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ARTICLES

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THE HIDDEN HISTORY OF NORTHERN CIVIL RIGHTS LAW AND THE VILLAINOUS SUPREME COURT, 1875–1915

Paul Finkelman*

Most scholarship on late nineteenth century race relations focuses on the long descent from integration, civil rights, and black political participation during Reconstruction, to the "Betrayal of the Negro" in the last quarter of the century that led to segregation, disfranchisement, and the "nadir" of civil rights in America.[1] For constitutional scholars, this decline begins during Reconstruction, when the Supreme Court eviscerated the Privileges and Immunities Clause of the Fourteenth Amendment,[2] in *The Slaughterhouse Cases*,[3] and continues until *Berea College v. Kentucky*,[4] in 1908, when the Court upheld a Kentucky law that prevented a private college from voluntarily operating on an integrated basis. Traditionally, in this

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[1] RAYFORD LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON (1965). This was originally published as RAYFORD LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877–1901 (1954).

[2] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

[3] The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

[4] Berea College v. Kentucky, 211 U.S. 45 (1908).

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chronology the central Supreme Court moment came in 1896, in *Plessy v. Ferguson*,[5] where the Court enshrined the concept of "separate but equal" as a counterbalance to the equal protection clause of the Fourteenth Amendment.[6]

Most scholars of this period agree that the Supreme Court betrayed the spirit and letter of the Civil War Amendments, but many also accept the notion that in these cases the Court reflected the majority view in the nation, and that there were few alternatives to this jurisprudence. This argument was at the heart of Michael Klarman's prize winning book *From Jim Crow to Civil Rights*.[7] There he argues that the anti-civil rights decisions of the Supreme Court in the late nineteenth century were essentially inevitable, because "[j]udges are part of contemporary culture, and they rarely hold views that deviate far from dominant public opinion."[8] He claims that Supreme Court justices "generally reflect popular opinion" and that most judges lack the "inclination" to challenge existing social conditions.[9] Thus he concludes that justices "are unlikely to be either heroes or villains," and that "they may well lack the capacity, to defend minority rights from majoritarian invasion."[10]

If we accept this argument, then the Court becomes little more than a rubber stamp for the political majority. But in fact, the Justices can oddly remain frozen in time as they age and political majorities and "public opinion" change. However, as the vigorous fights over court nominations during the last century suggest, most Americans do not accept this theory of the role of the Court. Starting with the conservative (and somewhat anti-Semitic) opposition to the nomination of Louis D. Brandeis in 1916,[11] we have witnessed many contentious battles over Court nominations precisely because who is on the Court *does* matter. Moreover, the political debates over court appointments focus on issues where the Court has

[5] Plessy v. Ferguson, 163 U.S. 537 (1896).

[6] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[7] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004). For a somewhat similar analysis, see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

[8] KLARMAN, *supra* note 7, at 6.

[9] *Id.*

[10] *Id.*

[11] A.L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009); JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET (2016).

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substantially changed society, such as those involving racial equality,[12] the right of a woman to control her own life,[13] or the right of accused criminals to due process and fair trials.[14] In these, and similar cases, the Court has often taken a position that was not popular, but in many cases later became popular.[15]

For more than two centuries the Court has often been unpopular. Some of its most controversial and unpopular decisions—*Chisholm v. Georgia*,[16] *Dred Scott v. Sandford*,[17] and the Income Tax Cases[18]—were overturned by constitutional amendments.[19] An amendment to prohibit child labor is still viable, almost a century after Congress passed it, but the need was obviated by statutes and a change in Supreme Court jurisprudence.[20] Redrawn statutes, changes in court personnel, and re-arguments before the Court have led to many reversals of unpopular decisions. On the flip side of this, often the Court has led the way to important political, economic, and social changes, even when its decisions were initially controversial and subject to political attacks.[21]

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[12] *See* Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954).

[13] *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[14] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[15] For example, today, few Americans object to racial integration, interracial marriage, access to birth control, giving defendants an attorney, or even reading people their "rights" when arrested. All of these changes, which resulted from Court decisions, were far more controversial when the decisions came down. Despite persistent and virulent opposition, polls indicate that most Americans support the outcome in *Roe v. Wade*.

[16] Chisholm v. Georgia, 2 U.S. 419, 427 (1793).

[17] Dred Scott v. Sandford, 60 U.S. 393, 396 (1857).

[18] Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 583 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

[19] U.S. CONST. amend. XI (altering the jurisdiction of the federal courts); U.S. CONST. amend. XIII, XIV (ending slavery and making blacks citizens of the nation and the state where they lived); U.S. CONST. amend. XVI (allowing a graduated income tax).

[20] *The Failed Amendments*, U.S. CONST. ONLINE, http://www.usconstitution.net/constamfail.html (last visited Nov. 16, 2017).

[21] KLARMAN, *supra* note 7, at *6.

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Michael Klarman and William E. Nelson,[22] for example, conclude that from the late nineteenth century to first quarter of the twentieth century in cases involving racial equality the Court was merely following popular will, as Courts must do. This Article argues that the evidence for this claim is mixed and often weak. I argue that the Civil Rights Act of 1875[23] was the product of a decade and a half of political hegemony by the Republican Party when it was at its most radical and most supportive of civil rights and racial equality. To the extent that Congress and the presidency reflected popular will, there was in fact strong support for civil rights in the nation. The equality provisions of the law were consistent with the national political majority that had supported civil rights for the previous decade and a half. In 1883, the Court struck down that law with a cramped, historically inaccurate, and cynical opinion in *The Civil Rights Cases*.[24] The Civil Rights Act was only eight years old when the Court struck it down.[25] As this Article demonstrates, both before that decision and in its aftermath most northern states adopted their own civil rights laws to protect racial equality, and in a wide variety of cases northern courts upheld and enforced this legislation. Civil Rights had enormous support in the North as well as among black southerners; thus the Court that struck down the 1875 law did not reflect the popular will—nor, I would argue, did it properly interpret the Fourteenth Amendment.[26]

Another example of the problematic nature of the theory that Court decisions reflect the popular will is seen when we look at Court's economic jurisprudence from the end of the nineteenth century through the first few years of the New Deal in the 1930s. The anti-equality decisions of the late nineteenth and early twentieth centuries came at the same time that the Court famously ignored public opinion with enormously unpopular economic decisions. The Court had no qualms about striking down all sorts of state and federal legislation in this period, even when it was enormously popular. The Court's decisions in *United States v. E.C. Knight*, which undermined the effectiveness of both the Sherman Act and Congress's Commerce

[22] NELSON, *supra* note 7. For a discussion of this book in this context, see Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019 (2014).

[23] An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875).

[24] *See* Civil Rights Cases, 109 U.S. 3, 26 (1883).

[25] 18 Stat. 335.

[26] U.S. CONST. amend. XIV.

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Clause power to regulate economic activity,[27] *Lochner v. New York*,[28] striking down a state maximum hours law, and *Hammer v. Dagenhart*,[29] striking down a federal ban on child labor, were overwhelmingly unpopular. But, that did not deter the Court. The period from the late nineteenth century to the mid-1930s is often called the "*Lochner*-era" because of the many unpopular decisions striking down progressive legislation on minimum wages, child labor, working conditions, business regulations, and anti-monopoly laws while upholding draconian legislation designed to stamp out labor unions. The Court was overwhelmingly unpopular for the half century ending in the late 1930s.

These cases show that Supreme Court decisions are not necessarily—I would argue almost never—based on public approval. This history suggests that it is both simplistic and incorrect to claim that the race cases of the late nineteenth century were inevitable because the Court was bound to follow the wishes of the majority. Indeed, had the Court followed the popular majority in this period it would have upheld the Civil Rights Act of 1875[30] and rejected the separate but equal doctrine. The Court in this period had choices and options. The majority of the Justices chose to follow a path that relegated blacks to discrimination, segregation, and inequality, while condoning state policies which denied them basic political rights.[31] Thus, we can rightly condemn the racism flowing from the Court starting in the 1870s.

Ironically, the Court might easily have used some of its own contract and due process jurisprudence to support civil rights. One example of this is the contrast between *Lochner*[32] and *Berea College*.[33] In *Lochner*, the Court held that New York's maximum hours law for bakers violated the liberty of contract that grew out of the due process clause of the Fourteenth Amendment.[34] Bakers had a "liberty" right to sign contracts to work as many hours as they wished.[35] Five years later, in *Berea College*, the Court upheld a Kentucky law which prevented Berea College from

[27] United States v. E.C. Knight, 156 U.S. 1 (1895).

[28] Lochner v. New York, 198 U.S. 45 (1905).

[29] Hammer v. Dagenhart, 247 U.S. 251 (1918).

[30] An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875).

[31] Plessy v. Ferguson, 163 U.S. 537 (1896).

[32] *Lochner*, 198 U.S. at 45.

[33] Berea College v. Kentucky, 211 U.S. 45 (1908).

[34] *Lochner*, 198 U.S. at 45.

[35] *Id.*

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enrolling both black and white students.[36] But, surely the Court could have easily applied the logic of *Lochner* to conclude that just as bakers had the liberty to work as many hours as they wanted, so too, did students have the liberty to attend a private college with anyone they chose. In these two cases, only five years apart, the Court privileged the liberty of contract for employers who wanted bakers to work more than sixty hours a week, but denied Berea College its liberty of contract to offer an integrated education to anyone who might want it. Similarly, the Court allowed bakers the liberty to contract to work as many hours as they wanted but denied Berea's students the liberty to contract for an education in an integrated setting.

From the 1870s to 1908, the Court's segregationist decisions were at odds with its economic decisions. However, in terms of popularity, this jurisprudence has a certain consistency in that both sets of decisions were anti-majoritarian. As this Article demonstrates, there was support in much of the nation for civil rights in this period. Decisions upholding the federal Civil Rights Act of 1875[37] and striking down segregation laws would have been more popular than the Court's economic jurisprudence.

This Article demonstrates that even though most white Americans may have held racist views and were opposed to social equality for blacks, from the Civil War until the eve of the Wilson administration there was support—sometimes strong support—in much of the United States for protective Civil Rights legislation. In its race decisions, the Court did not in fact reflect the view of the majority of Americans. There would have been considerable popular support for the Court, if it had reached a different conclusion in the *Civil Rights Cases*,[38] *Plessy v. Ferguson*,[39] and similar cases. The support would not have been unanimous (rarely is there unanimity for anything in the United States). The support would not, of course, have been found among most white southerners and some segments of the northern population would not have been thrilled with these outcomes. But such a jurisprudence would have been very popular among blacks, who constituted a majority of some southern states and a large percentage of other states.[40] Furthermore, I argue below that throughout

[36] *Berea College*, 211 U.S. at 45.

[37] An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875).

[38] Civil Rights Cases, 109 U.S. 3 (1883).

[39] Plessy v. Ferguson, 163 U.S. 537 (1896).

[40] In 1890, more than a third of the southern population was black. South Carolina, Mississippi, and Louisiana were more than 50% black, while Georgia, Florida, and Alabama were more than 40% black, and Virginia and North Carolina were more than one third black. Campbell Gibson & Kay Jung, *Historical*

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the North, Midwest, and far West, there was significant support for civil rights. Statutes passed by popularly elected legislatures throughout the nation (outside of the South) and court decisions in those states demonstrate significant support, or at least tolerance, for civil rights. Furthermore, the Republican Party—the Party of Lincoln and Emancipation—remained committed to some measure of racial equality until the first decade of the twentieth century. Throughout this period, Republicans almost always controlled the White House and often Congress. Into the early twentieth century, while holding the White House and sometimes both houses of Congress, Republicans prominently campaigned for an end to discrimination in voting. Had there been fair elections and equal access to the ballot in the South, Republicans would have had even greater political power.[41]

What follows is a discussion of civil rights law from the Civil War to the early twentieth century. Most of the evidence comes from northern state legislation and court decisions and the official position of the dominant Republican Party. However, I begin with a few examples of federal civil rights legislation during the Civil War, because these laws helped set the tone for what happened later. The main thrust of my argument is this: from the end of the Civil War to the early twentieth century almost every northern and western state—that is almost every state outside the South[42]—passed and enforced civil rights legislation. Many of these laws were adopted in the response to the Supreme Court's decision in *The Civil Rights Cases*,[43] striking down the federal ban in discrimination in public accommodations found in the Civil Rights Act of 1875.[44] In fact between 1884 and 1887 thirteen northern and western states (out of twenty-two) passed at least one new civil rights act.[45]

Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States, 107 tbl.A-15 (Sept. 2002), http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf.

[41] The black majorities in a number of states, and their large numbers in other states, would have sent a substantial number of Republicans—the Party of Lincoln—to Congress.

[42] I define the South as the eleven slave states that seceded in 1860–61; the four "loyal" slave states (Maryland, Delaware, Kentucky, and Missouri), plus the two states that had mandatory state-wide segregation up through the 1950s, West Virginia and Oklahoma. *See* Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 84–86 (1985).

[43] *Civil Rights Cases*, 109 U.S. at 26.

[44] An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875).

[45] Frederick M. Gittes, *Paper Promises: Race and Ohio Law after 1860*, *in* 2 THE HISTORY OF OHIO LAW 782, 800 (Michael Les Benedict & John F. Winkler eds., 2004); DONALD NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 103 (1991).

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I. THE CIVIL RIGHTS CASES

In popular literature and among many scholars, the most important race case of the late nineteenth century was *Plessy v. Ferguson*,[46] which constitutionalized the "separate but equal doctrine." But, for African-Americans the central case of the period was *The Civil Rights Cases*,[47] where, in 1883, the Court ruled that the Fourteenth Amendment did not empower Congress to protect blacks from discrimination in public accommodations, such as restaurants, trains, hotels, and theaters.[48] Had the *Civil Rights Cases* gone the other way—had the Court upheld the power of Congress to prevent segregation in inns, restaurants, transportation, and other public accommodations—*Plessy*[49] and the "separate but equal" doctrine would never have arisen for most aspects of American society. The Louisiana statute at issue in *Plessy* might never have been passed because it would have obviously violated the Civil Rights Act of 1875.[50] The South might still have been able to segregate public schools under the 1875 act, and individual business that were not considered public accommodations might have been segregated by local custom or individual practice. But much of what became segregated would have remained integrated. In addition, by striking down most the Civil Rights Act of 1875, the Court signaled that it was uninterested in the fate of blacks. A different decision in upholding the 1875 Act would have set a much different tone for the whole nation. Southern states might have been less brazen in their formal attack on black civil rights and black voting rights if the Court had signaled its intent to protect equality in its interpretation of the Fourteenth Amendment.[51] Similarly, strong support for the Fourteenth Amendment might have discouraged the massive southern attack on black voting rights and the evisceration of the Fifteenth Amendment.[52]

[46] *Plessy*, 163 U.S. at 537.

[47] *Civil Rights Cases*, 109 U.S. at 26.

[48] *Id.*

[49] *Plessy*, 163 U.S. at 537.

[50] An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875).

[51] U.S. CONST. amend. XIV.

[52] WANG XI, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910 (1997).

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African-American leaders understood the stakes when the Court struck down the Civil Rights Act of 1875. In a powerful speech at Lincoln Hall in Washington, D.C., Frederick Douglass attacked the decision.[53]

> In further illustration of the reactionary tendencies of public opinion against the black man and of the increasing decline, since the war for the Union, in the power of resistance to the onward march of the rebel states to their former control and ascendency in the councils of the nation, the decision of the United States Supreme Court, declaring the Civil Rights law of 1875, unconstitutional, is striking and convincing. . . .
>
> The future historian will turn to the year 1883 to find the most flagrant example of this national deterioration. Here he will find the Supreme Court of the nation reversing the action of the Government, defeating the manifest purpose of the constitution, nullifying the Fourteenth Amendment, and placing itself on the side of prejudice, proscription and persecution.[54]

Just a few days after the opinion was announced T. Thomas Fortune, a leading African-American intellectual and the editor of the *New York Globe*, concluded: "The colored people of the United States feel to-day as if they had been baptized in ice water."[55] Other black leaders and editors spoke out against the decision.[56] One response to the decision was the founding in Baltimore in 1885 of the Brotherhood

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[53] Frederick Douglass Speech before the Civil Right Mass Meeting, Washington, D.C., LIBR. CONGRESS 4 (Oct. 22, 1883), https://www.loc.gov/resource/mfd.24004/?sp=1. For a word searchable modern typescript, see Frederick Douglass, *Speech at the Civil Rights Mass-Meeting Held at Lincoln Hall*, TEACHING AM. HIST. (Oct. 22, 1883), http://teachingamericanhistory.org/library/document/the-civil-rights-case/.

[54] Frederick Douglass, *The Life and Times of Frederick Douglass*, *in* 3 THE FREDERICK DOUGLASS PAPERS: SERIES TWO: AUTOBIOGRAPHICAL WRITINGS: LIFE AND TIMES OF FREDERICK DOUGLASS 1, 395 (John R. McKivigan ed., 2012). This part of the *Life and Times* is an almost word-for-word restatement of the 1883 speech. It is also worth noting that in 1883, the Court also upheld Alabama's anti-miscegenation law, asserted that the state action here did not violate the Fourteenth Amendment because the law did not discriminate against anyone, because blacks could not marry whites, and whites could not marry blacks. Pace v. Alabama, 106 U.S. 583, 585 (1883).

[55] T. Thomas Fortune, *The Civil Rights Decision*, N.Y. GLOBE, Oct. 20, 1883, at 2 (quoted in Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123, 1123 (1995)).

[56] *See generally* Lado, *supra* note 55.

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of Liberty.[57] This was the nation's first post-bellum civil rights organization. Its goal was to use "all legal means without our power to procure and maintain our rights as citizens of this our common country."[58] Later in the decade it spent significant resources to publish the first treatise on civil rights law in the United States, *Justice and Jurisprudence*.[59]

The Civil Rights Act of 1875[60] was a fairly straightforward public accommodations act, prohibiting discrimination in restaurants, inns, theaters, and on public transportation. Regulations of such businesses had long been considered fully within the power of governments and were in fact deeply rooted in Anglo-American law. Until the decision in *The Civil Rights Cases*,[61] no one had ever doubted that these enterprises were subject to government regulation and were not merely private businesses. Historically, and certainly in the last quarter of the nineteenth century, such businesses were deeply connected to public activity and regulation. Governments traditionally regulated, inspected, licensed, or even gave franchises and monopolies to inns, hotels, taverns, restaurants, places of public entertainment, and modes of public transportation. The regulation of these businesses had always been connected to "state action." Thus, a federal law regulating access to such public places and accommodations seemed to be fully within the spirit, goals, and enforcement powers given to Congress in the Fourteenth Amendment. However, in *The Civil Rights Cases*, the Court majority cynically characterized railroads, inns and other places of public accommodations as purely private enterprises, disconnected from any state action and therefore immune from the Fourteenth Amendment.[62]

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[57] Its full name was the Mutual United Brotherhood of Liberty of the United States of America (MUBL). *"A Long, Full, Big Life": Johnson's Political Activism*, MD. ST. ARCHIVES (Dec. 2, 1998), http://msa.maryland.gov/msa/stagser/s1259/121/6050/html/12414300.html.

[58] HARVEY JOHNSON, THE NATIONS FROM A NEW POINT OF VIEW 21 (1903), https://babel.hathitrust.org/cgi/pt?id=mdp.39015069762055;view=1up;seq=31.

[59] BROTHERHOOD OF LIBERTY, JUSTICE AND JURISPRUDENCE: AN INQUIRY CONCERNING THE CONSTITUTIONAL LIMITATIONS OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS (Philadelphia, J.B. Lippincott 1889). On this history, see Lado, *supra* note 55, at 1172–84, and J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 142–46 (1993).

[60] An act to protect all citizens in their civil and legal rights, ch. 114, 18 Stat. 335 (1875).

[61] Civil Rights Cases, 109 U.S. 3, 26 (1883).

[62] *Id.* at 25.

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In dissent, Justice John Marshall Harlan, the only southerner on the Court,[63] provided overwhelming evidence that historically in England and the United States these businesses were subject to enormous government regulation, and in many cases could not operate without a state license or charter.[64] Thus, there was state action in every one of these businesses.[65] Harlan discussed railroads at length and concluded that the "sum of the adjudged cases is that a railroad corporation is a governmental agency, created primarily for public purposes, and subject to be controlled for the public benefit."[66] Upon this ground the State, when unfettered by contract, may regulate, in its discretion, the rates of fares of passengers and freight."[67] Thus, it was obvious that:

> Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethern concede to be so far fundamental as to be deemed the essence of civil freedom.[68]

Harlan demonstrated the same principles applied to Inns:

> The same general observations which have been made as to railroads are applicable to inns. The word 'inn' has a technical legal signification. It means, in the act of 1875, just what it meant at common law. A mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. "To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all

[63] Harlan was a slaveowner in Kentucky and rising politician before the Civil War and an officer in the U.S. Army during the War. LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN (1999).

[64] *See Civil Rights Cases*, 109 U.S. at 37–42 (Harlan, J., dissenting).

[65] *Id.* at 39.

[66] *Id.*

[67] *Id.*

[68] *Id.*

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> travellers or wayfarers who might choose to accept the same, being of good character or conduct." Redfield on Carriers, etc., § 575.[69]

Quoting a famous English case, Harlan reminded the Court, and the nation: "'An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender.'"[70] The reason for this was clear:

> The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want.[71]

The conclusion for inns was the same as for railroads:

> These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person.[72]

Similarly, "places of public amusement, within the meaning of the act of 1875, are such as are established and maintained under direct license of the law."[73] Thus, Harlan believed there was state action in all of these businesses and therefore Congress had the constitutional authority to regulate them.[74]

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[69] *Id.* at 40.

[70] *Id.* at 40–41.

[71] *Id.* at 41 (quoting Rex v. Ivens (1835) 173 Eng. Rep. 94; 7 Car. & P. 213).

[72] *Id.* at 41.

[73] *Id.*

[74] *Id.* at 43, 47, 61–62.

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The majority opinion in *The Civil Rights Cases* is infamous for its conclusion that:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[75]

Harlan offered a powerful answer to this absurd claim:

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875 now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens.[76]

Significantly, many northern states rejected the deeply cynical and intellectually dishonest claim of the majority of the Court in this case. Both before and after this decision the federal government and a number of northern states stepped forward to protect black civil rights thought legislation and court decisions.

II. CIVIL RIGHTS BEFORE 1883

Well before 1875 Congress began to protect black civil rights including equality in public accommodations as did a number of northern states. This history is mostly forgotten or virtually unknown. But it sheds light on the intentions of those who wrote the Fourteenth Amendment and the Civil Rights Act of 1875. It also illustrates the popular and political support for equality throughout the Civil War era.

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[75] *Id.* at 25.

[76] *Id.* at 61 (Harlan, J., dissenting).

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Congress began this process in the late spring and early summer of 1862, by ending slavery in the District of Columbia[77] and the federal territories.[78] This was first time in the nation's history that Congress had abolished slavery in any federal jurisdiction.[79] While not usually associated with civil rights, freeing slaves was the most fundamental beginning of civil rights in the United States. Shortly after the passage of the D.C. Emancipation Act, Congress provided for black public education in that city. While this bill created segregated schools that would not be funded on the same basis as schools for whites, it was nevertheless the first time in the history of the nation that Congress had appropriated money to educate blacks.[80] Although these schools were segregated, as the historian Howard Rabinowitz noted many years ago, the creation of segregated institutions like schools was a major step forward in a world where previously there had been no institutions for blacks.[81]

Beyond creating public schools, this law had a stunning provision on racial equality that was unprecedented in American law:

> And be it further enacted, That all Persons of Color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances [as] free white persons are or may be subject or amenable; that they shall be tried for any offences against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted of any crime or offence against

[77] An Act for the Release of Certain Persons Held to Service of Labor in the District of Columbia, ch. 54, 12 Stat. 376 (1862) (abolishing slavery in the District of Columbia).

[78] An Act to Secure Freedom to All Persons Within the Territories of the United States, ch. 111, 12 Stat. 432 (1862) (abolishing slavery in the Federal Territories of the United States).

[79] In the Northwest Ordinance, the Congress under the Articles of Confederation declared that there could be "neither slavery nor involuntary servitude" in the Northwest Territory. An Ordinance for the Government of the Territory of the United States north-west of the river Ohio, Act of July 13, 1787, 1 Stat. 51, 51–53. This statute was reenacted in 1789, containing the full text of the original. An Act to provide for the Government of the Territory Northwest of the river Ohio. Act of Aug. 7, 1789, ch. VII, 1 Stat. 50. However, at the time of its passage, Congress did not believe there were actually slaves in the Northwest, and thus the act was proscriptively banning slavery rather than actually ending slavery. For the history of the continuation of slavery in parts of the Northwest until the 1840s, see PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 46–101 (3d ed. 2014).

[80] An Act Providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and Other Purposes, ch. 83, 12 Stat. 407 (1862).

[81] HOWARD N. RABINOWTIZ, RACE RELATIONS IN THE URBAN SOUTH, 1865–1900 (1978). *See also* Howard N. Rabinowitz, *Segregation and Reconstruction*, *in* THE FACTS OF RECONSTRUCTION: ESSAYS IN HONOR OF JOHN HOPE FRANKLIN 79–97 (Eric Anderson & Alfred A. Moss, Jr. eds., 1991).

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> any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.[82]

This provision can be understood as the precursor of the Equal Protection Clause of the Fourteenth Amendment and the beginning of the northern movement towards racial equality. This was the first provision of its kind in the history of the nation: an explicit promise of equal protection of the laws for blacks charged with crimes.

In July, in the Militia Act of 1862, Congress and President Lincoln teamed-up to authorize the enlistment of black troops, which reversed seven decades of federal policy, prohibiting blacks from serving in the Militia and the national army.[83] The implications of this law were far reaching and fully understood by those who supported it. Militia service was considered a fundamental duty of able-bodied male citizens in a Republic. By authorizing black military service, Congress set the stage for black citizenship.[84]

Two years later, Congress authorized the creation of a new street railroad in Washington, D.C. At first glance, this was an unremarkable law. But buried in the details of incorporation, routes, stock regulations, and the like was the first equal accommodations law ever passed by Congress, and a forerunner of the Fourteenth Amendment, the Civil Rights Act of 1875, and the Civil Rights Act of 1964:[85]

> That the directors shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition

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[82] 12 Stat. 407 § 4 (1862).

[83] Act to Amend the Act Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, Approved February Twenty-Eight, Seventeen Hundred and Ninety-Five, and Acts Amendatory Thereof, and for Other Purposes, ch. 201, 12 Stat. 597 § 12. For a longer discussion of this and other statutes, see Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L.J. 63 (2015).

[84] The enlistment of black troops also almost certainly guaranteed that the War would become a war for freedom as well as for preserving the Union—as it did a few months later—because the Confederate states considered using black troops to be violation of the existing laws of war and would never accept any compromise that included black freedom or citizenship. *See* Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U CHI. L. REV. 2071, 2116 (2013).

[85] Civil Rights Act of 1964, Pub. L. No. 88-352; 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000a *et seq.* (2012)).

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> and management of the stock, property, estate, and effects of the company, not contrary to the charter, or to the laws of the United States and the ordinances of the city of Washington: *Provided*; That there shall be no regulation excluding any person from any car on account of color.[86]

In March 1865 Congress explicitly applied this rule to all other street railroads in Washington, D.C.[87] The public accommodations aspect of these laws is instructive for understanding the Civil Rights Act of 1875 and the Court's opinion in *The Civil Rights Cases*. As early as 1864 and 1865 Congress articulated the notion that allowing franchises for business involved in public accommodations—such as street cars—was clearly a form of "state action," and thus after the ratification of the Fourteenth Amendment Congress clearly had the power to prevent discrimination by such state actors.

That these tentative steps toward racial equality took place before the final end of slavery illustrates a trend in Congress and the North towards a new consensus on race relations. With the end of the War we know that Congress passed numerous laws to protect black civil rights. Less well known are the trends in the northern states. A series of cases and laws in Iowa and Michigan illustrate this trend. While I focus on those two states, it is important to understand that many other states in this period supported civil rights. For example, two years before the Supreme Court struck down the Civil Rights Act of 1875, the Supreme Court of Kansas held, in *Board of Education of Ottawa v. Tinnon*, that state law prohibited segregated education.[88]

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[86] An Act to incorporate the Metropolitan Railroad Company in the District of Columbia, ch. 190, 13 Stat. 326, § 14 (1864).

[87] An Act to amend an act entitled "An act to incorporate the Metropolitan Railroad Company in the District of Columbia" ch. 119, § 5, 13 Stat. 536, 537 (1865). Section 5 provided: "*And be it further enacted*, that the provision prohibiting any exclusion from any car on account of color, already applicable to the Metropolitan Railroad, is hereby extended to every other railroad in the District of Columbia."

[88] Bd. of Educ. v. Tinnon, 26 Kan. 1, 20 (1881). *See* Andrew Kull, *A Nineteenth-Century Precursor of* Brown v. Board of Education*: The Trial Court Opinion in the Kansas School Segregation Case of 1881*, 68 CHI.-KENT L. REV. 1199 (1993). At the same time, a lower court in Pennsylvania concluded that the Fourteenth Amendment prohibited segregated schools. Commonwealth *ex rel.* Allen v. Davis, 10 Weekly Notes of Cases 156 (C.P. Crawford County, Pa. 1881).

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A. Iowa

In 1868, the Iowa Supreme Court held that the City of Muscatine could not prohibit a black child from attending the "all-white" high school.[89] At the time, Muscatine had an elementary school for black children, but did not provide them with a high school education. The case was brought by Alexander G. Clark, the most prominent member of Iowa's black community, who would, much later in life, become the U.S. ambassador to Liberia.[90]

The school board objected to integrating the high school because it claimed "public sentiment is opposed to the intermingling of white and colored children in the same schools."[91] The Iowa Supreme Court asserted that such sentiments were irrelevant because neither the Constitution nor the legislature authorized segregated schools.[92] Rather it noted that the state constitution required that "[t]he board of education shall provide for the education of *all the youths of the State*, through a system of common schools."[93] The court acknowledged that school boards could classify students by ability or geography, but that "this discretion is limited by the line which fixes the *equality of right* in all the youths between the ages of five and twenty-one years."[94] Because of this "no discretion which disturbs that equality can be exercised; for the exercise of such a discretion would be a violation of the law, which expressly gives the same rights to *all* the youths."[95] In a remarkable attack on racism and ethnic discrimination, the court noted a school board could not

> require the children of Irish parents to attend one school, and the children of German parents another; the children of catholic parents to attend one school, and the children of protestant parents another. And if it should so happen, that there be one or more poorly clad or ragged children in the district, and public sentiment was opposed to the intermingling of such with the well dressed youths of the district, in the same school, it would not be competent for the board of directors,

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[89] Clark v. Bd. of Dirs., 24 Iowa 266, 277 (1868).

[90] *Alexander G. Clark: Celebrating Black History Month*, THE GAZETTE (Feb. 24, 2017), http://www.thegazette.com/subject/news/alexander-g-clark-celebrating-black-history-month-20170224.

[91] *Clark*, 24 Iowa at 269.

[92] *Id.* at 270.

[93] *Id.* at 271.

[94] *Id.* at 275.

[95] *Id.*

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> in their discretion, to pander to such false public sentiment, and require the poorly clothed children to attend a separate school.[96]

Having mocked ethnic, religious, and class discrimination, the court set out why any discrimination, including race discrimination, could not be allowed:

> Now, it is very clear, that, if the board of directors are clothed with a discretion to exclude African children from our common schools, and require them to attend (if at all) a school composed wholly of children of that nationality, they would have the same power and right to exclude German children from our common schools, require them to attend (if at all) a school composed wholly of children of that nationality, and so of Irish, French, English and other nationalities, which together constitute the *American*, and which it is the tendency of our institutions and policy of the government to organize into one harmonious *people*, with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation and happiness of *mankind*.[97]

Segregation was not just impermissible in Iowa; it was un-American. "The board cannot, in their discretion, or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing or the like."[98]

Significantly, the court decided the case in June 1868 before the ratification of the Fourteenth Amendment. The court based its decision on the Iowa Constitution and Iowa statutes. This was the first successful school desegregation case in U.S. history. But, despite the egalitarian rhetoric in the opinion, this case did not fully settle the right of blacks to attend school with whites everywhere in Iowa.

Smith v. The Independent School District of Keokuk,[99] decided in 1875, helped resolve any remaining ambiguities. Here the school district refused to admit Smith, a sixteen-year-old boy to the high school.[100] The District "den[ied] that such refusal was because of plaintiff's descent or color and aver[ed] that the high school room or

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[96] *Id.*

[97] *Id.* at 275–76.

[98] *Id.* at 277.

[99] Smith v. Indep. Sch. Dist., 40 Iowa 518 (1875).

[100] *Id.* at 518.

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building proper was full."[101] However, simultaneously, and in the same sentence, the school district asserted that the board

> had provided for the instruction of the plaintiff and other colored children in all the high school studies and by a competent teacher, in another room or building within the district; that the citizens of the city and district are opposed to mixed schools, and to admit colored pupils with the white would destroy the harmony and impair the usefulness of the high school.[102]

The Iowa Supreme Court saw through this nonsense, and asserted that the *Clark* case stood for the proposition that "a pupil may not be excluded [by] the schools because of his color, or required to attend a separate school for colored children."[103] Thus, Smith had to be admitted to regular high school.[104]

Despite *Smith* and the earlier precedent in *Clark*, Keokuk continued to fight integration. In *Dove v. The Independent School District of Keokuk*, the Iowa Supreme Court reaffirmed the right of Charles Dove to attend third grade at the school three blocks from his home, rather than at a school for black children ten blocks from his home.[105] This seems to have finally ended litigation on schools in this period. Some discrimination in education may have still existed in the state, but in terms of formal law, Iowa supported integrated schools.

Iowa also supported equality in public accommodations. In 1873, two years *before* Congress passed the Civil Rights Act of 1875 requiring equal accommodations in transportation, the Iowa Supreme Court upheld a verdict in *Coger v. North Western Union Packet Co.*, rejecting the right of a steamboat company to discriminate against black passengers.[106] The steamboat captain denied a meal and first class accommodations to Coger, a woman of mixed racial ancestry—

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[101] *Id.* at 519.

[102] *Id.*

[103] *Id.* at 519–20.

[104] *Id.*

[105] Dove v. Ind. Sch. Dist., 41 Iowa 689, 690, 693 (1875). The facts of this case parallel *Brown v. Board of Education*, 347 U.S. 483 (1954), where Linda Brown had to travel past a number of all-white schools before she reached the elementary school set aside for blacks. *See generally* RICHARD KLUGER, SIMPLE JUSTICE (1975).

[106] Coger v. Nw. Union Packet Co., 37 Iowa 145 (1873).

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described as a qaudroon—who was travelling from Iowa to Illinois.[107] Her attorneys in part argued "that their client cannot be regarded as a colored person; that, as white blood predominates in her veins, she is, in law, to be regarded as belonging to the white race, and is not, therefore, subject to rules or restrictions that may be imposed upon negroes."[108] However, on anti-racist, egalitarian grounds, the Iowa Supreme Court summarily rejected this race-based claim:

> However pertinent to such a case the discussion may have been, not many years ago, in some States of the Union, in our opinion, the doctrines and authorities involved in the argument are obsolete, and have no longer existence and authority, anywhere within the jurisdiction of the federal constitution, and most certainly not in Iowa. The ground upon which we base this conclusion will be discovered, in the progress of this opinion, to be the absolute equality of all men.[109]

The court then found that the "plaintiff was entitled to the same rights and privileges while upon defendant's boat, notwithstanding the negro blood, be it more or less, admitted to flow in her veins, which were possessed and exercised by white passengers." The court tied arguments about political and legal equality to traditional economic arguments—as the U.S. Supreme Court would later do in *Lochner* and other opinions:

> [R]ights and privileges rest upon the equality of all before the law, the very foundation principle of our government. If the negro must submit to different treatment, to accommodations inferior to those given to the white man, when transported by public carriers, he is deprived of the benefits of this very principle of equality. His contract with a carrier would not secure him the same privileges and the same rights that a like contract, made with the same party by his white fellow citizen, would bestow upon the latter. If he buys merchandise of the tradesman, or corn of the farmer, no principle of equality or justice will permit him to be supplied with an inferior article, or short weight or measure, because of his dark complexion. Why can it be claimed that his ticket for transportation upon a steamboat may assign him to a cot for sleep, or a place upon the guards for his dinner? It may be claimed that as he does not get accommodations equal to the white man he is not charged as great a price. But this does not modify the injustice

[107] *Id.* at 147–48.

[108] *Id.* at 153.

[109] *Id.*

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> and tyranny of the rule contended for. It amounts to a denial of equality. It says to the negro, you may have inferior accommodations at a reduced price, but no others. Who could defend the rule when carried to its legitimate end? Under it the colored man could be forbidden to buy merchandise or corn, except of an inferior quality, and the oppression and injustice would be justified on the ground that he is not charged the price of good articles of the same class. The absurdity and gross injustice of the rule—nay, its positive wickedness, as all other principles intended to inflict oppression and wrong, are readily exposed by tracing it to its natural consequences.[110]

Reflecting late nineteenth century notions that connected law to religion and morality, the Court further argued that "[t]he doctrines of natural law and of christianity [sic] forbid that rights be denied on the ground of race or color; and this principle has become incorporated into the paramount law of the Union."[111] Citing its own decision in the *Clark* case, the Iowa Court saw no difference between a contract for a seat on a boat, and the rule "that the directors of a public school could not forbid a colored child to attend a school of white children simply on the ground of negro parentage, although the directors provided competent instruction for her at a school composed exclusively of colored children."[112]

Economics, social policy, and public morality dovetailed with the state constitution and the federal constitution:

> The decision is planted on the broad and just ground of the equality of all men before the law, which is not limited by color, nationality, religion or condition in life. This principle of equality is announced and secured by the very first words of our State constitution which relate to the rights of the people, in language most comprehensive, and incapable of misconstruction, namely: 'All men are, by nature, free and equal.'[113]

Having set out the rule for the decision under the state constitution, the court also found it was required by the Fourteenth Amendment and the recently passed

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[110] *Id.* at 153–54.

[111] *Id.* at 154.

[112] *Id.*

[113] *Id.* at 154–55.

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Civil Rights Act of 1866.[114] Here the Court anticipated—and completely rejected—the arguments made by the majority in *The Civil Rights Cases* that law could not regulate "social equality."[115] The steamship company had argued that the "rights" Coger claimed were "social, and are not, therefore, secured by the constitution and statutes, either of the State or of the United States."[116] The Court was unimpressed by this argument because the rights were economic and contractual—they were rights protected in an open economy where the state regulated public accommodations. In doing this, the court emphatically rejected the idea that social rights were implicated on a common carrier, in a public place. People who travelled with strangers on boats (or trains), or ate in public restaurants next to strangers, were engaged in public commerce, and not in private socializing.[117] The court noted that Coger

> was refused accommodations equal to those enjoyed by white passengers. She offered to pay the fare required of those who had the best accommodations the boat afforded. She was unobjectionable in deportment and character. The advantages of the contract made with other passengers was denied her. Her money would not purchase for her that which the same sum would entitle a white passenger to receive. In these matters her rights of property were invaded, and her right to demand services to which she was lawfully entitled was denied. She complains not because she was deprived of the society of white persons. Certainly no one will claim that the passengers in the cabin of a steamboat are there in the character of members of what is called society. Their companionship as travelers is not esteemed by any class of our people to create social relations. Neither are these created by the seat at a common table. Those of high pretensions in society—the good and virtuous, may mingle as passengers in the cabin, and sit at the same table with the lowly and vicious without a thought that the social barriers erected by the haughty assumptions of pride and wealth, or the just requirements of morals and good manners are broken down, and that the high and low, good and bad, are thus brought to a common level of conventional society. The plaintiff could not have attained any social standing by being permitted to share the treatment

[114] *Id.* at 155–56.

[115] *Id.* at 156.

[116] *Id.* at 157.

[117] *Id.* at 147–48.

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> awarded to other passengers; she claimed no social privilege, but substantial privileges pertaining to her property and the protection of her person.[118]

The court had no doubt

> that she was excluded from the table and cabin, not because others would have been degraded and she elevated in society, but because of prejudice entertained against her race, growing out of its former condition of servitude—a prejudice, be it proclaimed to the honor of our people, that is fast giving way to nobler sentiments, and, it is hoped, will soon be entombed with its parent, slavery.[119]

This was not acceptable under the Iowa Constitution, the U.S. Constitution, or the Civil Rights Act of 1866.

B. Michigan

Like Iowa, Michigan also supported racial equality in this period. In 1866, the Michigan Supreme Court reviewed the conviction of William Dean who had voted in Wayne County.[120] The Michigan Constitution only allowed "whites" to vote.[121] Dean was of mixed ancestry, but was clearly at least partially black.[122] Despite an initial challenge by election officials on racial grounds, he was allowed to cast his ballot.[123] Clearly, at least some election officials in Wayne County did not have the

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[118] *Id.* at 157–58.

[119] *Id.* at 158.

[120] People v. Dean, 14 Mich. 406, 425 (1866).

[121] In all elections every white male citizen, every white male inhabitant residing in the State on the twenty-fourth day of June, one thousand eight hundred and thirty-five; every white male inhabitant residing in this State on the first day of January, one thousand eight hundred and fifty, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in this State two years and six months, and declared his intention as aforesaid, and every civilized male inhabitant of Indian descent, a native of the United States and not a member of any tribe, shall be an elector and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless lie shall be above the age of twenty-one years, and has resided in this State three months, and in the township or ward in which he offers to vote, ten days next preceding such election. MICH. CONST. of 1850 art. VII, § 1, http://www.legislature.mi.gov/documents/historical/miconstitution1850.htm.

[122] *Dean*, 14 Mich. at 414 (1886).

[123] *Id.* at 413.

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energy or desire to prevent a determined American (who happened to be of mixed ancestry) from voting.

After the election, the Wayne County district attorney, who was a Democrat, prosecuted Dean for illegal voting.[124] The prosecution appears to have been both racially and politically motivated, since almost all blacks in the nation were Republicans, while at the national level Democrats opposed the Civil Rights Act of 1866, the creation of the Freedman's Bureau, and the adoption of the Fourteenth Amendment. Thus, it is hardly surprising that Democratic Party leaders in Wayne County would seek to prosecute a black for illegal voting.

The legal issues in this case were unclear. The Michigan Constitution limited the franchise to "white" men.[125] At the trial Dean claimed he was only one-sixteenth black.[126] Dean's lawyer asked the trial judge to charge the jury that Dean had a right to vote if the jurors found Dean to be more than one half white.[127] Dean's lawyer also argued the judge should instruct the jurors to acquit his client if they believed he was mostly white, part Indian, and had "a trace only, or portion of negro or African blood in his veins."[128] Dean's attorney stressed that "as a person of 'Indian descent'" he was "a legal elector."[129] The judge, however, refused to give any of these instructions, and after his conviction, Dean appealed to the Michigan Supreme Court.[130]

In his majority opinion Justice James V. Campbell hinted that this prosecution was brought to settle the issue of mix-raced voting in the state. Campbell noted that if the court ruled in Dean's favor because he was "not more than one-sixteenth of African blood" then there would be no reason to consider his larger point—that if he were simply "less than one-half of African blood"—he would be "white" within the meaning of the 1850 Constitution.[131] Campbell noted that a decision on the one-

[124] *Id.* at 426.

[125] *Id.* at 414.

[126] *Id.* at 427.

[127] *Id.*

[128] *Id.*

[129] *Id.*; *see also* MICH. CONST. of 1850 art. VII, § 1 (allowing Indians to vote), http://www.legislature.mi.gov/documents/historical/miconstitution1850.htm.

[130] *Dean*, 14 Mich. at 427.

[131] *Id.* at 414.

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sixteenth quantum would "dispose of this case," but he did not want to do this because "the case is evidentially designed to obtain a ruling upon the general subject, in order to settle the position of persons of mixed blood under our constitution."[132]

Justice Campbell argued that there had never been a "generally prevalent legal meaning which can be regarded as having become so attached to the word 'white,' as to have been of any governing weight in its adoption."[133] He proudly noted that Michigan had "never sanctioned the discreditable penal enactments which put black men in the category of suspected criminals under bonds for good behavior, as was done in the [Michigan] territory" and other Midwestern states.[134] Nor had the state "attempted to make color a test of veracity in the witness box."[135] More significantly, Campbell claimed that in Michigan "there has been no serious difference between the privileges of any of our inhabitants, in matters of mere private concern."[136] He noted with regret that color was used for "political distinctions," despite "strong efforts to eradicate them."[137] Campbell argued, however, that these distinctions were solely between "who could be classed as white or not white" and that no one in Michigan had ever "advanced the absurd notion that a preponderance of mixed blood, on one side or the other of any given standard has the remotest bearing upon personal fitness or unfitness to possess political privileges."[138] Campbell asserted there was no "philosophical" basis for racial distinctions, and claimed that "the recognition of slavery . . . created and confirmed the feeling which has so jealously separated the white race into the privileged and dominant people in this country."[139] Campbell did not deny that the "right of the people to determine the qualification of electors" was "undisputed," but he was unwilling to extend the limitation on voting any further than was absolutely required by the language of the constitution.[140] He

[132] *Id.*

[133] *Id.* at 415.

[134] *Id.* at 416–17. For a discussion of these laws in the Old Northwest (which included Michigan), *see* FINKELMAN, *supra* note 79, at 46–101.

[135] *Dean*, 14 Mich. at 416.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 417.

[139] *Id.*

[140] *Id.*

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also asserted the right of the courts to interpret this language because "the term '*white*' has no ascertained and technically accurate legal meaning."[141]

After discussing various cases, mostly from Ohio, he asked: "If a man is not made white by a mere predominance of white blood, then the question arises: where is the line to be drawn, and how is the distinction to be ascertained?"[142] Rules for suffrage had to be "uniform as far as possible."[143] Color would not work, because he noted "there are white men as dark as mulattoes, and there are pure blooded albino Africans as white as the white Saxons."[144] The only interpretation that made sense, however difficult, was one of ancestry: "persons are white within the meaning of our constitution, in whom white blood so far preponderates that they have less than one-fourth of African blood."[145]

Chief Justice George Martin, concurring in the decision to overturn Dean's conviction, argued that a "preponderance" of white blood made someone white, and the rule should simply be if someone was more than half white, the person was white.[146] This was a more expansive position than the rest of the court was prepared to take. In taking this position Martin denounced the "racial science" of the prosecution, which offered the testimony of a medical doctor who claimed the shape of Dean's nose proved he was not white.[147] Martin mocked the majority opinion, declaring that under "the rule my brethren have established" the constitution should be "amended with all speed, so as to authorize the election or appointment of nose pullers or nose inspectors, to attend the election polls in every township and ward of the state, to prevent illegal voting."[148]

Despite Chief Justice Martin's anger that the decision was not expansive enough, this ruling overturned Dean's conviction and led to the enfranchisement of some men in Michigan who were of mixed ancestry.[149] Not every mixed race man

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[141] *Id.*

[142] *Id.* at 422.

[143] *Id.*

[144] *Id.* at 423.

[145] *Id.* at 425.

[146] *Id.* at 432.

[147] *Id.* at 438.

[148] *Id.*

[149] *Id.* at 425.

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was allowed to vote, and subsequent litigation was necessary before a number of mixed-race men in Wayne County, a Democratic stronghold, were registered.[150] Clearly, the Democrats in Wayne County did not want to register more potential Republican voters if they could avoid doing so, and they did not want to support a more racially fair and egalitarian society. But, despite this hostility to its decision, the Supreme Court had moved the state closer to racial equality. More importantly all the judges had denounced racism and the absurdity of the emerging racial science of the period.

In the wake of the decision in *Dean*, the Republicans moved to protect black rights. Perhaps the firm position of the court, with its enormously respected jurists, including Thomas Cooley, emboldened the Republicans in the legislature and in the state constitutional convention. In 1867, the Republicans totally dominated a state constitutional convention, holding three-quarters of the delegates to the Lansing convention.[151] This majority rewrote the Michigan Constitution and eliminated all racial discrimination in voting. The proposed constitution also contained controversial clauses on alcohol prohibition, local and municipal aid to railroads, and salaries for public officials.[152] The Republican Party supported the constitution and Republican candidates swept state offices that year. But the electorate emphatically rejected this new constitution by a vote of 110,582 to 71,729.[153] The meaning of this rejection is subject to different interpretations. Traditionally scholars have argued that "the constitution was defeated primarily because of the suffrage question."[154]

The suffrage issue surely led to Democratic opposition to the new constitution. But that accounted for at most a third of the electorate. The constitution was defeated by Republicans. The Republican Party controlled the state throughout this period and elected a governor even as the constitution was defeated.[155] In a careful analysis of

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[150] DAVID KATZMAN, BEFORE THE GHETTO: BLACK DETROIT IN THE NINETEENTH CENTURY 36 (1973).

[151] MARTIN HERSHOCK, THE PARADOX OF PROGRESS: ECONOMIC CHANGE, INDIVIDUAL ENTERPRISE, AND POLITICAL CULTURE IN MICHIGAN, 1837–1878, at 200 (2003).

[152] *See* STATE LIBRARY LEGISLATIVE REFERENCE DEPARTMENT, BULLETIN NO. 2, SEPT. 1907, at 17–42 (1907) (reprint of the proposed constitution of 1867).

[153] *Michigan Constitutions*, MICHIGAN MANUAL, 2007–2008, at 27–28 (http://www.legislature.mi.gov/(S(wlluknvpvk3phstpemouifjm))/documents/2007-2008/michiganmanual/2007-MM-P0027-p0028.pdf).

[154] George Blackburn, *Quickening Government in a Developing State*, *in* RADICAL REPUBLICANS IN THE NORTH: STATE POLITICS DURING RECONSTRUCTION 126 (James C. Mohr ed., 1976). *See also* KATZMAN, *supra* note 150, at 36–37.

[155] HERSHOCK, *supra* note 151, at 202.

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this contest, Martin Hershock concludes that the suffrage issue did not defeat the constitution. Rather he points to the strong opposition from many rank-and-file Republicans to subsidies for railroads, to prohibition, and to raising the salary of legislators.[156] Republican leaders did not doubt the general popularity of black suffrage. William Howard, the chairman of the state party, enthusiastically supported the new constitution, declaring his belief that the Party would not support any candidate "who turns his back on this fundamental issue" of black suffrage.[157] If Howard's understanding of his party was correct, then perhaps the whole analysis of this vote should be turned inside out. It may be that the Republicans used black suffrage, which was popular among the rank-and-file (who constituted a majority of the voters in the state), to garner support for the less popular provisions involving aid to railroads and salaries for state officeholders.[158] In other words, the suffrage provision did not undermine the constitution, but rather, the strong support for black suffrage among Michigan Republicans could not overcome deeper opposition to other parts of the proposed constitution. This analysis is supported by the actions of the Republicans at the convention. They might have put the black suffrage clause on the ballot as a separate item, allowing the electorate to ratify the new constitution without having to accept black equality. They did this with the controversial prohibition clause. But, at the Convention the Republican majority, by a vote of 50-to-16, decisively voted down a proposal to have black suffrage submitted to the electorate as a separate provision.[159]

In some ways, black suffrage at this time may be seen as an early version of what later became "waving the bloody shirt."[160] Republicans in Michigan were so committed to black suffrage and black civil rights that they were certain it was an issue that could carry the constitution despite other provisions—such as those involving railroads—that were not strongly supported within the party. This analysis is supported by the statutes, constitutional changes, and court cases dealing with race in the period from 1867 to 1885.

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[156] *Id.* at 203–04.

[157] *Id.* at 202.

[158] *Id.*

[159] MICH. CONSTITUTIONAL CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 702–03, 845–47 (Lansing, MI, J.A. Kerr & Co., printers to the state, 1867).

[160] During Reconstruction, this phrase was used to describe attempts to shore up support in the North by reminding voters of atrocities committed against unionists and blacks by southern white terrorists and former Confederates, who opposed racial equality.

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In 1867, the Michigan legislature ratified the Fourteenth Amendment.[161] The proposed amendment had been sent to the state in June, 1866, but the legislature did not sit that year, and thus no action could be taken until January 1867, when the state ratified the Amendment with great speed and almost no debate. On January 7, Governor Henry Crapo sent a copy of the Amendment to the state senate.[162] On January 15, by a vote of 25-to-1 the state senate ratified the Amendment.[163] The next day, by a vote of 71-to-15 the Michigan House ratified the Fourteenth Amendment.[164] This speedy and overwhelming vote for ratification indicates the support for black rights among Republicans in the state legislature. However, the vote in the Senate shows that even some Michigan Democrats, who might have been ambivalent or hostile to black rights, supported this fundamental change to the U.S. Constitution.

In the wake of ratifying the Fourteenth Amendment, the Republican majority in the Michigan legislature quickly adopted a general school law which unambiguously prohibited segregation in public education, declaring: "All residents of any district shall have an equal right to attend any school therein."[165] The state was now fully committed to ending segregation in its public schools. While some local school boards had integrated their schools, Michigan law had not required integration—or at least an end to segregation.[166] At the time of its passage most of the state's schools were integrated and only a few cities, such as Detroit and Jackson, appear to have had segregated schools.[167] Detroit, which had the largest black population in the state, was the only important district in the state to fight the law. Detroit officials argued that the law did not apply to them because the city had an independent school charter.[168] In 1869 the legislature responded by repealing part of the Detroit school charter so that there could be no doubt about the applicability of the statute to Detroit.[169] This legislative change demonstrates continued support for

[161] Caroline W. Thrun, *School Segregation in Michigan*, 38 MICH. HIST., Mar. 1954, at 1, 20.

[162] *Id.* at 19.

[163] *Id.* at 19–20.

[164] *Id.* at 20.

[165] Act of Feb. 28, 1867, No. 34, 1867 Mich. Pub. Acts 43.

[166] *See* Thrun, *supra* note 161, at 19–21.

[167] People *ex rel.* Workman v. Bd. of Educ. of Detroit, 18 Mich. 400, 412 (1869).

[168] *Id.* at 406.

[169] Act of Feb. 24, 1869, No. 233, 1869 Mich. Pub. Acts 71 ("An act relative to free schools of Detroit.").

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the integration in the legislature. However, as set out by the Supreme Court in *Workman v. Board of Education of Detroit*,[170] this new law was probably unnecessary. In 1868, Joseph Workman sued to force the Detroit schools to admit his child on the same basis as white children.[171] The Detroit school board argued that the 1867 law did not apply to the Detroit schools because the Detroit schools had been established independently of the general school laws.[172] In addition, the school board claimed that racism within the city made it impossible to comply with the law.[173]

The school board argued that "there exists among a large majority of the white population of Detroit a strong prejudice or animosity against colored people, which is largely translated to the children in the schools, and that this feeling would engender quarrels and contention if colored children were admitted to the white schools."[174] This sort of argument presaged the claims of the Supreme Court in *The Civil Rights Cases* and *Plessy*, as well as southern leaders in the 1950s and 1960s, such as the public officials in Virginia who closed public schools, rather than integrate them.[175] In the wake of the Civil War, where more than 200,000 African-Americans, including members of the First Michigan Colored Regiment,[176] fought for the Union cause, such blatant appeals to racism must have shocked the Republican-dominated Michigan Supreme Court.

In May 1869, the state supreme court emphatically endorsed the constitutionality of the 1867 integration statute and found it fully applicable to the city of Detroit.[177] Speaking for the Court, Chief Justice Thomas M. Cooley—one of the most important state judges in the nation—dismissed the idea that any lawyer could argue that the law did not mandate integration.

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[170] 18 Mich. 400 (1869).

[171] *See* KATZMAN, *supra* note 150, at 86–87 (discussing that *Workman* was a test case "to compel the Detroit Board of Education to admit his child into the tenth ward school").

[172] 18 Mich. at 405–06 (1869).

[173] *Id.* at 407.

[174] *Id.*

[175] Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

[176] Organized in Michigan in July 1863, the unit was renamed the 102nd United States Colored Infantry in early 1864. *See* KATZMAN, *supra* note 150, at 48.

[177] People *ex rel.* Workman v. Bd. of Educ. of Detroit, 18 Mich. 400, 414 (1869).

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> It cannot be seriously urged that with this provision in force, the school board may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of such distinctions, was meant to be established.[178]

The only legal issue for Cooley and his brethren was whether Detroit was exempt from the 1867 statute.[179] The Court found that the city was not exempt, and thus the city had to integrate its schools.[180]

In 1869, the issue of black suffrage once again arose in the state. Congress had passed the Fifteenth Amendment and sent it on to the states. In March, despite harsh protests from Democrats, the legislature ratified the Amendment. Clearly, Republican legislators felt confident they could support black suffrage only a year after the state had rejected the proposed Constitution that included black suffrage. Republicans were not worried that they would be defeated if they supported the Amendment.

Following this vote, the Republican dominated legislature sent to the electorate a series of amendments to the state constitution, substantially reflecting the proposed changes in the defeated 1867 constitution. By the time these amendments went before the people of Michigan the Fifteenth Amendment had been ratified and blacks now had the right to vote on the same basis as whites. Democrats nevertheless opposed the provision because it went beyond suffrage to entirely eliminate the word "white" from the Constitution, where it appeared five times, and thus eradicated all racially based state constitutional limitations. If passed, the amendment would not only have allowed blacks to vote, but also hold office, serve on juries, and serve in the militia. This amendment, which was basically a racial equality amendment, carried with 52% of the vote.[181] In the same referendum, the voters defeated amendments to allow for municipal aid to railroads and higher salaries for state officials.[182] This vote reinforces the interpretation that these issues, and not black

[178] *Id.* at 409–10.

[179] *Id.* at 410.

[180] *Id.* at 413.

[181] HERSHOCK, *supra* note 151, at 207.

[182] *Id.*

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suffrage, caused the defeat of the 1867 constitution with its provision for black suffrage.[183]

On April 15, 1871, the legislature adopted a mandatory school attendance law for all children ages eight through fourteen.[184] Two days later the state emphatically prohibited segregation in its public schools, leaving nothing to the imagination of local school officials who might not favor equality: "All persons, residents of any school district, and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any persons on account of race or color."[185] Integrated schooling was now mandatory for all of Michigan's children.

By 1871, well before the end of Reconstruction in the South, Michigan had integrated its schools and eliminated racial terminology in its constitution. Blacks were free to attend school with whites; black men could vote, serve in the militia, and be called for jury duty on the same basis as white men. One part of the state code still reflected antebellum notions of race. Like many other states, Michigan still banned interracial marriage.[186] This changed in 1883, as Michigan repealed its ban on such marriages and retroactively legitimized all interracial marriages that had

[183] *Id.*

[184] Act of Apr. 15, 1871, No. 165, 1871 Mich. Pub. Acts 251, 251–52.

[185] AN ACT to amend sections sixteen, twenty-three, twenty-four, twenty-five, twenty-eight, thirty-nine, fifty-seven, sixty-five, sixty-six, sixty-seven, eighty, one hundred and six, one hundred and thirty-seven, and one hundred and thirty-nine, of chapter fifty-eight, of the revised statutes of eighteen hundred and forty-six, being sections two thousand two hundred and fifty-nine, two thousand two hundred and sixty-six, two thousand two hundred and sixty-seven, two thousand two hundred and sixty-eight, two thousand two hundred and seventy-one, two thousand two hundred and eighty-two, two thousand three hundred, two thousand three hundred and eight, two thousand three hundred and nine, two thousand three hundred and ten, two thousand three hundred and twenty-three, two thousand three hundred and forty-nine, two thousand three hundred and seventy-eight, and two thousand three hundred and eighty, of the compiled laws; also, section two thousand three hundred and eighty-four of the compiled laws, as amended by an act approved April third, eighteen hundred and sixty-six; also, section four of an act approved March twenty-sixth, eighteen hundred and sixty-seven, amending an act to establish graded and high schools, approved February fourteenth, eighteen hundred and fifty-nine; also, section two thousand four hundred and eleven of the compiled laws, the same being section thirteen of an act for the relief of school districts, approved February seventh, eighteen hundred and fifty-five. Act of Apr. 17, 1871, No. 170, Sec. 28, 1871 Mich. Pub. Acts 271, at 274.

[186] AN ACT to amend section six of chapter one hundred and sixty nine, of the compiled laws of eighteen hundred and seventy-one, being compiler's section four thousand seven hundred and twenty four, relative to marriage. Act of Apr. 11, 1883, No. 23, 1883 Mich. Pub. Acts 16 (legalizing interracial marriages).

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already taken place in the state.[187] What had once been the most volatile issue regarding race and law had suddenly and without much fanfare disappeared in Michigan.[188]

The context of this law illustrates the direction of northern civil rights and stands in marked contrast to the direction the American South and the U.S. Supreme Court. In 1883, in the same term the Supreme Court struck down the Civil Rights Act of 1875, in *Pace v. Alabama*[189] the Court also upheld an Alabama law making it a felony for whites and blacks to marry or live as married persons. That year Michigan allowed interracial marriage.[190] Thus, at the very time that the southern states were prohibiting interracial marriage and sex, and the Supreme Court was supporting this development, some northern states were moving in the opposite direction. This suggests that had the Supreme Court favored racial equality there would have been northern support for its decisions.

With the adoption of the 1883 marriage law Michigan had eliminated all forms of state sanctioned racial discrimination, but at that very moment the U.S. Supreme Court allowed for private discrimination in *The Civil Rights Cases*. The Court narrowly construed the meaning of "state action" in the Fourteenth Amendment, holding that Congress lacked any power to regulate private action. Similarly, the Court refused to even consider that the Thirteenth Amendment, which banned slavery and involuntary servitude, might also restrict private discrimination. The Court's decision left the regulation of civil rights entirely in the hands of the states.

III. NORTHERN REPONSES TO *THE CIVIL RIGHTS CASES*

While southern states took advantage of the decision in *The Civil Rights Cases* to begin a war on black rights through the creation of segregation laws, northern states reacted in a different way. In the next quarter century, the South would segregate almost every public and private institution it could and the U.S. Supreme Court would acquiesce to almost all of these laws. Meanwhile, northern states passed and enforced anti-discrimination laws. In response to *The Civil Rights Cases*, 59%

[187] *Id.*

[188] On the history of conflicts over interracial marriage, see PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY (2002) [hereinafter WALLENSTEIN, TELL THE COURT I LOVE MY WIFE].

[189] Pace v. Alabama, 106 U.S. 583 (1883). For the background of this case, see WALLENSTEIN, TELL THE COURT I LOVE MY WIFE, *supra* note 188, at 110–14.

[190] Act of Apr. 11, 1883, No. 23, 1883 Mich. Pub. Acts 16 (legalizing interracial marriages).

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of the states outside of the South (thirteen of twenty-two) passed new civil rights acts.[191] A number of other northern states, such as Massachusetts, California, and Kansas, did not need to pass laws because they already had such laws on the books.

A. Michigan Civil Rights after 1883

In 1885, Michigan responded to the U.S. Supreme Court's decision in *The Civil Rights Cases* with "[a]n Act to protect all citizens in their civil rights."[192] With sweeping simplicity, and enormous economy of language, the legislature, in three short sections, sought to end private discrimination in the state. The law declared that all persons "within the jurisdiction" of Michigan were "entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement."[193] The law provided fines of $100 and up to thirty days in jail for anyone who violated the law.[194] The law also provided similar fines and punishments for "any officer or other person charged with any duty in the selection or summoning of jurors" who excluded potential grand jurors or petit jurors on the basis of race.[195] With the passage of the law Michigan seemed to have created a society where race did not matter, at least in the public sphere.

The Michigan Civil Rights Act of 1885, while a huge step forward in race relations, did not guarantee equality. The law provided no mechanism for enforcement, short of a prosecution or a private lawsuit. In those parts of Michigan where the Republican Party was in power, enforcement might be easy. But, in those parts of the state where Republicans were not in power, enforcement of the Civil Rights Act would be uncertain or non-existent. Most importantly, the large and growing population of blacks in Detroit could not expect vigorous enforcement of the new law from the Democrats who controlled Wayne County, and who were generally hostile to black rights.

Without the aid of a prosecutor, blacks had to turn to private lawsuits to secure integration. The Civil Rights Act did not provide for private suits but such suits were

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[191] *Id.*; *see also* Gittes, *supra* note 45, at 800.

[192] "An Act to protect all citizens in their civil rights," Act of May 28, 1885, No. 130, 1885 Mich. Pub. Acts 131 [hereinafter Michigan Civil Rights Act of 1885].

[193] *Id.* § 1.

[194] *Id.* § 2.

[195] *Id.* § 3.

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rooted in the Act, on the theory that a violation of the criminal law surely also constituted an actionable civil wrong. Private lawsuits, however, are a cumbersome way to vindicate the civil rights of a significant number of people. Such suits require private plaintiffs to bear the cost of law enforcement.

Compliance with the law was mixed. Some restaurants and hotels accepted black patrons, but other did not. In 1888, a black physician in Detroit, W.H. Haynes, sued a white owner of a restaurant, Fred Soup, who would not serve him.[196] Eight of the jurors voted to support Haynes, but with a deadlocked panel, the judge intervened to find in favor of Soup because Soup was serving meals at his boardinghouse, which was not a licensed restaurant. Haynes did not appeal this decision.[197]

A year later Haynes's attorney, S. Augustus Straker, took the case of William W. Ferguson, a college educated black businessman in the city. In August 1889 the owner of Gies' European Restaurant refused to seat Ferguson and M.F. Walker, a catcher for a Syracuse, New York baseball team, in his main dining room.[198] He offered them a table in the bar area, where they could order from the main dining room menu.[199] Gies even offered to put linens on the table in the bar, just as he would in the main dining room.[200] However, Gies emphatically told Ferguson that "[w]e cannot serve colored people right at those certain tables. . . . We cannot serve at these tables. If you will sit over at the next table in the other row, I will see that you are served there all right, the same as any other person will be."[201]

Ferguson and Walker left the restaurant and subsequently sued for damages. The case seemed ready made to secure the enforcement of the state's Civil Rights Act. Gies did not deny that he segregated patrons on racial grounds.[202] Unlike Fred Soup's boarding house, there were no doubts that Gies' establishment was a licensed restaurant open to the public. The fact that Gies served blacks in the "saloon section" of the restaurant, but not the main dining room, underscores the public nature of the business.

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[196] KATZMAN, *supra* note 150, at 95.

[197] *Id. See generally* Act of May 28, 1885, No. 130, 1885 Mich. Pub. Acts 131.

[198] Ferguson v. Gies, 46 N.W. 718, 719 (Mich. 1890).

[199] *Id.*

[200] *Id.*

[201] *Id.* at 719.

[202] *Id.*

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At the trial Circuit Judge George Gartner told the jury that "all citizens under the law have the same rights and privileges, and are entitled to the same immunities;—it makes no difference whether white or colored."[203] Gartner's charge denounced discrimination and the nation's racist past. He asserted that the "reasoning of Chief Justice Taney in his opinion in the Dred Scott Case is now largely almost universally regarded as fallacious and contrary to the principles of law then claimed to exist" and that the "fifteenth amendment placed the colored citizen upon an equal footing in all respects with the white citizen."[204] He noted that many states had adopted laws "to modify and overcome the prejudices entertained by many of the white race against the colored race, and to place the latter upon an equal footing with the former, with the same rights and privileges."[205] This was the "object" and the "purpose" of Michigan's civil rights act of 1885.[206]

This charge should have led to a verdict for Ferguson. However, Gartner did not stop with this forceful support of equality. Instead he told the jury that while Gies could not practice "unjust discrimination" it was permissible for him to "reserve certain portions of his business for ladies, and other portions for gentlemen, while he may also reserve other portions for his regular patrons or borders."[207] Similarly, Gartner told the jury that the restaurant might "reserve certain tables for white men, and others where colored men would be served, provided there was no unjust discrimination."[208] Gartner explained that "full and equal accommodations" did not mean "identical accommodations, but by it is meant substantially the same accommodation."[209] He asserted that a patron at a restaurant had "no more right to insist upon sitting at a particular table than a guest at a hotel has the right to demand a particular room, as long as the accommodations offered are substantially equal."[210]

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

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This charge came close to articulating a "separate but equal" standard that the U.S. Supreme Court would soon endorse in *Plessy v. Ferguson*.[211] But, here the Michigan trial judge did not even claim that there needed to be equality in the facilities. Gies admitted that the tables and other aspects of service in the "saloon" area were not equal to those in the other part of his restaurant.[212] But, to pass muster under Michigan's civil rights law, Judge Gartner told the jury the service had only to be "substantially the same."[213] When the jury found for Gies, Ferguson appealed to the Michigan Supreme Court.[214]

The Michigan Supreme Court emphatically and unanimously overturned this result.[215] Justice Allen B. Morse offered an extraordinary denunciation of racism and prejudice. The opinion certainly reflected the age in which Morse lived, an age when even some of the most egalitarian whites probably did not *truly* believe that the races were equal. As the extensive quotations below show, Morse implied that being black was similar to having a birth defect or a "deformity."[216] But, Morse rejected treating people differently simply because they looked different.[217] In spite of its paternalism and mild racism, Morse's opinion was a profound rejection of segregation and race prejudice. In the end he concluded that racism "is not only not humane, but unreasonable."[218]

Morse began his opinion by explaining that the "fault" in Judge Gartner's "instruction is that it permits a discrimination on account of color alone which cannot be made under law with any justice."[219] Restaurant owners might be free to make rules for other types of customers,

> But in Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges

[211] Plessy v. Ferguson, 163 U.S. 537, 544 (1896). The Ferguson in this case was a white judge in Louisiana not related to the plaintiff in *Gies*.

[212] *Gies*, 46 N.W. at 719.

[213] *Id.*

[214] *Id.* at 719–20.

[215] *Id.* at 721.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 720.

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> under the law that is denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction.[220]

Six years after *Gies*, in *Plessy v. Ferguson*, the U.S. Supreme Court would cite *Roberts v. City of Boston*,[221] an antebellum case allowing segregated schools, to bolster its support for the "separate but equal doctrine."[222] Judge Gartner cited this case to support his decision that Gies did not have to seat black patrons next to white patrons. But, the Michigan Supreme Court would have none of this. The court noted that the *Roberts* case "was made in the *ante bellum* days, before the colored man was a citizen, and when, in nearly one-half of the Union, he was but a chattel. It cannot now serve as a precedent."[223] In an extraordinary affirmation of racial equality, the Michigan Court asserted that the *Roberts* case was now useful only as

> a reminder of the injustice and prejudice of the time in which it was delivered. The negro [sic] is now, by the constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship.[224]

After quoting almost the entire text of the Michigan Civil Rights Act of 1885, Justice Morse declared that the 1885 act,

> [E]xemplifies the changed feeling of our people towards the African race and places the colored man upon a perfect equality with all others, before the law in this state. Under it, no line can be drawn in the streets, public parks, or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor

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[220] *Id.*

[221] *See* Roberts v. City of Boston, 59 Mass. 198 (1849).

[222] Plessy v. Ferguson, 163 U.S. 537, 544–45 (1896).

[223] *Gies*, 46 N.W. at 720.

[224] *Id.*

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> can such a line of separation be drawn in any of the public places or conveyances in this act.[225]

Morse argued that under the common law white men had always had "a remedy against any unjust discrimination to the citizen in all public places" and that since the adoption of the Civil War Amendments, and especially after the passage of the Michigan Civil Rights Act,

> the colored man, under the law of this state, was entitled to the same rights and privileges in public places as the white man, and must be treated the same there; and that his right of action for any injuries arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen.[226]

Morse emphatically declared that "any discrimination founded upon the race or color of the citizen is unjust and cruel, can have no sanction in the law of this state" because such discrimination "taints justice."[227] Morse then demolished the racist notion that God had made blacks inferior to whites, asserting such ideas were founded on reasoning that "does not commend itself either to the heart or judgment."[228]

As he wrote this opinion, Morse probably reflected on his own life. As a young man he had lost an arm storming Missionary Ridge while serving in the 16th Michigan.[229] Thus, he understood the cost of equality, declaring:

> The humane and enlightened judgment of our people has decided—although it cost blood and treasure to do so—that the negro [sic] is a man; a freeman; a citizen; and entitled to equal rights before the law with the white man. This decision was a just one. Because it was divinely ordained that the skin of one man should not be as white as that of another furnished no more reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed, or otherwise deformed. The law, as I understand it, will never permit color or

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] *Id.* at 721.

[229] *Allen Morse*, MICH. SUP. CT. HIST. SOC'Y, http://www.micourthistory.org/justices/allen-morse (last visited Jan. 10, 2018).

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> misfortune that God has fastened upon a man from his birth, to be punished by the law. . . . The law is tender, rather than harsh, toward all infirmity; and if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life.[230]

This section of the opinion certainly smacked of paternalism—the comparison of blackness to a "deformity" reflects the racism of the age. At the same time, however, it also reflected the social reality of the age. Many northern whites may have in fact thought that blackness was at best something like a birth defect that hurt African-Americans. Surely most whites understood that African-Americans had fewer and more circumscribed life chances than whites. But, again, despite this racist paternalism, Morse's conclusion was anything but racist. While recognizing "the prejudice against association in public places with the negro, which does exist, to some extent in all communities," he emphatically asserted that "it is not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable."[231] Thus, Morse declared, he could never

> deny to any man any rights and privileges that bring in law to any other man, simply because the Creator colored him differently from others, or made him less handsome than his fellows, for something that he could not help in the first instance, or ever afterwards removed by the best of life and human conduct.[232]

Here, to a large degree, Morse anticipated the modern idea that distinctions cannot be made on the basis of immutable characteristics.

Morse concluded by reaffirming the principle that "all men are equal before the law."[233] He accepted the idea that any person

[230] *Gies*, 46 N.W. at 721.

[231] *Id.*

[232] *Id.*

[233] *Id.*

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> may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.[234]

Citing the state's civil rights act and its school laws, Morse asserted that "all citizens who conform to the law have the same rights to such places, without regard to race, color, or condition of birth."[235] Thus, he ordered a new trial.[236]

The *Gies* opinion illustrates that at the very time the U.S. Supreme Court was rushing to embrace southern segregation and racism, a distinguished northern court was headed in the opposite direction. In 1893, the Michigan legislature once more intervened to create a level playing field for African Americans.[237] The Michigan Civil Rights Act of 1885 dealt with businesses and public accommodations. But in the early 1890s a new form of business discrimination began to appear in the field of life insurance.

In the early 1890s most major insurance companies either refused to sell to blacks or sold to them, but with higher premiums than they changed whites.[238] Companies justified these practices by relying on the work of a self-taught statistician, Frederick L. Hoffman, who argued in articles and then a book that insurance companies should not write policies for blacks because of their high mortality rate.[239] Some companies used this argument to charge higher premiums for blacks.[240] In 1893, Michigan attempted to stop this practice by prohibiting any life insurance company doing business in the state from making "any distinction or discrimination between white persons and colored persons, wholly or partially of African descent, as to the premiums or rates charged for policies."[241] Any company

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[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] Act of May 4, 1893, No. 59, 1893 Mich. Pub. Acts 60 (amending "chapter one hundred and thirty-one of Howell's Annotated Statutes of the State of Michigan" to include section 32 intended to prevent insurance companies from distinguishing and discriminating based on race in insuring lives).

[238] GUNNAR MYRDAL, AN AMERICAN DILEMMA 316 (1944).

[239] FREDERICK K. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (The Lawbook Exchange 2004) (1896).

[240] MYRDAL, *supra* note 238.

[241] Sec. 1, § 32, 1893 Mich. Pub. Acts 60–61.

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not following this law could be fined $500 for each violation, while officers of the company involved in issuing such policies could be fined from $50 to $500 and sentenced up to one year in jail.[242]

Six years later, Michigan amended its marriage law.[243] The new regulation had nothing to do with race—it regulated health.[244] However, this amendment to the marriage law was added to the section of the law that had been amended in 1883 to allow interracial marriage.[245] In amending this section, the legislature reaffirmed the 1883 law legalizing interracial marriages and similarly reconfirmed the validity of all interracial unions in the state that had taken place before 1883. This reaffirmation of interracial marriage was probably legally unnecessary, but by doing so Michigan placed itself squarely on the equality side of the great divide in the nation over race. In this period, the South was moving to segregate everything it could and disfranchise blacks as much as possible and the Supreme Court was readily giving its blessing to these events. Michigan, on the other hand was passing new civil rights legislation in the 1890s and reaffirming its commitment to equality.

B. Other States

Many other northern and western states mirrored the legislation and jurisprudence of Iowa and Michigan.[246] Like Michigan, in 1885 Indiana passed a civil rights act which barred discrimination in public accommodations, transportation, and other public places.[247] Unlike Michigan, Indiana was not a Republican stronghold with a history of progressive views on race. It was one of the most racist states in the North with a long history of Negrophobia. Nevertheless, the legislature declared there was an "emergency" so that this law could take effect

[242] *Id.*

[243] Act of June 15, 1899, Laws of Michigan, 1899, No. 247, sec. 1, § 6, 1899 Mich. Pub. Acts 387, 387–88.

[244] *Id.*

[245] *Id.*

[246] In his book on the subject, Michael Klarman acknowledges some of these laws but dismisses them as toothless and meaningless, with "trivial sanctions." KLARMAN, *supra* note 7, at 22. However, he also failed to actually analyze them.

[247] "An act to protect all persons in their civil and legal rights, prescribing penalties for their violation to be recovered in a civil action, defining certain misdemeanors and fixing their penalties, and declaring an emergency," Act of Mar. 9, 1885, Indiana Laws, 1885, 75–76.

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immediately.[248] This is suggestive of the support that existed, even in a place like Indiana, for a different result in *The Civil Rights Cases*.[249] Illinois also had a notoriously racist past and it was arguably almost as racist as its neighbor to the east.[250] But, like Indiana, in 1885 Illinois also responded to the U.S. Supreme Court with its own civil rights act, which provided civil penalties of up to $500 to be paid to a plaintiff or criminal penalties of up to $500 and up to a year in prison.[251] The law was expansive in its coverage, prohibiting discrimination on the basis of race in the "equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens."[252] Ohio[253] and New Jersey[254] passed such laws in 1884 and Colorado[255] and Minnesota[256] did so in 1885, while other states passed such laws in the next two decades. Kansas had passed such a law in 1874 while California's law dated from 1872, so neither state needed to respond the Supreme Court's decision. From 1885 until the election of Woodrow Wilson in 1912, New York, New Jersey, Pennsylvania, Michigan, Wisconsin, Minnesota, Nebraska, Montana, Utah, Washington, and California adopted new civil rights laws, in addition to those passed before 1883 or in 1884–85 in response to the decision in *The Civil Rights Cases*.[257]

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[248] 1885 Ind. Acts 76.

[249] James H. Madison, *Race, Law, and the Burdens of Indiana History*, *in* THE HISTORY OF INDIANA LAW 48 (David J. Bodenhamer & Randall T. Shepard eds., 2006). On the history of race in antebellum Indiana, see Paul Finkelman, *Almost a Free State: The Indiana Constitution of 1816 and the Problem of Slavery*, 111 IND. MAG. OF HIST. 64 (2015), and FINKELMAN, *supra* note 79.

[250] FINKELMAN, *supra* note 79.

[251] "To Protect Citizens in their Civil and Legal Rights and Fixing a Penalty for their Violation," Illinois Law, 1885, 85. Act of June 10, 1885, § 2, 1885 Ill. Laws 64, 65.

[252] *Id.* § 1 at 64.

[253] "An act to protect all citizens in their civil and legal rights," Act of Feb. 7, 1884, 1884 Ohio Laws 15.

[254] "An act to protect all citizens in their civil and legal rights," Act of May 10, 1884, ch. ccxix, 1884 N.J. Laws 339.

[255] "An act to protect all citizens in their civil rights," Act of Apr. 4, 1885, No. 161, 1885 Colo. Laws 132.

[256] "An act to protect all citizens in their civil and legal rights," Mar. 7, 1885, ch. 224, 1885 Minn. Laws 295.

[257] Many of these laws are summarized in PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1951). For a good discussion of these acts in a few states, see David McBride, *Mid-Atlantic State Courts and the Struggle with the "Separate but Equal" Doctrine: 1880–1939*, 17 RUTGERS L.J. 569 (1986).

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These laws contained tough penalties which state courts implemented when cases came before them. In 1895, for example, a black football player from Indiana University won a $100 judgment when a hotel refused to rent him a room.[258] The penalties in these statutes were not trivial and the laws themselves were not merely symbolic. Pennsylvania's law of 1887, for example, provided a fine of $50 to $100 for denying equal access to public transportation, theaters, hotels, restaurants, concerts "or place of entertainment or amusement."[259] While this amount might seem "trivial" today, $100 in 1887 was a substantial sum. There are a number of ways of calculating the "value" of $100 in 1887. Under an "inflation" measure, $100 in 1887 was equal to the buying power of almost two thousand dollars today.[260] By other measures, this amount was even greater. Compared to wages earned, $100 in 1887 might be worth as much as $10,000 today—that is to say, a job paying $40,000 a year today would have paid only $400 at the time.[261] On the other hand, when compared to per capita income, $100 in 1887 was worth what $17,600 would be worth today.[262] But, whatever method used to calculate its value, the $100 fine was not insignificant. For a large economic actor, such as a railroad, the $100 fine would have been worth avoiding, and for a small hotel, restaurant, or theater, even a $50 fine would have been a great burden.

[258] Madison, *supra* note 249, at 48 (citing Fruchey v. Eagleson 43 N.E 146 (1896)). The fact that Eagleson was allowed to play football at the state university is also suggestive of a level of equality the North was willing to tolerate. Even after southern state universities integrated there was great resistance to allowing blacks to play on sports teams. *See also* EMMA LOU THORNBROUGH, THE NEGRO IN INDIANA BEFORE 1900: A STUDY OF A MINORITY 264 n.17 (1957). Thornbrough notes of a case where the owner of a resort settled a suit for $400 in 1892 after he refused accommodations to two black women. *Id.*

[259] "An Act to Provide Civil Rights For all People, Regardless of Race or Color," Act of 1887, ch. 130, No. 72, § 1, 1887 Pa. Laws 130, 130–31.

[260] Determining the value of money over time is complicated. Various web sites lead to different numbers. Economic History Services (http://eh.net/howmuchisthat/) finds that as a factor of inflation a $100 in 1887 was worth $1,930. That is, a "basket of goods" that cost $100 in 1887 would cost $1,930 today. However, relative to unskilled wages, a $100 in 1887 would be worth $11,300 today. Furthermore, relative to the per capita Gross Domestic Product (GDP) a $100 in 1887 was worth what $17,600 today. These disparities illustrate how much more workers make today, relative to the cost of goods, than in 1887.

[261] *Id.*

[262] *Id.*

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New York and New Jersey had similar laws rejecting separate but equal.[263] New Jersey's act of 1884[264] provided for substantial fines, from $500 to $1000. By the same analysis used for the Pennsylvania laws, this was equivalent to the buying power today of between $9000 and $18,000 today, and of course a much larger amount based on inflation or compared to wages.[265] This law also provided the right of the complaining witness to pursue a private action of debt for up to $500,[266] which would be a huge incentive for victims of discrimination to file suit. The statute further provided for the possibility of jailing offenders for up to one year.[267] In addition to civil rights, the law protected the right to serve on a jury, and provided fines of up to $5000 for any official who refused to call a black for jury service. In *Miller v. Stampul*[268] the New Jersey Supreme Court upheld this law, and a $500 fine, against a theater owner who refused to admit blacks on the same basis as whites. It is unlikely that the theater owner considered the law toothless or the sanction trivial. It would be much like being fined $10,000 today.

Such legislation and jurisprudence was not confined the east coast. In 1881, two years before the Court struck down the Civil Rights Act of 1875, a Cincinnati jury awarded a black woman $1000—an enormous sum of money at the time—when a railroad forced her to ride in a smoking car instead of honoring her ticket for the first class car.[269] Three years later, in 1884—a year after *The Civil Rights Cases*—Ohio adopted a new civil rights law, declaring that all its citizens were "equal before the law," and that such a status was "essential to just government."[270] The statute prohibited private businesses from discriminating, and specifically prohibited

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[263] *See* McBride, *supra* note 257, at 569–70.

[264] "An Act to protect all citizens in their civil and legal rights," Act of May 10, 1884, ch. ccxix, § 2, 1884 N.J. Laws 339, 339.

[265] Economic History Services (http://eh.net/hmit/compare/compare_answer.php). Relative to unskilled wages, a $1000 in 1884 would be worth $57,800 today. Relative to the Per capita Gross Domestic Product (GDP) a $1000 in 1884 was worth $87,000 today. Economic History Services (http://eh.net/howmuchisthat/).

[266] Ch. ccxix, § 2, 1884 N.J. Laws at 339; *see also* McBride, *supra* note 257, at 584–85.

[267] Ch. ccxix, § 2, 1884 N.J. Laws at 339.

[268] Miller v. Stampul, 84 A. 201, 202 (N.J. 1912).

[269] Gray v. Cincinnati S. R. Co., 11 F. 683, 685–87 (C.C.S.D. Ohio 1882). *See also* Patricia Hagler Minter, *Freedom: Personal Liberty and Private Law: The Failure of Freedom: Class Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHI.-KENT L. REV. 993, 993 (1995).

[270] Act of Feb. 7, 1884, 1884 Ohio Laws 15; *see also* DAVID A. GERBER, BLACK OHIO AND THE COLOR LINE, 1860–1915, at 46 (1976).

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discrimination in all "inns, public conveyances on land or water, theaters and other places of public amusement."[271] A second act passed later that year extended this law to cover "inns, restaurants, eating-houses, and barber-shops, and all other places of public accommodation and amusement."[272] This law became a model for other states.[273] Three years later Ohio repealed its last remaining black laws, with the passage of the "Arnett bill." This law was sponsored by Benjamin Arnett, a black state legislator who represented predominately white Green County.[274] In 1894, just about the time when the U.S. Supreme Court was giving its blessing to separate but equal, Ohio raised the maximum fines for violation of the civil rights laws from $100 to $500, raising the maximum jail time from 30 days to 90 days, and most importantly, providing for the first time a statutory minimum for violators of $50 or 30 days in jail.[275] Two years later Ohio passed a tough anti-lynching law, which made counties financially responsible for damages if lynchings took place in their jurisdiction, in addition to providing criminal punishments for lynchers.[276] This law contrasts with the huge numbers of lynchings in the South and the refusal of the Supreme Court to support prosecutions of southern white terrorists.[277]

These laws did not make Ohio a bastion of equality. Southern Ohio was more "southern" than "northern," and racism was common in that part of the state. However, the Ohio Civil Rights Laws received "strong support from most courts."[278] In 1902, for example, an Ohio court upheld a suit against a bowling alley that refused service to a black man[279] and a few years later the Court concluded that the law would allow for a judgement against the owner of a theater that would not sell a ticket to a

[271] Act of Feb. 7, 1884, 1884 Ohio Laws 15, § 1.

[272] "An act to amend section 1 of an act entitled an 'act to protect citizens in their civil and legal rights,' passed Feb. 7, 1884," Act of Mar. 27, 1884, 1884 Ohio Laws 90 (amending Act of Feb. 7, 1884, 1884 Ohio Laws 15, § 1) (protecting citizens in their civil and legal rights).

[273] Gittes, *supra* note 45, at 800.

[274] GERBER, *supra* note 270, at 241–42.

[275] "An act to amend sections 2 and 3 of an act entitled 'An act to protect all citizens in their civil and legal rights,' passed Feb. 7, 1884 and amended Mar. 27, 1894," Act of Feb. 7, 1894, 1894 Ohio Laws 17–18 (1894) (amending Act of Feb. 7, 1884, 1884 Ohio Laws 15, §§ 2–3).

[276] "An act for the Suppression of Mob Violence," Act of Apr. 10, 1896, 1896 Ohio Laws 136 (creating a civil cause of action for victims of mob violence).

[277] United States v. Cruickshank, 92 U.S 542, 556–57, 559 (1875).

[278] Gittes, *supra* note 45, at 801.

[279] Johnson v. Humphrey Pop Corn Co., 4 Ohio C.C. (n.s.) 49, 49–50 (1902).

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black.[280] Such laws and decisions do not square with claims that the northern civil rights statutes suffered from a "triviality of sanctions"[281] or were merely symbolic.

Other midwestern states also passed various civil rights laws in the 1880s and 1890s, legalizing interracial marriage, guaranteeing blacks equal access to public accommodations and other facilities, and even requiring that insurance companies charge the same premiums for blacks that they did for whites. The year before the Court upheld segregation in *Plessy*, Wisconsin passed a law "to protect all citizens in their civil and legal rights."[282] Throughout the Northeast and Midwest, states passed such laws in the 1880s and 1890s, at the very time that the South was enacting mandatory segregation laws. Moreover, these laws were passed *after* the Supreme Court struck down the federal Civil Rights Act of 1875 in the *Civil Rights Cases*.[283] In other words, the northern response to the Court's rejection of racial fairness in the *Civil Rights Cases* was to adopt state laws to accomplish what the Court would not let Congress accomplish. These laws demonstrate that northern white public opinion was not in concert with the Supreme Court or with southern white views on race and segregation. The laws also demonstrate that the Court had options in the race cases of the period, and had cases like *The Civil Rights Cases* or *Plessy* gone the other way, there would have been substantial public support for them.

Illustrative of northern support for equality is the Nebraska Supreme Court's 1889 decision in *Messenger v. State*.[284] Here the Nebraska court upheld the state's 1885 "Act to provide that all citizens shall be entitled to the same civil rights, and to punish all persons for violations of its provisions."[285] The Court explicitly recalled the Civil War and the way it had forever changed American society and American law. Messinger, a white barber was prosecuted when he refused to shave a black man. The court remanded the case for further proceedings on technical grounds, but significantly supported civil rights, noting:

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[280] Davis v. Euclid Ave. Garden Theater Co., 17 Ohio C.C. (n.s.) 495, 495–97 (1911).

[281] KLARMAN, *supra* note 7, at 22.

[282] "An act to protect citizens in their civil and legal rights," Act of Apr. 13, 1895, ch. 223, 1895 Wis. Laws 428 (protecting citizens in their civil and legal rights).

[283] The Civil Rights Cases, 109 U.S. 3, 25 (1883).

[284] Messenger v. State, 41 N.W. 638, 639 (Neb. 1889).

[285] "An act to protect all citizens' civil rights and to punish violations of civil rights," Act of Mar. 4, 1885, ch. 104, 1885 Neb. Laws 393 (protecting all citizens' civil rights and punishing violations of civil rights).

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> The statute will not permit him to say to one: "You were a slave or a son of a slave; therefore I will not shave you." Such prejudices are unworthy of our better manhood, and are clearly prohibited by the statute. In this state a colored man may sit upon a jury, cast his ballot at any general or special election where he is entitled to vote, and his vote will be counted, and he has the right to travel upon any public conveyance the same as if he were white. The authority of the state to prohibit discriminations on account of color in places of public resort, as a barber-shop, is undoubted, and the proprietors of such shops can adopt and enforce no rules which will not apply to white and colored alike.[286]

Similarly, in 1902 an Ohio court upheld the right of a black man to sue under a state civil rights statute after he was denied the right to use a bowling alley at a public resort.[287] Here the Ohio court cited the Michigan court's decision in *Ferguson v. Gies*.[288]

In 1905, the Iowa Supreme Court upheld a judgment against a restaurant that refused to serve a black man.[289] This case was decided three years before the Supreme Court upheld mandatory segregation of private colleges in *Berea College*.[290] This case reflects the Iowa cases of the 1860s and 1870s supporting equality.[291] Similarly, in 1902 an Ohio court upheld the right of a black man to sue under a state civil rights statute after he was denied the right to use a bowling alley at a public resort.[292] Here the Ohio court cited the Michigan court's decision in *Ferguson v. Gies*.[293]

The northern laws and decisions supporting civil rights in this period illustrate that there was a powerful cultural and legal alternative to the racism of the Supreme Court and its refusal to apply the Fourteenth Amendment as its framers intended—to create a more just and racially fair society. That the Court did not do this was not

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[286] *Id.* at 639.

[287] Johnson v. Humphrey Pop Corn Co., 4 Ohio C.C. (n.s.) 49, 49–50 (1902).

[288] *Id.* at 54.

[289] Humburd v. Crawford, 105 N.W. 330, 330 (Iowa 1905).

[290] Berea College v. Kentucky, 211 U.S. 45 (1908).

[291] NELSON, *supra* note 7, at 151–52.

[292] Johnson v. Humphrey Pop Corn Co., 4 Ohio C.C. (n.s.) 49, 49–50 (1902).

[293] *Id.* at 54.

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a function of the logic of the law,[294] or of the language of the new Amendment. It was a function of the lack of experience that these Justices had with liberty, equality, and racial fairness. This was compounded by their insensitivity to racial prejudice. They represented a narrow swath of elite white culture, and they were not willing to see that blacks were entitled equality or justice. Possibly, as William E. Nelson charitably suggests "the courts were not racist,"[295] but quite frankly that seems unlikely. In any event, the decisions of the Supreme Court harmed blacks, and accepted all sorts of racial assumptions that undermined equality. If the "courts were not racist,"[296] their decisions certainly were. Moreover, as the cases and statutes discussed above demonstrate, the Supreme Court justices were not in tune with the legislative majorities of many states or the members of the highest courts of these states.

The push for civil rights in Ohio and the rest of the North was not a function of supporting equality to gain votes because it is hard to imagine how black votes could have been considered critical in a statewide election anywhere in the North. In 1890 blacks constituted only 1.6% of the population of the Northeast and 1.9% of the Midwest.[297] In 1890, for example, there were only 70,092 blacks in New York State, compared with 5,923,952 whites.[298] It seems implausible that this population—which was 1.2% of the entire state[299]—could possibly have made much of a difference in any statewide election. Perhaps in a few state legislative districts, or in razor thin state-wide elections black voters could have provided the balance, but overall, the black vote was almost meaningless to northern politics at this time. Thus, these civil rights laws were not passed to woo the vast voting power of blacks—because there was no "vast" black vote to woo. Rather it reflected a general view in the Post-Civil War North that Civil Rights mattered. This sentiment was found throughout the North and West, as well as among the huge black population of the South, including places like Louisiana, Mississippi, and South Carolina, where the

[294] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic; it has been experience.").

[295] NELSON, *supra* note 7, at 186.

[296] *Id.*

[297] Gibson & Jung, *supra* note 40.

[298] *Id.*

[299] *Id.*

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majority of the population was black.[300] But the Supreme Court ignored such sentiments in this period.

The northern states continued to support civil rights into the early Twentieth Century. Black migration to the North had little to do with this, because, there was in fact very little black migration at the time. In the *Plessy* era, the black population was overwhelmingly southern and only a very few southern blacks moved to the North before World War I. More than 90% of the blacks in America lived in the former slave states in the era of *Plessy*, and as late as 1950, 70% of the blacks in America would still be living in the South. From 1880 to 1910 there was no increase in the overall percentage of the black population in the Midwest,[301] while in the Middle Atlantic states the black percent of the population grew by four tenths of one percent, from 1.8 to 2.2.[302] In 1880 Pennsylvania was 2.0% black and it was only 2.5% black in 1910; in Ohio, the black percentage actually dropped by 0.2% in this period, while in New Jersey it went up one tenth of one percent, from 3.4 to 3.5. New York was 1.3% black in 1880 and only 1.5% in 1910. Illinois showed the greatest growth after Pennsylvania, going from 1.5% to 1.9% in this period. Such growth could hardly have stampeded northern political leaders into supporting civil rights. This miniscule population growth could not have enticed white legislatures to support civil rights because they relied on black votes or hoped to earn the support of black voters.

The small number of blacks in these states also illustrates how unimportant they were in the North. New York's white population grew by almost four million people in this period while its black population grew by about 69,000.[303] Similarly, in Illinois the white population grew by almost 2.5 million while the black population grew by just under 63,000. The few blacks moving into these and other northern and midwestern states were barely visible among the millions of immigrants from southern and eastern Europe. Whatever the cause of northern support for black civil rights, it was clearly not a function of migration or gross numbers. Similarly, black voting power cannot explain the support for civil rights legislation.

The nexus of race, legal rights, and northern opinion can be seen in the valiant, but failed, attempt to protect the southern black vote in the 1890s. In 1888, the

[300] *Id.* at 115, 119.

[301] *Id.*

[302] *Id.*

[303] *Id.*

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Republican Party fought to regain the White House, after losing it in 1884 to a Democrat for the first time since the Civil War. This was not a time to take chances or alienate voters. The third paragraph of the Party's platform affirmed the Party's

> unswerving devotion to the National Constitution and . . . to the personal rights and liberties of citizens in all the States and Territories of the Union, and especially to the supreme and sovereign right of every lawful citizen, rich or poor, native or foreign born, white or black, to cast one free ballot in public elections, and to have that ballot duly counted.[304]

To put it another way, the dominant political party of the era believed that support for civil rights was a winning issue. While a reactionary Supreme Court made war on civil rights, the Republicans continued to campaign for civil rights, and across the North they often succeeded.

In 1889, after winning the election on this platform, President Benjamin Harrison urged Congress to pass legislation to protect black voters.[305] In 1891, Congressman Henry Cabot Lodge sponsored such a bill, known as the "Lodge Federal Elections Bill" more commonly known as the "Lodge Force Bill," because it would have used federal power to force the southern states to allow blacks to vote.[306] Lodge's bill passed the House, but died in the Senate when a few western Republicans defected from their party's support for the bill.[307] The handful of western Republicans opposing the bill were from silver producing states, and they voted against black voting rights in return for the support of southern Democrats for free-coinage of silver.[308] As the *Nation* noted, "the Lodge bill" was "buried by a bargain between Democrats and free silverites."[309] A few years later the populist Democrat William Jennings Bryan railed that "you shall not crucify mankind upon

[304] Gerhard Peters & John T. Woolley, *Republican Platform of 1888*, AM. PRESIDENCY PROJECT (June 19, 1888), http://www.presidency.ucsb.edu/ws/index.php?pid=29627.

[305] XI, *supra* note 52, at 248.

[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] *Id.* at 248.

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a Cross of Gold."[310] In this instance a few western Republicans crucified black voting rights on a cross of silver.

The history of this failed voting rights law suggests the complexity of race relations at this time. A slight alteration of the vote in the Senate and Congress would finally have implemented its powers under section 2 of the Fourteenth Amendment and under the Fifteenth Amendment to protect the black vote. This history also suggests that the world of the 1880s and 1890s was not universally hostile to black rights. In other words, had the Supreme Court been inclined to protect freedom, civil rights, and black suffrage, it could have found support, in much of the North, as well as of course among black southerners.

Throughout the rest of the decade the Republican Party continued to support black voting rights, once again suggesting that there was substantial support of black rights, from the political party that came in close in 1892 and won the presidency in 1896 and 1900. In 1892, the Republican Party Platform denounced lynching,[311] and directly asserted the rights of black voters:

> We demand that every citizen of the United States shall be allowed to cast one free and unrestricted ballot in all public elections, and that such ballot shall be counted and returned as cast; that such laws shall be enacted and enforced as will secure to every citizen, be he rich or poor, native or foreign-born, white or black, this sovereign right, guaranteed by the Constitution. The free and honest popular ballot, the just and equal representation of all the people, as well as their just and equal protection under the laws, are the foundation of our Republican institutions, and the party will never relax its efforts until the integrity of the ballot and the purity of elections shall be fully guaranteed and protected in every State.[312]

In 1896, at the height of the worst depression in the nation's history, the party took the time and the platform space to "demand that every citizen of the United States shall be allowed to cast one free and unrestricted ballot, and that such ballot shall be

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[310] WILLIAM JENNINGS BRYAN, *Cross of Gold Speech*, THE FIRST BATTLE: A STORY OF THE CAMPAIGN OF 1896, at 199, 199 (1896), *reprinted in*, DOCUMENTS OF AMERICAN HISTORY 626 (Henry Steele Commager ed., 8th ed. 1968).

[311] Gerhard Peters & John T. Woolley, *Republican Party Platform of 1892*, AM. PRESIDENCY PROJECT (June 7, 1892), http://www.presidency.ucsb.edu/ws/index.php?pid=29628 (The Party declared: "We denounce the continued inhuman outrages perpetrated upon American citizens for political reasons in certain Southern States of the Union.").

[312] *Id.*

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counted and returned as cast."[313] The Party also proclaimed its "unqualified condemnation of the uncivilized and preposterous [barbarous] practice well known as Lynching, and the killing of human beings suspected or charged with crime without process of law."[314] In 1900, the Party continued its support of black suffrage. "It was the plain purpose of the fifteenth amendment to the Constitution, to prevent discrimination on account of race or color in regulating the elective franchise. Devices of State governments, whether by statutory or constitutional enactment, to avoid the purpose of this amendment are revolutionary, and should be condemned."[315] In 1908, the Party reminded voters of its history of supporting racial fairness, proudly declaring:

> The Republican party has been for more than fifty years the consistent friend of the American Negro. It gave him freedom and citizenship. It wrote into the organic law the declarations that proclaim his civil and political rights, and it believes today that his noteworthy progress in intelligence, industry and good citizenship has earned the respect and encouragement of the nation. We demand equal justice for all men, without regard to race or color; we declare once more, and without reservation, for the enforcement in letter and spirit of the Thirteenth, Fourteenth and Fifteenth amendments to the Constitution which were designed for the protection and advancement of the negro, and we condemn all devices that have for their real aim his disfranchisement for reasons of color alone, as unfair, un-American and repugnant to the Supreme law of the land.[316]

IV. CONCLUSION

So, could the Court have done more to protect the civil rights of blacks? Was the nation so irredeemably racist that the Court could not have stood for civil rights, instead of against civil rights? From the 1860s until the early twentieth century many whites in the North (as well as blacks everywhere), were not only willing to accept civil rights for blacks, but were also prepared to support such rights in the political arena. State legislatures in northern states notoriously hostile to blacks, like Indiana and Illinois, still passed legislation to protect the fundamental civil rights of all their citizens. Northern judges were similarly willing to enforce such laws. Political and

[313] Gerhard Peters & John T. Woolley, *Republican Party Platform of 1896*, AM. PRESIDENCY PROJECT (June 18, 1896), http://www.presidency.ucsb.edu/ws/index.php?pid=29629.

[314] *Id.*

[315] Gerhard Peters & John T. Woolley, *Republican Party Platform of 1900*, AM. PRESIDENCY PROJECT (June 19, 1900), http://www.presidency.ucsb.edu/ws/index.php?pid=29630.

[316] Gerhard Peters & John T. Woolley, *Republican Party Platform of 1908*, AM. PRESIDENCY PROJECT (June 16, 1908), http://www.presidency.ucsb.edu/ws/index.php?pid=29632.

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cultural leaders from the same social background as most members of the Court were willing to fight for black rights. No less a Boston Brahmin that Henry Cabot Lodge fought for black rights in this period. In *Plessy*, Justice John Marshall Harlan, who came from an elite, former slaveholding, Kentucky family, dissented with a powerful indictment of racism. Justice William Day, a moderately progressive Republican from Ohio, recently appointed by Theodore Roosevelt, joined him in his dissent in *Berea College*.

A different jurisprudence would not have eliminated racism in America. Southern legislatures would have still worked to establish white supremacy where they could. In the North there would have been some discrimination and prejudice. But a different jurisprudence would have made segregation more difficult and perhaps have made integration come sooner and with less pain. Certainly the moral stature of the Court and its legacy would have be different.

As the legal scholar Richard Aynes has forcefully noted,

> [a]s long as John Harlan's dissent remains in volume 163 of the United States Reports, no one can say with accuracy that the *Plessy* decision was merely a product of its times. Justice Harlan bears witness to the fact that there were other possibilities open to the Court and that there were people who lived in those times who were not as inhibited by racist views as the majority of the Court was in Plessy.[317]

Indeed, racial attitudes for this period are not simple to describe or understand. But, there was room for alternative views on race and civil rights at this time.

This unknown and "hidden" history of northern civil rights from the Civil War to World War I underscores that there were important alternatives for race relations from the end of Reconstruction to the inauguration of Woodrow Wilson. In this period the Court was not merely following public opinion in its civil rights jurisprudence. On the contrary, the Court made a conscious choice to placate the white South and ignore the sentiments of both black southerners and huge numbers of white northerners. The tragedy of court sanctioned segregation and racism was not an inevitable result of the political culture of the age. The Court of this period might have even been heroic in these cases. But, with the exception of Harlan and later Justice William R. Day, the Justices chose to reject equality, and the obvious goals of the Civil War Amendments. This was indeed villainous.

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[317] Richard L. Aynes, *An Examination of Brown in Light of* Plessy *and* Croson*: Lessons for the 1990s*, 7 HARV. BLACKLETTER J. 149, 154 (1990).

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