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"The Special Favorite of the Laws"? Black Lives Matter Moments in American Constitutional and Legal History

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ARTICLE

"THE SPECIAL FAVORITE OF THE LAWS"? BLACK LIVES MATTER MOMENTS IN AMERICAN CONSTITUTIONAL AND LEGAL HISTORY

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> The law no longer knows white nor black, but simply men, and consequently, we are entitled to ride in public conveyances, hold office, sit on juries, and do everything else which we have in the past been prevented from doing solely on the ground of color.[1]
> (Delegate to a convention of Alabama freedmen, 1867)

On May 25, 2020, Minneapolis Police Officer Derek Chauvin killed George Floyd in a wanton act of police brutality by kneeling on his neck for more than nine minutes. In the immediate aftermath of the murder, widespread protests against police brutality erupted in Minneapolis and across the nation. At Floyd's memorial service on June 4, civil rights activist and Reverend Al Sharpton placed the killing in a broader context: "George Floyd's story has been the story of Black Folk in America."[2] Using Derek Chauvin's knee as a metaphor, Sharpton talked about the myriad ways in which white supremacy imposed and continues to impose economic, social, and political inequality on people of African descent in the United States.

Sharpton concluded his remarks with an appeal for Americans to finally deal with the issue of accountability in policing, systemic prejudice, and racial injustice. He pointed to the need for what I call "historical recov-

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* This essay is derived in part from Professor Williams's keynote at the *UST Law Journal* Symposium: Protest and Reform, October 23, 2020.

1. L.S. Berry, W.M.V. Turner & R.D. Wiggins, *Address of the Colored Convention to the People of Alabama,* Montgomery Daily State Sentinel, May 21, 1867, at 2.

2. For the complete text of Al Sharpton's speech, see Al Sharpton, Reverend, Eulogy for George Floyd's Memorial Service (June 4, 2020) (transcript available at www.rev.com/blog/transcripts/reverend-al-sharpton-eulogy-transcript-at-george-floyd-memorial-service). For audio and text, see Gabriela Saldivia, *I Can Breathe Now: After Days of Nationwide Protests, George Floyd is Eulogized*, NPR (June 4, 2020), https://www.npr.org/2020/06/04/869721514/hundreds-expected-at-memorial-for-george-floyd-after-days-of-nationwide-protests.

ery." This process of learning United States history through the lens of African Americans enables us to better understand the intentional policies, practices, and procedures that form the basis of contemporary challenges regarding race, law, and public policy. It also lays the groundwork for understanding the urgency of passing legislation entitled The George Floyd Justice in Policing Act.

This process of historical recovery is essential. All too often when confronted with examples of racial prejudice with roots in historical injustices, many Americans look to fix the blame on individual choices rather than identifiable policies, practices, and procedures that continue to exert enormous influence on law and society. Without the foundational historical knowledge necessary to comprehend the connection among these issues, most discussions on how to eliminate systemic racism eventually degenerate into a form of victim blaming. A good example can be found in the ongoing debate and discussion over the destruction of the Rondo community in St. Paul. In 1956, the predominantly Black neighborhood was literally bisected to accommodate the construction of the I-94 freeway. Some 600 families were displaced, not to mention a large number of businesses shuttered.[3] This was not an isolated incident confined to St. Paul. In Minneapolis, the construction of Interstate 35W in 1959 also resulted in the destruction of one of the few city neighborhoods where Black people could rent and own homes unencumbered by racially restrictive covenants.[4] The impact of these deliberate choices on the part of lawmakers and urban planners continues to echo in our contemporary moment. The 2020 Census shows that while only about 25 percent of Black people own homes in the Twin Cities, white homeownership stands at 76 percent. This disparity encapsulates the legacy, in many ways, of state and federal laws and discriminatory practices. The income gap provides further evidence; the median

3. On the history of Rondo start with: Alisha Volante, *The Rondo Neighborhood & African American History in St. Paul, MN: 1900s to Current*, *in* KRIS NELSON COMMUNITY-BASED RESEARCH PROGRAM 471 (Univ. of Minn. Digit. Conservancy ed., 2015), https://hdl.handle.net/11299/178547; *see also* Ehsan Alam, *Before it Was Cut in Half by I-94, St. Paul's Rondo was a Thriving African-American Cultural Center*, MINNPOST, June 19, 2017; EVELYN FAIRBANKS, DAYS OF RONDO (Minnesota Historical Society Press, ed., 1990); KENNETH C. FOXWORTH, THE URBAN RENEWAL DEVASTATION OF THE RONDO COMMUNITY (Mankato State Univ., ed., 1991). On Minnesota Black History, see generally WILLIAM D. GREEN, DEGREES OF FREEDOM: THE ORIGINS OF CIVIL RIGHTS IN MINNESOTA, 1865–1912 (2015); DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

4. On Minneapolis, see Ernest Lloyd, How Routing an Interstate Highway through South Minneapolis Disrupted an African-American Community (May 18, 2013) (Dissertation, Hamline University). On housing segregation, see generally RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (1st ed., 2017).

national income for white households comes in at $84,500 a year compared to just $38,000 a year for Black households.[5]

At the national level, many white Americans persist in believing that the abolition of slavery accomplished through the Civil War and Reconstruction was sufficient to guarantee African Americans absolute equality under the law. In reality, during the roughly twelve-year period between the end of the Civil War and the Hayes Tilden Compromise of 1877 effectively ending Reconstruction, civil rights for African Americans remained bitterly contested. Despite the passage of seven major pieces of legislation, including three constitutional amendments, none proved sufficient to check the rising tide of discrimination and racist violence.[6]

Looming large in the present discourse over accountability in policing is whether enough political will exists to sustain the dialogue and action necessary to effect lasting change. Importantly, historical recovery can bring clarity to the present situation and a longitudinal focus for the work ahead. Civil rights and physical security for African Americans have often been treated as something that could be accomplished with the stroke of pen. Legislation is only the first step in the much broader process of true reform. Only long-term engagement unfettered by artificial timelines and expectations of a quick victory can address what took centuries to create.[7]

One of the many strains of resistance to the extension of civil rights, even among some of its purported champions, centered on the duration of Reconstruction. Throughout the Reconstruction Era, the idea of a return to normality, in which African Americans might avail themselves of the normal channels of law unassisted by federal agencies and not enforced by federal troops, was squarely out of tune with the stark reality of concerted efforts to deny them equal protection of the law. Interestingly, this very language taken directly from the text of the Fourteenth Amendment became and remains the basis for many contemporary challenges to interventions meant to protect African Americans from discrimination.

Unfortunately, measures adopted to secure simple justice for African Americans have been perceived as unjustified special privileges or redress for past injustices rather than basic features of citizenship and deterrents to discriminatory action. This misperception fueled backlash against anti-discrimination laws such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, key tools in the fight against systemic racism.

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5. For Minnesota income inequality statistics, see Greg Rosalsky, *Minneapolis Ranks Near the Bottom for Racial Equality*, NPR (June 2, 2020), www.npr.org/sections/money/2020/06/02/867195676/minneapolis-ranks-near-the-bottom-for-racial-equality.

6. On Reconstruction, see ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION (1982); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988); RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO, FROM RUTHERFORD B. HAYES TO WOODROW WILSON (1965).

7. YOHURU WILLIAMS, RETHINKING THE BLACK FREEDOM MOVEMENT (2015).

This viewpoint also developed in the aftermath of the Civil War; it was most clearly articulated by the United States Supreme Court in the Civil Rights Cases of 1883.[8] Echoes of this claim continue to dominate contemporary discourse over efforts to ensure absolute equality before the law for African Americans in key areas, such as the exercise of the elective franchise. As an example of historical recovery, the history of the Civil Rights Cases themselves demonstrate the connective tissue. They link efforts undertaken to end the First Reconstruction in the South and current calls for a Third Reconstruction to finally achieve, regardless of race, the promise of equal citizenship promised in the Fourteenth Amendment. By examining the circumstances of one case tied to the Civil Rights Cases of 1883, we can see through the process of historical recovery the problematic roots of the special privilege's argument.

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In 1908, Oklahoma police charged a young white man named Charles Johnson with stealing thirty bushels of oats. Unable to secure a bondsman, Johnson was set to remain in jail until a generous benefactor came to his aid. Upon learning of his arrest, Bird Gee, who said he had known Johnson since the prisoner's youth, came forward to post the $500 bond. Aside from the oddity of the theft, what made the story newsworthy was Johnson's benefactor, described by the newspaper as a "wealthy negro."[9]

In fact, Bird Gee was one of the most prosperous and influential Black citizens in Oklahoma City at the time. Born in Missouri around 1844, Gee served in the Civil War. Like many African Americans after the war, he migrated to Kansas. There in 1873, he unsuccessfully ran to become the constable of Doniphan County. That same year, further conveying his commitment to civic engagement, he also served as secretary of the Colored Farmer's Club of Highland, Kansas.[10] Gee, a talented entrepreneur, migrated to Oklahoma sometime in the late 1800s and succeeded as a realtor and undertaker. While the newspaper hinted at Gee's fortune and standing in the community, it is unlikely that many of his white neighbors were aware of the forces that drove him to relocate. Chances are, they did not

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8. Civil Rights Cases, 109 U.S. 3 (1883).

9. *He Liked Oats*, MUSKOGEE TIMES-DEMOCRAT, Feb. 28, 1908, at 5. On the life of Bird Gee, see AMINA HASSAN, LOREN MILLER: CIVIL RIGHTS ATTORNEY AND JOURNALIST (2015); LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

10. *See* HASSAN, *supra* note 9; MILLER, *supra* note 9. On Black migration to Kansas after the Civil War, see NELL IRVIN PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION (1976).

know of his role in one of the most notorious landmark Supreme Court cases of the era, the Civil Rights Cases of 1883.[11]

Some thirty-three years before being highlighted for his success in Oklahoma, in October of 1875, Gee was residing in Hiawatha, Kansas where he registered as a guest at a local hotel. When the dinner bell rang later that day, Gee joined his fellow boarders in the dining room to await service. His presence clearly rankled one patron, who upon seeing Gee take a seat, left the table to complain to the owner, David Stanley. Instead, he encountered Stanley's son, Murray. After listening to the complaint, Murray went to the dining room and, after a brief verbal exchange, forcibly ejected Gee from his seat.[12] Flustered and humiliated by this treatment, Gee hastily gathered his belongings and found other accommodations.[13]

Prior to 1875, Gee enjoyed very little protection from this type of discriminatory behavior until the passage of the Civil Rights Act of 1875, which was destined to become the last of the great Reconstruction Era laws. The law prohibited discrimination in places of public accommodation, including inns, public amusement venues, and restaurants. Cognizant of the new directive, Gee filed a complaint with U.S. District Attorney George R. Peck. After a brief investigation, Peck charged the father and son with violating the decree. On April 14, 1876, Murray Stanley alone was indicted by a federal grand jury for refusing the privileges of an inn to a person of color.[14] He appealed the decision to the federal circuit court, arguing that Congress lacked constitutional authority to enact a public accommodations law. Unable to reach a decision, the circuit court sent the matter to the U.S. Supreme Court.[15]

Predictably, the case caused quite a stir in the region. White people opposed to the extension of civil rights to African Americans decried the bill as a transgression on *their* civil rights—specifically, their freedom of association. They further framed the bill as a mechanism to reward African Americans for acts of discrimination that afforded them a special legal status denied to white people. "Now what do you think of that fearful civil rights bill?" observed a Kansas editorial published in the *Waterville Telegraph*.[16] "There is no doubt but that the negro will get judgement [sic] for

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11. U.S. Civil War Pension Index, *microformed on* NAI No. T288, Roll 170 (National Archives); *Colored Farmer's Club of Highland*, THE KANSAS CHIEF, (Sol Miller, ed.) Sept. 25, 1873, at 3.

12. THE HOLTON RECORDER, (Beck & Shiner, ed.) Apr. 13, 1876, at 4; *On Run for Constable*, THE KANSAS CHIEF, Mar. 27, 1873, at 2.

13. Civil Rights Cases, 109 U.S. 3 (1883); MILLER, *supra* note 9, at 3–4.

14. Civil Rights Cases, 109 U.S. at 4.

15. *Id.*

16. *Various Items from the State Capitol*, Waterville Telegraph, Apr. 14, 1876 at 2; *White Cloud Items*, THE KANSAS CHIEF, Apr. 6, 1876 at 3.

$1000. If the said parties would refuse to board a white man, he would just have to stand it, like a little man."[17]

Despite the editorialist's effort to paint the law as a grant of special privileges to the descendants of slaves, the law was clearly necessary to ensure a baseline of equality for African Americans. In the aftermath of the war, it addressed efforts undertaken to relegate Black people to second-class citizenship. As Gee explained to Peck, he arrived at the dining room first and simply desired to be treated with the same courtesy and respect as other patrons. The humiliation he endured, including being forcibly ejected from his seat, meant he paid first-class fare for second-class treatment.

Of course, Gee was not the only person of color to suffer such indignities. Such incidents became common after the Civil War, sparking several legal challenges around the nation, including the 1867 case of *The West Chester & Philadelphia Railroad Company* (WC & PRR) *v. Mary Miles*.[18]

Miles brought suit against the railroad company after her ejection for refusing the conductor's demand to move to the colored section. Presupposing future appeals to segregation based on a dubious claim of public safety, the railroad asserted that it was "not unreasonable . . . to seat passengers so as . . . to prevent contacts . . . arising from natural . . . repugnancies, which are liable to breed disturbances by promiscuous sitting."[19] The court, however, decided in favor of Miles, noting that the carrier "could not compel plaintiff to change her seat simply on account of her color."[20]

Undaunted, WC & PRR appealed the lower court's ruling to the Pennsylvania Supreme Court, which heard the case in April of 1867. Writing for the majority, Republican Justice Daniel Agnew sided with the railroad. While agreeing with the premise that a common carrier could not decline to take a passenger based on skin color, he nevertheless agreed with the railroad that it was "not unreasonable to assign places . . . to passengers of each color" if the accommodations were equally comfortable, safe, and convenient.[21] To underscore his point, Agnew drew an analogy to the "ladies' car," which he proclaimed, "implies no loss of equal right on the part of the excluded sex . . . or the use of separate cars to separate civilian passengers from military transports."[22]

In coming to this conclusion, Justice Agnew acknowledged, but chose to overlook, a March 1867 state law that specifically forbade railroad com-

17. *Various Items from the State Capitol*, *supra* note 16, at 2.

18. On the Miles case, see MIA BAY, TRAVELING BLACK: A STORY OF RACE AND RESISTANCE (2021); MARK E. DIXON, THE HIDDEN HISTORY OF CHESTER COUNTY: LOST TALES FROM THE DELAWARE & BRANDYWINE VALLEYS (2011). *See also* Ali Roseberry-Polier, *Taking History to the Streets with Preservation Activism*, Hidden City Philadelphia, June 6, 2018, hiddencityphila.org/2018/06/taking-history-to-the-streets-with-preservation-activism.

19. *See* West Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 209 (1867).

20. *Id.* at 210.

21. *Id.* at 211.

22. *Id.*

panies from discriminating based on race. The law, prohibiting “any passenger railway company from excluding any race of people from its passenger cars on account of color,” was first introduced by State Senator Morrow B. Lowry in 1865.[23] Agnew maintained that this law was not relevant because it passed after the incident involving Miles.

While the passage of the Lowry law made the Court’s decision moot, the decision would later be cited by the U.S. Supreme Court as a key precedent in the landmark case of *Plessy v. Ferguson* (1896).[24] Thus, like Gee’s case, an action brought to address the use of racial discrimination later became one of many precedents used to justify the constitutionality of the “separate but equal” doctrine.

Importantly, Agnew’s ruling demonstrated that the Republican Party, often touted as the Party of Lincoln, was by no means uniform on the issue of civil rights for African Americans. Speaking in support of the bill that ultimately became the Civil Rights Act of 1875 in December of 1873, African American Republican Representative Joseph H. Rainey of South Carolina laid the issue squarely before his fellow legislators. “We, sirs,” he observed, “would not ask of this Congress as a people that they should legislate for us specifically as a class if we could only have those rights which this bill is designed to give us accorded us without this enactment.”[25] Cautioning his colleagues not to overlook the pervasiveness of segregation, Rainey further explained:

> We do not ask the passage of any law forcing us upon anybody who does not want to receive us. But we do want a law enacted that we may be recognized like other men in the country. Why is it that colored members of Congress cannot enjoy the same immunities that are accorded to white members? Why cannot we stop at hotels here without meeting objection? Why cannot we go into restaurants without being insulted? We are here enacting laws for the country and casting votes upon important questions; we have been sent here by the suffrages of the people, and why cannot we enjoy the same benefits that are accorded to our white colleagues on this floor?[26]

“I say to you, gentlemen . . .” he maintained, “that the negro will never rest until he gets his rights.” He continued, “We ask them because we know it is proper, not because we want to deprive any other class of the rights and immunities they enjoy, because they are granted to us by the law of the land.”[27]

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23. Dixon, *supra* note 18, at 71.

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

25. CONG. GLOBE, 43rd Cong., 1st Sess. 343–44 (1874) (Statement of Rep. Joseph Rainey addressing the Civil Rights Bill of 1875 on December 19, 1873).

26. *Id.*

27. *Id.*

Although the Senate ultimately passed the bill by a vote of thirty-eight to twenty-six on February 27, 1875, and paved the way for it to become law on March 1, Stanley's challenge expressed many of the concerns that had been voiced in opposition to its adoption. By the time the Supreme Court was set to rule on Stanley's and four other public accommodations cases under the banner of the Civil Rights Cases in 1883, African American civil rights, at least regarding access to places of public accommodation, remained largely in limbo. African Americans were keenly aware of the import of the coming decision. The nearly six-year hiatus between when many of the plaintiffs filed suit and the decision was already a disappointment. This dissatisfaction was nothing in comparison to the disillusionment that followed the publication of the Court's opinion.

Writing for the eight-person majority, Justice Joseph Bradley held that the Civil Rights Act of 1875 was unconstitutional on the grounds that it exceeded the scope of the "equal protection" clause of the Fourteenth Amendment.[28] The Court held it applied only to actions taken by state actors and not private individuals.[29]

In an oft-quoted passage echoing the spirit of the challenge to the law raised in the Kansas editorial, Justice Bradley questioned not only the constitutionality of the law but the efficacy of additional civil rights legislation. "When a man has emerged from slavery," Bradley maintained,

> 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.[30]

Justice Bradley's words mocked the lived experience of African Americans in this period, including the fear and uncertainty that dogged ordinary tasks such as renting a room or taking the trolley. As early as 1866, in a speech at the Eleventh National Women's Rights Convention, Frances Ellen Watkins Harper revealed how "I, as a colored woman, have had in this country an education which has made me feel as if I were in the situation of Ishmael, my hand against every man, and every man's hand against me."[31] She offered an example, "Let me go tomorrow morning and take my seat in one of your street cars[.] I do not know that they will do it in New York, but

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28. Civil Rights Cases, 109 U.S. 3, 25.

29. *Id.* at 24–25.

30. *Id.* at 25; *see also* Lawrence Goldstone, Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865–1903 (2011).

31. *See* Frances Ellen Watkins Harper, Address at Eleventh National Women's Rights Convention: We Are All Bound Up Together (May 1, 1866).

they will in Philadelphia — and the conductor will put up his hand and stop the car rather than let me ride."[32]

Harper underscored the compounding impact of the harm. As she told those gathered in 1866, "Today I am puzzled where to make my home. I would like to make it in Philadelphia, near my own friends and relations. But if I want to ride in the streets of Philadelphia, they send me to ride on the platform with the driver."[33]

Rather than providing certainty for African Americans on this front, the Court's ruling had the opposite effect. It removed the only federal law aimed at prohibiting racial discrimination by private individuals and businesses, opening the door for increased discrimination.

While African Americans were clearly disappointed, the Court's decision was met with stunned approval of the law's detractors and of those committed to the maintenance of white supremacy. "The opinion is a surprise to the country," observed an editorial in the Hiawatha Kansas *Brown County Word*, "but it is good law, it will stand, and it agrees with the prejudices of almost every white man, woman and child in the United States."[34] An editorial in the *Natchez Weekly Democrat* came to a similar conclusion. "The civil rights bill was, conceived in a spirit of hatred during a period of national madness. The return of good feeling has brought about its nullification and we think the whole country feels that a useless load has been lifted from Its [sic] shoulders that was grievous to every section of the country."[35] The *Kansas City Chief* arrived at a similar conclusion. "This decision will have a bad effect, in some respects, and in others a salutary one," the newspaper observed in an article aptly entitled, "Civil Rights Law Dead."[36] "The ones to suffer," the newspaper concluded, "will be chiefly the upstarts, who persisted in forcing themselves among people who could not appreciate them, simply because they thought the law would uphold them. Those colored people who were content to keep with their own class, will never feel the difference."[37]

The missed opportunity for the law to function as a deterrent to future discriminatory action was highlighted by the response to the ruling in the District of Columbia. As a federal jurisdiction, it would remain enforceable there. An editorial in the *Lincoln Bee* observed, "There are several suits pending in the District, and the reference made to these in Justice Bradley's opinion caused some consternation among hotel and restaurant men, who imagine it will operate disastrously to them. The strong intimation that the

32. *Id.*

33. *Id.*

34. *The Civil Rights Cases*, BROWN COUNTY WORLD, Oct. 25, 1883, at 2.

35. THE WEEKLY DEMOCRAT, Oct. 24, 1883, at 4.

36. *Civil Rights Law Dead*, THE KANSAS CHIEF, Oct. 18, 1883, at 2.

37. *Id.*

law of Congress is operative in the District of Columbia while not deciding the question pending as to the District is construed as authoritative."[38]

African Americans saw the outcome very differently. Even before the case was decided, they could not always be sure of the law's enforcement, especially in the states of the former Confederacy. Activists were keenly aware of the impact of the court's decision, framing it as another blow to absolute equality before the law. African American civil rights activists Frederick Douglass and A.M.E. Bishop Henry McNeil Turner were among the most vocal critics. Turner saw in the framework of Justice Bradley's opinion what he termed, "those famous FIVE DEATH DEALING DECISIONS" as the Court's final capitulation to white supremacy.[39]

Turner did not mince words in affixing blame for the Court's motivation, despite its political affiliation with the Party of Lincoln, to support white supremacy. "It is not hinted that this Republican Supreme Court had caused it to be noised abroad what their 'finding' would be if the 'law' was inquired into," Turner observed.[40] "The Court, it is said," he continued,

> could see, and only see, Negroes in Kansas and Missouri intermingling with white persons, in hotels and inns; Negroes, in California and New York, associating, on equal terms, with Caucasians in theatres; and Negroes in the presence of those free from the taint of African blood, in the parlor-cars of Tennessee. These sights completely blinded the eyes of the, at other times, learned Judges, and one of their number, not too full of indignation for utterance, proclaimed aloud, these things may not be; these pictures shall not in future be produced; the law is unconstitutional; and all of the other members, save one, said, Amen![41]

Turner singled out for praise Justice John Marshall Harlan whose singular dissent from the majority opinion reverberates powerfully in our contemporary moment. Justice Harlan alone seemed to recognize that only positive action, in the form of affirmative legislation, could ensure for African Americans a fair chance at real equality—free from discriminatory practices. He also recognized the unique historical circumstances that informed the necessity of such laws. "The one underlying purpose of congressional legislation," Justice Harlan stated, "has been to enable the black race to take the rank of mere citizens."[42] Furthermore, he argued, "The difficulty has been to compel a recognition of their legal right to take that rank, and to secure the enjoyment of privileges belonging, under the law, to them as a

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38. LINCOLN BEACON, Oct. 25, 1883, at 2.

39. HENRY MCNEAL TURNER, CIVIL RIGHTS. THE OUTRAGE OF THE SUPREME COURT OF THE UNITED STATES UPON THE BLACK MAN. REVIEWED IN A REPLY TO THE NEW YORK "VOICE," THE GREAT TEMPERANCE PAPER OF THE UNITED STATES, 3 (1889) *microformed on* Davis Libr., Univ. of N.C. at Chapel Hill (2000), http://docsouth.unc.edu/church/turnercivil/menu.html.

40. *Id.* at 6–7.

41. *Id.* at 7.

42. Civil Rights Cases, 109 U.S. 3, 61 (1883).

component part of the people for whose welfare and happiness government is ordained."[43] In a moment of historical recovery, Justice Harlan maintained, "At every step in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, 'for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.' "[44]

Contemplating both the immediate and long-term implications of the Court's decision, Justice Harlan somberly added,

> To-day it is the colored race, which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be some other race that will fall under the ban. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree—for the due enforcement of which, by appropriate legislation, congress has been invested with express power—everyone must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.[45]

Justice Harlan's forecast came to pass just thirteen years later with the Supreme Court's ruling in *Plessy v. Ferguson* (1896).[46] The doctrine of "separate but equal" effectively created two tiers of citizenship. With *Plessy*, the class of people Justice Bradley previously contended were becoming "the special favorites of the law" were relegated to the back of the bus, the side door of the theatre, and other prescribed spaces marked by the legal designation "Colored."[47] Justice Bradley likened the necessity for additional legislation to protect African Americans from additional acts of discrimination to "running the slavery argument into the ground,"[48] but no aspect of American life or culture, from lunch counters to cemeteries, subsequently escaped the tentacles of Jim Crow segregation.

43. *Id.*
44. *Id.*
45. *Id.* at 62.
46. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).
47. Civil Rights Cases, 109 U.S. at 62.
48. *Id.* at 24.

Justice Harlan, of course, also offered a spirited dissent from the majority in *Plessy*. "Our constitution is colorblind, and neither knows nor tolerates classes among citizens. . . . The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution."[49]

Justice Harlan did not mean "color blindness" in the same way it is sometimes invoked today to challenge race-specific legislation, but rather to highlight the necessity of laws to protect African Americans and other minorities from the tyranny of white supremacy. The language of the Constitution itself did not acknowledge such racial classifications. Moreover, Justice Harlan understood for the larger principles upon it was framed to have real meaning, legislators should check the impulse toward segregation and other forms of discriminatory action that undermined the principle of citizenship and the equal protection of the law. In the parlance of today, Justice Harlan understood it would not suffice for the law simply to be not racist, but instead it must be antiracist, with a range of actions to remediate, correct, and prevent acts of discrimination.

Justice Harlan's opinion was the minority view. In the decades following the Court's ruling in *Plessy*, African American activists once again set their sights on challenging the roots of inequality within the law. In the two decades after the end of World War II, coupled with the rise of nonviolent direct action, these efforts bore fruit in successful legal challenges to state sanctioned segregation in housing, higher education, and transportation. In tandem, both trajectories undermined the precedent established in *Plessy* that culminated in the ultimate repudiation of the "separate but equal" doctrine in the Court's opinion in *Brown v. Board of Education*.[50]

Even with Justice Harlan's dissenting opinion becoming the majority view, the Second Reconstruction faced the same conundrum that plagued the first. As Michael Klarman documented, the backlash against *Brown v. Board of Education* fueled massive resistance in the South.[51] The passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 faced similar opposition. As in 1875, the Civil Rights Act of 1964 inspired fear and was met with fierce opposition by those who viewed steps toward affirmative rights for African Americans as a grant of special privileges. The law served as a hallmark of the Second Reconstruction, as the civil rights movement came to be known, but was dogged by the reverberations of the Court's opinion in the Civil Rights Cases of 1883. Instead of being viewed as a remedy for past historical injustices that made such corrections neces-

49. Plessy v. Ferguson, 163 U.S. at 559, 562.

50. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

51. Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. Am. Hist., 81–118, n.1 (1994); Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004).

sary, opposition to affirmative action framed it as a grant of special privileges to African Americans, creating unfair advantages.

In addition, pressure continued to sunset so-called entitlement programs based on similar reasoning from the Reconstruction Era. Christopher Edley Jr. and Gene B. Sperling conceptualized the problem in a June 1989 editorial in *The Washington Post*, aptly titled, "Have We Really 'Done Enough' for Civil Rights?"

> The very success of widespread racial exclusion — lasting until just one generation ago — left everyone and no one responsible at the same time. With overt discrimination mostly out of the picture, employers could blame an absence of black workers on educational disadvantage; educators could shrug and point to housing; housing officials and real estate brokers could point to low incomes; and so on. It is fatuous to pretend that the debilitating effects of centuries of servitude — persisting in the sharecropper culture of the South and the jampacked ghettos of the North well into the post-World War II period — can be reversed in a brief period of lukewarm tolerance. Sensible remedies to our great national conundrum are not easy to come by, but a country that cares about its integrity must try. The first step in reaffirming our commitment to the ideals of racial justice is to make another attempt at an honest discussion of our differences on how to achieve it.[52]

Edley and Sperling determined that the three ingredients "needed to renew this generation's effort at Reconstruction [were]: reaffirmation, pragmatism and another way of doing the business of civil rights."[53] Without such a commitment in our present moment, we remain susceptible to replicating the mistakes of the past. Justice Harlan's dissent, as well as Bishop Turner's critique, resonate as powerfully today as they did in 1883 and with the same sense of urgency. Efforts to restrict African American voting rights, along with an unwillingness to address issues of discriminatory practices in housing, education, employment, and criminal justice, form the crux of the problem.

More than a century ago W.E.B. Du Bois wrote that, "The problem of the twentieth century is the problem of the color line; the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea."[54] In 2021, the problem of the twenty-first century remains the problem of the color line, reinforced by legacies of injustice that assume equality while reinforcing structures that deny it. The backlash

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52. Christopher Edley & Gene Sperling, *Have We Really 'Done Enough' for Civil Rights?*, WASH. POST (June 25, 1989), https://www.washingtonpost.com/archive/opinions/1989/06/25/have-we-really-done-enough-for-civil-rights/1b3fc305-be26-42bd-90c7-a726bdf924b6.

53. *Id.*

54. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND DRAWINGS 8 (A.C. McClurg & Co., 2d ed. 1903).

against efforts to ensure equality in policing and voting rights in our time demonstrate the continued prescient value of Justice Harlan's dissents in both the Civil Rights Cases of 1883 and *Plessy v. Ferguson*. In a nation where racial inequality runs rampant, the only pathway "to enable the black race to take the rank of mere citizens"[55] must involve a concerted effort at dismantling those structures, policies, practices, and procedures that continue to perpetuate inequality. We must be unencumbered by artificial timelines and superficial metrics. Then, and only then, will we be able to conquer racial inequality consistent with the ideological underpinnings of our governing documents.

After the Supreme Court decided the Civil Rights Cases, and despite his successful business ventures in the state, Bird Gee eventually left Kansas. As his grandnephew later recalled, "Uncle Bird was furious and announced he was going to Indian Territory to spend the rest of his life among what he called 'the heathens.'"[56] Like countless other African Americans, he later settled in Oklahoma.[57] In the first decade of the twentieth century, newspaper accounts capture bits of his life there, such as posting bail for Charles Johnson. He continued to enjoy success as a businessman, despite the encroaching Jim Crow tentacles of not only individual acts of prejudice and discrimination but state-sanctioned segregation in the aftermath of the Supreme Court's decision in *Plessy v. Ferguson*. In the first few years of the twentieth century, he continued to amass wealth and influence through his ownership of multiple properties, earning designation as one of the wealthiest men in the region. However, when Oklahoma became the forty-sixth state admitted to the Union in November of 1907, he quickly found himself a target, the victim of a campaign of harassment by local officials bent on introducing segregation to the former "Indian" territory. Gee weathered the legal assaults on his integrity and assets, including unjust imprisonment for a short period in 1912 for allegedly falsely representing his property in a bond case—carrying a prison term of ten years. He did so with the same dignity, grace, and commitment to fight he exhibited in Kansas.[58]

Gee's experience might best be summed up by a letter he submitted to the editor of the *Kansas City Chief* from the state of New York, where he was visiting in September of 1876. "Please permit me space in your columns," he began, "to give to the many readers of the Chief a few thoughts on the condition of Kansas and the Eastern States," and the question "Where will you go to better yourselves?"[59] While acknowledging menaces to the harvest such as drought and grasshoppers in Kansas, Gee noted that

55. Civil Rights Cases, 109 U.S. 3, 61 (1883).

56. For quote attributed to Bird Gee, see Loren Miller, *How Supreme Court Overcame its Racism*, EBONY MAGAZINE, 57 (Mar. 1, 1966).

57. *Id.*; MILLER, *supra* note 19.

58. *Abstract of Judgment*, THE DAILY OKLAHOMAN, May 2, 1912, at 6.

59. Bird Gee, *From New York*, THE KANSAS CHIEF, Sept. 14, 1876, at 2.

things were scarcely better in the East. "The manufactories are all suspending," he grimly observed:

> thousands of men are out of employment walking the streets who are dependent on labor for support. Starvation is staring them in the face. The great cry with them is, they are living under the Republican administration, and want a change. They all want change [;] when they feel round, they have none.[60]

Gee's advice to his fellow Kansans was simple. "Improve your lands in Kansas and stick to it."[61] To further emphasize his point, Gee turned his attention to politics, recounting a troubling speech given by a New York Democrat a few days prior. Gee remarked, "He said this is and should be a white man's government, for the white men and their posterity."[62] Pointedly, he inserted, "It is well to note such expressions made by a party in anticipation of being placed in power."[63] In addition to general concerns about work and the economy African Americans shared with their fellow citizens, Gee highlighted the unique anxieties African Americans faced with regard to the unchecked resurgence of an ascendent white supremacy and the accompanying racial terror upon which it always depended for enforcement.

The Court's decision in the Civil Rights Cases further discounted the value of Black lives regardless of their contribution to the larger society. This was true not only of Gee, but of many of his neighbors and colleagues that included the notable Black scientist and inventor George Washington Carver. In March of 1888, both men, along with several other prominent Black families, "as an evidence of the determination of our people to live and make homes here," planted more than 1600 ornamental trees.[64] That same month, Carver testified on Gee's behalf regarding the latter's claim to a homestead exemption. Finding Carver, "a somewhat remarkable character" by "reason of his color, and opportunities," the local *Ness County News* turned an article regarding his testimony into a mini biography.[65] After extolling Carver's many accomplishments and finding him "a pleasant and intelligent man to talk with," the editor pointed out the stark reality of life in Jim Crow America.[66] He concluded "were it not for his dusky skin—no fault of his—he might occupy a different sphere, to which his abilities would otherwise entitle him."[67]

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Beeler Buglings*, NESS CITY TIMES, Mar. 1, 1888, at 4.
65. *Twenty-Five Years Ago*, NESS COUNTY NEWS, Mar. 29, 1913, at 1.
66. *Id.*
67. *Id.*; *see also*, *Notice for Publication No 512*, NESS CITY SENTINEL, Mar. 10, 1888, at 8; MARK D. HERSEY, MY WORK IS THAT OF CONSERVATION: AN ENVIRONMENTAL BIOGRAPHY OF GEORGE WASHINGTON CARVER 19 (2011).

Why and how is this germane to the proposed George Floyd Justice in Policing Act? It is an important step in healing the wounds and addressing the discriminatory action that has been, as Al Sharpton put it, "the story of black folks in America."[68] It is a story that inextricably connects generations in a shared struggle to make the promises of American democracy real against the backdrop of its foundations in white supremacy. Most of what we know about Bird Gee, for example, was recorded by his grandnephew. He was the distinguished jurist and civil rights attorney Loren Miller. Along with Thurgood Marshall, he became one of the primary architects of the National Association for the Advancement of Colored People's (NAACP) campaign to invalidate racially restrictive covenants and end housing segregation in the 1940s. Such cross-generational activism is not uncommon and also points to a larger challenge.

We must acknowledge and accept that a problem crafted and reinforced for centuries cannot be wiped out in a generation. No more compelling example of that exists than the current battle over voting rights in states like Ohio, Florida, and Georgia. Those rights were jeopardized by the Supreme Court's skewering of the Voting Rights Act of 1965 in *Shelby County v. Holder*[69] in 2013. It was Congressman John Lewis who reminded us of the importance of history and the need for historical recovery in that moment. "We may not have people being beaten today," he observed,

> maybe they're not being denied the right to participate, to register to vote, they're not being chased by police dogs or trampled by horses. But in the 11 states of the old Confederacy and even in some of the states outside of the South, there has been a systematic, deliberate attempt to take us back to another period.[70]

Lewis implored, "My message to the members of the United States Supreme Court is remember, don't forget our recent history. Walk in our shoes. Come and walk in our shoes."[71]

Congressman Lewis, in his final letter to the American people published posthumously in July of 2020, pointed to history as an important foundation for the work ahead. Reflecting on his own journey, Lewis punctuated the issue of intergenerational trauma as a spark for activism. As he wrote, "Emmett Till was my George Floyd. He was my Rayshard Brooks, Sandra Bland, and Breonna Taylor."[72] Far from echoing the problematic adage that history repeats itself, Lewis offered a powerful lesson in agency—reminding us that his own life, like the lives of Bird Gee, Loren

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68. Sharpton, *supra* note 2; Saldivia, *supra* note 2.

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

70. Amy Goodman, Opinion, *Big Wins, Loss for Civil Rights*, SPOKESMAN-REVIEW (June 28, 2013), https://www.spokesman.com/stories/2013/jun/28/big-wins-loss-for-civil-rights.

71. *Id.*

72. John Lewis, Opinion, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html.

Miller, and countless other known and unknown women and men, was a testament to it.

As Lewis put it, "Democracy is not a state. It is an act, and each generation must do its part to help build what we called the Beloved Community, a nation and world society at peace with itself."[73] The work of historical recovery remains essential to that process.

73. *Id.*