

WHY THE *CIVIL RIGHTS CASES* BELONG IN THE ANTI-CANON: BLACK CITIZENSHIP, THE FOURTEENTH AMENDMENT, AND JUDICIAL INTERPOSITION

Matthew Norman* & Christopher Bryant**

I. INTRODUCTION

Citizenship should mean something. In a republic, citizenship should signal far more than protection from deportation. Though some may lack the franchise, *all* citizens nevertheless constitute the constituent members of the political community, whose interests and welfare the government has been instituted to protect and advance. A caste system is irreconcilable with the most fundamental precepts of a republic, as the Declaration of Independence's assertion that "all men are created equal" reflects.

The framers of the Fourteenth Amendment well knew this. Black citizenship had been a flashpoint in antebellum debates about both slavery and the status of free Black people, culminating in perhaps the single-most shameful moment in the Supreme Court's long history: the odious claim in Chief Justice Taney's *Dred Scott* opinion that even freed slaves and their descendants could not become citizens but rather were, in the eyes of the law, "so far inferior that they had no rights which the white man was bound to respect."¹ One of the core purposes of the Fourteenth Amendment,² and the Civil Rights Act of 1866³ before it, was to excise

* Associate Professor of History, University of Cincinnati Blue Ash College.

** Rufus King Professor of Constitutional Law, University of Cincinnati College of Law. The authors thank Professor Thomas for the kind invitation to participate in the spring 2021 Symposium and the University of Cincinnati and the Harold C. Schott Foundation for financial support. Of course, remaining errors are ours alone.

1. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

2. See, e.g., KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* 140 (2014).

3. *Id.* at 169 (noting that the Civil Rights Act of 1866 had sought to supplant *Dred Scott*'s citizenship holding). See also Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 417 (2020) ("It is common ground, and has been since their enactment, that the [1866] Act and the [Fourteenth] Amendment made citizens of the freed slaves and overruled *Dred Scott* as applied to persons of African ancestry generally.").

from our constitutional order Taney's corrosive ideology of caste and replace it with an unambiguous and irreversible commitment to full and equal citizenship for all persons born or naturalized in the United States, regardless of race, color, or previous enslavement.

As the Amendment and the statute both evidence, those who steered the course of the Thirty-ninth Congress knew that a caste system could not be eradicated and replaced with legal equality by mere legislative declaration. Congress would need to make the promise of equal citizenship a reality by eradicating the vestiges of centuries of the most onerous oppression and responding to the inevitable hostility the intended transformation would regrettably provoke. That is why the statute proceeded to enumerate civil rights for federal protection⁴ and why the Fourteenth Amendment ended with an express commitment to Congress of a broad enforcement authority.⁵

Notwithstanding the centrality of Black citizenship to the Reconstruction project, the concept has played no substantial role in the jurisprudence of the Fourteenth Amendment. That lamentable omission can be traced to the Court's 1883 invalidation of the most sweeping and progressive civil rights legislation enacted prior to 1964. In the ironically branded *Civil Rights Cases*, the Court held that the provisions of the Civil Rights Act of 1875 attempting to secure to all persons "full and equal" access to "inns, public conveyances on land or water, theaters, and other places of public amusement" exceeded the powers of Congress.⁶ In so holding, the Court deigned even to acknowledge, let alone explain, its rejection of the defense that the law was an appropriate means to the end of obtaining full and equal citizenship for Black people.

That defense of the law had been made both in the legislative debate preceding the statute's enactment⁷ and in the spirited and extended dissent by Justice Harlan.⁸ By ignoring the claim, the majority presaged, indeed foreordained, the High Court's enduring disregard of the citizenship clause as a source of congressional authority to combat pervasive societal discrimination, a neglect that continues to this day. Recent events, and the massive protests they spurred, demonstrate that, sadly, the issue of full and equal citizenship for African Americans has not been mooted by the

4. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

5. U.S. CONST. amend. XIV, § 5.

6. *Civil Rights Cases*, 109 U.S. 3, 11-14 (1883).

7. See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019). See generally ALLEN FRIEDLANDER & RICHARD A. GERBER, *WELCOMING RUIN: THE CIVIL RIGHTS ACT OF 1875* (2019) (detailing the long road leading to the enactment of the 1875 Act).

8. *Civil Rights Cases*, 109 U.S. at 46-48 (Harlan, J., dissenting).

intervening 138 years. To the contrary, as the fact of this symposium itself suggests, the matter has never been more relevant or timely.

This brief essay ventures the claim that one small but significant step in the direction of restoring our constitutional commitment to Black citizenship, rightly understood, would be recognition by both the academy and the judiciary that the *Civil Rights Cases* belong in the constitutional anti-canon: that small handful of Supreme Court decisions deemed not only to have been erroneous but to have been so misguided in rationale and so disastrous in consequences as to serve as an illustrative example of what the Court ought never do again.

First comes an abbreviated sketch of the 1875 Act and the 1883 ruling invalidating it, focusing on the Black citizenship issues implicated by both. Part II of this essay then reviews the contemporaneous reaction to the 1883 decision, revealing that, although the case today escapes the derision it deserves, it was in its time perceived by many as the terrible miscarriage of both law and justice that it is. Part II also explores the historiography of the *Civil Rights Cases* and briefly discusses a few of the many consequences a more appropriate understanding of the decision would have for the history of Reconstruction and the long civil rights movement that preceded and followed that pivotal period. Part III will show that the *Civil Rights Cases* are not currently accorded anti-canonical status. It will also identify just a few of the most deleterious consequences—practical, political, and doctrinal—of the *Civil Rights Cases* that compel the ruling's anti-canonization. Doing so is a crucial part of a broader effort to restore the true meaning of full and equal citizenship for all Americans.

II.

Justice Bradley's opinion for the Court in the *Civil Rights Cases* reasoned that the Fourteenth Amendment could not supply the power needed for Congress to enact the accommodations provisions of the 1875 Act because the Amendment forbade only action by state governments and the challenged provisions sought to regulate "private" entities, such as railroad corporations, steamboat firms, inns and theaters.⁹ There were many problems with this reasoning, but for present purposes the key rejoinder was Justice Harlan's invocation of the Amendment's citizenship guarantee. The sole dissenter in the case, Harlan instructed the majority that Section 5 of the Amendment empowered Congress to enforce *all* the

9. *Civil Rights Cases*, 109 U.S. at 11-14.

Amendment's provisions.¹⁰ To be sure, the second sentence of section 1 spoke of forbidden acts by states, but the *first* sentence was not so limited.¹¹

The Amendment opens, of course, with the unqualified declaration that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹² Virtually self-evident in today's political culture,¹³ birthright citizenship was a dramatic reversal of antebellum constitutional law and a broad promise of full integration of the former slaves into public life on terms of fundamental legal equality. Access to public conveyances and inns was indispensable to the exercise of the right of locomotion, deemed a core element of Anglo-American liberty by no less an authority than William Blackstone. As the Act's congressional proponents and chief judicial defender explained, persons routinely and pervasively denied that access, and that liberty, were denied the full and equal citizenship promised by the Amendment.¹⁴

In the light cast by these observations, it seems ineluctable that Congress's power to enforce the Amendment embraced the power to secure such access. Indeed, the *Civil Rights Cases* majority did not so much refute this syllogism as ignore it. Not one word can be found in Justice Bradley's opinion about the significance of the citizenship grant. And of course, that omission not only contributed to the demise of the 1875 Act, a calamity itself of incalculable scope. The Court's tacit dismissal of an understanding of the citizenship guarantee that accorded it remedial significance for those long subject to legally imposed subordination also worked a tragic distortion in our fundamental law that has curtailed congressional power to redress such subordination to this day.¹⁵ This corruption of constitutional law is too little remarked upon today,¹⁶ but many living on the day the ruling was announced promptly perceived its pernicious potential.

10. *Id.* at 46 (Harlan, J., dissenting).

11. *Id.*

12. U.S. CONST. amend XIV, § 1.

13. For an overview of recent controversy concerning the application of the Fourteenth Amendment's citizenship clause to children born to parents not lawfully present in the United States, see Ramsey, *supra* note 3, at 421-24.

14. See generally FONER, *supra* note 7; FRIEDLANDER & GERBER, *supra* note 7.

15. See *infra* note 82 and accompanying text.

16. Two rare exceptions are Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1833-37 (2010), and Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 365-66 (2006). See also Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 720, 730, 733 (2003) (discussing

III.

A

The wire service story from Washington that reported the Supreme Court's decision in the *Civil Rights Cases* noted that "no other decision of the court since the famous *Dred Scott* decision by Chief Justice Taney has created so much excitement and discussion."¹⁷ In response to Taney's opinion in *Dred Scott*, Abraham Lincoln, Frederick Douglass, and others not only condemned the decision but Lincoln warned of a sequel, a second *Dred Scott* ruling where the Taney Court would determine that a state could not impair a constitutionally protected right to own other human beings and thereby slavery would be nationalized by becoming legal in all states. The Civil War and ratification of the Thirteenth Amendment eliminated the opportunity for the Court to render such a decision, but in 1883, the memory of *Dred Scott* was fresh in the minds of many who saw a direct connection between Taney's opinion that persons of African descent could not become citizens and had "no rights which the white man was bound to respect" and the Court's decision to strike down Sections 1 and 2 of the Civil Rights Act of 1875.

In widespread protests against the decision in the *Civil Rights Cases*, Taney's *Dred Scott* opinion was invoked as a way to emphasize the retrograde nature of the ruling. African American lawyer Richard T. Greener denounced it as the "most startling decision of the Supreme Court" since Taney's opinion in *Dred Scott*.¹⁸ Both Greener and Robert Brown Elliott, an African American from South Carolina who had served in Congress, asserted that Taney's opinion was "consistent and logical" given the status of persons of African descent at the time it was rendered.¹⁹ What troubled both men was that the majority ruling in the *Civil Rights Cases* ignored amendments to the Constitution that Elliott characterized as being "professedly adopted as a protest against the doctrine advanced by Judge Taney."²⁰ For Elliott, the *Civil Rights Cases* "reaffirmed" Taney's opinion and served as vindication of Jefferson Davis's

congressional debates on the meaning of citizenship and individual rights during and before the Civil War).

17. The wire service story reporting on the Supreme Court's ruling in the *Civil Rights Cases* appeared in many newspapers. For example, see *Unconstitutional*, WATERLOO COURIER, Oct. 24, 1883.

18. *The Civil Rights Decision*, BROOKLYN DAILY EAGLE, Oct. 21, 1883.

19. *Id.*

20. *Civil Rights*, PRATT COUNTY PRESS (Iuka, KS), Nov. 8, 1883.

conception of states' rights.²¹ Greener feared that in nullifying a federal statute that had been passed after extensive deliberations and signed into law by the president to enforce the Fourteenth Amendment, the Court had negated "at least twenty years on the road to progress."²² (The estimate proved optimistic by nearly seventy years.) A Chicago newspaper agreed with Greener's assessment and editorialized that the decision represented nothing less than a return to the "heathenish, feudal decision of Chief Justice Taney."²³ Seeking to minimize the damage the Court's ruling might do to the Republican Party's standing with Black voters, a Republican editor in Emporia, Kansas quoted from Taney's opinion in *Dred Scott* and reminded readers that the Democrat Party had never questioned Taney's views on African American citizenship and the conviction that Black people had no rights that white people were bound to respect. The editor therefore concluded that the country's 1.5 million Black voters could not look to the Democrats "for equality of rights and privileges with white citizens."²⁴

The Republican Party was the party of Lincoln, and its efforts on behalf of freedom and equality had resulted in steadfast loyalty from African Americans. But after President Hayes had withdrawn military support from the final remaining governments under Republican control in the South in 1877, Republican commitment to racial equality was called into question. Evidence that Republicans could no longer take African American voters for granted was seemingly provided just days before the Supreme Court issued its ruling in the *Civil Rights Cases*, when Democrat George Hoadly won a narrow victory in the Ohio gubernatorial election and attributed this to African American voters. Democrats seized upon the opportunity the *Civil Rights Cases* provided to point out that it was a "Republican Supreme Court" that had declared much of the 1875 Civil Rights Act unconstitutional.²⁵ The *Pittsburgh Daily Post* gleefully noted how the ruling was "producing consternation in the Republican ranks," and Democratic editors found it curious that Robert B. Elliott would "re-write history" by "paying tribute to the memory of Judge Taney" for suggesting that his opinion on Black citizenship was consistent with the circumstances of 1857.²⁶

21. *Id.*

22. *The Civil Rights Decision*, *supra* note 18.

23. CHICAGO TELEGRAM, quoted in WEEKLY PUBLIC LEDGER (Memphis, TN), Oct. 23, 1883.

24. *Democratic Civil Rights*, EMPORIA REPUBLICAN (Emporia, KS), Nov. 8, 1883.

25. *Re-Writing History*, EATON DEMOCRAT (Eaton, OH), Nov. 8, 1883.

26. PITTSBURGH DAILY POST, Oct. 19, 1883; *Rewriting History*, PITTSBURGH DAILY POST, Oct. 31, 1883; *Re-Writing History*, *supra* note 25.

Republicans were indeed conflicted by the Court's ruling, as an editor in Pennsylvania disapproved of Elliott's invocation of Taney's opinion in *Dred Scott* and reminded readers that Taney's "legal absurdities" sought to accomplish nothing less than the nationalization of slavery. The majority's decision in the *Civil Rights Cases* was therefore not at all similar to *Dred Scott*, as the editor assured readers that no rights were "stricken down" by the Court's ruling. Instead, the editor naively, and events would prove vainly, urged Democrats in the southern states to approve legislation that would "secure those personal rights which the Court has relegated to the States as exclusively within their jurisdiction."²⁷ The *Chicago Tribune* also sought to shore up Republican unity in the wake of the ruling by criticizing the legal arguments of Frederick Douglass and other African Americans who had questioned the Court's decision in such an "unreasoning and unreasonable spirit." Troubled by the prospect that some Black people in Chicago were now openly questioning whether they would continue to vote Republican, the *Tribune* reminded them of "all the benefits the Republican party has conferred upon their race." According to the *Tribune*, access to public accommodations was a "social right," not a civil right, and since the Constitution did not grant Congress power to regulate "social affairs" or "say what company any man shall keep," the Court's decision was therefore unobjectionable.²⁸

Robert G. Ingersoll, a noted attorney and orator, took issue with this distinction between civil rights and social rights when he shared the speaker's platform with Frederick Douglass at a mass meeting in Washington to protest the *Civil Rights Cases*. Ingersoll asserted that the Fourteenth Amendment created citizens and empowered Congress to protect "all the rights belonging to a free man." Contrary to those who deemed access to public accommodations a matter of social rights, Ingersoll asserted it was a question of equal rights, for "[r]iding in the same cars, stopping at the same inns, sitting in the same theatres, no more involve a social question, or social equality, than speaking the same language, . . . breathing the same air, . . . defending the same flag, loving the same country, or living in the same world."²⁹ A Civil War veteran, Ingersoll feared the Court's ruling would lead to an unraveling of all the progress that had been made since crushing the rebellion, abolishing

27. *Resurrecting Judge Taney*, PITTSBURGH COMMERCIAL GAZETTE, Nov. 6, 1883.

28. *The Social Rights Decision*, CHICAGO TRIBUNE, Oct. 20, 1883; *The Negroes and the Republican Party*, CHICAGO TRIBUNE, Oct. 26, 1883.

29. Proceedings of the Civil Rights Mass-Meeting Held at Lincoln Hall, October 22, 1883, 26, 29, 47-49, 52-53 (1883).

slavery, and establishing citizenship for formerly enslaved persons. The decision gave “new life to the serpent of State sovereignty” and “breathed upon the dying embers of ignorant hate.” Now, the “old issues are again upon us” and it must be determined whether the federal “arm” would protect all citizens or “be palsied by the action or non-action of a State.”³⁰

John P. Green, an African American member of the Ohio legislature, shared Ingersoll’s concerns regarding the wider implications of the Court’s ruling. Although Green thought that the Civil Rights Act of 1875 was of little “practical utility in the South,” he feared that striking down the federal law would “establish a precedent for the interfering with and unsettling the entire legal status of the former slave population.”³¹ Just as Green believed the Court’s ruling in *Dred Scott* had destroyed the old Democratic Party, he feared that the ruling in the *Civil Rights Cases* was an attempt to foster unity with white Republicans in the South at the expense of African Americans. Such a move would destroy the party of Lincoln and undermine all that Republicans had accomplished.³²

A Republican newspaper in Columbus, Ohio editorialized that the Supreme Court’s ruling in the *Civil Rights Cases* had “aroused the people of the North to the fact that the work of reconstruction is not yet complete.”³³ As debate over civil rights enforcement continued, so did violence in the South, as four Black men were murdered prior to state elections in Virginia and a white Republican official was assassinated in Mississippi. Alarmed by these recent events, a convention of African American men met in Columbus at the end of December and called on the state legislature to “enact such a law as will secure to every citizen of the state, regardless of race or color, the full and unchallenged enjoyment of every civil right accorded to the most favored.”³⁴ Delegates to the convention believed the nation was in a crisis where nothing less than individual rights and the fate of the Union were at risk. The convention’s president asserted that Southern white terrorists were once again teaching “the lessons they taught . . . at Fort Pillow.”³⁵ By invoking the April 1864 massacre of Black soldiers, an explicit connection was made between Civil War atrocities and efforts to suppress African American citizenship. The meaning, legacy, and perhaps even the ultimate result of the Civil War remained undetermined, as the convention drew upon Lincoln’s

30. *Id.*

31. John P. Green, *Civil Rights*, CLEVELAND GAZETTE, Oct. 20, 1883.

32. *Id.*

33. *Civil Rights*, OHIO STATE JOURNAL (Columbus, OH), Dec. 12, 1883.

34. *Colored Convention*, OHIO STATE JOURNAL (Columbus, OH), Dec. 27, 1883.

35. *Id.*

Gettysburg Address in proclaiming that “the perpetuity and effectiveness of a government of the people, by the people and for the people” hung in the balance.³⁶ Clearly, the task of Reconstruction—adjusting to life after slavery—was far from complete and reactions to the *Civil Rights Cases* complicate the traditional narrative of Reconstruction and suggest that a “long Reconstruction” extended well beyond 1877.

A Mississippi newspaper editor certainly hoped that the *Civil Rights Cases* dealt the final blow to Reconstruction and federal efforts to enforce “social relations.”³⁷ According to the editor, the Civil Rights Act of 1875 was “conceived in a spirit of hatred during a period of national madness,” and he hoped the “good feeling” that had produced the Court’s ruling would mark a new era of sectional harmony.³⁸ In a different column, the Mississippi editor praised the Supreme Court for setting aside partisan politics in the *Civil Rights Cases*. He welcomed this “return” to “law and justice” and likened it to the “purity” that prevailed when Taney was Chief Justice.³⁹ The editor’s praise for Taney was part of a larger effort to rehabilitate Taney. In its October 1883 issue, *Century Magazine* published two letters that defended Taney’s reputation as a jurist and friend of African Americans. The letters offered a vigorous defense by pointing out that Taney had freed his slaves and harbored no personal animosity toward African Americans. His opinion on Black rights and citizenship in *Dred Scott* was simply restating what the Founders believed and demonstrated his “respect for precedent and for the letter of the Constitution.”⁴⁰ This evidence suggests that John P. Green had very good cause for concern that the desire for sectional reconciliation that produced reunions between Civil War veterans from both sides was tilting so far in favor of the side that had been defeated on the battlefield that Republicans would completely abandon their commitment to African American citizenship.⁴¹

The editor of an African American newspaper in Arkansas prescribed a seemingly simple remedy for the *Civil Rights Cases*: “it is necessary for each state to pass civil rights bills similar to the one made void by the supreme court.”⁴² When asked about the impact of the *Civil Rights Cases*, an African American in Cincinnati, Ohio echoed this view

36. *Id.*

37. THE WEEKLY DEMOCRAT (Natchez, MS), Oct. 24, 1883.

38. *Id.*

39. NATCHEZ DEMOCRAT, Oct. 18, 1883.

40. CENTURY ILLUSTRATED MAGAZINE, vol. 26, no. 6 (Oct. 1883), at 957–58.

41. *Our Civil Rights Held Inviolable*, ARKANSAS MANSION, Nov. 3, 1883.

42. *Id.*

and stated: “It convinced thousands of colored men just as I had been convinced before—if they wanted their rights secured they must look to the States in which they lived.”⁴³ The Democratically-controlled legislature in Ohio wasted little time in passing a civil rights law that sought to protect equal access to public accommodations.⁴⁴ Several northern states soon followed Ohio’s lead by enacting statutes modeled after the 1875 Civil Rights Act. The story of Ohio’s 1884 Civil Rights Act, as well as the other public accommodations laws approved in the wake of the *Civil Rights Cases*, has largely been ignored in the historical and legal literature, as scholars have tended to dismiss the significance of these northern civil rights statutes from the 1880s. As significant as these laws were, however, even more important was the failure of even a single former-Confederate state to enact such a statute.

B

Given the significance of the Court’s decision in the *Civil Rights Cases*, the depth and breadth of reactions it provoked, the various political and legal maneuverings it prompted, and the extent to which all of this contributed to debates over equal rights and citizenship, the long Reconstruction, and legacy of the Civil War, it is remarkable how little attention historians have devoted to the subject. The standard synthesis on the Reconstruction Era, Eric Foner’s *Reconstruction: America’s Unfinished Revolution* (1988) mentions the *Civil Rights Cases* in passing and suggests that Harlan’s dissent was a “lonely voice.”⁴⁵ Michael Fitzgerald’s more recent *Splendid Failure: Postwar Reconstruction in the American South* (2007)⁴⁶ does not discuss the *Civil Rights Cases*, while Allen Guelzo’s *Reconstruction: A Concise History* (2018) only briefly discusses the ruling.⁴⁷ In *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* (2011), Lawrence Goldstone recognizes the significance of the *Civil Rights Cases* by devoting a chapter to the subject and condemning Bradley’s opinion as erroneous.⁴⁸ In his recently published book, *The Second Founding: How the Civil War and*

43. *Well! Well! More Developments as to Republican Election Methods*, CINCINNATI ENQUIRER, Apr. 23, 1884.

44. THE REVISED LAWS OF OHIO 483-84 (O.W. Aldrich ed., 2d ed. 1884).

45. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 587 (1988).

46. MICHAEL FITZGERALD, SPLENDID FAILURE: POSTWAR RECONSTRUCTION IN THE AMERICAN SOUTH (2007).

47. ALLEN C. GUELZO, RECONSTRUCTION: A CONCISE HISTORY 118, 128 (2018).

48. LAWRENCE GOLDSTONE, INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865-1903, at 118-29 (2011).

Reconstruction Remade the Constitution (2019), Foner offers a much more extensive analysis of the *Civil Rights Cases* and the reaction to the Court's decision than he did in his previous work on Reconstruction.⁴⁹ Foner's reassessment of the significance of the *Civil Rights Cases* along with Pamela Brandwein's *Rethinking the Judicial Settlement of Reconstruction* (2011),⁵⁰ and Friedland and Gerber's *Welcoming Ruin* (2019),⁵¹ an exhaustive history of the passage of the Civil Rights Act of 1875, suggest that scholars are beginning to re-examine the significance of both the federal law and the Court's decision to invalidate it.

Despite these recent contributions, it is evident that the *Civil Rights Cases* and the responses to the Court's decision merit a thorough consideration, for it was more than mere hyperbole when the ruling was compared to *Dred Scott*. While not the sequel that Lincoln and others warned of prior to the Civil War, the *Civil Rights Cases* had a more significant and lasting impact on African American citizenship and civil rights. Just five years after *Dred Scott*, Lincoln's attorney general issued an opinion that disputed Taney's view of African American citizenship, and ratification of the Fourteenth Amendment followed in 1868. In declaring Sections 1 and 2 of Civil Rights Act of 1875 unconstitutional, the Supreme Court relieved the federal government of the responsibility for enforcing civil rights and left the matter up to the states. The ruling in the *Civil Rights Cases* has not been overturned, and it would be eight decades before Congress would enact new civil rights legislation. Contrary to the hopes of many, the Court's ruling provided further proof that the revolution was moving backward, and as Robert Brown Elliott feared, "Time has, indeed, brought its revenge."⁵²

IV.

Other symposia have been profitably devoted to consideration of the concept of the constitutional anti-canon,⁵³ so this essay is no place to seek to contribute to those rich discussions. But while the precise contours of the concept of an anti-canon as well as the cases properly belonging in it

49. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 151–57 (2019).

50. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011).

51. ALAN FRIEDLANDER & RICHARD ALAN GERBER, *WELCOMING RUIN: THE CIVIL RIGHTS ACT OF 1875* (2019).

52. *Civil Rights*, PRATT COUNTY PRESS (Iuka, KS), Nov. 8, 1883.

53. See, e.g., *Symposium: Supreme Mistakes*, 39 PEPP. L. REV. 1 (2011). But see generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (sounding a cautionary note about the "incomplete theorization" of the elements of anti-canonical status).

remain contested,⁵⁴ a few elements stand out as especially relevant to the concept's purpose and, accordingly, its scope. The main function of the very notion is educational in the broadest possible sense. Anti-canon cases teach law students, legal scholars and other interested writers, and jurists present and future about virtuous use of the extraordinary power of judicial review by inviting careful study of its catastrophes.⁵⁵ Thus, to qualify for anti-canonical status a case must be universally, or almost universally, recognized as "wrong," meaning that the Court's ruling did not comport with the Constitution rightly understood.⁵⁶ But more than error, even error so widely acknowledged, is required before a case belongs in the anti-canon. The case should also have worked enormous and enduring harm to the legal order and the society it serves.⁵⁷ The case should also have the capacity to teach important lessons about judicial virtue by highlighting an especially clear example of its telling absence.⁵⁸

By these measures, the *Civil Rights Cases* are clearly not currently anti-canonical. Most importantly, the ruling is not widely recognized, either in the legal academy or in the legal profession, as erroneous. To the contrary, it not only remains "good law" (both in the technical sense that it has never been expressly overruled and also in the more general sense that it has not been overtaken or denigrated by intervening cases), but it continues to generate legal progeny. As recently as the Rehnquist Court's invalidation of the civil remedy provision of the Violence Against Women Act,⁵⁹ the *Civil Rights Cases* have been reaffirmed and extended.⁶⁰ From a doctrinal standpoint, the ruling is not merely alive but, all too sadly, well.

Development of the arguments, not to mention a strategy, for changing the ruling's formal legal status is obviously beyond the scope of this brief essay.⁶¹ The short challenge to the majority's reasoning, or more accurately its dismissive silence, set out above will have to suffice for present purposes. But assuming that careful reconsideration of the constitutional case undergirding the 1875 Act will in time produce an

54. See Greene, *supra* note 53, at 379.

55. See J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513, 1553 (1999).

56. See *id.*

57. To illustrate, *Dred Scott* anchors the anti-canon for many reasons, but high among them must be its contribution to bringing about the tragedy of the American Civil War. See Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 38 (2011).

58. See, e.g., *id.* at 38 (describing *Dred Scott* "as an exercise in judicial overreaching, intellectual dishonesty, and disastrous statesmanship").

59. *United States v. Morrison*, 529 U.S. 598 (2000).

60. *Id.* at 622.

61. We do aspire, however, to that end, among others related to it, in future efforts.

academic and judicial repudiation of the *Civil Rights Cases*, the remainder of this essay sketches the additional considerations that would place the case in the anti-canon. In addition to being wrongly decided, the decision has worked the kind of profound harm that sets it apart from mere error. The ruling also illustrates the kind of profound abuse⁶² of judicial authority that has much to teach to those who would understand or practice sound exercise of that power.

It is tempting to assume that the extent of the harms traceable to the *Civil Rights Cases* is obvious. The decision strangled in the cradle a national civil rights guarantee, the breadth of which would not be achieved again for nearly a century—a century of oppression so ubiquitous and indefensible as to be recognized by the nation’s political leadership at the time as a serious liability from a foreign affairs perspective. The historiographical apology for the ruling,⁶³ however, which asserts that it was at most insult added onto injury already and independently inflicted, requires a response.

It may be true that the political will to enforce the law had lapsed in the wake of the notorious Compromise of 1877,⁶⁴ though that conclusion may itself be overstated and overly simplistic.⁶⁵ But, in any event, this effort to explain away the ruling’s significance, even if grounded in some truth, ignores two crucial facts, first about the 1875 Act specifically and second about statutes more generally.

First, though some have disparaged the law’s enforcement provisions,⁶⁶ the 1875 Act authorized robust penalties both civil and criminal,⁶⁷ even going so far as to impose liability on federal prosecutors

62. Some of the recognized anti-canon cases might be better characterized as instances of neglect than abuse of this authority. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Korematsu v. United States*, 323 U.S. 214 (1944).

63. See *supra* notes 45-47 and accompanying text.

64. Accord FONER, *supra* note 45, at 587.

65. Paul Finkelman, *The Hidden History of Northern Civil Rights Law and the Villainous Supreme Court, 1875-1915*, 79 U. PITT. L. REV. 357, 503 (2018) (observing that “the northern response to the Court’s rejection of racial fairness in the *Civil Rights Cases* was to adopt state laws to accomplish what the Court would not let Congress accomplish” and concluding that “[t]hese laws demonstrate that northern white public opinion was not in concert with the Supreme Court.”).

66. See, e.g., DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA* (2014) (arguing in chapter 8 that “the complications and cost involved with filing suit” contributed to rendering the 1875 Act a nullity even before it was stuck down by the Supreme Court).

67. The Act provided an election of remedies between, on the one hand, a civil suit in federal court for a monetary penalty and, on the other hand, criminal prosecution for a misdemeanor. In either case, the authorized sanctions were significant. “[A]ny person who” violated the first section’s prohibition of discrimination, or aided or incited such a violation, could be required, “for every such offense, [to] forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be

for willful failure to enforce the Act.⁶⁸ So political will to enforce, if indeed flagging, might well have been spurred or supplanted by members of the bar acting as private attorneys general. And, of course, for every time the statute was executed via judicial order at the end of lengthy process, on innumerable additional occasions the statute's command would be effectuated via such less rancorous means as a demand letter or coldly calculated self-enforcement by corporate firms interested only in their bottom line.⁶⁹ Second, the existence of a valid law on the books would have squarely placed on those opposed to the Act's protections the burden of obtaining its repeal. Judicial invalidation of the law, however, meant that instead those seeking equal access to public accommodations bore the gargantuan burden of enacting new civil rights legislation. That heroic feat took just short of a century. Civil rights legislation was narrowly thwarted countless times in the interim solely by

recovered in an action of debt, with full costs." Alternatively, a criminal conviction for violating the Act would entail the imposition of a fine "not less than five hundred nor more than one thousand dollars" or imprisonment "not less than thirty days nor more than one year." Civil Rights Act of 1875, ch. 114, § 2, 18 Stat. 335, 336 (emphasis added). To provide perspective concerning the substantiality of the monetary penalties, in 1875 the annual salary of the President of the United States was \$50,000 (having been doubled in 1873). Cf. Finkelman, *supra* note 65, at 400 (observing that "[u]nder an "inflation" measure, \$100 in 1887 was equal to the buying power of almost two thousand dollars today" and "[c]ompared to wages earned, \$100 in 1887 might be worth as much as \$10,000 today").

68. Perhaps reflecting an anticipated reticence to enforce the Act, the Act's third section "specially authorized and *required*" those U.S. "district attorneys, marshals, and deputy marshals . . . , and commissioners appointed by the [U.S.] circuit and territorial courts, with powers of arresting and imprisoning or bailing offenders against [U.S.] laws" to bring legal "proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial." Lest the import of that language be disregarded or evaded, the Act further ordered that "such district attorneys shall cause such proceedings to be prosecuted to their termination as in other cases" and provided that "any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined *not less than one thousand nor more than five thousand dollars*. . . ." Civil Rights Act of 1875, ch. 114, § 3, 18 Stat. 335, 336 (emphasis added).

69. See, e.g., *A Civil Rights Case Avoided by a Compromise*, CLEVELAND GAZETTE, July 4, 1885, at 4 (recounting an episode in which a restaurant paid one Mr. Stevens, who had been refused service, "a handsome sum" to forgo filing suit under an Ohio civil-rights statute modelled on the 1875 federal statute).

antimajoritarian procedural hurdles,⁷⁰ including notorious abuse of the Senate's filibuster.⁷¹

However the direct effects of nine decades of the Act's enforcement might have been weighed, to that would need to be added the inestimable ripple effect on the culture more generally that each episode of enforcement would have launched. Each invocation of the law would have subtly but no less substantially inculcated the greater society's most revered commitment to equal citizenship. After its invalidation, this salutary instruction was replaced by the opposite message reinforced by Jim Crow's endless series of causal and universal slights.⁷² Little reflection would seem necessary to support the conclusion that it would be hard to overstate how disastrous were the consequences of the *Civil Rights Cases*. Without in any way minimalizing the injuries worked by other anti-canonical rulings, a thorough accounting of the harms caused by the *Civil Rights Cases* suggests that the decision easily belongs in such notorious company as *Dred Scott*,⁷³ *Plessy*,⁷⁴ *Locher*,⁷⁵ and *Korematsu*.⁷⁶

The decision also deeply distorted the course of constitutional law. And this distortion underscores perhaps the most important aspect of the hubris that bred it—namely, a judicial failure to accord Congress its proper role in giving flesh to the Fourteenth Amendment's bare bones. As Harlan's dissent documented, throughout the antebellum decades, the Court had accorded wide latitude to congressional efforts to employ both expressly enumerated and even justly implied powers to protect slavery. "That doctrine," Harlan powerfully proclaimed, "ought not now to be abandoned, when the inquiry is not as to an implied power to protect the master's rights, but what may congress do, under powers expressly

70. See Rebecca E. Zietlow, *Free at Last! Anti-subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 301 (2010) ("From 1937 to 1950, a flood of civil rights legislation was introduced in Congress. Segregationists in Congress blocked or watered down that legislation until 1964, when Congress enacted the first major civil rights legislation enacted since Reconstruction."). Segregationists prevailed in the pre-1964 contests not because they enjoyed electoral majorities but rather through the effective employment of various anti-majoritarian political and legislative tools. See Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 959 (2005).

71. See Zietlow, *To Secure These Rights*, *supra* note 70, at 959.

72. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 94 (2004) (discussing the deep and enduring injury inflicted when African Americans took their "medicine of insult, discourtesy and prejudice sitting down and saying nothing, thereby losing their self-respect") .

73. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

74. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

75. *Lochner v. New York*, 198 U.S. 45 (1905).

76. *Korematsu v. United States*, 323 U.S. 214 (1944). Jamal Greene identifies these four as the canonical cases of the existing constitutional anti-canon. See Greene, *supra* note 53, at 387.

granted, for the protection of freedom, and the rights necessarily inhering in a state of freedom.”⁷⁷ In support of that claim Harlan had on his side not only rhetoric and reason but also constitutional text⁷⁸ and history.⁷⁹ Nevertheless, one legacy of his defeat in 1883 is that to the present the Court meets with suspicion congressional efforts to make meaningful the promises of the Reconstruction Amendments.⁸⁰ This judicial usurpation is another reason the *Civil Rights Cases* must be recognized as a wrong turn too important to remain uncorrected.

V. CONCLUSION

The doctrine of interposition posits a role for a State, acting as an independent sovereign, to intercede between the federal government and citizens within the State to shield the latter from the former by retarding if not negating federal policy.⁸¹ At the risk of comical understatement, that doctrine is itself controversial.⁸² Lacking any pretense to the legitimacy and representativeness enjoyed by a State’s elected officials, the Supreme Court, in the *Civil Rights Cases*, acting over Harlan’s thorough and well-reasoned dissent, nevertheless interposed itself between the people of all the States and the policy their federal elected representatives had chosen as a means of progressing nearer the

77. *Civil Rights Cases*, 109 U.S. at 38 (Harlan, J., dissenting).

78. U.S. CONST. amend. XIV, § 5.

79. See A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 598-601 (2010) (discussing historical context supporting congressional primacy in enforcement of the Reconstruction and citing related scholarship).

80. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act of 1994 as applied to state local governments on the ground that the statute so applied exceeded Congress’s power to enforce the Fourteenth Amendment); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating the civil-remedy provision of the Violence Against Women Act of 1994 on the ground that the statute exceeded Congress’s enumerated powers, including the power to enforce the Fourteenth Amendment); *Shelby County v. Holder*, 570 U.S. 529 (2013) (invalidating the coverage formula triggering application of the Voting Rights Act’s preclearance requirement on the ground that as crafted it could not be sustained as valid exercise of Congress’s power to enforce the Reconstruction Amendments).

81. For a discussion of the historical roots of the notion of state “interposition,” see Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 207 (2007).

82. The notion has more than a whiff of “massive resistance” and Little Rock. As Michael Paulsen has noted, “‘Interposition’ and ‘Nullification’ are dirty words these days, because they have been invoked on the wrong sides of the great constitutional crises of our nation’s history—southern secessionists resisting the Union and southern segregationists resisting *Brown v. Board of Education*.” Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-third Century*, 59 ALB. L. REV. 671, 686 (1995). He continued: “But it is not too hard to imagine the shoe being on the other foot.” *Id.*

achievement of the Fourteenth Amendment's promise of birthright citizenship free from the taint of race. Neither the Court, nor the legal academy, nor the nation has yet to fully comprehend, let alone correct, this grave error.