Reconstruction Redux: Rehnquist, *Morrison*, and the *Civil Rights Cases*

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I. Introduction

The *Civil Rights Cases*,[2] decided in 1883 and recently affirmed in *United States v. Morrison*,[3] are among the few Jim Crow cases that remain good law. In those consolidated cases, the Supreme Court invalidated the Civil Rights Act of 1875, a law that prohibited racial discrimination in privately owned restaurants, public carriers, theaters, and inns.[4] Finding that the Fourteenth Amendment's equality protection did not extend to private actors, the Court announced what is now known as the state action rule.[5] It would take Congress nearly a century to enact similar anti-discrimination

[*] Association Attorney, Leonard Carder, LLP. J.D., CUNY School of Law. Writing is as much a collective project as an individual one. The thoughts and ideas of others are an integral part of this Article, and it has been an honor to work closely with so many. First, this Article would not be possible without the brilliant insight and unwavering encouragement of Professor Ian Haney Lopez at the University of California, Boalt Hall School of Law, who not only helped narrow the scope of the Article, but also inspired me to tackle this controversial topic. I must also express my gratitude to the *Harvard Civil Rights-Civil Liberties Law Review* editors for offering constructive and invaluable suggestions that have dramatically improved this piece. I would also like to thank Jamie Crook, Alex Zuniga, Catherine Meza, and other students in Professor Haney Lopez's Equal Protection Race Theory class for providing excellent comments. Finally, I want to offer a special thank you to CUNY Law School and Professors Victor Goode and Rhonda Copelon. Both have proven that a lawyer can dream as much as anyone else and that no legal task is too difficult to overcome. I truly believe that the state action rule, as it is articulated in the *Civil Rights Cases*, will eventually be cast aside as an archaic rule unfit for a just world.

[1] Ruth Ann Whiteside, Joseph Bradley and the Reconstruction Amendments 264 (Apr. 1981) (unpublished Ph.D. dissertation, Rice University) (on file with the University of California, Berkeley Law Library) (quoting a letter from Justice Bradley to Justice Woods).

[2] 109 U.S. 3 (1883).

[3] 529 U.S. 598, 622–23 (2000).

[4] *Civil Rights Cases*, 109 U.S. at 4.

[5] *Id.* at 25–26.

legislation in the Civil Rights Act of 1964, this time asserting its power to do so under the Commerce Clause, not the Fourteenth Amendment.[6] The state action doctrine, however, remains. This Article argues that the doctrine is both grounded in racism[7] and an obstacle to the full effectuation of the Fourteenth Amendment.[8]

One hundred seventeen years after the *Civil Rights Cases*, the Supreme Court affirmed the state action rule in *United States v. Morrison*,[9] by invalidating a provision in the Violence Against Women Act ("VAWA") that provided a private cause of action to victims of gender-based violence.[10] The late Chief Justice Rehnquist, writing for the 5-4 majority, recalled the "time honored principle" that the Fourteenth Amendment prohibits only state action and "erects no shield against merely private conduct, however discriminatory or wrongful."[11] Rehnquist also invoked *United States v. Harris*[12] and *United States v. Cruikshank*,[13] other cases decided in the late 1800s, to support the holding in *Morrison*. Because the earlier cases held that Congress did not have the power to restrict the discriminatory behavior of private actors, the Court invalidated the VAWA provision under the same analysis.[14] This parallel analysis, however, neglected to mention the underlying facts of the earlier cases and their important real-life consequences: the exoneration of white participants in racially motivated violence, including murder.[15]

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[6] Pub. L. No. 88-352, 78 Stat. 241 (1964). The legislation was a "practical circumvention of the state action doctrine insofar as it applied to congressional legislative authority." Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1073 n.100 (1977).

[7] By racism, I mean the conscious belief that, as a matter of scientific fact and moral vision, whites are the superior race. The term is a thorny one, and it is not my intention to simplify it. Scholars have posited different ways to explain the concept. *See*, *e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–24 (1987) (discerning the manifestations of unconscious racism and race privilege). Such an intricate discussion is beyond the scope of this Article. Nonetheless, I use the term to connote one element of racism—a view not uncommon in the late nineteenth century and arguably the norm, rather than the exception, among whites.

[8] For a discussion of the logical inadequacy of the state action doctrine as it relates to the Fourteenth Amendment, see Charles Black, *State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967); Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); Harold Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 905 (1994).

[9] 529 U.S. 598, 621–22 (2000).

[10] *Id.*

[11] *Id.* at 621 (citation omitted).

[12] 106 U.S. 629 (1883).

[13] 92 U.S. 542 (1875).

[14] *Morrison*, 529 U.S. at 620–21.

[15] *See infra* Parts II–III.

Rehnquist's subtle implication in *Morrison* that the contemporary reader should adhere to the moral and legal guidance of the nineteenth-century Justices indicates either a failure to understand history or an attempt to rewrite it.[16] By 1883, the Supreme Court had taken a series of actions effectively ending Reconstruction. The Court invalidated provisions of the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871 and helped to orchestrate the withdrawal of federal troops from the South following the Compromise of 1877.[17] Consequently, Rehnquist's praise of the Justices and the holdings in *Harris* and *Cruikshank* should give the modern reader pause. In fact, the consequences of the *Civil Rights Cases* go beyond the articulation of a legal rule. The result of the decision in 1883 was to end Reconstruction and to undermine federal initiatives designed to remedy the effects of the antebellum slavery regime—effects that have yet to be remedied today.[18] Because systematic and widespread private activity was the driving force behind racism following the Civil War, the legal principles promoted in the case undermined the Fourteenth Amendment as a means of eradicating racial inequality.

The *Civil Rights Cases* and the state action doctrine established two continuing principles of constitutional jurisprudence. First, conduct that the Court labels "private activity"—any activity which is non-governmental in character—is shielded from constitutional scrutiny regardless of the impact or pervasiveness of the activity. Thus, the right to equality effectively depends on the identity of the perpetrator, and there is no constitutional violation if the perpetrator is a private actor.[19] Second, the state has no affirmative duty to protect persons from private actors who deny Four-

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[16] Rehnquist wrote:

> The force of the doctrine of *stare decisis* behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.

Morrison, 529 U.S. at 622. Each of the Presidents Rehnquist named were Republicans and Union supporters during the Civil War.

[17] *See infra* Part II.A.

[18] Structural racial inequality in the United States is a fact. In 2003 the real median income for non-Hispanic whites was $48,000, while for African Americans it was $30,000. The total poverty rate was 24.4% among African Americans, 22.5% among Hispanics, and 8.2% among whites. Health care statistics show similar structural differences. For African Americans, 19.5% are uninsured, and 32.7% of Hispanics are uninsured; only 11.1% of whites are uninsured. Press Release, U.S. Census Bureau, Income Stable, Poverty Up, Numbers of Americans With and Without Health Insurance Rise, Census Bureau Reports (Aug. 26, 2004), http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html; *see also* Press Backgrounder, Human Rights Watch, Race and Incarceration in the United States (Feb. 27, 2002), http://www.hrw.org/backgrounder/usa/race.

[19] *See* Chemerinsky, *supra* note 8, at 505 ("It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.").

teenth Amendment rights, including the right to equality. Accordingly, the state may simply sit and watch as "private" action, in the form of intentional, pervasive, and systematic acts, erects a society grounded in racial subordination. Despite its suspect history, the state action doctrine remains alive and well today, blocking federal initiatives designed to prevent systemic discriminatory practices, as in *Morrison*.

While most scholars and much of the United States public consider *Plessy v. Ferguson*[20] to be the leading Supreme Court decision that sanctioned racist practices following the Civil War, the *Civil Rights Cases* played an equally powerful and insidious role in American jurisprudence. In fact, the two cases are not inconsistent.[21] *Plessy* permitted state-sanctioned segregation, while the *Civil Rights Cases* authorized racist discrimination systematically perpetrated by intransigent white Southerners. Both relied on the now discredited social rights/political rights dichotomy,[22] both contained a passionate dissenting opinion from Justice John Marshall Harlan, and both were celebrated by Southern segregationists.[23] Considered in tandem, they were instrumental in the creation of a new legal regime that, as part of its essential character, established and perpetuated racial subordination throughout nearly all elements of American society. A close examination of the decision in the *Civil Rights Cases*, together with the social and political history surrounding it, shows that the case should be of no greater moral authority than *Dred Scott*[24] or *Plessy*.

The remainder of this Article is divided into four parts. Part II discusses the role of racism in the eighteen years following the Civil War, both in contributing to the demise of Reconstruction and as a crucial ideological component in informing Supreme Court jurisprudence. Part III analyzes the *Civil Rights Cases* and the state action doctrine, paying particular attention to the influence of racism in the decision. Part IV discusses the

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[20] 163 U.S. 537 (1896) (holding that state-sponsored segregation does not violate the Equal Protection Clause of the Fourteenth Amendment).

[21] *See* Black, *supra* note 8, at 70 (characterizing the "separate but equal" and state action doctrines as "fraternal twins").

[22] *Plessy*, 163 U.S. at 544 ("The object of the [Fourteenth A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce *social*, *as distinguished from political equality*, or a commingling of the two races upon terms unsatisfactory to either.") (emphasis added); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1125–28 (1997) (showing how *Plessy* employed the discourse of social rights as a proxy for the old slavery regime, consequently establishing a new and arguably more effective form of racial subordination). *Compare Plessy*, 163 U.S. at 544, *with* the *Civil Rights Cases*, 109 U.S. 3, 22 (1883) ("Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the *social rights* of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship . . . .") (emphasis added).

[23] C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 146 (1963) (depicting a celebration by white Southerners at the opera house in Atlanta after the *Civil Rights Cases*).

[24] Dred Scott v. Sanford, 60 U.S. 393 (1857).

current state action doctrine as announced in *Morrison*, the most recent Supreme Court decision to reaffirm the *Civil Rights Cases*. This Article concludes that the Court should discard the *Civil Rights Cases* as it has discarded *Plessy*, *Pace v. Alabama*,[25] and *Dred Scott*, and in its place, adopt an alternative state action doctrine that triggers constitutional scrutiny when the state fails to act in preventing private discrimination.

II. Reconstruction and the Jurisprudence of Racism

In order to fully appreciate the logic and rule structure of the state action doctrine and the *Civil Rights Cases*, it is crucial to understand their history. This Article examines two kinds of history. First, it analyzes the legal history of the *Civil Rights Cases*, including the important decisions preceding the *Civil Rights Cases* as well as certain Justices' candid opinions on race. Second, it evaluates important historical moments of the Reconstruction Era, focusing on the resistance to Reconstruction and the prevailing racial attitudes of the day. Through the examination of five cases—*Blyew v. Kentucky*, *Hall v. Decuir*, *Cruikshank*, *Pace*, and *Harris*—and their historical context, it is unmistakably clear that the driving purpose of the state action doctrine was to protect and reinforce a racially hierarchical society. Racism was one of the motivating forces behind Supreme Court jurisprudence between 1867 and 1883, and the rules the Court announced mirrored the prevailing racial views of that era.

A. Reconstruction, the Supreme Court, and a New American Apartheid

Between 1867 and 1883, the Supreme Court slowly but deliberately undermined Reconstruction and other national attempts to remedy the effects of slavery. Emboldened by a transforming public opinion that was not interested in full equality between whites and African Americans, the Court invalidated the Ku Klux Klan Acts as well as other laws designed to protect newly emancipated African Americans.[26] The five cases this Section discusses have one element in common: each reinforced racial inequality. While the Court may not have always written its judicial opinions in expressly racist terms, the Court's holdings tacitly endorsed a new Southern racist regime, which had emerged following the Civil War and

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[25] 106 U.S. 583 (1883).

[26] *See generally* Hodding Carter, The Angry Scar: The Story of Reconstruction 210–18 (1959). According to most scholars, it is clear that Northern political will for Reconstruction dissipated within ten years of its inception, although theories differ as to the cause. Some argue that Northern business leaders were eager to capitalize on the South's vast productive capacity in agriculture leading to the restoration of a plantation-like economy. Others argue that Northern interest in reconciliation and unity led to Reconstruction's demise. However, it is generally agreed that the end of Reconstruction resulted as much from a failing Northern political will as it did from Southern resistance. *See generally* Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 (1988).

effectively protected Southern intransigence to Reconstruction and its accompanying terrorist strategies.

Blyew v. United States,[27] one of the first post–Civil War "white violence" cases to reach the Supreme Court, illustrates the Court's narrow reading of Reconstruction legislation. In *Blyew*, the Court protected two white men, Blyew and Kennard, accused of bludgeoning four African Americans to death; the victims were Lucy Armstrong, a blind woman over ninety years old, her son Jack, his wife Sallie, and their seventeen-year-old son Richard Foster.[28] The criminal case began in a Kentucky trial court, yet U.S. Department of Justice officials removed the case to federal court through the Civil Rights Act of 1866, a law designed to prevent states from permitting racist violence through the state judicial system.[29] Kentucky law at that time prevented African Americans from being witnesses against whites in its state courts. Prosecuting the defendants in a Kentucky court would thus be futile because the only witness to the murder was an African American woman. Blyew and Kennard appealed the case's removal to federal court.

The Supreme Court held that the statute enabling removal did not apply to the case against Blyew and Kennard.[30] The statute stated that federal district courts had exclusive jurisdiction "of all causes, civil and criminal, affecting persons who are denied . . . in the courts or judicial tribunals of the State . . . any of the rights secured to them by the first section of the act."[31] The Court held that only "living persons" could remove the case to federal court because only they are "affected" by the cause of action.[32] Thus, because the victims were dead, the statute did not apply, and the Court exonerated two white murderers.[33] More significantly, the decision meant that as long as Kentucky law prevented African American people from being witnesses in court, whites were effectively shielded from prosecution in federal courts for murdering black people. In fact, Justice Bradley—who would later author the opinion in the *Civil Rights Cases*—argued just that, stating in dissent that the majority decision "gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will."[34] The factual and legal consequences of the decision indicate it did not simply represent a racially neutral interpretation of a statute. Rather, subsequent decisions show that *Blyew* fits a larger pattern of Supreme Court jurisprudence undermining federal legislation designed to protect African Americans from racist state laws.

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[27] 80 U.S. 581 (1871).
[28] *Id.* at 584–85.
[29] *Id.* at 592–93.
[30] *Id.* at 594–95.
[31] Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27.
[32] *Blyew*, 80 U.S. at 594 ("Manifestly the act refers to persons in existence.").
[33] *Id.* at 593 (holding that the witness, a relative of Lucy Armstrong, was not "affected" by the case).
[34] *Id.* at 599 (Bradley, J., dissenting).

Justice Bradley's *Blyew* dissent stands in stark contrast to his view in *United States v. Cruikshank*, where he joined the majority in dismissing the indictments of eight white participants in the murders of African Americans in Louisiana.[35] The story of the Colfax Massacre of 1873 and the ensuing legal proceedings is an under-publicized chapter in American legal history. The case arose out of an armed struggle to occupy the local courthouse in Colfax, Louisiana.[36] More than one hundred armed whites revolted against the appointment of an African American as sheriff in Colfax, and organized a militia to take back the courthouse. To quell the revolt and defend the courthouse, the sheriff deputized around fifty African American men. After a long battle, the courthouse mysteriously caught fire, and the African American group surrendered to the illegal militia. Afterwards, the drunken white militia members murdered close to forty African American prisoners. The militia continued on a violent rampage throughout the area, roaming from one black neighborhood to another. In the end, between sixty and one hundred African Americans were killed.[37]

Immediate reaction to the massacre was one of horror as Northerners scorned the Southern violence. The Department of Justice indicted ninety-eight whites for their roles in the massacre, yet only managed to convict three.[38] Judge Joseph Bradley, who at the time presided over the Fifth Circuit and heard the case at the trial court level, questioned whether the federal government was empowered to prosecute the participants in the massacre at all.[39] By the time the case reached the Supreme Court, Bradley was a Supreme Court Justice. The Court rejected the Justice Department's argument that the white attackers violated the victim's Fourteenth Amendment rights, stating that the amendment "adds nothing to the rights of one citizen as against another."[40] For protection from their fellow citizens, African Americans had to look to the state legislature and courts. With regard to the indictments, the Court held that they were defective for vagueness.[41] Hence, the Court once again exonerated the white mob—this time, one that massacred nearly one hundred people. As in *Blyew*, the Court utilized seemingly race-neutral language to arrive at its conclusion.

Beyond his judicial opinions, Justice Bradley's personal views on race reflected the Court's hostility to Reconstruction laws.[42] While presid-

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[35] 92 U.S. 542 (1875). Justice Bradley authored the lower court decision dismissing the indictments. *See* United States v. Cruikshank, 25 F. Cas. 707 (C.C.D. La. 1874) (No. 14,897).

[36] *See* CARTER, *supra* note 26, at 205–09.

[37] *Id.*

[38] MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 246 (2003).

[39] *See* Whiteside, *supra* note 1, at 218–19. Justice Bradley immediately dismissed the charge in the indictment alleging a Fourteenth Amendment violation because private actors, not the government, were responsible for the actions. *Id.*

[40] *Cruikshank*, 92 U.S. at 553–54. The indictments were brought under the Enforcement Act. *See* Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140.

[41] *Cruikshank*, 912 U.S. at 555.

[42] *See* Whiteside, *supra* note 1, at 264–65.

ing over the Fifth Circuit in Louisiana and Texas, Bradley spent much time with former Confederate jurists. He empathized with white Southern businessmen, especially plantation owners, who were integral to the flourishing economy prior to the Civil War that helped to make the United States a formidable economic power,[43] and sympathized with Southern anger toward Reconstruction. For example, Bradley estimated that a crop of sugar might have yielded $100,000 in profit on a thousand acre plantation with 250 "unemancipated" hands to work it, and noted that hiring the former slaves as laborers would severely cut into the plantation owners' profits.[44] He further observed that "the Negroes would not stay on the plantations and will refuse to work them, and without them, the plantations will become a desert waste."[45] The consequences of Reconstruction, Bradley concluded, were not fully appreciated by Northerners.[46] His sentiments therefore focused not on the impact of slavery on African American people, but the impact of emancipation on whites—rich whites in particular. Bradley's ideas on race were even clearer in his later correspondences. While deliberating upon the legal issues posed by the *Civil Rights Cases*, Bradley expressed his belief that forcing a white man to sit next to a black man in a railroad car would be to introduce a "new kind of slavery":

> To deprive white people of the right of choosing their own company would be to introduce another kind of slavery . . . . Surely a white lady cannot be enforced by Congressional enactment to admit colored persons to her ball or assembly or dinner party . . . . The antipathy of race cannot be crushed and annihilated by legal enactment.[47]

Bradley's views, while not so acceptable today, were not uncommon in the late nineteenth century.[48]

However, the Court's opinion in *Cruikshank* was not without criticism. J. R. Beckwith, a district attorney with the Department of Justice whose responsibility, with other federal prosecutors, was to enforce the Civil Rights Acts, observed that the "white league as an armed organization never would have existed but for [Justice Bradley's] action."[49] Coincidentally, Beckwith's concern is nearly identical to Bradley's in *Blyew*—that the Court would be allowing "vindictive outlaws" to act with "impunity."[50] Furthermore, Beckwith's premonition proved true, as the number

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[43] *Id.* at 147–50.
[44] *Id.* at 150.
[45] *Id.*
[46] *Id.* (quoting a letter from Justice Bradley to Justice Woods).
[47] *Id.* at 264 (quoting a letter from Justice Bradley to Justice Woods).
[48] *Id.* at 291 (stating that by 1874 Justice Bradley had begun to mirror the national mood).
[49] *Id.* at 213.
[50] Blyew v. United States, 80 U.S. 581, 599 (Bradley, J., dissenting). For an analysis of the transformation of Justice Bradley's legal writings, see John A. Scott, *Justice Bradley's*

of attacks against African Americans in the South accelerated.[51] The failure of federal and state authorities to contain organized and systematic incidents of racial violence, such as the Colfax Massacre or the Hamburg Massacre in South Carolina, where between 15 and 125 African Americans were killed, was understood by whites throughout the South as a license to pursue its terrorist strategies in fighting Reconstruction.[52]

In contrast to *Cruikshank* and *Blyew*, *Hall v. Decuir* did not involve racial violence.[53] Like those cases, however, the Court's holding in *Hall* is best understood not for its legal coherency but for its discriminatory consequences. The case was a foreboding precursor to the *Civil Rights Cases*, as the Court invalidated a state law prohibiting racial discrimination on privately owned public carriers.[54] It stemmed from an African American woman who boarded a vessel and attempted to enter a cabin reserved for whites. The ferry refused to provide her with service. Decuir sued the carrier under a Louisiana law preventing racial discrimination in privately owned public carriers. The Supreme Court held against Decuir, and—invoking the dormant Commerce Clause—found that states were powerless to regulate interstate commerce because such power was exclusively reserved by the federal government.[55] Noting that while leaving one state and entering another, the ferry would have to move blacks from cars exclusively reserved for whites or force whites to sit with blacks, Chief Justice Waite explained that "[c]ommerce cannot flourish in the midst of such embarrassments."[56] Waite also questioned the substance of the Louisiana law and provided a preview to the separate but equal doctrine to be announced a few years later in *Plessy*:

> Substantial equality of right is the law of the State and of the United States; but equality does not mean identity . . . . [T]he laws of the United States do not require the master of a steamer

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Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases *to the* Civil Rights Cases, 25 RUTGERS L. REV. 552 (1971).

[51] Whiteside, *supra* note 1, at 220.

[52] *See* W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 678–92 (1935) (describing the extraordinary and systemic Southern intransigence to Reconstruction and concluding that the Supreme Court, "through a process of reasoning very similar to that of Democratic legislators, deprived the enforcement legislation of nearly all its strength when it rendered its decisions in the cases of *United States v. Cruikshank* and *United States v. Reese*"). *Reese*, 92 U.S. 214 (1875), was another Reconstruction case where the Court invalidated congressional legislation enacted under the Fifteenth Amendment criminalizing a state official's refusal to count another's vote because of race.

[53] 95 U.S. 485 (1877).

[54] *Id.* at 485.

[55] *Id.* at 490–91.

[56] *Id.* at 489.

> to put persons in the same apartment who would be repulsive or disagreeable to each other.[57]

The holding created what would later become an unavoidable catch-22. *Hall* prohibited states from legislating against racial discrimination in private ferries, but the *Civil Rights Cases* prevented Congress from regulating private activity under the Fourteenth Amendment. Moreover, in 1890, the Court held that the Commerce Clause did not prevent a state from enacting a Jim Crow ordinance that applied to public carriers in interstate commerce.[58] Consequently, scholars would be better off understanding the holdings of *Decuir* and the *Civil Rights Cases* not for their internal logic but for their practical, social, and political significance: neither state nor federal authority could prevent racial discrimination in anything that constituted "interstate commerce."

Pace v. Alabama supports this contention.[59] While the case directly concerned an anti-miscegenation law, like those decisions before it *Pace* is an expression of racist jurisprudence. The Supreme Court, in a two-page unanimous opinion written by Justice Stephen J. Field, affirmed an Alabama Supreme Court decision upholding the state's anti-miscegenation law. The law penalized interracial adultery more severely than adultery between members of the same race.[60] The Court held that the law did not violate the Equal Protection Clause because the law penalized black and white violators equally.[61] The Alabama Supreme Court was more explicit in its reasoning, finding that the "crime" of fornication between persons of different races was more "evil" because it would result in the "amalgamation of the two races, producing a mongrel population and a degraded civilization, the prevention of which is dictated by a sound public policy affecting the highest interests of society and government."[62]

The language here speaks for itself. Justice Field made no mention of the Alabama court's language and simply affirmed the decision. Eighty-four years later, in *Loving v. Virginia*, the Supreme Court held that anti-miscegenation laws violated the Fourteenth Amendment, specifically finding that such laws were grounded in the ideology of white supremacy.[63] Hence, even by the Court's own (subsequent) standards, the holding in *Pace* was

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[57] *Id.* at 503–04.

[58] *See* Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587 (1890); *see also* William M. Wiecek, *Synoptic of United States Supreme Court Decisions Affecting the Rights of African-Americans, 1873–1940*, 4 BARRY L. REV. 21, 24 (2003) (discussing *Louisville, New Orleans & Tex. Ry. Co.*).

[59] 106 U.S. 583 (1883).

[60] *Id*. at 584.

[61] *Id.*

[62] Pace v. State, 69 Ala. 231, 232–33 (1881).

[63] 388 U.S. 1 (1967). "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." *Id*. at 11.

grounded in racism. It is no logical stretch to conclude that the Court, in 1883 when it decided *Harris*, *Pace*, and the *Civil Rights Cases*, was influenced and guided by a racist belief in the "supremacy" of the "white race." Indeed, it would be a much greater stretch to argue the contrary—that the Supreme Court's holdings in *Harris*, *Pace*, and the *Civil Rights Cases* were *not* motivated by racial animus.

In addition to this opinion, Justice Field's personal writings reveal hostility toward non-whites. He wrote that the Fourteenth Amendment was unnecessary, concluding that the Thirteenth Amendment's abolition of slavery and its incidents was all that was needed to correct the condition.[64] In a correspondence, Field wrote:

> It would have been most fortunate . . . had [the Thirteenth Amendment] been deemed sufficient and been accepted as such . . . . But the North was in no mood for a course so simple and just. Its leaders clamored for more stringent measures, on the ground that they were needed for the protection of the freedmen.[65]

He was also convinced of the superiority of white Americans: "You know I belong to the class who repudiate the doctrine that this country was made for the people of all races . . . . On the contrary, I think it is for our race—the Caucasian race."[66]

By 1883, it was clear that Southern whites had an ally in the judicial branch of the federal government. In *United States v. Harris*, the Supreme Court once again protected a white murderer.[67] Harris was prosecuted in Tennessee for leading a white mob into a local jail, sequestering a prisoner, and lynching him in public view.[68] The Department of Justice prosecuted Harris in federal court under Section 2 of the Ku Klux Klan Act of 1871, which made it a crime for two or more persons to "conspire . . . or go in disguise upon a highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws."[69]

The Court invalidated section 2 and held that Congress was without power to regulate and effectively police private conduct under the Four-

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[64] *See* CARL BRENT SWISHER, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW 155 (1963).

[65] *Id.*

[66] Charles W. McCurdy, *Stephen J. Field and the American Judicial Tradition*, *in* THE FIELDS AND THE LAW 5, 17 (U.S. Dist. Court for the N. Dist. of Cal. Historical Soc'y & Fed. Bar Council eds., 1986).

[67] 106 U.S. 629 (1883).

[68] *Id.* at 629–32.

[69] Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13. The language of the law expresses a clear intent to target the Klan, which was notorious for disguising themselves during their terrorist attacks.

teenth Amendment.[70] Because Harris and the white mob were not acting as government actors nor in a governmental capacity, they could not be prosecuted under the Act. Consequently, much like in *Cruikshank*, the Court prevented the federal government from taking effective steps to deter and punish white racist terror.

Justice Samuel Miller, who joined the majority in *Harris*, also harbored an arguably racist attitude. Though formerly an opponent of slavery, Miller became disenchanted with Reconstruction.[71] He questioned the Republican Party's "extreme policy" affording African American citizens the right to vote, stating in correspondence that many "regret[ted]" such radical proposals.[72] Regarding the speed with which Congress was moving in enforcing Reconstruction, Miller wrote that "[t]he strain upon constitutional government, from the pace at which the majority is now going, is one which cannot be much longer continued without destroying the machine."[73] Miller later focused on the "problems" created by immigration—the spread of communism, socialism, anarchism, and nihilism—and mistrusted foreign-born populations "not accustomed to Anglo-Saxon traditions of government."[74]

Blyew, *Hall*, *Cruikshank*, *Pace*, and *Harris* cannot be read in isolation. Each enforced racial hierarchy, and each resulted in the legal legitimization of racism. The cases reflected the prevailing racial attitudes of the day, including those of the Court. While many of the cases have been overruled or superseded,[75] the *Civil Rights Cases* and the "canonical" state action doctrine it articulates remain alive and well today.

B. Reconstruction, White Resistance, and the Ku Klux Klan

While the Supreme Court was deciding cases such as *Cruikshank*, *Hall*, and *Blyew*, another reality was facing the nation, and the South in particu-

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[70] *Harris*, 106 U.S. at 636–38.

[71] *See* Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. Rev. 1927, 2015–16 (2003).

[72] Charles Fairman, Mr. Justice Miller and the Supreme Court: 1862–1890, at 139–40 (The Lawbook Exch., Ltd. 2003) (1939) (quoting a Dec. 22, 1867 letter from Justice Miller to his brother-in-law William P. Ballinger).

[73] *Id*. at 138 (quoting an Apr. 24, 1867 letter from Justice Miller to his brother-in-law William P. Ballinger).

[74] Purcell, *supra* note 71, at 2015–16 (quoting 6 Charles Fairman, Reconstruction and Reunion, 1864–1888: Part One 430 (1971)).

[75] *See, e.g.*, Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 39–40 (1948) (upholding a state law prohibiting segregation on public carriers and distinguishing *Hall*); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 209–10 (1970) (Brennan, J., dissenting) ("[T]he holding of *Harris* and the *Civil Rights Cases*, that Congress cannot under § 5 protect the exercise of Fourteenth Amendment rights from private interference has been overruled.") (citations omitted); Loving v. Virginia, 388 U.S. 1, 11 (1967) (rejecting the rationale in *Pace* and holding that marriage restrictions based solely on racial classifications violate the Equal Protection Clause). *But see* United States v. Morrison, 529 U.S. 598, 624 (2000) (rejecting the proposition that *Harris* was overruled).

lar—Reconstruction. Although its primary goal was to help lift the South out of the economic and political turbulence of the Civil War, most Southern whites considered it a mere extension of Northern military rule and the creation of an oppressive regime contrary to the venerable values of the antebellum past. Southern opposition was aggressive, widespread, and relentless. The notion that Reconstruction would enforce racial equality, where African American citizens would be "equal" with their white counterparts, was so repugnant to the Southern conscience that compliance with new anti-discriminatory laws was unthinkable.[76]

The most pronounced collective response to Reconstruction was the organization of a clandestine terror group—the Ku Klux Klan. The Klan was not centrally organized, and did not constitute itself as a political party; according to many, the Klan as a national organization failed to implement its long term goals.[77] However, the power of the Klan as a network of racist and violent white vigilantes should not be underestimated.

The Klan was composed exclusively of white men, intent on frustrating the purpose of Reconstruction and its accompanying constitutional amendments.[78] The Klan was organized to maintain white supremacy and defend against the tyranny of "carpetbag" and "negro" rule.[79] Southern white men joined the Klan by the tens of thousands, while small newspapers and other community vehicles served as publicity tools for the organization.[80]

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[76] *See generally* MAGRATH, *supra* note 23, at 155. Despite its failure, Reconstruction was briefly successful in offering new initiatives designed to destroy the old system of racial relations. Congress revised the Constitution by enacting the Thirteenth, Fourteenth, and Fifteenth Amendments, and also created the Freedman's Bureau to direct the Reconstruction process. The Bureau erected schools, encouraged former slaves to leave their old plantations, and facilitated organization among African American workers to strengthen their political power. It also facilitated land acquisitions following Lincoln's executive order permitting the confiscation of abandoned property, coining the phrase "40 acres and a mule." *See also* FONER, *supra* note 26; ERIC FONER & OLIVIA MAHONEY, AMERICA'S RECONSTRUCTION: PEOPLE & POLITICS AFTER THE CIVIL WAR 37–72 (1995) (describing Southern African Americans in 1865 organizing mass meetings, marching in parades, petitioning the government for redress, and organizing conventions to discuss Reconstruction strategies); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS 174 (1991) (In 1865, 40,000 "freedmen" received 400,000 acres of abandoned Confederate land, but in 1866 President Johnson rescinded Lincoln's order and restored much of the land to its white former owners. According to Roediger, emancipation led to the largest uncompensated revolutionary seizure of land prior to the Soviet Revolution of 1918.).

[77] *See* GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 100–04 (1984).

[78] *See* HOWARD N. MEYER, THE AMENDMENT THAT REFUSED TO DIE: EQUALITY AND JUSTICE DEFERRED–THE HISTORY OF THE FOURTEENTH AMENDMENT 71–72 (Madison Books 2000) (1973).

[79] *See* Lisa Cardyn, *Sexualized Racism, Gendered Violence, Outraging the Body Politic in Reconstruction South*, 100 MICH. L. REV. 675, 692 (2002) (citing 5 J. Select Comm. on Conditions of Affairs in the Late Insurrectionary States, 42d Cong., Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States, South Carolina, pt. 3, at 1363, 1373–74, 1457–60 (1872) (According to one former Klansman, the organization's intent was to "frighten the colored people into a kind of obedience to them, so that they could be subverted to the interests of the [D]emocratic Party.")).

[80] *See* CARTER, *supra* note 26, at 210.

One former member of the White Brotherhood, another Reconstruction-era Klan, stated that the chief purpose of the Klan was to "keep the negroes from elevating themselves to white people and keep them from going to the polls and voting and to overthrow the republican party," the leading agent for the advancement of colored people.[81] The Klan used threats of violence to achieve these goals.[82] It directed their energies toward people of color, white sympathizers, and "carpetbag" politicians—politicians, usually Northern, appointed by the federal government to manage Reconstruction.[83] Because of the sheer enormity of Klan activity, which spread through the entire South, federal authorities recognized the futility of leaving policing power to the state authorities.[84] The scope of the Klan's reign of terror was so great that Congress held hearings lasting two years, leading to the passage of the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871.[85] A few years later, the Supreme Court would strike these acts down as unconstitutional.[86]

W. E. B. Du Bois and others have documented the gravity of Klan terror. Much of Du Bois's research is based on testimony taken during Congressional hearings addressing Reconstruction and the Klan problem. For example, Jonathan Gibbs, the African American Secretary of State in Florida, reported that in 1871, 153 people were murdered in Jackson

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[81] Cardyn, *supra* note 79, at 692 (citing North Carolina Senate, Trial of William W. Holden, Governor of North Carolina, Before the Senate of North Carolina, on Impeachment by the House of Representatives for High Crimes and Misdemeanors 1262, 2019 (1871)).

[82] *See* CARTER, *supra* note 26, at 210. Carter describes some actual methods of intimidation, including printing in weeklies warnings like "No rations have we, but the flesh of man. And love niggers best—the Ku Klux Klan. We catch them alive and roast them whole. And hand them around with a sharpened pole." *Id.*; *see also* WILLIAM PEIRCE RANDEL, THE KU KLUX KLAN: A CENTURY OF INFAMY 113 (1965) (describing a Klan message sent to an African American tenant of another prosperous African American, stating "[y]ou are in great danger, you are going heedless with the Radicals and against the white population . . . . You are marked and watched closely by the K.K.K.").

[83] The story of "Pitchfork" Ben Tillman, South Carolina governor and U.S. Senator, illustrates the Klan's popularity and the collective Southern embrace of white supremacy. Unapologetic about his advocacy of violence, Tillman participated in the Hamburg Massacre of 1876, where a white mob murdered at least five African Americans four days after they had paraded to celebrate Independence Day. Tillman stated on the Senate floor, "[w]e took the government away. We stuffed ballot boxes. We shot them." Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1091 n.190 (2002) (citations omitted); *see also* FRANCIS BUTLER SIMKINS, PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN 400 (1944); Charles B. Dew, Book Review, *Tightening the Noose*, N.Y. TIMES, May 21, 2000, at 31.

[84] *See* CARTER, *supra* note 26, at 217.

[85] *See* Act of May 31, 1870, ch. 114, 16 Stat. 140 (Enforcement Act); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (Ku Klux Klan Act). Congress published thirteen volumes of testimony regarding the Klan and its extraordinary influence in the South. *See Affairs in Insurrectionary States, Parts 1–13: Hearing Before the Comm. to Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42d Cong. (2d Sess. 1871).

[86] *See* United States v. Harris, 106 U.S. 629 (1883) (invalidating section 2 of the Ku Klux Klan Act); United States v. Cruikshank, 92 U.S. 542 (1875) (invalidating section 6 of the Enforcement Act).

County.[87] In Texas, 1035 men were murdered between the close of the war and 1868, and in 1869, thirty counties had no civil government whatsoever.[88] North and South Carolina witnessed 197 murders in the eighteen months prior to June 30, 1867, while whippings were "without number."[89] Between 1869 and 1871 in Mississippi, thirty-five African Americans were killed in Kemper County alone, while whippings occurred almost daily.[90]

According to Du Bois, "from war, turmoil, poverty, forced labor and economic rivalry of labor groups, there came again in the South the domination of the secret order, which systematized the effort to subordinate the Negro."[91] As Klan strength grew, Southern opposition to Reconstruction also gained strength. District Attorney Beckwith's assertion that the "white league as an armed organization never would have existed but for [Justice Bradley's] action" proved to ring true.[92] To people living in the South, the Klan was the de facto enforcement organization of a new Southern racist regime, but to the Supreme Court, the Klan was a "private actor," shielded for the most part from Congressional attempts to regulate it.

The intensity of the resistance to Reconstruction reflected a more general racism that permeated American society. Racism was rampant in the North; it influenced decision makers, policy, and the law.[93] For example, *Scribner's Monthly*, a popular magazine published in New York, offered the following message to its Southern readers in 1875:

> Men of the South, we want you. Men of the South, we long for the restoration of your peace and your prosperity. We would see your cities thriving, your homes happy, your plantations teeming with plenteous harvests . . . . [T]he old relations between you and us are forever restored—that your hope, your pride, your policy, and your destiny are one with ours.[94]

The message symbolized a greater social phenomenon—Northern reconciliation and acquiescence to Southern pride, policy, plantation, and racism.

Again, the Court decisions must be understood in their historical context. It makes little sense to separate their legal reasoning from this history, especially at a time when issues of race were of paramount impor-

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[87] DU BOIS, *supra* note 52, at 677.

[88] *Id.*

[89] *Id.* at 675 (quoting PAUL LELAND HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 83 (1927)).

[90] RANDEL, *supra* note 82, at 102.

[91] DU BOIS, *supra* note 52, at 677.

[92] *See* Whiteside, *supra* note 1, at 213.

[93] *See* ROEDIGER, *supra* note 76, at 178 (citing an 1862 edition of *The Boston Pilot*, stating "[t]he negro is indeed unfortunate, and the creature has the common rights of humanity living in his breast; but, in the country of the whites where the labor of the whites has done everything, and his labor nothing, what right has the negro . . . to equality or to admission.").

[94] *Topics of the Time*, 10 SCRIBNER'S MONTHLY 509, 509 (1875).

tance to the nation. But this history poses a question to the contemporary jurist—why continue to rely on these nineteenth-century interpretations of the Fourteenth Amendment as the Court did in *Morrison*, especially when many, such as *Pace* and *Plessy*, have been resoundingly rejected?

III. THE *CIVIL RIGHTS CASES* AND THE STATE ACTION DOCTRINE

Through the *Civil Rights Cases*, the Supreme Court dealt the final and most decisive blow to Reconstruction and the nineteenth-century struggle for racial liberation. While *Cruikshank*, *Hall*, *Blyew*, *Pace*, and *Harris* each played an important role in forming what would become a new and different kind of racial apartheid, the *Civil Rights Cases* incorporated their logic to establish one decisive and influential rule—the state action doctrine.

A. The Civil Rights Act of 1875 and Its Evisceration

The *Civil Rights Cases* addressed whether the Civil Rights Act of 1875 was a permissible exercise of the enabling provision of the Fourteenth Amendment.[95] The 1875 Civil Rights Act was truly visionary for its time. The Act guaranteed to all persons, among other things, the right to enjoy and take advantage of "inns, public conveyances on land or water, theaters, and other places of public amusement . . . ."[96] It further established a private cause of action for victims of civil rights abuses, as well as criminal penalties against violators.[97] An outgoing pro-Reconstruction Congress crafted the legislation over protests from Southern Democrats and some conservative Republicans. Ohio Democrat Allen Thurman thought the bill ignored the critical boundary between private and state conduct, arguing "[i]t makes every tavern-keeper the State in which he lives."[98] A

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[95] *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[96] Act of Mar. 1, 1875, ch. 114, 18 Stat. 335. Section 1 of the Act states:

> Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore, *Be it enacted* . . . That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Id. at § 1. In fact, it would take Congress nearly a century to legislate similar protections, with the Civil Rights Act of 1964.

[97] *Id*. at § 2.

[98] A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 75 (2005) (citing CONG.

Georgia senator suggested that the Act "invited to these halls . . . the [Paris] commune."[99] It was "the most dangerous precedent that has ever been set by this legislative body."[100] Despite these aggressive protests, Congress passed the Civil Rights Act in 1875. The law would soon become a battleground between African Americans intent on enforcing their legal rights and whites insistent on disregarding the law altogether.[101]

The Supreme Court consolidated several cases from five different states—Kansas, Missouri, Tennessee, California, and New York.[102] In one of these cases, a San Francisco theater owner appealed an indictment levied against him for denying an African American a seat in the dress circle of his theater. In another, a Tennessee railroad company appealed a decision against it for denying a seat to an African American woman in the "ladies" car reserved for whites only.[103]

The legal issue in the *Civil Rights Cases* was whether Congress was empowered by the enabling provisions of the Thirteenth and Fourteenth Amendments to prohibit discrimination in limited private and quasi-public settings.[104] Writing for the Court, Justice Bradley stated that because the Fourteenth Amendment was prohibitory in character, Congress's power to enforce the legislation only amounted to the power to correct an already existing state law or activity grounded in state authority that deprived people of due process or equal protection under the law. While positive rights and privileges were "undoubtedly" secured by the Amendment, they were only secured by prohibition against the states. Hence, Congress could only utilize section 5 of the Fourteenth Amendment for corrective purposes after it had identified a particular state law or action grounded in state authority which needed to be fixed.

As to the Thirteenth Amendment, the Court made a similar conclusion. The Thirteenth Amendment categorically prohibited slavery or indentured servitude, restricting both state and private actors. The respondents argued that the Amendment gave Congress the power not only to prohibit slavery but also the "incidents" or "badges" of slavery, and that racial discrimination in carriers, inns, restaurants, and other places of quasi-public enjoyment were nothing other than direct and causative incidents of more

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GLOBE, 42d Cong., 2d Sess. 279–80 (1871); CONG. GLOBE, 42d Cong., 2d Sess. 892–93, 928 (1872)). For the House of Representatives, see, for example, 2 CONG. REC. 375–82, 405–06, 417–22, 427–30 (1874); APPENDIX TO THE CONG. REC., 43d Cong., 1st Sess. 341–44 (1874) (containing the May 29, 1874 speech of Rep. William B. Read).

[99] Sandoval-Strausz, *supra* note 98, at 75.

[100] *Id.*

[101] *Id.* at 76–77. At the time of the *Civil Rights Cases*, there were nearly 158 other lawsuits predicated on the Act pending in courts throughout the country. *Id.*

[102] *See* HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION, RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 150 (2001).

[103] *See* Civil Rights Cases, 109 U.S. 3, 5–8 (1883).

[104] *Id.* at 10–12.

than 250 years of African slavery on the continent.[105] The Court rejected the following argument:

> [C]ongress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the *social rights* of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.[106]

Justice Bradley opined instead that should Congress be enabled to pass the Civil Rights Bill, "it is difficult to see where it is to stop."[107] He continued:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.[108]

Justice Bradley's invocation of social rights as opposed to civil/political rights would later become the crucial jurisprudential rationale justifying segregation in *Plessy*.[109]

National response to the *Civil Rights Cases* is as instructive as the case itself. The *New York Times* wrote that "the white people are jubilant," and that there was a "wild scene in the opera-house . . . . White men stood on their feet and cheered . . . . The feeling of the colored people today is deep, and in their ignorance they imagine the effect may be much more than reality."[110] It denounced the Civil Rights Act as "mischievous," a product of radical abolitionism, and lauded the holding as a step in the right direction.[111] Other Northern newspapers joined in the celebration. The *Philadelphia Daily Evening Bulletin* stated that public opinion had changed so dramatically that the law was unnecessary.[112] Of course, the white people were not celebrating the establishment of a new legal nuance—the state action doctrine—but rather were cheering for the end of Reconstruction and the evisceration of its most powerful and symbolic law, the Civil Rights Act of 1875.

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[105] *Id.* at 20.
[106] *Id.* at 22 (emphasis added).
[107] *Id.* at 14.
[108] *Id.* at 24–25.
[109] *See* Siegel, *supra* note 22, at 1125–28.
[110] MAGRATH, *supra* note 23, at 146.
[111] FRANK J. SCATURRO, THE SUPREME COURT'S RETREAT FROM RECONSTRUCTION: A DISTORTION OF CONSTITUTIONAL JURISPRUDENCE (2000).
[112] *See* RICHARDSON, *supra* note 102, at 150–51.

B. The Civil Rights Cases *Were Wrongly Decided*

Justice Bradley's decision was not a logical inevitability. Justice Harlan's strongly worded dissent should give rise to contemporary suspicion of the legal reasoning of the *Civil Rights Cases*, and was no less passionate than his dissent in *Plessy*, widely regarded today as the preferable interpretation of the Fourteenth Amendment. Arguing that the case was decided on grounds "entirely too narrow and artificial," Harlan said that the Thirteenth and Fourteenth Amendments were "sacrificed" by a "subtle and ingenious verbal criticism."[113] The Thirteenth Amendment contained a similar enabling provision, granting Congress the power to enforce its provisions. The Amendment "universally" abolished slavery, and unlike the Fourteenth Amendment made no mention of state action. Nevertheless, the Court glossed over this argument, inexplicably contending that the Thirteenth Amendment proscribed "slavery," but not "distinctions of race, or class, or color."[114] Justice Harlan argued that it was difficult to fathom racial discrimination in inns and other places of public enjoyment that was not a direct "incident" of slavery, and therefore should be subject to Thirteenth Amendment proscriptions.[115]

Similarly, Justice Bradley did not address congressional intent regarding whether the enabling provision of the Fourteenth Amendment should protect persons from both state and private activity. Although it is impossible to accurately determine the precise intent of Congress in drafting the Fourteenth Amendment, many of the legislators who enacted the Civil Rights Act also enacted the Fourteenth Amendment, and it is difficult to imagine that Congress would enact a law under section 5 if it believed it had no power to do so. As Justice Harlan noted, the Fourteenth Amendment was the first time in the nation's history where Congress was vested with affirmative power to enforce an express prohibition on the states.[116] Moreover, discriminatory state laws would be invalid on the face of the Fourteenth Amendment, regardless of whether Congress enforced the provi-

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[113] *Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).
[114] *Id.* at 30–31 (majority opinion).
[115] *Id.* at 36 (Harlan, J., dissenting). Justice Harlan wrote:

> [S]ince [slavery] rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race . . . . Congress, therefore, under its express power to enforce that amendment . . . may enact laws to protect that people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct and primary character, operating upon . . . such individuals and corporations as exercise public functions and wield power and authority under the State.

Id.
[116] *Id.* at 45.

sion.[117] Read together with the Necessary and Proper Clause, section 5 was a positive grant of authority to Congress. Nonetheless, the Court chose to read the enabling provision in such a way as to render the provision utterly ineffective. State laws would always be subject to the substantive provisions of the Fourteenth Amendment, so it would be meaningless to confine section 5 as merely a negative grant of power.

Finally, Justice Harlan aptly noted that inns, public conveyances, and places of public amusement were fundamentally public in character—as the Court had noted prior to 1883.[118] For example, a fixture of common law was the recognition that inn-keeping should be well-regulated for the benefit of the public interest.[119] Nevertheless, the cogency of Harlan's argument (which, like *Plessy*, if decided today would be preferable to the majority's contentions) was lost on the majority, and Bradley's opinion prevailed.

Many political leaders at the time decried the decision as flawed because it debilitated the very purpose of the Fourteenth Amendment. For example, Senator James Falconer Wilson, a member of Congress during the enactment of the Fourteenth Amendment, echoed the sentiments of Republican legislators when he stated:

> A failure to enact laws for the equal protection of citizens is a denial of such protection. A neglect to enforce laws enacted to assure such equal protection is a denial of it. Toleration of a custom or practice which asserts inequality in the enjoyment of the common rights of citizenship is a denial of equal protection.[120]

Wilson's commentary was not unfounded. The state action rule proved to be the single most important legal doctrine enabling the creation of a new society that reestablished racial hierarchy. As long as the government did not actively participate in racist practices, private persons could act with impunity, shielded from federal legislative interference.

Ultimately, it is impossible to understand the logic of the *Civil Rights Cases* without recognizing the influence of racism. It would be a stretch of the imagination to think that the prevailing moral vision of the day did not come into play in the Court's holding. But for racism, the Court would not have been so concerned about its version of forced assimilation, or Bradley's "new form of slavery."[121] But for racism, the Court, as it did in *Plessy*, would not have found Harlan's view so contentious.

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[117] *See id.* at 45–47.
[118] *Id.* at 37–43.
[119] *See* Sandoval-Strausz, *supra* note 98, at 73.
[120] SCATURRO, *supra* note 111, at 130 (citing 15 CONG. REC. 135 (1883)).
[121] *See* Whiteside, *supra* note 1, at 264 (paraphrasing Justice Bradley, "the freedom of blacks could not require the slavery of white citizens, which is what enforced friendship between the races would mean").

It is misleading to understand the *Civil Rights Cases* as articulating a rationally defensible neutral principle of law.[122] Rather, the case is better understood as the Court's codification of the contemporary political ideology of the day, informed by assumptions of racial superiority and a collective ruling class desire to end Reconstruction. Ultimately, the case stands for the principle that people in the United States may be racist if they want to be, and the state is not empowered to regulate racist activity through the Fourteenth Amendment, no matter the severity, so long as the activity is "private." The consequences of the *Civil Rights Cases*, coupled with *Plessy*, led to nothing less than state sanction of a brutal, hierarchical, and unjust society that lingers to this day.[123]

IV. The State Action Doctrine Today: A Lingering Constitutional Tragedy

Jurists and scholars have passionately debated the state action doctrine, and at one point in the late 1960s, it appeared that the Supreme Court was moving toward rejecting it completely.[124] As Professor Black noted in 1967, it was "exceedingly rare" for the Court to support a decision on the strength of the state action doctrine.[125] Nonetheless, as the composition of the Court transformed, it not only prevented the rule's evisceration, but also affirmed many of its fundamental policy rationales. Today, while the state action doctrine remains riddled with inconsistency, it remains good law and continues to protect private actors engaging in discrimination.

A. The State Action Doctrine: A Continuing "Conceptual Disaster Area"

Even though *Morrison* is good law, the Supreme Court has yet to establish precise standards in applying the state action doctrine. This im-

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[122] Professor Chemerinsky argues that the decision should be given little weight in interpreting the Fourteenth Amendment because the case was important more as a reflection of a political choice than as an interpretive tool. *See* Chemerinsky, *supra* note 8, at 524. Chemerinsky is technically correct, labeling the "political choice" as a "desire to minimize federal enforcement of the Fourteenth Amendment." *Id.* Nevertheless, Chemerinsky would have been more persuasive, and certainly more accurate, if he labeled the choice as a desire to defend and reinforce a racially hierarchical society.

[123] *See* Black, *supra* note 8, at 90 ("[T]he 'state action' concept in the field to which I've limited myself has but one practical function; if and where it works, it immunizes racist practices from constitutional control."). For an excellent summary of the role of law as preserving racial hierarchies through a transforming justificatory rhetoric, see Siegel, *supra* note 22.

[124] *See* United States v. Guest, 383 U.S. 745, 782–83 (1966) (Brennan, J., dissenting) (calling for, in an opinion joined by Chief Justice Warren and Justice Douglas, a reevaluation of the *Civil Rights Cases*).

[125] *See* Black, *supra* note 8, at 84. Black notes that before 1967, *Hodges v. United States*, 203 U.S. 1 (1902), was the last time the Court employed the state action doctrine to invalidate a congressional act. In *Hodges*, the Court protected a white employer who had intimidated a group of African American mill workers into quitting their jobs by threatening to kill them. *Id.*

precision, which was famously labeled a "conceptual disaster area" by Black, is as much a reflection of the doctrine's irrational theoretical underpinnings as it is a failure of the Court to articulate a clear standard.[126] The state action doctrine contains alarming logical inconsistencies and questionable policy rationales. The essential principle underlying the state action rule is that the federal government is unable to regulate purely "private" conduct.[127] As with most rights secured by the Constitution, the rule is premised upon the notion that only the government is capable of infringing upon certain rights.[128] If only the government is capable of violating those rights, then Congress may not use the enabling act of the Fourteenth Amendment to enact a law that would regulate conduct that the Amendment would otherwise not prohibit.

Of course, the Supreme Court has substantially altered the state action doctrine from the original form outlined in the *Civil Rights Cases*. Beginning in the 1940s, notably with *Shelley v. Kraemer*, the Court broadened the doctrine to encompass not only direct state activity, but also ancillary activity that—by virtue of its relationship with state activity—is considered state action.[129] *Lugar v. Edmonson Oil Co.* outlines the rule.[130] In that case, the Court announced a two-part test to determine whether a party is a state actor. First, the litigated injury must be caused by an "exercise of some right or privilege created by the State or by a rule of conduct imposed by the State."[131] Second, the party charged with the deprivation must "fairly be said to be a state actor."[132] In *Lugar*, the Supreme Court held that the defendant, a corporation, acted under "color of state law" when it sought and won a prejudgment writ of attachment against plaintiff's property pursuant to a Virginia procedural statute.[133] The plaintiff, who sued under 18 U.S.C. § 1983, argued successfully that the defendant, despite being a private corporation, acted upon a right created by the state, and jointly acted with the trial court to unjustly attach the plaintiff's property pursuant to the state statute.[134] Since the corporation and the court acted in concert, the corporation could be deemed a state actor and liable under § 1983.[135]

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[126] Black, *supra* note 8, at 95.

[127] *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978).

[128] *See Flagg Bros.*, 436 U.S. at 156.

[129] 334 U.S. 1 (1948).

[130] 457 U.S. at 936–39. For an excellent synopsis of the current rule, see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–98 (2001).

[131] *Lugar*, 457 U.S. at 937.

[132] *Id.*

[133] *Id.* at 942.

[134] *Id.* at 940–41.

[135] *Id.* at 942. The Court stated that the inquiries for determining state action in claims filed under 42 U.S.C. § 1983 were similar to inquiries in Fourteenth Amendment claims. Section 1983 provides a private cause of action for individuals to sue others if they acted to deny rights guaranteed by the Constitution "under color of law." Fourteenth Amendment claims, like the one in *Morrison*, typically consist of arguments that a particular law or action is unconstitutional and repugnant to the Fourteenth Amendment.

In practice, the *Lugar* test is an exercise in futility, as is illustrated by the often conflicting outcomes of various cases. For example, in *Shelley*, the Court held that judicial enforcement of a private racially restrictive covenant in real property was state action that triggered constitutional scrutiny.[136] Similarly, a private business leasing property from the state was a state actor for the purposes of the Fourteenth Amendment,[137] and a company-owned town restricting speech was subject to constitutional limitations.[138] The Court also held that privately controlled political parties responsible for holding elections should be scrutinized under the Fourteenth Amendment after they restricted voting rights based on race.[139] Yet the nexus test, or governmental function test, has its limits. For example, a privately owned and operated utility corporation—the exclusive provider of electricity to a particular region—was deemed a private actor not subject to constitutional scrutiny.[140] Moreover, the Court held that the operation of a state's regulatory scheme, which granted a private racially restrictive club a liquor license, failed to render the club a state actor.[141]

The doctrine—murky, vague, and bizarre—is no less a "conceptual disaster area" today than it was in 1967, when Black wrote his seminal piece.[142] *Shelley* illustrates the essential logical failure of the state action doctrine: the Court observed that the judicial branch was a state actor for the purposes of the Fourteenth Amendment. It went on to state that judicial enforcement of substantive common-law rules, even if racially neutral, could deny rights guaranteed by the Fourteenth Amendment.[143] Of course, this begs the question: why shouldn't every judicial sanction of a private racist act trigger Fourteenth Amendment protection?

Yet the problem is not *Shelley*. The problem is the *Civil Rights Cases*. The *Civil Rights Cases* established a paradigm that is nearly impossible to "reform" without opening extraordinary logical loopholes. *Shelley* was the Court's first major attempt at escaping the doctrine's extraordinary restrictions, and represents an effort to reconcile the goals of the Fourteenth Amendment with the state action doctrine. The problem in the doctrine lies not only in the artificial dichotomy between supposedly "private" and governmental activity, but also in refusing to allow Congress or the courts to

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[136] 334 U.S. 1, 19 (1948). Of course, *Shelley* was decided before *Lugar*, but judicial inquiry into the state action requirement followed a similar direction.

[137] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

[138] Marsh v. Alabama, 326 U.S. 501, 507–08 (1946). While this case involves First Amendment litigation, the Court applied a similar state action analysis.

[139] Terry v. Adams, 345 U.S. 461, 468–69 (1953); *see also* Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

[140] Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

[141] Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[142] Black, *supra* note 8, at 95.

[143] *See* Shelley v. Kraemer, 334 U.S. 1, 17 (1948) (discussing Am. Fed'n of Labor v. Swing, 312 U.S. 321 (1941), where the Court invalidated a state court's injunction restraining peaceful picketing in a dispute between private parties).

redress injurious discriminatory conduct when that conduct is perpetrated by a private actor.[144]

Ultimately, the failure of the state action doctrine as a clear and effective legal standard with regard to the Fourteenth Amendment is a consequence of the doctrine's historical roots. Not only was the state action doctrine framed to debilitate rather than promote the Fourteenth Amendment, but the doctrine was crafted by a Supreme Court that was grounded in and motivated by racist ideology.

B. United States v. Morrison*: The* Civil Rights Cases *as Good Law*

In 2000, the Supreme Court in *United States v. Morrison*, by a 5-4 majority, reaffirmed the *Civil Rights Cases* and *Harris* as canonical fixtures of American jurisprudence.[145] *Morrison* invalidated a provision of the Violence Against Women Act ("VAWA"), a federal law criminalizing gender-based violence.[146] A woman who was sexually assaulted while a student at the Virginia Polytechnic Institute sued her attacker and the school under section 40302 of VAWA. Section 40302 provided both a civil remedy and private cause of action for victims of gender-based violence.[147] The law defined "crimes of violence motivated by gender" as those committed because of gender and due, at least in part, to an animus based on the victim's gender."[148] Subsection (b) stated that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."[149]

The Court first held that the Commerce Clause did not provide authority for Congress to enact section 40302.[150] The Court then addressed

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[144] For an interesting discussion on the problematic distinction between "private" and "state" activity, see Horowitz, *supra* note 8. *See also* Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Mark Tushnet, Shelley v. Kraemer *and Theories of Equality*, 33 N.Y.U. L. REV. 383 (1988).

[145] *See Morrison*, 529 U.S. 598, 621–22 (2000). *Morrison* will certainly be among Chief Justice Rehnquist's more memorable decisions. While much scholarship has focused on his Commerce Clause jurisprudence, Rehnquist's invocation of some of the more egregious Reconstruction cases will likely continue to provoke debate.

[146] *Id*. at 603–07; *see also* VAWA, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified in scattered sections of 16, 18, and 42 U.S.C.).

[147] *Morrison*, 529 U.S. at 605. Section 40302 of the Act stated:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

42 U.S.C. § 13981(c) (2000).

[148] § 13981(d)(1).

[149] § 13981(b).

[150] *Morrison*, 529 U.S. at 617–19. The Court's Commerce Clause analysis has sparked considerable scholarship. For an example of a discussion of *Morrison* and the Court's narrow reading of the Commerce Clause, see Robert C. Post & Reva B. Siegel, *Equal Protec-*

whether section 5 of the Fourteenth Amendment provided such authority. Because the fundamental inquiry was whether Congress could legislate against private discriminatory conduct, the Court looked to previous cases which had addressed the issue, and found *Harris*, *Cruikshank*, and the *Civil Rights Cases*.[151] Relying on these cases, the Court held that Congress was not empowered to regulate the private conduct of individuals, regardless of whether that conduct was grounded in gender discrimination.[152] Such regulation was reserved exclusively to the states.

Writing for the majority, the late Chief Justice Rehnquist analogized to *Harris*, which invalidated a provision of the Ku Klux Klan Act of 1871.[153] The Act prohibited private persons from conspiring to deny others' rights under the Fourteenth Amendment.[154] The Court also drew parallels to the *Civil Rights Cases*, which struck down federal legislation preventing private operators of inns, carriers, and other places of public accommodation from discriminating on the basis of race.[155] *Cruikshank* was also pertinent; the Court stated in dicta that the Fourteenth Amendment "simply furnishes an additional guaranty against any encroachment *by the States* upon the fundamental rights which belong to every citizen as a member of society."[156]

According to the Court, *Harris*, *Cruikshank*, and the *Civil Rights Cases* were examples of good law announcing sound principles that had withstood the test of time. The force of the state action doctrine and its "enduring vitality" derived not only from the length of time in which the cases had been on the books, but because members of the Court "obviously" had "intimate knowledge" of the events surrounding the enactment of the Fourteenth Amendment.[157] The Justices, after all, were appointed by Republican presidents, including Lincoln, Grant, Hayes, Garfield, and Arthur.[158]

Rehnquist's hasty description of the Supreme Court Justices of 1883, implying that the Justices' reasoning commanded contemporary reliance, is hardly persuasive. To the contrary, most Justices were unabashedly hostile toward Reconstruction and harbored discriminatory attitudes about race.[159] Contemporary reliance on *Harris*, *Cruikshank*, and the *Civil Rights Cases* is questionable at best, and at worst a misguided attempt to reaffirm and validate the racist jurisprudence of the late 1800s. In fact, the most glaring problem of the Court's invocation of these cases is what the Court

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tion by Law: Federal Antidiscrimination Legislation After Morrison *and* Kimel, 110 YALE L.J. 441, 485 (2000).

[151] *See generally* United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1875); Civil Rights Cases, 109 U.S. 3 (1883).

[152] *Morrison*, 529 U.S. at 619–28.

[153] *Id.* at 621–24 (discussing *Harris*, 106 U.S. 629).

[154] *See* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

[155] *Morrison*, 529 U.S. at 621–24 (discussing the *Civil Rights Cases*, 109 U.S. 3).

[156] *Morrison*, 529 U.S. at 622 (emphasis added) (citing *Cruikshank*, 92 U.S. at 554).

[157] *Id.* at 622.

[158] *Id.*

[159] *See supra* Part II.A.

omitted from the discussion—an explanation of their facts. As we have seen, *Harris* saw the Court exonerate the leader of a white mob that sequestered an African American man from a Tennessee jail and lynched him in public view.[160] In *Cruikshank*, the Court exonerated nine white defendants who were convicted for their participation in the Colfax Massacre in which approximately 100 African Americans were murdered.[161] In the *Civil Rights Cases*, the Court invalidated the fines levied against a series of white entrepreneurs who denied African American citizens entry to theaters, public carriers, or inns based on their race.[162] Nonetheless, to the *Morrison* majority, the state action doctrine was logically sound and practically necessary to prevent the obliteration of the framers' "carefully crafted balance of power between the States and the National Government."[163]

The outcome of *Morrison* is quite similar to the outcome in the older cases. As in *Harris*, *Cruikshank*, and the *Civil Rights Cases*, the perpetrator of an egregious and discriminatory act escaped legal liability. Moreover, the Court undermined Congress's power through the enabling provision of the Fourteenth Amendment to prevent and deter private discriminatory conduct—in this case the criminalization of gender-based violence. The legal consequence of *Morrison*, similar to that of *Harris* and the *Civil Rights Cases*, was the judicial usurpation of a Congressional act designed to punish pervasive and systematic discrimination.[164] The Court's message to the public, not unlike its message in 1883, was that as long as the state or its agents were not the actual and direct perpetrators, the Court—and in effect the power of the federal government as a whole—would turn a blind eye to gender violence.

The best way to understand the result in *Morrison* is as a product of bad law, counterintuitive logic, and Supreme Court doctrine that undermined the goals of the Fourteenth Amendment and helped shape a racially hierarchical society.[165] *Morrison* illustrates the continuing failure of the state action doctrine to effectuate the purpose of the Fourteenth Amendment, and the Court's decision highlights the continuing urgency of discarding the old Reconstruction cases and adopting a new state action rule.

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[160] *See* United States v. Harris, 106 U.S. 629, 629 (1883).

[161] *See Cruikshank*, 92 U.S. at 554.

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

[163] *Morrison*, 529 U.S. at 620.

[164] *See* Post & Siegel, *supra* note 150, at 485 (questioning the reasoning of *Morrison* and wondering why, in 2000, it was necessary to evoke *Harris* and the *Civil Rights Cases* as express limitations on federal power to regulate within the private sphere).

[165] It would be difficult to fathom a similar outcome in *Harris*, *Cruikshank*, or the *Civil Rights Cases* today. Of course, federal legislation has made it illegal for private actors to discriminate in a variety of settings, including theaters and inns. The Supreme Court has upheld congressional legislation regulating the conduct of private activity as valid under the Commerce Clause. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding the 1964 Civil Rights Act's prohibition on discrimination in a privately operated hotel a valid exercise of federal legislative power under the Commerce Clause).

V. Conclusion

The *Civil Rights Cases* should be discarded, like *Dred Scott*, *Plessy*, and *Pace v. Alabama*, as a constitutional tragedy. As discussed above, many scholars have argued that the doctrine should be abolished because it lacks coherence; reconciling *Shelley* and other modern cases with the *Civil Rights Cases* defies logic. But the doctrine should be discarded for a more obvious reason that has been too often neglected: the state action doctrine as it applies to the Fourteenth Amendment is a rule grounded in racism. The irrationality of the current doctrine is a direct result of its invidious origin, and the failure to consider racism as a driving force in these nineteenth-century cases leads to a failure to appreciate the operation of the doctrine. Though few Jim Crow cases remain good law, the *Civil Rights Cases*—despite the extraordinary breadth of its holding and its undeniably racist logic—linger as part of the American legal canon. Contemporary reliance on a doctrine mired in racism must be reevaluated, especially when the Court continues to use the doctrine in order to invalidate laws designed to eliminate discriminatory conduct, as it did in *Morrison*.

The state action doctrine continues to defeat the purpose of the Fourteenth Amendment for two fundamental reasons. On one hand, it prevents Congress from regulating private discriminatory conduct, as shown by *Morrison*. On the other, it shields private actors from constitutional scrutiny when they engage in systematic racist practices, as illustrated in the *Civil Rights Cases*.[166] As Professor Black noted in 1967, the practical reality of the doctrine is that when invoked, it primarily serves the purpose of shielding private actors from federal legislation and constitutional scrutiny for their discriminatory conduct, regardless of its scope or severity.[167]

Ultimately, law reflects society's values. But the law often trails society's moral transformation. Until the Court can resolve the state action problem, which arbitrarily categorizes racist conduct depending on the identity of the actor and not the quality of the harm, the struggle for racial equality in the law will be a losing battle.[168]

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[166] *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that the operator of a private club was a private actor for the purposes of the Fourteenth Amendment and therefore free to discriminate based on race).

[167] Black, *supra* note 8, at 90.

[168] An in-depth discussion of an alternative to the current state action doctrine is beyond the scope of this Article. Nevertheless, many scholars have written on the topic. *See generally* David Bazalon, *Civil Liberties—Protecting Old Values in the New Century*, 51 N.Y.U. L. Rev. 505 (1976); Black, *supra* note 8; Casebeer, *supra* note 8; Chemerinsky, *supra* note 8; Horowitz, *supra* note 8; Ira Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 Harv. C.R.-C.L. L. Rev. 297 (1977); Reynolds, *supra* note 8. Black, for example, argues that the Fourteenth Amendment conveys on states a duty to protect individuals from racial discrimination, whether that discrimination is private or public:

While the task at hand, rejecting the state action rule and replacing it with a new rule that implicates state responsibility, is enormous, the Constitution has never been a static document. The inherent racism in the state action rule is undeniable, and as a result the legal reasoning of the *Civil Rights Cases* is packed with contradiction. The Supreme Court has overruled Jim Crow cases in the past, like *Plessy* and *Pace*. It should not hesitate to do it again.

> [W]here overt and affirmative racial discrimination appears, or where a discrimination appears which is practically racial in its main incidence, and where a state's legal regime makes this discrimination lawful, with all the aids incident to lawfulness, the state has "denied" equal protection of the laws to the victim race.

Black, *supra* note 8, at 99–100.

Similarly, many international laws hold state actors responsible for violations of rights by private individuals if the state actors fail to take appropriate steps to remedy the violation. One such example is the Maastricht Guidelines, an interpretive tool for the International Covenant on Economic, Social, and Cultural Rights. *See* Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, Maastricht, The Netherlands, Jan. 22–26, 1997, Para. 14 (providing that nations which fail to "regulate activities of individuals or groups so as to prevent them from violating economic, social, and cultural rights" violate the Covenant).

Critics question whether erosion of the state action doctrine will lead to governmental intrusion into the most private of affairs. Would this new approach create a cause of action for those not invited to a private dinner party on the basis of race? Chemerinsky posits a persuasive response to this argument: "If the goal is to protect individual freedom, then it is best to decide cases on the merits, without reference to state action." Chemerinsky, *supra* note 8, at 538. Put another way, if the concern is the protection of liberty, then Courts should evaluate which deprivation of liberty is more injurious. Rather than using the state action doctrine as an entirely arbitrary "dividing line," courts would determine substantively the types of activity that should remain free from judicial intervention. *Id.* at 538-38. For example, an employer's liberty interest in racial discrimination in its employment practices would be outweighed by the employee's equality interest.

The concern that individual liberty would be sacrificed absent the state action doctrine is also based on the faulty assumption that the state never regulates private behavior. To the contrary, the law, and the common law in particular, consistently regulates private behavior through negligence, defamation, and trespass tort actions. Consequently, to the extent that the "dinner party" concern is one for governmental intrusion into private affairs (and not merely federal, as opposed to state, intrusion), the concern amounts to a fear of a legal system that will not tolerate racist practices.

Finally, some have argued that overruling the state action doctrine would lead to a dramatic increase in caseloads. Professor Chemerinsky offers at least two counter-arguments. First, any increase in litigation would be a "short term phenomenon" because, like any change in the law, once society adapts to new rules, it modifies its behavior. *Id*. at 548–49. Second, because of the current doctrine's complexities and lack of coherent standards, creating a doctrine with clearer standards may actually decrease judicial caseload. *Id*. Needless to say, the parade of justifications claimed by the doctrine's defenders is speculative at best.