created equal, and entitled to certain rights, among them life, liberty and the pursuit of happiness, but there is not law to protect us in the enjoyment of them. . . . We are placed at the mercy of every lawless ruffian; we are declared to be the victims of infamous injustice without redress . . . .<sup>221</sup>

Fortune argued that the decision was both incorrect and unjust. Harkening back to the Declaration of Independence, his writing indicated an underlying belief that, where rights were guaranteed, they should be enforceable. Twice in his initial editorial on the *Cases* Fortune cited the wording of the Declaration and found intolerable Court declarations that the government is powerless to protect its citizens in “the enjoyment of life, liberty and the pursuit of happiness.” Referring to the Court's decisions in both the *Civil Rights Cases* and *United States v. Harris*,<sup>222</sup> in which the Court held the Ku Klux Klan Act of 1871 unconstitutional, Fortune asked, “What sort of Government is that which openly declares it has no power to protect its citizens from ruffianism, intimidation and murder! Is such a Government worthy of

220. See, e.g., *Race Separation—Attempt to Keep Children Apart in the Schools*, W. CYCLONE, July 29, 1887 (reporting on the introduction of a bill in the Georgia legislature to make it a penal offense to educate white and African American children in the same schools, which the paper argued would be contrary to a clause in the state constitution); BAPTIST HEADLIGHT, Oct. 15, 1893 (reporting, “The long talked of jim-crow separate coach bill of the State of Kentucky went into effect the 1st day of October, and the editor of this paper had the pleasure of riding in one of the noted Negro coaches three days before it went into effect. . . .”).

221. Fortune, *supra* note 1, at 315, 316. Earlier in the same year, Fortune had made a similar argument:

We fully understand the law of the United States—we know that it has the power to make citizens, and we know that it has no power to protect them. Thus the Negroes of the South were made citizens of the United States, but the states say they shall not enjoy the privileges of citizenship and the National Government has shown in a thousand instances that it had no power to coerce the states. . . . [Non-interference by the federal government is] based upon the powers vested in the federal government and those reserved to the states. . . . While the tyranny which has always flowed from centralized government is obviated, no check is placed upon the tyranny of the individual state. . . .

N.Y. GLOBE, Feb. 17, 1883, reprinted in THE BLACK PRESS, *supra* note 107, at 173, 174. Fortune argued that “governments are maintained for the protection of life, liberty and the pursuit of happiness of its members,” and that the federal government must have the power to guarantee such protection. *Id.*

222. *United States v. Harris*, 106 U.S. 629 (1882).

the respect and loyalty of honest men?" Fortune argued that in declaring that African Americans have no civil rights and that mistreatment and exclusion are permissible, that the Court "has reaffirmed the infamous decision of the infamous Chief Justice Taney that a 'black man has no rights that a white man is bound to respect.'"<sup>223</sup>

A little more than a month later, Fortune devoted another editorial to the *Cases*. Fortune applauded Justice Harlan's dissent. He contrasted the "broadness and soundness" of Harlan's opinion with the "sophistries, the subterfuges" and "technicalities" of the Court's majority; Justice Harlan had appropriately planted himself "squarely upon the letter and spirit of the Constitution and the long-established precedents of the Supreme Court. . . ." Fortune wrote approvingly of Harlan's invocation of the *Dred Scott* decision and prior judicial sanction of congressional power to protect the property rights of slave-owners to regulate the conduct of individuals within states and to impose fines and penalties against those who would have impeded the retrieval of slaves by their owners. Why had Congress lost the power to protect the rights of citizens within states? Why was congressional authority now more constricted, despite amendments to the Constitution that were intended to expand congressional powers? Fortune asked, "Is it because the aggrieved are black freemen and not white slave drivers? Or, rather, is it because the present Supreme court is deficient in legal acumen, or swayed by color-phobia, or biased by powerful corporate influences most interested in the decision as rendered?"<sup>224</sup> Fortune ventured that all of these contributed to the Court's decision. "There is no doubt in our mind that the Constitution of the United States is broad enough to shield each and every citizen in his civil and political rights," Fortune wrote. As Justice Harlan had suggested, the American people had intended that Congress have such power by ratifying the Thirteenth and Fourteenth Amendments.<sup>225</sup>

One year later, Fortune commented on the *Cases* in an article published by the *A.M.E. Church Review*. Fortune returned to the

223. Fortune, *supra* note 1, at 315. Fortune also touched on issues of federalism, as well as on the political nature of the decisions. "The Government of the United States is the puppet of the States," he stated disapprovingly, "a thing without power to protect the citizens of its own creation." *Id.* He argued, further, that the *Cases* represented the consequence of an abuse of power by the Republican Party. The editorial indicated that far from seeing the Court's decision as an apolitical, reasoned judgment, Fortune believed that it was the Republican party that "has gradually stripped [the colored man] of all the rights which had been given to him for his valor in the field and his patriotism in time of peace." *Id.*

224. *Mr. Justice Harlan's Opinion of Civil Rights*, N.Y. *GLOBE*, Nov. 24, 1883, at 2.

225. *Id.*

Court's suggestion that the Civil Rights Act concerned "the social rights of men and races in the community," which were not protected by the postwar amendments.<sup>226</sup> Fortune, first, however, criticized not only the Court, but also, more generally, the Anglo-Saxon race and its jurisprudence, for conceding that all have inherent and common rights and yet yielding nothing from this sense of equity.<sup>227</sup> In so arguing, Fortune repeatedly referred to his own belief in the existence of natural rights, from which persons cannot justly be alienated.<sup>228</sup> Despite Anglo-Saxon recognition of common rights, Fortune charged, the Anglo-Saxon "yields only to the force of circumstances."<sup>229</sup> As the *Dred Scott* case had established, from the foundation of the United States until 1865, people of African origin in the United States had only slave status and had "no rights which the white man was bound to respect."<sup>230</sup> Only the "most sanguinary warfare" had lifted the status of African Americans to that of full-fledged citizens, endowed with equal rights before the law and in all avenues of civil life.<sup>231</sup>

Fortune again criticized the Court for construing the amended Constitution from the standpoint of the 1850s, rather than 1876, and for overriding the "obvious letter and spirit of the constitutional amendments in the matter of the relations of the citizens of States to the Federal Government."<sup>232</sup> The Civil War had been fought to decide the right of a state to secede from the federal compact, and, according to Fortune, at the conclusion of the war, constitutional amendments were intended in letter and spirit to enlarge the powers

226. T. Thomas Fortune, *Civil Rights and Social Privileges*, A.M.E. CHURCH REV. (1885), at 128-31.

227. *Id.* at 124; see also *id.* at 127 (discussing the "absurdity of the claims set up by those who oppose our enjoyment of what even they concede belongs to us. . ."); *id.* at 129 (stating that white men have "the constitutional disposition to deny rights they know to be common in their nature and scope. . .").

228. For example, despite the state of American law before the adoption of the Thirteenth Amendment, Fortune asserted that "holding property in man" was a crime. Moreover, Fortune argued, the American people's legal sanction for the crime provided ground for claims for reparations. *Id.* at 123. Fortune also relied on a belief in natural rights when stating that while obligation was owed the states for ratifying the postwar amendments, the existence of any such debt depended upon whether "a sense of obligation can obtain in a case where that is returned which could not, in law or equity, justly have been alienated, usurped or withheld in the first instance." *Id.* According to Fortune, even the "savage" had a sense of his natural rights. Fortune credited the savage with courage, "a vigilant readiness at all times to expose himself to danger in defense of what he regards as his natural rights." *Id.* at 119.

229. *Id.* at 124. Fortune stated, "[I]f you would enjoy these common rights which he concedes belong to you, he makes you contend for them one by one at the ballot-box, in the jury panel, on the palace car, on steamboats, at the threshold of hotels, and even at the doorway of . . . churches. . . ." *Id.*

230. *Id.* at 121 (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857)).

231. *Id.* at 122, 124.

232. *Id.* at 122. Fortune excepted Justice Harlan from the reach of his criticism.



of the federal government *vis a vis* the states. In passing on the *Civil Rights Cases*, and, particularly, in ruling that the federal government was powerless under even the amended Constitution to interfere in the internal civil affairs of the state, the Court stripped the federal government of the power needed to enforce law and order and to give effect to "the full measure of right and justice which attach to the manumission and enfranchisement of a wronged and defrauded class."<sup>233</sup>

Fortune saved some of his fire, however, for those disposed to confound civil rights and social privileges, an effort which he termed "selfish and malicious."<sup>234</sup> "Civil rights," Fortune asserted, "comprise all public benefits sought to be obtained by or insured to individuals by the organization of mankind into government for mutual protection and advantage."<sup>235</sup> According to Fortune, civil rights were defined and secured by constitutional and statutory enactment, and regulated by society through its legally constituted tribunals. To Fortune, it was axiomatic that no citizen possessed a legal prerogative to enjoy a larger share of public benefits or to enjoy benefits not common to all citizens.<sup>236</sup> This, he declared, "is, or should be, the primal object of all organized government; and, in so far as it fails to compass this object, it fails in the essential element of its creation."<sup>237</sup> Moreover, Fortune argued, partiality in the enforcement of civil rights jeopardizes the rights of all and leads to contempt of the rule, for "[t]he law, or the construction or interpretation of the law, which would curtail, abridge, or deny to any citizen a coequal participation in these

233. *Id.* at 122-23. Fortune wrote:

It will appear obvious . . . that the power of the Federal authority in the jurisdiction of States,—in the matter of proper protection of life, limb and property and the enforcement of the full measure of such civil rights as inhere in the citizen by reason of his citizenship,—is as impotent as a new born infant; and that . . . he might just as well not be a citizen of the United States.

*Id.* at 123.

Fortune noted that the citizen denied proper redress by the state courts might still proceed to federal court with an appeal, on the theory that while federal courts have no jurisdiction over matters internal to the State, generally, such jurisdiction obtains when a state proclaims its inability to enforce law and order and, in essence, abdicates its sovereign function to the central government. *Id.*

234. *Id.* at 128.

235. *Id.*

236. Fortune added, "[I]t would be directly in contravention of equity . . . [that] my neighbor shall enjoy a certain public benefit, but I shall not. In our government the theory is that no man shall have advantage before the law to the detriment of his neighbor." *Id.* at 129. Unfortunately, though, theory and practice in the United States "are often sorely out of joint with each other." This dissonance was "painfully true" when the judiciary was called upon to decide matters between black and white citizens, especially in the South. *Id.*

237. *Id.* at 128.

benefits, public in their nature, and operating directly upon the constitution of society, is a flagrant miscarriage of justice. . . .”<sup>238</sup> By contrast, Fortune defined social privileges as “regulated wholly by individual tastes and inclinations, and . . . in no sense subject to the cognizance or supervision of government.”<sup>239</sup> Whereas every citizen could demand civil rights, social privileges could be won only by conduct, position, abilities, and affluence.<sup>240</sup>

In his first editorial comment on the Court’s decision, *Cleveland Gazette* managing editor H.C. Smith declared with dismay, “[W]e are again excluded from all rights of a citizen except in the exercise of the ballot, and there is not surety of our keeping this.”<sup>241</sup> Smith rejected the idea that the decision was merely a ploy to affect party politics,<sup>242</sup> a notion that had circulated along with the suggestion that the sponsors of the Civil Rights Act had known during the legislative process that the Act would be declared unconstitutional. Smith believed, instead, that the Act was constitutional, and that the decision was a consequence of the fact that “the Court is toadying to the South in establishing the Calhoun theory of ‘States Rights’ . . . .”<sup>243</sup> Smith argued that the ruling would have a tremendous impact in both the North, where hundreds of places of public accommodation would close their doors to African Americans and to other minorities, and the South, where African Americans would feel the full weight of the decision. The law provided no protection for the southern freedmen,

238. *Id.* at 129. Fortune listed a number of actions that constituted a denial of civil rights and that, therefore, were of menace to all. These included barring the free passageway to the ballot box of an individual or class, invidious discrimination in the accommodation and convenience of travel and in places of public amusement, separate schools, and the enactment of miscegenation laws. *Id.* at 128.

239. *Id.* at 131.

240. *Id.*

241. *Civil Rights Law: Declared Unconstitutional by the Supreme Court*, CLEV. GAZETTE, Oct. 20, 1883, at 2. Smith noted that congressional jurisdiction to pass legislation protecting civil rights remained in the territories and the District of Columbia. *Id.*

Smith and *Gazette* president John F. Lightfoot had provided an earlier indication of their editorial position in a column on the outcome of a test case before a lower court earlier in the year. See CLEV. GAZETTE, Aug. 25, 1883.

242. A column written by the Hon. John P. Green, which also appeared in the October 20 edition of the *Gazette*, argued for a political reading of the Court’s decision: “I sadly fear that the men who are in control of the Republican party at Washington are, just now, sacrificing principal to machine politics; and that, in their over-zealous efforts to please [Southern] party leaders . . . , they may alienate their old allies—the colored Republicans—from the party . . . .” Hon. John P. Green, *Civil Rights: Deep Game Being Played by Arthur Politicians—What Next?*, CLEV. GAZETTE, Oct. 20, 1883, at 2.

243. *Civil Rights Law: Declared Unconstitutional by the Supreme Court*, CLEV. GAZETTE, Oct. 20, 1883, at 2.

and whites could, thus, "carry social ostracism to any extent without fear of law."<sup>244</sup>

Smith advocated three responses to remedy the situation. First, African Americans must continue to work in their own interest: "[We] have our own destiny to work out, and the sooner we stop crying the Republican party will do it, or any other party, and settle down to work, the sooner our progression will be more noticeable, ourselves and rights demand more respect and attention."<sup>245</sup> Second, Smith recommended the passage of civil rights legislation in the states, although he admitted that this strategy would be of limited success: "There is positively *no* hope of all the Southern States adopting such a law," Smith wrote.<sup>246</sup> Third, Smith suggested that African Americans work for a constitutional amendment that would include the guarantees of the Civil Rights Act. To pursue these ends, Smith favored convening a mass "indignation meeting," and joined others in calling for a state convention of African-American men to meet in Columbus in late December.<sup>247</sup>

The stated position of the *People's Advocate* was critical but optimistic.<sup>248</sup> To the *Advocate*, the ruling reflected poorly on the Court, which failed to interpret the Constitution in light of events that had occurred since the Civil War. In its decision, the Court had followed the lead of lower courts that had "boldly" asserted the unconstitutionality of the Civil Rights Act, ignoring the principles that had guided the period of Reconstruction and, instead, catering to economic interests.<sup>249</sup>

While the *Civil Rights Cases* would have a "moral effect" and delay the enjoyment of civil rights, the *Advocate* ventured, revolutions

244. *Id.*

245. *Id.*

246. *Id.*

247. *SPYE—Call of a State Convention*, CLEV. GAZETTE, Dec. 15, 1883, at 1. Smith was not the only discussant in the vast and varied conversation about the *Cases* to attempt to exclude women from the activities he envisioned. The historical record is replete with remarks such as his, which were specifically addressed to men. Regrettably, scant written evidence remains of African-American women's perspectives.

248. See *The Civil Rights Decision*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883, at 2; see also *Some Corrections*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883, at 2.

249. *The Civil Rights Decision*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883, at 2. By contrast, the *Advocate* praised Justice Harlan who, the paper reported, "[showed] a willingness to let no technicalities of constitutional interpretation, developed in a long political struggle to subvert the National authority to that of the States, stand in the way of the equal Civil Rights of all citizens." PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883, at 2. The paper also applauded Colonel Ingersoll, calling his argument that the Supreme Court could have reached the opposite decision, consistent with its earlier decisions, "conclusive." PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883, at 2.

do not move backward. The paper suggested that the decision would have little impact in areas where, as a result of prior judicial decisions or favorable public sentiment, the civil rights of African Americans were already respected. In other localities, the decision would set the cause of civil rights back, but the fight for equal rights would continue: "The Supreme Court has not the power to stay the march of progress any more now than it did when the Dred Scott decision was rendered," the *Advocate* contended, "[that decision] was an anachronism. So is this."<sup>250</sup>

Moreover, the *Advocate* took note of a loophole left by the Court—the possibility of finding the authority for congressional regulations pursuant to the Commerce Clause. The paper reported that Congressman O'Hara had an excellent opportunity to introduce a bill to meet the Court's objections and "still prevent citizens from distant states being subjected to outrage while on common carriers."<sup>251</sup>

The paper also emphasized other ways in which the Court had limited its decision. Most importantly, the Court had not decided that African Americans did not have the right to the full and equal enjoyment of public accommodations, but, rather, only that Congress had not the power under the postwar amendments to create legislation regulating discriminatory conduct within the states. Under the Fourteenth Amendment the provisions remained in effect in the District of Columbia and the territories, and, as previously noted, the Court indicated that Congress might enact legislation to prevent discrimination pursuant to the Commerce Clause.<sup>252</sup>

Journalist John Edward Bruce reflected upon the *Civil Rights Cases* in speeches delivered in November of 1883.<sup>253</sup> In the first, an address to the Bethesda Literary Society in Georgetown, Bruce suggested that the Supreme Court's decision exemplified the white race's effort to oppress African Americans, referring to the "parsimonious quibblings of prejudiced judges" as one of the devices used by the white race "to change the order of nature and to set itself up as the special favorite of heaven."<sup>254</sup> Although Bruce denied that he was prepared to argue the legal technicalities, he denounced the Court's

250. *The Civil Rights Decision*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883, at 2.

251. PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 20, 1883, at 2.

252. *Some Corrections*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883, at 2.

253. John E. Bruce, *Reflections on the Decision in the Civil Rights Cases and Is This Our Country*, in THE SELECTED WRITINGS OF JOHN EDWARD BRUCE: MILITANT BLACK JOURNALIST 19-26 (Peter Gilbert ed., 1971).

254. *Id.* at 20.

action on a number of grounds. First, the ruling conflicted with a higher form of law and was, in essence, immoral:

The decision of the Supreme Court . . . can never annul the decision of that highest of courts, which fixed the *Status* of every man from the Creation of the world when it declared that out of one blood were created all the nations that dwell upon the face of the earth. . . .<sup>255</sup>

Second, the *Cases* denied African Americans the very rights that other citizens enjoyed, a denial in conflict with the Constitution's grant of citizenship. Bruce asked whether the Supreme Court meant to reaffirm the infamous holding of *Dred Scott*, that African Americans had no rights white men were bound to respect.<sup>256</sup> Moreover, the decision left African Americans again vulnerable, opening the door for white Southerners to repeat the kind of atrocious crimes, to which African Americans had previously been subjected.<sup>257</sup> And, finally, by refusing to grant the national government the ability and power to protect citizens, the Court had virtually acknowledged state sovereignty, while continuing to profess opposition to the doctrine.<sup>258</sup>

Bruce delivered a second address in which he highlighted the Court's decision as exemplifying the disparity between the ideals of the nation and its practices. "The government of the United States on paper is one of the best governments that ever saw the light of day," Bruce stated, but "[p]ractically it is not."<sup>259</sup> Bruce called the Constitution and the Declaration of Independence, as far as they related to African Americans, "the blackest lies ever evolved from the inauguration of the Sainted Fathers."<sup>260</sup> Just as the founding fathers had never meant to allow African Americans to enjoy the benefits and privileges "which a proper and just observance of [the Constitution and the Declaration] sought to bestow," the Thirteenth, Fourteenth, and Fifteenth Amendments failed to guarantee to African Americans true protection.<sup>261</sup> While the amendments may have been well-intended and were written for the especial benefit of African Americans, their enforcement required additional actions by the federal government, and the Court's decision reinforced Bruce's belief that African Americans could scarcely rely on the good will of the majority of whites. Bruce

255. *Id.*

256. *Id.* at 21.

257. *Id.*

258. *Id.*

259. *Id.* at 25.

260. *Id.*

261. *Id.*

asked whether African Americans could consider the United States "our country"? He answered, "Morally and of right it is our country, socially and politically it is not our country, but simply our abiding place."<sup>262</sup> Citizenship would not be real until every person of every race and nationality were secure in his or her civil and political rights. The United States "will never be our country," Bruce asserted, "while the Constitution remains inoperative and the laws on the Statute books are playthings of the Supreme Court."<sup>263</sup>

In December of 1883, Bruce began serving as managing editor of the Washington, D.C. *Grit*, and in his first editorial, Bruce again condemned the *Cases*:

The recent infamous decision of the Supreme Court has placed the negro where the war left him, *only* in a more helpless condition; for there we had the 'whole power of the administration' at our back. Now we have it against us, judging from the indifference with which the treatment of our people received at the hands of the Judiciary. . . .<sup>264</sup>

At first blush, the *Arkansas Mansion's* position on the *Cases* seems to stand out as an anomaly among African-American newspapers. Indeed, as one paper, the *Loneke Democrat*, reported, "Henry Simkens, the editor of the Arkansas Mansion, for colored folks, stands solitary and alone among the colored press in justifying the recent decisions on the civil rights bill."<sup>265</sup> Simkens downplayed the importance of the ruling and even argued that the treatment of African

262. *Id.* at 23.

263. *Id.* at 24.

264. *Salutatory*, THE GRIT (Washington, D.C.), Dec. 21, 1883. This issue was the paper's first. The Rev. W. B. Bruce was listed as editor, J.E. Bruce as managing editor. At the outset, the paper asserted that it would advocate an independent position: "THE GRIT IS NEITHER FOR, NOR AGAINST THE ADMINISTRATION, BUT FOR THE PEOPLE." THE GRIT, Dec. 21, 1883, at 1 (immediately under the newspaper's title).

265. *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 17, 1883, at 1. Significantly, however, there is evidence that at least some other African Americans in the South also reacted to the Court's decision with both cynicism about the intent of the Act, and of the Republican party, and with a hand of cooperation extended to Southern whites. See, e.g., *State News*, HUNTSVILLE GAZETTE (Alabama), Nov. 10, 1883, at 2 (coverage of the Birmingham meeting at which Rev. J.H. Welch, the chair of the meeting, advocated "the cultivation of more friendly relations with the whites of the South." Welch is quoted as stating, "that the southern people, without regard to party lines, would prove the last refuge of the colored people, and would help them to reach a higher and nobler manhood."); see also *PEOPLE'S ADVOCATE* (Washington, D.C.), Oct. 27, 1883, at 2 (excerpt from the *Mobile Gazette*, in which the *Gazette* emphasized the willingness of African Americans in the South to cooperate with whites). In a speech before the National Educational Association, Booker T. Washington, though he did not mention the *Cases* directly, offered an opinion on the strategy to be followed in the aftermath of the Court's ruling: "Any movement for the elevation of the Southern Negro, in order to be successful," Washington stated, "must have to a certain extent the cooperation of the Southern whites." In this light, Washington proposed,

Americans by "the more favored races" was better left unregulated by law.<sup>266</sup> "Now [that] the farsical civil rights bill has been annulled by the supreme court of the United States, equal rights falls back upon its merit where it rightfully should," Simkens argued.<sup>267</sup>

Without the Civil Rights Act, Simkens contended, African Americans would have more incentive to acquire knowledge and wealth, which would, in turn, lead to recognition and equal treatment.<sup>268</sup> Intelligence and wealth were the keys to respect. Civil rights legislation was not only ineffectual, according to the editor, but counterproductive, in that it removed "all the superior virtues of colored people"

The best course to pursue in regard to the civil rights bill in the South is to let it alone; let it alone and it will settle itself. Good school-teachers and plenty of money to pay them will be more potent in settling the race question than many civil rights bills. . . .

Booker T. Washington, Speech Delivered Before the National Educational Association in Madison, Wisconsin (July 1884), in 2 A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 649 (Herbert Aptheker ed., 1951) [hereinafter 2 DOCUMENTARY HISTORY]. On the other hand, some African-American papers published in the South firmly rejected compromise. "The work of the past was accomplished not by 'coalescing' with enemies, but by fighting and *beating* them," wrote D. McD. Lindsey of the *North Carolina Republican*. N.C. REPUBLICAN, May 22, 1884. In 1884 the *Republican* endorsed an effort to overcome the Court's adverse ruling on the Civil Rights Act led by Senator Edmunds of Vermont, arguing, "If the constitution shall be found obstinately in the way of the full security of Civil Rights by Congressional legislation then the *Constitution must be amended.*" *Id.* On May 22, 1884, the *Republican* printed the full text of Senator Edmunds's bill, which was introduced and referred to the Senate Committee on the Judiciary on December 4, 1883.

Surviving issues of the *Savannah Weekly Echo*, a paper edited by Thomas T. Harden that provided extensive coverage of congressional action, domestic policy, and foreign affairs, suggest that despite the paper's Southern location, the *Echo* endorsed Justice Harlan's dissent. See SAVANNAH WEEKLY ECHO, Dec. 2, 1883 (covering Justice Harlan's opinion); SAVANNAH WEEKLY ECHO, Jan. 20, 1884 (discussing a pamphlet that contained a sermon given in Washington, D.C., by Rev. J.E. Rankin entitled, "The State and the Citizen of the State," which the paper considered "of much interest to our people especially when it is known that it is in regard to the late Civil Rights decision"; and noting, further, that the pamphlet was dedicated to Justice Harlan because of "the manly and determined standpoint he assumed in favor of the colored American"). Similarly, surviving issues of the *Weekly Defiance*, published in Atlanta, Georgia, and edited by Rev. W.H. Heard, suggest that the paper would not have allied itself with the *Mansion's* point of view. See WEEKLY DEFIANCE, Feb. 24, 1883 ("Manhood says I have rights as a citizen of these United States. . . . I am a part and parsol of this nation, and I intend to trouble it until every right comes. . . .").

266. *Equal Rights*, ARK. MANSION, Oct. 27, 1883, at 1.

267. *Id.* Compare *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1 (restating the position that the actions of the Republican party during the years of Reconstruction were ill advised: "[the party] could not protect us by constitutional law and undertook to do it by unconstitutional measures which has in a great many instances served as a scarecrow, but did considerable harm in others.") with PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883 (excerpt from the *Virginia Star*, in which the *Star* downplayed the potential effect of the decision, citing the spirit of resistance to the law that had been generated by a belief, held by a large number of whites, that civil rights should have been left entirely to the states; the *Star* explicitly declined to offer an opinion as to the validity of this view, stating that it was sufficient to know that the belief had engendered opposition to the law).

268. "[T]he more you try to down a meritorious man," Simkens wrote, "the higher he rises in the estimation of his peers. Hence, intelligence must and will rule, numerical majorities to the contrary notwithstanding." ARK. MANSION, Nov. 17, 1883.

and transformed them "into one class, and that the lowest class." With the education and professionalization of African Americans, Simkens proclaimed, "cast [i.e. racial] prejudice will in time die of itself sooner than it could be killed by any special legislation."<sup>269</sup>

The *Mansion* stated a slightly different position a week after its initial editorial. The editor still disagreed with the tone of alarm sounded by "the colored people" in response to the *Cases*, but he downplayed the significance of the decision rather than repeating the suggestion that the Court's action would secure greater respect for civil rights. The Court had not touched rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments, Simkens argued: the constitutional laws granting equal rights and privileges had not been disturbed by the Court's action. Only the "modus operandi of instituting the suit" had been changed from the United States district courts to the courts of the respective states, and Simkens found this change of little consequence. Indeed, Simkens now stressed the importance of access to the courts for redress.<sup>270</sup> He noted that it was now necessary for each state to pass civil rights bills to provide a right of action and to fix penalties,<sup>271</sup> and he emphasized that aggrieved

269. ARK. MANSION, Oct. 27, 1883.

270. Simkens replaced his earlier aversion to civil rights legislation and emphasis on self-help with an acknowledgement of the importance of recourse to the courts and a rose-colored, but more detailed interpretation of the Court's decision. Pursuant to the decision, Simkens wrote, rights were not only enforceable in state court, but remained enforceable in federal court in a number of circumstances. For example, the ruling left unaffected the ability of government employees, United States homesteaders, and citizens of the territories to pursue their claims in either state or federal courts. Moreover, United States admiralty courts continued to have concurrent jurisdiction over violations of the laws occurring on the high seas or navigable waters; and, Simkens argued, picking up on the loophole left by the Court, despite the Court's ruling, federal courts retained jurisdiction to decide allegations of discrimination by common carriers traveling interstate. Simkens wrote, "[W]e think that a case brought would prove that the United States has concurrent jurisdiction over railroad cases, where the road is not confined entirely to one state, as the judges well protected themselves by saying that congress may have power to regulate commerce . . . among the several states. . . ." *In Response to Plebian's Inquiry*, ARK. MANSION, Nov. 24, 1883, at 1. Indeed, abrogations of contract also remained remediable: "If a man or corporation takes your money to give you specified accommodations," Simkens advised his readers, "he is bound at law and in equity for the obligation of contract." *Id.*

271. The *Mansion* specifically endorsed state legislation in another article appearing in the same issue of the paper. The article reported, "A mass meeting of colored people at Keokuk . . . resolved to ask the legislature of Iowa to adopt the sections of the civil rights bill recently decided unconstitutional." ARK. MANSION, Nov. 3, 1883, at 1. The *Mansion* opined that such an act would not be "special legislation," and endorsed the effort. *Id.* Subsequent editions of the *Mansion*, however, reported that Arkansas already had a civil rights law on the books and expressed the opinion that the citizens of the state required no additional legislation. *Civil Rights*, ARK. MANSION, Nov. 10, 1883, at 1; see also *A Civil Rights Inquiry*, ARK. MANSION, Nov. 17, 1883, at 1 (letter from "A Plebian").



persons who felt unfairly treated in state court retained their right to appeal adverse state court decisions to the federal courts.<sup>272</sup>

Simkens backpedaled, again, in editorials appearing on November 10 and 17. "In denouncing the civil rights bill to be farcical," Simkens wrote, "it was not our intention to reflect discredibly upon neither the originators of the bill nor the republican party."<sup>273</sup> Simkens continued to maintain that the Act, as passed, was unconstitutional but explained, "we called it farcical because public opinion prohibited its enforcement, as under our laws all men are entitled to a trial by jury."<sup>274</sup> "Public sentiment rules supreme," Simkens argued, "civil rights laws to the contrary notwithstanding."<sup>275</sup>

Indeed, both Simkens's suggestion that the Act was, in fact, unconstitutional and, also, his approval of the Court's decision seem to rest squarely on his belief that public opinion "is in all cases the supreme law of the land."<sup>276</sup> Simkens statement, thus, relied on a distinction between the correct determination of law and assertions about morality; his approval of the Court's action took issue only with those who would criticize the correctness of the decision and was not necessarily a defense of its moral worthiness.<sup>277</sup> The distinction is seen more clearly in Simkens' response to the *Louisville Bulletin's* argument that the decisions in *Dred Scott* and the *Civil Rights Cases* were incompatible. Simkens argues, to the contrary, that while the

272. *Our Civil Rights Held Inviolable*, ARK. MANSION, Nov. 3, 1883, at 1. The paper's position paralleled an interpretation of the law offered by Attorney General Brewster in a letter published by the *Mansion* on the same date as its second editorial. Brewster's letter stated that African Americans retained particular rights pursuant to the United States Constitution, that the U.S. executive and Congress were powerless to interfere for the protection of the rights of citizenship, that these rights could only be enforced in state court, and that appeals from judgments of state courts could be brought to the federal courts. *The Rights of Negroes: A Letter from Attorney-General Brewster—The Only Remedy for Grievance*, ARK. MANSION, Nov. 3, 1883, at 1.

It is perhaps also significant that the *Mansion* reprinted excerpts from the editorial statements of white-controlled Arkansas papers, the *Arkansas Gazette*, the *Arkansas Democrat* and the *Arkansas Methodist*, in which the *Mansion's* editorial opinion was cited with approval. *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 3, 1883, at 1; *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 10, 1883, at 1; see also *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 17, 1883, at 1 (excerpt from *Loneke Democrat*).

273. ARK. MANSION, Nov. 10, 1883, at 1; see also ARK. MANSION, Nov. 17, 1883, at 1.

274. ARK. MANSION, Nov. 10, 1883, at 1.

275. *Id.* The Court, thus, had merely disrobed African Americans of an ineffective shield, which, however, had been "in good faith thrown around us for a safeguard." *Id.* The November 10 editorial appeared again, largely unchanged, in the November 17 edition of the *Mansion*.

276. ARK. MANSION, Nov. 10, 1883.

277. A similar argument was put forward by the *Mansion's* Washington correspondent: "Undoubtedly, [the decision] is a back-set in some respects to [the colored] race, but whatever our views of its effects, it is useless to berate the court, for the decision is undoubtedly correct law." *Washington Letter*, ARK. MANSION, Dec. 1, 1883, at 1.

*Dred Scott* decision would have been wrong under the order of things in 1883, that the case was in accordance with the law in the 1850s, which was determined by the prevailing sentiment. This realism about the law in no way suggests that Simkens believed that the *Dred Scott* decision was morally right.<sup>278</sup>

Although the *Mansion* never retracted its initial statement of approval for the Court's decision,<sup>279</sup> a layer of cautious disapproval, or veiled criticism was thus also apparent. Interestingly, at the end of its October 27 editorial extolling the virtues of self-help over the enforcement of civil rights on "an unwilling people," Simkens advised patience. "[I]f we cant stay in the states," the editor recommended, "let us go to the United States territories [where, according to contemporaneous interpretations of the *Cases*, the Court's invalidation of the Civil Rights Act would not apply], not to Africa."<sup>280</sup> Similarly, in its article on Bishop Turner's views, the *Mansion* sounded resigned about, rather than approving of the Court's decision. What more could African Americans have expected from a test case brought before the Court? "[I]t was evident that somebody had to be disappointed, and as usual it fell upon us."<sup>281</sup>

Excerpts from editorials found in a number of additional African-American newspapers appear in the pages of newspapers that have been preserved, such as the *Mansion*, even though copies of the originals may not be accessible. The content of these editorials generally fall within the range of perspectives offered by the writers discussed above. For example, the Negro Newspaper Microfilm Series contains some editions of the *Plaindealer* of Detroit, but only those issued between 1889 and 1892. Nevertheless, the *Arkansas Mansion's* coverage of the *Cases* includes the following quote from the *Detroit Plaindealer*:

The decision of the supreme court in the civil rights cases causes almost universal disapproval of the people, both white and colored,

278. *Id.* Indeed, Simkens used his disagreement with the holding of *Dred Scott* as the basis for a challenge to those who applauded Justice Harlan's dissent. The *Mansion's* initial coverage of the dissent was brief, and Simkens limited his criticism to a few sentences that focused on the consequences of granting Congress the power to legislate to grant or to remove the liberty of citizens: "With [Justice Harlan,] the *Dred Scott* decision, Fugitive Slave Law and the Civil Rights Bill, are in accord with the Constitution, and black men applaud him, but the writer is one of those that says, 'Give us liberty or death.'" *Our Opinion of Justice Harlan's Views*, ARK. MANSION, Dec. 1, 1883, at 1.

279. "The facts are in a nutshell," the *Mansion* editorial stated on November 3, in agreement with the Court, "the United States congress had not constitutional right to legislate or make laws for the government of the citizens of the several states, as each state is a sovereign of itself. . . ." *Our Civil Rights Held Inviolable*, ARK. MANSION, Nov. 3, 1883, at 1.

280. *Equal Rights*, ARK. MANSION, Oct. 27, 1883, at 1.

281. *Turner on the Civil Rights*, ARK. MANSION, Oct. 27, 1883, at 1.

in Detroit. It still remains an insult to the memory of Lincoln, who freed this race, and to Sumner who introduced the bill. It gives the lie to truths asserted and maintained by Webster, Edmunds and Butler, all able statesmen and lawyers. It is ignoring to the names of those who fought and bled, be they living or dead.<sup>282</sup>

The *Mansion's* sample of editorial opinions also includes an excerpt from an editorial appearing in the *Cincinnati Afro-American*, which argued that the Court's decision left African-American travelers at the mercy of "any irresponsible ruffian who chooses to abuse him."<sup>283</sup> The *Mansion* also contains a passage from the *Afro-American* that includes a call for the national executive committee formed by the recent national colored convention to convene in order to discuss the Court's decision.<sup>284</sup> An excerpt from the *Paris (Texas) Laborer* includes the announcement that African Americans would react to the Court's decision by redoubling their energies "to make the race felt and respected as Americans citizens." "By so doing," the *Laborer* added, "we will lay up for ourselves rights where supreme courts cannot corrupt nor Judge Bradley break through and steal."<sup>285</sup>

### III. JUSTICE AND JURISPRUDENCE

In an article published by the *A.M.E. Church Review* in 1887, Everett James Waring, an African-American lawyer in Baltimore, discussed the formation, purpose, and activities of the United Brotherhood of Liberty.<sup>286</sup> According to Waring, the Brotherhood was "composed of some of the most prominent colored men in the United States,"<sup>287</sup> who intended "to test in the courts infringement of

282. *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 3, 1883, at 1.

283. *Id.*

284. ARK. MANSION, Nov. 10, 1883, at 1.

285. *Civil Rights: Opinions of the Press*, ARK. MANSION, Nov. 17, 1883, at 1 (excerpt from *Paris Laborer* (Texas)).

286. Waring, E.J., *The Colored Man Before the Law*, 3 A.M.E. CHURCH REV. 496 (1887), reprinted in part in 2 DOCUMENTARY HISTORY, *supra* note 265, at 695-96 (under the heading *Mutual United Brotherhood of Liberty, 1887*). For more information on Waring, the Brotherhood of Liberty, and the growth of the African-American bar in Baltimore, see J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 142-49 (1993); David S. Bogen, *Maryland's First Black Attorney*, in 100TH ANNIVERSARY OF THE ADMISSION OF EVERETT J. WARING THE FIRST BLACK LAWYER TO BE ADMITTED TO THE BAR IN MARYLAND (Bar Association of Baltimore City and the Monumental City Bar Association, 1985); J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077 (1994); Bettye C. Thomas, *Public Education and Black Protest in Baltimore, 1865-1900*, 71 MD. HIST. MAG. 381 (1976); A. Briscoe Koger, Dr. Harvey Johnson—Pioneer Civic Leader (1957) (unpublished manuscript, on file with the Enoch Pratt Free Library, Baltimore, Maryland); William G. Paul, *The Shadow of Equality: The Negro in Baltimore, 1864-1911*, at 205-10 (1972) (unpublished Ph.D. dissertation, University of Wisconsin).

287. Waring, *supra* note 286, at 503 (quoting an interview with a *News* reporter given by himself), reprinted in part in 2 DOCUMENTARY HISTORY, *supra* note 265, at 695.

the rights of colored people, whether as a race or as individuals. . . ."<sup>288</sup> The Brotherhood believed that appeal to the courts would complement political efforts, and Waring outlined the role of litigation in challenging oppression based on race:

We should organize the country over. Raise funds and employ counsel. Then, if an individual is denied some right or privilege, let the race make his wrong their wrong and test the cause in law. . . . Some may say that this is futile—that we shall fail. Suppose we do at first, do we not know that in the end, phoenix-like, there will emerge from a sea of failures glorious success.<sup>289</sup>

In 1889, the Brotherhood published *Justice and Jurisprudence*, a treatise on the status of civil rights and a tremendous source for analyses of African-American perspectives on the law in the 1880s.<sup>290</sup> In it, the Brotherhood made clear their perception that the postwar amendments “introduced into the Constitution a new, fundamental civil system” with the “deepest constitutional significance”<sup>291</sup> and offered a critical analysis of the Court’s retreat on civil rights. They charged that the Court misinterpreted the Reconstruction Amendments, ignored precedent, manipulated language to justify outcomes, and founded decisions on prejudice and policies instead of higher law and the forward march of morality. The book includes a preface, which paints the Brotherhood’s argument in broad brush strokes, a dedicatory address, a letter from the Brotherhood to “their brethren the citizens of the United States of African descent,” correspondence between the Brotherhood and their Counsel, and forty-six chapters of argument against the legitimacy and logic of both the *Civil Rights*

288. Waring, *supra* note 286, at 503, *reprinted in part in* 2 DOCUMENTARY HISTORY, *supra* note 265, at 695.

289. Waring, *supra* note 286, at 504, *reprinted in part in* 2 DOCUMENTARY HISTORY, *supra* note 265, at 696. In support of the utility of a legal approach, Waring cited four cases that had successfully vindicated the rights of African Americans in Maryland, including a suit by three Baltimore women who were denied accommodations on a steamer on the basis of their race. Waring, *supra* note 286, at 504, *reprinted in part in* 2 DOCUMENTARY HISTORY, *supra* note 265, at 696. “[W]hen white men deny us our rights,” Waring wrote, “let us call them into court and compel them to defend the wrong.” Waring, *supra* note 286, at 504, *reprinted in part in* 2 DOCUMENTARY HISTORY, *supra* note 265, at 696. The strategy outlined by Waring presaged the successful course of action developed and implemented by Charles Hamilton Houston and Thurgood Marshall in the 1930s and 1940s to overturn *Plessy v. Ferguson*.

290. Some question exists as to whether the organization described by Waring is the same body that drafted and issued *Justice and Jurisprudence*. The book depicts the Brotherhood as an organization of African Americans dedicated to legal reform, but, unfortunately, offers no list of members and credits no individuals with authorship. For further discussion of authorship, see Smith, *supra* note 286, at 1077, 1085-86 n.41 (1994).

291. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 484.

*Cases and Hall v. DeCuir*,<sup>292</sup> which comprise the bulk of the text. These sections are followed by a lengthy digest of laws and cases relating to civil rights. A sprinkling of quotations from a variety of philosophers, statesmen, and jurists opens each section and chapter.<sup>293</sup>

The preface, the letter to brethren, and the dedicatory address are each signed by the Brotherhood of Liberty. In the preface, the Brotherhood summarized the book's two main themes:

The first concerns the Positive Law of the Fourteenth Amendment, by which the whole power of the American state is pledged to maintain the equality of civil rights of every American citizen by Due Process of Law. The second discloses the transparent veils of legal fiction under cover of which the civil rights of all races are being slowly undermined.<sup>294</sup>

The Brotherhood proposed that judicial interpretation threatened to unravel the constitutional structure underlying the American republic, which the Brotherhood defined as "liberty regulated by law."<sup>295</sup>

In the dedicatory address, the Brotherhood elaborated on its purpose. *Justice and Jurisprudence* was intended to provide an exposition of the meaning of the Fourteenth Amendment, and, thereby, also offer a defense of the reign of constitutional law and the liberty of all Americans.<sup>296</sup> The effort responded to the Brotherhood's perception that recent decisions by the Court were eroding judicial protection for civil rights, in defiance of the intent of the Fourteenth Amendment. "It appears to your addressers," the text asserts, "that civil-rights doctrines are [in a] . . . mischievous state, and that the decisions of the courts are involved in an intricate tangle of verbal mysticism. . . ."<sup>297</sup>

292. *Hall v. DeCuir*, 95 U.S. 485 (1878) (invalidating a Louisiana statute that forbade transportation companies from segregating passengers by race on the ground that the regulation burdened interstate commerce).

293. The entries range from Bentham's "Plain law and plain sense," *JUSTICE AND JURISPRUDENCE*, *supra* note 5, at 47, to analyses of legal subjects. The introductory section preceding the first chapter of the book, for example, includes single quotations from Disraeli, Voltaire, Hooker, Epea Pteroenta, Bolingbroke, Tilden, Pascal, Everett, Bacon, Stahl, Sismondi, Dionysius of Halicarnassus, Constantine, Addison, U.S. Grant, R.E. Lee, Lao-Tze, J. Black, Shakespeare, Seward, Jefferson, and multiple quotations from Lincoln, Justice Harlan, Mulford, Milton, Nicolay and Hay, D'Aubigne, President Harrison, Madison, Swift, Webster, and Washington.

294. *Id.* at i.

295. *Id.* at v.

296. Throughout the address, the Brotherhood emphasized that the proper enforcement of the Fourteenth Amendment was in the general interest, not only that of African Americans, and would promote general happiness. *See, e.g., id.*, at 21 ("if the principles of the Fourteenth Amendment be carried into every region of civil right . . . it will in time prove to be of the greatest advantage to . . . the general happiness, and the practical prosperity of the whole American people."); *id.* at 54 ("if Jurisprudence can with safety pluck Justice by the nose . . . [it] will eventually overturn our whole system of government.").

297. *Id.* at 7.

According to the Brotherhood, the Fourteenth Amendment was designed for the protection of the civil rights of African Americans,<sup>298</sup> and recent cases had abandoned this intent with opinions marked by “false refinement, obscurity, and injustice.”<sup>299</sup>

Moreover, the Court’s rulings had left the status of African Americans to the vagaries and whims of regional powers. The inconsistent administration of justice across the country that resulted had “a tendency to create two distinct civic classes under the same government,—a most pernicious result, and one which the noble framers of the amendments especially sought to avoid.”<sup>300</sup> The Court’s relegation of responsibility to local authorities created a form of tyranny,

298. *Id.* at 10. The Brotherhood easily reconciled their view that the postwar amendments were designed specifically to bring African Americans from slavery to freedom and to ensure the rights of African Americans, with the position that the “Fourteenth Amendment obliterated the race-line so far as all rights fundamental in a state of freedom are concerned.” *Id.* at 9; *see also id.* at 347, 476; Waring, *supra* note 286, at 499, 504 (arguing that the postwar amendments were designed both to remedy the grievances of the newly freed race, in particular, and, also, intended to serve a color-blind ideal—i.e., that “[n]ot the texture of hair, not race, not color of skin, but character is the sublime test and criterion among men and angels”). In suggesting that the Fourteenth Amendment “obliterated the race-line,” the Brotherhood proposed that the amendment sought to eradicate racial discrimination; they were not suggesting that race was irrelevant to the passage of the post-war amendments, its terms, or its proper interpretation. *See, e.g.,* Waring, *supra* note 286, at 500 (the amendments were intended to replace the rule of *Dred Scott*, which had established in America a doctrine of absolutism based on race); *see also id.* at 497 (arguing, in defense of African-American assertions of the rights of citizenship, “The white man draws the color line. He has always drawn it. . . . Tell me not that we draw the color line; that moral crime lies at the white man’s door.”).

More specifically, according to the Brotherhood the postwar amendments were intended to protect the new status and the rights granted African Americans, and such protection was necessary to eradicate discrimination against African Americans on the basis of race, color, or previous condition of servitude. This contextual interpretation of the amendments was similar to the oft-quoted passage of the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1873) (cited with approval in Waring, *supra* note 286, at 499), in which the Court stated, “It is true that only the 15th Amendment in terms mentions the Negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the 15th.”

The Brotherhood’s view of the intent of the Fourteenth Amendment and their support for judicial protection against prejudice is at odds with many current invocations of color-blind readings of the Constitution, which often neglect the context and specific purpose of the amendments and, instead, suggest that the amendments were intended to protect individuals, not groups. *See, e.g.,* *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1163 (Cal. 1976), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978) (“[T]he equal protection clause by its literal terms applies to ‘any person,’ and its lofty purpose, to secure equality of treatment to all, is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others.”). The Counsel to the Brotherhood of Liberty argued that the postwar amendments were, indeed, intended to foster individuality “to its fullest expression,” but, he stated, they would do so by placing “in eternal bondage the unconstitutional element of race-antagonism in the society of America,” not by ignoring the nation’s history of slavery, segregation, and discrimination. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 483.

299. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 10-11. The Brotherhood accused the courts of allowing prejudice to influence decision-making and warned that the judiciary should not “legalize customs” that were both subversive of the Constitution and immoral. *Id.*

300. *Id.* at 7.

handing one class of citizens the power of meting out the civil rights of the other, a situation that was particularly injurious since whites had long regarded African Americans as objects of social and civil contempt. Without federal protection of the rights of African Americans by the federal courts, "the invasions of majorities are as unlimited and unconscionable as their power over minorities is absolute."<sup>301</sup> The resulting discriminatory treatment to which African Americans would be subjected violated the intent of the post-war amendments and was, thus, unconstitutional.<sup>302</sup>

The recent rulings of the Court had not only violated the intent of positive law, according to the Brotherhood, but they also conflicted with divine truths and, more specifically, the spirit of mercy, moderation, and benevolence that forms the basis for civil government and is connected to the special destiny of the American people.<sup>303</sup>

In subsequent passages about the intent of those who framed and ratified the postwar amendments, the Counsel again acknowledged the influence of religious teaching on the amendments and, in particular, the debt owed the Gospel of St. Luke for its vision of goodwill toward all people, be they Jew or Gentile, white or black.<sup>304</sup> The framers of the amendments "determined to follow the precedent set by the great law-giver of the enslaved Israelites" and, thus, enscribed the love of liberty and foundation for civil rights into the Constitution.<sup>305</sup>

The Brotherhood proffered a distinction between "justice" and "jurisprudence," and argued that the Fourteenth Amendment represented a command for justice in American law.<sup>306</sup> The role of jurisprudence was to expound on the correct application of principles,

301. *Id.* at 14.

302. Although *Justice and Jurisprudence* focused primarily on the meaning and proper construction of the Fourteenth Amendment, the book also sheds light on the Brotherhood's interpretation of the Thirteenth and Fifteenth Amendments. For instance, in a passage of interest to students of the Thirteenth Amendment, the Brotherhood wrote, "the ancient system of slavery in America consisted of many parts, having a social, civil, political, and ecclesiastical character." *Id.* at 12-13.

303. *Id.* at 14-15. The Brotherhood described the protection and enforcement of civil rights as "subservient alike to the teachings of the gospel of Christ and to the mandates of the Constitution of the United States as augmented by the Thirteenth, Fourteenth, and Fifteenth Articles of Amendment. . . ." *Id.* at 21-22. In a later section of the book, the Brotherhood reiterates that the legal status of civil rights, as established by the Fourteenth Amendment, is based on the Christian belief that "the soul of each human being is alike precious and immortal in the sight of the great Author of nature and government." *Id.* at 39. See also Smith, *supra* note 286, at 1090-92 (discussion of "heaven born justice").

304. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 137.

305. *Id.* at 137-38.

306. *Id.* at 12.

exchanging vague for fixed and settled rules and “following and protecting the solid precedents of popular freedom, by exact learning and profound reasoning.”<sup>307</sup> The courts were responsible for conforming rules of law to the commands of the constitutional amendments and, in particular, for giving life to the principles introduced by the amendments—the strengthening of the federal government and the replacement of pro-slavery dogmas with the national purpose of endowing the newly freed race with the immunities and privileges of American citizenship.<sup>308</sup> To the Brotherhood, *Dred Scott* demonstrated that, even in the United States, jurisprudence “might be made a vehicle of tyranny”;<sup>309</sup> and, they submitted, if the Court remained under the influence of prejudice, jurisprudence would again serve not justice, but the dominions of brute force and arbitrary will.<sup>310</sup>

In the address to “Their Brethren the Citizens of the United States of African Descent,”<sup>311</sup> the Brotherhood reiterated that “love of liberty, and of the civic equality of man,” principles enscribed in the Constitution by the recent amendments, were fundamental truths, not to be weighed “as mere dust in the balance, beside the prejudice of by-gone slavery,” but, instead, to triumph over injustice.<sup>312</sup> The mandates of the Fourteenth Amendment were fundamental, and their interpretation required

a system of comprehensive principles, not a dispute about words or doctrines. The great governing, controlling law, which supplies the link in the change or transition from slavery to freedom, cannot be construed as a trivial parol contract between citizens; it must be expounded broadly, understandingly, and conscientiously, as a grave national compact of freedom with seven millions of adopted citizens.<sup>313</sup>

The Fourteenth Amendment declared the “glory of man to be self-dominion,” and was intended to shield the citizen “from civic ostrac-

307. *Id.* at 16.

308. *Id.* at 16-17.

309. *Id.* at 17.

310. *Id.* at 17-18. The text emphasizes the importance of separating judicial decision-making from the judgments of popular will: “[T]he wise men of the bench should not necessarily agree with the opinion of the mass of people,” the Brotherhood wrote, “popular notions and circumstances which sway unofficial judgments are neither the standards of rectitude nor masters of the juristic conscience.” *Id.* at 18.

311. *Id.* at 23-39.

312. *Id.* at 32-33.

313. *Id.* at 35-36. The significance the Brotherhood accorded the Fourteenth Amendment would be hard to overstate. The Fourteenth Amendment represented the textual embodiment of the restructuring of the nation that was consequent to the Union’s victory in the Civil War. The Fourteenth Amendment “repaired” the Constitution “at the expense of thousands of millions,” and this repair was “cemented by . . . a profusion of the best blood of the nation. . . .” *Id.* at 32-33; see also *id.* at 35, 503.



cism and contemptuous attacks.”<sup>314</sup> Its doctrine was borne of both the Declaration of Independence’s avowal, “that all men are born free and equal” and the constitutional maxim that “every rank or character of citizen is equally subject to the laws.”<sup>315</sup> Indeed, the mandate of the Fourteenth Amendment—i.e. “the universality of that liberty which makes the meanest member of the state sacred in the glory of its reflected lustre . . . regardless of class, color, race, creed, or previous condition”—represented “the grand bond which unites American citizens, the glory of our common country.”<sup>316</sup> Can it be, the Brotherhood asked, that such fundamental principles may be repudiated by the judiciary?

The main body of *Justice and Jurisprudence* is rich with discussion and analysis of the law and worthy of separate study. For purposes of this article, however, a few themes relating directly to the *Civil Rights Cases* should be noted. First, in the opening chapters, *Justice and Jurisprudence* condemns the wide schism between the promise of American law and its enforcement, and suggests that the Court’s jurisprudence was partly to blame. The text, written by the Brotherhood’s Counsel, proposes that a foreign observer would find strange the discrepancy between the guarantees found in the post-war amendments, which had initially been affirmed by the Supreme Court in broad statements of principle, and the “anomalous status of the civil rights of our citizens of African descent.”<sup>317</sup> Given the clarity of the guarantees, the foreign observer would expect that actions to challenge the denial of civil rights, or the immunities and privileges of citizenship, would involve the trial of a single issue of fact—i.e., whether or not a plaintiff had suffered unjust discrimination.<sup>318</sup> In fact, how-

314. *Id.* at 36.

315. *Id.* at 36-37; see also *id.* at 420 (attributing the spirit of the Fourteenth Amendment to “the heaven-born justice of equality, which the Declaration of Independence proclaimed”). The book’s references to the Declaration and the Constitution reflect distinctly different sets of assumptions about the two documents’ authority and flaws. In contrast to the Declaration, which derived from natural law and contained principles that were binding on expounders of jurisprudence, the Constitution had been an imperfect compromise, an arrangement that had grown more sublime with the addition of the postwar amendments. Nevertheless, *Justice and Jurisprudence* does not support the theory that the unamended Constitution had merely been an instrument of oppression. “It is not true that the Constitution was made exclusively by and for the white race,” the Counsel wrote, “it was established by ‘the people of the United States’ for themselves and their posterity. . . .” Since free persons of color had been citizens of at least five states and had constituted part of the people of the United States, they numbered among those for whom the Constitution was established. *Id.* at 528.

316. *Id.* at 39. Similar statements about the origin and meaning of the Fourteenth Amendment were reiterated by the Counsel later in the book. See, e.g., *id.* at 431-33.

317. *Id.* at 72-75.

318. *Id.* at 73.

ever, the observer would soon discover that despite pronouncements of equality, a citizen's complexion determined his standing before the law.<sup>319</sup> In order to uncover the causes of these incongruities, the book posits a situation in which unbiased characters, like the foreign observer, investigate and discuss the status of civil rights. It then presents a dialogue between an impartial foreign student, who lacks the prejudice generated in those influenced by the civil and social environment of slavery, and the chief justice of the Supreme Court.<sup>320</sup>

The dialogue between the student and the chief justice touches on the intention, meaning, and authority of the postwar amendments and both the actual and the proper role of the courts in construing the law. According to these narrators, the amendments were intended to constitute the states and the people as a plural unit—"one country, one liberty, one destiny."<sup>321</sup> The amendments incorporated the spirit of the Declaration of Independence and the divine truth that "all men are created equal," and, in keeping with these, were intended to "sweep away every vestige" of the previous condition of slavery.<sup>322</sup> Since the amendments granted civil rights to African Americans as American citizens and since they spoke to the fundamental difference between "the rights of freedom and wrongs of slavery," their enforcement was not to be subject to fluctuation or sectional bias.<sup>323</sup> The fact that the nation passed the amendments in the wake of the war only heightened their significance. The chief justice opined,

[H]alf a million of lives were lost to secure those very civil rights which it is asserted a two-penny public servant may now repudiate because he may lose a dime in his business if the civil rights of one class of citizens are not sacrificed to the objections of another class.<sup>324</sup>

The chief justice and student suggest, further, that by adopting the amendments, the states incorporated into the Constitution the proposition that "no man is so humble as to be denied the law's protection."<sup>325</sup> And, since the Constitution was supreme, the guarantees of the amendments were binding on the states and on their citizens.

319. *Id.* at 75.

320. *See id.* at 73-134.

321. *Id.* at 81.

322. *Id.* at 80-81.

323. *Id.* at 88.

324. *Id.*; *see also id.* at 98 ("Reform . . . required . . . a violent, bloody revolution to eradicate the national error and deep-seated abuses of slavery. At the close of the Civil War the nation immediately embodied in the Constitution these very amendments, the proudest work of her power and wisdom.").

325. *Id.* at 92.

The Constitution imposed restraints on the states and on individuals, and, thus, the authority of the amendments extended to the actions of both states and persons.<sup>326</sup>

Why, then, did a disparity exist between the guarantees of equality promised by the amendments and the status of African Americans? The discussants assert that no logic could defend the Court's repudiation of the Constitution.<sup>327</sup> The Constitution entrusted the protection of freedom to the Supreme Court<sup>328</sup> and, through their enabling clauses, the amendments also imposed on Congress the obligation of safeguarding the "legacy of freedom" bequeathed to African Americans.<sup>329</sup> The courts were supposed to be calm and in command, and should have rejected any loose or equivocal constructions of the amendments.<sup>330</sup> It would be absurd, the student argues, for the amendments to be interpreted

as if the States, Congress, the common law or the public, had annexed to them a clause providing that "nothing herein contained shall be so construed as to impair the emoluments which . . . hotel-keepers, common carriers, or the proprietors of places of public resort . . . may hereafter receive from citizens who repudiate these amendments . . . [and that such public servants can lawfully] pass such rules and regulations to establish and maintain a color line. . . ." <sup>331</sup>

The language of the Fourteenth Amendment should have been construed "as people generally understand it," and not subject to the whims of popular opinion or special interests.<sup>332</sup>

The Court had undermined the authority of the Fourteenth Amendment, the chief justice explained to the student, because the issues presented had been framed with dexterity, enabling the Court to decide civil rights cases in deference to the authority held by public servants to protect and to guide their vocations.<sup>333</sup> But why had common sense been so trampled,<sup>334</sup> leaving vulnerable the rights of African-American citizens? The student suggested the answer: "race-

326. *Id.* at 91.

327. *Id.* at 85.

328. Throughout, the book evinces a belief that the federal courts have a singular role to play in the protection of civil rights. *See, e.g., id.* at 463 ("The nation has confided the principle of equality of right by due process of law to the care of her jurisprudents. . . ."); *id.* at 473-75 (The postwar amendments "conferred the fullest authority and power upon the guardian of jurisprudence, for the enforcement of the principles of the new system.").

329. *Id.* at 90.

330. *Id.* at 117.

331. *Id.* at 86-87.

332. *Id.* at 86.

333. *Id.* at 77-78.

334. *Id.* at 86.

instincts in America involve only prejudice against the helplessness of a fellow-man.”<sup>335</sup> The discussants conclude that decisions of the courts that subordinate constitutional mandates to the prerogatives of public servants were the result of race prejudice and that change in the law would occur only when courts were filled with judges who could put prejudice aside and enforce civil rights.<sup>336</sup>

The text reviewed the central holding of the *Civil Rights Cases*, explaining that the Court had found that the Fourteenth Amendment reached only actions of the state and had restricted the scope of congressional authority. Pursuant to the *Cases*, Congress could only establish laws necessary and proper to counteract and to provide redress for the effects of discriminatory state actions and lacked the power to provide due process of law for the vindication of civil rights more generally. Most pointedly, the Court had ruled that Congress lacked the authority to regulate the conduct of individuals in the states.<sup>337</sup> The text quoted approvingly and at length from Justice Harlan’s dissent, agreeing with Harlan that the Court’s construction of the law had defeated the ends that the people had desired to accomplish.<sup>338</sup> In fact, the text reminded its readers, the Congress that had enacted the civil rights bill consisted in large part of members who had proposed the Fourteenth Amendment—and these “framers” of both the amendment and the bill believed the Act was constitutional.<sup>339</sup>

Later in the book, the Counsel offered additional thoughts on the meaning of the Civil Rights Act. The Act had declared,

Discriminations against persons, based upon grounds purely arbitrary and not recognizable by law, made solely because of certain physical characteristics, which in no way affected their capacity or fitness for the privileges and immunities of citizenship, were unlawful violence, and made them statutory crimes. . . .<sup>340</sup>

The aim of the Act was “the overthrow of all unbridled authority and . . . that arbitrary power which sought in any form to deprive [African Americans] of their civil rights,” whether such authority was wielded by the state or public servants.<sup>341</sup> The postulates of the legislation included that no particular color, religion, nor class was exclusively entitled to freedoms, that equality could legally be diminished by rules

335. *Id.* at 81.

336. *Id.* at 111-12.

337. *Id.* at 147-48, 155-56, 562-63.

338. *Id.* at 149.

339. *Id.* at 140, 152.

340. *Id.* at 374.

341. *Id.*

based on invidious discrimination, that impartial legal protection was the right of every person, and that the nation's welfare required that the benefits of the laws governing society should be apportioned equally.<sup>342</sup> The Act replaced the rule of slavery with "the doctrine of the equality of man, notwithstanding his color."<sup>343</sup>

In the *Cases*, however, the Court abandoned the nation's new creed. The Court displayed hostility, departing from the record "to deliver a grave moral lesson, to utter a pious homily, to school and discipline colored humanity in the doctrines of humility; . . . exhorting it not to walk erect, but more in accordance with the mediaeval gait of *Dred Scott*."<sup>344</sup> The text quoted from passages of the Court's opinion that approvingly recounted how in the years before emancipation, "free colored people" had been discriminated against in the enjoyment of accommodations without considering it an "invasion of [their] personal status. . . ."<sup>345</sup> The Court had, thus, suggested that it would be appropriate to model the rights of African Americans in the post-emancipation era after the condition of free blacks living under the shadow of *Dred Scott*, reproached African Americans for seeking freedom, and deemed extravagant legislation placing American citizens above degradation.<sup>346</sup>

Indeed, the Counsel argued, the Court had also subverted the Thirteenth Amendment, which had been intended to "extirpate the institutions of slavery."<sup>347</sup> It was too apparent for argument that the refusal by the purveyors of public accommodations to accord African Americans common privileges was a badge of servitude. The text maintained, "[T]he perpetuation of any insignia, ceremonialism, emblem, device, token, custom, ordinance, rule, or regulation, symbolic of the previous condition of slavery, and enforced as such, is a gross invasion of the equality of the race," in violation of the Thirteenth Amendment.<sup>348</sup>

342. *Id.* at 374-75.

343. *Id.* at 375.

344. *Id.* at 142.

345. *Id.* at 142-43.

346. *Id.* at 143; *see also id.* at 429 ("[B]y this language of grave import [the Court] admonished the country, that . . . it was not expedient to conform American jurisprudence to the exalted standard of morality which had been proposed by the nation, and which the political reformation of the Fourteenth Amendment sought to enforce.").

347. *Id.* at 440. "[T]he abolition of slavery or involuntary servitude," the text stated, could only be interpreted as intending "the substitution of the equality before the law of each individual in any of the states" and equality throughout the United States "in its broad, Christian, historical, and political signification." *Id.* at 470.

348. *Id.* at 440.

Despite the destructive force of the Court's ruling, however, the Fourteenth Amendment remained a powerful force for equality. The Amendment continued as a formal acknowledgement of the rights, liberties, immunities, and privileges of citizenship and provided definition to rights that neither the United States nor the States nor individuals could infringe.<sup>349</sup> Moreover, the Fourteenth Amendment's prohibition of discriminatory state actions remained intact, and Congress retained the authority to adopt appropriate legislation to render such state laws null and void.<sup>350</sup> In addition, the *Cases* did not impair the right of citizens, now including African Americans, to obtain judgment in state court for denial of the privileges and immunities to which they were entitled under state and common law.<sup>351</sup> And finally, all judgments of state courts that infringed on the provisions of the Fourteenth Amendment would also continue to be void. Nevertheless, the text concluded, if private citizens of the states were to be permitted to violate the rights of citizenship, "the framers of the Fourteenth Amendment, who also framed the Civil-Rights Bill, have labored in vain. . . ."<sup>352</sup>

The remainder of the book focuses principally on *Hall v. DeCuir*, in which the Court struck a state statute prohibiting racial segregation

349. *Id.* at 156.

350. *Id.* at 157.

351. *Id.*

352. *Id.* at 159. Notwithstanding the Court's restriction on the authority delegated to Congress by the Fourteenth Amendment's enabling clause, the text stated, a number of substantive affirmations could be specified outlining the constitutional status of the civil rights of African Americans after the *Cases*. These included: (1) that the Fourteenth Amendment was a valid compact between the sovereign people of the United States and the citizens of African descent; (2) that freedmen born or naturalized in the United States were citizens of the United States and of the states in which they resided; (3) that no state could make any law abridging the privileges and immunities of the freedmen, nor depriving them of life, liberty, or property without due process, nor the equal protection of law; (4) that by its adoption, the Fourteenth Amendment became the supreme law of the land and bound every judge of every state; (5) that privileges and immunities of citizens included those which constituted the essence of republican citizenship or those that had been common to citizens in the states under state laws; (6) that African Americans became entitled to the privileges and immunities of citizens of the several states; (7) that African Americans could not be constitutionally deprived of the "full and unqualified enjoyment of all such civil immunities and privileges" by state law, custom, or enactment, on account of their race, color, or previous condition of servitude or for reasons other than those applicable to every other citizen; (8) that, by virtue of being citizens of the United States, African Americans were protected against "all discrimination on account of his race" and were entitled to all the privileges and immunities that states accorded their most favored citizens; (9) that "under the Fourteenth Amendment, by virtue of section two of article four," the civil rights of African Americans were not constitutionally subject to any limits interfering with their immunities and privileges—whether or not they were adopted under color of law—provided such limits were solely applicable to African Americans and were not applicable alike to all citizens; and (10) that among other privileges and immunities was the free enjoyment of engaging in all industrial pursuits and the free enjoyment of all accommodations "upon the same terms as they are enjoyed by the citizens of each State." *Id.* at 160-62.

on the ground that the regulation burdened interstate commerce, and, therefore, invaded an area within the exclusive province of Congress.<sup>353</sup> The text points to *Hall* as both the turning point in the Court's treatment of civil rights and the decision that, taken together with the *Civil Rights Cases*, both signified the emasculation of the Fourteenth Amendment and revealed the Court's antagonism toward the rights of African Americans.

The questions presented to the Supreme Court in *Hall* were (a) whether state legislation seeking to impose a direct burden on interstate commerce or to interfere with its freedom encroached upon the exclusive power of Congress; and (b) whether the state statute was, therefore, unconstitutional.<sup>354</sup> The Court found that Louisiana lacked the authority to require those engaged in interstate transportation to carry African-American passengers in the same cabin as whites. The Court reasoned that Congress had exclusive jurisdiction to regulate interstate commerce, that inaction by Congress was equivalent to a declaration that commerce should remain free and untrammelled; and that such an implicit declaration left public servants at liberty to adopt "such reasonable rules and regulations" for the disposition of passengers.<sup>355</sup>

*Justice and Jurisprudence* points out that the *Hall* Court used congressional inaction as an excuse for prohibiting states from protecting the rights guaranteed by the amendment, and then, effectively nullified congressional authority to prevent discrimination in the *Civil Rights Cases*. As a result, neither the states nor Congress could enforce the right to travel interstate unhindered by discrimination based on race, color, or previous condition of servitude.<sup>356</sup> Taken together, *Hall* and the *Cases* conferred upon proprietors the "untrammelled" authority to invalidate the constitutional rights guaranteed by the Fourteenth Amendment.<sup>357</sup> The Court had left the rights of minorities to the discretion of members of the majority, who could and would cater to the whims of prejudice,<sup>358</sup> a result at odds with the requirements of a constitutional system.

353. Although a complete analysis of African-American responses to *Hall v. DeCuir* is beyond the scope of this Article, some discussion of *Justice and Jurisprudence's* treatment of the case is included in order to capture more fully the book's perspective on the *Civil Rights Cases*.

354. *Id.* at 197-98.

355. *Id.* at 198, 561.

356. *Id.* at 199-200.

357. *Id.* at 221, 228.

358. Published in 1889, years after *Hall* and the *Civil Rights Cases*, *Justice and Jurisprudence* was able to report on the actual consequences of the decisions. "Since the publication of [*Hall v. DeCuir*]," the text asserts, for example, "there have been found no dikes or barriers to stem the

## CONCLUSIONS

The record of African-American responses to the *Civil Rights Cases* would be impressive alone for the range and depth of discussion that it reveals. A substantial proportion of the African-American population in the 1880s knew of the Court's ruling. Thousands of African Americans participated in meetings and debated resolutions concerning the cases, and untold numbers acquired a detailed familiarity with the decision by reading accounts disseminated by the black press. A large number of the African-American leadership not only evidenced knowledge of the ruling and the dissent, in their particulars, but also articulated perspectives that addressed the more fundamental issues of law raised by the *Cases*.

Yet the record is all the more significant for its depiction of a tremendously diverse set of reactions, one that reflects both the uniqueness of the individual speakers and writers and variations in their backgrounds, including differences in geographic location, past experience, age, educational level, and even economic status. The diversity of opinion extends to all aspects of the views expressed: for example, participants in the discourse differed (1) in their levels of optimism about both the ability of law to change either public opinion or behavior and the potential for white Americans to relent in their racism; (2) about party politics and the value of allegiance to the Republican Party; and (3) about which course of action to pursue to secure civil rights and how confrontational such strategies should be. Perspectives on questions specifically related to legal theory—for example, the nature and meaning of law, the significance and intention of the postwar amendments, constitutional interpretation, and the Court's construction of the Thirteenth and Fourteenth Amendments—were similarly complex and varied.

Nevertheless, general themes and commonalities appear in this record of perspectives on the law. Most broadly, discussants almost universally shared a critical position on the outcome of the *Cases*.<sup>359</sup>

torrent of illiterate prejudice. . . . Supported by this authority, the public servants of high and low degree impudently usurp and overturn the civil rights of [African Americans], as if there were no Fourteenth Amendment." *Id.* at 360; *see also id.* at 386 (arguing that ever since *Hall*, public servants had subjected African Americans "to humiliating discriminations. . . , the very same conspicuously humiliating badges, the degrading customs and provisions, ignominious marks, conditions, and ceremonials, which [were notorious] under the antebellum black code. . . ."); *id.* at 428-29 (contending that since the *Civil Rights Cases*, "barbarizing race-antagonism" had increased and that, in response to *Hall* and the *Cases*, state courts also refused to admit African Americans to all the privileges enjoyed by white citizens).

359. As discussed above, the initial editorial position of the *Arkansas Mansion* stands as an exception.



More specifically, though, the materials suggest commonality on issues related to the role of law in the American polity, the fundamental canons of American law, the relationship between positive law and morality, the meaning of the postwar amendments, and the role of the courts in interpreting the Constitution. Perspectives converged on both descriptions of the way law operates, in fact, and beliefs about how law ought to function.

The common ground evidenced by the materials may have been created, in part, by the very conditions to which the writers and speakers objected, that is, the continuation of the many forms of discrimination, degradation, and humiliation suffered by African Americans at the hands of their white fellow citizens and the barriers faced by African Americans attempting to take advantage of the opportunities suggested by their status as citizens. As South Carolina Congressman Richard Harvey Cain stressed in a speech on the House floor during the debate over the Civil Rights Bill, for example, the past and present everyday experience of being African American in the United States affected the development of his perspective.<sup>360</sup> Whatever their origins, the following points of congruence are among those that emerge from the speeches, articles, editorials, and writings discussed in the main portion of this Article.

#### A. *Constitutional Democracy and Interpretation of Fundamental Law*

Echoing the words of James Madison, still resonating after a century, Frederick Douglass, T. Thomas Fortune, and many of their contemporaries argued that the protection of minorities from potential abuse by majorities was a fundamental purpose of constitutional democracy and an obligation of its administration. According to this vision of constitutional democracy, law ought to restrain majorities (whether groupings are based on race, color, previous condition, or religion) from perpetuating their advantage at the expense of minorities: indeed, majorities have an obligation to legislate for the good of all and courts a duty to adjudicate equitably.<sup>361</sup> In this vein, Frederick Douglass asserted that the true object of government “is to protect the

360. “The reason why I know and feel [the need for federal protection of civil rights more than a white legislator],” stated Cain, “is because my face is painted black and his is painted white. We who have the color . . . know and feel all this.” Cain, *supra* note 95, at 329.

361. See, e.g., Fortune, *supra* note 95, at 129 (“In our government the theory is that no man shall have advantage before the law to the detriment of his neighbor.”).

weak against the encroachments of the strong.”<sup>362</sup> Thus, the authority to protect the rights of citizens and, in particular, to safeguard those who were part of a despised minority, was an essential quality of government. Without such authority, government lacked legitimacy.

The writers and speakers also took seriously the promise of the Declaration of Independence and argued that governments are maintained for the protection of the “life, liberty and the pursuit of happiness” of their members.<sup>363</sup> The rights proclaimed by the Declaration, they argued, ought to be enforced by a system of laws. Again, without the power to protect these fundamental rights, government lacked legitimacy.<sup>364</sup>

Many asserted that law should comport with a higher morality and, consequently, that interpreters of the Constitution should construe the law in accordance with broad moral principles. As more than one speaker suggested, the Constitution should be interpreted “in favor of liberty.”<sup>365</sup> While morality may, today, often seem difficult to derive or justify, the speakers contended that the distinctions courts must make when deciding basic issues of civil rights were clear. “It does not require law books,” John W. Anderson, J.C. Delphey, and Joseph Evans wrote, “to satisfy the intelligent mind as to what is just and what is unjust.”<sup>366</sup>

Moreover, the consequences of a decision are one measure of its morality and are, thus, relevant to determinations of law. Writers and speakers gauged and tested whether a law, action, or decision was in favor of liberty, versus whether it was oppressive, by experience and how it would impact people’s lives. The columnist “Le Duke” argued, for example, that the Court’s action merited condemnation if, having considered the effect of removing legal restraints upon evil, members

362. VOICE OF BLACK AMERICA, *supra* note 95, at 561.

363. See, e.g., R. B. Elliot, A Speech on the Civil Rights Bill, *reprinted in* CARTER G. WOODSON, *NEGRO ORATORS AND THEIR ORATIONS* 323 (1925) (speech delivered by South Carolina’s Robert Brown Elliott to the United States House of Representatives); Fortune, *supra* note 1, at 315; John W. Anderson et al., *Pittsburgh: A Strong Civil Rights Argument from the Keystone State—The Atlanta Constitution Roughly Handled*, CLEV. GAZETTE, NOV. 24, 1883, at 2; T. Thomas Fortune, *Is There Any Law for the Negro*, N.Y. GLOBE, Feb. 17, 1883, at 2.

364. See, e.g., Fortune, *supra* note 1, at 315; T. Thomas Fortune, *Is There Any Law for the Negro*, N.Y. GLOBE, Feb. 17, 1883, at 2.

365. See, e.g., JUSTICE AND JURISPRUDENCE, *supra* note 5, at 360 (stating that love of liberty was not to be weighed as “mere dust in the balance” but to triumph over injustice); Douglass, *supra* note 33, at 300; *Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. GLOBE, Oct. 27, 1883, at 2.

366. John W. Anderson, et al., *Pittsburgh: A Strong Civil Rights Argument from the Keystone State—The Atlanta Constitution Roughly Handled*, CLEV. GAZETTE, NOV. 24, 1883, at 2.

of the Court had still been inclined to declare the Civil Rights Act unconstitutional.<sup>367</sup>

Discussants, thus, argued strongly for a method of interpretation that would ever attempt to bring the application of law into line with morality and with the promises of the Declaration. In so doing, they acknowledged and emphasized the disparity between the ideals and the reality of the American experiment in constitutional democracy and engaged in spirited criticism of the Constitution, as well as the record of judicial interpretation of the constitutional framework. The Counsel for the Brotherhood of Liberty wrote, for example, of the conflict that had pervaded judicial interpretation throughout American history between the forces for equality and the impetus for tyranny based on prejudice.<sup>368</sup> All too often, tyranny had prevailed. As Robert Brown Elliott similarly stated, the civil status of African Americans had been disputed "at the very formation" of the United States, "when by a short-sighted policy . . . one Negro counted as three-fifths of a man. . . ."<sup>369</sup> Although the text of the Constitution may have been broad enough to embrace the rights of African Americans, historically the Court had refused to adopt such constructions. John Edward Bruce summed up this point, stating that while "[t]he government of the United States on paper is one of the best governments that ever saw the light of day, . . . [p]ractically it is not."<sup>370</sup> And as the Brotherhood of Liberty's Counsel asserted, despite pronouncements of equality, a citizen's complexion determined his standing before the law.<sup>371</sup>

Although the writers and speakers expressed a wide range of opinion on the ability of law to restrain behavior or alter public opinion, many of those who were most doubtful nevertheless insisted on the symbolic value of law.<sup>372</sup> As Frederick Douglass stated with regard to the Civil Rights Act, though lack of enforcement had rendered the Act virtually dead, by appealing to the best instincts of all Americans and declaring that all were equal citizens, the law nonetheless had spoken.<sup>373</sup>

367. *Le Duke, Civil Rights*, PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 27, 1883, at 1.

368. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 440-41.

369. Elliott, *supra* note 363, at 326.

370. Bruce, *supra* note 253, at 25.

371. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 72-75; *see also* Fortune, *supra* note 95, at 274 (arguing that theory and practice in the United States "are often sorely out of joint with each other" when the judiciary is called upon to decide matters between black and white citizens).

372. *See, e.g., Onus, Mobile: The Civil Rights Decision. Business Looking Up. Other Notes of Interest*, HUNTSVILLE GAZETTE (Alabama), Nov. 3, 1883, at 3.

373. Douglass, *supra* note 33, at 305.

Discussants also expressed strong opinions about appropriate and inappropriate methods of judicial construction of fundamental law. The writers and speakers condemned interpretations that seemed arbitrary, reliant on public opinion, or overly formalistic.<sup>374</sup> They argued that the courts ought to construe the Constitution in accordance with the letter and intent of the law and, again, with guidance from the spirit of freedom. In this sense, they suggested that the Court ought to decide constitutional issues in favor of a particular vision of the nature of American democracy. In fact, the courts had a responsibility to align the law with its moral underpinnings, and, presaging the approach developed decades later by the National Association for the Advancement of Colored People, a number of the discussants argued that African Americans should devise a deliberate legal strategy to press the courts to so conform the law to principles of justice.<sup>375</sup>

Many of the writers and speakers referred to natural rights, which T. Thomas Fortune defined as those rights from which persons could not justly be alienated.<sup>376</sup> Although many relied upon natural rights or underlying principles of justice as the moral basis for law, to which law should conform, they clearly distinguished between the moral authority of natural rights and the enforceable power of positive law as construed by the Court.<sup>377</sup> Natural rights became enforceable only when explicitly imported into positive law, by enactment, judgment, or custom. The discussants drew upon both positive law and natural rights, as well as other extratextual sources such as religious beliefs, to support their critiques of the *Cases*, and they argued that constitu-

374. See, e.g., *id.* at 300 (arguing that the Court's judges "ought to live . . . an eagle's flight beyond the reach of fear or favor, praise, or blame, profit or loss"); JUSTICE AND JURISPRUDENCE, *supra* note 5, at 17-18 (stating, "The wise men of the bench should not necessarily agree with the opinion of the mass of people. . .").

375. See, e.g., *Our Western Letter: Civil Rights Mass Meeting of St. Louis Colored Citizens, at Which Hon. J. Milton Turner Orates*, CLEV. GAZETTE, Dec. 1, 1883, at 4 (suggesting the use of test cases to challenge discriminatory practices); Waring, *supra* note 286, at 503-04 (outlining the strategy envisioned by the Brotherhood of Liberty to bring test cases in the courts to challenge infringement of civil rights nationwide).

376. Fortune, *supra* note 95, at 123.

377. See Douglass, *supra* note 33, at 301-02 (stating both that decisions of the Court are law and that its rulings could be judged by a higher moral code). The Brotherhood of Liberty's Counsel also recognized and maintained the distinction between natural rights and positive law, for instance, in arguing that *Hall v. DeCuir* demonstrated that "an inflexible rule of natural right, incorporated into the organic law may be overturned." JUSTICE AND JURISPRUDENCE, *supra* note 5, at 307; see also *id.* at 358 (emphasizing that, with the adoption of the Fourteenth Amendment, the tenets of natural law were reduced to writing and, thus, made part of the organic law); Fortune, *supra* note 95, at 121-23 (arguing, for example, that "holding property in man" was a "crime," although acknowledging its legal status in the United States before the passage of the Thirteenth Amendment); Bruce, *supra* note 253, at 20.

tional interpretation should be based on and consistent with both positive law and natural rights.

### B. *The Significance of the Postwar Amendments*

The writers and speakers repeatedly emphasized the significance of the postwar amendments, which they viewed as essentially reconstituting the nation. The Counsel to the Brotherhood of Liberty stated, for example, that the amendments "introduced into the Constitution a new, fundamental civil system" with the "deepest constitutional significance."<sup>378</sup> The amendments, and especially the Fourteenth Amendment, represented a command for justice in American law<sup>379</sup> and were the textual embodiment of the Union's victory over the secessionists and pro-slavery forces in the nation's bloody civil war—i.e., the restructuring of both the federal system and of the relations between the central government and its citizens.<sup>380</sup> The amendments unequivocally transformed into positive law natural rights, which were based on the spirit of liberty and of the civic equality of all persons, and, in so doing, grafted onto the Constitution the promises of the Declaration of Independence.

The amendments so fundamentally altered the constitutional framework of the nation, the writers and speakers argued, that they should be construed broadly, in light of their origin and historical, political and religious meaning and context.<sup>381</sup> According to the Brotherhood of Liberty, for example, interpretation of the mandates of the Fourteenth Amendment required "a system of comprehensive principles, not a dispute about words or doctrines."<sup>382</sup>

T. Thomas Fortune and others also argued that the postwar amendments were intended in letter and spirit to enlarge the powers of the federal government in relation to the states.<sup>383</sup> The "States' rights" theory of John Calhoun had been a casualty of war that the amendments finally put to rest. Discussants generally viewed the transfer of power to the national government as a development in favor of liberty, as they feared abuse of power by the central govern-

378. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 484.

379. *See, e.g., id.* at 12.

380. *See, e.g., id.* at 32-33 (asserting that the Fourteenth Amendment "repaired" the Constitution "at the expense of thousands of millions," and that this repair was "cemented by . . . a profusion of the best blood of the nation").

381. *See, e.g., id.* at 471-73.

382. *Id.* at 35.

383. *See, e.g., Fortune, supra* note 95, at 122-23; JUSTICE AND JURISPRUDENCE, *supra* note 5, at 16-17.

ment less than tyranny of majorities over minorities within the states.<sup>384</sup>

Thus they argued that the amendments had affirmed and strengthened a direct reciprocal relationship between the nation and its citizenry, and, indeed, had clarified that the rights associated with this relationship were not to be mediated by the states.<sup>385</sup> Many asserted, with Fortune, that only the "most sanguinary warfare," the Union victory, and the subsequent passage of the constitutional amendments enabled African Americans to acquire the status of full-fledged citizens.<sup>386</sup>

Moreover, the writers and speakers viewed the postwar amendments as a compact between the national government and the freed race, its new citizenry.<sup>387</sup> They saw this compact as hard-earned and, although many shied away from explicitly stating so, overdue.<sup>388</sup> The Thirteenth and Fourteenth Amendments, in particular, were intended specifically to eradicate discrimination against African Americans and to endow the race with the privileges and immunities of American citizenship.<sup>389</sup>

The Thirteenth Amendment's prohibition of slavery and involuntary servitude meant more than the elimination of the formal trappings of slavery. "As we walked out of slavery," John Mercer Langston stated, "we walked into citizenship."<sup>390</sup> The Thirteenth Amendment was intended to secure the rights of the freedmen and to provide the federal government with the authority to protect these rights.<sup>391</sup> The discussants argued that the Thirteenth Amendment em-

384. See, e.g., T. Thomas Fortune, N.Y. *GLOBE*, Feb. 17, 1883, reprinted in *THE BLACK PRESS*, *supra* note 107, at 163 ("While the tyranny which has always flowed from centralized government is obviated, no check is placed upon the tyranny of the individual state. . .").

385. See, e.g., Open Letter from Bishop Henry McNeal Turner to Professor B. K. Sampson (Nov. 6, 1883), in *RESPECT BLACK*, *supra* note 33, at 62 (arguing that it was the national government, not the states, that had granted citizenship and was intended to protect the rights of citizenship).

386. Fortune, *supra* note 95, at 122, 124.

387. See, e.g., *JUSTICE AND JURISPRUDENCE*, *supra* note 5, at 35-36 (describing the Fourteenth Amendment as "a grave national compact of freedom with seven millions of adopted citizens").

388. See, e.g., R. B. Elliott, *supra* note 363, at 309-10, 327 (invoking the bravery and patriotism African Americans demonstrated during the War of Independence, the War of 1812, and the Civil War in support of appeals for the constitutional protection of civil rights).

389. See, e.g., *JUSTICE AND JURISPRUDENCE*, *supra* note 5, at 10, 16-17, 438.

390. *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. *GLOBE*, Oct. 27, 1883, at 2.

391. See, e.g., *The Civil Rights Law: Hon. John Mercer Langston Defines Citizenship and the Rights Attaching to It*, N.Y. *GLOBE*, Oct. 27, 1883, at 2; *RESPECT BLACK*, *supra* note 33, at 68 (Henry McNeal Turner) (stating, "The intention [of the powers amending the Constitution] was to entirely free, not to partly liberate.").

powered Congress to legislate for the eradication of not only the institution of slavery, but also its badges and incidents, including those rules and practices in civil society denoting racial inferiority.<sup>392</sup> As the Brotherhood of Liberty's Counsel wrote, the abolition of slavery could only be interpreted as intending "the substitution of the equality before the law of each individual in any of the states" and equality throughout the United States "in its broad, Christian, historical, and political signification."<sup>393</sup> The perpetuation of any insignia, device, custom, rule, or regulation symbolic of the previous condition of slavery and enforced as such was, therefore, a violation of the mandate of the Thirteenth Amendment.<sup>394</sup>

Similarly, the Fourteenth Amendment secured positive rights and privileges, including, for example, the right to travel, "subject only to such rules as were alike applicable to all travellers without regard to color. . . ."<sup>395</sup> As stated by the Counsel to the Brotherhood of Liberty, the privileges and immunities of American citizenship were to be measured by those rights enjoyed "by all other American citizens in their industrial business [and] pursuit of pleasure. . . ."<sup>396</sup> Discussants argued that, pursuant to the Fourteenth Amendment, these privileges and immunities, or "civil rights," could not legally be subjected to conditions, rules, and regulations that were solely applicable to citizens of a particular race or color.<sup>397</sup>

Moreover, the Fourteenth Amendment was intended to relieve African-American citizens from the effects of prejudice and to protect essential rights from infringement without regard to the instrument of invasion.<sup>398</sup> In the words of the Brotherhood of Liberty's Counsel, if private citizens of the states were permitted to violate the rights of citizenship, "the framers of the Fourteenth Amendment . . . have labored in vain. . . ."<sup>399</sup> "What does it matter to a colored citizen," argued Frederick Douglass, "that a State may not insult and outrage him if a citizen of a State may?"<sup>400</sup> In the view of the writers and speakers,

392. See, e.g., RESPECT BLACK, *supra* note 33, at 68-69 (Henry McNeal Turner).

393. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 470.

394. *Id.* at 440.

395. *Id.* at 222.

396. *Id.* at 139; see also *id.* at 169 (stating that the rights, immunities, and privileges of freedom conferred by the amendments included the ability, unhampered by racial discrimination, to "form alliances by means of trade and business," as well as "the unrestricted privileges of civil intercourse.").

397. *Id.* at 139, 170.

398. See, e.g., *id.* at 302-04.

399. *Id.* at 159.

400. Douglass, *supra* note 33, at 304-05.

the framers of the Fourteenth Amendment had intended to protect African Americans from injustice, not merely from the states, but from individuals within the states.<sup>401</sup>

The discussants asserted that the Thirteenth and Fourteenth Amendments were intended to expand congressional powers.<sup>402</sup> They agreed with Justice Harlan that the enabling clause granted Congress the power to enforce all provisions of the Fourteenth Amendment, not merely those clauses interpreted to prohibit only discriminatory state action.

### C. Criticism of the Cases

Criticism of the Court's opinion converged along a number of lines. First, discussants argued that the decision was contrary to the dictates of positive law and in violation of the mandates of morality. More specifically, the Court had departed from established forms of reasoning in its interpretation of the Thirteenth and Fourteenth Amendments and application of precedent, and, in so doing, had defeated the letter and spirit of the amendments.<sup>403</sup> The Justices failed to construe the amendments broadly, in the spirit in which they had been passed.

Many of the discussants argued that the decision had turned a blind eye to the expansion of federal powers intended by the postwar amendments by refusing to grant the national government the ability and authority to protect the rights of citizenship. "[I]n my opinion," stated Blanche K. Bruce, "[the decision is] the revival of Calhoun's theory of State rights."<sup>404</sup> Although the Court had not been candid about the retrograde underpinnings of its decision, the *Cases* in fact resurrected prewar doctrines of state sovereignty.<sup>405</sup>

Moreover, the *Cases* relegated to the states the responsibility for protecting rights guaranteed by the Constitution, knowing that, as a result, such rights would be vulnerable to invasion. The Court, thus,

401. See, e.g., *id.*

402. See, e.g., *Mr. Justice Harlan's Opinion of Civil Rights*, N. Y. GLOBE, Nov. 24, 1883, at 2.

403. See, e.g., Geo. B. Vashon, *Another View of the Decision: Further Legislation Declared Necessary*, N. Y. GLOBE, Nov. 3, 1883, at 1 (arguing that the Court had ignored "the spirit of the law," "nursed and cherished errors of expression and trampled on the will of the people").

404. *Civil Rights Decision: View of Leading Colored Men*, HUNTSVILLE GAZETTE (Alabama), Oct. 20, 1883, at 2.

405. See, e.g., Bruce, *supra* note 253, at 21; Hon. John P. Green, *Civil Rights: Deep Game Being Played by Arthur Politicians—What Next?*, CLEV. GAZETTE, Oct. 20, 1883, at 2. Similarly, the Brotherhood's Counsel argued that the Court had displayed its hostility in passages of the opinion in which the Court suggested use of the pre-war rights of "free" African Americans as a model for postemancipation freedom. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 142-43.



left the rights of minorities to the discretion of members of the majority, choosing to ignore the likely consequences of its judgment. By refusing Congress the authority to protect the rights of citizenship, the Court essentially denied African Americans the rights to which they were entitled, rights that they had earned with their blood, service, and bravery.<sup>406</sup>

Many writers and speakers argued that the Constitution was broad enough to shield African Americans in their civil and political rights,<sup>407</sup> and that, therefore, the Court's opinion was not compelled by the terms of the Constitution. Indeed, the Court's stated justifications masked the true basis for the outcome of the *Cases*, which was, at least in part, either crudely political or based on racial bias.<sup>408</sup> As the chief justice and student in *Justice and Jurisprudence* concluded, decisions of the courts that subordinated constitutional mandates to the prerogatives of public servants, such as were made in the *Cases* and *Hall v. DeCuir*, were the result of race prejudice.<sup>409</sup> "I look upon [the *Cases*] as one more shocking development of that moral weakness in high places. . . ," declared Frederick Douglass.<sup>410</sup>

The discussants argued, in particular, that the Court applied different rules of interpretation to achieve particular outcomes. The inconsistency between the Court's decisions in the *Cases* and *Dred Scott*, for example, revealed the Court's hidden agenda. "O for a Supreme Court of the United States which shall be as true to the claims of humanity as the Supreme court formerly was to the demands of slavery!" Frederick Douglass declared.<sup>411</sup> Where the Court had relied on the intention of the framers to support its protection for the "property rights" of slave owners, Douglass and others argued, it now "utterly ignored and rejected the force and application of object and intention as a rule of interpretation."<sup>412</sup> Why did the Court now find congressional authority more constricted, despite the ratification of amendments to the Constitution that were intended to have the opposite effect? "Is it because the aggrieved are black freemen and not white slave drivers?" T. Thomas Fortune asked rhetorically.<sup>413</sup> To Fortune

406. See, e.g., Fortune, *supra* note 1, at 315.

407. See, e.g., Bruce, *supra* note 253, at 25; Mr. Justice Harlan's *Opinion of Civil Rights*, N.Y. GLOBE, Nov. 24, 1883, at 2.

408. See, e.g., Douglass, *supra* note 33, at 305.

409. JUSTICE AND JURISPRUDENCE, *supra* note 5, at 111-12.

410. Douglass, *supra* note 33, at 298.

411. *Id.* at 303-04.

412. *Id.* at 303.

413. Mr. Justice Harlan's *Opinion of Civil Rights*, N.Y. GLOBE, Nov. 24, 1883, at 2.

and the many others whose views have been preserved in the historical record, the answer was clear.

