I. INTRODUCTION .............................................. 38

II. THE FOURTEENTH AND FIFTEENTH AMENDMENTS BECOME BUT HIDEOUS MOCKERIES .............................................. 40

III. EARNESTLY DISCUSSING THE DECISIONS .............................................. 44

IV. FEDERALISM .............................................. 50
A. Preserving The Main Features Of The General System .............................................. 51
B. The Cause Of All Our Woes .............................................. 51

V. CLASS LEGISLATION .............................................. 53

VI. CLASS LEGISLATION IN THE BLACK PRESS .............................................. 61
A. The Bane Of The Negro Is Legislation Especially For The Negro .............................................. 61
B. The Negro Is A Citizen And Must Be Protected .............................................. 66
1. The same rights as are enjoyed by other people .............................................. 67

2. We object to being put on a level with them .............................................. 68

VII. CONCLUSION .............................................. 71

1. INTRODUCTION

The years 1873-1883 form perhaps the most important decade in United States constitutional history.\(^1\)

In the course of deciding a steady stream of cases involving the Thirteenth, Fourteenth and Fifteenth amendments,\(^2\) the Supreme Court laid the basis for the next century of the constitutional law of civil rights and civil liberties. Unfortunately, it was a "dreadful decade."\(^3\)

In decision after decision, the Court struck down federal laws designed to protect civil rights and civil liberties, and devitalized the new amendments.

These early civil rights decisions of the United States Supreme Court provoked a significant response in the African American community. Discussion of the decisions, especially the Civil Rights Cases (1883), was a major theme in the African American press of the time.\(^4\)

that "Congress shall have power" to enforce the amendment by means of "appropriate legislation."


4. By "African American press" or "Black press," I mean the press edited by Blacks and intended for a primarily Black audience. See Roland Wolseley, The Black Press U.S.A. 3-23 (1990). The papers of this period were usually published weekly, were around four pages in length with five or six columns per page. They were usually highly partisan, and reflected the personality of their owners and editors. Subscriptions were usually one or two dollars per year. Philip M. Mabe, Racial Ideology in the New Orleans Press, 1862-1877, at 29-30 (University of Southwestern Louisiana Ph.D. 1977); Georgetta M. Campbell, Extant Collections of Early Black Newspapers: A Research Guide to the Black Press. 1880-1915, at xiv (1981).


\(^1\) Law Clerk, Honorable James T. Giles, United States District Court for the Eastern District of Pennsylvania. B.S., Oklahoma State University 1978; Ph.D., State University of New York at Stony Brook, 1984; J.D., Yale Law School, 1992. The author would like to thank Bruce Ackerman for his early encouragement of this project, and Deborah Freedman for her constant editorial help. This article is dedicated with special thanks and appreciation to the members of P.A.C.T. (Project for a Calculated Transi-

\(^2\) See Civil Rights Cases, 109 U.S. 36 (1883) and ends with the

\(^3\) The period opens with the Slaughter-House Cases, 83 U.S. 36 (1873) and

\(^4\) These early civil rights decisions of the United States Supreme Court provoked a significant response in the African American community. Discussion of the decisions, especially the Civil Rights Cases (1883), was a major theme in the African American press of the time.\(^4\)

that "Congress shall have power" to enforce the amendment by means of "appropriate legislation."
The Black press reported mass meetings and speeches which were held in response to the decisions and filled its columns with letters, editorials and “exchanges” discussing the reasoning and implications of the decisions.

Black Americans responded to these civil rights decisions on many different levels. The few favorable decisions naturally provoked praise for the Court and hopes for the future, while the unfavorable decisions generated condemnation and fear. But African Americans and their press responded to these decisions on a much more complex level than mere cheering or hissing: they engaged the legal reasoning of the Supreme Court majority and made legal arguments. In effect, African Americans wrote and spoke dissents to the unfavorable opinions of the Supreme Court. Taken together, these African American dissents define an alternative Constitution, a Constitution which differs drastically from the official version proclaimed by the Supreme Court.

Since the African American dissenter’s alternative Constitution was rooted in the experience of oppression, it was often freed of the abstraction and formalism of mainstream legalism. From their position at “the bottom” of American society, the dissenter’s in the African American press could see more clearly the reality of


The Black press of this time usually published excerpts from other papers (usually Black) around the country as part of a program of “exchanges.” Columns written by subscribers in other cities were also common. Thus, the reported response to civil rights decisions has a much broader geographic range than is indicated by simple reference to the cities of publication given in note 4.

6. They also wrote what were effectively concurrences to decisions which they regarded as favorable. See infra Section VI.A.


8. See Looking to the Bottom, supra note 7.


10. See, e.g., Civil Rights Cases, 109 U.S. 3 (1883) (Fourteenth Amendment reaches only state action); Ex Parte Virginia, 100 U.S. 339 (1880) (discriminatory action by a state judge, even in the absence of a discriminatory statute, is state action for Fourteenth Amendment purposes). The Slaughter-House Cases, 83 U.S. 56 (1879), effectively gutted the Fourteenth Amendment’s privileges or immunities clause.

11. For example, although the Civil Rights Cases’ holding that the Fourteenth Amendment only reaches state action remains intact, there has been a great deal of litigation concerning the existence, magnitude, and significance of a discriminatory actor’s connection to the state. See, e.g., Shelley v. Kramer, 334 U.S. 1 (1948) (courts in enforcement of racial covenant); Terry v. Adams, 345 U.S. 461 (1953) (primary run by private club); Burton v. Wilmington Parking Authority 365 U.S. 715 (1961) (restaurant in city-owned parking lot refuses to serve Blacks); Bell v. Maryland 378 U.S. 226 (1964) (state court enforcement of trespass laws against black sit-in participants); Moose Lodge No. 107 v. Iww, 407 U.S. 163 (1972) (private club with state liquor license refuses to serve Blacks); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (discontinuance of service by privately owned utility licensed and regulated by state public utilities commission); Hudgens v. NLRB, 424 U.S. 507 (1976) (threats of arrest made to union picketers by shopping mall owner); Blum v. Vartetsky, 457 U.S. 991 (1982) (discharge or transfer to lower level of care of Medicaid patients by privately owned nursing homes receiving reimbursement from the state for caring for Medicaid patients); Bennett-Baker v. Kohn, 457 U.S. 830 (1982) (discharge of employees by private school whose income comes primarily from public sources and which is regulated by public authorities).

12. One issue of modern importance which is conspicuously absent from the Black press is discussion of the meaning of the Fourteenth Amendment’s Due Process Clause. This may be partly an artifact of the particular issues presented in cases during this period, and partly due to the fact that the Due Process Clause did not yet achieved the prominence it later acquired as a means of securing “fundamental” rights against state interference. See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 14-30 (1980).

13. For a much more detailed discussion than I can possibly give here, see David Wycoff, Death Dealing Decisions: The African American Press Responds to Early Supreme Court Civil Rights Opinions (manuscript on file with the author).
ers in the African American press, yet which barely figured on the surface of the Supreme Court's opinions: the relationship of federal civil rights laws to what was known as "class legislation." Class legislation is not even a category for legal analysis in modern constitutional law. But it figured heavily in the legal reasoning of the nineteenth century, and it was bitterly divisive among writers in the Black press.14

A discussion of legal theory in the Black press must be grounded in an understanding of the main constitutional issues facing the nation after the Civil War. In the next section I will discuss the cases, from Slaughter-House15 to the Civil Rights Cases,16 which defined the Supreme Court's civil rights jurisprudence from 1873-1883. In Section III, I will describe the enormous response that these decisions generated in the African American press. Since the main doctrinal issue before the Court in these cases was the impact of the Reconstruction amendments on the federal system, I will next discuss the Court's theory of federalism and the alternative ideas expressed in the African American press. While the Court was attached to the old federal system, and attempted to preserve as much of it as possible, African Americans saw state power as a source of oppression, and were willing to jettison the old dual-federalist system in favor of a strong nation-state. African American detachment from dual-federalist assumptions brought other legal issues to the fore. In particular, the role to be played by "class legislation" was an important concern of writers in the Black press. In section V, I discuss the concept of class legislation, and the way it was used by some Republicans to justify a retreat from the activist state which had made Reconstruction. Finally, in Section VI, I discuss attitudes toward class legislation in the African American press.

The national legal landscape is bleak for progressive lawyers in 1992. It is my hope that by examining the words and ideas of the dissenters in the African American press of 100 years ago we can both rediscover a lost jurisprudence of equality and sustain our own hopes and ideals during a time when "[o]ne by one the safeguards that were placed around the liberties of the people are being torn down."17 The dissenters in the Black press have more to offer us than just an inspiring example of resistance. By looking to their Constitution, progressive lawyers can find a source of insight and values which will help us make choices today. As we construct our own "Constitution of Aspiration," we can make the move from critical theory to critical practice.18

II. THE FOURTEENTH AND FIFTEENTH AMENDMENTS BECOME BUT HIDEOUS MOCkERIES

African Americans' antebellum experience gave them little reason to expect favorable decisions from the United States Supreme Court. In the years before the Civil War, the Court had interpreted a Constitution whose text was ambiguous about slavery in ways that threw the power of the national government behind the institution. The Court upheld the constitutionality of the Fugitive Slave Acts of 179319 and 1850.20 It struck down state personal liberty laws that were designed to protect fugitive slaves and to prevent free Blacks from being kidnapped into slavery.21 It held that even free Blacks were not citizens of the United States.22 It held that Congress was without power to prohibit slavery in the territories.23 The Court's reasoning in Dred Scott even led to speculation, by both pro- and anti-slavery forces, that the free states might not be able to maintain their bans on slavery.24 In addition, the Court held that the Bill of Rights was a limit only upon the federal government,25 thus depriving anti-slavery agitators of Con...

14. Perhaps the closest analog to the nineteenth century debate over class legislation and civil rights laws is the current debate over affirmative action. Both debates are framed around conceptions of equal protection, and both are divisive within the African American community. I will not address the modern debate over affirmative action in any detail in the text, but will occasionally mention parallels and cite to modern cases in the footnotes. On the modern affirmative action debate, see, e.g., Stephen Carter, Reflections of an Affirmative Action Baby (1991); Gertrude Ezorsky, Racism and Justice: The Case for Affirmative Action (1991).

15. 85 U.S. 36 (1875).
18. See especially, When the First Quail Calls, supra note 7; Looking to the Bottom, supra note 7.
20. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, upheld in Dred Scott v. Sandford, 60 U.S. 393 (1857), and Adben v. Booth, 62 U.S. 506 (1859). Since all nine Justices wrote opinions in Dred Scott, there has always been controversy as to what parts of the decision were holdings and what parts were dicta. For a good discussion of the Dred Scott case and the Court's opinions, see, Harold Hyman & William Wiecek, Equal Justice Under Law: Constitutional Development 1835-1875, at 172-192 (1982). One modern commentator on the case has concluded that "As a matter of historical reality,... the Taney opinion is, for all practical purposes, the Dred Scott decision." Id. at 180 (quoting Don Feinrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 333-334, 337 (1978) (emphasis in original)). This certainly seems to be the consensus in the Black press of 1873-83.
23. Id.
stitutional protection from hostile slave-state governments. 26

Thus, by the eve of the Civil War, the Court had created a radically pro-slavery Constitution. 27 This pro-slavery legal theory, complemented by the pro-slavery political ideas of state sovereignty associated with John C. Calhoun, 28 envisioned a national government that was not just a neutral bystander, but an active protector and even promoter of slavery. 29

Before the war, African Americans "had no rights the white man was bound to respect." 30 But the war and its constitutional aftermath had brought about "a change — a great change," 31 which gave African Americans new cause for hope. African Americans had "been made citizens." 32 The United States thus emerged from the Civil War with the potential to start anew as a "purely fre
died Republic." 33 free of the taint of slavery and caste. 34 Appropriately, the new era began with a renewed Court, dominated by appointees of the Republican party which had led the fight for Union and against slavery. 35

Ironically, the Supreme Court first confronted the implications of the new-modeled Constitution in a case that did not involve the rights of the African Americans who had so recently been "clothed in full citizenship." 36 Instead, the Slaughter-House Cases 37 addressed the claims of white butchers in Louisiana who claimed that a state law giving a single corporation a monopoly over the slaughter of livestock condemned them to involuntary servitude in violation of the Thirteenth Amendment and denied to them the privileges and immunities of United States citizenship guaranteed by the Fourteenth Amendment. 38

In an opinion written by the extreme pro-slavery Justice Daniels of Virginia, the Supreme Court narrowly interpreted the first amendment's right of petition against the federal government, at one point when the right to petition was one of the primary weapons of the anti-slavery movement and one of the central issues dividing pro and anti-slavery forces. White v. Nichols, 44 U.S. 266 (1845). See Eric Schnapp, "Libeluous" Petitions for Redress of Grievances — Bad Histrionography Makes Worse Law, 74 IOWA L. REV. 305, 306 n.27 (1989).

26. Southern States reacted to a rising tide of abolitionist sentiment in the 1830s by passing laws restricting freedom of speech and press, and requiring postmasters to search for abolitionist literature. The right of the Southern States to ban abolitionist publications from the mail was upheld by Andrew Jackson's postmaster general. No State Shall ABRIDGE, supra note 24, at 30-31.

27. Garrisonian abolitionists accepted a pro-slavery interpretation of the Constitution with a vengeance, denounced the Constitution as a "covenant with death" and abjured all political activity. However, many "political abolitionists" rejected the Garrisonian's moral purity in favor of a more pragmatic approach to anti-slavery work that included electoral politics. This political activity was complemented by the development of abolitionist legal theories that used the language (and silences) of the Constitutional text to construct an anti-slavery Constitutionalism. See e.g., FREE SOIL, FREE LABOR, FREE MEN, supra note 24 at 73-102; WALDO E. MARTIN, JR., THE MIND OF FREDERICK DOUGLASS 37-38 (1984); Robert Cover, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 134-58 (1975); JACOBUS TENDERICK, EQUAL JUSTICE UNDER LAW 43-56 (1995); No State Shall ABRIDGE, supra note 24, at 42-48.

28. See, e.g., EQUAL JUSTICE UNDER LAW, supra note 20, at 15-17, 139-140, 211-213.

29. See, e.g., Dred Scott v. Sandford, 60 U.S. 393, 426 (1857) ("The government of the United States had no right to interfere [with the slave states] for any other purpose but that of protecting the rights of the [slave] owner . . . "); Id. at 452 ("The only power conferred on Congress in the territories is the power coupled with the duty of guarding and protecting the [slave] owner in his rights."); EQUAL JUSTICE UNDER LAW, supra note 20, at 183-189.

30. Freedmen in the United States a Mockery, Cleveland Gazette, Dec. 15, 1883 at 1 (call for a state convention of Black men, to be held in Columbus, Ohio, on December 26, 1883). The words, of course, echo the infamous statement of Justice Taney in Dred Scott: At the time of the founding, according to Taney, African Americans "had no rights which the white man was bound to respect." 60 U.S. at 407.


32. Id. Although the author believed this to be "a great change," he or she recognized the limitations of formal recognition of citizenship:

We have been made citizens; we have been tendered better recognition; yet when the proud Caucasian speaks of our free country, we as colored men cannot join in the chorus.

The year grew and with the passage of time the country would pass itself as one man and in thunder tones demand that the Constitution be carried out to a letter, demand that our rights secured to us by the Constitution be a reality, not the mere word. See also, Essence and Practice of Law, New York Globe, July 7, 1883 (speech given by Mr. R.S. Smith, Washington correspondent of the Globe at Howard Law School commencement):

By the last amendments to the Constitution, all men were made full-pledged citizens in the eyes of the law. But what are the practices with regard to these acts? May not a citizen be refused the most vital provisions of these acts within the very precincts of the capital without attracting any noticeable comment? The truth is, our ability to create law has grown with our growth, but our power or disposition to enforce it has not strengthened with our strength. It were far better never to have added amendments to the Constitution, only to be defied and ignored. Each article, each section, each clause, each word of that magna charta of human rights should be held sacred and inviolable; and just so far forth as any part of it is openly disregarded, does the whole lose its potency and effect.


34. See, e.g., Mr. Justice Harlan's Opinion of Civil Rights, New York Globe, Nov. 24, 1883 at 2 ("[W]e had a great war and among the things it forever doomed to the devil was colorphobia in the Constitution.").

35. The infamous Chief Justice Taney died in 1864. By 1872, only one Justice, Clifford, had been appointed by a Democrat (Buchanan). Five Justices (Chase, Swayne, Davis, Field, Miller) had been appointed by Lincoln, and three (Bradley, Hunt, Strong) by Grant. By 1883, no Democratic appointees remained on the Court, GERALD GUNther, CONSTITUTIONAL LAW B2-B3 (11th ed. 1985).

36. The Rights And Wrongs of the Colored People, Christian Recorder, November 8, 1883 at 2 (article reprinted from the Cincinnati Enquirer). The Christian Recorder, published in Philadelphia since 1843, was the official organ of the African Methodist Episcopal Church. Its editor in 1853 was the Reverend B.T. Tanner.


38. App. 83 U.S. 56 (1873).

39. In one sense, the fact that white butchers were the plaintiffs in this case was not at all ironic. The butchers who challenged the monopoly were small entrepreneurs, and "exemplars of the 'free labor system'" which had animated Republican ideology before
Justice Miller’s opinion for the Court drastically narrowed the protection provided by the Fourteenth Amendment by claiming that the amendment distinguished sharply between United States citizenship and state citizenship.39 The Fourteenth Amendment’s privileges and immunities clause, Miller argued, brought only those “privileges and immunities” of national citizenship under the protection of the national government. Privileges and immunities of state citizenship would be left to the state to protect, as they had been before the war.40 This interpretation was not necessarily destructive of the nation’s power to protect fundamental rights. If most rights were identified as privileges or immunities of national citizenship, with a few residual rights entrusted to state protection, the ability of the federal government to protect its citizens would not have been seriously impaired. However, the Slaughter-House Court took exactly the opposite approach. The Court identified the privileges and immunities of state citizenship broadly, as “nearly every civil right for the establishment and protection of which organized government is instituted.”41 The privileges and immunities of United States citizenship, on the other hand, were held to be a narrow class of rights which “owe their existence to the Federal government, its national character; its Constitution, or its laws.”42

With its narrow reading of the Fourteenth Amendment’s Privileges and Immunities Clause, the Slaughter-House Court took what was in retrospect the first step toward gutting the national protection of civil rights and civil liberties. However, the Court left some room for optimism when it indicated that it might not take such a narrow view when the rights of African Americans were the subject of litigation, since the “one pervading purpose” of the Reconstruction Amendments was “the freedom of the slave race.”43 Robert Brown Elliott, an African American Congressman from South Carolina,44 expressed this optimistic reading in 1874 when he said that the Slaughter-House Court “declared [the Reconstruction Amendments] to have as their all-pervading design and end the security of the recently enslaved race, not only their nominal freedom, but their complete protection from those who had formerly exercised unlimited dominion over them.”45 Elliott recalled the “shame and humiliation” that the Court brought upon itself and the country in the era of Dred Scott, but concluded that “those days are past. The Supreme Court of today is a tribunal as true to freedom as any department of this government.”46

Over the course of the following decade, the
Supreme Court shattered any early optimism that its reading of the Reconstruction amendments would be more generous when the rights of African Americans were at stake. While the Court continued to make ringing pronouncements about the nation's commitment to African American equality, its decisions brutally contradicted its occasional bursts of inspiring rhetoric. The Court struck down portions of an 1870 Act designed to protect African American voting rights. It held that the right to bear arms, freedom of assembly, and the right to jury trial were not privileges or immunities of United States citizenship. The Court held that a Louisiana statute forbidding discrimination on public carriers was an impermissible burden on interstate commerce. In a series of decisions, the Court affirmed the rights of African Americans to serve on state juries without discrimination, but restricted federal supervision of state trials so severely that its promises became illusory.

The nightmarish quality of the years 1873-83, as Reconstruction was smashed and the Supreme Court gutted the possibility of effective enforcement of civil rights, was captured by the Petersburg Lancet in 1883: "One by one [the Reconstruction enactments] are expunged [from the statute books]. One by one the safeguards that were placed around the liberties of the people are being torn down, and they are left to the tender mercies of unrelenting prejudice." In the hands of the United States Supreme Court, "the 14th and 15th amendments [had] become but hideous mockerys."

The final blows were struck by the Supreme Court 10 years after the Slaughter-House majority declared that the "one pervading purpose" of the Reconstruction Amendments was African American liberation. In United States v. Harris, decided in January of 1883, the Court declared the criminal conspiracy section of the 1871 Ku Klux Klan Act to be unconstitutional, effectively gutted the possibility of effective enforcement of civil rights...


48. See, e.g., Slaughter-House v. United States, 100 U.S. 305, 307 (1886) (repeating the assertion of Slaughter-House, supra note 45, about the "one pervading purpose" of the Reconstruction amendments).


50. United States v. Cruikshank, 92 U.S. 542 (1876) (arms and assembly). Walker v. Sauvinet, 92 U.S. 90 (1876) (jury trial). The Court held that the rights spelled out in the Bill of Rights were not among the privileges or immunities of United States citizenship. They were simply limitations on Congressional power.

Cruikshank arose from the infamous Colfax massacre. Ninety-eight whites were indicted in federal court after violently breaking up a meeting of African Americans. Over sixty Blacks were killed. Only 9 of the whites were actually brought to trial, and three were convicted in Louisiana federal court under the Enforcement Act of May 31, 1870. The Supreme Court reversed the convictions, arguing that such acts by private individuals could be a federal crime only if the disrupted meeting had an object connected with national citizenship. Since the meeting was convened to discuss state elections, it was beyond the protection of the federal Constitution. RECONSTRUCTION AND REUNION, part 2, supra note 47, at 261-76; No State Shall Abridge, supra note 24, at 1273-74; see also J. Peter Magrath, Morrison R. Waite: The Triumph of Character 146-47 (1965) (After River, "the Negro's right to freedom in the selection of juries became meaningless. All that was necessary to keep Negroes off juries was the avoidance of open, public discrimination."). For an in-depth discussion of the jury cases and their implications, see Benno Schmidt, "The Right to Jury Trial After Reconstruction," 63 Tex. L. Rev. 1 (1984).


52. Strauder v. West Virginia, 100 U.S. 303 (1880) (statute confining jury service to whites unconstitutional); Ex parte Virginia, 100 U.S. 339 (1880) (state judge who excluded African Americans from jury lists may be prosecuted under Civil Rights Act of 1875).


55. The Nashville Convention, Colored Tribune, April 1, 1876 (announcing a national convention of Black men to be held in Nashville, Tennessee). On the role played by conventions in galvanizing African American political participation after the war, see RECONSTRUCTION, supra note 50, at 110-119; W.E.B. Du Bois, Black Reconstruction in America, 1860-1880, at 230-235, 361-367 (1962). For a collection of speeches and discussions from these conventions, see PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865-1900 (Philip Foner & George Walker eds. 1986).

56. 83 U.S. at 71.

57. 106 U.S. 629 (1883). Justice Woods wrote the opinion for a unanimous Court. Harris arose from a racist atrocity in Tennessee. Four African Americans were taken from a deputy sheriff by a white lynch mob and beaten so brutally that one later died.

58. Act of April 20, 1871, ch. 22, 17 Stat. 15. This Act was also known as the Force Act of 1871. The Supreme Court held that it reached private racist conspiracies. Griffin v. Breckinridge, 403 U.S. 207 (1971). The Griffin Court recognized that Harris seemed to imply the unconstitutionality of § 1875 (3), since the language of the provision struck down in Harris is basically the
tively putting lynching outside the jurisdiction of the federal courts. On October 15, 1883, in the Civil Rights Cases, the Court struck down the provisions of the Civil Rights Act of 1875, the Sumner Act, which had prohibited private acts of racial discrimination in theatres, inns, public conveyances and other places of public amusement. In both cases the Court held that the Fourteenth Amendment protected African Americans only from discrimination by the state or its agents. While the Court recognized that the Thirteenth Amendment authorizes legislation reaching private action, and "clothes congress with the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery," the Amendment was held not to authorize the legislation at issue. The vast majority of everyday "private" acts of oppression could not be penalized by federal criminal or civil law. African Americans would have to look to the states for the protection of the vast majority of their rights.

III. EARNESTLY DISCUSSING THE DECISIONS

The cases of 1883 came "like an avalanche, carrying [African Americans'] fondest hopes down the 'hill of despair,' and burying them." Five days after Justice Bradley read his Civil Rights Cases opinion from the Bench, the New York Globe proclaimed

"The colored people of the United States feel today as if they had been baptized in ice-water. From Maine to Florida they are earnestly discussing the decision of the Supreme Court declaring the Civil Rights Law to be unconstitutional. Public meetings are being projected far and wide to give expression to the common feeling of disappointment and apprehension for the future."

The decisions, especially the Civil Rights Cases, provoked an enormous response in the African American community and its press. Discussions, debates, and meetings about the decisions took place all over the country, and the Civil Rights Cases opinion was "the principle topic of discussion in all circles, whether social, religious or political." A mass meeting in Washington D.C.'s Lincoln Hall to discuss the Civil Rights decision was "the largest meeting ever gathered in a Washington
Hall." 48 "There were over 2,000 persons inside the doors and double that number turned reluctantly away," 49 An indignation meeting held in a small town in Texas so frightened the white authorities that the state militia was called out. 70 Editors of African American newspapers apologized to their readers that they could not "begin to publish one-half of the opinions given by colored men all over the country on 'The Civil Rights' decision." 71 The decision was the dominant news story in the African American press for at least a month after it was handed down on October 15, 1883. 72

Even six years later, the Civil Rights Cases still haunted African Methodist Episcopal Bishop Henry Mc-

Neal Turner. 73 When asked, in 1889, to write an essay about the decision for the New York Voice, Bishop Tur-

It is to me a matter of wonder . . . to find a single, solitary individual who belongs in the United States, or who has been here for any con-

45 siderable time, unacquainted with those famous FIVE DEATH DEALING DECISIONS. Indeed sir, those decisions have had, since . . . the day of their pronouncement, more of my study than any other civil subject. 74

I (exchange from Detroit Plaindealer) ("The decision . . . causes a universal disapproval of the people, both white and colored, in Detroit."); Bad Blunders, Christian Recorder, Nov. 15, 1883 at 1 (Rev. I.F. Aldridge criticizes the decision, then goes on to discuss questions of church (A.M.E.) doctrine.).

The following headlines illustrate the extent to which dis-

68. Civil Rights Decision: An Immense Mass Meeting of the Colored Citizen-


72. It is revealing to contrast this reaction in the African American community and press to the following report in a white paper: "The calm with which the country receives the news shows how completely the extravagant expectations . . . of the war have died out." New York Evening Post, Oct. 16, 1883 (quoted in C. Vann Woodward, RECONSTRUCTION AND REUNION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 245 (1966)). For a more exten-

sions for warfare costing more than $8,000. The next day he-

70. This story was reported in a number of papers. See Arkan-

sas Mansion, Nov. 17, 1883 (exchange from the Topeka (Kansas) Tribune); Huntsville Gazette, Nov. 3, 1883 (incorrectly dated as October 27 on inner pages); The Colored People of Texas: White Folks Fearfully Frightened by a Negro Meeting, Petersburg Lancet, Nov. 24, 1883 at 3 (from a report in the Conservator). The details of what happened differ slightly from paper to paper, but the basic idea is con-

71. Political — Civil Rights — Society Gossip — A Marriage

Cleveland Gazette, Oct. 20, 1883 at 2.

68. Civil Rights Decision: An Immense Mass Meeting of the Colored Citizens and Their Friends at Lincoln Hall, Cleveland Gazette, Oct. 27, 1883 at 1.

69. Another mass meeting was reported in Civil Rights: The Harmonious and Enthusiastic Mass Meeting at Halcyon Hall Last Monday Evening, Cleveland Gazette, Nov. 3, 1883 at 2 ("Quite a crowd of ladies and gentlemen assembled . . . to take some action in regard to, and hear discussed the recent infamous decisions of the Supreme Court.").

67. One of the African American press for at least a month after it was handed down on October 15, 1883. 72
These "death dealing decisions" left African Americans with the feeling that they had "been abandoned by the government and left to the laws of nature." The despair and anger engendered by the decisions was captured by the New York Globe when it proclaimed: "There is no law in the United States for the Negro. The whole thing is a beggarly farce." "We are aliens in our native land."77

The Supreme Court's destruction of civil rights legislation created a painful dilemma for the African American community. While the Court's decisions relinquished the law to oppression, African Americans' earlier experience during Reconstruction showed them that law, when held to its promises, could also be a weapon of liberation. As Professor Mari Matsuda has written, those who have been excluded by the dominant culture have learned to approach this dilemma "with characteristic duality." They are "aware of the historical abuse of law to sustain existing conditions of domination," but at the same time they "have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice."78

Professor Matsuda has eloquently expressed the dualist response:

There are times to stand outside the courtroom door and say "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood." Sometimes . . . there is a need to make both speeches in one day.79

Both types of responses appear in the African American press. Sometimes writers "stand outside the courtroom door" and heap scorn upon the Court and the nation which could tolerate so many years of oppression. Sometimes they "stand inside the courtroom" and "and in thunder tones demand that the Constitution be carried out to a letter."80 Often, both approaches appear in the same speech or article.

Perhaps the most powerful voice of the African Americans standing "outside the courtroom door" was that of Reverend Henry McNeal Turner. Turner believed that

the [Civil Rights] decision merits no moderate talk; it should be branded, battle-axed, sawed, cut and carved with the most bitter epithets and blistering denunciations that words can express. We want fire-eaters now a thousand times [more] than we do conservatives. The nation deserves and will receive, if it lets that decision stand, the hiss of man, the curse of God, and the ridicule of the ages.81

For Turner, the Court's decisions "absolve[d] allegiance of the negro to the United States."82 Moreover: "If the decision is correct, the United States constitution is a dirty rag, a cheat, a libel, and ought to be spit upon by every negro in the land."83 Turner went so far as to say "the negro hereafter who will enlist in the armies of the government, or swear to defend the United States Constitution ought to be hung by the neck."84

Most writers in the African American press were not quite as biting as Turner in their attacks on the Court or the Constitution.85 But it was a common feeling that the Court "deserve[d] the contempt of our race and all fair-minded persons of every race."86 The delivere
erers of adverse opinions were described as "small men," "judicial notndescript[s]," "a "narrow minded body of judicial owls," "gout-breeders," or "a "conclave of human donkeys." Comparisons of Justices Bradley and Woods to "the infamous, the execrable Chief Justice Taney," that "reactionary, unrepentant, bigoted Maryland lawyer [who] had no right to stamp on this land his low native prejudice," were common, as were comparisons of the 1883 decisions to Dred Scott and other antebellum decisions. Writers in the Black press complained that the Court was racist, that it was improperly influenced by corporations, and that the adverse decisions were part of a political scheme to curry favor with the white South.

Henry McNeel Turner's "battle axe" approach to the decisions was in tune with his political project for African American liberation. Turner had concluded by 1883 that it was hopeless to try and defeat racism in the United States, and urged African Americans to "prepare to return to Africa, or get ready for extermination."
Most African Americans, however, probably agreed with a writer in the Christian Recorder: "It is just as well that the white people understand it, that the Western world is not to be the home of the white man only... . The black man is here also, and he proposes remaining. He proposes to live in amity and equality with his neighbors. If, however, there is to be a conflict, he will not alone be the sufferer. The under rai cannot be destroyed without bringing down the upper.

In the meantime we say to our brethren: Husband your resources. See to it that you preserve your health. Get information. Know once for all that you must depend upon your resources. See to it that you preserve your health. Get information. Know once for all that you must depend upon

W.H. Brooks... said... (the white people of that section [the South] did not care how intelligent, how thrifty, how moral a colored man was, they placed him below the position of the poorest and meanest white. [The best solution] was a wholesale emigration to the west. Leave the South deserted, compel the whites to labor and it was possible that a beneficent result would follow."). On Colonization and westward migration after the end of Reconstruction, see August Meier, Negro Thought in America, 1880-1915: Racial Ideologies in the Age of Booker T. Washington 59-68 (1988); Reconstruction, supra note 50, at 598-600; Nell Painter, Exodusters: Black Migration to Kansas After Reconstruction (1977).

101. The Recent Decision, Christian Recorder, Oct. 25, 1883 at 2. It is worth quoting this article at greater length:

The very idea is humiliating in the extreme. That we, with four generations of American blood flowing in our veins, shall hold our rights at the sufferance of men who have not one generation of such blood behind them, is simply maddening. And yet this is precisely what the recent decision of the Supreme Court makes possible. The rights of colored men whose fathers fought through the battles of the Revolution that made the Republic possible, placed at the souffrance of white men whose fathers fought on the opposite side! We say nothing of the war of 1812 and the greater war of 1860. Was there ever a people for such base ingratitude?... [Be] strong and defensively defiant. If the white people of the country insist on widening the breach between the two races, let them widen it. We have as little to lose as they, even less. A disturbed country affects only its capital, which the whites have taken pains to keep from us; save only, and thanks to them for it, the capital of strong arms and broad feet—feet prepared to stand the flow of even an Alpine brook. We are seven millions strong today. How rapidly we are increasing let the last census tell. If they were wise they certainly would not make it necessary for us to store up feelings that only the conscious weakness of to-day keeps from breaking out. But we are not always going to be weak; not always going to hold our rights at the sufferance of any. To-morrow we will have enough strength to defend our own rights, and if the white people, which we already possess will not be called into play to hold it in suspense.

It is just as well that the white people understand it, that the Western world is not to be the home of the white man only... . The black man is here also, and he proposes remaining. He proposes to live in amity and equality with his neighbors. If, however, there is to be a conflict, he will not alone be the sufferer. The under rai cannot be destroyed without bringing down the upper.

In the meantime we say to our brethren: Husband your resources. See to it that you preserve your health. Get information. Know once for all that you must depend upon yourself.

See also, Be Men, Petersburg Lancet, Dec. 29, 1883 at 2: It is true that the Negro does not enjoy all his political and civil rights as does the whites. It is true that we are ostracized and grovelled and ill-treated;... it is true that on account of the color of our skin we are maliciously abused: but then all these things being facts, shall we give up in despair? Shall we desert the land of our nativity hallowed in tears, enriched with their blood, filled with their hard hands," and "made productive and beautiful," they needed to use every means of protest which was available to them. Turner's battle axing of the Supreme Court's decisions had to be just one part of a multi-faceted resistance to racist America. Others
had to "stand inside the courtroom" and lay claim to the Constitution.

The African American people resisted slavery with all the means that were available to them for over 200 years. Part of that resistance had been to claim the promises of the Constitution as their own, even when the Court and the nation said that African Americans were not among "the People" for whom the Constitution was created. Political abolitionists, and their anti-slavery interpretations of the Constitution, had ensured that even during the bleakest days of slavery the meaning of the Constitution was contested terrain. African Americans were not about to give up that terrain now, "when the power of the Constitution has been made stronger, more unequivocal, more explicit upon the question of individual rights than when the Supreme Court upheld the right of the slave trader." The Reverend Benjamin T. Tanner, writing in the wake of the Civil Rights Cases, spoke for many in the African American community when he laid claim to the Constitution, and denied that the Supreme Court had the final say in its interpretation:

In the Constitutional administration of the status of the negro . . . was virtually settled in 1872, when every Democrat and Republican . . . voted for his rights and drove the negro question out of politics.

The legislative history of the 1875 Civil Rights Act makes Bishop Turner's argument that both parties' 1872 platforms endorsed the content of that Act problematic. Senator Sumner first introduced his bill in 1870. The original bill guaranteed equal access to public schools, churches, cemeteries, juries, public transportation and public accommodations. The bill failed. Sumner reintroduced the bill at each session of Congress. The bill was finally passed, shorn of the church, school and cemetery provisions after Sumner's death in 1874. James M. McPherson, Ordeal By Fire: The Civil War and Reconstruction 576-77 (1982); Black Reconstruction, supra note 55, at 591-94. For a more detailed account of the 1875 Act's legislative history, see Reconstruction and Reunion, part 2, supra note 47, at 156-84. Though both major candidates' platforms in 1872 contained broad calls for legal equality, majority support for the Sumner Act could not be mustered in Congress at that time. Some modern commentators, and some writers in the Black press, thought that the bill was passed more as a memorial to Charles Sumner than out of a genuine commitment to civil rights. See, e.g., Ordeal By Fire, supra, at 576; Arkansas Mansion, Nov. 10, 1883 at 1 ("The bill was chiefly valuable as a monument of the life work and character of . . . Charles Sumner.").

Although Bishop Turner's argument is less than convincing on its merits, it is intriguing. The idea that a statute of questionable constitutionality could be given constitutional stature in a sort of referendum by national election is strikingly similar to the ideas of some modern scholars. See, e.g., Bruce Ackerman, Triggering Ratification: The Electoral Mandate for the Fourteenth Amendment, Ch. 9 of Discovering the Constitution (manuscript on file with the author 1986) (elections of 1866 as mandate on fourteenth amendment); Rethinking the New Deal, Ch. 13 of Discovering the Constitution (manuscript on file with the author 1988) (elections of 1936 as mandate for New Deal); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988) (amendment by national referendum); No State Shall ABRIDGE, supra note 24, at 131 (election of 1866 as referendum on presidential versus radical reconstruction).

Government . . . the six millions and a half colored citizens have as much interest as any other equal number, of whatever descent . . . They know too well that as relates to citizenship they are Americans or they are nothing. Nor has this "liberty" been attained by them at any small price; for the country itself will bear witness that we have paid as great price as any, and greater than most. To say nothing of our enforced immigration and our passive suffering, we absolutely won the boon by helping fight the battles of '76, which made the Republic possible, the battles of '12, which made it respected, and the battles of '60, which made, as the glorious Sumner said, "the Nation national." We say therefore we have won the right of American citizenship, which no power on earth can make us willingly surrender; and therefore do we realize the duty involved of seeing the Government Constitutionally administered.

The recent Supreme Court decision — is it correct? If it be, we of the seven millions are just as ready to receive it as they of the forty-three millions. But the question is, is it?
 Reverend Tanner’s questioning of the correctness of the Supreme Court’s decisions makes it clear that resistance to the decisions was not limited to complaints about their evil effects, or attacks on the integrity and character of the Justices. Resistance included arguments about the meaning of the Constitution. African Americans were simply not willing to agree that the decisions of the Supreme Court were legally correct.

Writers in the Black press claimed that the Court’s legal reasoning was deficient. They protested that the decisions were out of line with the Court’s own precedents. Contradicted the intent of the framers of the Reconstruction amendments, and misunderstood the backdrop of state law. They asserted that the Court had revived the states rights theories which African Americans hoped had died on the battlefields, and had ignored the new national citizenship which had arisen from the ashes of the war. They accused the Court of deliberately conflating civil and social equality in order to deny African American citizens their civil rights.

By writing dissents to the Supreme Court’s opinions, and putting forth their own interpretations of the Constitution as the legally correct ones, African Americans could do battle against a racist nation and still be “armed with the Constitution of the United States.” Central to the legal disagreement between the African American dissenter and the Supreme Court was a dispute over the effect that the Reconstruction amendments should have had on the relationship between the states and the nation. It is this issue of federalism which we now turn.

IV. FEDERALISM

The central doctrinal issue the Supreme Court


111. See, e.g., Mr. Justice Harlan’s Opinion of Civil Rights, New York Globe, Nov. 24, 1883 at 2 (The “abortion of a decision rendered by Mr. Justice Bradley” was attributable to the fact that the Supreme Court was “deficient in legal acumen. . . . swayed by colorphobia, and biased by powerful corporate influences.”).

112. See, e.g., Civil Rights, Cleveland Gazette, Oct. 20, 1883 at 2 (by Hon. John P. Green, also published in Christian Recorder, Nov. 1, 1883) (“One of the features of the Republican party which most distinguished it from the Democratic party [had always been] the fact that the Constitution was being sufficiently broad and elastic to save the Union and guarantee to every citizen his rights of citizenship.” Such “broad and elastic” readings of the Constitution allowed the Republicans to “raise and equip armies and send them into the rebellious States,” “to issue a greenback currency,” and to reconstruct the nation in the aftermath of the war. It was this creative use of Constitutional theory by the Republican party which had “most distinguished it from the Democratic party and opened the way to all its glory and fame. “But now, at this late day, we find a Court composed of Republican judges, for the most part, who have all subscribed to this self-same doctrine, casting it aside and bartering away the rights and liberties of men who have risked their lives in putting them in office.”); Mr. Justice Harlan’s Opinion of Civil Rights, New York Globe, Nov. 24, 1883 at 2 (Supreme Court had upheld fugitive slave acts in spite of the fact that they “regulate[d] the conduct of citizens and slaves and their masters”); Mr. Justice Harlan’s Opinion of Civil Rights, New York Globe, Nov. 24, 1883 at 2 (Supreme Court had upheld fugitive slave acts in spite of the fact that they “regulate[d] the conduct of citizens and slaves and their masters.”); Mr. Justice Harlan’s Opinion of Civil Rights, New York Globe, Nov. 24, 1883 at 2 (Supreme Court had upheld fugitive slave acts in spite of the fact that they “regulate[d] the conduct of citizens and slaves and their masters.”).

113. See, e.g., Civil Rights, Peoples Advocate, Oct. 27, 1883 at 1 (“The rules of construction which Mr. Justice Bradley has employed enough have accepted the [Sumner] law constitutional upon the ground of manifest intent.”).

114. See, e.g., New York Globe, June 2, 1883, reprinted in THE BLACK PRESS, 1827-1890, supra note 4, at 164-65 (“The State courts of the South are the safety, the cloak, of the lawless cutthroats who live by intimidation and murder of black men.”); Mr. Justice Harlan’s Opinion of Civil Rights, Cleveland Gazette, Nov. 20, 1883 at 2 (The State courts of the South are the safety, the cloak, of the lawless cutthroats who live by intimidation and murder of black men.”).

115. See, e.g., New York Globe, June 2, 1883, reprinted in THE BLACK PRESS, 1827-1890, supra note 4, at 164-65 (“The State courts of the South are the safety, the cloak, of the lawless cutthroats who live by intimidation and murder of black men.”); Mr. Justice Harlan’s Opinion of Civil Rights, Cleveland Gazette, Nov. 20, 1883 at 2 (The State courts of the South are the safety, the cloak, of the lawless cutthroats who live by intimidation and murder of black men.”).

116. For a discussion of nineteenth century conceptions of civil and social equality, see Mark Turshen, The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston, in THE CONSTITUTION AND AMERICAN LIFE 224-43 (David Thelen ed. 1988). The Court in claimed in the Civil Rights Cases that the rights of access to public spaces which were protected by the Civil Rights Act of 1875 (Sumner Act) could not be protected under Congress’s power to enforce the Thirteenth Amendment because they were not “fundamental rights which pertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.” Instead they were mere “social rights.” 165 U.S. at 22. Opponents of the Sumner Act commonly criticized it as an attempt to legislate “social equality.”

Writers in the Black press accused opponents of civil rights of deliberately conflating “social equality, which is the result of mutual agreement among individuals,” and civil equality, which is secured by “legal rights which are given by the law and enforced against the court.” Colonel Pledger Calls The National Committee Together To Lay The Needs Of The Colored People Before Congress And Is Interviewed, Washington Bee, Dec. 1, 1883 at 2 (The Civil Rights Cases decision “revives the old states rights theories, the very thing that the people of the south fought over.”). For a short biography of William A. “Colonel” Pledger, see THE BLACK PRESS, 1827-1890, supra note 4, at 28.

117. For a discussion of nineteenth century conceptions of civil and social equality, see Mark Turshen, The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston, in THE CONSTITUTION AND AMERICAN LIFE 224-43 (David Thelen ed. 1988). The Court in claimed in the Civil Rights Cases that the rights of access to public spaces which were protected by the Civil Rights Act of 1875 (Sumner Act) could not be protected under Congress’s power to enforce the Thirteenth Amendment because they were not “fundamental rights which pertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.” Instead they were mere “social rights.” 165 U.S. at 22. Opponents of the Sumner Act commonly criticized it as an attempt to legislate “social equality.”

Writers in the Black press accused opponents of civil rights of deliberately conflating “social equality, which is the result of mutual agreement among individuals,” and civil equality, which is secured by “legal rights which are given by the law and enforced against the court.” Colonel Pledger Calls The National Committee Together To Lay The Needs Of The Colored People Before Congress And Is Interviewed, Washington Bee, Dec. 1, 1883 at 2. Frederick Douglass recognized that sometimes the line between civil and social rights might be hard to define, that “[s]o far as is hard to say what social equality is,” but the Sumner Act presented easy cases, since “it is certain that going into the same street car, hotel or steam heat cabin, does not make any man society for another more than flying in the same air makes all birds of one feather.” Hon. Frederick Douglass: His Earnest and Eloquent Address, Cleveland Gazette, Nov. 24, 1883 at 1 (speech of Frederick Douglass to the National Convention of Colored Men at Louisville, Kentucky (part 2 of 2)).

118. Hon. Frederick Douglass: His Earnest and Eloquent Address, Cleveland Gazette, Nov. 17, 1883 at 1 & 3 (speech by Frederick Douglass to the National Convention of Colored Men at Louisville, Kentucky (part 1 of 2)).

Published by Yale Law School Legal Scholarship Repository, 1992
faced in deciding early civil rights cases was the role to be played by federalism in the post-War world.\textsuperscript{118} Effective protection of African American rights depended upon the willingness and ability of the national government to intervene in the South. But the national guarantees of citizenship, freedom, and equality encoded in the Reconstruction amendments were in sharp conflict with the basic tenets of antebellum constitutional theory, which was committed to a federal system in which the national government was of sharply limited power, and the vast majority of powers were committed to the states.

A. PRESERVING THE MAIN FEATURES OF THE GENERAL SYSTEM

The Supreme Court Justices who decided early civil rights cases had much invested in antebellum constitutional theory.\textsuperscript{119} They came of age professionally in a world where the legal regulation of everyday life lay with the states, national power was strictly limited, and the most prominent representative of national power likely to be seen by most Americans was the local postmaster.\textsuperscript{120} In this world the United States was a plural, rather than a singular, noun.\textsuperscript{121}

This strong dual-federalist system was more than just an artifact of the lack of need for a powerful central government, it was an essential part of the Federalist Constitutional scheme. The Federalists and their heirs hoped that the federal system would “break and control the violence of faction,” thereby avoiding the intercine struggles which had racked the classical democracies.\textsuperscript{122} In addition, the federal system, with its weak national government of enumerated powers, insured that most decisions affecting the day-to-day life of citizens were made in local and state bodies. Since these bodies could be more easily held accountable to the citizenry than those in far-away Washington, D.C., liberty was ensured and democracy was protected from centralization and the J'aite Court.

The experience of the war gave “great force to the argument . . . of those who believe[d] in the necessity of a strong National government.”\textsuperscript{123} The Supreme Court recognized that the Reconstruction Amendments granted “additional powers to the Federal government,” while placing “additional restraints upon those of the States.”\textsuperscript{124} However, the Court resisted the full nationalizing implications of the War and its constitutional aftermath. Justice Miller, writing for the Court in \textit{Slaughter-House}, responded to those who believed that the War and Reconstruction had revolutionary implications for the redistribution of power from the states to the nation: “[H]owever pervading this sentiment, and however it may have contributed to the adoption of the [Reconstruction] amendments . . ., we do not see in those amendments any purpose to destroy the main features of the general system.”\textsuperscript{125} The federalist-system-as-it-was was a fixed point in the Justices’ legal universe. Although the Reconstruction Amendments might alter the contours of that universe in significant ways, the Court would struggle to preserve its “main features.”\textsuperscript{126}

B. THE CAUSE OF ALL OUR WOES

African Americans were well aware of the importance of federalist thought to the old Constitutional order. But they had no reason to look back on antebellum federalism upon the willingness and ability of the national government to intervene in the South. But the national guarantees of citizenship, freedom, and equality encoded in the Reconstruction amendments were in sharp conflict with the basic tenets of antebellum constitutional theory, which was committed to a federal system in which the national government was of sharply limited power, and the vast majority of powers were committed to the states.


119. As Robert Cover wrote, “Judges, more than most men, are conscious of the baggage of the past. Thus, the traditions they inherit will be important.” \textit{Justice Accused}, supra note 27, at 7.


125. \textit{Id.}

126. \textit{Id. at 68. See also, Ex parte Virginia}, 100 U.S. 339, 345 (1880) (The amendments “were intended to be . . . limitations on the power of the States and enlargements of the power of Congress.”).

127. 83 U.S. at 82 (emphasis supplied).

128. \textit{Id.} That the preservation of federalism is a central concern of the Supreme Court’s decisions is apparent from even a cursory glance at them. Consider some of the concerns voiced by Justice Bradley for the Court in the \textit{Civil Rights Cases}. Bradley feared that any construction of the Fourteenth Amendment which did not have a state action requirement would allow Congress “to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and supersede them.” 109 U.S. at 13. Such a construction would result in federal legislation which “steps into the domain of local jurisprudence and lays down rules for the conduct of individuals in society towards each other.” 109 U.S. at 14. Brandishing the ultimate textual reminder of the federal system, Bradley warned that a construction of the Fourteenth Amendment with no state action requirement “is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution are prohibited by it to the States, are reserved to the States respectively or to the people.” 109 U.S. at 15.

Early lower federal court opinions, written by Supreme Court Justices riding circuit, indicated that at least some members of the Court were willing to go much further in restructuring the federal system. Indeed, in 1873, four dissenters in \textit{Slaughter-House}, including Bradley, gave a nationalistic interpretation of the Reconstruction Amendments. However, by 1883 even Bradley, who penned the \textit{Civil Rights Cases}, had adopted a conservative attitude. See John Anthony Scott, \textit{Justice Bradley’s Evolving Concepts of the Fourteenth Amendment from the Slaughter-House Cases to the Civil Rights Cases}, 25 RUTGERS L. REV. 552 (1971).
federalism with veneration. The Constitution and the federal system were born in compromises that insured the survival of slavery. 129 The anti-slavery movement had been a "faction" of the type that the federal system was designed to keep in check. 130 And the system had "worked" for a long time. Abolitionists had been contained in the north and silenced in the south for nearly a century until westward expansion and the acquisition of territories forced slavery back to the center of national debate and drove the country to civil war. 131 In the few cases when the federal system might have protected African Americans from slavery, it had failed them miserably. 132 The African American experience with federalism was expressed by D. Augustus Straker in March of 1883, when he wrote to the New York Globe:

"[W]e recognize the fundamental doctrines of the National Constitution which declare that all power not expressly given to the National Government by the States is reserved to the State, also that the several states are sovereign and independent in the exercise of all powers, not enumerated as delegated to the National Government. It is sad, but it is true, that this mythical line, as indeterminate as the equator of the earth, or at least as intangible, has been the cause of all our woes." 133

For African Americans, the idea that the old federal system protected democracy against despotism, the notion that states' rights served as a bulwark of liberty against an oppressive national government, was simply absurd. "While the tyranny which has always flowed from centralized government [wa]s obviated, no check [wa]s placed upon the tyranny of the individual state . . . . [W]a]s this wise? Did[ ]this ensure the largest liberty to the individual? We doubt it. Experience refutes it." 134

African American experience turned federalist political theory on its head. Tyranny in its most brutal form was a product of state law, while liberation came through the most awesome exertion of national power ever seen. 135 "States made men slaves; legislated them into chattels. The nation struck the shackles from their fettered limbs, and made them men." 136 "States did not free the negro, the States . . . . did not make him a citizen, the States did not give him the elective franchise, the States did not call on him to go 200,000 miles to vote for the President of the United States; no, the States did not call on him . . . .


130. See, e.g., Andrew Jackson, Farewell Address (March 4, 1837), in III MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 292-308 (James D. Richardson ed. 1897). Jackson warned against "systematic efforts publicly made to sow the seeds of discord between different parts of the United States and to place party divisions directly upon geographical distinctions; to excite the South against the North and the North against the South, and to force into the controversy the most delicate and exciting topics." Id. at 295. Jackson went on to attack abolitionists as, at best, misguided philanthropists, "but everyone, upon sober reflection, will see that nothing but mischief can come from these improper assaults upon the feelings and rights of others." Id. at 298.


132. See supra notes 19-29 and accompanying text.

133. States Rights Heresy, New York Globe, March 10, 1883. The author was identified in the Globe as "D.A.S." According to the editor of THE BLACK PRESS, 1827-1890, supra note 4, at 94, a "D.A.S." who often appeared in the Negro American Era was probably D. Augustus Straker. "He was a professor of common law at Allen University in South Carolina, and later moved to Detroit where he was a prominent lawyer and judge. He published The New South Investigated (Detroit 1888) and was a frequent contributor to the New National Era." Id. Straker was very critical of the Compromise of 1877, which led him to temporarily abandon the Republican party and become an advocate for political independence. By 1888 he had qualified a return to the Republican fold. Straker believed that only a combination of self-help and strong legal protections would lead to African American advancement. He believed that Black children should be taught Black history as a way of building self-respect and racial solidarity. NEGRO THOUGHT IN AMERICA, supra note 100, at 33, 53, 56-57, 242-245.

See also, Is There Any Law for the Negro?, New York Globe, Feb. 17, 1883 (article by T. Thomas Fortune) ("[T]he National Government has shown in a thousand instances that it had no power to coerce the states. . . . This non-interference was based upon the powers vested in the federal government and those reserved to the states — the which vested and reserved rights have always made the central government the helpless foot ball of bellicose states and placed the citizens of the United States more at the mercy of the state than at the mercy of the sisterhood of states."); T. THOMAS FORTUNE, BLACK AND WHITE: LAND, LABOR AND POLITICS IN THE SOUTH 128-29 (1884) (reprint 1968) ("[T]he citizen of a State is far more sovereign than the citizen of the United States. The State is a real, tangible reality; a thing of life and power; while the United States is, purely, an abstraction.")

134. T. THOMAS FORTUNE, BLACK AND WHITE: LAND, LABOR AND POLITICS IN THE SOUTH 128-29 (1884) (reprint 1968) ("[T]he citizen of a State is far more sovereign than the citizen of the United States. The State is a real, tangible reality; a thing of life and power; while the United States is, purely, an abstraction — a thing that no man has successfully defined, although many, wise in their way and in their own conceit, have philosophized upon it to their own satisfaction. The metaphysical polemics of men learned in the science of republican government, covering volume upon volume of 'debates,' the legislation of ignoramuses, styled statesmen, and the 'strict' and 'liberal' construction placed upon their work by the judicial magi, together with a long and disastrous rebellion, to the cruel arbitrament of which the question had been, as was finally hoped, in the last resort, submitted, have failed, all and each, to define that visionary thing the so-called Federal government, and its just rights and powers. As Alexander Hamilton and Thomas Jefferson left it, so it is to-day, a bone of contention, a red flag in the hands of the political madravos of one party to infuriate those of the other parties.") For a biography of T. Thomas Fortune, editor of the New York Globe, see EMMA LOU THORNBROUGH, T. THOMAS FORTUNE: MILITANT JOURNALIST (1972).


136. Changes in the federal budget give some indication of the startling increase in the activity of the national government during the war and the early years of Reconstruction. During four years of Civil War, the federal government spent nearly twice as much as it did in the entire antebellum period. During the first four years of post-war peace, federal expenditures nearly equalled the antebellum total. BEYOND EQUALITY, supra note 33, at 47.

strong into the army during the late war, . . . but the United States did it all . . . ." 137 The experience of the freedmen in the South after the war confirmed that the worst forms of oppression would come from the states and from their white fellow citizens, while the only hope for protection came from the nation. 138

This view of federalism “from the bottom” 139 led many African Americans to radical nationalism as the only hope for their liberation. 140 For African Americans, the federalism inherited from the founders was a system for the preservation of their own bondage, while the Reconstruction Amendments were a (however incomplete) expression of their highest aspirations. African Americans’ lived experience, their view “from the bottom” of American society, thus led them to privilege citizenship, freedom, and equality over federalism. As the editors of the New York Globe proclaimed:

The right of the government, and its transcendent duty to protect American citizens upon American soil should be maintained at all times and at all hazard. . . . Some American statesmen . . . must be found who will see to it that the laws are faithfully executed, and that a Republican form of government is guaranteed in each of the Southern States. Let the cry of “Caesarism” and “Imperialism” be raised. . . . Give us the “Caesarism” of Liberty; give us the “Imperialism” of Equal Rights! 141

African Americans believed that “National power is the only remedy” to assure that “every citizen has equal and exact justice under the constitution and laws.” Therefore, “it must be asserted.” 142 Freed by memory from the Supreme Court’s attachment to pre-war federalism, writers in the African American press were able to fully appreciate the nationalizing possibilities of the Reconstruction Amendments. Thus, they were able to present a comprehensive legal program which interpreted the Reconstruction Amendments in a way that would have allowed the direct exertion of national power to protect civil rights.

Since there was broad agreement in the Black press that the war and Reconstruction had smashed the old federal system and replaced it with a new nation, there was little disagreement about the proper resolution of the main doctrinal issues associated with federalism, such as the state action requirement. Most writers agreed that the nation had the power, and the duty, to directly protect the rights of its citizens against infringement from any quarter. This common agreement about federalism allowed disagreements about other legal issues to come to the fore in the Black press. Among the most divisive of these other legal issues was the question of the relationship between civil rights laws and what was known as “class legislation.” Since “class legislation” is not a prominent part of the modern legal vocabulary, I will review the influence of nineteenth century ideas about class legislation on the Supreme Court’s early civil rights decisions 143 before discussing the class legislation debate in the Black press. 144

V. CLASS LEGISLATION

Near the end of Justice Bradley’s Civil Rights Cases opinion appears a statement filled with such cruelty that it leaps off of the page:

137. Christian Recorder, December 13, 1883 (open letter from Henry McNeal Turner). Reverend Turner continued, “and now this decision sends us back to the States to get our Civil Rights, for the white people of the respective States to decide whether we shall be treated as people or dogs.”


139. See Looking to the Bottom, supra note 7.

140. This study has concentrated on Newspaper articles which discuss civil rights decisions. Therefore, the nationalist statements reproduced here are focused on national enforcement of civil rights. National aid for education was also a common plea in the African American press. See e.g., Hon. Frederick Douglass: His Earnest and Eloquent Address, Cleveland Gazette, Nov. 24, 1883 at 1 (speech of Frederick Douglass to the National Convention of Colored Men at Louisville, Kentucky (part 2 of 2)) (“In the presence of this appalling picture [of illiteracy] presented by the last census we hold it to be the imperative duty of Congress to take hold of this important subject, and without waiting for the States to adopt liberal school systems within their respective jurisdictions, to enter vigorously upon the work of universal education.”) Douglass continued by urging Congress to lay the foundation for a great National system of aid to education.” In particular, Congress should distribute money “among the colored colleges of the country, giving the preference as to amounts to the schools that are doing effective work in industrial branches.”); Huntsville Gazette, Nov. 17, 1883 at 4 (“National aid for free schools’ should be a plank in the next Republican platform.”).

141. America’s Degradation: The Impotency of the Government to Protect its Citizens at Home, New York Globe, Dec. 29, 1883 (suggesting that a “Caesar of Liberty” is already available: General John A. Logan). This article contrasted the concern shown by President Arthur for an American citizen (O’Donnell) about to be hanged in Ireland with his indifference to the fate of “vast numbers of colored Republicans of the South who have been ruthlessly shot down, and hanged by mobs without one word of remonstrance from him as President.” Arthur’s reaction to racist violence in the South was also compared unfavorably to the showdown policies of Andrew Jackson in the crisis over nullification.

Similarly, the editors of the Louisville Bulletin held that “a despotic, centralized government is to be despised,” but a government should be “strong enough to protect the citizens in all of their rights.” The Bulletin warned: “If the legislative branch of the Government is not competent to enact laws to secure to the citizens of the country the rights inherent in the citizen; if the states have powers superior to the general government, and can dictate who may be and who shall not be citizens; who may enjoy the privileges and who shall not enjoy them; then is our Government a farce, a delusion and a snare, and the sooner it is overthrown and an empire established upon its ruins, the better. Exchange from Louisville Bulletin published in: Arkansas Mansion, Nov. 3, 1883 at 1; Christian Recorder, Oct. 25, 1883 at 2; Petersburg Lancet, Oct. 27, 1883. See also, Once More, Washington Bee, Nov. 10, 1883 ("When a republic fails to protect its citizens, it is well to abolish such government and establish another and inaugurate measures by which all citizens can be protected.").


143. See infra Section V.

144. See infra Section VI.
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.\footnote{145}

The inhumanity and audacity of these words is so multi-layered that an appropriate response is difficult. At its center is the idea that the Sumner Act had made African Americans “the special favorite of the laws,” by guaranteeing them equal access to public spaces. How can the Court refer to a people who were held as human property only twenty years earlier, and who had been subject to the most brutal treatment since, as “the special favorite of the laws”?

At one level these words can be read as merely a restatement of the Court’s conclusion that African Americans should appeal to state law and state courts for the protection of their civil rights, as white citizens would, rather than rely on the protection of federal law or the federal courts. Read in this way, the words are no more than a particularly callous statement of the Court’s commitment to federalism. However, the particular language used — “special favorite of the laws” — resonates in another arena of nineteenth century legal and political struggle. This language evoked the spectre of class legislation.\footnote{146}

“Class” or “special” legislation was common parlance in the nineteenth century legal lexicon. Such legislation employed state power in the interest of a single class of citizens, at the expense of a different class.\footnote{147} Opposition to such legislation had roots in the egalitarian tradition of Jacksonian democracy.\footnote{148} The Jacksonians resisted state created corporations, monopolies, tariffs and paper money because they were designed to benefit the “moneyed power” at the expense of the “laboring classes,” the vast majority of the population.\footnote{149}

Jacksonian opposition to class legislation extended only to unfair distribution of social and economic benefits and burdens among white citizens.\footnote{150} While Jacksonians railed against the moneyed power, and condemned privilege as inimical to democracy and republicanism, the slave-holding aristocracy of the South was the beneficiary of class legislation in its most loathsome form — the slave code. Part of the genius of the Republican party was its ability to recognize the contradiction inherent in Jacksonian democracy’s attitude toward race, and to mobilize the north in opposition to the slave-holding south. By shifting the Jacksonian democratic impulse from opposition to the “moneyed power” to opposition to the “slave power,” the Republicans were able to give anti-slavery a social base far broader than that provided by the abolitionists’ reliance on moral opposition to slavery.\footnote{151}

Given these ideological roots of the Republican party, it is not surprising that Jacksonian opposition to class legislation, as extended to cover racial inequities, was reflected in Reconstruction. The Thirteenth Amendment, by abolishing slavery, also did away with all the special legislation which had accompanied and supported the institution. The Fourteenth Amendment also embodied opposition to class legislation. Senator Jacob Howard, the manager of the amendment for the Joint Committee said of the equal protection clause: “This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of people...
persons to a code not applicable to another."

Opposition to class legislation was thus an enduring legacy of the Jacksonian roots of Republicanism.

Any follower of the current debate over affirmative action will recognize that opposition to class legislation in its equal protection guise can be a two edged sword, to be used against measures that would effectively redress the effects of past discrimination. Just as modern opponents of affirmative action describe it as a violation of equal protection, opponents of early federal civil rights bills voiced their opposition in the language of class legislation.

Thus, Congressman Nelson Taylor of New York objected to the 1866 Freedmen's Bureau Act on the grounds that it was "class legislation — legislation for a particular class of the blacks to the exclusion of all whites." President Johnson later vetoed the act, using his veto message to warn Congress that it should not provide special treatment for any "favored class of citizens," and to "urge upon Congress the danger of class legislation." Opposition to class legislation, which had fueled the Republican drive for equal protection of the laws, was now being used to block efforts to make that equal protection more than mere verbiage. This opposition was not limited to Democrats. As Reconstruction progressed, increasing numbers of Republicans came to use the language of class legislation to oppose Republican legislation.

During the early years of Reconstruction the Radical Republicans in Congress were able to form a majority coalition which coupled an inclusive vision of democracy with an activist state to secure rights to those "best men" to leadership. However, even during the early days after emancipation, opposition to special legislation on behalf of the freedmen was not limited to Democrats or people who had opposed the abolition of slavery. Once emancipation was achieved, even some abolitionists were wary of any further legislative action on behalf of African Americans.

So long as this position was isolated among a few disaffected Republicans, the radical coalition remained intact. However, as early as 1870 the party began to see large scale defections into the ranks of a new "reform" movement — "liberal Republicanism."

Eric Foner has described the liberal Republican reformation movement as "at one and the same time a moral creed, part of an emerging science of society, and the outcry of a middle-class intelligentsia alarmed by class conflict, the ascendancy of machine politics, and its own exclusion from power."

At the center of liberal ideology was the belief that the political and economic worlds were governed by scientific laws. The laissez-faire principles of classical liberalism furnished the axioms for the liberals' "science of society." Since society ran by a set of natural laws, the discovery and implementation of these laws was a task for experts. Politics, rather than being a means for implementing the will of the majority, became "the art by which the teachings of social science are put into practice." Democracy was to be judged not by how effectively it represented the will of the majority, but by whether it elevated "the best men" to leadership.

The ideological roots of the liberal defection from radical republicanism lay in the existence of two different visions of the free labor ideology which animated the Republican party before the war. One vision of free labor came out of the republican tradition, the other was a construct of the classical liberalism associated with Adam Smith. This ambiguity in free labor ideology allowed the liberal reform movement to abandon the
radical wing of the Republican party, while still laying claim to the party’s ideological heritage.

Republican ideology from the time of Paine and Jefferson had held that true freedom entailed ownership of productive property. Only the citizen who enjoyed the economic independence which came with property ownership could possess the political independence and “civic virtue” which would keep the republic healthy. At the same time, too much wealth concentrated in a few hands would lead to self-indulgence, arrogance and the domination of the political process by the few. Therefore, the ideal republican free laborer was a small scale entrepreneur, a farm owner, or an artisan, an owner of productive property which he worked himself. The free laborer of classical liberalism, on the other hand, owned no productive property. He worked, for wages, for another. He was a free laborer “only in the sense that no legal bonds tied [him] to particular tasks or masters.” His “freedom rested simply in his ownership of his capacity to labor.”

To those steeped in the republican tradition, the Smithian free laborer was dangerously dependent upon the one who paid his wages. To many northerners, a worker who spent his entire life dependent on the wages of another seemed almost as unfree as a slave.

Before the war, these two visions of the free laborer were able to peacefully coexist within the Republican party. Because of economic mobility for white workers in the antebellum years, the Smithian wage laborer was perceived as being merely in a state of transition, accumulating property and experience on his way to becoming a republican free laborer. Meanwhile, slavery, which degraded the value of free labor, and the slave power, which used its concentrated wealth for its own ends, were the common enemies of either vision of free labor. After the war, however, changing economic conditions brought out the contradictions between the two visions of free labor. This conflict precipitated a crisis in free labor ideology, and led to a split in Republican ranks.

While economic mobility in the pre-war years had blurred the distinctions between labor and capital by making today’s wage laborer tomorrow’s owner, the rapid expansion of industrial capitalism in the years after the war led to increasing class divisions and antagonisms. Meanwhile, the common struggle of all proponents of free labor against slavery was completed. Eric Foner has described the result:

During Reconstruction the coalition which had fought the Civil War dissolved into its component elements, and strands of the free labor ideology were adopted by contending social classes, each for its own purposes. For the middle class, free labor became a stolid liberal orthodoxy, in which individualism, laissez-faire, the defense of private property, and the rule of the “Best Men” defined good government. At the same time, the labor movement, especially after 1873, adopted the free labor outlook as an affirmation of the primacy of the producing classes and a critique of the emerging capitalist order, rather than as a testament to the harmony of interests in society.

Republicans had envisioned that a “purified republic” would emerge from the ashes of the war. The republic would be made up of free and equal citizens and would use the new activist state to pursue the common good. As post-war class divisions grew, Republicans began to question the existence of a unitary common good. Many working class and African American Republicans hoped that both state and federal gov-


171. For a detailed description of the development of wage labor during and after the war, see BEYOND EQUALITY, supra note 33, at 3-44.

172. Ambiguities of Free Labor, supra note 38, at 770.

173. Id. at 769.

174. FREE SOIL, supra note 24, at 16-17; Labor and the Constitution, supra note 168, at 1101; BEYOND EQUALITY, supra note 33, at 30-31; Ambiguities of Free Labor, supra note 38, at 770.

175. The accuracy of the perception that most northern wage laborers were only in a transitional stage to economic independence was questionable even before the war. The 1850’s had seen wage workers emerge as a permanent class. But, as late as 1860, large factories were still a rarity. Most wage earners worked with only a few others, in an enterprise owned by an individual or small partnership. Thus, the free labor image which northern Republicans had of their society was still tenable when the war began. FREE SOIL, supra note 24, at 29-39; Labor and the Constitution, supra note 168, at 1102-03. For a detailed description of the development of wage labor during and after the war, see BEYOND EQUALITY, supra note 33, at 3-44.

176. Politics and Ideology in the Age of the Civil War, supra note 131, at 126. See also Ambiguities of Free Labor, supra note 38; Labor and the Constitution, supra note 168, at 1100-04.

177. Beyond Equality, supra note 33, at 73 (quoting Thaddeus Stevens) (“No distinction would be tolerated in this purified Republic but what arose from merit and conduct.”).

178. BEYOND EQUALITY, supra note 33, at 79-80, 335.
The liberal reform movement formed the vanguard of the elite and middle class Republicans who feared the emerging "politics of class feeling." The influence of the liberal movement on the Republican party was strengthened beyond its absolute size by the fact that liberal ranks included academicians, editors, and intellectually inclined businessmen and lawyers. Many of the liberal reformers had been supporters of the anti-slavery movement, but by 1870 they had begun a defection from the radical coalition, and had formed alliances with conservative Republicans and Democrats in a retreat from Reconstruction. It is no coincidence that this fracturing of the radical movement, the retreat from Reconstruction, and the abandonment of the freedmen was led by elite middle class reformers. As William Forbath has explained, the liberals' "disenchantment with federal intervention and 'Black Republicanism' in the South . . . was closely bound up with a desire to curb the 'extreme phase of republicanism' and the clamour for 'class legislation' which seemed rife at home." 185

In the aftermath of the war, some Radical policies toward the defeated South struck elite Republicans as dangerous examples of the class legislation that would inevitably result from runaway democracy in an activist state. Radicals' early experiments with confiscation and redistribution of former slave-holders' land were particularly frightening, since confiscation was the "quintessential case" of class legislation. Some Republicans, including the editors of the New York Times, feared that the precedent set by confiscation "would not be confined to the South," but would soon spread to the North where "a war on property" would "succeed the war on Slavery." 189

Reconstruction measures much less radical than land redistribution were still threatening to elite Republicans who feared the power of the emerging working class. African Americans were majorities or near majorities in most of the Southern states. Federal laws which protected the political rights of the freedmen would take an active role in ensuring the fair and equal distribution of wealth and power which was necessary to make the republican vision of free labor a reality. 179 Elite and middle class Republicans, on the other hand, "looked upon the hybrid of their own creation — the mixture of the democratic state and the active state — as Frankenstein's monster." 180 Among the most frightening and dangerous products of this hybrid was the masses of working people pursuing their own interests by seeking "class legislation" in the form of regulatory laws like the eight-hour day, or redistributive plans, like progressive taxes. 181

179. I do not mean to imply that white working class and African American interests were identical, only that both groups had a direct interest in activist government and in what liberals considered class legislation.


181. See THE BEST MEN, supra note 160, at 182-84, 211-12; Laiss-sec-Faire and Liberty, supra note 147, at 302, 306-09; Reform Republicans, supra note 161, at 57-58; Reconstruction, supra note 50, at 478-82, 498; Beyond Equality, supra note 33, at 533-540.

182. Beyond Equality, supra note 33, at 335 (quoting Nation editor E.L. Godkin). Godkin was the pre-eminent spokesman for liberal reform. THE BEST MEN, supra note 160, at 273-74.

183. Reform Republicans, supra note 161, at 53-54; Reconstruction, supra note 50, at 488.

184. Reform Republicans, supra note 161, at 53-54, 64-77; Reconstruction, supra note 50, at 492. I do not mean to imply that the liberal defection was the only cause of radical Reconstruction's death. However, as Michael Les Benedict has pointed out, the liberal defection did "sap the party of much of its intellectual vigor and its crusading spirit."

185. Reform Republicans, supra, at 55. In addition, the liberals allied themselves with conservative Republicans and even Democrats in their attempt to dislodge the radicals from power. Id. at 64-77. The abandonment of Reconstruction by any Republicans was particularly painful to African Americans, since the party had led the nation, however reluctantly, from containment of slavery to abolition, to African American citizenship and even enfranchisement.

186. The pain of being abandoned by the Republican party was expressed by several writers. See e.g. Our Colored Exchanges, Washington Bee, Nov. 10, 1883 (exchange from the Cairo Pilot) ("It would scarcely have occasioned a ripple of excitement if a Democratic supreme bench had bridged our civil rights with a shadow Court composed of Republican Judges, for the most part, . . . barring away the rights and liberties of men who have risked their lives in putting them in office."); The Civil Rights Decision, New York Globe, Oct. 20, 1883 at 2, reprinted in The Black Press, 1827-1890, supra note 4, at 167-68 ("The Democratic Party is a fraud — a narrowminded, corrupt bloody fraud; the Republican party has grown to be little better."); New York Globe, Nov. 3, 1883 ("The Republican party, like the United States, is a hollow sham."). It was, at least partially, this sense of betrayal that resulted in the massive outpouring of distress in the press and led the New Orleans Standard to complain, "Morally, this decision [the Civil Rights Cases] is the heaviest blow that has been struck at us." Peoples Advocate, Oct. 27, 1883 at 2 (exchange from New Orleans Standard).

187. Ambiguities of Free Labor, supra note 38, at 789 (citing 4 Nation 920 (1867)). See also Reconstruction, supra note 50, at 497-99; Politics and Ideology in the Age of the Civil War, supra note 11, at 97-127.

188. See C. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP (1978); Reconstruction, supra note 50, at 498-99.

189. See Reconstruction, supra note 50, at 68-71, 158-59 (Frederick's Bureau authorized to divide abandoned and confiscated land for rental and eventual sale to freedmen and loyal fugitives; Sherman's Field Order No. 15). Tragically, by 1866 almost all African Americans who had received land had been evicted from their new property, after Presidential pardons of plantation owners and orders to restore prior ownership. Id. at 159-64.

190. Reform Republicans, supra note 161, at 68-69. See also THE FOURTEENTH AMENDMENT, supra note 147, at 176-77.


192. For population figures see BLACK RECONSTRUCTION, supra note 55, at 383 (South Carolina), 431 (Mississippi), 451 (Louisiana), 487 (Alabama), 495 (Georgia), 511 (Florida), 526 (North Carolina), 556-37 (Virginia), 546 (Arkansas), 552 (Texas), 563-64 (Maryland), 566 (Kentucky), 571 (Tennessee), 576 (Missouri). Three states of the old confederacy, South Carolina, Mississippi and Louisiana, had Black majorities. Three others, Alabama, Florida and Georgia, were just under half Black. Two states, Virginia and North Carolina, were about forty per cent Black. The remaining three states, Texas, Tennessee and Arkansas, were about one quarter African American. Reconstruction, supra note 50, at 294.
threatened to produce the same kind of class legislation on behalf of the “African proletariat” in the South that elites feared from the “Celtic proletariat” and other working people in Northern cities. The African American/Radical dominated state governments of the reconstructed South affirmed the liberals’ fears by using progressive taxes to finance public services, internal improvements, and public school systems.

The activist governments of the southern states during Reconstruction would have been frightening to elite Republicans under any circumstances. The fact that African Americans played a major role in the new political order made the southern Radical wing of the party particularly unattractive to liberals. Although the liberals were racial egalitarians by the standards of their day, and many of them had been active in the movement to end slavery, they still believed that Black people were inferior to whites. Thus, their middle class inclination to favor the men of “intelligence and culture” from the former southern slave-holding class was reinforced by their racist disdain for the freedmen’s experiment in self government.

The liberal reformers’ retreat from Reconstruction also served a pragmatic political purpose. Liberals believed that the only way to dislodge radical Republicans from power was to divert the country’s attention away from the great moral issues of slavery and race which had been at the center of the party’s agenda during the war and the early years of Reconstruction. It was the radicals’ anti-slavery fervor and discipline which had allowed them to consolidate their power in the party and steer party policy. If the liberal reformers could deflect the nation’s attention from racial justice, they would rob the radicals of the issue which had given them their moral cachet and kept them in power. The liberal reformers therefore wanted to put away the “bloody shirt,” forget slavery and the war, and get on with the “important” issues of the day, such as tariff reduction, “good government,” and civil service reform. These were the issues which liberals believed to be the nation’s truly pressing concerns. They were also the issues which could propel the reformers to political power.

The liberal reformers thus hoped to dislodge radicals from power and to “place administration and legislation in the hands of the best men.” In the north “the best men” were identified as the liberals themselves. In the south they were the men of “intelligence and culture” from the former slave-holding class — the south’s “natural leaders.” Both would be propelled to power together by smashing the “politics of class feeling.”

The liberals’ solution for the evils of the “politics of class feeling” and its resulting class legislation was a retreat from the activist state back to the safe haven of limited government. Since the majority of the population could not be trusted to refrain from using the political branches for their own interest, the judiciary had to be enlisted in the liberal cause to foil the redistributive aims of the masses. Many judges were in fact attracted to liberal ideology by its anti-majoritarian aspects and the prominence of elite attorneys in the movement. Courts had several mechanisms through

191. Reform Republicans, supra note 161, at 69 (quoting liberal Republican Charles Francis Adams, Jr.). Adams also feared a growing “Chinese proletariat on the Pacific.” Id. See also Beyond Equality, supra note 33, at 335-36.
192. Reform Republicans, supra note 161, at 75-76; Reconstruction, supra note 50, at 364-379; Eric Foner, Rights and the Constitution in Black Life During the Civil War and Reconstruction, in THE CONSTITUTION AND AMERICAN LIFE 203, 218-220 (David Thelen ed. 1988).
193. The Best Men, supra note 160, at 14-15; Reconstruction, supra note 50, at 492.
195. See Reconstruction, supra note 50, at 497-99; Reform Republicans, supra note 161, at 69; The Best Men, supra note 160, at 29-36.
196. Reform Republicans, supra note 161, at 73-74.
197. Reconstruction, supra note 50, at 497.
198. Writers in the Black press were aware that the attention of the country was slipping away from racial justice. One writer recalled that over the course of the previous decade, the country had seen “the ebb of public sentiment on the rights of the new citizen and the shifting of the main political issues which divide National parties from those questions growing out of the reconstruction period to those mainly economical in their nature.” The Civil Rights Decision, Peoples Advocate, Oct. 20, 1883.
199. Reform Republicans, supra note 161, at 60 (quoting liberal Henry Adams).
201. Reconstruction, supra note 50, at 499 (quoting Nation, June 16, 1870).
203. See Beyond Equality, supra note 33, at 379-81.
which they could curb the tendency of runaway democracy to pass class legislation. The federal legislature could be limited by using the tradition of federalism, with its doctrine of enumerated powers. Judges could restrict both federal and state legislation by a construction of Reconstruction which emphasized the laissez-faire principles which were part of the liberal version of free labor ideology, and thus give laissez-faire a constitutional basis in the new Amendments.

For modern constitutional lawyers, the idea that the Fourteenth Amendment embodies laissez-faire principles is encapsulated in a single reviled code word—Lochner.\textsuperscript{206} The conventional wisdom of constitutional history adopts the view of Justice Holmes, expressed in his famous Lochner dissent, that reactionary judges had simply read their own personal laissez-faire economic theories into the Fourteenth Amendment's protection of liberty and property. Holmes's view that the Fourteenth Amendment was "not intended to embody a particular economic theory,"\textsuperscript{207} but was designed with much more limited purposes in mind, was shared by the majority of the Court in Slaughter-House. The Slaughter-House majority held that "the one pervading purpose" of the Reconstruction amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."\textsuperscript{208} However, the four dissenters in Slaughter-House took a different view. The dissenters believed that Reconstruction went far beyond the dissolution of slavery and the establishment of African American freedom. They believed that Reconstruction implemented free labor ideology into constitutional law.\textsuperscript{209}

The claim of the Slaughter-House dissenters that Reconstruction had encoded free labor principles into the Constitution was not at all unreasonable. The millions of white northerners who fought and mobilized for total war were not driven to death and sacrifice by pure moral opposition to slavery. Instead, many who joined the Republican cause "opposed slavery and the Slave Power" chiefly because they appeared to threaten the flourishing of 'Free Labor' and the North's 'free labor system.'\textsuperscript{211} For many Republicans, then, the fruits of victory should have included the reconstruction of the South, and the nation, into a national free labor system. But which vision of free labor, the republican or the liberal, should it be? This question was faced by the Slaughter-House dissenters.\textsuperscript{212}

William Forbath has pointed out that the plaintiff butchers in Slaughter-House were "exemplars" of the republican free laborer. "They were artisan shopkeepers, and pursued their calling by selling their products, not their labor."\textsuperscript{213} Each butcher "owned productive property, . . . worked in his own buildings, and employed one or two hirelings, who, in turn, would learn their trade and become independent workingmen themselves."\textsuperscript{214} When Louisiana granted an exclusive slaughterhouse monopoly to a single corporation, the state threatened to reduce these independent, productive property owning free laborers to a dangerous state of dependence on the corporation which owned the monopoly rights.

If the republican free labor system was constitutionalized by Reconstruction, it had to protect these archetypal free laborers from a monopoly which deprived them of their ability to pursue their trade and even threatened to force them into the dependence of "wage slavery." The Slaughter-House dissenters warned that "our government will be a republic only in name . . . if the right of free labor . . . is violated,"\textsuperscript{215} and would have struck down Louisiana's monopoly grant as unconstitutional.

Since the butchers were archetypes of the republican free laborer, the Slaughter-House dissenters' defense of them against Louisiana's grant of monopoly could have been a major blow for the republican free labor vision. However, Field's dissent also contains a gratuitous statement of the liberal vision of free labor. In a footnote immediately after his affirmation of the "sacred" "right of free labor,"\textsuperscript{216} Field quotes a passage from Adam Smith's Wealth of Nations which celebrates the "liberty . . . of the workman and of those who might be disposed to employ him" to freely contract in the marketplace.\textsuperscript{217} Thus, while the facts of Slaughter-House...
implicate republican free labor principles, the “authority” cited by Field relies on liberal free labor, and envisages a laissez-faire world in which freedom of contract is raised to constitutional status.

It is easy to understand why the Slaughter-House majority resisted either of the free labor interpretations of Reconstruction offered up in the dissents. A truly republican free labor Constitution would have required an extremely active and powerful federal government, the Frankenstein state that elite republicans feared. An activist democratic nation-state would not only be dangerous to elite economic and political interests, it would also obliterate the familiar and beloved federal system. Even the laissez-faire, limited government reading of free labor favored by liberals, when constitutionalized, would have required an overhaul of the federal system by making the Supreme Court the “perpetual censor upon” state legislation affecting vast areas of commercial and industrial life. In 1873, the Court was (narrowly) unwilling to accept the implications of either vision of constitutionalized free labor.

The reception of the laissez-faire version of free labor in other courts was more enthusiastic. As William Forbath has reported, “nothing in Field’s Slaughter-House dissent . . . quite prefigured the fanatic liberal which judges would soon infuse into the fourteenth amendment and state constitution due process clauses as these became weapons against the working class’s political initiatives.” Meanwhile, the republican vision of free labor disappeared from official ideology, and survived only in the hopes and dreams of the labor movement. By the 1890s, laissez-faire liberalism had worked its way back into the U.S. Reports, this time via the Fourteenth Amendment’s due process clause.

Field’s Slaughter-House dissent thus proved to be the beginning of a path by which the “sacred” “right of free labor” dissolved into freedom of contract, and by which republicans who had created the activist state justified calls for limited government and laissez-faire.

While the Supreme Court’s commitment to federalism delayed the victory of laissez-faire in economic relations for a quarter of a century after Slaughter-House, limited government won earlier victories when the Court struck down federal civil rights laws. In Slaughter-House the pull of laissez-faire worked at cross-purposes with the restraint of federalism, and laissez-faire narrowly lost. In the Civil Rights Cases, and in other cases striking down federal civil rights laws, laissez-faire/limited government and federalism pulled together, both in opposition to federal protection of civil rights.

By demanding that African American citizens no longer be the “special favorite of the laws,” Justice Bradley struck a blow against what liberals perceived to be class legislation. The opinion was thus a victory for limited government and the ascendant laissez-faire philosophy. At the same time, by striking down a law that interfered with traditional state prerogatives, and intruded into the “domain of local jurisprudence,” the decisions were also a victory for federalism. The painful irony of this early success for the emerging laissez-faire order was that it came at the expense of African American rights, rights which were declared by the Court to be the central concern of Reconstruction.

Speaking in 1883 to a National Convention of Colored Men, Frederick Douglass complained that as a result of the nation’s retreat from Reconstruction the African American citizens of the south had “been abandoned by the Government and left to the laws of nature.” For Douglass and other African Americans, this abandonment was a bitter betrayal of Reconstruction.
tion by Congress and the United States Supreme Court. Ironically, the idea that African Americans, and all other citizens, should be “left to the laws of nature” also captures the essence of the “science of society” espoused by liberal proponents of laissez-faire. When Justice Bradley declared that the African American citizen would no longer be “the special favorite of the laws,” ideological principle, an attachment to federalism, class bias, racism and political expediency coalesced in the “death dealing decisions” of the Supreme Court.

VI. CLASS LEGISLATION IN THE BLACK PRESS

The possibility that federal civil rights laws were examples of class legislation, and violated Jacksonian concepts of equal protection by making African Americans the special favorites of the law, is only hinted at in the Supreme Court’s opinions. The most obvious examples of class legislation, such as land confiscation, did not survive long enough to merit the Court’s review. The offense done to the Court’s conception of federalism by the civil rights laws which did reach the Court provided more than enough reason for the Court to strike them down. There was no need for the Court to even consider the class legislation issue. For writers in the Black press, however, the relationship between civil rights laws and class legislation assumed a prominent role in the discussion of the Court’s decisions. While African Americans who were unhappy with the Supreme Court’s decisions expressed their displeasure through a blizzard of criticisms, personal, political, and legal, the few writers who approved of the decisions almost invariably spoke of federal civil rights laws as class legislation, which the Court had properly struck down. Opposition to class legislation was thus one of the few rationales mustered by supporters of the Court in its defense.

The role of class legislation, and its relationship to civil rights laws, was deeply divisive in the African American community. Opposition to class legislation was part of the egalitarian heritage of Jacksonian democracy, and had fueled the battle against slavery. However, after the slave power was defeated in battle the rhetoric of class legislation was deployed against civil rights laws which had been designed to fulfill freedom’s promise. These contradictions in the possible meaning of class legislation were bound to produce divisions in the African American community, just as they had within white Republican ranks. In addition class divisions within the African American community provided the same opportunities for conflicting attitudes toward class legislation as existed among white Republicans. Meanwhile, all African Americans had to struggle with the tension between their need for protection and their desire for autonomy.

In the wake of the Civil Rights Cases, the relationship of class legislation to civil rights laws became a particularly prominent topic in the Black press. Responses took three basic forms. A minority of writers labeled the Sumner Act class legislation, and deployed anti-class legislation arguments to affirm the Supreme Court’s decision that the Act was unconstitutional. Some writers who opposed the Court’s decisions defused the class legislation issue by denying that civil rights laws could be so categorized. Other writers faced the issue directly and argued that African Americans’ unique history justified the use of special remedial measures that might otherwise be condemned as class legislation.

A. THE BANE OF THE NEGRO IS LEGISLATION ESPECIALLY FOR THE NEGRO

A few writers in the African American press disapproved of the Sumner Act as class legislation, and applauded the Supreme Court’s decision to strike down the Act in the Civil Rights Cases. These writers argued that the Sumner Act had given special protection to African American citizens which was not available to other citizens, that it was “legislation especially for the negro.” They argued that no citizen deserved such “special protection.” These opponents of the Sumner Act believed that special protection was not only undeserved, it was undesirable. They hoped that the death of the Act would provide a spur for African American self-advancement and would even hasten the end of racism.

Cleveland Gazette, Nov. 24, 1883 at 1 (speech of Frederick Douglass to the National Convention of Colored Men at Louisville, Kentucky (part 2 of 2)).

228. See supra note 74 and accompanying text.

229. See supra Sections III-IV.

230. See infra Section V.L.


233. See infra Section V.L.

234. See infra Section V.L.B.1.

235. See infra Section V.L.B.2.

236. The Recent Decision, Christian Recorder, Nov. 1, 1883 (by “Will”). Perhaps the classification of the Sumner Act as class legislation by some of its opponents can best be understood through a simple hypothetical example. Suppose two male citizens, one white and one Black, were refused admission to a hotel. When asked why, the manager replied, “I didn’t like the looks of the white man. I don’t allow Blacks into my hotel.” The African American citizen could bring a suit in federal court under the Sumner Act, while the white man would be limited to a common law action in state court. Thus, only the African American would be entitled to federal jurisdiction over his claim.

During Senate debate over the Sumner Act, Senator Hamilton of Maryland identified two other aspects of the Sumner Act, besides its grant of federal jurisdiction over racial exclusion suits, which condemned it as special legislation in the eyes of its detractors: (1) The Sumner Act provided criminal penalties for racial exclusion, whereas other forms of exclusion were only actionable under common law civil suits; (2) The Sumner Act fixed civil penalties at $500, whereas “All private wrongs under the common law are to be compensated according to the injury done.” Cong. Rec., 43rd Cong., 2d Sess. app. 114-115 (1875) (Sen. Hamilton). Thus, opponents of the Act who wanted to label it class legislation could look to its grant of federal jurisdiction, and to the provision of different remedies than those available in non-racial cases.
The idea that civil rights laws should be condemned as class legislation because they provided special protection to African Americans which was not generally available to all citizens was expressed forcefully by African American attorney John D. Lewis of Philadelphia.²³⁷ Writing in the Christian Recorder under the headline “Conservative Views of a Colored Lawyer,”²³⁸ Lewis first recognized the unusual history of African Americans in North America by reminding his readers that the Constitution “was only practically made to apply to colored people by the Thirteenth and Fourteenth Amendments.”²³⁹ Lewis thoroughly approved of the changes in “the organic law” which had elevated himself and his fellow African Americans “to the dignity of American citizenship.”²⁴⁰ However, he criticized African Americans who “show[ed] a weakness to clamor for class legislation or a civil law as extra protection to them.”²⁴¹ Lewis admonished advocates of civil rights laws: “The colored people should not ask or expect more statutory law than is available for the protection of every other class of citizens.”²⁴²

Some writers emphasized that special legislation in the form of civil rights laws was not just more than African American citizens deserved. It was a positive evil. As one writer in the Christian Recorder explained: “The bane of the negro is legislation ‘especially for the negro.’ As soon as this country finds out that the only legislation necessary for the negro is only that which is necessary for white people, so soon will the absurdity of such nonsense as Civil Rights bills be apparent.”²⁴³ Class legislation in the form of civil rights laws was not just undeserved. It was undesirable.

Writers who labeled civil rights laws as class legislation, and so condemned them as undeserved and undesirable special protection, gave several types of reasons for their stance. Some writers made standard laissez-faire liberal arguments against class legislation. Others complained that African American citizens were stigmatized when they were made the subject of “legislation especially for the negro.” Writers who opposed class legislation in the form of civil rights laws often framed their arguments in the language of racial pride and expressed an attachment to the beliefs of anti-slavery legal theory.

Henry Simkens, editor of the Arkansas Mansion and one of the few editors of African American newspapers who opposed the Sumner Act and welcomed the Civil Rights Cases,²⁴⁴ spoke in the idiom of laissez-faire:

Now the farcical civil rights bill has been annulled by the Supreme Court of the United States, equal rights falls back upon its merit where it rightfully should. These things should be let severely alone to regulate themselves, then like the more favored races, every man will be respected for what he knows and has, which will be an incentive to the race to acquire knowledge and wealth.²⁴⁵

237. Lewis was born in Toronto, Canada. He graduated from Yale Law School and practiced for three years in Boston before moving to Philadelphia. In 1876 he became one of the first two African Americans admitted to the Philadelphia Bar. The other admittee, J. Howard Scott, quit the law soon after, leaving Lewis as the only practicing African American attorney in Philadelphia until his death in 1891. Lewis was elected as one of Pennsylvania’s delegates to the Nashville Convention of Colored Men in 1879, and was a leader in the fight against segregation in Philadelphia. From the time of his arrival in the city, he lobbied for the repeal of a statute which required separate schools. After school segregation was officially banned in 1881, he called upon community groups to monitor compliance throughout the city.

238. Lewis was an “independent,” in effect a Democrat, a political alignment which was very unusual among African Americans. His withdrawal from the Republican party was apparently motivated by his perception that the party had chosen political expediency over African American rights in the Compromise of 1877. In addition, he believed that by the late 1870s the Republican party was dominated by manufacturing interests and capital. The best one could hope for from the Republican party, Lewis believed, were policies favorable to industrial factory workers. Since the vast majority of African Americans were small farmers or farm laborers, Lewis thought they had little to gain by supporting the Republican party. William Dorsey’s Philadelphia, supra note 36, at 167-72, 203, 217-18.

239. Conservative Views of a Colored Lawyer of This City, Christian Recorder, Nov. 1, 1883 at 2. Lewis’s remarks were published along with an article by John P. Green, who approved of the Sumner Act, under the headline, Civil Rights: The Opinions of Two Leading Colored Lawyers on the Recent Decision. Green’s remarks were also reported in the Cleveland Gazette, Oct. 20, 1883. Lewis’s column was cited with approval in the Arkansas Mansion, Nov. 10, 1883.

240. Lewis wrote: “So soon . . . as the organic law raises any race or people to the dignity of American citizenship they show a weakness to clamor for class legislation or a civil law as extra protection to them . . . .” This passage seems to indicate that Lewis viewed African American “clamor[ing]” for class legislation as just the latest in a history of such demands by numerous “race[s] or people” who had become American citizens. In fact, American history had seen waves of immigration and new citizens. See ORDEAL BY FIRE, supra note 105, at 82-83; FREE SOIL, FREE LABOR, FREE MEN, supra note 24, at 226-260 (Republicans and nativism). It seems likely that Lewis is referring to the European immigrants in the white working class and their demands for special protection in the form of labor laws.

241. Lewis was the originator of the bill nor the Republican party, as we still believe and always will believe that the Republican party conscientiously freed the colored people and did all in their power to secure their equal rights before the law. They were so egotistical in the matter that they even passed unconstitutional laws in order to accomplish that end, and at
While most writers in the Black press were appalled by the decisions, Simkens believed that they were "really a blessing in disguise," because they would lead to a laissez-faire political and social order which would provide the proper incentives for the development of middle class virtues. The African American citizen could "pluck from this seeming nettle of disaster the perfumed rose of success," by following a plan of individual self-advancement:

He must strike out boldly for himself, and must rely largely upon his own efforts to win the confidence and respect of his white fellow-citizens. Let him be prudent, self-reliant, industrious, temperate and provident of his means; let him educate himself morally and mentally; let him be scrupulously regardful of the rights of others — insisting the expiration of twenty-one years or thereabouts, when the colored people met in national convention and declared that they were of age and desired to be their own moral free agents to think and act for themselves. In response to this the national government only disobeyed us the shield which was in good faith thrown around us for a safeguard. Hence we called it farcical because public opinion prohibited its enforcement, as under our laws all men are entitled to a trial by jury. Public sentiment rules supreme, civil rights laws to the contrary notwithstanding.

Accord as Mansion, Nov. 10, 1883 at 1. In contrast to Simkens' remarks of October 27, supra, which emphasized individual effort and class distinctions, and regarded the Act as an evil, this article emphasizes the ineffectiveness of the Act. For a description of African American attempts to enforce the rights promised by the Sumner Act, and the ineffectiveness of the federal government in providing protection, see John Hope Franklin, Race and History: Selected Essays, 1938-1988, at 116-31 (1989) (originally published in Prologue, volume VI (1974)).

Notice the Mansion’s emphasis on the role of jury trials in ensuring that the Sumner Act’s public accommodations sections were not effective. Section 2 of the Act provided for $500 damages in civil suits and for criminal penalties. Civil Rights Cases, 109 U.S. at 9 (quoting the Act). Thus a defendant in any suit brought under the Act, civil or criminal, would be entitled to a jury trial by the Sixth and Fourteenth Amendments to the United States Constitution. Since local whites could easily dominate juries, it would be hard for African Americans to win even when a case was brought to trial. When Congress passed the public accommodations provisions of the 1964 Civil Rights Act, it avoided this problem by relying on equal rights remedies, which provided the defendant’s right to a jury trial. See Title II of the 1964 Civil Rights Act, §§ 204, 206, 78 Stat. 241, 244-245 (1964).

246. [Here, there is a reference to an article in the Arkansas Mansion, Nov. 24, 1883 at 1. This article reprints remarks made by ex-Congressman Robert B. Elliott. I have attributed them to Simkens in the text because they express his editorial line. In fact Simkens opens this article by writing:]

Referring to the civil rights decision we said, although we differed in opinion from the majority of the leading colored men, that we would wait at the helm until all swung around and agreed with us on the subject. We find in every week’s exchanges great men changing their account of color, why, because we had plenty of money and put on the air of an intelligent gentlemen. We were recognized as such so long as the two lasted together, and just as soon as they were severed we were lowered in the balance of equality.

Equal Rights, Arkansas Mansion, Oct. 27, 1883. One historian has pointed out that Simkens seemed to have forgotten that Jim Crow segregation was a post-Civil War phenomenon. Calvin Smith, Arkansas, in The Black Press in the South, 1865-1979, supra note 4, at 66-70. But, with this personal history, it is easy to see why Simkens would place great faith in advancement through sheer self-determination.

248. Our Exchanges, Christian Recorder, Nov. 15, 1883 at 2 (exchange from Florida News). This and the following quote are not from Simkens, but seem to fairly express his views. As was the case with the Mansion’s editorials, there are certain ambiguities in this piece which make it unclear whether the author opposed class legislation in principle, or simply found it to be ineffective in practice. The author complained, “Class legislation has never done any good for any of our people.” But, as a preface to this statement he wrote, “The decision . . . should not surprise anybody.” The Sumner Act “has been a dead letter ever since it was enacted, and this decision will not affect the present social status of the colored people in the least.” Thus, it is possible that the author believed class legislation might do some good under the proper circumstances.

249. Id. While there is a lot of discussion of “self-improvement” in the Black press, some of which sounds very similar to the rhetoric of Simkens and other opponents of civil rights legislation, most authors did not see self-help as being in opposition to federal protection of civil rights. Instead, the two should work together. In the aftermath of the decisions, however, there was “no remedy in the Constitution, therefore no power in Congress, to remedy the injustice to which we are subjected.” President Arthur on Civil Rights, New York Globe, Dec. 8, 1883. African Americans were advised, “We should not look for assistance from whence none can come,” id., and were thus thrown back on unreliable state law and self-help as their only remaining options.

63
lawyer" of Philadelphia, voiced a common liberal anxiety: fear of demagogues. Liberals worried that demagogues would use the possibility of class legislation and the spoils of electoral victory to bring the masses under their sway, by promising special benefits to their supporters.250 Liberals saw both the machine politics of Northern cities, such as New York's Tammany Hall, and the Radical/African American dominated state governments of the reconstructed south as dangerous expressions of this demagogic tendency to stir up class antagonisms. Making a similar argument in the aftermath of the _Civil Rights Cases_, Lewis asserted that when there is "too much law"251 in the form of "class legislation,"252 "the colored people are made the easy prey of prejudice, artifice and imposition in the hands of designing men, for sinister purposes."253

Both Simkens and Lewis believed that African American advancement would be speeded by the suspension of special legislation. Simkens appealed baldly to the hopes of an emerging Black middle class when he wrote:

> The caste prejudice will in time die of itself sooner than it could be killed by any special legislation. Had it not been for the special legislation, the whites of the South would have respected colored men of distinction, also colored ladies and gentlemen on travel, and treat ill-bred blacks as they did and do ill-bred whites, but the Civil Rights Bill took away all the superior virtues of colored people and formed them into one class, and that the lower class.254

Simkens believed that "wealth and intelligence is the key to the situation," and that whites would not discriminate against those African Americans who "had plenty of money and put on the air of an intelligent gentleman."255 Since the "annulling [of] the farcical civil rights bill by the Supreme Court" would only put poor blacks in the same situation as poor whites, and would actually improve white attitudes toward wealthy blacks, the decision would "not militate against the interest of the colored people."256

Simkens' attitude toward class legislation and social class meshed neatly with the elitism of liberal reformers. Simkens believed that the "looseness with which the negro race practice class restrictions is one great barrier to the association of the aristocratic classes of the two races."257 Therefore, "if we ever hope to receive the just recognition from the white race, a higher grade of moral and refined society must be formed among us, and a line drawn barring out all that are not possessed of the required qualifications,"258 just as liberals believed in the rule of the "best men," Simkens advised his fellow African Americans "to consider the propriety of dividing [among class lines] in order that [they] might eventually conquer!"259

Although it is easy to look back on this expression of elitism with disdain, perhaps the most astonishing, and tragic, aspect of Simkens approach is the extent to which it underestimated the power of racism. The liberal reformers and their conservative allies were willing, even anxious, to reach out and embrace the men of "quality" in the former slave-holding class. But Simkens' hope that a member of the former slave race would "find favor in the sight of his white fellow-citizens"260 by becoming a refined member of the middle class was hopelessly optimistic. Racism would prevent all but a few African Americans from approaching middle class economic status, and ensure that even those who did acquire "wealth and intelligence" would still not "find favor" in the eyes of white America.261

250. _See Reform Republicans_, supra note 161, at 59-60, 69-70; _Reconstruction_, supra note 50, at 490-91. Liberal Republican fear of demagogues reflects a recurring theme in republican theory. The republican tradition had always held that ownership of productive property was a prerequisite for the independence needed by a virtuous citizen. The reason demagogues were such a danger was that most citizens were not propertied and thus were not independent. When faced by a large population of propertyless citizens, the believer in republicanism has two options: use an activist state to redistribute property to the masses; or restrict full citizenship to the few who have property. _See Forty Acres and a Mule_, supra note 169. The radical impulse was to use the former, liberals wanted to do the latter.

251. _Conservative Views of a Colored Lawyer of This City_, Christian Recorder, Nov. 1, 1883 at 2.
252. _Id_.
253. _Id_.
255. _Id_.
256. _Id_.
257. _Id_.
258. _Id_.
259. _Id_.
260. _Id_.
261. _Id_.
John D. Lewis agreed with Simkens that African Americans would be better off without the Sumner Act because "this class of legislation only held a whip over respectable citizens, which made them more combative against a remedy thus sought." But the opposition of "conservative" African Americans like Lewis and Simkens to federal civil rights laws did not necessarily mean that they had abandoned a commitment to equality under law. African American opponents of the Sumner Act asserted that the Supreme Court's decisions did not upset the fundamental fact of African American citizenship, and the right to equal laws which went along with that citizenship. It just meant that African Americans would have to rely on state courts for protection of their rights.

John D. Lewis, for example, had a strategy that would rely on more than just the hope that white racism would be tempered by the economic advancement of a Black middle class. Lewis would answer any "abridgement of a colored citizen's civil rights" by bringing an "action in our common law courts." Lewis shared the belief, routine among writers in the Black press, that the rights of access to "hotels, cars, theatres, etc." which the Sumner Act had protected, were common law rights and therefore should be guaranteed to all citizens in state court. Lewis explained:

Common carriers, inn-keepers, etc., are licensed insurers of the citizens' rights, and cannot legally discriminate on the basis of color. I would advise in every such case a civil suit in the common law court for damages . . . and even though I were not successful . . . by the time I carried the aggressor through the Supreme Court, he, no doubt, would conclude that it would have been cheaper for him to receive decent colored persons on the same basis of all other citizens.

In order to insure that African Americans could afford such litigation, Lewis urged the creation of a legal defense fund for that purpose.

Criticisms of class legislation in the African American press were not based solely in liberal ideology, nor did they all extol the virtues of social Darwinism. Writers in the Black press also grounded their critique in racial pride, anti-slavery legal theory, and memory of the repressive and stigmatizing role played by special legislation before the war.

In the awful days of slavery, the infamous Justice Taney had used the fact that even free African Americans "were governed by special legislation directed expressly to them," as evidence that they were "marked and stigmatized," and therefore could not have been considered to be citizens of the United States. Simi-

lignant, how thrifty, how moral a colored man was, they placed him below the position of the poorest and meanest white.).

262. Conservative Views of a Colored Lawyer of This City, Christian Recorder, Nov. 1, 1883 at 2.

263. See, e.g., Civil Rights: Opinions of the Press and Leading Men of the Country, Arkansas Mansion, Nov. 10, 1883 at 1 ("Ex-Gov. P.B.S. Pinchback . . . holds that with or without the civil rights bill . . . the civil rights of all citizens are defined by the common law. If he was denied any privilege belonging to him as a citizen of Louisiana on account of his color he has a right to seek redress in the courts of the state."); Arkansas Mansion, Nov. 10, 1883 at 1 (letter to editor from J.B. Atkinson) ("We need no special legislation to enforce our civil rights; we must enforce them just as every other citizen of the United States does . . ."); A Civil Rights Inquiry, Arkansas Mansion, Nov. 17, 1883 at 1 (by "A Plebian") ("Are the rights of the colored citizens of Arkansas not already secured by law? Let us see."). The author then describes Articles of the State Constitution which guarantee equality before the law, and suggests that colored people can enjoy all their rights if the "club their means and employ good counsel.").

264. Conservative Views of a Colored Lawyer of This City, Christian Recorder, Nov. 1, 1883 at 2. Lewis's call for common law litigation was more than a mere polemical device. He brought such cases as Lewis explained in the Christian Recorder, even [in] the absence of the [Civil Rights Cases] decision, had I cause of action for any abridgement of a colored citizen's civil rights, I would have brought that action in our common law courts, as I did in the case of Brown vs. the Union Railroad Company, and as was done in the case of Chew vs. the Arch Street Theatre, and not under the Civil Rights Bill. Conservative Views, supra.

Some of Lewis's optimism about the prospect of continuing victories in common law courts may be due to indications in Philadelphia that the white community would be reasonable about African American claims to equal treatment. Soon after the Civil Rights Cases, Philadelphia's largest white newspaper opined that "progressive public opinion" would no longer support exclusion of African Americans from public spaces. In 1887, Pennsylvania passed a state law which guaranteed the rights which had been secured by the Sumner Act. However, Pennsylvania's civil rights law placed a $100 cap on damages that could be recovered, making it harder and riskier to pursue litigation. Lawyers who followed Lewis in the 1890s had a very difficult time winning civil rights cases, and such cases were soon an insignificant part of their work. William Dorsey's Philadelphia, supra note 36, at 171. Conservative Views of a Colored Lawyer of This City, Christian Recorder, Nov. 1, 1883 at 2.

266. See infra notes 280-283 and accompanying text.

267. Conservative Views of a Colored Lawyer of This City, Christian Recorder, Nov. 1, 1883 at 2. Lewis's position makes it clear that African American opponents of the Sumner Act did not necessarily disapprove of the rights that it protected. They just thought those rights should be protected by ordinary common law rules in state courts rather than by "special legislation" from the federal government.

268. Id. When Lewis died in 1891, he left money for the creation of such a legal defense fund. William Dorsey's Philadelphia, supra note 36, at 171. Lewis's legal and non-legal strategies for African American advancement seem to be more collective and show more cross-class solidarity than those of Simkens. Contrast the tone of Lewis's comments in the Christian Recorder, supra: The colored people will sooner secure their civil rights by relying upon their own resources in common with all other citizens. Let them individually and unitedly educate themselves to a higher standard of respect, industry, integrity and confidence in each other. Then, if civil rights, or any other right which belongs to the citizen, be denied them, they should raise a residuary fund for the purpose of diligently defending themselves against any such aggression.

with those of Simkens and his supporters in the Arkansas Mansion. Lewis was concerned about class and color divisions within the African American community. In 1879, shortly before the National Colored Convention in Nashville, Lewis suggested that the issue of "caste within the race" should be a topic for discussion. William Dorsey's Philadelphia, supra, at 168, 277.

269. Taney surveyed statutes placing special restrictions on African Americans, then went on to say that these laws show that this class of persons were governed by special legislation directed expressly to them, and always connected with
larly, a correspondent with the Christian Recorder argued that by singling out African Americans for “special treatment,” the Sumner Act had “virtually recorded that the colored man is the inferior of all other citizens.”

Therefore, by striking down the Sumner Act, the Supreme Court had “paid a compliment to the colored citizens,” by removing from them the stigma of being subject to special legislation. As long as civil rights laws were in place, African Americans were held by the laws of the United States as a parent does his child. Now that the Sumner Act was struck down, the African American citizen had “become[] a full grown man,” who could enforce his civil rights by the same means “as every other citizen of the United States.”

In the same way that some African Americans’ memory of the stigmatizing, oppressive role played by antebellum anti-Black class legislation colored their view of post-war civil rights laws, memories of the constitutional ideas of anti-slavery legal theory also provoked African American opposition to the Sumner Act. Soon after the Sumner Act was struck down, a resolution asking Congress for new legislation to replace the Act was introduced to a convention of African American men meeting in Hartford, Connecticut. One delegate to the convention objected that

it seemed strange to him to be asking of the legislature protection in his civil rights, as he was a citizen of the country, born as was his father here beneath the flag. Being a citizen, he thought he was secured in the rights of citizenship. He quoted the Declaration of Independence, and said the rights set forth therein were honestly set forth and for many years honored. He felt that it was a degradation to ask for protection in rights which no one had the right to deprive him of, and in keeping with this feeling he voted “No!” [on the resolution asking for new legislation.]

Thus, at least some African American opposition to the Sumner Act was based on an attachment to the anti-slavery legal theories that held all of Reconstruction to be declarative of existing rights.

B. The Negro Is A Citizen And Must Be Protected

While a few writers greeted the death of the Sum-
ner Act as a blow against class legislation, a victory for a new laissez-faire social order in which "wealth and intelligence" would be the key to success, or as the removal of the last reminder of stigmatizing "special" treatment, most writers were dismayed by the decisions. Many of those who attacked the Court's reasoning felt compelled to address the issues of class legislation and laissez-faire which had been raised obliquely by the Court and more directly by their fellow African Americans and other Republican opponents of class legislation.

The African American response to those who believed that the Sumner Act had improperly made African American citizens the special favorite of the laws was twofold. Some writers denied that the Sumner Act was class legislation at all. Other writers acknowledged that the Sumner Act was "especially for the negro," but justified such legislation as a necessary part of any real commitment to African American freedom.

1. The same rights as are enjoyed by other people

Some writers in the African American press had a simple answer to critics who used class legislation arguments to attack civil rights laws: such arguments were not class legislation in the first place. The usual understanding of class legislation was that it was legislation especially for the benefit of one group of people, at the expense of another group. African American writers denied that this was a feature of civil rights laws. Civil rights laws did not secure special privileges to Blacks. Instead, they secured rights to African Americans which were already held by whites. Reconstruction and civil rights laws also made possible, for the first time since the nation's founding, the achievement of real freedom for citizens of all races.

Some writers objected to the classification of the Sumner Act as class legislation by pointing out, "The plain intent and meaning of the Civil Rights Law, was to secure to the colored people, the same rights as are enjoyed by other people. That, and nothing more." 278 Since the Act gave no benefit to Blacks that was not already enjoyed by whites, it could not be classified as legislation especially for the negro. 279

To support the argument that the Sumner Act secured no special privileges to African Americans, many writers argued that the rights protected by the Act were simply common law rights. As John Mercer Langston 280 explained, the Sumner Act "seems to be simply a declaratory statute explanatory of existing rights. It does not create our rights; it simply defines and explains them. What rights does it explain? The simplest common law rights of which we have any knowledge . . . " 281

These common law rights should be guaranteed to all citizens, as part of their citizenship. "The means of enforcing these rights. . . always existed through the various channels of the state courts," and white citizens could use the state courts to vindicate their common law rights. 282 However, "the laxity of [the state] courts in several states" when it came to enforcing the rights of Black citizens "brought about the enactment of the [Sumner] civil rights bill." 283 Since the purpose of Sumner's Act was simply to give African American citizens the same access to common law rights already possessed by white citizens, it was absurd to claim that the legislation gave special benefits to African Americans.

Another reason that civil rights laws could not properly be classified as class legislation was that the achievements of Reconstruction had benefitted all citizens, not just African Americans. Before the war, when slavery corrupted the Constitution, "there was not a man in the country, however white, as no one black, who was in the position of his full share of civil, religious and legal rights."

The idea that the rights enumerated in the Sumner Act were guaranteed by state common law was referred to by Justice Bradley in the Civil Rights Cases. Bradley prefaced his imposition of the state action requirement with the claim that "Inkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them." 109 U.S. at 25. Justice Goldberg, writing in 1964, also argued that common law rights at the time of the adoption of the Fourteenth Amendment included the right of nondiscriminatory access to public accommodations. See Bell v. Maryland, 378 U.S. 226, 296-305 (1964) (Goldberg, J., concurring) (arguing that state enforcement of facially neutral trespass law against Black sit-in demonstrators violated Fourteenth Amendment). One modern commentator has argued that the common law tradition's protection against discrimination was relatively limited. It may be that "whatever law did exist applied solely to common carriers, enterprises traditionally subject to stringent common-law regulation." Erwin Chemerinsky, Rethinking State Action, 80 U.L. Rev. 503, 516 (1985). Whatever the historical record may show, writers in the Black press inevitably spoke of the common law tradition as color-blind, although they certainly recognized that the law that was actually pronounced in courts was anything but.

279. This argument was made forcefully by Justice Harlan in his dissent. See 109 U.S. at 61-62 (Harlan, J., dissenting).
280. John Mercer Langston was one of the preeminent African American leaders of the nineteenth century. See WILLIAM CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829-65 (1989); William Cheek & Aimee Lee Cheek, John Mercer Langston: Principle and Politics, in BLACK LEADERS OF THE NINETEENTH CENTURY, supra note 44, at 103-126; JOHN MERCER LANGSTON, FROM THE VIRGINIA PLANTATION TO THE NATIONAL CAPITOL (1894). Langston, at the request of Charles Sumner, drafted the bill which was eventually to become the Sumner Civil Rights Act. BLACK LEADERS OF THE NINETEENTH CENTURY, supra, at 120.
281. The Civil Rights Law, New York Globe, Oct. 27, 1883 (speech by John Mercer Langston, given at a meeting at the First Congregationalist Church in Washington D.C. on October 19). See also, Civil Rights: Opinions of the Press, Arkansas Mansion, Nov. 3, 1883 at 1 (exchange from Cincinnati Afro-American) (Sumner Act was "meant to enforce" the common law); The Civil Rights Bill Declared Unconstitutional: Opinions of Some of Our Colored Exchanges, Petersburg Lancet, Oct. 27, 1883 (same); Civil Rights: Opinions of the Press and Leading Men of the Country, Arkansas Mansion, Nov. 10, 1883 at 1 ("Ex-Gov. P.B.S. Pinchback . . . holds that with or without the civil rights bill . . . the civil rights of all citizens are defined by the common law.").
282. Address to the Colored People of Louisville, Arkansas Mansion, Oct. 27, 1883 at 1.
283. Id.

https://digitalcommons.law.yale.edu/yjll/vol3/iss1/4
political liberty."284 The destruction of slavery and the establishment of equality under the law "emancipated the white men of the country and the black alike."285 The amendments and civil rights acts had aimed to establish a nation of universal freedom, in which all citizens were protected by the federal government in their fundamental rights to "life, liberty, and the pursuit of happiness."286 Speaking specifically of the Sumner Act, one correspondent wrote to the New York Globe:

The Civil Rights bill was not worded . . . so as to specially protect the Negro, but to guarantee civil treatment to every honest man who had sufficient respect for and confidence in [the] purity and stability of our Government to become a citizen of it. A Civil Rights bill hurts no one, protects all and is only odious to those who make laws for the protection of respectable persons a necessity.287

2. We object to being put on a level with them

Given the antebellum association of class legislation with slavery and the fact that civil rights laws could be justified without arguing for class legislation, it is remarkable that some writers in the black press did face the issue head on and present arguments in favor of "legislation especially for the negro." These arguments were marked by a rejection of the formalism of liberalism and an intense appreciation of the unique historical experience of African Americans.

One of the most striking things about laissez-faire/liberal ideology is its formalism, often manifested in its blindness to power differentials. It is this formalism which allows the category "class legislation" to exist and to contain examples which seem wildly divergent. A minimum wage law, designed to ensure that no one who owns nothing but the ability to labor, falls into the same category as a grant of monopoly designed to protect a manufacturer who owns everything else. A progressive income tax, or a civil rights law, or an eight hour day law, all fall into the same category as a slave code, and all are to be condemned. This formalism treats legislation designed to bring some justice to the victims of hundreds of years of slavery as if it were a handout to bank owners. In the formalistic world of liberal jurists, class legislation is class legislation, no matter which group benefits and which pays the cost.288

Some writers in the African American press re-

285. Id. Compare Slaughter-House, 83 U.S. at 123 (Bradley, J., dissenting) ("The mischief to be remedied [by the Reconstruction Amendments] was not merely slavery but [also] insubordination of free speech and free discussion."); Ex parte Virginia, 100 U.S. 339, 364-65 (1880) (Field, J., dissenting) (importance of protecting Northerners and Unionists in the South).
286. I speak here of the aim of the Reconstruction amendments as perceived by writers in the Black press. Of course, the Supreme Court rejected this nationalist interpretation of Reconstruction in Slaughter-House and the other "dreadful decade" cases. See supra Section II. However, most writers in the Black press continued to claim that the nation had a duty to protect its citizens' fundamental rights to life liberty and the pursuit of happiness. See, e.g., Civil Rights Laws, New York Globe, Feb. 3, 1883 at 2 ("[if, according to the decisions of the supreme court, the United States has the power to protect citizens in the enjoyment of that 'life, liberty and the pursuit of happiness,' which it unblushingly guarantees, we fail to see it. The United States is a complex fraction, any one of whose parts is vastly more unified and perfect than the whole. The United States is simply a tub without any bottom, and we power to protect citizens in the enjoyment of that 'life, liberty and the pursuit of happiness.'").
287. The United States is a complex fraction, any one of whose parts is vastly more unified and perfect than the whole. The United States is simply a tub without any bottom, and we power to protect citizens in the enjoyment of that 'life, liberty and the pursuit of happiness.' We object to being put on a level with them.
288. Some writers in the African American press re-
jected this formalistic approach to law and social relations, and recognized the racial dynamics of power in post-War America. Justice Bradley defended his decision to end African Americans’ status as “special favored of the laws” on the grounds that they could still secure their rights by the same means as other citizens. As we have seen, some African Americans believed Bradley was right, and urged their fellow Black citizens to rely on state law, just as whites would. But the editors of the Christian Recorder had the following message to give to “that class of our friends who accept” the Civil Rights Cases decision because “it simply leaves us where the white men of the country are left; neither better nor worse.”

We, of course, object to this on the ground that as yet things are not even. We are not as educated as white men; we are not as rich; we are not as strong in character; we are not as numerous; and altogether we are not as well prepared to protect ourselves. Therefore, we object to being put on a level with them.

The editors of the Recorder knew that formal equality on a non-level playing field is not equality at all. As Justice Blackmun has explained, “In order to get beyond racism, we must first take account of race. . . . And in order to treat some persons equally, we must treat them differently.”

Some African American opponents of early civil rights laws, like modern opponents of affirmative action, objected to any claim that special protection was needed on the grounds that such claims were stigmatizing. For African American supporters of civil rights laws, however, the need for special protection arose from power imbalances which could be recognized without shame or stigma because they were so obviously a product of history rather than a failing of African American character. It was a history so awfully filled with racist oppression that it was not at all surprising that African Americans were “not on a level” with white citizens. This recognition of the history and continuing effects of racial oppression broke the formal symmetry of the liberal attitude toward class legislation and formed the basis for African American arguments in favor of “legislation especially for the negro.”

The importance of historical memory for the definition and defense of class legislation can be clearly illustrated in the context of early Republican plans for redistribution of rebel lands to the former slaves who had worked them. To opponents of the redistribution policy it was naked class legislation of the worst kind: the property of one group of people was to be forcibly expropriated by the government and handed over to another group. However, from the viewpoint of African Americans in the former slave states land redistribution could hardly be called confiscation at all. Through the prism of African American history it looked much more like the “land which they had watered with their tears, enriched with their blood, tilled with their hard hands.” was payment long overdue for hundreds of years of forced and uncompensated servitude.

African American “carpetbagger” William Whipper reminded liberal opponents of “special treatment” for African Americans that “[t]he white race have had the benefit of class legislation ever since the founding of our government.” But now white Americans, after hundreds of years of benefiting from special treatment at the expense of African Americans:

[after having stolen from us the worth of two hundred years hard labor; after having bound us in chains and fetters, mentally as well as physically; after having surrounded us with the most demoralizing social evils; after having received our protection and devotion while they were completely at our mercy, during the late civil war, they now reward us by ignoring every claim we have upon citizenship, every tie that should bind together the members of a body politic, and withhold from us all sympathy and all encouragement.

White America’s cries of foul against “legislation especially for the negro” seemed hollow in the wake of this history, even when they came from people who had been friends of the anti-slavery movement.

Hundreds of years of slavery and racial oppression had produced a massive transfer of wealth from African

similar attachment to an abstract category called “racial classification” has haunted the Court’s doctrinal analysis of modern affirmative action programs. See Michel Rosenfeld, Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality, 87 Mich. L. Rev. 1729 (1989).

296. See supra Section VI.A.

299. See supra note 50, at 507 (When African Americans heard liberal “reformers” clamor against “class legislation” and admonitions to the freedmen to “work out their own destiny, they discerned a refusal to acknowledge blacks’ unique historical experience, and a cruel indifference to their fate.”).

299. See supra notes 186-189 and accompanying text.

299. The Twentieth Anniversary of Lincoln’s Proclamation of Emancipation, Washington Bee, Jan. 6, 1883 at 1-2 (speech of Frederick Douglass).

299. The term “carpetbagger,” although originally intended by white southerners to be an insult, has now become “so unavoidable a part of the lexicon of Reconstruction” that it has lost its perjoritive implications. Reconstruction, supra note 50, at 295 n.28. See id. at 157-38, 294-97. For information about William Whipper, see THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION (1977).


299. To Your Tents, O Israel!!, Peoples Advocate, Nov. 10, 1883 at 2.

https://digitalcommons.law.yale.edu/yjll/vol3/iss1/4
Americans to white Americans, convincing most African Americans that they needed special protection from white domination. Frederick Douglass described the situation to a gathering celebrating the twentieth anniversary of the Emancipation Proclamation:

No people ever entered the portals of freedom under circumstances more unpunitive than the American freedmen. They were thrown overboard in an unknown sea in the midst of a storm without planks, ropes, oars or life preservers and told they must swim or perish. They were without money, without friends, without shelter and without bread.

The land which they had watered with their tears, enriched with their blood, tilled with their hard hands, was owned by their enemies. They were told to leave their old quarters and seek food and shelter elsewhere.

As Frederick Douglass exclaimed, the true "marvel" of the African American condition was not that they were in need of federal protection and special legislation, it was that African Americans were "not exterminated."

It is remarkable, and a testament to the power of liberal ideology, that whites who derided civil rights laws as class legislation, many of whom had been advocates of anti-slavery, could ignore the concrete reality of history in favor of the abstract appeal of laissez-faire and "neutral" legislation. But this failure of memory and imagination was more than just a product of liberal ideology. It was also a self-conscious part of the liberal political project. By disavowing civil rights legislation, and thus suppressing African American political activity in the South, liberal reformers hoped to divert the nation's attention from the moral issues of race and justice which had brought radicals into power, and consolidate their own grip on politics. The formalism and ahistoricism of liberal laissez-faire legal theory provided the perfect tool for this exercise in forgetting, while racism insured that the victims would be unworthy of concern to most white Americans.

To the victims themselves, the history of racism in America was too painful, and its effects too longlasting, to ignore. Frederick Douglass explained the importance of memory to African Americans in a powerful attack on those who would forget:

[T]he nation may forget; it may shut its eyes to the past and frown upon any who may do otherwise, but the colored people of this country are bound to keep a fresh memory of the past till justice shall be done by them in the present. When this shall be done we shall as readily as any other part of our respected citizens plead for an act of oblivion.

Unfortunately, no matter how "fresh [the] memory of the past" was kept in the minds of African Americans, it could not be saved from the Supreme Court's "act of oblivion."

Writers in the Black press were well aware that white America was shutting its eyes to the effects of two and a half centuries of slavery. African Americans recognized that over the course of the previous decade, the country had seen "the ebb of public sentiment on the rights of the new citizen and the shifting of the main political issues which divide National parties from those questions growing out of the reconstruction period to those mainly economical in their nature."

Even those whites who had formerly seemed to be friends, and who had actively participated in the struggle to end slavery, were abandoning the cause of African Americans, and leaving them to the laws of nature.

With white America's act of oblivion in mind, the Christian Recorder presented an argument in favor of federal civil rights laws which used an analogy that the Recorder hoped might appeal to the former "friends" who had deserted them:

We wonder if it has ever occurred to these friends of ours that the plea we make [for civil rights laws] is precisely the plea which American industry makes when it is proposed to take away its Civil Rights bill, in the shape of the Tariff, for what is Tariff but a protection to a class who confess themselves not to be as strong as another class?

As we see, then, the cases, if not precisely, are largely similar. In their competition with white men, colored men, by reason of their immaturity, ask Congress to throw around them the arms of protection in the shape of a Civil Rights law, which it does. But the Supreme Court says Congress shall not do it; and the class of friends alluded to above say "Amen," supplementing it with the statement, "you are just where white men are; don't fret or ask for more." In their competition with foreign industries, American industry, just like the colored man, by reason of immaturity, asks

299. The Twentieth Anniversary of Lincoln's Proclamation of Emancipation, Washington Bee, Jan. 6, 1883 at 1-2 (speech of Frederick Douglass). See also Civil Rights, Peoples Advocate, Oct. 27, 1883 at 1 (by "Le Duke," a regular columnist) ("We are now left in the desert unarmed to reason, unarmed, with a wolf, to battle unshielded with the elements — the snow of scorn and the whirlwind of prejudice.").

300. The Twentieth Anniversary of Lincoln's Proclamation of Emancipation, Washington Bee, Jan. 6, 1883 at 1-2 (speech of Frederick Douglass).

301. According to Edward Herman and Noam Chomsky, the distinction between "worthy" and "unworthy" victims plays an important role in "manufacturing consent" for United States foreign policy today. See Herman & Chomsky, Manufacturing Consent: The Political Economy of the Mass Media 37-142 (1988).

302. Washington National Republican, April 17, 1888, reprinted in Voice of Black America, supra note 45, at 520-536 (speech by Frederick Douglass on April 11, 1888 in Washington, D.C., at a celebration of the twenty-sixth anniversary of emancipation in the District. Douglass had just returned from a tour of the south, where he had been shocked by the conditions of the ex-slaves there. He denounced the low pay, the "truck" system, and landlord-tenant laws.).


304. See supra note 227 and accompanying text.

70
Congress to throw around it the arm of its protection in the shape of strong Tariff laws, which is done; and the Supreme Court says, "Amen, it is all right." And our friends say, "Amen," too.

We colored men are of the opinion that if it is sufficient for us to be on the same platform with the white man, no better and no worse, American industry ought to be satisfied if it can be on the same platform with the industries of the world. . . . Our only objection to the Bradley opinion is that it leaves the weak at the mercy of the strong. And is not that the objection which the industry of our country makes when you talk to it of free trade? One and the same principle is involved, and it is impossible with any show of equity to grant the wishes of one and deny the wishes of the other. If the nation must protect its weak industries it surely ought to protect its weak men. The principle that abolishes Civil Rights will bring a Free Trade.305

The *Christian Recorder*'s comparison of civil rights laws to protective tariffs served two purposes. By appealing to the self-interest of the industrialists who were coming to dominance in the Republican party, the *Recorder* hoped to awaken support for civil rights among those who were oblivious to the plight of African Americans. At the same time, the analogy served to remove any hint of stigma from the beneficiaries of civil rights laws. If the captains of industry were not stigmatized and humiliated by protective tariffs, why should African Americans, who had so much more reason to need protection, be stigmatized by federal protection of their civil rights?306

While the editors of the *Christian Recorder* used an analogy to build support for civil rights and defuse the issue of stigmatization, William Whipper took a more direct route, appealing openly to the experience of African American history:

I want class legislation in favor of liberty, justice and equality as a remedy for the evils of the past.

It was class legislation that has changed our whole civil condition . . . . It was class legislation that placed us outside of the Constitution, and it is class legislation that must bring us back again. Therefore, I am for class legislation wherever it is needful, right, and in conformity with the principles of justice and humanity.307

Convinced by experience that "legislation especially for the negro" was needed, and freed by memory from fear of being stigmatized by such legislation, writers in the African American press were able to argue for federal civil rights laws without apology, even to the point of embracing "class legislation." If the nation truly devoted itself to eradicating the effects of slavery and racism, there would indeed come a time when "the scales are . . . balanced."308 At that point, there would be no need or justification for African Americans to be the special favorite of the laws. Until that time came, some writers in the African American press demanded that "legislation especially for the negro" be a part of the nation's commitment to civil rights.

VII. CONCLUSION

As Reconstruction ground to a halt after 1877, judges inspired by the possibilities of Justice Field's Slaughter-House dissent began to craft laissez-faire principles into the Constitution through the due process clause of the Fourteenth Amendment. Concerns about federalism delayed the Supreme Court's adoption of laissez-faire jurisprudence, but the Civil Rights Cases can be seen as an early victory for laissez-faire, a victory which came at the expense of the one group whose protection was declared by the Court to be a central purpose of Reconstruction. The myth of laissez-faire, with its autonomous individuals interacting upon terms of free contract, would dominate the legal landscape of economic regulation for the next six decades, until economic crisis and the political mobilization of the New Deal forced the Supreme Court to abandon it.309

---


306. This argument also exhibits total disdain for liberal Republican legal theory and political economy by using an analogy to protective tariffs to drive its point home. Liberal orthodoxy rejected tariffs as another objectionable example of class legislation. Although this objection to trade barriers was an entrenched aspect of liberal political economy, *Reform Republicans*, supra note 161, at 57-58, 63-64; *The Best Men*, supra note 160, at 172-82, it never rose to the level of constitutional doctrine. John Sprout has pointed out that "[a]lthough they used the term 'free trade' in advancing their tariff views, few liberal reformers were really free-traders themselves. Rather, it was an ideal many of them clung to long after they had abandoned it as a feasible alternative to protectionism." After 1872, 'moderate protection' or 'judicious re-form' replaced free trade as the goal of most orthodox liberals." **Id.** at 177.

307. New National Era, Dec. 12, 1872, *reprinted in The Black Press*, 1827-1890, supra note 4, at 156-57. Whipper's more direct approach may be attributable in part to the fact that he was writing in 1872, before it was clear that white America would try to forget the injustices of the past. See also *New National Era*, Nov. 23, 1872, *reprinted in The Black Press*, 1827-1890, at 156 (William Whipper) ("We have been oppressed as a class and we must rise from fear of being stigmatized by such legislation, writ-
Law and Liberation

Today, half a century after the death of laissez-faire in the economic sphere, our courts have yet to come to terms with the laissez-faire fictions of racial dynamics rejected by the dissenters in the black press.

has rejected an anti-capitalist republican interpretation of Reconstruction, in which wealth redistribution would be constitutional required. See, e.g., James v. Valthier, 402 U.S. 137 (1971) (classifications which disadvantage poor people are not subject to heightened scrutiny under the Fourteenth Amendment).


The modern Supreme Court has overcome many federalism-based impediments to effective enforcement of civil rights. The Court seemed for a time to escape the type of formalistic analysis that is blind to the power

Wycoff: LEGISLATION ESPECIALLY FOR THE NEGRO? THE BLACK PRESS RESPONDS TO

Published by Yale Law School Legal Scholarship Repository, 1992
THE CIVIL RIGHTS LAW.

HON JOHN MERCER LANGSTON DEFINES CITIZENSHIP AND THE RIGHTS ATTACHING TO IT.

By an Exhaustive Analysis of the Relations of the Citizen and the Government—What Constitutes Citizenship—What Parties are Created for the Duty of the People at this Time.

Specially Reported for The Globe.

WASHINGTON, Oct 22.—Not within the memory of the oldest inhabitants has ever before so large, refined and highly representative an audience assembled to hear any man as the one that greeted the Hon John Mercer Langston upon the occasion of his great lecture upon the "Status of the Colored American, His Relationships and His Duties," at the First Congregational Church last Friday evening. Two hours before the time of beginning people began to congregate in front of the capacious edifice, and when the doors were opened at seven o'clock more than a thousand persons stood ready to enter, and within thirty minutes thereafter, seats were at a premium. At eight o'clock, the time for beginning, there was no standing room in any part of the Church, and hundreds of people crowded the immense vestibule, all anxious to hear the renowned orator of the occasion.

Seated upon the stage were Hon B. K. Bruce, Hon. Frederick Douglass, Rev Dr J. E. Rankin, Prof R. T. Greene, Judge William Lawrence, Hon O. S. B. Wall, Dr C. B. Purvis, Captain Isaac F. Norman, Rev J. A. Mulligan, Mr W. E. Matthews and others.

The following were among the letters of regret at their inability to hear Minister Langston's lecture, read by Mr Lawson: Justice J. M. Harlan, Attorney General Brewster, District Attorney G. B. Corkhill, Postmaster General W. Q. Gresham, Assistant Secretary of State John Andrew Wylie, Assistant to give bonds that he come a charge upon the town he proposed to reside. We wish a legal settlement in that State by endeavor, well know and will the usages that marked this territory.

Shall I speak of the "Dred Scott" decision? It was sent to this country by the Supreme Court of the States as the thundering prelude of the liberty of the color and without it we might not have freedom even in blood. It came with it! It may be the case that and consolidate, make firm an civil rights, our equality before was necessary to have given us the aid of the Supreme Court. accept it upon the Scriptural makes the wrath of man to the remainder he restraineth.

Upon the "Dred Scott" decision dwell. You understand it fully. men have no rights which would respect it were its worthy Markable declaration! It is with Chief Justice Taney could ever have any such sentiment, with the Independence standing before him, the Articles of Confederation stand him, with the Constitution of States standing before him, the, it was once the law standing before him, the mid-heaven; and yet, uttering in the face of all the docs teach the equality of mankind, shadow of law, without reason morality, legal or otherwise, to utterance was announced as the land.

But, leaving such decisions of let us come to the opinions of General. We have had two returning Generals in this country, the period of the slave holding. I refer to Mr Le William Wirt. Under the formation was discussed as to whether could be citizens preclude the learned Attorney decided, but held us simply "denizens." latter the question—"Can color be citizens so as to command A sets?" was considered. And I concluded that we were civil non-i.

The colored American a "Ie man who had given his life in
THE CIVIL RIGHTS DECISION.

The colored people of the United States feel to-day as if they had been baptized in icy water. From Maine to Florida they are earnestly discussing the decision of the Supreme Court declaring the Civil Rights law to be unconstitutional. Public meetings are being projected far and wide to give expression to the common feeling of disappointment and apprehension for the future.

The Republican party has carried the war into Africa, and Africa is accordingly stirred to its centre.

We need not at this time review the legal aspects of the law or the decision. In times past we have done so.

It was only a few months ago that the Supreme Court declared that the Ku Klux law was unconstitutional—that the United States was powerless to protect its citizens in the enjoyment of life, liberty and the pursuit of happiness. What sort of Government is that which openly declares it has no power to protect its citizens from ruffianism, intimidation and murder? Is such a Government worthy the respect and loyalty of honest men? It certainly does not enjoy our respect and our loyalty to it is the cheapest possession we have.

Having declared that colored men have no protection from the government in their political rights, we ask that the colored people of this country have not peculiar and common to each every other class of their fellow-citizens—is, in law. The attempt of men and parties to mate for us a condition peculiar and not common has caused all of the dissatisfaction which Republican machine organs have complained of among us. To our efforts to make it plain that our friends, as well as our enemies, have used us to advance their selfish interests must be ascribed such sentiment those spoken by the Times. In State municipal election we have clearly shown we know how to wield a manly, independent ballot. If it still be necessary to go for
Legislation Especially For The Negro?

imbalances produced by the history of race in this country. But the modern Supreme Court seems to be slipping back into formalism, failure of historical memory, and liberal assumptions of individualism, all of which preclude the formulation of effective remedies for racism. Our courts and our political institutions continue to espouse the liberal ideal of equality in the abstract. However, by clinging to the belief that “color blind” responses to racism will remedy its effects, they understate racism’s power, persistence, and pervasiveness. Such underestimation may have been understandable in 1883, when writers in the Black press had seen a change from slavery to full (formal) citizenship in the course of one generation. But there is no excuse for it now, after the experience of the last century.

To those who fear that any non-color blind remedy will stigmatize its beneficiaries, the Black press had a simple answer one hundred years ago that remains compelling today. Remember history. Race “has been the cause of exclusion, so let [it] ... be the ground of recognition until the scales are once more balanced.” Only by following this command can we answer the appeal made by the dissenters in the Black press over a century ago, the “demand that our rights secured to us by the Constitution be a reality, not the mere word.”


314. Freedom in the United States a Mockery, Cleveland Gazette, Dec. 15, 1883 at 1 (call for a state convention of Black men, to be held in Columbus, Ohio, on December 26, 1883).