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# Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890

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# DEBUNKING THE MYTH OF CIVIL RIGHTS LIBERALISM: VISIONS OF RACIAL JUSTICE IN THE THOUGHT OF T. THOMAS FORTUNE, 1880–1890

*Susan D. Carle\**

## INTRODUCTION

This essay addresses the development of American understandings of the various roles of lawyers in building democracy by focusing on legal reform efforts in the American civil rights movement. In recent years, the supposed achievements of that movement have come under attack as part of a critique of the ideology of legal liberalism. That critique argues that civil rights lawyers and other activists too greatly emphasized court-focused strategies aimed at achieving what would turn out to be Pyrrhic “civil” rights victories—i.e., gains solely in “formal” equality through requirements enshrined in law as to how the state must treat its citizens.<sup>1</sup>

No case has received more attention as part of this critique of legal liberalism in the civil rights movement than the National Association for the

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1. As one leading scholar puts it, legal liberalism’s core elements have become familiar:

courts as the primary engines of social transformation; formal conceptual categories such as rights, and formal remedies such as school desegregation decrees, as the principal mechanisms for accomplishing that change; and a focus on reforming public institutions (or, in some versions, public and private institutions without much distinction) as a means of transforming the larger society.

Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258 (2005).

Advancement of Colored People's (NAACP) 1954 litigation victory in *Brown v. Board of Education*.<sup>2</sup> The fiftieth anniversary of that case saw an outpouring of critical literature questioning *Brown*'s supposed accomplishments.<sup>3</sup> As the critics who generated that literature pointed out, racial justice is far from a reality today despite the dismantling of de jure discrimination.<sup>4</sup> Indeed, economic indicators suggest that some disparities based on race have in fact grown larger in recent decades.<sup>5</sup>

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2. 347 U.S. 483 (1954).

3. See, e.g., CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004) (arguing that *Brown* was a catalyst for resistance to racial integration); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) [hereinafter *RETHINKING BROWN*] (collecting leading constitutional scholars' drafts of proposed alternative opinions in *Brown*); Kevin Brown, *The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1598 (2004) (criticizing the U.S. Supreme Court in *Brown* for delineating the psychological ramifications of segregation as they affected African Americans while disregarding the effects segregation had on whites, an alternative rationale that would have made desegregation more palatable to the majority group); Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Price Award Speech)*, 47 HOW. L.J. 473, 492 (2004) (claiming civil rights breakthroughs occurred, not as a direct result of *Brown*, but due to pressure by elite groups and American self-interest during the cold war); Donald E. Lively, *The Desegregation Legacy: Uncertain Achievement and Doctrinal Distress*, 47 HOW. L.J. 679, 700 (2004) (arguing that the rationale in *Brown* lacked strong legitimacy); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693, 1707–08 (2004) (claiming that *Brown* did not change white attitudes on race, but did indirectly affect national perspectives on racial equality).

4. See, e.g., Jack M. Balkin, *Brown as Icon*, in *RETHINKING BROWN*, *supra* note 3, at 3, 12 (“In the half century since *Brown*, it is clear that although the elimination of Jim Crow has done much good, blacks as a group still lag behind whites in many of the most important social measures of well-being and success—household income, infant mortality, life expectancy, educational opportunity, and employment levels.”).

5. One recent study concludes that middle-class African Americans are in fact economically worse off and have made negative progress as compared to whites in economic terms since the civil rights revolution. See JULIA B. ISAACS, THE BROOKINGS INST., ECONOMIC MOBILITY OF BLACK AND WHITE FAMILIES 4 (2008) (summarizing results of a longitudinal survey finding that two of three white children from middle-income families grow up to have higher real family incomes than their parents while only one out of three African American children from the same income group surpass their parents in absolute income levels). In 2005, the per capita income of African Americans was \$16,629 as compared to \$28,946 for whites, and the disparity between the average wealth of African Americans as compared to whites was even more extreme. See DEDRICK MUHAMMAD, THE INST. FOR POLICY STUDIES, 40 YEARS LATER: THE UNREALIZED AMERICAN DREAM 9 (2008). The poverty rate for African Americans is 24.3% as compared to 8.2% for non-Hispanic whites. U.S. CENSUS BUREAU, PEOPLE AND FAMILIES IN POVERTY BY SELECTED CHARACTERISTICS: 2005 AND 2006 (2007), available at <http://www.census.gov/hhes/www/poverty/poverty06/table3.pdf>. The homeownership rate among African Americans in 2007 was 47.2% as compared to 75.2% for non-Hispanic whites. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP—ANNUAL 2007: TABLE 20 (2007), <http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t20.html>. The subprime mortgage crisis has also hit African Americans with disproportionate severity. See generally AMAAD RIVERA ET AL., UNITED FOR A FAIR ECON., FORECLOSED: STATE OF THE DREAM 2008, at 1 (2008), available at [http://www.community-wealth.org/\\_pdfs/articles-publications/cdfis/report-rivera-et-al.pdf](http://www.community-wealth.org/_pdfs/articles-publications/cdfis/report-rivera-et-al.pdf).

Even before *Brown*'s anniversary, scholars built careers slaying the sacred cow of *Brown* adulation. Political scientist Gerald Rosenberg concluded in 1991, on the basis of his extensive empirical study of newspaper accounts and other evidence, that *Brown*'s impact had been drastically overrated.<sup>6</sup> In law, Michael Klarman's prize-winning work developed a thesis along similar lines.<sup>7</sup> Klarman's magnificent survey of the history of the Court's civil rights jurisprudence argues that in important respects *Brown* was counterproductive to the civil rights cause because the Court's ruling provoked a vicious backlash among resisting communities in the South and elsewhere.<sup>8</sup> Klarman believes that much of what the *Brown* litigators hoped to achieve would probably have happened more quickly and smoothly through alternative means.<sup>9</sup>

This critical literature aimed at reassessing *Brown* responds to an earlier generation of *Brown* hagiography within legal academia, which was fond of invoking *Brown* to extol the virtues of the American legal system and its courts, especially the U.S. Supreme Court and its allegedly laudable protection of civil and political rights.<sup>10</sup> The critique of liberal legal academics' ideological agenda was well deserved. But attacks on legal liberalism within legal academia should not be allowed to distort evaluations of the aims of the civil rights movement itself—at least without

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6. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 156 (2d ed. 2008) (1991). According to Gerald Rosenberg, the "claim that a major contribution of courts in civil rights was to give the issue salience, press political elites to act, prick the consciences of whites, legitimate the grievances of blacks, and fire blacks up to act is not substantiated." *Id.* Instead, his evidence suggests that "*Brown*'s major positive impact was limited to reinforcing the belief in a legal strategy for change of those already committed to it." *Id.* Among *Brown*'s negative effects, Rosenberg finds that it "unleashed a wave of racism that reached hysterical proportions," was "used as a club by Southerners to fight any civil rights legislation," and "stiffen[ed] resistance and rais[ed] fears" so that it "may actually have delayed the achievement of civil rights." *Id.* at 155–56. It was instead a combination of other factors that created the pressures that eventually led to civil rights revolution; "the Court reflected that pressure; it did not create it." *Id.* at 169.

7. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

8. *Id.* at 385–442.

9. *Id.* at 392, 397. Arguments that less confrontational tactics would better achieve the goals of the civil rights movement have long historical roots, just as arguments in favor of militant approaches do. See Victor Michael Glasberg, *The Emergence of White Liberalism: The Founders of the NAACP and American Racial Attitudes* 33–34 (May 1971) (unpublished Ph.D. dissertation, Harvard University) (on file with the Fordham Law Review) (noting that most white liberals at the turn of the twentieth century counseled moderation and small steps on the path of racial progress in lieu of militancy, which they argued would have backlash effects in hardening racial divisions).

10. See, e.g., Owen Fiss, *A Life Lived Twice*, 100 *YALE L.J.* 1117 (1991) (praising the Warren Court's interpretation of *Brown*); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 2, 9, 12, 14, 29–30 (1979) (discussing *Brown* in laudatory terms as a decision that led to social change, procedural innovation, and a true account of the "constitutional value of equality"). For an excellent examination of legal liberalism generally, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

first seeking to understand those aims by taking a long view on the movement for racial justice.

In this essay, I seek to promote taking such a long view of the movement for racial justice by evaluating the legal liberal critique of that movement in relation to an important early leader: T. Thomas Fortune, a law-educated militant journalist, public intellectual, and organizer who has been largely forgotten by legal scholars today. In 1887, Fortune founded the Afro-American League (AAL), a national organization that was short-lived but nevertheless played an important historical role in the transmission of ideas to later groups including the Afro-American Council; the Niagara Movement, which was W. E. B. Du Bois's more militant but also short-lived organization consisting of professional African American men, or his "talented tenth"; and then, five years later, the biracial NAACP. Fortune's multidimensional view of the struggle for racial justice embraced a number of ideas we tend to see as distinct or even opposing today. As I will discuss below, Fortune supported reactive court battles and proactive legislative reform; establishment of equal civil and political rights and an ultimate goal of economic justice; and intrarace self-help and interracial coalition politics aimed at eliminating poverty for all persons regardless of race. Examining Fortune's ideas helps remind us that the history of the American civil rights struggle was more complex and multidimensional than the legal-liberal gloss remembers today.<sup>11</sup>

This essay seeks to contribute to a developing literature that is reassessing the nature of the ideological commitments, as well as understandings about the interaction between law and social change, of race activists who pioneered methods that in time led to *Brown* and then to the direct action civil rights campaigns of the 1960s.<sup>12</sup> I focus my attention on

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11. Cf. THOMAS F. JACKSON, FROM CIVIL RIGHTS TO HUMAN RIGHTS: MARTIN LUTHER KING, JR., AND THE STRUGGLE FOR ECONOMIC JUSTICE (2007) (exploring Martin Luther King, Jr.'s efforts to reclaim and further develop ideas connecting racial and economic justice).

12. Many scholars, writing from many perspectives, have begun to show that the activists involved in work for racial justice that eventually led to *Brown* were not intent on the visions of legal liberalism now under attack. Ken Mack has brilliantly excavated the intragroup self-help concerns of African American lawyers working on the cause of racial justice from the 1930s to 50s. See Mack, *supra* note 1, at 277 (discussing the "voluntarist-autonomy view" among African American lawyers during the interwar era, which was "explicitly anti-legalist and emphasized black autonomy and voluntary private arrangements among African-Americans as the best guarantor of equality in American life," and which held that "blacks should be suspicious, or at least skeptical, of the ability of innovations in either public or private law to guarantee equality with whites"). Mack explains that this view coexisted with "a legalist strand that centered on moral and legal claims directed to the larger white majority," translated into the "language of law." *Id.* at 280 & n.75.

Risa Goluboff has written persuasively about case investigations, litigation, and other activities of the National Association for the Advancement of Colored People (NAACP) and the U.S. Department of Justice in the 1930s and 40s that sought legal avenues to secure labor and economic rights for African American workers. See RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007). Goluboff emphasizes the "lost promise" of the civil rights movement's interest in these years on developing litigation theories to boost economic as well as political and civil rights. See, e.g., *id.* at 6 (explaining that her book explores the potential of black workers' claims "to spur the creation of new civil rights

a period that has not yet received much attention in connection with this re-evaluation of the civil rights movement within legal scholarship: the late nineteenth century, and, in particular, the decade of the 1880s.<sup>13</sup> As I will discuss further below, this decade saw the first articulation of test case litigation as a strategy for building a national civil rights organization.<sup>14</sup> Investigating the ideas motivating these activists' plans shows that some conceptions today associated with legal liberalism were central to race activists' agenda during that decade. Other ideas also important in this period have dropped out of the discourse constructed by legal-liberal *Brown* hagiographers. Those ideas include early versions of a voluntarist, self-help, and intrarace uplift emphasis,<sup>15</sup> as well as ideas about achieving

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doctrines"); *id.* at 13 (noting that the book's goal is "to highlight the consequences of lawyers' strategic litigation choices about which cases to pursue and which to avoid, which harms to emphasize and which to ignore"); *id.* at 14 (arguing that lawyers should not only have established "norm[s] of racial nondiscrimination" but also "rights to work, to join a union, to participate in the labor market, [and] to minimal subsistence").

Glenda Gilmore, examining newly accessible files in former Soviet Union archives, has demonstrated how important were race activists with Communist Party ties, as well as other fellow radical travelers, to building grassroots efforts for racial justice. See generally GLENDA ELIZABETH GILMORE, *DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919–1950* (2008).

In a book soon to be published, Tomiko Brown-Nagin describes how radical lawyers and other militants who led the Student Nonviolent Coordinating Committee (SNCC) direct-action sit-ins in Atlanta in the 1960s clashed with older generations of race activist lawyers. On Brown-Nagin's account neither of these generations of lawyers held views about the relationship between courts and socio-legal-political change resembling the legal liberalist caricature; her story is instead far more complex and interesting. See TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: COURTS AND COMMUNITIES IN THE CIVIL RIGHTS MOVEMENTS* (forthcoming 2009) (on file with the Fordham Law Review).

13. This period remains underdeveloped with respect to reassessments of the legal-liberalist critique of the civil rights movement within legal scholarship, even while the scholars discussed *supra* note 12 have done impressive excavations for periods beginning in the 1920s and later. The significance of this period in setting agendas that would influence the later directions of organizations devoted to racial justice may remain underappreciated as well. An earlier generation of towering historians who wrote about the race leaders of the late nineteenth and first years of the twentieth century developed a grand narrative involving the dramatic clash between two titans, Booker T. Washington and W. E. B. Du Bois. See, e.g., LOUIS R. HARLAN, *BOOKER T. WASHINGTON: THE WIZARD OF TUSKEGEE, 1901–1915*, at 32–106 (1983) (exploring rise of opposition to Washington); AUGUST MEIER, *NEGRO THOUGHT IN AMERICA, 1880–1915: RACIAL IDEOLOGIES IN THE AGE OF BOOKER T. WASHINGTON 171–89* (1963) (exploring disputes between the "radicals," led by Du Bois, and the "conservatives," led by Washington). While it is certainly true that these two great figures did clash and that this clash is important to understanding the period, there was far more going on that deserves the attention of legal scholars; closer inspection uncovers material with more nuanced implications than the "grand battle" thesis might suggest.

14. See, e.g., Joseph S. Davis, Letter to the Editor, *Baltimore Lawyer's View of the Case*, N.Y. FREEMAN, July 16, 1887 (on file with the Fordham Law Review) (urging Fortune's Afro-American League to make as a central priority the litigation of civil rights cases "from the station house to the Supreme Court").

15. These are ideas similar to those Mack describes among African American lawyer-activists in the 1930s and after. See Mack, *supra* note 1, at 281–99; see also MEIER, *supra* note 13, at 121–57 (presenting the classic discussion of the historical development of these ideologies).

greater economic justice for African Americans<sup>16</sup> through attacks on peonage and convict labor, and ideas about the importance of challenging systems of economic exploitation generally.<sup>17</sup>

Yet another now-overlooked idea of central importance to Fortune emphasized the link between racial justice for African Americans and a just economic order that minimized poverty and stark inequality for persons of all races. These ideas were connected to Fortune's embrace of ideas I will label "English" socialism, which favored retaining the institutions of democracy but working through them for government interventions that would redistribute economic resources and lessen the consequences of preexisting social and economic inequality.<sup>18</sup> Those ideologies as aspects of the struggle for racial justice did not vanish with the AAL. Indeed, although this fact has been all but forgotten today, virtually all of the key founders of the NAACP—both African American and white—were centrally motivated by similar progressive or democratic socialist political visions.

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16. Trouble spots in language often signal trouble spots in social consciousness, and terminology around racial identity is no exception. Because T. Thomas Fortune strongly favored the term Afro-American, I use this term in its updated version when referring to persons socially identified as being of African descent. When quoting directly from historical sources, I retain the term used by the author.

17. These are precursors to ideas Goluboff detects in her work examining some of the NAACP's projects during the 1930s and 40s. See generally GOLUBOFF, *supra* note 12.

18. "English" style or democratic socialism existed in many varieties, including Christian, Fabian, and utopian socialism, and merged into some strains of American progressivism. In their emphasis on achieving reform through existing democratic institutions, these perspectives differed from the harder-line, revolutionary socialism of German thinkers such as Karl Marx and others. See generally RICHARD T. ELY, *SOCIALISM: AN EXAMINATION OF ITS NATURE, ITS STRENGTH AND ITS WEAKNESS, WITH SUGGESTIONS FOR SOCIAL REFORM* (New York, Thomas Y. Crowell & Co. 1894); RICHARD T. ELY, *THE SOCIAL ASPECTS OF CHRISTIANITY* (New York, Thomas Y. Crowell & Co. 1889); PETER D'A. JONES, *THE CHRISTIAN SOCIALIST REVIVAL, 1877–1914: RELIGION, CLASS, AND SOCIAL CONSCIENCE IN LATE-VICTORIAN ENGLAND* (1968).

Strands of populism also strongly influenced the progressive thought of the late nineteenth century. These influences included a suspicion of the trustworthiness of enterprises engaged in the large-scale accumulation of capital and a concern about the effect on the political system of the exercise of such economic power. See generally LAWRENCE GOODWIN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978) (presenting a classical historical treatment of the populist movement). These ideas also wove through the political thought of Fortune and other progressives of the era, including his close friend and fellow race activist T. McCants Stewart. See *infra* note 116 (discussing Stewart's biography and political views).

Today, in contrast, predominant ideologies of neoliberalism favor capital accumulation and distrust redistributive policies. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005). Situated within this very much changed contemporary mindset, we may easily fail to appreciate how pervasive were very different ideas about redistribution and curtailing the power of wealth at the turn of the last century. See, e.g., Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 *LAW & HIST. REV.* 577, 585 (2002) (noting the elite Mugwump jurist's "condem[nation of] the excessive wealth of the very rich, their corrupt control of the government, and their use of this control to exploit the working class and poor").

As I will show below, Fortune was an early and key contributor to the development of a political vision linking racial and economic justice. Having received legal education in the late 1870s, Fortune was able to produce sophisticated legal analyses that foreshadow critical race theory and illuminate with particular clarity race activists' developing thought on the connection between racial justice and law.<sup>19</sup> Not only did he straddle abolitionism's equal legal rights discourse and a developing discourse focusing on racial self-help and in-group advancement, but he also linked law to far more than the "negative" civil rights vision of legal liberalism. Fortune conceived of law as a potentially powerful tool for constructing a just social order with respect to economic relations, as well as civil and political rights.

Fortune had his most productive and most visionary years as a public intellectual in the 1880s, and for this reason I focus on that decade in this essay. Understanding Fortune's later role becomes much more complex, for a number of reasons. For one, after the 1880s, Fortune developed an increasingly close friendship with Booker T. Washington, which eventually led to Fortune's financial dependency on and political domination by Washington.<sup>20</sup> The question of precisely when such a dynamic developed between Fortune and Washington is subject to dispute,<sup>21</sup> but beyond the scope of this essay. Secondly, Fortune struggled with a mental condition that today would probably be viewed as a tendency to manic depression or a similar disability; it may indeed be that Fortune's phenomenal productivity during the 1880s was related to such a condition. In any event, in 1907, after years of increasingly acute struggle, Fortune suffered what his biographer characterizes as a complete nervous "breakdown."<sup>22</sup> At this point Washington secretly assumed financial control of and ejected Fortune from the newspaper he had devoted his life to building. Fortune thereafter lived a tragically reduced life in which he scraped together a living as a freelance journalist until his death in 1927.<sup>23</sup>

These aspects of Fortune's later life require brief mention to avoid leaving readers with misimpressions about what happened to Fortune after the conclusion of my narrative here: in shortest summation, the full story of

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19. See James M. McPherson, *Preface* to TIMOTHY THOMAS FORTUNE, *BLACK AND WHITE: LAND, LABOR AND POLITICS IN THE SOUTH* (William Lorez Katz ed., Arno Press & N.Y. Times 1969) (1884) (describing Fortune's newspaper as "the leading Negro paper in the country during the 1880's and 1890's").

20. MEIER, *supra* note 13, at 227 ("[B]y the early 1890's [Fortune] and Washington had developed a close and paradoxical relationship that came to include financial aid . . .").

21. Compare *id.*, with Shawn Leigh Alexander, *Introduction* to T. THOMAS FORTUNE, *THE AFRO-AMERICAN AGITATOR: A COLLECTION OF WRITINGS, 1880-1928*, at xi, xxv-xxvi (Shawn Leigh Alexander ed., 2008) (describing the relationship between Fortune and Washington as one of mutual advantage).

22. See EMMA LOU THORNBROUGH, *T. THOMAS FORTUNE: MILITANT JOURNALIST* 305-06 (1972). Fortune also struggled with alcohol dependency. *Id.* Dating the point at which this became a serious problem for Fortune is, again, difficult, and not of particular concern to most of my discussion here. *Id.*

23. *Id.* at 323-52.

his life is a tragic one, in which the extreme stresses of race prejudice and related issues of financial desperation had terrible consequences on Fortune's sensitive and brilliant nature. The difficulty of assessing the sum total of his contribution given his tragic decline in the later years of his life may indeed account in substantial part for Fortune's relative historical obscurity. But this difficulty does not detract from what is clear and deserving of far more attention, as I will show below—namely that, in the militant and creative years of his early career, Fortune functioned as a leading public intellectual of his time, who, through his efforts to organize and define the platform for the Afro-American League, laid down important tenets for race activism that would be transmitted through a series of subsequent organizations far into the future. For this reason, the study of T. Thomas Fortune's thought and activism in the 1880s helps us understand more about the roots of the modern civil rights movement and suggests forgotten alternatives that might help define future paths for a movement for racial and economic justice today.

I proceed as follows. In Part I, I briefly sketch Fortune's early life, examine the ideas to which he was exposed through his legal training at Howard Law School, and describe his early journalism career and his underlying political philosophy as articulated in his 1884 publication, *Black and White*.<sup>24</sup> In Part II, I examine in detail Fortune's journalistic writings throughout the 1880s with a special focus on what they reveal about Fortune's thinking as to the role of law in achieving racial justice.<sup>25</sup> Finally, in Part III, I trace the way in which the ideas Fortune developed through his journalism and other writing ended up in the organizing platform of the Afro-American League, briefly sketch the history of that organization as revealed in Fortune's newspaper accounts, and highlight some of the salient aspects of the carryover of the League's platform to subsequent organizations, including the Niagara Movement and the NAACP.

## I. FORTUNE'S BACKGROUND AND CAREER

### A. *Early Years*<sup>26</sup>

Timothy Thomas Fortune was born on October 3, 1856, to Emanuel and Sarah Jane, an enslaved couple, in Marianna, Florida, a small village

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24. T. THOMAS FORTUNE, *BLACK AND WHITE: LAND, LABOR, AND POLITICS IN THE SOUTH* (Wash. Square Press 2007) (1884).

25. To do so, I surveyed all extant copies of Fortune's newspapers from 1883 to 1890, and indexed, read, and analyzed approximately 250 articles of most potential relevance in examining Fortune's thought about law. I present a summary of my findings based on these original source materials here.

26. This section's description is summarized from an excellent biography of Fortune by Emma Lou Thornbrough. See THORNBROUGH, *supra* note 22, at 3–9. For a more recent biographical treatment along with an excellent representative sampling of Fortune's journalism throughout his career, see Alexander, *supra* note 21, at xi–xxx.

located in Jackson County in the north of that state.<sup>27</sup> Emanuel's father was an Irishman, Thomas Fortune, who had been killed in a hot-headed duel when Emanuel was an infant. His mother was the daughter of a mixed-race enslaved woman and a Seminole Indian. Emanuel had been raised with the son of the owner of the plantation on which he was born, and had learned to read and been taught the trade of shoemaker and tanner. He later had been "sold" to the man who owned the plantation on which Sarah Jane lived and ran a tannery for him.<sup>28</sup> Sarah Jane's father was also of Native American heritage; her mother was the child of a white father and an enslaved African American mother.<sup>29</sup>

After Emancipation, Emanuel and Sarah Jane married legally and took Fortune as their last name. They moved their family of five children to land owned by Emanuel's former owner's son, who had been Emanuel's childhood friend. The Fortunes farmed, concentrating on growing cotton, and supplemented their diet with fishing and hunting.<sup>30</sup> Their son, T. Thomas Fortune, or Tim, as he was then known, recalled his childhood as a happy, outdoors life.<sup>31</sup> He attended a Freedmen's Bureau school taught by two Union soldiers in an African American church in Marianna and also worked in the offices of a community weekly newspaper, where he learned to "stick" type, a skill that provided him with the "rudiments of the trade that w[ere] to determine his life work."<sup>32</sup>

Emanuel had received a far better education than most freedmen, and also had natural ability as an orator—a talent both Tim and his brother Emanuel, Jr. would inherit. This skill suited their father to politics, and Emanuel, Sr. soon became active in the Republican Party. In 1868, he was elected a delegate to the Florida Constitutional Convention and then became a member of the Florida House of Representatives.<sup>33</sup> But as the Reconstruction Era progressed, white violence and animosity in Marianna grew, and Emanuel and his allies became targets of death threats and an assassination attempt. As the community descended into violence, the Fortune family lived through long periods of horror and fear. These experiences left a lasting impression on Timothy, who from childhood exhibited a "sensitive and imaginative" disposition<sup>34</sup>—a personality trait that would provide him with both his greatest strengths and weaknesses in adulthood.

In light of these worsening conditions, the Fortunes decided to relinquish their farm and livestock investments, which they could not sell, and attempt

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27. THORNBROUGH, *supra* note 22, at 3–4.

28. *Id.* at 4.

29. *Id.*

30. *Id.* at 7–8.

31. *See id.*

32. *Id.* at 9; see also T. Thomas Fortune, *After War Times: A Boy's Life in Reconstruction Days, Part 9*, NORFOLK J. & GUIDE, Sept. 10, 1927, at 14 (describing early experiences in newspaper printing).

33. THORNBROUGH, *supra* note 22, at 12.

34. *Id.* at 17.

a completely new start in the city of Jacksonville. The decision proved the right one: by 1871, all the Republican leaders in Jackson County had either been killed or fled as white supremacy took hold through a “number of outrages . . . greater than in any other part of Florida.”<sup>35</sup> Timothy, thirteen at the time, left home for Tallahassee, where his father’s political connections got him a position as a state senate page. He made three dollars a day, which he sent home to his family, and also received tips for doing errands for the legislators, which he kept for spending money. Timothy observed and learned much through this experience, and developed a deep suspicion of carpetbaggers from the North, whom he saw duping freedmen while claiming to be their friends.<sup>36</sup> He also enrolled in another Freedman’s Bureau school and found various jobs in newspaper printing and offices. His connections to a Florida congressman got him an appointment as a mail route agent and then as customs agent, and he continued earning and saving money for college through these positions.<sup>37</sup>

On a date that remains somewhat uncertain,<sup>38</sup> Fortune enrolled at Howard University in Washington, D.C., yet another Freedman’s Bureau institution. There, Fortune obtained all the higher education he would receive before embarking on his national career as journalist and race activist, including instruction in law. To understand Fortune’s thought on the relationship between race activism and law, it helps to trace its roots to his formative educational experiences at Howard.

### B. *Howard University*

Howard University had opened its doors in 1868 as a school seeking to impart a classical curriculum with a strong focus on Greek and Latin.<sup>39</sup>

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35. *Id.* at 18.

36. *Id.* at 20–21.

37. T. Thomas Fortune, *After War Times: A Boy’s Life in Reconstruction Days, Part 20*, NORFOLK J. & GUIDE, Sept. 19, 1927, at 16.

38. See CATALOGUE OF THE OFFICERS AND STUDENTS OF HOWARD UNIVERSITY FROM JUNE 1874 TO FEB. 1876 [hereinafter CATALOGUE 1874–1876] (listing Fortune as a student in the Normal Department); see also THORNBROUGH, *supra* note 22, at 24 (dating Fortune’s enrollment at Howard to 1874). Fortune biographer Shawn Leigh Alexander’s dating of Fortune’s enrollment to the fall of 1876 seems the best informed. See Alexander, *supra* note 21, at xiii.

39. See WALTER DYSON, HOWARD UNIVERSITY: THE CAPSTONE OF NEGRO EDUCATION, A HISTORY: 1867–1940, at 156 (1941). Howard chose this pedagogical goal for two reasons, according to an internal historian: first, because its founders were graduates of schools such as Princeton and Yale that used such a classical curriculum; and, second, because “the opinion generally held at that time [was] that when a Negro learned to read Greek that accomplishment alone proved his equality with white men.” *Id.* Oberlin College’s international fame for educating African Americans in classical languages weighed heavily in this aspiration. See generally W. E. Bigglestone, *Oberlin College and the Negro Student, 1865–1940*, 56 J. NEGRO HIST. 198 (1971) (discussing Oberlin College’s early model for African American education); James Oliver Horton, *Black Education at Oberlin College: A Controversial Commitment*, 54 J. NEGRO EDUC. 477 (1985); Cally L. Waite, *The Segregation of Black Students at Oberlin College After Reconstruction*, 41 HIST. EDUC. Q. 344 (2001).

Accordingly, in its first years Howard University's program focused almost exclusively on such training, even though only a small number of entering students were prepared for it.<sup>40</sup> To accommodate all students, the school had a Preparatory Department, designed to prepare students to enter college, as well as a Normal Department, designed to prepare students for teaching.<sup>41</sup> Fortune's prior education had been spotty, having "been picked up in printing offices and in much reading of all sorts of literature," as he later wrote, so he was required to enroll in both departments, taking some subjects in each.<sup>42</sup> Then, a bank collapse wiped out Fortune's modest savings. Determined to obtain a higher education nevertheless, Fortune found work as a messenger in the U.S. Department of Treasury, and later, more lucratively, in the print shop of the *People's Advocate*, a new African American weekly newspaper in the city.<sup>43</sup>

Early in his studies at Howard University, Fortune met the distinguished African American orator and statesman John Mercer Langston,<sup>44</sup> a Republican lawyer and former Freedman's Bureau official who had been appointed as professor of the law department at Howard in 1868, dean in 1870, and acting University president in 1873.<sup>45</sup> In July 1875, Langston

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40. See DYSON, *supra* note 39, at 157.

41. RAYFORD W. LOGAN, HOWARD UNIVERSITY: THE FIRST HUNDRED YEARS, 1867–1967, at 34 (1968); see also CATALOGUE 1874–1876, *supra* note 38, at 7, 18 (describing curricula and admissions standards for Preparatory and Normal Departments).

42. Fortune, *supra* note 37, at 92.

43. For an analysis of the importance of the relationships Fortune developed at the *Advocate* with many leading African American intellectuals, see Alexander, *supra* note 21, at xiii.

44. THORNBROUGH, *supra* note 22, at 26.

45. John Mercer Langston had been born in 1829 to a free mother of African American and Indian heritage and a wealthy white plantation owner father, and had inherited considerable wealth after both parents passed away in his young childhood. See JOHN MERCER LANGSTON, FROM THE VIRGINIA PLANTATION TO THE NATIONAL CAPITOL: OR THE FIRST AND ONLY NEGRO REPRESENTATIVE IN CONGRESS FROM THE OLD DOMINION 11–16, 22 (Johnson Reprint Corp. 1968) (1894). In 1849, he graduated from Oberlin College, one of the few universities at the time to offer admission to African Americans. See *id.* at 96. Langston's college education was heavy in the traditional classical curriculum standard among institutions of higher education at the time, and emphasized ancient languages as well as rhetoric and elocution, subjects in which Langston excelled. See *id.* at 93, 112. After graduation, Langston wanted to go on to law school, but, despite his superior academic achievement, he was denied admission to several law schools to which he applied on grounds of race. See *id.* at 104–10. A college advisor suggested that Langston enroll in Oberlin's theology school as a substitute means of obtaining further advanced education in order to prepare himself to practice law, and Langston did so, obtaining his master's degree in theology from Oberlin in 1853.

Langston later reported that he found that his theological training prepared him well for law. As he explained, "[t]he intricate and profound system of hermeneutics and exegesis as taught and applied to our sacred writings . . . required all the powers of the stoutest understanding," and thus prepared him for the "hardest and most difficult tasks" connected with difficult intellectual problems, including those in law. *Id.* at 113.

After obtaining his advanced degree, Langston read for the bar in the offices of a white abolitionist lawyer, and then sat for and was admitted to the Ohio bar, after the chief justice committed the subterfuge of examining Langston and concluding that he met the state bar's requirement that only "white" men be admitted. *Id.* at 125.

resigned after being passed over as permanent university president.<sup>46</sup> Fortune, perhaps erroneously, recalls Langston as still presiding over Howard at the time Fortune was studying there,<sup>47</sup> but regardless of whether he was physically present, Langston's influence, both on the institution he had founded and on Fortune personally, persisted according to Fortune's account.<sup>48</sup>

### 1. Howard Law School

Howard's law department operated as a part-time night program designed to be completed in two years.<sup>49</sup> The school charged tuition of forty dollars,<sup>50</sup> which most of its small group of students paid by serving as clerks in federal government offices. Aside from Langston, Howard University had several adjunct instructors who received small stipends for teaching part-time at night.<sup>51</sup> The school had few resources; its library of law books was minimal, consisting primarily of donated volumes.<sup>52</sup> It nonetheless produced a number of impressive graduates, including some of the lawyers and other members of the Niagara Movement, as well as some of the nation's first white female lawyers, since it, unlike most law schools at the time, granted admission to women.<sup>53</sup>

Enrolled as one of five students in Howard's law department for the 1877–1878 term,<sup>54</sup> Fortune absorbed ideas about law that would lead him to write in a genre one might label early critical race jurisprudence, which sounded both in tones of natural rights theory and skeptical realism about the politically charged nature of courts' rulings on racial justice. These ideas were key to Fortune's later writing, and it therefore bears

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Langston practiced law and became active in the abolitionist movement in Ohio, and during the Civil War helped recruit African American soldiers for the Union army. After the war, Langston became an official within the Freedman's Bureau and carried out other civic work aimed at promoting the Republican Party in African American communities. On Langston's life until 1865, see generally WILLIAM CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829–65 (1989).

46. See LOGAN, *supra* note 41, at 79–80.

47. See T. Thomas Fortune, *After War Times: A Boy's Life in Reconstruction Days*, Part 22, NORFOLK J. & GUIDE, Nov. 26, 1927, at 14 (stating that Langston was acting president when Fortune entered Howard). This recollection does not conform with the dating of Fortune's enrollment as the fall of 1876, see *supra* note 38, but this is not of crucial significance to my inquiry.

48. See Fortune, *supra* note 47, at 14.

49. CATALOGUE 1874–1876, *supra* note 38, at 24.

50. *Id.* at 26.

51. See DYSON, *supra* note 39, at 220. In 1875, the university, strapped for funds, could give the law department even less financial assistance, and its professors thus “served at a real sacrifice.” *Id.*

52. *Id.* at 226–28 (describing the expansion of the law library).

53. See J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 54 (1993) (describing Howard's nondiscriminatory admissions policy and the later accomplishments of some of its early white female graduates).

54. CATALOGUE OF THE OFFICERS AND STUDENTS OF HOWARD UNIVERSITY FROM MARCH 1876 TO MARCH, 1878, at 8 (Washington, D.C., W. M. Stuart Printer 1878) [hereinafter CATALOGUE 1876–1878].

investigating the jurisprudential tradition Fortune absorbed during his law school training.

## 2. John Mercer Langston's Equal Rights Analysis

Langston's published speeches<sup>55</sup> reveal his abolitionist-style perspective on the natural rights of all American citizens, regardless of race, to "absolute legal equality."<sup>56</sup> Consistent with the underlying assumptions of most jurists at the time, Langston saw rights as falling into several categories: legal or civil rights, political rights, and social rights.<sup>57</sup> Most important of the political rights was that to "free and untrammelled use of the ballot."<sup>58</sup> Civil or legal rights concerned that limited set of privileges considered central to the natural rights of all citizens; it was these rights that constitutional law should guarantee. In this respect Langston agreed with the standard legal thought of his era. What is more interesting is Langston's views as to which rights fit within this category. In a speech delivered at the Indianapolis Colored Men's Convention soon after Emancipation, Langston listed these legal rights as including

the right to bring a suit in any and all the courts of the country, to be a witness of competent character therein, to make contracts, under seal or otherwise, to acquire, hold, and transmit property, to be liable to none other than the common and usual punishment for offences committed by him, to have the benefit of trial by a jury of his peers, to acquire and enjoy without hindrance education and its blessings, . . . and to be subjected by law to no other restraints and qualifications, with regard to personal rights, than such as are imposed upon others.<sup>59</sup>

As reflected in this passage, Langston viewed the right to equal and nonsegregated education as a core civil right that should be guaranteed under law. In this view Langston shared the perspective of other

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55. Langston's classroom lecture notes unfortunately do not appear to have survived. We do, however, know something about Langston's general method of instruction. It emphasized, as Langston later reported, the forensics he had found so useful in his own education; students performed "dissertations, addresses and debates," and "'extemporaneous oration' on law topics, held weekly under the direction of the dean." LANGSTON, *supra* note 45, at 298. In addition, Langston held mandatory lectures every Saturday morning on the topic of "professional ethics," which involved "full exposition of those branches of intellectual and moral philosophy so essential to . . . a thorough understanding of the law." *Id.* at 300–01. These, he was sure, were "in no sense an irksome duty for a single [student]." *Id.* at 301.

56. John Mercer Langston, *Citizenship and the Ballot*, Address Before the Colored Men's Convention of Indiana (Oct. 25, 1865), in FREEDOM AND CITIZENSHIP: SELECTED LECTURES AND ADDRESSES 99, 99 (Washington, D.C., Rufus H. Darby 1883) [hereinafter LECTURES].

57. See generally LINDA PRZYBYSEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 81–87 (1999) (discussing this late-nineteenth-century taxonomy of rights).

58. Langston, *supra* note 56, at 100.

59. *Id.* at 99–100.

abolitionists, such as Charles Sumner.<sup>60</sup> But the abolitionists differed in this position from most jurists of the late nineteenth century, who classified education as a “social” right. Social rights, the standard legal thinking held, pertained to free and voluntary associations among persons in the private sphere, and neither could nor should be subject to government regulation through law.

This jurisprudential carving of the realm of rights into civil or legal rights, requiring recognition and protection in law, and social rights, which were not properly subject to law’s reach, posed a major problem to post-Reconstruction civil rights jurisprudence, as historian Linda Przybyszewski has discussed in her biography of Supreme Court Justice John Marshall Harlan.<sup>61</sup> Justice Harlan was the sole dissenter in several key opinions in which the Court retreated from the Reconstruction Era agenda. But Justice Harlan failed to dissent from some other key cases of this type. According to Przybyszewski, in these cases a major stumbling block in Harlan’s thinking was his inability to categorize the rights at issue—namely, the right to attend nonsegregated public schools, and the right to engage in intimate relationships across race lines—as civil as opposed to social rights.<sup>62</sup>

In contrast, T. Thomas Fortune faced no such analytic conundrum because he fully embraced the abolitionist view of the rights to equal education and to engage in intimate relationships and marriage with the person of one’s choosing as core legal or civil rights. In his staunch insistence on the nonsegregation principle in education, even after many of his contemporaries began to back away from such absolutism, Fortune had learned well from Langston’s example. In a 1874 speech, Langston had called for the abolition of “[t]wo separate school systems, tolerating discriminations in favor of one class against another.”<sup>63</sup> And in a speech at Howard University that same year, Langston placed this demand in the mouth of abolitionist Charles Sumner, who, Langston reported, had charged the first class of graduates from Howard’s law department with the following professional mission:

I do not doubt that every denial of equal rights, whether in the school-room, the jury-box, the public hotel, the steamboat, or the public conveyance, by land or water, is contrary to the fundamental principles of republican government, and therefore to the Constitution itself, which should be corrected by the courts, if not by Congress. See to it that this is

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60. See PRZYBYSZEWSKI, *supra* note 57, at 82–83 (“As a congressman during Reconstruction, Sumner tried to shift public schools and accommodations from the category of social rights to that of civil rights.”).

61. *Id.* at 81–117.

62. *Id.* at 84–87 (examining why Harlan dissented in the *Civil Rights Cases*, 109 U.S. 3 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), but failed to dissent in *Pace v. Alabama*, 106 U.S. 583 (1883), and *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899)).

63. John Mercer Langston, Equality Before the Law, Address at Oberlin College (May 14, 1874), in LECTURES, *supra* note 56, at 154.

done. The Constitution does not contain the word ‘white;’ who can insert it in the law? Insist th[en] the common school, where the child is prepared for the duties of manhood, shall know no discrimination unknown to the Constitution.<sup>64</sup>

As this passage well illustrates, Langston was passionately committed to the principle of nonsegregation, not only in education but in transportation and public accommodations as well. As he stated in continuing this same speech cast through Sumner’s reported words,

Insist, also, that the public conveyances and public hotels, owing their existence to law, shall know no discrimination unknown to the Constitution . . . . Insist upon equal rights everywhere; make others insist upon them. . . . I hold you to this allegiance: first, by the race from which you are sprung; and secondly, by the profession which you now espouse.<sup>65</sup>

In short, Langston espoused a noncompromising abolitionist equal rights rhetoric on such matters as education, public transportation, and public accommodations, and saw work toward securing equal legal rights as key to the mission of African American lawyers, both as a matter of race allegiance and professional role. Fortune adhered to the same viewpoint throughout his writing in the decade of the 1880s.

But this focus on the achievement of legal recognition of the principle of nonsegregation in education, transportation, and public accommodations was not the only or main political objective of late-nineteenth-century race activists. Instead, as I discuss below in Part II, Fortune, along with his contemporaries, soon began to complicate this analysis with other emphases that included racial solidarity and self-help—and, for some militants such as Fortune, economic radicalism as well.

In the end, Fortune did not graduate from the law department; marriage and pressing financial commitments caused him to leave without his degree.<sup>66</sup> But Fortune’s studies at Howard left him with a life-long interest and sophistication in analyzing law. As his biographer points out, through his law study, “Fortune gained an understanding of fundamentals, especially in American constitutional law, which was reflected in his writings in later years.”<sup>67</sup>

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64. John Mercer Langston, Eulogy on Charles Sumner, Address at Howard University (Apr. 24, 1874), in *LECTURES*, *supra* note 56, at 178.

65. *Id.* at 178–79.

66. In part, Fortune’s education fell victim to national political developments: in 1876, the Republicans lost control of Congress, and with this change came a drying up of funding, both in student aid through jobs arranged by friendly Republican congressmen, and in institutional resources for Howard University and its law department in particular, which closed for the 1876–1877 academic year. See *CATALOGUE 1876–1878*, *supra* note 54, at 8 (stating that the law school did not operate in 1876–1877); THORNBROUGH, *supra* note 22, at 24–28 (describing Fortune’s situation in Washington, D.C.).

67. THORNBROUGH, *supra* note 22, at 27.

Fortune and his new wife, Carrie (nee Smiley), decided to return to Florida for “four dark and troublous years.”<sup>68</sup> There Fortune tried teaching in the school system but “found conditions insufferable,” including miserable pay, political exploitation, and indignities in the treatment by the superintendents and trustees<sup>69</sup>—another formative experience that undoubtedly contributed to Fortune’s strong interest in education reform. He returned to his printing skills at a Jacksonville newspaper, but “found the atmosphere of Florida so degrading and stifling”<sup>70</sup> that he could not tolerate it. Luck turned Fortune’s way when a former co-worker from the Washington, D.C., *Advocate* told him about a job opening as a printer for a white-owned religious newspaper in New York City. Job offer in hand, Fortune left Florida with Carrie in 1881.

### C. Fortune’s Journalism Career to 1890

#### 1. Fortune’s Newspapers

As his biographer recounts, Fortune’s first experiences in New York City were less than fully positive. Although conditions with respect to the exercise of civil and political rights were better in New York City than in Florida—African Americans could vote and often attended integrated public schools—Fortune found “that in some respects economic proscription was more intense than in Florida.”<sup>71</sup> Soon after he started working at the newspaper that had recruited him, for example, the white employees of the paper walked out on strike, protesting the fact that their employer had added a second African American employee to the staff.<sup>72</sup> The strikers were unsuccessful in their demand and Fortune and his friend continued to work at the paper for a year, but must have felt highly uncomfortable there. They soon began helping at a new small African-American weekly paper and, once they judged it financially feasible to do so, they decamped for full-time work on that paper. Fortune became its managing editor in 1883<sup>73</sup> and renamed it the *New York Globe*, thus launching himself at the age of twenty-five into a career as a national public intellectual.<sup>74</sup>

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68. T. Thomas Fortune, *After War Times*, Part 23, NORFOLK J. & GUIDE, Dec. 3, 1927, at 16.

69. THORNBROUGH, *supra* note 22, at 32.

70. *Id.* at 33.

71. *Id.* at 37.

72. *Id.*

73. Fortune first worked as managing editor of the *New York Globe* with a general editor named John F. Quarles, a man of scholarly accomplishment and wide travel who had studied law at Howard under Langston and now practiced law in New York City. *Id.* at 41. After lending a hand in Fortune’s training, Quarles turned over the full editorship to Fortune. *Id.*

74. The *Globe*’s launching roughly coincided with the founding of many African American and other special interest newspapers in many parts of the country. *See id.* at 39–40 & n.6. The four-page weekly was produced on-site using relatively inexpensive printing

The name of Fortune's paper changed periodically as different business partnerships formed and dissolved, so that it sequentially bore the names *New York Globe* (until November 1884), *New York Freeman* (until October 1887), and then *New York Age* (until Fortune's breakdown in 1907 and Booker T. Washington's secret assumption of financial control). But except for a year and a half during which Fortune's brother and another partner assumed editorial responsibility, the character and purpose of Fortune's paper remained constant: to present politically independent, sharp, and often witty analyses of the events of his time. His work offered fresh and creative perspectives that still sound surprisingly on point in their critical insights.<sup>75</sup>

I will explore in more detail Fortune's favorite topics in Part II below. By way of general introduction, these topics included federal aid for education, maltreatment of African Americans on common carriers and in places of public accommodations and amusement, and, with increasing frequency as the decade of the 1880s wore on, reports of "outrages" in the form of lynchings and other acts of violence against African Americans (and also other groups, such as Italian Americans, about which Fortune also reported).<sup>76</sup> Fortune published many exposés of the peonage labor and the convict leasing systems in the South, and he wrote in support of the nondiscriminatory policies of the Knights of Labor, the then-growing labor organization that sought to unite workers across race lines in both the North and the South.<sup>77</sup> Editorials on the need for African American and white workers to recognize their common class interests were frequent.

Fortune was a staunch women's rights advocate, and his papers usually carried a weekly women's column, written by a leading African American society woman, as well as occasional reporting on women's suffrage and the accomplishments of African American women in the professions.<sup>78</sup>

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technology at which Fortune was expert, and bore a mistake-free, professional appearance unusual at the time. *Id.* at 44.

75. His format remained constant as well. Hard news and political analysis typically appeared on the front page, along with columns submitted by regional correspondents from around the country reporting on local developments and happenings. Internal editorial pages carried opinion pieces, frequently but not always drafted by Fortune, along with snippets of information and opinion, and often letters responding to pieces run in prior weeks. These letters were often quite critical, thus giving Fortune's papers, at least through the early 1890s, the feel of an open forum for disagreement and debate. *See infra* note 208 (citing examples of letters critical of Fortune's ideas).

76. *See, e.g., Eleven Men Murdered—Is the White South Civilized?*, N.Y. AGE, Mar. 21, 1891 (on file with the Fordham Law Review) (reporting on the murder by "a mob of 'the best citizens' of New Orleans" of eleven Italians being held in custody following a jury acquittal and noting similar issues of prejudice as those facing black men in the South).

77. On the Knights of Labor, see generally PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER*, 1619–1973, at 47–63 (1974).

78. *See, e.g., T. Thomas Fortune, Afro-American Women*, N.Y. AGE, Apr. 25, 1891 (on file with the Fordham Law Review) (describing African American women's accomplishments as physicians and other professionals and concluding that "women are taking care of themselves"); *Mr. Fortune of the West: Glances at Indianapolis and Chicago*, N.Y. AGE, Aug. 11, 1888 (on file with the Fordham Law Review) (describing meeting Ida Wells, "who handles a goose quill with diamond point as handily as any of us men in

Fortune also displayed a sympathetic sensitivity to the political struggles of other traditionally excluded groups, including people of color around the world,<sup>79</sup> and (after a brief foray into populist anti-Semitism<sup>80</sup>) Jews, whom he saw as experiencing discrimination in the United States and Russia similar to that facing African Americans.<sup>81</sup> His favorite analogy, however, was to the political struggles of the Irish, whose experiences provided particular inspiration for his vision for the Afro-American League, as I will discuss later.<sup>82</sup>

In 1884, Fortune wrote *Black and White*, a book that outlined the underlying political and economic philosophy that guided his journalistic writings throughout the 1880s. A brief examination of that work completes my background discussion here.

## 2. Fortune's Creative Accomplishment in *Black and White*

Although some Fortune scholars have downplayed the significance of *Black and White*,<sup>83</sup> a recent reassessment persuasively argues that such views are tainted by American historians' cold war antipathy to recognizing the importance of economic radicalism in the civil rights movement.<sup>84</sup> In any case, when read through contemporary eyes, *Black and White* does seem to present a curious mix of natural rights talk melded with the rhetoric

newspaper work"); *The Nation Capital*, N.Y. GLOBE, Sept. 13, 1884 (on file with the Fordham Law Review) (reporting that "Belva A. Lockwood, one of the most distinguished lawyers at the capital," had accepted the Woman's Rights nomination for President); *Women's Suffrage Convention*, N.Y. FREEMAN, Nov. 7, 1885 (on file with the Fordham Law Review) (women's suffrage convention in Boston). Fortune gave militant journalist, organizer, and antilynching activist Ida B. Wells a job and ownership interest in his paper after a mob destroyed her printing operation in Tennessee in the aftermath of her paper's criticism of a lynching in 1892. His support of women and women's rights distinguished him from some race activists of his time. See, e.g., STEPHEN R. FOX, *THE GUARDIAN OF BOSTON: WILLIAM MONROE TROTTER 102-03* (1970) (describing militant African American journalist William Monroe Trotter's opposition to women being granted membership rights in the Niagara Movement); see also PAULA J. GIDDINGS, *IDA: A SWORD AMONG LIONS: IDA B. WELLS AND THE CAMPAIGN AGAINST LYNCHING* 151, 231-32 (2008) (describing Fortune's support for Wells's career).

79. See Seth Moglen, *Introduction* to FORTUNE, *supra* note 24, at v, ix (describing Fortune as "unusually attentive to the way in which the oppression of African Americans was part of a global system of economic exploitation that affected poor people of all races and nationalities").

80. See *The Labor Problem*, N.Y. GLOBE, Feb. 17, 1883 (on file with the Fordham Law Review).

81. See, e.g., N.Y. AGE, Jan. 11, 1890 (on file with the Fordham Law Review) (expressing sympathy for Jews).

82. See, e.g., *Mr. Downing on Ireland: What Irishmen Have Done for Freedom*, N.Y. FREEMAN, Jan. 9, 1886 (on file with the Fordham Law Review) (discussed further *infra* notes 125, 194 and accompanying text).

83. See, e.g., THORNBROUGH, *supra* note 22, at 70, 82 (describing the book as giving "the impression of having been written in haste by an angry but reasonable young man," and Fortune's economic ideas as "not profound"); McPherson, *supra* note 19 ("When he wrote as a quasi-Marxist, Fortune was less perceptive and original than when he wrote as a Negro . . . [H]is economic ideas were derivative and sometimes superficial . . .").

84. Moglen, *supra* note 79, at v, xiii-xv.

of economic radicalism. But might not the very fact that Fortune's theory appears somewhat curious today signal the historic loss of ideas that tie concepts of civil and political rights to arguments for more just economic arrangements?<sup>85</sup> If so, those ideas may merit excavation as part of the project of developing new syntheses along these lines today.

Fortune's theory of natural rights starts with the idea that human beings have certain inherent rights, including not only the political and civil rights enshrined in the Declaration of Independence—which he, like Langston, was fond of citing<sup>86</sup>—but also rights to basic subsistence resources including air and water.<sup>87</sup> This was a version of agrarian radicalism espoused by thinkers such as the English protosocialist John Ruskin<sup>88</sup> and the American single-taxer Henry George,<sup>89</sup> both of whom developed ideas that remained important in American progressivism during the years of transition from a predominantly agrarian to a predominantly industrial economy.<sup>90</sup> Drawing from ideas about the importance of rights in land from George and Irish activist Charles Stewart Parnell, Fortune included the right to land as one of these natural rights.<sup>91</sup> To Fortune, an important start to solving the problems of poverty, oppression, inequality, and vice lay in the grant to all citizens of the right to supply their basic subsistence needs through land's cultivation.<sup>92</sup> Fortune extended this basic analysis to the problem of class oppression shared among both African American and white workers. Fortune argued that the fundamental cause of social injustice was the amalgamation of great wealth in the hands of the few, along with the exploitation of working people's labor to generate that wealth.

It was not a far stretch from these political convictions to an interest in the labor movement as a potentially positive political force for social and

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85. *But see generally* JACKSON, *supra* note 11 (exploring Martin Luther King, Jr.'s efforts to develop and reclaim ideas linking the civil rights movement to the movement for economic justice).

86. *See, e.g.*, FORTUNE, *supra* note 24, at 72.

87. *Id.* at 136.

88. John Ruskin was an English art and social critic who wrote in opposition to the free market liberal individualism of philosophers such as John Stuart Mill. *See generally* JOHN RUSKIN, *UNTO THIS LAST AND OTHER WRITINGS* (Clive Wilmer ed., 1985). Ruskin's ideas included extending the principles of Biblical teachings about caring for the poor into economic relationships by adopting laws to impose just wages, prevent the exploitation of workers, and protect the destitute; in the words of one expert commentator, much of what Ruskin argued for "are now the truisms of the welfare state." Clive Wilmer, *Introduction to RUSKIN, supra*, at 7, 30.

89. Henry George, author of *Progress and Poverty*, was an enormously popular writer at the time who argued that the roots of economic injustice and other social problems of the nineteenth century lay in the private ownership of land and proposed a single land tax as a way of equalizing social wealth. *See generally* HENRY GEORGE, *PROGRESS AND POVERTY* (Vanguard Press 1929) (1879).

90. Moglen, *supra* note 79, at xxi.

91. FORTUNE, *supra* note 24, at 136–37. I am grateful to Shawn Leigh Alexander for pointing out to me the relationship between this idea and the thought of Irish activist Charles Parnell.

92. *Id.*

economic change. Fortune wrote optimistically of his hope that in the South and elsewhere workers would soon unite across race lines to develop a political force aimed at redistributing society's wealth. Foreseeing a time when racism would be less prevalent than it was in his, Fortune noted that even then class oppression would undoubtedly persist. Even a world in which race discrimination had abated, Fortune argued, would not present true conditions for justice. Fortune's powers of sympathetic identification led him to a political vision based on reducing both racial and general economic injustice. To Fortune, poverty was the true touchstone of injustice, regardless of race. As he stated in his preface to *Black and White*: "My purpose is to show that poverty and misfortune make no invidious distinctions of 'race, color, or previous condition,' but that wealth unduly centralized oppresses all alike."<sup>93</sup>

Fortune developed other themes in *Black and White* that would be of great importance to the thought of the period. He wrote cogently of the need for African Americans to maintain political independence from both major electoral parties,<sup>94</sup> and he weighed in on the debate about classical versus "industrial" models of higher education.<sup>95</sup> But it would take us too

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93. FORTUNE, *supra* note 24, at xxxii.

94. Fortune called on African Americans to break away from the Republican Party, which had betrayed African Americans both during and after Reconstruction. *Id.* at 69–79. He also saw that the Democratic Party was no friend to African Americans; what was needed was political independence so that African Americans could make politicians work for their votes. *Id.* This was a theme to which Fortune would return repeatedly in the pages of his paper and one that shaped his organizational plan for the Afro-American League (AAL). *See infra* Part III.

95. The debate about the respective virtues of classical higher education, emphasizing languages and rhetoric as already described, versus what was often referred to as "industrial" education, centered on more practical, often manual or vocational, skills, lasted among African American intellectual leaders for years, and is one of the points of disagreement often cited in summarizing the iconic clash between Booker T. Washington and W. E. B. Du Bois. It is possible that scholars have made too much of this disagreement, since in actuality all significant race organizations took care to formally endorse both education routes. But the debate is interesting nonetheless in raising issues concerning the relationship between economic class and strategies for racial progress.

Fortune brought a personal vehemence to the topic, though it is hard to see why any personal bitterness about his own educational experiences underlay his views. It was, after all, his exposure to a classical education emphasizing rhetoric, elocution, and classical languages at Howard that helped prepare him for his own subsequent career as a leading national intellectual (although, it must be conceded, his manual typesetting skills were also essential). Fortune may have been writing less out of personal experience than out of sympathetic identification with many of his cohorts' frustration at finding themselves continually thwarted by discrimination from success in professional careers. As Fortune argued,

I maintain that any education is false which is unsuited to the condition and the prospects of the student. To educate him for a lawyer when there are no clients, for medicine when the patients, although numerous, are too poor to give him a living income, to fill his head with Latin and Greek as a teacher when the people he is to teach are to be instructed in the *a b c's*—such education is a waste . . .

FORTUNE, *supra* note 24, at 47. Opponents of industrial education often fastened on the idea that advocating vocational training was equivalent to admitting African American inferiority and entitlement to a less advanced form of education than that which white students could

far afield to engage in a detailed examination of these themes; my focus must remain on Fortune's ideas about race activism, government, and law. On these topics, Fortune's writing reveals a deeply cynical but also passionately justice-seeking sensibility that helps illuminate the analytic underpinnings of late-nineteenth-century militant visions of racial justice and strategies for its achievement. I turn to that topic in Part II below.

## II. FORTUNE ON THE ROLE OF LAW IN ACHIEVING RACIAL JUSTICE

A close reading of Fortune's journalism, along with his work in *Black and White*, reveals his analysis of the problem of racial injustice as a deep and multifaceted one, whose solution would require change in many spheres of life, especially education and economics. Law-trained and with a talent for generating prescient legal-critical insights, Fortune clearly regarded law as important to the struggle for racial justice. Proactively, Fortune argued for legislative change, especially federal legislation to fund and guarantee the right to effective and adequate education for all citizens. But Fortune also strongly championed court-focused strategies aimed at the retroactive undoing of the Supreme Court's holdings limiting the reach of the Reconstruction Amendments and the civil rights statutes enacted under them.

Although Fortune and others writing in his weekly cared deeply about law in this respect, they never came close to embracing legal liberalist notions that court-driven legal principles could solve the problem of racial injustice. Indeed, it would be ludicrous to think that these historical figures, given what they had witnessed and experienced in their lifetimes, would be anywhere near so naive as to trust courts in this way. Fortune's view of the Court is well summed up by his pithy descriptions of that institution as "deficient in legal acumen," "swayed by colorphobia," and "biased by powerful corporate influences."<sup>96</sup> Needless to say, believing that court-made law matters deeply to the cause of racial justice is not the same as being a legal liberal.

### A. Fortune on Education

Foremost among the topics that received front-page attention in Fortune's papers throughout the 1880s was a decade-long, eventually unsuccessful initiative to obtain federal aid for education, commonly referred to as the Blair Education Bill, in reference to its chief sponsor, Republican Senator

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routinely expect. But that was far from the militant Fortune's point. To Fortune, there was nothing degrading about being a member of the laboring class; rather, it was there that human dignity rested. Those who deserved to be looked at askance, as members of a "peculiar" class that "stand off by themselves," *id.* at 38, were those few African Americans who had higher educations and elitist aspirations. Fortune's profession (though certainly not his income) placed him in this elite class of intellectuals, but his allegiance still rested with the struggling laborer and recently emancipated freedmen of his own background.

96. *Mr. Justice Harlan's Opinion of Civil Rights*, N.Y. GLOBE, Nov. 24, 1883 (on file with the Fordham Law Review).

Henry W. Blair of New Hampshire. This initiative took the form of several proposals to provide approximately fifteen million dollars in federal aid per year to states in proportion to their respective illiteracy rates in order to help support improvements in basic education.<sup>97</sup> The proposals gained favorable Senate action several times, only to be blocked from action in the House of Representatives.<sup>98</sup>

According to historians, opposition to the bill did not line up on regional or party grounds. Southern states wanted the appropriation, arguing that since Northerners had forced enfranchisement of African Americans, they should help bear the costs of educating the freedmen. The key issues that blocked enactment involved opponents' wariness about Republican protariff policies and concerns about locking treasury surpluses into expensive new appropriations commitments.<sup>99</sup> Other stated concerns invoked federalism, or constitutional limits on federal involvement in and oversight of state matters. To counter these objections, later versions of the proposed bill called for joint federal and state oversight, or even left supervision of expenditures completely to the states.<sup>100</sup> Yet another objection was whether federal funding would eventually come with demands for nonsegregated education. In an attempt to allay these fears, the proposed bill was amended to explicitly authorize continuation of dual education systems, though even this step failed to result in its enactment.<sup>101</sup>

Such compromise proposals may have been acceptable to the politicians—and even to African American leaders who were consulted on the matter—because many were willing at the time to compromise on the nonsegregation principle in the interests of obtaining more resources for African American education.<sup>102</sup> Not surprisingly, however, segregated education was unacceptable to equal rights militants such as Fortune.<sup>103</sup> He was likewise opposed to proposals to reduce or eliminate proposed federal oversight of appropriations to the states, pointing out that southern states already invested far more funds in white schools than in African American

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97. See generally Daniel W. Crofts, *The Black Response to the Blair Education Bill*, 37 J. S. HIST. 41 (1971); Allen J. Going, *The South and the Blair Education Bill*, 44 MISS. VALLEY HIST. REV. 267 (1957). Four versions of the Blair Education Bill were introduced between 1880 and 1890, after which time the proposal died for all realistic purposes. See *id.* at 288, 290.

98. Going, *supra* note 97, at 275.

99. *Id.* at 273–90.

100. *Id.*

101. Crofts, *supra* note 97, at 43; Going, *supra* note 97, at 273–74.

102. Crofts, *supra* note 97, at 53 (reporting surprise of one egalitarian white congressman to discover that African American Baptist ministers with whom he met in Washington, D.C., supported segregated education). The issue of segregated education was a top topic of debate in the many African American literary societies that flourished in the late nineteenth century in major cities including New York, Washington, D.C., and Boston, with papers being delivered on both sides of the question. See, e.g., *Mixed or Separate Schools: Lack of Business Enterprise by Race Journals*, N.Y. FREEMAN, May 29, 1886 (on file with the Fordham Law Review) (arguing against speaker at Bethel Literary Society in Washington, D.C., who advocated separate schools).

103. See, e.g., FORTUNE, *supra* note 24, at 70–71.

ones and could be expected to continue to do the same with additional funds received from the federal government in the absence of federal oversight.<sup>104</sup> Throughout the 1880s, Fortune wrote in favor of the Blair initiative but against compromise proposals that would have assured the continued acceptability of segregated schools.

In 1883, Fortune testified before the Senate Committee on Labor and Education.<sup>105</sup> In his testimony, republished in his paper, Fortune argued that the national government should be the guarantor of the social resources necessary to prepare its citizens for effective citizenship: “the education of the people is a legitimate function of Government and is not in any sense a feature of centralization, but is eminently a feature of self preservation.”<sup>106</sup> Education should be equated with national defense and other services provided by the national government without controversy: “We make lavish appropriations for harbors, forts, the navy and the army for the common defense, but illiteracy is a more insidious foe from within than any that can or will assail us from without.”<sup>107</sup> Fortune further proposed the creation of a federal Bureau of Education to assume responsibility for education.<sup>108</sup>

To the Fortune writing in the early and mid 1880s, the federal government was the proper protector of the fundamental well-being and proper development of its citizens. This responsibility included guaranteeing a right to adequate and effective education, not only for African Americans but also for “ignorant foreigners” and uneducated whites as well.<sup>109</sup> Fortune saw a connection of fundamental importance between education and racial justice, and saw this connection as including not only a negative right to be free of state-sponsored discrimination in the form of school segregation, but also the positive right to an adequate and effective education that would properly prepare citizens for citizenship and provide them with the future means of earning a livelihood and achieving economic security.<sup>110</sup>

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104. *Id.*

105. *Status of the Race: Mr. Fortune Before the United States Senate Committee on Education and Labor*, N.Y. *GLOBE*, Sept. 22, 1883 (on file with the Fordham Law Review).

106. *Id.*

107. *Id.*

108. When New York newspapers published editorials raising constitutional objections to the Blair initiatives, Fortune fired back that “in this matter of National aid to education . . . [i]lliteracy is a national sore” that could not “be left to heal itself,” and that intelligent citizenry is not only a state but also a national blessing. *Id.* On the issue of cost, Fortune pointed out, the money that would go to help fund Southern schools was “little in excess of the annual appropriation for education by the Single state of New York.” *National Aid to Education*, N.Y. *GLOBE*, Jan. 5, 1884 (on file with the Fordham Law Review).

109. *The Blair Education Bill*, N.Y. *FREEMAN*, Jan. 1, 1887 (on file with the Fordham Law Review).

110. Fortune made the same points and elaborated on them further in *Black and White*. Pointing to statistics showing that, upon Emancipation, fewer than one in ten thousand freedmen could read or write, Fortune argued that the federal government had the responsibility to rectify this situation as part of developing a free and capable citizenry. FORTUNE, *supra* note 24, at 28–31. Articulating a far more robust understanding of state

In his congressional testimony, Fortune tied his analysis of the federal government's duty to guarantee education to his critique of peonage and convict labor in the South and the need to provide means for southern African Americans to improve their economic situation.<sup>111</sup> He worked in some of his ideas about basic rights to subsistence guaranteed by government through access to commonly owned land as well. Not one to mince words in front of any audience, he included rhetoric on the evils of concentrating wealth in the hands of the few.<sup>112</sup> This was another topic to which he returned repeatedly in his writing, and his view on the government's role in regulating economic relations further reveals his understanding of the relationships between racial and economic justice and law. I turn to that subject below.

### B. *The Labor Movement and Private, Voluntary Economic Ordering*

If Fortune's top priority was the right to education guaranteed by the national government, perhaps his second-favorite topic concerned the relationship of race oppression to economic systems of production. Fortune was especially interested in how the operation of law maintained oppressive systems of economic production, especially in peonage and convict labor,<sup>113</sup> but also in the exploitation of labor generally. Thus Fortune

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action and the role of the government in fostering the conditions for human flourishing than that which the Court was then able (or has yet) to grasp, Fortune wrote that "[t]he United States government is directly responsible for the illiteracy and the widespread poverty which obtain in the South" because it was "[u]nder its sanction and by its connivance [that] the institution of slavery flourished and prospered, until it had taken such deep root as to be almost impossible of extirpation." *Id.* at 32. Fortune unabashedly proposed a unified national system of education as the proper means by which to meet this responsibility. In his book, as in his newspapers, he also vehemently opposed segregated schools on grounds of both their status-based harm and the wasteful costliness of maintaining dual systems. *Id.* at 39 ("Aside from the manifest injustice of setting up two school-houses in the same ward or district—injustice to the children in the spirit, false from every standpoint, that one child is better than another—the *double expense* of maintaining two schools is obvious . . .").

111. *Status of the Race: Mr. Fortune Before the United States Senate Committee on Education and Labor*, *supra* note 105.

112. *Id.*

113. See, e.g., *Infamies of the Southern Convict Lease System*, N.Y. GLOBE, Feb. 2, 1884 (on file with the Fordham Law Review) ("[W]e unhesitatingly pronounce the penal systems of the twelve Southern States which practice the 'Convict Lease System' as an open violation of the 13th article of the Federal Constitution."); N.Y. FREEMAN, Sept. 18, 1886 (on file with the Fordham Law Review) (analyzing states' enactment of laws to keep "industrial slave's noses to the grinds-tone"); N.Y. FREEMAN, Dec. 3, 1886 (on file with the Fordham Law Review) (discussing the "southern labor question"); *Rambles in the South: Industrial Slavery in South Carolina*, N.Y. FREEMAN, May 16, 1885 (on file with the Fordham Law Review) (condemning the system of "industrial slavery" in South Carolina); *The Rich and the Poor*, N.Y. GLOBE, Dec. 29, 1883 (describing as "among the most difficult problems" this issue of how millions of industrious African American laborers in the South "are to be protected against deliberate robbery, and robbery viler still because clothed in the garb of legislative enactment"); *Victorious Strikers*, N.Y. FREEMAN, Feb. 19, 1887 (on file with the Fordham Law Review) (reporting on strike of guano workers in Alabama). The young Booker T. Washington also contributed analyses condemning the southern prison

wrote, the “poorer classes of the South are systematically victimized through the medium of legislation” and these “laws are systematically framed in the interest of capitalist.”<sup>114</sup>

Fortune also reported with great enthusiasm about the growth of the Knights of Labor and about that organization’s explicitly nonracist message and membership policies.<sup>115</sup> Fortune saw in the Knights of Labor hopeful signs of the potential development of a unified, majoritarian, class-based political movement. Unlike electoral party politics, about which he was unremittingly cynical, Fortune continued through the end of the 1880s to retain a positive hope for the white working class’s potential for racial enlightenment.<sup>116</sup>

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system. See, e.g., Booker T. Washington, *Southern Prisons*, N.Y. FREEMAN, Apr. 17, 1886 (on file with the Fordham Law Review) (noting the suffering in southern prisons).

114. *The Rich and the Poor*, supra note 113.

115. See, e.g., *Boston’s Labor Movement: The True Lesson of Judge Ruffin’s Funeral*, N.Y. FREEMAN, Dec. 11, 1886 (on file with the Fordham Law Review) (reporting on Knights of Labor meeting in Boston); *Colored Knights of Labor in Arkansas*, N.Y. FREEMAN, July 17, 1886 (on file with the Fordham Law Review) (reporting on Knights of Labor strike in Arkansas and tying it to analysis of peonage labor as “virtual continuation of the slave system”); *Failure of Labor*, N.Y. FREEMAN, Apr. 10, 1886 (on file with the Fordham Law Review) (reporting on unsuccessful Knights of Labor action); *Labor Upheavals*, N.Y. FREEMAN, Mar. 20, 1886 (on file with the Fordham Law Review) (reporting on rise of Knights of Labor and that “colored men all over the Union are rapidly becoming affiliated with the organization,” a fact “[w]e predicted . . . in ‘Black and White,’ but we did not expect so speedy a consummation of [our] prediction”); N.Y. FREEMAN, Oct. 9, 1886 (on file with the Fordham Law Review) (stating that Knights of Labor “took Southern prejudice, arrogance and intolerance by the throat and gave it the most furious shaking it has had since the war,” and refused “to sanction the discrimination made against their colored fellow-member”).

116. See, e.g., *The Economic and Civil Conditions North and South*, N.Y. FREEMAN, Feb. 12, 1887 (on file with the Fordham Law Review) (stating the time will come “when the white and black masses of the South will recognize that they have mutual interests”). By the end of the decade, labor confrontations had grown increasingly violent, and rising Jim Crowism had clearly infected the white-led labor movement just as it had the rest of the country. Fortune began to publish critical reports about manifestations of race prejudice within the labor movement, but continued to express hope that the labor movement would take a turn in a positive direction. See, e.g., M. W. Caldwell, *Civil Rights in Tennessee: Manifestations of Prejudice in Nashville*, N.Y. AGE, July 5, 1890 (on file with the Fordham Law Review) (reporting on ludicrous discrimination of railroad unions).

In this position, Fortune was very much an independent thinker, as shown by comparing his view to that of his close friend and fellow activist T. McCants Stewart. Stewart was an African American minister, professor, and lawyer who often wrote for and was featured in Fortune’s weeklies. Stewart shared Fortune’s progressive analysis of the evils of unrestrained capitalism and the need to reduce the disparity between the rich and the poor, but Stewart’s thinking focused on within-race advancement and eschewed what he saw as Fortune’s romantic notions of majoritarian class solidarity across lines of race. Stewart even agreed with the position taken in an article in another African American paper to the effect that “black men [should] combine and apply for the places made vacant by the strikers, . . . [I]f we fail to apply and then growl about not having an opportunity to compete with the whites, the fault will be with us.” *Pernicious Labor Teachings*, N.Y. FREEMAN, May 1, 1886 (on file with the Fordham Law Review). In response, Fortune countered that he thought it a shame to see “so good a man as [Stewart] go wrong.” *Some Crude Notions of Capital and Labor*, N.Y. FREEMAN, May 22, 1886 (on file with the Fordham Law Review). Fortune argued that “colored laborers . . . cannot afford to antagonize white laborers when

Although Fortune championed a strong labor movement, he was not a booster of all of its activities. Fortune wanted the labor movement to amass political power in order to change the fundamental structure of government, as the Knights of Labor had envisioned; he did not espouse a labor movement model aimed at settling industrial relations through contests of private power, as the trade union model endorsed.<sup>117</sup> An unsigned editorial written a few days after the Haymarket Riot of May 4, 1886, explained these views.<sup>118</sup> The editorial, entitled “The Futility of Strikes and Boycotts,” disapproved of the growing phenomenon of labor strikes aimed at securing higher wages and the eight-hour work day.<sup>119</sup> At first glance, this might appear a strange position for an editorial in Fortune’s paper, given Fortune’s usual staunchly prounion views.<sup>120</sup> But in context, the

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the latter are on strike for whatever cause,” and that Stewart’s doctrine encouraging African American strikebreaking was a “pernicious practice” that “would intensify the antagonism between white and colored labor.” *Id.* For biographical information on Stewart, see ALBERT S. BROUSSARD, *AFRICAN-AMERICAN ODYSSEY: THE STEWARTS, 1853–1963* (1998).

117. On the difference between the Knights of Labor and trade unionism, see FONER, *supra* note 77, at 56 (“The reform program of the Knights stressed land reform, increased education, and workers’ cooperatives, matters of minor interest to the national trade unions, which concentrated on higher wages, shorter hours, and improved working conditions.”).

118. The Haymarket Riot involved a massive strike in Chicago in support of the eight-hour day that ended in multiple deaths of civilians and police after unknown persons—probably anarchists—threw a bomb into the crowd. It marked the culmination of a growing wave of strikes called primarily by the craft union movement to force employers to grant an eight-hour day and other labor concessions. See JAMES GREEN, *DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA* 145–91 (2006).

119. *The Futility of Strikes and Boycotts*, N.Y. FREEMAN, May 8, 1886 (on file with the Fordham Law Review).

120. In his interest in and support for the labor movement, Fortune was joined in and influenced by another friend and fellow newspaper editor John Swinton. See THORNBROUGH, *supra* note 22, at 42 (noting that Fortune described Swinton as the first white journalist “who extended to me the right hand of fellowship”) (internal quotation marks omitted). Swinton was a white militant journalist who owned his own well-respected but largely self-funded radical paper, *John Swinton’s Paper*, from 1883 until 1887; the two men’s friendship was based on the many interests they had in common. Both were gifted journalists with a passion for both racial and economic justice and strong intellectual interests in the progressive and radical political and economic theorists of their day. See *id.* at 44.

For biographical treatments of Swinton, see EUGENE V. DEBS, *PASTELS OF MEN* (1919); ROBERT WATERS, *CAREER AND CONVERSATION OF JOHN SWINTON: JOURNALIST, ORATOR, ECONOMIST* 9 (1902). See also SENDER GARLIN, *THREE AMERICAN RADICALS* 3–46 (1991); *John Swinton Dead: The Noted Economist, Writer, and Orator Gone*, N.Y. TIMES, Dec. 16, 1901, at 9. Swinton was a Scot by birth who had emigrated to Kansas during the free-soil movement in the 1850s and later moved to New York City. Much of Swinton’s writing covered the labor movement and the cause of working people generally, but Swinton also included analyses on race-progressive lines, such as sympathetic explanations of the causes of African American strikebreaking. GARLIN, *supra*, at 27–28 (citing Editorial, *A Mistake of Colored Men*, JOHN SWINTON’S PAPER, Nov. 28, 1886). Swinton wrote editorials denouncing the system of convict labor in the South, very possibly motivated by Fortune’s many excellent treatments of this subject in his papers. The two men clearly read and sometimes cited each other. See, e.g., *Educational Problem*, N.Y. GLOBE, Mar. 31, 1883 (on file with the Fordham Law Review) (reporting on speech Swinton gave before the Bethel Literary and Historical Association); *The Civil Rights Decision*, N.Y. GLOBE, Oct. 20, 1883 (on file with the Fordham Law Review) (announcing first appearance of Swinton’s paper);

views expressed in the editorial are consistent with Fortune's view about the role of government in protecting its citizens and setting the conditions for a just society.

The editorial in Fortune's paper argued that it was counterproductive to the true aims of the working class to seek shorter hours and higher wages through industrial confrontation rather than government reform. This was because the laws of economics dictated that higher wages and shorter hours would cause employers' manufacturing costs to go up, which employers would pass on to consumers in the form of higher prices; through this cycle, working people would find themselves no better off because their wages would buy less. Thus, private ordering of economic relations through a battle between labor and capital would not accomplish the goal of greater economic justice; only government could do that:

[P]hilosophers of the labor movement will still have to seek the proper remedy through the intricate and tortuous machinery of legislation [in order to] . . . curtail[] to some extent the enormous and pernicious aggregation of capital in the hands of a limited number of men, to the danger and disadvantage of the masses of society.<sup>121</sup>

As with Fortune's views on education, this view places responsibility for reform squarely on the shoulders of government as directed through legislation. Such legislation could be achieved through coalition building aimed at building a majority united by similar economic interests.

A concern about the dangers of lawless violence surely influences this argument in favor of government intervention rather than the private ordering of industrial relations through contests between labor and capital. In context, it is not difficult to understand why. Not only had the deaths resulting from the Haymarket Riot occurred just days before, following waves of strikes that had been marked by increasing violence, but anarchist elements within the labor movement were becoming stronger at the time and strikers' rhetoric and actions were headed increasingly in revolutionary

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*The Rich and the Poor*, *supra* note 113 (on file with the Fordham Law Review) (quoting Swinton's paper). Both men struggled enormously with the financial demands of putting out their papers, contributing large sums of personal funds to their projects and living in great financial precariousness as a result. These difficulties caused Swinton to abandon his paper in 1887, and Fortune in 1907.

In yet another similarity, both men also published books presenting their economic and political analyses of the problems of the day. Compare FORTUNE, *supra* note 24, with JOHN SWINTON, A MOMENTOUS QUESTION: THE RESPECTIVE ATTITUDES OF LABOR AND CAPITAL (Arno Press 1969) (1895). Swinton's opus, while more engagingly written than most similar works of the era, displays a naive optimism about the inevitability of social progress characteristic of books written by white progressives at the time, including some who would eventually be involved in the founding of the NAACP. See generally WILLIAM ENGLISH WALLING, THE LARGER ASPECTS OF SOCIALISM (1913) (arguing for the inevitability of social progress along democratic socialist lines). In contrast, Fortune's book takes a more hard-headed and original perspective, gained from synthesizing the rhetoric of class-based analysis with new insights arising from the perspective of race analysis. See *supra* Part I.C.2 (discussing *Black and White*).

121. *The Futility of Strikes and Boycotts*, *supra* note 119.

socialist directions.<sup>122</sup> To Fortune, who had lived through extreme violence at the end of Reconstruction in Florida, such rhetoric and uncontrolled violence must have been disconcerting, to say the least. Moreover, Fortune was watching lawless violence grow in the form of lynchings and other outrages against African Americans.<sup>123</sup> He could not have failed to make a connection between this violence and the labor violence taking place at the same time, especially as employers' increasing use of African American strikebreakers directly connected the two forms of violence through white laborers' attacks on African American scabs.<sup>124</sup> While Fortune refrained from engaging in blanket condemnations of the labor movement for its growing Jim Crowism, he seemed unable to convince himself that the path to greater racial and economic justice lay with the private ordering of relations between labor and capital through labor agitation.

Fortune was no pacifist—he was fond of a rhetoric calling on African American men to exert their masculinity through violent self-defense where circumstances warranted.<sup>125</sup> But he was at bottom a believer in the orderly regulation of relations through government. This is perhaps not surprising for a child of the Reconstruction Era, disillusioned though Fortune was by what he lived through during those years. During his formative childhood years, Fortune had witnessed his father Emanuel Fortune, Sr.'s willingness to sacrifice material well-being and physical safety to participate in bringing about a new, more just society ordered through law, and Fortune had followed a path similar to his father's in his idealism, material sacrifice, and commitment to reasoned public debate. That commitment reflects a central theme in Fortune's political thought: to Fortune, the achievement of racial and economic justice depended centrally on government reform through democratic processes. This vision in turn required faith in a means by which democratic, majoritarian processes could bring about such reform. To Fortune, that means was the creation of majoritarian pressure organized through coalition politics across lines of race and within the common interests of the working class.

In short, Fortune's vision of the transformative potential of democratically enacted public law was a rich one, focusing centrally on

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122. For one recent engaging treatment of the background to and events preceding the Haymarket Riot, see GREEN, *supra* note 118.

123. According to statistics monitored by Fortune's friend Ida B. Wells, the number of "Negroes murdered by mobs" reported by the *Chicago Tribune* had increased from 52 in 1882 to 164 by 1885. See IDA B. WELLS, *Mob Rule in New Orleans*, in SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892–1900, at 158, 206 (Jacqueline Jones Royster ed., 1997) (detailing statistics).

124. See FONER, *supra* note 77, at 78 n.†.

125. See, e.g., *Shall We Help Ireland?*, N.Y. FREEMAN, Jan. 9, 1886 (on file with the Fordham Law Review) (arguing that, like the Irish, African Americans should strike back rather than "run[n]ing like a deer"); see also MEIER, *supra* note 13, at 73 (noting that Fortune called on African Americans to defend themselves if ejected from first-class coaches, arguing that "one or two murders growing from this intolerable nuisance would break it up" (quoting *Railroad Villanies*, N.Y. GLOBE, Mar. 31, 1883 (on file with the Fordham Law Review))).

legislative reform. But Fortune at the same time saw a place for legal reform through court-focused action. To Fortune, defensive litigation was pressing in the short run in order to stem attacks on civil and political rights.

### C. Fortune on Legal Developments in the Courts

With his legal training, Fortune was able to write with sophisticated understanding and critical insight about the Supreme Court's civil rights rulings of the decade. In 1883 alone, the Court issued three important civil rights decisions, all with devastating results for the reach of the Reconstruction Amendments and federal civil rights statutes passed pursuant to them. Fortune wrote passionate denunciations of each of those decisions. Fortune also frequently reported on incidents of discriminatory treatment and violence against African Americans, including against himself and his friends. To oppose these dignitary harms, he championed the use of test cases, which were being filed experimentally in many parts of the country on a variety of legal theories.<sup>126</sup>

The Supreme Court's civil rights jurisprudence of the late nineteenth century focused on interpreting the three Reconstruction Era constitutional amendments: the Thirteenth Amendment, which abolished slavery;<sup>127</sup> the Fourteenth Amendment, which provided that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws";<sup>128</sup> and the Fifteenth Amendment, which provided that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."<sup>129</sup> In a complex line of cases, the Court narrowed the reach of these amendments by drawing a line between public or government action on the one hand and private action on the

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126. Beginning even before the 1860s and with growing frequency in the 1870s and after, African American travelers were filing lawsuits against transportation providers to protest ill treatment on a variety of grounds, including common-law common carrier doctrines, admiralty law, the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended at scattered sections of 49 U.S.C.), and federal civil rights statutes (enacted in 1868 and 1875). It would take me too far afield to discuss the development of legal challenges and doctrines in this area, but Fortune was well aware of these developments and discussed the cases with great interest. Excellent scholarly work documenting the frequency and various theories of these cases includes David S. Bogen, *Precursors of Rosa Parks: Maryland Transportation Cases Between the Civil War and the Beginning of World War I*, 63 MD. L. REV. 721 (2004); Patricia Hagler Minter, *The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South*, 70 CHL.-KENT L. REV. 993 (1995); Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855–1914*, 13 LAW & HIST. REV. 261 (1995); Joseph R. Palmore, Note, *The Not-So-Strange Career of Interstate Jim Crow: Race, Transportation, and the Dormant Commerce Clause, 1878–1946*, 83 VA. L. REV. 1773 (1997).

127. U.S. CONST. amend. XIII.

128. *Id.* amend. XIV, § 1.

129. *Id.* amend. XV, § 1.

other, holding that the language of the Fourteenth and Fifteenth Amendments just quoted reached government or state action only. Fortune's critique focused on attacking this public-private dichotomy and pointing out the ways in which the Court's reasoning eviscerated the protections promised by the Reconstruction Amendments and civil rights statutes enacted under them. The three key cases decided in 1883 involved state inaction—in failure to prosecute private parties for terrorizing freedmen through acts of violence in order to prevent them from exercising their newly won right to vote in *United States v. Harris*;<sup>130</sup> in permitting common carriers to prohibit persons of African American descent from moving freely on public transportation or availing themselves of public accommodations in the *Civil Rights Cases*;<sup>131</sup> and in refusing legal recognition to interracial romantic unions and to children born of such unions in *Pace v. Alabama*.<sup>132</sup> Fortune pointed out that such state inaction had the result of denying inherent political and civil rights on account of race just as profoundly as might acts of state action. In this respect, Fortune's thought was a harbinger of the critical legal studies and critical race studies critiques of the public/private distinction almost a century later.

### 1. *United States v. Harris*

Though not often discussed today, *United States v. Harris* drove the nail into the coffin of federal prosecutions of private acts of violence against freedmen attempting to exercise their newly won rights to political participation. The first case in this line was *United States v. Cruikshank*,<sup>133</sup> which arose from an 1873 massacre of fifty African American freedmen in Colfax, Louisiana, that has been described as the “bloodiest single instance of racial carnage in the Reconstruction era.”<sup>134</sup> Federal prosecutors indicted some of the whites involved in the massacre<sup>135</sup> under section 6 of the federal Enforcement Act of May 31, 1870.<sup>136</sup> On certificate from the U.S. Circuit Court for the District of Louisiana, the Supreme Court held that each of the thirty-two counts of the indictment had a fatal flaw in the language through which it had been pled. The first count, for example, had

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130. 106 U.S. 629 (1882).

131. 109 U.S. 3 (1883).

132. 106 U.S. 583 (1882).

133. 92 U.S. 542 (1875).

134. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 437 (1988).

135. For details of this event, see *id.*

136. See *Cruikshank*, 92 U.S. at 548. Section 6 of the Enforcement Act of May 31, 1870 provided that,

if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to . . . injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States . . . such persons shall be held guilty of felony.

Enforcement Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140.

alleged that the defendants banded together unlawfully to hinder and prevent “citizens [of African descent and persons of color] in the free exercise and enjoyment of their lawful right . . . to peaceably assemble”; the Court held that such a pleading was too broad because it could reach a “meeting for any lawful purpose whatever,” rather than solely a peaceable meeting “for consultation in respect to public affairs and to petition for a redress of grievances,” which was the only type of meeting that would be protected as “an attribute of national citizenship.”<sup>137</sup>

The Court engaged in similar reasoning in invalidating all of the other counts of the indictment as well. As to counts that charged an intent to deprive citizens of “lives and liberty of person without due process of law,” the Court concluded, “It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.”<sup>138</sup> Even though the indictment had specifically recited that the citizens at issue were “of African descent and persons of color,” the Court held this insufficient because “[t]here is no allegation that [the violation alleged] was done *because* of the race or color of the persons conspired against.”<sup>139</sup> Likewise, the allegations that the defendants had intended to “hinder and prevent the citizens named, being of African descent, and colored,” from exercising “their several and respective right and privilege to vote at any election” was insufficient because the Fifteenth Amendment protected, not the right to vote, but only “exemption from *discrimination* in the exercise of the elective franchise on account of race, color, or previous condition of servitude.”<sup>140</sup> In sum, the Court concluded, each count of the indictment had failed to specify a violation of any “particular right” protected by the Constitution.

The Court declared section 6 of the 1870 Enforcement Act unconstitutional altogether in its companion opinion in *United States v. Reese*.<sup>141</sup> *Reese* involved an indictment against inspectors of a municipal election in Kentucky for refusing to receive and count the vote of “a citizen of the United States of African descent.”<sup>142</sup> The Court, reiterating its statement in *Harris* that the Fifteenth Amendment “does not confer the right of suffrage on any one,”<sup>143</sup> held that section 6 of the Enforcement Act was too broad because its language evinced no “intention to confine its provisions to the terms of the Fifteenth Amendment.”<sup>144</sup>

Thus, by the time *Harris* came before it, the Court had already held that a Reconstruction Era statute aimed at protecting freedmen from violence was unconstitutional, and had devised a series of jurisprudential moves that

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137. *Cruikshank*, 92 U.S. at 551–53 (internal quotation marks omitted).

138. *Id.* at 553–54.

139. *Id.* at 554 (emphasis added).

140. *Id.* at 555 (emphasis added).

141. 92 U.S. 214 (1875).

142. *Id.* at 215.

143. *United States v. Harris*, 106 U.S. 629, 637 (1883).

144. *Reese*, 92 U.S. at 220.

rendered problematic any attempt to use Reconstruction Era legislation to protect freedmen, not only from private acts, but even from state action interfering with their exercise of the political and civil rights supposedly granted by the Reconstruction Amendments.

In *Harris*, prosecutors in Tennessee had turned to a different but similar Reconstruction Era statute, enacted prior to the ratification of the Fifteenth Amendment, known as the Ku Klux Klan Act of 1861. Section 2 of that Act contained a provision very similar to section 6 of the 1870 Enforcement Act.<sup>145</sup> Using this provision, prosecutors had indicted R. G. Harris and nineteen other whites on charges of conspiring to prevent African American citizens from voting through acts of violence.<sup>146</sup>

The Court, relying on both *Reese* and *Cruikshank*, first held that the Fifteenth Amendment could not support the prosecutors' indictment. As it had already held in those cases, the Fifteenth Amendment only provided for an "exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude," and not the right to vote.<sup>147</sup> The Court also rejected arguments that section 2 could be supported under the Fourteenth Amendment, holding that the amendment "does not add anything to the rights of one citizen as against another," but only offered "an additional guaranty against any encroachment by the States upon the fundamental rights" of national citizenship.<sup>148</sup> By its very terms, the Court reasoned, the Fourteenth Amendment covered only state action; it was never intended to confer "on Congress the power to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen."<sup>149</sup>

The language of the Thirteenth Amendment clearly contained no state action requirement and thus potentially offered the most promise for reaching private conduct. But the Court rejected the argument that this amendment could support section 2 of the Ku Klux Klan Act, using reasoning similar to that it had employed in *Reese* and *Cruikshank*. The Court argued that "the provisions of [section 2] are broader than the Thirteenth Amendment would justify," because the statutory provision could potentially be used to reach conspiracies "between two free white

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145. The provision of the 1870 Act, which took effect in 1871, prohibited "two or more persons within any State or Territory" from conspiring or going "in disguise upon the public highway or upon the premises of another" for the purpose "of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or . . . hindering . . . any State" from protecting such rights. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, ch. 22, § 2, 17 Stat. 13, 13 (1871), *invalidated by Harris*, 106 U.S. at 640–41.

146. *Harris*, 106 U.S. at 629–30.

147. *Id.* at 637. The Court asserted that "it requires no argument" to show that the language of the 1861 Act, "framed to protect from invasion by private persons, the equal privileges and immunities under the laws," could not be founded on the clause of the Constitution whose sole object is to protect the right to vote from "denial or abridgement, by the United States or states, on account of race, color, or previous condition of servitude." *Id.*

148. *Id.* at 638.

149. *Id.* at 644.

men against another free white man.”<sup>150</sup> This possibility that the Thirteenth Amendment could be read to “accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded,” produced a construction that “is clearly unsound.”<sup>151</sup> Thus, the Court concluded, section 2 was unconstitutional on its face. To the Court at the time, it did not matter that this specter of overly broad application was not present on the facts of the case before it, which did involve the deprivation of political rights to African American citizens.

Fortune’s analysis of *United States v. Harris* bluntly identified the consequences of the Court’s decision. As he noted, the decision meant that, although African Americans could in theory have the ballot, government was stripped of the power to protect the exercise of it. Fortune understood the principles of federalism that led to the result, but critiqued the way the Court had applied them, pointing out the ill effects of holding that Reconstruction Era statutes could offer no protection against private violence to the country’s newly enfranchised citizens.<sup>152</sup> As Fortune proclaimed: “There is no law in the United States for the Negro. The whole thing is a beggardly farce.”<sup>153</sup> Fortune also presciently warned that African Americans should not expect future protection from law. “Having been made equal before the law by a spasmodic outburst of goodness, we have got to settle down to that earnest and successful competition which equality of citizenship imposes.”<sup>154</sup> In other words, Fortune believed that it would be misguided to look to the Court for assistance in the project of racial advancement; self-help and intrarace solidarity were instead key to the strategy that conditions demanded.

## 2. *The Civil Rights Cases*

Fortune’s observations that legal principles, judges, and the political parties appointing those judges offered little hope for racial justice were further confirmed later in the year, when the Court handed down yet another severe blow to efforts to use federal legislation enacted pursuant to the Reconstruction Amendments to protect civil rights. In the *Civil Rights Cases*,<sup>155</sup> the Court invalidated the Civil Rights Act of 1875, which provided that all citizens 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

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150. *Id.* at 641.

151. *Id.* at 643.

152. *See, e.g., Civil Rights Laws*, N.Y. GLOBE, Feb. 3, 1883 (on file with the Fordham Law Review); *Is There Any Law for the Negro?*, N.Y. GLOBE, Feb. 17, 1883 (on file with the Fordham Law Review) (“While the tyranny which has always flowed from centralized government is obviated, no check is placed upon the tyranny of the individual state . . .”).

153. *The Ku-Klux Law*, N.Y. GLOBE, Jan. 27, 1883 (on file with the Fordham Law Review).

154. *Id.*

155. 109 U.S. 3 (1883).

places of public amusement; subject only to the conditions and limitations . . . applicable alike to citizens of every race and color.”<sup>156</sup> Five cases involving the statute had been consolidated by the Court for joint review, including four criminal prosecutions of hotels and theaters for denying access on grounds of race and one suit an African American couple had filed against a railroad company that had refused the wife access to the ladies car.<sup>157</sup>

The Court held the above-quoted provision of the 1875 Act unconstitutional. Analyzing the statute under the Fourteenth Amendment, the Court held that, like the statute in *Harris*, it impermissibly sought to regulate action beyond that of the state itself by laying “down rules for the conduct of individuals in society towards each other.”<sup>158</sup> Such an attempt to regulate social relations, the Court held, was something Congress could not do: the 1875 Act “is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement.”<sup>159</sup> Because it had disposed of the issue on this ground, the Court noted, it need not decide whether the right to enjoy equal accommodations and privileges in places of public accommodations, entertainment, and transportation “is one of the essential rights of the citizen which no State can abridge.”<sup>160</sup>

The Court next turned to the Thirteenth Amendment, acknowledging that legislation under this amendment “may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration” and “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>161</sup> However, the Court asserted, discrimination on public transportation and in places of public accommodation and entertainment had “nothing to do with slavery.”<sup>162</sup> The Court rejected arguments linking these forms of

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156. *Id.* at 9 (quoting The Civil Rights Act of March 1, 1875, ch. 114, § 1, 18 Stat. 335, 335–36, *invalidated by The Civil Rights Cases*, 109 U.S. at 26).

157. *Id.* at 4–5 (summarizing cases in the Court syllabus). On the significance of gender in these “ladies car” cases, see generally Welke, *supra* note 126.

158. *The Civil Rights Cases*, 109 U.S. at 14.

159. *Id.* at 19.

160. *Id.* The Court would reach that question, again with results adverse to the civil rights cause, in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

161. *The Civil Rights Cases*, 109 U.S. at 20.

162. *Id.* at 24. The Court further reasoned, with seemingly patently illogical circularity, that the only proper recourse for a party complaining of discriminatory treatment was “to be sought under the laws of the State.” *Id.* But in the earlier case of *Hall v. DeCuir*, 95 U.S. 485 (1877), the Court struck down a Louisiana statute that prohibited discrimination on account of color in transportation on the grounds that such legislation amounted to the regulation of interstate commerce, a power that the Constitution granted exclusively to the federal government. (On the role of interstate commerce clause analysis in these cases, see generally Palmore, *supra* note 126.) Thus it would appear that the states were not constitutionally authorized to prohibit discrimination in interstate transportation. The Court further stated that, if state laws “are adverse to [the rights of a person complaining of discriminatory treatment] and do not protect him, his remedy will be found in the corrective

discrimination to the so-called Black Codes that had existed during slavery, which barred inns and public conveyances from receiving African Americans; these had been “merely a means of preventing” escapes of enslaved persons, and “no part of the servitude itself.”<sup>163</sup> Congress had not, at the time it enacted the Thirteenth Amendment, intended to go so far as to seek 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, . . . the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.”<sup>164</sup> Just as free persons of color before the abolition of slavery had enjoyed the “essential rights” of free white citizens but still were subjected to discrimination in public accommodations and transportation, “[m]ere discriminations on account of race or color were not regarded as badges of slavery,”<sup>165</sup> and thus could not be prohibited as such under the authority of the Thirteenth Amendment.

In dissent, Justice Harlan voiced many of the obvious arguments against the majority’s opinion. First, he pointed out, slavery had been an institution that “rested wholly upon the inferiority, as a race, of those held in bondage,” and thus “their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.”<sup>166</sup> Pointing to *United States v. Reese* and other cases, Harlan noted that “[t]his [C]ourt has uniformly held that the national government has the power . . . to secure and protect rights conferred or guaranteed by the Constitution.”<sup>167</sup> The right to be free of discrimination on account of race should apply “in respect of such civil rights as belong to freemen of other races.”<sup>168</sup> In Harlan’s eyes, the rights to free movement on common carriers and in places of public accommodation or entertainment were civil rights, not social rights as the majority opinion would have it.

Harlan further disputed the line the Court had drawn between public and private action. Congress’s power to legislate to remove badges of inferiority left from slavery should extend to, “at least, such individuals and corporations as exercise public functions and wield power and authority under the State.”<sup>169</sup> As Harlan noted, corporations such as railroads are granted special powers under law to carry out public purposes and are

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legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws.” *The Civil Rights Cases*, 109 U.S. at 24. But it would appear that this was precisely the purpose of the Civil Rights Act of March 1, 1875, that the Court was invalidating in its opinion in the *Civil Rights Cases*, leaving it unclear how Congress could draft the kind of legislation the Court was positing could be used to protect citizens against race discrimination.

163. *The Civil Rights Cases*, 109 U.S. at 22.

164. *Id.*

165. *Id.* at 25.

166. *Id.* at 36 (Harlan, J., dissenting).

167. *Id.* at 34.

168. *Id.* at 36.

169. *Id.*

subject to state control for public benefit, and, such “being the relations these corporations hold to the public,” it followed that the right of a person of color to use the public services provided by such corporations “upon the terms accorded to freemen of other races, is as fundamental, in the state of freedom established in this country, as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom.”<sup>170</sup>

Fortune, needless to say, agreed with Harlan’s analysis and not the majority’s. In the days following the Court’s ruling, Fortune wrote that the *Globe* was “profoundly grateful” to “our friends,” but prepared to return to “our enemies . . . scorn for scorn.”<sup>171</sup> Noting that “only a few months ago” the Court in *Harris* had declared the United States “powerless to protect its citizens in the enjoyment of life, liberty, and the pursuit of happiness,” Fortune asked, “[W]hat sort of Government is that which openly declares it has no power to protect its citizens from ruffianism, intimidation and murder!”<sup>172</sup> Fortune’s critique of the *Civil Rights Cases* followed the same lines as those being offered by a number of leading African American statesmen, including Langston.<sup>173</sup> Because the Court’s opinion in the *Civil Rights Cases* had focused on rights—or lack thereof—against discrimination in public transportation and places of public accommodations, these critiques focused on these aspects of civil liberty as well. As Fortune wrote,

the Supreme Court now declares that we have no civil rights—declares that railroad corporations are free to force us into smoking cars or cattle cars; that hotel keepers are free to make us walk the streets at night; that theatre managers can refuse us admittance . . . it has reaffirmed the infamous decision of the infamous Chief Justice Taney [in *Dred Scott*] that a “black man has no rights that a white man is bound to respect.”<sup>174</sup>

The Court’s rulings thus set the course for efforts to improve the citizenship status of African Americans through the courts. As Fortune and many others would vividly describe, the reality of race discrimination by common carriers and places of public accommodations severely curtailed the

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170. *Id.* at 39. Justice John Marshall Harlan proceeded to canvas common-law doctrines recognizing the quasi-public nature of innkeepers and the relationship between state licensing and the operation of places of public amusement and he concluded that “such discrimination practised by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power” under the Thirteenth Amendment as well. *Id.* at 43.

171. *Between Two Fires*, N.Y. *GLOBE*, Oct. 27, 1883 (on file with the Fordham Law Review).

172. *The Civil Rights Decision*, *supra* note 120.

173. For a thorough discussion of the responses of many African American statesmen, journalists, and other leaders to the civil rights cases, see Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 *CHI.-KENT L. REV.* 1123 (1995).

174. *The Civil Rights Decision*, *supra* note 120 (quoting *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857)).

mobility and thus the civil freedom of African American citizens.<sup>175</sup> As court-driven law protected these practices, it also necessarily set the nature of the strategies required for resistance against them. Law was important because it supported practices with real and important restrictions on the physical mobility, and thus the basic civic freedom, of African American citizens. Because the Court had struck down legislative initiatives aimed at invalidating such practices, it became necessary to develop strategies aimed at the Court's jurisprudence itself.

The aspects of civil rights embodied in the ability to enjoy free movement in transportation, public accommodations, and public entertainment would continue as a special focus of the reporting in Fortune's papers throughout the decade and would also become important tenets of Fortune's platform for the Afro-American League, as I discuss in Part III. This was not so because Fortune thought these aspects of civil liberty were the complete—or even most important component of the—solution to the problem of racial injustice. Fortune instead saw the ultimate solution to racial injustice as tied up in the cause of economic justice, as I have already explored. Forms of discrimination in transportation and public accommodations became key issues because they imposed significant material burdens on immediate lived experience, and thus, presented concrete issues around which to organize resistance. Fortune and other race activists sought to reverse the Court's rulings on these matters as one set of tangible goals of a movement with a much broader, multifaceted agenda.

### 3. *Pace v. Alabama*

Of the Court's three major civil rights decisions in 1883, the one that arguably troubled Fortune the most was a less remembered one, *Pace v. Alabama*.<sup>176</sup> In that case, a unanimous Court<sup>177</sup> upheld the constitutionality of an Alabama statute that made it illegal for any "white person" and any person of African descent to marry or live in "adultery or fornication" together, punishable by imprisonment or hard labor for two to seven years.<sup>178</sup> Another section of the Alabama Code prescribed less severe penalties for adultery and fornication involving persons of the same race.<sup>179</sup> The plaintiff, Tony Pace, an African American man, and his wife, Mary

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175. In the years to come, even moderate leaders, such as Mary Church Terrell, would bridle against the hardship imposed by being humiliated during attempts to travel, dine, or sleep in a place of public accommodation while going about their business. See MARY CHURCH TERRELL, *A COLORED WOMAN IN A WHITE WORLD* 295, 300, 384–85, 390–92 (1996) (describing in detail incidents of humiliation in seeking to travel on Pullman cars, such as conductors leaving her stranded in strange locations where she could not obtain overnight accommodations, and being refused service in restaurants and hotels).

176. 106 U.S. 583 (1883).

177. This was a key civil rights case in which Justice Harlan failed to dissent. See *supra* note 62 and accompanying text (discussing reasons for Justice Harlan's failure to dissent in two key civil rights cases of the era).

178. *Pace*, 106 U.S. at 583 (citation omitted) (internal quotation marks omitted).

179. *Id.* (citation omitted).

Cox, a white woman, had been convicted and sentenced to two years imprisonment under the statutory provision that applied to interracial couples, and Pace filed a Fourteenth Amendment challenge, arguing that the state had denied him equal protection of the laws because it punished him as a black person more severely than it would a white person for the same conduct.<sup>180</sup>

Prefiguring its later decision in *Plessy v. Ferguson*,<sup>181</sup> the Court reasoned that the Alabama statutes did not violate the Fourteenth Amendment's equal protection mandate because the state had treated the races equally: both blacks and whites who engaged in intimate relations across race lines were punished more severely than persons of either race engaged in impermissible sexual relations within the same race.<sup>182</sup>

Fortune's critique focused on two aspects of the decision, invoking the vocabulary of both realism and natural rights. Fortune foresaw the harm both *Harris* and *Pace* would do to the race as a whole, the former by denying protection of the law from harassment and persecution through violence, and the latter by denying the legality and thus undermining the stability of relationships into which would be born children to whom society would assign an African American identity. Fortune also described the issue as one of natural rights, noting, "[I]t cannot be overlooked, that when a law prohibits a black man from marrying a white woman, because of his color, it strikes at the root of natural liberty."<sup>183</sup>

In some ways, Fortune seemed more troubled by this case than any other of the year. With sophisticated critical-legal insight, Fortune pointed out the way in which the Court's logic undermined families and defiled African Americans' striving for social respectability. The law's prohibition on marriage between the parents of children conceived through interracial sexual unions meant that fathers could not restore respectability to their children's mothers even if they wanted to, and it thus all but instructed fathers to abandon such children. Likewise, the Court had demeaned the innocent children of such unions by relegating them to mandatory illegitimacy.

Fortune would return to these decisions repeatedly during the course of the year, tying their results to the politics of the Court and the nation generally. No legal formalist, Fortune placed the blame for the Court's opinions squarely on the national political parties. According to Fortune, the opinions were the result of partisan politics and no more, and heralded the abandonment of African Americans by both Democrats and Republicans.<sup>184</sup>

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180. *Id.* at 584.

181. 163 U.S. 537 (1896).

182. *Pace*, 106 U.S. at 585.

183. *The Southern Problem*, N.Y. GLOBE, Mar. 3, 1883 (on file with the Fordham Law Review).

184. *Troubled Waters*, N.Y. GLOBE, Mar. 3, 1883 (on file with the Fordham Law Review); see, e.g., *Social Disorders*, N.Y. GLOBE, Mar. 3, 1883 (on file with the Fordham

For all of his antiparty rhetoric, Fortune was an inveterate political junkie; the pages of his papers were always full of national political analysis and commentary. That commentary, hardheaded and cynical, called on African Americans to cease trusting politicians of either party or any race to help them. Fortune called for African Americans to engage in self-help strategies—to help themselves through their own efforts and to distrust outsiders purporting to have friendly or sympathetic intentions, especially institutions tied to party politics, including the courts. This theme would undergird his vision for the Afro-American League later in the decade.

### III. FOUNDING THE AFRO-AMERICAN LEAGUE

Fortune's position as editor of what he had developed into the leading newspaper of its type gave him an excellent vantage point from which to observe and develop a sophisticated analysis of political developments. The national scope of the paper's reporting gave him detailed knowledge of events throughout the country, and his interest in and knowledge about politics led him to comment with authority on developments in the national parties and electoral campaigns. Because he controlled a paper of relatively large circulation and excellent reputation, his opinions mattered to African American public opinion. And because he had legal training and a sophisticated understanding of law, he was ideally suited to work on theorizing the relationship between law and race activism. Fortune also had a platform from which to engage in national-level organization-building work based on this analysis, and he engaged in that activity as well.

Fortune occasionally suggested forming a national civil rights organization in his newspaper writings.<sup>185</sup> In the spring of 1887, Fortune published a detailed, thought-out call for the formation of a national organization to be called the Afro-American League.<sup>186</sup> Its motivating issue was “mob law in the South,” and its strategy would be to “take hold of the matter ourselves, as the Irish have done” and “[I]et the entire race . . . organize into a Protective League . . . on the same plan that the Irish National League is.”<sup>187</sup> A month later, Fortune listed six issues such a national league could immediately address, namely, (1) the “almost universal suppression of our ballot in the South”; (2) its “reign of lynch and mob law”; (3) the “unequal distribution of school funds”; (4) the “odious

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Law Review) (“[W]e were the stepping stones of ambitious men who treated us with contempt when we could no longer be used as tools.”); *The Civil Rights Decision*, *supra* note 120 (saying that the Republican Party has “tried the faith of the colored man” and “gradually stripped him of all the rights which had been given to him for his valor,” while the Democratic Party is “a narrow-minded, corrupt, bloody fraud”).

185. See, e.g., THORNBROUGH, *supra* note 22, at 105–06 (describing a 1884 speech by Fortune); Alexander, *supra* note 21, at xviii, xxxiii n.42 (describing several 1884 articles).

186. *A Proposed Afro-American National League*, N.Y. FREEMAN, May 28, 1887 (on file with the Fordham Law Review). See generally Emma Lou Thornbrough, *The National Afro-American League, 1887–1908*, 27 J. S. HIST. 494 (1961).

187. *A Proposed Afro-American National League*, *supra* note 186.

and demoralizing penitentiary system of the South, with its chain-gangs” and “convict leases”; (5) the “almost universal tyranny of common carrier corporations in the South . . . in which the common rights of colored men and women are outraged and denied”; and (6) “the general policy of those who conduct places of public accommodation,” involving “matters [that] reach down in the very life of a people.”<sup>188</sup> Fortune hoped (unrealistically, as it turned out) that the South would be the “stronghold” for organizing such an organization, because that was where these forms of injustice were “most glaring and oppressive.”<sup>189</sup> It was there that the “colored laboring masses of that section [were] fast falling into a condition not unlike . . . chattel slavery,” and “employers of such labor, [were] backed up by ample legislation and by all the machinery of the law.”<sup>190</sup>

Fortune’s idea for the Afro-American League occurred in the context of and in competition among a huge outpouring of organizational efforts of many varieties; the League was but one of many organizing ideas in play at the time. National African American conventions had occurred periodically for many years, including the one Langston had spoken at in 1865, followed by national meetings in 1869, 1871, and 1873; indeed, such meetings started several decades before Emancipation.<sup>191</sup> This organizing energy had reached high levels by the 1880s, as Fortune had observed through reports he was publishing in his newspapers. Fortune reported on the call for a national colored convention in Louisville in 1883.<sup>192</sup> That same year, there were statewide conventions as well, such as one called by Harry C. Smith, the highly respected editor of the *Cleveland Gazette*, and prominent Republican lawyer Ferdinand Barnett (most famous for his later marriage to antilynching activist Ida Wells). This call followed from the Court’s decision in the *Civil Rights Cases*.<sup>193</sup> New England was another frequent site of such meetings. An 1886 Boston meeting opened with comparisons to the struggle of the Irish in England: “[T]he 8,000,000 colored Americans of the United States . . . know what it is to be oppressed, [and] send a hearty greeting to the Irish people in Ireland, who are struggling to be free from

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188. *The Afro-American League*, N.Y. FREEMAN, June 4, 1887 (on file with the Fordham Law Review).

189. *Id.*

190. *Id.*

191. On the national and state African American convention movement, see generally MEIER, *supra* note 13, at 4–10 (describing various conventions). As August Meier notes, the focus of these convention meetings swung between civil rights and economic advancement and labor issues. *Id.* at 8–9.

192. *Education in the South*, N.Y. GLOBE, Sept. 15, 1883 (on file with the Fordham Law Review).

193. *The Proposed Conference*, N.Y. GLOBE, Feb. 16, 1884 (on file with the Fordham Law Review). The signers of this call explained that they had looked “with alarm upon the rise and growth of a political despotism in the South arrayed against the exercise of the constitutional rights and privileges of our kinsmen in that section,” and viewed “with supreme disgust the seeming indifference and apathy of the General Government.” *Id.* Unlike some earlier gatherings, the call disavowed “partisan allegiance[s]” in asking all sympathizers to come together to work for greater public awareness and education on the issues at stake. *Id.*

the oppressive policy of the English government . . . .”<sup>194</sup> Its theme was that help for the people must come from within: just as the “Irishman depends upon the brainy men of his race for leadership,” so too the African American should stop “pin[n]ing] his hopes to some slimy, oily, trick[y] white man for leadership.”<sup>195</sup> Ohio, too, formed an “equal rights league” that year, organized against “laws . . . degrading to colored people” on the statute books of the several states.<sup>196</sup>

In Baltimore, the Brotherhood of Liberty was formulating test case litigation strategies that Fortune would soon incorporate into his list of priorities for the AAL. The push to focus the AAL on test case litigation appears to have come first from Baltimore lawyer Joseph Davis. Explaining that he was drawing on ideas that he and fellow lawyer Everett Waring had begun to develop through test case litigation in that city,<sup>197</sup> Davis wrote to the *Freeman* urging that the AAL make among its highest priorities to get statutes off the books that “should be declared unconstitutional and void.”<sup>198</sup> Such test litigation, Davis argued, must lead the Constitution either to “assert itself or it must confess its weakness and receive the contempt it may merit from the honest men of all nationalities.”<sup>199</sup>

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194. *Shall We Help Ireland?*, *supra* note 125.

195. *Id.*

196. *Equal Rights League*, N.Y. FREEMAN, June 19, 1886 (on file with the Fordham Law Review).

197. The Brotherhood of Liberty engaged in a sophisticated, multipronged civil rights organizing strategy, pursuing such campaigns as test case litigation to protest transportation segregation and state bastardy laws, successful legislative reform efforts, and a community defense campaign that included providing legal representation for the defendants charged in an uprising by exploited African American guano miners in the Navassa Phosphate Company case. *See generally* Elaine Kaplan Freeman, Harvey Johnson & Everett Waring, *A Study of Leadership in the Baltimore Negro Community, 1880–1900* (Sept. 1968) (unpublished Master’s thesis, George Washington University) (on file with the Fordham Law Review). The Brotherhood was formed in the wake of the 1883 *Civil Rights Cases* decision through an alliance between militant Baptist minister Harvey Johnson and several civil rights lawyers. *See id.* at 1. Johnson recruited and paid the expenses for two African American lawyers to apply for admission to the Maryland bar and secured a state supreme court ruling invalidating, on equal protection grounds, the state’s racial restriction on bar membership. *Id.* at 20–24. He then reputedly traveled to Howard Law School to find a lawyer willing to be a pioneering African American practitioner in the state, where he was introduced to Everett Waring, who became Baltimore’s first African American lawyer and head of the Brotherhood’s legal affairs only two weeks after being admitted to the Maryland bar. *Id.* at 27–28.

Perhaps because he was *not* a lawyer, Johnson believed that “process in courts of law, rather than political agitation” would better promote African-American citizenship rights. *Id.* at 24 (internal quotation marks omitted). *See also* REV. W. M. ALEXANDER, *THE BROTHERHOOD OF LIBERTY: OR OUR DAY IN COURT, INCLUDING THE NAVASSA CASE* (1891) (pamphlet describing the Brotherhood’s campaigns); Henry J. McGuinn, *Equal Protection of the Law and Fair Trials in Maryland*, 24 J. NEGRO HIST. 143, 151–53 (1939) (describing the Brotherhood’s work in the Navassa case).

198. Davis, *supra* note 14.

199. *Id.*; *cf.* MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (describing use of national shaming in the eyes of the world as a civil rights strategy in the 1950s and after).

Davis also spelled out the elements necessary for test case litigation to work. It would be necessary to “follow such cases as are suitable from the station house to the Supreme Court,” and it would require “the best legal talent attainable.”<sup>200</sup> These lawyers would have to be paid, and paid well. To support such efforts, the organization formed would have to have a big membership and with it the “sum[s] of money needed in the legitimate prosecution of its [objectives].”<sup>201</sup> With these words, written in 1887, Davis in essence outlined the test case litigation strategy that would be pursued by the NAACP when it was founded almost a quarter century later.<sup>202</sup> At the time, however, this intensively court-focused, and expensive, test case strategy was only one of many visions and ideas in play.

Soon Fortune’s columns reported on meetings of local and state leagues around the country, usually in regions where organizing among race activists had already occurred. There were local meetings in Boston, Baltimore, Philadelphia, the District of Columbia, and Cleveland, and meetings at the state level as well, in states including Kansas, Rhode Island, and New York.<sup>203</sup> Lawyer Frederick McGhee, whom Du Bois would later credit with the idea for the Niagara Movement,<sup>204</sup> called along with others for the formation of a league in Minnesota.<sup>205</sup> In late 1889, Fortune announced that a date for a national convention had been set for January 1890 in Chicago<sup>206</sup> and began using the *Freeman* to generate turnout to this important event. Discussion of who should be chosen to lead this new organization also followed; Langston’s name was floated,<sup>207</sup> though in the end he chose not to attend.

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200. Davis, *supra* note 14.

201. *Id.*

202. See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 *LAW & HIST. REV.* 97, 115–28 (2002) (describing NAACP’s early test case litigation strategies).

203. See, e.g., *An Afro-American League*, N.Y. FREEMAN, June 11, 1887 (on file with the Fordham Law Review) (Boston); *The Afro-American League*, N.Y. FREEMAN, June 25, 1887 [hereinafter *The Afro-American League, June 25, 1887*] (on file with the Fordham Law Review) (Baltimore); *The Afro-American League*, N.Y. FREEMAN, July 9, 1887 [hereinafter *The Afro-American League, July 9, 1887*] (on file with the Fordham Law Review) (Louisville); *In Readiness for Chicago*, N.Y. AGE, Dec. 28, 1889 (on file with the Fordham Law Review) (New Jersey, Pennsylvania, Illinois, and Ohio); *Kansas State Convention*, N.Y. FREEMAN, Oct. 8, 1887 (on file with the Fordham Law Review) (Kansas); *A League in Rhode Island*, N.Y. AGE, Dec. 24, 1887 (on file with the Fordham Law Review) (Rhode Island); *League Project Booming*, N.Y. AGE, Nov. 16, 1889 (on file with the Fordham Law Review) (Syracuse, San Francisco, Washington, D.C., New York, and Knoxville); *League Sentiment Growing*, N.Y. AGE, Nov. 9, 1889 (on file with the Fordham Law Review) (Minnesota and Philadelphia); *New London Notes*, N.Y. FREEMAN, Oct. 1, 1887 (on file with the Fordham Law Review) (New London); *Now for Chicago Leaguers*, N.Y. AGE, Dec. 7, 1889 (on file with the Fordham Law Review) (Cleveland).

204. See PAUL D. NELSON, FREDRICK L. MCGHEE: A LIFE ON THE COLOR LINE, 1861–1912, at 131–32 (2002).

205. *League Sentiment Growing*, *supra* note 203.

206. *Now for Chicago Leaguers*, *supra* note 203.

207. *League Sentiment Growing*, *supra* note 203.

Cracks in the unified front soon became apparent.<sup>208</sup> One involved how the League would deal with organizations not specifically organized as leagues. Fortune wanted such groups to declare themselves affiliated with the AAL, but long-standing local activists had other ideas. Another point of contention revolved around the organization's name. Pursuing the analogy to Irish self-help, Fortune liked the connotations of an "Afro-American" League, but others wanted to keep the abolitionist-style emphasis on "equal rights" by using that phrase in the organization's title. Along with this difference in the connotations embedded in the organization's name came differences in focus. Some protested Fortune's idea that the organization's members be primarily African Americans, to which Fortune responded that it was not the organization that was drawing the color line because "[t]he color line is unmistakably and cruelly drawn already."<sup>209</sup>

Fortune found himself explaining in the *Age* what was special about the AAL organizing model as opposed to other possibilities. Quickly picking up on the idea of forcing legal equality as one key distinguishing feature of the League, Fortune promised that the AAL would not be just "passing . . . resolutions," or just endorsing political parties, but instead would have a "corner-stone . . . contention [of] absolute justice under State and Federal constitutions."<sup>210</sup>

Fortune's Afro-American League convened in Chicago as planned, in a national meeting that appears to have been well attended and somewhat boisterous.<sup>211</sup> The delegates endorsed Fortune's platform basically as written. A heated debate took place on the Blair Education Bill, with the delegates in the end passing a resolution that endorsed solely "the principle

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208. In his efforts to use his paper to help promote the AAL's organization, Fortune proved himself—during this decade at least—amenable to criticism and open debate. Fortune published many letters and columns supporting the call for the formation of the League, but published some criticism and dissent as well. See, e.g., *The Afro-American League*, June 25, 1887, *supra* note 203 (urging organization of state league before calling of national convention); *The Afro-American League*, N.Y. FREEMAN, July 2, 1887 (on file with the Fordham Law Review) (arguing that the evils the League hoped to address are not amenable to political treatment); *The Florida Facts*, N.Y. FREEMAN, Aug. 13, 1887 (on file with the Fordham Law Review) (noting that the idea of a League was opposed in Florida); *League Sentiment Growing*, *supra* note 203 (noting that the *Christian Monitor* thought league organizing should slow down, while the *Bee*, a Washington, D.C.-based African American newspaper, wanted an equal rights league, an idea to which Fortune "[would] not consent").

209. J. C. Price, *The Afro-American League*, N.Y. AGE, Oct. 11, 1890 (on file with the Fordham Law Review).

210. *Importance of the League Meeting*, N.Y. AGE, Jan. 4, 1890 (on file with the Fordham Law Review).

211. Fortune presided and appeared somewhat hampered by lack of experience in maintaining order there. See *The League Convention*, N.Y. AGE, Feb. 1, 1890 (on file with the Fordham Law Review) (reporting that the "uproar which the newspapers chronicled . . . was of a mild character, the result rather of the desire of each delegate to have something to say than a disposition to be boisterous," and describing how a "gavel had not been secured for the chairman," so that a delegate had "contributed to the humor of the situation by handing [Fortune] a hayseed looking umbrella").

of Federal aid for education[]."212 The delegates adopted a multilevel organizational structure—which later would be criticized for being too unwieldy—and elected heads of a large number of subcommittees. Respected southern educator J. C. Price was elected League president, and highly successful Chicago lawyer E. H. Morris was elected attorney of the League. In another decision later criticized and rescinded, the convention delegates resolved that holders of political office could not hold national League offices.

This appears to have been one of the issues that prevented leaders with political aspirations from attending the AAL convention.<sup>213</sup> Just one month later, in Washington, D.C., an alternative large meeting of a somewhat different character took place. Attendance at the meeting overlapped with that of the month before at the Chicago AAL convention, but it featured a different list of speakers, focused far more heavily on Washington, D.C.'s African American political elite and leaders with partisan political ties and histories of holding political office. Langston, now a U.S. congressman from Virginia, attended and spoke, and delegates endorsed the Blair Education Bill as well as resolutions urging Congress to enact measures to protect southern national elections from fraud and to prevent murders of African Americans for political reasons.<sup>214</sup>

After the initial flurry of effort and enthusiasm surrounding the AAL's first national convention, Fortune faced the much more difficult task of sustaining a national organization for the long haul. Reports in his paper testify to his uphill efforts to keep the League's momentum going. A number of regional correspondents filed convincing accounts of work in their areas,<sup>215</sup> and some state leagues, especially in New York, reported real progress in regional initiatives, such as successful efforts in Albany, in conjunction with other groups, to enact state legislation to strengthen that state's civil rights legislation and ban discrimination in insurance.<sup>216</sup>

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212. *Id.*

213. See Thornbrough, *supra* note 186, at 499.

214. *Opinion Divided in Boston*, N.Y. AGE, Feb. 15, 1890 (on file with the Fordham Law Review).

215. See *A League in Rhode Island*, N.Y. AGE, July 11, 1891 (on file with the Fordham Law Review) (Rhode Island state league); *Personal and League Notes*, N.Y. AGE, June 6, 1891 (on file with the Fordham Law Review) (Nebraska and Minnesota state leagues); *Personal and League Notes*, N.Y. AGE, May 30, 1891 (on file with the Fordham Law Review) (Harrisburg, Pennsylvania, convention).

216. See, e.g., *Civil and Public Rights*, N.Y. AGE, Apr. 12, 1890 (on file with the Fordham Law Review) (New York civil rights legislation drafted by supporters of the New York League); *The Civil Rights Measure*, N.Y. AGE, Apr. 26, 1890 (on file with the Fordham Law Review) (reporting on hotel industry's opposition to Albany League's work on antidiscrimination legislation as well as introduction of another bill banning discrimination in insurance); *Insurance Discrimination*, N.Y. AGE, May 17, 1890 (on file with the Fordham Law Review) (Albany League's progress on insurance legislation); *The New York League on Deck*, N.Y. AGE, Mar. 1, 1890 (on file with the Fordham Law Review) (New York League's work with committee on civil rights); *New York State League*, N.Y. AGE, May 9, 1891 (on file with the Fordham Law Review) (state AAL convention at which Fortune

Boston's Equal Rights League sent reports of meetings and resolutions supporting federal elections legislation and taking other stands,<sup>217</sup> and the District of Columbia, also adhering to its National Equal Rights Association model, reported on big meetings weighing in on federal elections legislation proposals at the time.

At the same time, Fortune decided to undertake a test case litigation of his own. After being ejected from a pub in New York City, Fortune retained his friend and fellow activist, the lawyer T. McCants Stewart,<sup>218</sup> to file a case under New York's state law banning discrimination in places of public accommodations. The front pages of Fortune's papers began to feature calls for contributions to Fortune's legal defense fund. These calls were never signed by Fortune himself, but instead by other well-known race leaders.<sup>219</sup> At the same time, Fortune and Price were confronting the difficulty of sustaining a national organization on very limited resources, a problem that would soon prove fatal to the AAL.

Although local efforts continued much longer,<sup>220</sup> the last successful reports of League activity are full front-page treatments of Stewart's arguments in Fortune's case and then the successful verdict he obtained in it.<sup>221</sup> Booker T. Washington wrote to the *N.Y. Age* to congratulate his old friend Stewart, as well as his newer associate Fortune, with whom a relationship of manipulation through financial dependency would at some point begin to grow.<sup>222</sup>

There was little time to celebrate this victory, however. Fortune began to complain that insufficient funds had been transmitted from state leagues into the AAL's treasury to pay the expenses of running the organization.<sup>223</sup> By winter, Fortune was refuting as "humbug" claims that the League was dead, but desperately urged state vice presidents to organize and send in their payment of one dollar per person to the national office, as he as

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spoke); *Work of the Albany League*, N.Y. AGE, Mar. 28, 1891 (on file with the Fordham Law Review) (insurance bill passes).

217. See, e.g., William C. Nell, *At the Cradle of Liberty*, N.Y. AGE, Aug. 9, 1890 (on file with the Fordham Law Review) (reporting on Boston meetings); William C. Nell, *Boston's National League*, N.Y. AGE, July 19, 1890 (on file with the Fordham Law Review) (same).

218. For more about Stewart, see *supra* note 116.

219. See, e.g., E. L. Thornton, *Fortune Prosecution Fund*, N.Y. AGE, Sept. 13, 1890 (on file with the Fordham Law Review) (reporting that Washington, D.C., leaders T. T. Simmons, J. E. Bruce, and Robert H. Terrell were involved in raising money for Fortune's defense fund).

220. For an excellent investigation into these continuing local efforts, see Shawn Leigh Alexander, "We Know Our Rights and Have the Courage to Defend Them": The Spirit of Agitation in the Age of Accommodation, 1883–1909, at 77–98 (Sept. 2004) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst) (on file with the Fordham Law Review) (describing continuing local work by League chapters and supporters in various parts of the country).

221. See, e.g., *Justice*, N.Y. AGE, Nov. 14, 1891 (on file with the Fordham Law Review).

222. On the beginnings of this unfortunate aspect of Fortune's relationship with Washington during this period, see THORNBROUGH, *supra* note 22, at 160–61, 171.

223. *The League*, N.Y. AGE, Oct. 11, 1890 (on file with the Fordham Law Review).

secretary “cannot carry the League on his shoulders.”<sup>224</sup> By spring of the next year, there was no money for postage.<sup>225</sup> Reports came in of some organizing efforts in the Midwest and New England, and the New York organizations’ efforts to enact and strengthen that state’s civil rights protective legislation continued, but even Fortune could find little positive news to report about organizing in the South.

The South’s importance led the AAL to decide to hold its next national convention there, but that decision only exacerbated the organization’s already flagging status. A much smaller national meeting took place in Knoxville, Tennessee, in 1891, but few delegates attended.<sup>226</sup> Those who did were forced to brave Tennessee’s separate cars law, giving AAL lawyer Frederick McGhee facts to pursue a challenge to this statute on breach of contract and intentional infliction of emotional distress grounds.<sup>227</sup>

But these steps did not reinvigorate the League. After the Knoxville meeting, Fortune again insisted that the League was not dead,<sup>228</sup> but issued another urgent call for local leagues to report to the general secretary that winter. In 1892 no convention was held, and by August 1893 even Fortune was prepared to announce the AAL’s demise as a national organization.<sup>229</sup>

The enthusiastic rise followed by the rapid demise of the Afro-American League at the national level is sometimes described as an unfortunate failure, but history proves otherwise. As already noted, organizations dedicated to race advancement came and went with frequency without their agendas necessarily being set back as a result. Just as the League followed from prior national equal rights conventions, the organizing efforts leading to the League laid the groundwork for later efforts. Fortune’s Afro-American League played just such a role in the history of the movement for racial justice, a topic I turn to briefly below.

#### IV. THE LEGACY OF THE AFRO-AMERICAN LEAGUE IN LATER RACE ACTIVISM

##### A. *The Afro-American Council*

In 1898, five years after Fortune acknowledged that the national AAL was defunct, AAL founding member Reverend Alexander Walters, along

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224. *Apathy in the League*, N.Y. AGE, Dec. 6, 1890 (on file with the Fordham Law Review).

225. *What’s the Matter with the League?*, N.Y. AGE, Mar. 14, 1891 (on file with the Fordham Law Review).

226. T. Thomas Fortune, *Personal and Pertinent*, N.Y. AGE, July 25, 1891 (on file with the Fordham Law Review). Fortune claimed this was because delegates did not want to brave Tennessee’s separate cars law. *Id.*

227. See NELSON, *supra* note 204, at 32–34 (describing McGhee’s efforts in this case and his frustration at the AAL’s lack of successful fundraising for it).

228. See *The League Very Much Alive*, N.Y. AGE, Aug. 29, 1891 (on file with the Fordham Law Review).

229. Thornbrough, *supra* note 186, at 501.

with Fortune and others, revived it under the new name of the Afro-American Council (AAC).<sup>230</sup> Although there was a substantial overlap in the membership and leadership of the two organizations, one difference was salient: Booker T. Washington had by this time emerged in the eyes of many whites as a fitting national leader, following his accommodationist speech at the 1895 World's Fair in Atlanta,<sup>231</sup> and he manipulatively and heavy-handedly sought AAC control. Nevertheless, although the tone of the AAC's platform was less militant than that of the AAL, the stated objectives of the AAC remained substantially consistent with the objectives of the AAL adopted ten years earlier.<sup>232</sup>

The AAC's objectives were listed in a different order than the AAL's, and some of their focus and underlying analytical principles had changed, but the ten "objects" of the AAC listed in its constitution and by-laws included all six of the AAL's, ordered as follows: (1) combating lynching; (2) "testing the constitutionality of laws which are made for the express purpose of oppressing the Afro-American," (3) "securing legislation which in the individual States shall secure to all citizens the rights guaranteed them by the 13th, 14th and 15th Amendments to the Constitution,"<sup>233</sup> (4) "[p]rison [r]eform," (6) "both industrial and higher education," and (10) "[t]o urge the appropriation [of] school funds by the Federal Government to provide education for citizens who are denied school privileges by discriminating State laws."<sup>234</sup>

Some differences are also obvious. Fortune's call for attention to wages had switched to a call for "promot[ing] business enterprises," and instead of emphasizing organizing in the South, the AAC "recommend[ed] a healthy migration from terror-ridden sections of our land to States where law is respected and maintained." The AAC's objectives also placed greater emphasis on self-help and work by the African American community to encourage education, to "promote business enterprises among the people," and to "inaugurate and promote plans for the moral elevation of the Afro-

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230. For Walters's detailed account of reviving the League, see ALEXANDER WALTERS, *MY LIFE AND WORK* 95–140 (1917).

231. See LOUIS R. HARLAN, *BOOKER T. WASHINGTON: THE MAKING OF A BLACK LEADER: 1856–1901*, at 217–28 (1972) (describing this speech and its consequences in elevating Washington's national reputation).

232. See generally *THE NATIONAL AFRO-AMERICAN COUNCIL* 15 (Cyrus Field Adams ed., 1902).

233. *Id.* The Afro-American Council (AAC) mentioned discrimination as had the AAL, but that concept was now collapsed into challenges to constitutionality of laws made "for the express purpose of oppressing the Afro-Americans." *Id.* Unlike the AAL's founding platform, the AAC's made no mention of different kinds of discrimination, such as common carriers and places of public accommodation, and no mention of discrimination carried out by private actors. The theory for legal challenges to discrimination became exclusively rooted in constitutional theories rather than referring to both constitutional as well as contract and tort-based common carrier doctrines, as had the AAL. And the priority given to bringing test cases had possibly shifted as well: the Council listed it as its second priority, right under lynching. The emphasis on the oppressive "purpose" of these laws also perhaps signals a slight shift in or refining of the theory under which such cases would be pursued.

234. *Id.*

American people.”<sup>235</sup> And in the place of the AAL’s militant demands, the AAC’s language spoke of investigating and making “an impartial report of all lynchings,” and working to “educate sentiment on all lines that specially affect our race.”<sup>236</sup>

Proper historical assessment of the AAC as a civil rights organization awaits further inquiry from a new generation of scholars.<sup>237</sup> One respect in which its historical importance is very clear is in its role in providing a battleground on which militants such as African Methodist Episcopal Minister Reverdy Ransom—an eloquent spokesperson for views much like the early Fortune’s, sounding in the social gospel movement, and English or Fabian socialism blended with militant race analysis<sup>238</sup>—fought it out with Washington supporters. Other militants who jumped into this battle within the AAC included Ida Wells-Barnett,<sup>239</sup> former AAL booster Frederick McGhee,<sup>240</sup> militant equal rights advocate and newspaper editor William Monroe Trotter, who edited the fiercely anti-Washington *Boston Guardian*, and other anti-Washington Bostonians.<sup>241</sup> Somewhat later, Du Bois, who at first criticized Ransom’s attacks on Washington, joined the anti-Washington bandwagon and began agitating against him in print and in public remarks as well.<sup>242</sup> Convinced that the cause required a complete break from Washington’s domination and manipulative tactics, Du Bois, Ransom, McGhee, Trotter, and others formed the idea of establishing a new independent and militant movement, to be named the Niagara Movement, after the place of its first meeting in 1905.<sup>243</sup>

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235. *Id.*

236. *Id.*

237. The standard historical assessment has been to characterize the AAC as never truly developing legs as an organization. *See, e.g.*, Thornbrough, *supra* note 186, at 506 (“Torn as it was by internal dissension and, more important, lacking adequate financial support, the Council made little progress in carrying forward the fight for racial equality.”). But more recent scholarship has documented more wide-ranging activities, especially by regional chapters. *See, e.g.*, ALEXANDER, *supra* note 197, at 106–476 (presenting a detailed and comprehensive documentation of the activities of the AAC). In this monumental investigation of both the national- and regional-level activities of the AAC, Alexander’s dissertation opens important new perspectives in understanding the AAC’s historical significance and reassessing standard historical evaluations of the organization.

238. On this highly important, but today greatly underappreciated, race leader, who strongly influenced Du Bois’s later thought and spoke publicly in militant opposition to the Tuskegee machine some years before Du Bois did, see generally CALVIN S. MORRIS & REVERDY C. RANSOM: BLACK ADVOCATE OF THE SOCIAL GOSPEL (1990); Susan Carle, *Vision of Social Justice in the Thought and Activism of Reverdy Ransom in Chicago* (Mar. 7, 2009) (unpublished manuscript, on file with author).

239. *See* GIDDINGS, *supra* note 78, at 403–04, 413–14, 423, 437–39.

240. *See* NELSON, *supra* note 204, at 108–11.

241. *See* FOX, *supra* note 78, at 30–80.

242. *See* DAVID LEVERING LEWIS, W. E. B. DU BOIS: BIOGRAPHY OF A RACE, 1868–1919, at 287 (1993).

243. *Id.* at 297–342. The founding of the Niagara Movement is also reflected in a treasure trove of original documents organized by archivists at the Du Bois Library at the University of Massachusetts at Amherst. *See* Du Bois Central, Umass Amherst W. E. B. Du Bois Library, SCUA, <http://www.library.umass.edu/spcoll/collections/dubois/index.htm> (last visited Feb. 17, 2009).

### B. *The Niagara Movement*

The preparations for the Niagara Movement's first meeting were carried out in secrecy in order to avoid it being infiltrated by Washington's spies. Fortune was nowhere near the founding meeting, for several reasons. First, by that point, Fortune's health and psychological state had drastically declined as he headed for a total collapse in what we might today call a nervous breakdown in 1907.<sup>244</sup> Second, even if he had been in fighting form, Fortune was close to the last person, other than Booker T. Washington himself, who would have been invited to the Niagara Movement's secret founding. By then Fortune was correctly perceived as Washington's intimate friend and ally, and the Niagara movement "men"—as all were, on Trotter's insistence<sup>245</sup>—were determined to keep Washington allies away from their meeting.

For these reasons, it is all the more striking that the Niagara Movement's 1905 Declaration of Principles so closely resembles the AAL's.<sup>246</sup> As did the AAL, the Niagara Movement, in its Declaration, placed suffrage—and, more specifically, continuing with the AAL's emphasis on masculinity rights, "manhood suffrage"—first on its list.<sup>247</sup> Second, the Declaration protested "against the curtailment of our civil rights," namely, "the right to equal treatment in places of public entertainment according to their behavior and deserts."<sup>248</sup> Next on the Niagara Movement's list was "economic opportunity," and the discussion in its Declaration of this issue returned to Fortune's and the League's analysis of the interconnections among socioeconomic class, systems of land ownership and economic production, and private orderings and public law.<sup>249</sup> Thus the Niagara Movement members stated,

We especially complain against the denial of equal opportunities to us in economic life; in the rural districts of the South this amounts to peonage and virtual slavery; all over the South it tends to crush labor and small business enterprises; and everywhere American prejudice, helped often by iniquitous laws, is making it more difficult for Negro-Americans to earn a decent living.<sup>250</sup>

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244. See THORNBROUGH, *supra* note 22, at 304–06.

245. For more on William Monroe Trotter's opposition to allowing women to join the Niagara Movement as regular members see *supra* note 78.

246. Fortune would later complain that Du Bois had stolen his ideas in drafting the AAL's founding documents when he drafted the Niagara Movement's Declaration of Principles. See THORNBROUGH, *supra* note 22, at 269–70. A comparison of the two documents suggests he was right; indeed, it made good sense for Du Bois to start the process of drafting founding principles for a new organization by working from similar documents drafted by organizations that had come before. *Id.*

247. See THE NIAGARA MOVEMENT: DECLARATION OF PRINCIPLES (1905) [hereinafter NIAGARA MOVEMENT PRINCIPLES], available at <http://www.library.umass.edu/spcoll/digital/dubois/312.2.839-01-07.pdf>.

248. *Id.* at 1.

249. *Id.*

250. *Id.*

On education, the Niagara Movement called on the state to provide this basic resource to all Americans: “Common school education should be free to all American children and compulsory.”<sup>251</sup> This analysis of education moved away from the emphasis the AAL and the AAC had placed on the national government’s role, and called for both state and federal government to step up to the plate.<sup>252</sup>

In other parts of the three-page-long declaration, the Movement called for “abolition of the dehumanizing convict-lease system,”<sup>253</sup> and the recognition of African American rights to decent housing and health: “We plead for health—for an opportunity to live in decent houses and localities, for a chance to rear our children in physical and moral cleanliness.”<sup>254</sup>

The Niagara Movement also protested discrimination: “Any discrimination based simply on race or color is barbarous.”<sup>255</sup> As the League had, it singled out for protest the system of “‘Jim Crow’ cars, since its effect is and must be to make us pay first-class fare for third-class accommodations, render us open to insults and discomfort and to crucify wantonly our manhood, womanhood and self-respect.”<sup>256</sup> The Niagara Movement addressed the connections between race and labor problems about which Fortune had written so much.<sup>257</sup> Finally, just as the young

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251. *Id.*

252. *Id.* at 1–2 (noting that “[w]e urge an increase in public high school facilities in the South, where the Negro-Americans are almost wholly without such provisions,” and “[w]e believe that, in defense of our own institutions, the United States should aid common school education, particularly in the South, and we especially recommend concerted agitation to this end”).

253. *Id.* at 2.

254. *Id.* Here, interestingly, the issue of decent housing—a very pressing one in light of the denial of good housing to African Americans in most parts of the country, *see, e.g.*, TERRELL, *supra* note 175, at 113–19 (describing housing discrimination she and her distinguished husband faced in Washington, D.C.)—was not framed as a discrimination analysis but rather in the vocabulary of social rights.

255. NIAGARA MOVEMENT PRINCIPLES, *supra* note 247, at 2.

256. *Id.* Note that here the analysis of various aspects of the wrong of discrimination in public accommodations was separated into several theories. One was contract or common carrier analysis: one should get what one pays for. Another was the grievousness of the affront to dignity rights. Yet a third was the affront to African American masculinity and femininity specifically.

257. *Id.* (“We hold up for public execration the conduct of two opposite classes of men: The practice among employers of importing ignorant Negro-American laborers in emergencies, and then affording them neither protection nor permanent employment; and the practice of labor unions in proscribing and boycotting and oppressing thousands of their fellow-toilers, simply because they are black. These methods have accentuated and will accentuate the war of labor and capital, and they are disgraceful to both sides.”).

Fortune had, the Niagara Movement declared its militancy<sup>258</sup> and called for agitation.<sup>259</sup>

The Niagara Movement's Declaration of Principles also echoed some of the AAC's themes<sup>260</sup> and added ideas that were not in the terser and more rudimentary founding platform of the League.<sup>261</sup>

The Niagara Movement's existence as an organization was brief. Financial troubles and bickering by some of its members, especially the prickly Trotter, led it to cease meeting in any large-scale way within a few years of its formation. But as was the case with the AAL, the ideas hammered out through the formative period of the Niagara Movement were passed along to new organizations.

This next time, the ideas of the Niagara Movement, inherited in substantial part from Fortune and the AAL, went into a forum that was in some ways more problematic and complicated because this movement—first called the National Negro Conference, a year later to become the NAACP—was, during its first decade, heavily dominated by wealthy whites. This meant, on the one hand, involvement by donors with financial resources and connections based on centuries of race privilege that could support the hiring of paid staff and otherwise provide resources to keep the fledgling organization on its feet through its early years. But it also meant that those wielding power within the organization lacked first-hand experience with racial oppression and held what appear through

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258. *Id.* (“We refuse to allow the impression to remain that the Negro-American assents to inferiority, is submissive under oppression and apologetic before insults. Through helplessness we may submit, but the voice of protest of ten million Americans must never cease to assail the ears of their fellows, so long as America is unjust.”).

259. *Id.* at 3 (“Of the above grievances we do not hesitate to complain, and to complain loudly and insistently. . . . Persistent manly agitation is the way to liberty, and toward this goal the Niagara Movement has started and asks the co-operation of all men of all races.”).

260. *See, e.g., id.* (urging “upon Congress the enactment of appropriate legislation for securing the proper enforcement of those articles of freedom, the thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States,” and “corresponding duties upon our people,” including duties to vote, respect the rights of others, work, obey the laws, be clean and orderly, send children to school, and to respect ourselves).

261. These included protesting the unfair and unequal treatment of African Americans in the military and “the increase of a desire to bow to racial prejudice” in the nation’s churches. The Niagara Movement called for “upright judges” and “juries selected without discrimination on account of color,” and for “the same measure of punishment and the same efforts at reformation for black as for white offenders,” as well as for “orphanages and farm schools” and “juvenile reformatories for delinquents.” *Id.* at 2–3.

This last platform was probably included on the suggestion of founding member William H. H. Hart, a Howard University law professor from 1890 until 1922, who also operated a farm school for African American orphan boys until Congress discontinued its appropriation to the District of Columbia to fund that endeavor, prompting Hart to enter into a prolonged litigation battle against the federal government. *See* DICTIONARY OF AMERICAN NEGRO BIOGRAPHY 294 (Rayford W. Logan & Michael R. Winston eds., 1982); L. M. Hershaw, *William H. H. Hart*, 19 J. NEGRO HIST. 211 (1934) (obituary notes). Hart was the victorious plaintiff in *Hart v. Maryland*, 60 A. 457, 463 (Md. 1905), in which the Maryland Court of Appeals struck down that State’s separate car law because it posed an undue burden on interstate commerce as applied to interstate passengers.

contemporary eyes to be sometimes problematic attitudes about their relative superiority in relation to the group they were setting out to serve.<sup>262</sup>

### C. *The Founding of the NAACP*

The NAACP is often referred to as having been founded primarily by whites,<sup>263</sup> but this assumption is belied by a closer look at the transmission of the substantive founding platform of the NAACP. Such an examination shows that the new organization's ideas came straight from the Niagara Movement and the African American organizations that preceded it, with some adjustments largely made in order to educate and explain the issues to a biracial membership. In addition, many of the African Americans who played significant roles in the NAACP's organizing meetings or were on its founding committee or first board of directors had been members of the AAL, the AAC, or the Niagara Movement.<sup>264</sup>

The discourse throughout the 1909 founding conference sounded in the English-style socialism favored by Fortune, Ransom, Du Bois, and other progressives of both races during the period. Du Bois, for example, emphasized foremost the importance of the right to vote, for which all African Americans were united in demand,<sup>265</sup> and at the same time emphasized the problems of industrial conflict between African Americans and working class whites. This conflict, Du Bois perceived, "accentuates race prejudice; when a whole community, a whole nation, pours contempt on a fellow-man it seems a personal insult for that man to work beside me or at the same kind of work."<sup>266</sup> Thus, Du Bois argued, the "first result[] of the denial of civil rights is industrial jealousy and hatred."<sup>267</sup> Moreover, he pointed out, if white workers have the vote and African Americans do not,

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262. On the racial attitudes of the NAACP's founders, see generally Glasberg, *supra* note 9.

263. See, e.g., *id.* at 65 ("[T]he roots of the NAACP lie far indeed from the Black militant thrust of the turn of the century . . .").

264. These included Bishop Walters, Fortune's co-signer of the call to found the AAL and later president of the AAC, as well as Ida Wells-Barnett, one of the more militant voices within the AAC, and Mary Church Terrell, a more moderate AAC member who was invited onto the NAACP's first Executive Committee. From the Niagara Movement came founder W. E. B. Du Bois, who would go on to edit the NAACP journal, *The Crisis*, from 1910 until 1934; L.M. Hershaw, a D.C. intellectual who had worked with Du Bois in editing the predecessor publication *The Horizon* and joined the NAACP's 1910 General Committee; Morehouse College President John Hope, Du Bois's friend from Atlanta; as well as Chicago dentist and race activist Charles Bentley, appointed to the NAACP's first board of directors. In addition, the Niagara Movement's one white member, Mary White Ovington, played a key role in the NAACP's founding and continued to be deeply involved in the day-to-day operations of the national organization for many years. See generally CAROLYN WEDIN, *INHERITORS OF THE SPIRIT: MARY WHITE OVINGTON AND THE FOUNDING OF THE NAACP* (1998).

265. See W. E. B. Du Bois, *Politics and Industry*, in *PROCEEDINGS OF THE NATIONAL NEGRO CONFERENCE 1909*, at 79-82 (William Loren Katz ed., 1969) [hereinafter *NATIONAL NEGRO CONFERENCE*].

266. *Id.* at 83.

267. *Id.*

white workers can “enforce [these] feeling[s] of prejudice and repulsion.”<sup>268</sup>

So too, virtually all of the whites who spoke at the founding conference were committed to various forms and degrees of progressivism-merging-into-socialism of a mild democratic sort. Thirty years had passed since Fortune had read and been inspired by Henry George, John Ruskin, Karl Marx, and the English socialists, but the NAACP’s white founders had read many of the same works and were committed to many of the same ideas. William English Walling, the secretary of the founding committee and a southerner by birth and background,<sup>269</sup> echoed Du Bois’s emphasis on economic class, seeing “two Souths, those who employ Negro labor and those who compete with it.”<sup>270</sup> He argued, “The white workingmen must be persuaded that their only permanent welfare is co-operation with their colored fellow-workers and that opposition must inevitably lead to total demoralization of all organized effort of both classes.”<sup>271</sup> In the ensuing discussion period, Reverend Waldron agreed, opining that, “unless something is done to change things, the poor white man not only of the South, but particularly in the South, is going to feel the pinch of the shoe just as much as the Negro.”<sup>272</sup> In a paper Waldron delivered later in the day, he called on “the Negro” to “make common cause with the working class which to-day is organizing and struggling for better social and economic conditions,” noted that “[t]he old slave oligarchy maintained its ascendancy largely by fixing a gulf between the Negro slave and the white free laborer,” and argued that the “Negro . . . must see that the cause of labor is his cause.”<sup>273</sup>

Oswald Garrison Villard, the conference convener, outlined a program for organizing a strong permanent body to grow out of the conference. Villard urged the organization to establish a “political and civil rights bureau,” which “would bend its energies to bringing about the enforcement of the Fourteenth and Fifteenth Amendments” and “obtaining court decisions upon the disfranchising laws and other discriminatory

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268. *Id.* at 84.

269. See William English Walling, *The Negro and the South*, in NATIONAL NEGRO CONFERENCE, *supra* note 265, at 98.

270. *Id.* at 101.

271. *Id.*

272. *Discussion*, in NATIONAL NEGRO CONFERENCE, *supra* note 265, at 110, 110 (statement of Rev. J. Millon Waldron).

273. J. Milton Waldron, President, Nat’l Negro Am. Political League, *The Problem’s Solution* (May 31, 1909), in NATIONAL NEGRO CONFERENCE, *supra* note 265, at 159, 164–65. Niagara Movement founding member William Trotter then reiterated the importance of the understanding of the connections between race and class that had been previously made. “The existence of color lines in industrial matters is calamitous,” Trotter pointed out. In the South, in particular, he noted, white workers were turning out African American workers wherever they could. “And why is this?” Trotter posed; because the African American is disenfranchised. See NATIONAL NEGRO CONFERENCE, *supra* note 265, at 113 (statement of William M. Trotter).

legislation.”<sup>274</sup> Assuring that with the right connections such a board “would have no difficulty in raising” large sums, Villard proposed that the organization set as one of its goals to “have at its disposal sufficient money to employ the highest legal talent obtainable” and cover “the heavy cost of carrying up to the Supreme Court case after case.”<sup>275</sup> With these resources available to carry on a more sustained assault, Villard envisioned that the Court, which he characterized as “that shifting and evasive body,” would finally be “compelled to decide whether there shall be two degrees of citizenship in this country.”<sup>276</sup>

The resolutions adopted by the 1909 committee echoed these priorities<sup>277</sup> and outlined three “first and immediate steps,” namely: “(1) That the Constitution be strictly enforced and the civil rights guaranteed under the Fourteenth Amendment be secured impartially to all”; “(2) That there be equal educational opportunities for all and in all the States, and that public school expenditure be the same for the Negro and white child”; and “(3) That in accordance with the Fifteenth Amendment the right of the Negro to the ballot on the same terms as other citizens be recognized in every part of the country.”<sup>278</sup>

Thus the NAACP was launched, and would go on to play an important role in the civil rights movement as it moved through the twentieth century. That history involves a much longer, more complicated story, of course, but in important ways begins with T. Thomas Fortune and his Afro-American League. Tracing the long and multifaceted roots of the civil rights

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274. Oswald Garrison Villard, *The Need of Organization* (June 1, 1909), in NATIONAL NEGRO CONFERENCE, *supra* note 265, at 197, 203.

275. *Id.* at 202–03.

276. *Id.* at 203. Similarly, on the issue of lynching, which he brought up first in his presentation, Oswald Garrison Villard proclaimed, “Never has a race needed more a strong central legal bureau able to employ the ablest counsel to prosecute men who kill and call it law.” *Id.* at 201. Such a bureau would stand “ever ready to insist upon the punishment of guilty officials” and could also “cure the lynching evil by prosecuting lax authorities and bringing civil suits for damages against the local or county authorities.” *Id.* at 201–02. And Villard also envisioned an education bureau, which would seek to uplift the standards of Negro schools and colleges; as well as an industrial relations bureau, which would “deal with the colored man in relation to labor.” *Id.* at 204. Thus Villard’s proposal hit all of the main elements of the AAL’s founding platform: education, lynching, labor, disenfranchisement, and discrimination. *See id.* at 201–04.

277. The resolutions further “denounce[d] the ever-growing oppression of our 10,000,000 colored fellow citizens,” and stated,

The systematic persecution of law-abiding citizens and their disfranchisement on account of their race alone is a crime that will ultimately drag down to an infamous end any nation that allows it to be practised, and it bears most heavily on those poor white farmers and laborers whose economic position is most similar to that of the persecuted race.”

Charles Edward Russell, *Address*, in NATIONAL NEGRO CONFERENCE, *supra* note 265, at 220, 222. They also listed the issues of persecution of organized workers, peonage, enslavement of prisoners, and disfranchisement of “large bodies of whites in many Southern States”; and demanded “for the Negroes, as for all others, a free and complete education.” *Id.* at 222–23.

278. *Id.* at 223–24.

movement's motivating ideas should thus include locating their origins in Fortune's thought and activism of the 1880s.

#### CONCLUSION

The AAL, the AAC, the Niagara Movement, and the early NAACP all clearly embraced demands for what we would translate today as "formal" equality in civil and political rights. Fortune was staunchly in favor of abolishing race segregation in schools, a view he shared with some but not all of the race leaders of his time. He wrote in enthusiastic support of using courts for test case litigation to challenge segregation and other ill-treatment of African Americans by common carriers and places of public accommodation and amusement. He argued tirelessly about the importance of fighting against the dignitary harms of such Jim Crow practices and laws. These are all ideas today associated with legal liberalism, and it would simply be a gross distortion of the historical record to portray these priorities as anything less than central to race activists' agenda in the 1880s. But this does not mean that race activists thought about court-centered action on issues such as transportation segregation in legal liberalist terms.

To the contrary, as I have shown, Fortune combined calls for court-centered strategies with calls for legislative reform to create a more just economic order. He thought such reform could be achieved through the creation of interracial coalitions based on commonalities of class interest. He further thought that the ultimate cause of justice rested in the elimination of poverty and severe economic disadvantage for all citizens regardless of race.

Fortune's ideas about the connections between racial and economic justice obviously no longer fit the requirements of our times. Turn-of-the-century utopian socialism cannot compete with the inexorable press of neoliberalist ideologies pushing toward global economic development with little regard for the suffering of the economically disadvantaged. But in thinking about paths forward in promoting greater justice—around race, around class, within the United States and globally—it may be well to pick up some of the skeins of analysis lost along the way in the twentieth-century struggle for racial justice in the United States. Some of those skeins sought to knit together various types of analysis, including analyses of the problems of race *and* class; and of civil and political rights, on the one hand, *and* economic justice, on the other. More of that knitting may be very much needed in the face of the compartmentalized analytical and political activity in which social justice activists and intellectuals are engaged today.