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The Law of Racial Segregation

Law was as central in shaping status as it was in shaping rights to physical and psychic integrity at the turn of the century. Just as in the matter of unintended injury, law mediated among the competing interests of individuals, railroads, and the state. African-Americans resisted their exclusion from first-class accommodations in public transit by resort to law. Railroads and other carriers turned to law to justify their right to regulate the space of public transit. Southern states and Congress asserted their authority to regulate corporate power and the terms of access to public transit through law. In this sense, as is true of each of the legal narratives told here, the law of race had both its own story and was exemplary of a broader pattern in the construction of a protectionist state. Yet nowhere was the conundrum at the center of this study of individual liberty in turn-of-the-century America more boldly, painfully present: protection of liberty – whether the safeguarding of physical and psychic integrity or of status – was paired with limitations on individual autonomy. Even in attempting to use state regulation to their own ends, Americans, white and black, advanced the power of the state.

The modern law of race began with African-Americans' resistance to the unwritten norms of interaction between the races called "custom." Blacks brought the first legal challenges to carriers' racially exclusionary practices in the North in the decade or so before the Civil War. The timing of the challenges reflected the rising tide of antislavery sentiment in the North, as well as the increasing importance of public transit in urban life. In this way, what historians have noted with regard to segregation generally held true as well for the law of race: its beginnings were in the North.[1]

[1] See Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* (Chicago, 1961); J. Morgan Kousser, "'The Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment," *Northwestern University Law Review* 82 (1988): 941.

William Howard Day, an early, outspoken, black civil rights activist, brought the only suit which would reach a state supreme court before the war after he and his wife, Lucy Stanton Day, were denied cabin passage on a Great Lakes steamer in 1855.[2] The company responded to Day's suit by insisting that "custom and usage" and company regulations limited blacks to deck passage on the Detroit River and Lake Erie.[3] In *Day v. Owen* (1858), the Michigan Supreme Court acknowledged the established custom and usage regarding black passengers and found that the company's regulation was supported by custom. The court brushed aside Day's argument that being denied the first-class accommodations he sought was tantamount to excluding him from passage; he had not been excluded the court insisted, he merely had not been allowed passage in exactly the accommodations he sought. The law, the court explained, gave passengers a right to passage, not a right to choose their seat.[4] The court's holding in *Day* was consistent with decisions of other Northern states' lower courts. In a number of suits challenging the practice of streetcar companies excluding blacks from the interior of the cars, Northern trial courts held that common carriers' public function barred them only from excluding passengers entirely, not regulating where they rode.[5]

The Michigan Supreme Court's decision in *Day*, and other early cases involving segregation or exclusion on steamboats, railroads, and streetcars in the North, reflected the peculiar legal status of public carriers of passengers in nineteenth-century America. As a matter of law, "common carriers" were both private and public. They were privately owned and yet they served an essential public function. Over the course of the nineteenth century, state supreme courts and the United States Supreme Court crafted a "common law of common carriers" in which the public obligation of carriers was carefully balanced against the fact of private ownership.[6] The common law was judge-made law. Each state had its

[2] R.J.M. Blackett, *Beating Against the Barriers: Biographical Essays in Nineteenth-Century Afro-American History* (Baton Rouge, 1986), 287, 299; Ellen N. Lawson, "Lucy Stanton: Life on the Cutting Edge," *Western Reserve Magazine* 10 (1983): 9.

[3] *Day v. Owen*, 5 Mich. 520 (1858).

[4] Ibid.

[5] *State v. Kimber*, 30 Ohio Dec. 197 (Hamilton C.P. Ct. 1859); *Goines v. M'Candless*, 4 Phil. Rep. 255 (Dist. Ct. 1861); *Derry v. Lowry*, 6 Phil. Rep. 30 (C.P. Ct. 1865); For discussion of suits brought in Massachusetts and New York, see Litwack, *North of Slavery*, 111–12; Dorothy Sterling, ed., *We Are Your Sisters: Black Women in the Nineteenth Century* (New York, 1984), 223–24.

[6] See, e.g., *Inhabitants of Worcester v. The Western R.R.*, 45 Mass. (4 Met.) 564, 566 (1842). See also *New Jersey Steam Navigation Company v. Merchants' Bank*, 47 U.S. (6 How.) 344, 382–83 (1848); *Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678 (1872); *Murphy v. Western & Atlantic R.R.*, 23 F. 637, 638 (C.C.E.D. Tenn. 1885) (describing railroads as "in a large sense public institutions subject to public control").

own law of common carriers just as each state had its own common law rules relating to the law of negligence or the law of nervous shock. One state's holdings were not legally binding on another. Nonetheless, as was true generally of the common law, states looked to the decisions of their brethren in other states for guidance, so that a law that was common in the sense of shared, in fact, developed.

In evaluating the rights and obligations of common carriers to passengers, courts looked to the centuries-old common law of inns, which like common carriers were privately owned but served a public function. The common law required that innkeepers accept all guests of good character and conduct who sought room and paid the established rate.[7] In his widely respected treatise on *Bailments,* Judge Joseph Story explained that carriers of passengers "are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest."[8] The public duty of carriers and innkeepers required them not only to carry or accept as guests, but also to protect the comfort and safety of their passengers and guests.[9] But there were exceptions to the obligation to carry. In keeping with their private police power, that is, their obligation to protect what amounted to the health, safety, and welfare of their passengers, carriers had the right, and in some cases the obligation, to exclude persons afflicted with contagious diseases, persons of known bad character, and those intent on harming other passengers. To protect their own business interests, carriers also had the right to exclude those intent on harming the carrier's business.[10]

In keeping with their rights and obligations, carriers were allowed under the common law to adopt "reasonable regulations." The law required only that regulations be published or otherwise made known and regularly, not capriciously, enforced. Reasonable regulations were part of the contract for passage between carrier and passenger. A carrier could eject or refuse to carry any passenger who did not comply with its regulations. Courts and the law became involved only when a passenger brought suit challenging a regulation. To determine the reasonableness of a regulation, a court looked to the social realities, norms, and customs of the area.[11] In this way custom

[7] *Jencks v. Coleman,* 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258); *Commonwealth v. Power,* 7 Met. 596 (Mass. 1854).

[8] Joseph Story, *Commentaries on the Law of Bailments,* 8th ed. (Boston, 1870), 421, 581. See also Andrew K. Sandoval-Straus, "Bed, Board and Hearth: The Common Law of Innkeepers and the Legal Construction of Public Space," paper presented at the ASLH Annual Meeting, Princeton, N.J., October, 2000.

[9] *Chamberlain v. Chandler,* 3 Mason 242, 245–46 (N.Y. 1823).

[10] *Jencks,* 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7258).

[11] Ibid.

and regulations formed an unbreakable circle: custom led to regulations, and in turn courts determined the reasonableness of regulations by reference to custom.

Prior to the Civil War, formal company regulations defining conditions of passage for blacks, when in place at all, were largely limited to carriers in the North.[12] The Michigan Supreme Court had decided *Day v. Owen*, after all, in a context in which the United States Supreme Court could hold that blacks "had no rights which the white man was bound to respect."[13] So long as the institution of slavery cast its legal shadow over the land, custom operated as law in many matters. A conductor for the Chicago & Northwestern Railroad in Illinois in 1870 could explain that there had never been any need to object to colored ladies riding in the ladies' car "because the custom had always been to have them go into the forward car [the smoker] and they always went there as a matter of course.... They knew their place and they went to it."[14] As his comment suggests, it was in the context of blacks no longer "knowing their place" that formalization of rules became necessary. The Civil War and the end of slavery had transformed the landscape of daily life. And what carriers quickly discovered was that black women would seek the privilege of their sex: access to ladies' accommodations.

Ladies' cars were an early example of carriers' regulatory power. In establishing ladies' cars, common carriers embedded the most "natural" of social divisions – that of sex – in the structure of carriage.

[12] Regulations were often oral. For example, when the first streetcar companies began operations in San Francisco in the early 1860s, the company superintendents merely told their conductors that blacks should not be allowed on the cars. If they got on, they should be asked to leave; if they refused, they should be put off. Testimony of Thomas S. Dennison (Conductor), Mr. Gardner (Superintendent, Omnibus R.R. Co.), *Record in Charlotte Brown;* Testimony of Mr. Morrison (Superintendent, North Beach and Mission R.R. Co.), in *William Bowen v. The North Beach and Mission R.R.*, undated newspaper clipping, California Historical Society, San Francisco. See Barbara Y. Welke, "Rights of Passage: Gendered-Rights Consciousness and the Quest for Freedom, San Francisco, California, 1850–1870," in Quintard Taylor and Shirley Moore, eds., *African-American Women in the American West* (Oklahoma University Press, forthcoming).

[13] *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 407 (1857). The classic explication of the case is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York, 1978). On the case brought by his wife, Harriet Robinson Scott, and the consequences of lawyers pursuing his case rather than hers, see Lea Vander Velde and Sandhya Subramanian, "Mrs. Dred Scott," *Yale Law Journal* 106 (1997): 1033–122.

[14] Testimony of Wilson J. Hunter (conductor, witness for defendant railroad), *Record in Anna Williams*, pp. 29–30.

Ladies' accommodations embedded in public travel an accepted system of unequal accommodations, yet company regulations establishing ladies' accommodations were accepted as natural because they fit the social landscape of nineteenth-century American life. In the few instances where white men challenged their exclusion from ladies' accommodations, courts held that the regulations were reasonable by reference to nothing other than the social standards and travel conditions of the time. In an 1874 opinion, the Wisconsin Supreme Court explained at length the absolute necessity of "ladies' cars":

> The use of railroads for the common carriage of passengers has not only vastly increased travel generally, but has also specially led women to travel without male companions. To such, the protection which is a natural instinct of manhood towards their sex, is specially due by common carriers. And in view of the crowds of men of all sorts and conditions and habits constantly traveling by railroad, it appears to us to be not only a reasonable regulation, but almost if not quite a humane duty, for railroad companies to appropriate a car of each passenger train primarily for women and men accompanying them; from which men unaccompanied by women should be excluded, and even women or men accompanying women of offensive character or habits; so as to group women of good character on the train together, sheltered as far as practicable from annoyance and insult. It is a severe comment on our civilization that such a regulation should be necessary, but the necessity is patent to all experience and intelligence.[15]

No state or federal law, no judicial decision required that carriers make distinctions among passengers in seating on the basis of sex. "Ladies' cars" were a reflection of carriers' private right of regulation, as much in their power not to offer as in their power to offer. As one railroad noted of "ladies' cars" in 1874, "[t]he establishing of reserved cars for white women is at most but a courtesy, a license or privilege that may at any moment be revoked."[16]

In the wake of the Civil War, ladies' accommodations provided legal justification for segregation by race. The legal validity of regulations establishing ladies' accommodations evidenced carriers' right to

[15] *Bass v. The Chicago & Northwestern Ry.*, 36 Wis. 450, 460 (1874). See also *Cracker v. The Chicago & Northwestern Ry.*, 35 Wis. 657, 672 (1875); *Brown v. Memphis & Charleston R.R.*, 7 F. 51, 56 (C.C.W.D. Tenn. 1881). For earlier cases involving the obligation of steamboat captains to female passengers, see *Chamberlain v. Chandler*, 3 Mason 242, 245–46 (N.Y. 1823); *Nieto v. Clark*, 1 Clifford 145, 149–50 (C.C.N.Y. 1858).

[16] Statement and Brief of the Respondent's Counsel (defendant railway), April 7, 1874, p. 27, *Record in Chilton.*

separate passengers who had paid the same fare to promote the comfort and safety of their passengers. Beginning with the 1867 decision of the Pennsylvania Supreme Court in *The West Chester and Philadelphia Railroad Company v. Miles*, ladies' accommodations served as an analogy to establish the legality of regulations segregating passengers by race. Black was to white as male was to female. "The simple question," Justice Daniel Agnew of the Pennsylvania Supreme Court wrote in *Miles*, "is whether a public carrier may, in the exercise of his private right of property, and in the due performance of his public duty, separate passengers by any other well-defined characteristic than that of sex." His unqualified answer was yes. Sex as an existing, accepted ground for separating passengers paying the same fare provided a legal, socially irrefutable analogy for separating passengers by race.[17]

Before the United States Supreme Court in 1877 in *Hall v. Decuir*, lawyers for John Benson, the owner of the *Governor Allen*, made the most of the sex/race analogy. Arguing on Benson's behalf, R. H. Marr carefully explained, "Passengers on steamboats are not huddled together, male and female, in the same apartments[;] separation on the basis of sex is a requirement of common decency." "No one pretends," he insisted, "that this uniform separation violates the law of equality; nor can it be tortured into an assertion of the superiority of one sex or the other."[18] And then he completed the analogy:

> A male passenger, basing his right on the laws of the United States, might have complained that he was not allowed a stateroom in the ladies' cabin, with as much force and propriety as a colored passenger could have complained that he was furnished apartments and accommodations not inferior to, but different in locality, from those furnished to white passengers.[19]

Through the postemancipation years and into the twentieth century this analogy remained fundamental to the legal justification of racial segregation on common carriers.[20]

Segregation by race, like segregation by sex, fit deeply held assumptions about the fundamental differences between black and white, male and female. In language that would be cited and quoted with approval by almost every Southern state court to address the question

[17] *Miles*, 55 Pa. 209, 211.

[18] Brief and Argument for Plaintiff in Error (John G. Benson, defendant), p. 33, *Record in Decuir.*

[19] Ibid., 10.

[20] See, e.g., *Council v. Western & Atlantic R.R. Co.*, 1 I.C.C. 638, 641 (1887); *Chiles v. Chesapeake & Ohio Ry.*, 125 Ky. 299, 305 (1907).

of race on common carriers, Justice Agnew, writing for the Pennsylvania Supreme Court in *Miles*, focused much of his opinion on the natural separation of the races. God had created the races "dissimilar" to effect his intent, Justice Agnew explained, that they not "overstep the natural boundaries He has assigned to them." He had separated the white and black races on the face of the globe. "The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature." Law and custom had long ordained this natural separation.[21] Seen in this light, a regulation separating passengers on the basis of race was undeniably reasonable.

Yet what the Pennsylvania Supreme Court in *Miles*, the defendant's lawyer in *Decuir*, the conductor in *Williams*, and others who relied on the analogy provided by sex ignored was precisely the sex of the plaintiffs before them. Mary Miles, Josephine Decuir, Anna Williams, and the majority of other plaintiffs in suits challenging discrimination on carriers were women. The very existence of regulations providing special accommodations to ladies on public transit meant black women would seek the privilege of their sex. Whether demanding recognition of their right to a seat in the interior of a streetcar, a seat in a ladies' car of a train, or accommodation at the ladies' table or in the ladies' cabin of a steamer, black women sought a right ordained by social custom for "ladies" and recognized by carriers in their regulations.[22]

As a practical matter, so long as a carrier had only a regulation assigning blacks to a particular coach or a regulation establishing a ladies' coach there was no conflict. For example, the train on which Mary Miles was riding had a single passenger coach on which the company's regulations required blacks to sit at one end of the car.[23] In Anna Williams's 1870 suit against the Chicago & Northwestern Railroad the reverse was true. The railroad had no formal regulation assigning blacks to a particular part of the train, but it did have a regulation establishing a ladies' car for the exclusive use of ladies traveling alone or with a gentleman escort.[24] Before the Illinois Supreme Court, Anna Williams's lawyer focused the court's attention on the fact that the defendant railroad "had established a rule

[21] *Miles*, 55 Pa. at 213.

[22] Women had also dominated in cases brought in the North prior to the war challenging the practice of streetcar companies which excluded blacks or allowed them only to ride on the platform of cars. Although streetcars were not segregated by sex, the right to a seat in the interior of the car was clearly seen as gendered female. For a broader discussion of these suits, see Welke, "Rights of Passage."

[23] *Miles*, 55 Pa. 209, 210 (1867).

[24] *Chicago & Northwestern R.R. v. Williams*, 55 Ill. 185 (1870).

discriminating between the sexes."[25] "[H]aving made such discrimination, and thereby rendered some cars less fit and less desirable for the use of ladies than would have been the case had no such distinction been made, the company had no right to exclude [Williams] from the ladies' car." Moreover, by excluding her from the ladies' car on account of her color, the defendant-railway had virtually excluded Anna Williams from its train.[26] The Illinois Supreme Court essentially agreed. Under the circumstances, the railroad could not require Williams to "go forward to the car set apart from and occupied mostly by men." The court continued, "It is a sufficient answer to say, that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to [Williams] at that time. She may have undertaken the journey alone, in view of that very fact, as women often do."[27]

Through the 1870s and 1880s, state and federal courts applying the common law of common carriers, particularly federal trial courts, demanded that black women paying first-class fare enjoy the same privileges that white women paying first-class fare enjoyed. When Selina Gray and her husband, William, brought suit against the Cincinnati Railroad Company in federal district court in Ohio in 1882, Judge Swing strongly directed the jury that the common law required that what a carrier provided for white ladies traveling first-class must be provided for black ladies traveling first-class. If "this lady" bought a first-class ticket and presented herself for admission to the ladies' car and there was room in that car, the agents of the company were obligated to open the door and furnish her a seat. If they refused to do so and agreed to carry her only so long as she would ride in the smoking car "where none but gentlemen were, and where they were smoking, she had a right, under the law, to say that she would not go into it." The law required this company "to provide for this colored woman precisely such accommodation, in every respect, as were provided upon their trains for white women."[28] Three years later, in 1885, Judge E. S. Hammond, a federal district judge in Tennessee, echoed this conclusion in *Logwood v. Memphis & Charleston Railroad.* Judge Hammond instructed the jury that although carriers may segregate passengers by race, they must nonetheless "furnish substantially the same accommodations to all." "If a railroad company furnishes for white ladies a car with special

[25] Appellee's Brief (Anna Williams, plaintiff), *Record in Anna Williams,* pp. 1–4.
[26] Ibid.
[27] *Williams,* 55 Ill. 185, 189 (1870).
[28] *Gray,* 11 F. 686–87.

privileges of seclusion and other comforts, the same must be substantially furnished for colored ladies."[29]

Even in suits brought under the Civil Rights Act of 1875, federal courts adopted the common-law standard. In 1877, in *United States v. Dodge*, Judge Duval, a federal trial judge in Texas, instructed the jury that "every citizen of the United States, male or female, native born or naturalized, white or black, who pays to the carrier the fare demanded for the best accommodations, is entitled to the best provided for the different sexes." If the train had only one car appropriate for the accommodation of ladies, then Milly Anderson was entitled to a seat there. Only if the evidence showed that both cars on the train were equally used by gentlemen and ladies, without distinction of race, would the conductor not have been guilty for directing Anderson to one car rather than the other. But, the judge insisted, the jury must be convinced that the car to which the conductor had directed Anderson "was in fact, in all respects, equal to the other, and was as fit and appropriate at that time for white female citizens as for colored female citizens." In fact, they should consider the evidence as though Milly Anderson had been a "white female citizen, instead of a colored one."[30]

From the beginning, the balance courts struck between race and gender was a fragile one. But as equality and individual rights assumed a place in the vocabulary they had not had before, they disrupted the right of carriers to impose inferior accommodations on men as well as women. In 1882, Judge Swing in *Gray v. Cincinnati Southern Railroad* had spoken deploringly, but resignedly, of the practice of requiring all men, even those who sickened from or detested smoke, to ride in the smoker if they were not accompanying a lady. He had insisted that "the gentlemen's money is just as good as the lady's, in the eye of the law and they are bound to provide for him such reasonable accommodation as he has paid and contracted for."[31] In 1885, Judge D. M. Key, a federal district judge in Tennessee, pointedly told the jury that a white man ejected from the ladies' car and ordered into the smoker would have had as much right to object as a man of color.

[29] *Logwood*, 23 F. 319. That the jury nonetheless reached a verdict against the Logwoods was likely shaped by Judge Hammond's telling them that "[a]ll travelers have to submit to some discomforts and inconveniences," and that if they believed the conductor and "there was no unreasonable delay," the Logwoods could not recover. See also *Houck*, 38 F. 226, 229 (C.C.W.D. Tex. 1888).

[30] *Dodge*, 25 F. Cas. 882 (D.C.W.D. Tex. 1877) (No. 14,976) (charge to jury). Although this was a criminal prosecution under the Civil Rights Act of 1875, the judge's jury charge stressed that the right to equal carriage was protected by the common law.

[31] *Gray*, 11 F. 683, 686.

> A train with but two cars in which passengers could go, as in this case, and in which the ladies and their friends had one exclusively, the other car being used for smoking and for gentlemen without lady friends, does not give like accommodations to all. The passenger from the rear car may go into the forward car and smoke, but the passenger in the forward car cannot go into the rear car for any purpose. He cannot go into it to smoke or to escape the smoke, however offensive to him.[32]

Two years after *Murphy*, in 1887, the Interstate Commerce Commission, in its first decision addressing racial discrimination in railroad passenger accommodations, echoed Judge Key's language. In *Council v. Western & Atlantic Railroad*, the commission exhorted, "[b]ut the right of the carrier to assign a white man to another car than the ladies' car, or a colored man to a car for his own race, takes nothing from the right of either to have accommodations substantially equal to those of other passengers paying the same fare." The car to which William Councill had been removed, the commission insisted, did not meet this standard.[33]

Railroads and other carriers responded with outrage to the idea that any individual had rights superior to those of the company in its regulation of its property. In Anna Williams's 1870 suit before the Illinois Supreme Court, the Chicago & Northwestern Railway's lawyer argued, "In short, the question raised is whether a railroad company, by its agents, has control of its cars, or whether its many passengers have such control." To remind himself to emphatically make the point in his oral argument before the court, the railway's lawyer answered his own question in capital letters: "RAILROAD COMPANIES HAVE CONTROL OF THEIR CARS."[34] And yet what the Illinois Supreme Court's 1870 verdict for Williams made clear was that there were distinct limits to the property rights of carriers.

Unwilling to see their rights supplanted by African-Americans, by state or federal legislatures or by courts applying the common law, carriers employed a series of contradictory, but overlapping, strategies to subvert or circumvent the law. From the outset, carriers contributed to the sexualization of race, using charges of immorality and sexual threat to justify the exclusion of black women and men from first-class, ladies' accommodations. Defending itself against a suit brought by Jane Brown after she was ejected from a ladies' car in Corinth, Tennessee, in 1880, the Memphis & Charleston Railroad insisted that the conductor

[32] *Murphy v. Western & Atlantic R.Rs.*, 23 F. 637, 640 (C.C.E.D. Tenn. 1885).
[33] *Council*, 1 I.C.C. 638, 641 (1887).
[34] Appellant's Oral Argument (Chicago & Northwestern Ry. Co.), p. 3, *Record in Anna Williams*.

excluded Brown because she was a prostitute and therefore could not be permitted to ride among ladies.[35] In Jane Brown's case, the ploy failed. Judge Hammond, the Tennessee federal district judge trying the case, pointedly denied the right of a carrier to adopt a regulation which excluded women from the ladies' car on the basis of their character for chastity. Such a regulation, he explained,

> would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from traveling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.

He instructed the jury to treat the case exactly as though Jane Brown "were a white woman excluded under similar circumstances." The jury responded with a verdict for Brown of $3,000.[36] But most black women were not as fortunate as Brown. For example, in Sallie Robinson's suit brought under the Civil Rights Act of 1875, her lawyer, William Randolph, insisted that denying Robinson a seat in the first-class ladies' coach "because of a belief, that she being colored and her traveling companion white, therefore, she must necessarily be a woman wanting in virtue" was the same as denying her accommodations because of race.[37] The U.S. Supreme Court, embracing the decision of the lower court in the railroad's favor, disagreed. The law forbade carriers from discriminating on the basis of race alone. Any other basis of exclusion took the case outside the protection of the Civil Rights Act.

The sexualization of race was also used by railroads to defend against suits brought by black men. Railroad lawyers warned jurors to consider what a verdict for a black man ejected from a ladies' car would mean for the rights of their wives and daughters.[38] Southern judges as well as juries found the argument compelling. In one opinion after another, Southern state supreme courts quoted at length

[35] *Brown v. Memphis & Charleston R. Co.*, 7 F. 58. The railroad also initially claimed to have ejected Brown on the basis of a regulation barring colored persons from riding in the ladies' car, but later withdrew the argument because, in fact, it did not have a formal regulation.

[36] *Brown v. Memphis & Charleston R. Co.*, 5 F. 499, 500, 502 (C.C.W.D. Tenn. 1880).

[37] Brief for Plaintiffs in Error (Richard A. & Sallie J. Robinson), p. 17, *Record in Robinson (The Civil Rights Cases)*.

[38] See, for example, the argument of the Louisville & Nashville R.R. Company's lawyer to the jury on retrial of William Brinkley's suit, cited in Brinkley's appeal to the Sixth Circuit. Bill of Exceptions, filed by W. A. Brinkley in Sixth Circuit, April 3, 1899, *Record in Brinkley*.

from the Pennsylvania Supreme Court's 1867 decision in *Miles*, including the language, "If a negro take his seat beside a white man or his wife or daughter, the law cannot repress the anger, or conquer the aversion which some will feel."[39]

The sexualization of race provided an alternative basis for exclusion under circumstances where law forbade discrimination on the basis of race or where the custom of racial exclusion had not been formalized in regulations. The portrayal of black women and men as immoral or sexually dangerous also justified regulations excluding black passengers in general from facilities set aside for white ladies. Finally, the image of black women as low-class and immoral explained why most whites saw no injustice in requiring black women to ride in smoking cars with white and black men or in colored bureaus with minimal privacy, while white women enjoyed segregated facilities.

At the same time that railroads and other common carriers were sexualizing race, they sought to take the language of gender, at least the privileges of white ladies, out of the legal debate over race by minimizing the significance of gendered accommodations, focusing on the bare physical accommodations, and substituting ungendered terms for the traditional gendered terms of carriage. All three strategies were at work in Mary Jane Chilton's suit against the St. Louis & Iron Mountain Railway. At trial, the conductor countered Chilton's fear of riding in a car with men by insisting that "all classes, both male and female" rode in the smoker. Before the Missouri Supreme Court, the railroad focused the court's attention on the trifling differences in the bare physical accommodations between the two cars on the train. "Surely," the railroad's lawyers sarcastically observed, "the difference between seats covered with enameled cloth and seats covered with plush, is not so great, as that one should consider himself greatly wronged, if not allowed to choose between them."[40] Ignored was the fundamental fact that Chilton was a woman traveling with two children in her care at nightfall. Finally, the railroad avoided gendered terms of carriage in describing the cars. In its pleadings and briefs, the railroad referred to the "ladies' car," from which the conductor and brakeman had excluded Chilton. But rather than admit that they had directed her to

[39] Despite the fact that the plaintiff, Mary Miles, was a woman, Justice Agnew's opinion portrayed a world in which there were white men protecting white ladies from black men. *Miles*, 55 Pa. 211–12. For cases citing *Miles* with approval, see *Hall v. Decuir*, 95 U.S. 485, 503 (1877) (J. Clifford conc.); *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896); *Bowie v. Birmingham Ry. & Electric Co.*, 125 Ala. 397, 406–10 (1899); *Chiles v. Chesapeake & Ohio Ry. Co.*, 125 Ky. 299, 306–9 (1907), aff'd 218 U.S. 71 (1910).

[40] Statement and Briefs of the Respondent (railroad), p. 22, *Record in Chilton*.

the smoker, they referred to it as "another car equally safe, comfortable, commodious, and convenient." In its 1893 opinion, the Missouri Supreme Court adopted the defendant's labels. By substituting a conclusory label for what was, in fact, the smoker, the railroad and the court could paper over the fact that white passengers were segregated by sex to provide white ladies with a car free from the vices and dangers of men. Having semantically eradicated the inequality between the two cars, the court could go on to conclude that there were no differences between the two cars which mattered.[41]

But if these ploys worked in some cases, railroads and other carriers could not always erase the figure of the black woman or man before the court. As we have seen, most of the black women and men who brought suit in the 1870s and 1880s were conscious representatives of the new black middle class. While the law did not make skin color, sex, respectability, or previous condition of servitude the basis for decision per se, there was a close correspondence between these factors and winning or losing.[42] The evident respectability of many women and men bringing suit became foundation for and justification of decisions in their favor.[43] The Tennessee trial judge in Ida B. Wells's 1883 suit against the Chesapeake, Ohio & Southwestern Railroad described Wells as "a person of lady-like appearance and deportment, a school teacher, and one who might be expected to object to traveling in the company of rough or boisterous men, smokers and drunkards."[44] In reaching a verdict in favor of Lola Houck in

[41] *Chilton v. St. Louis & Iron Mountain Ry. Co.*, 114 Mo. 94 (1893). For examples from other cases in which railroads used these strategies, see Appellant's (defendant Chicago & Northwestern R.R.) Oral Argument, *Record in Anna Williams*, pp. 4–5; Oral Argument of Joseph B. Cummings (counsel, the Georgia R.R.), *Record in Heard*, pp. 29–31; Testimony of Charles Oaks (brakeman, witness for railroad), *Record in Houck*, p. 31.

[42] Evidence of a prior history of slavery seemed to almost ensure defeat in court. See Chapter 8, n. 39.

[43] The pattern had begun with Northern cases brought before and during the war and applied as well to cases brought under state equal-accommodation laws and the Interstate Commerce Act. See, e.g., *Derry v. Lowry*, 6 Phil. Rep. 30 (1865) (describing Mrs. Derry as a "very respectable woman, almost white, ... being then on her way home from a church, where with others of her race, she had been engaged in providing comforts for the wounded soldiers"); Reasons for Judgment (J. E. North Cullom), June 14, 1873, *Record in Decuir*, p. 74 (describing Decuir as "genteel in her manners, modest in her deport, neat in her appearance and quite fair for one of mixed blood.... She was never a slave, nor a descendant of a slave"); *Heard*, 1 I.C.C. 720, 721 (1887) (describing Heard as "a man of education and decorous behavior").

[44] Opinion, Statement of Facts, Judge James O. Pierce, Dec. 24, 1884, *Record in Wells (Sept. 15, 1883, incident)*, pp. 61–62.

1888, the Texas federal district judge in *Houck v. Southern Pacific Railway Company* wrote, "The undisputed evidence in the case shows that Mrs. Houck is a young married woman with some degree of negro blood in her veins, that casually looking at her or her husband it would be difficult to distinguish either of them from white persons."[45] Not all black women ultimately won their cases (Ida B. Wells, for example, lost on appeal) and fewer black men won even at trial, yet, as cases like Lola Houck's decided late in the 1880s made all too clear, the rise of a black middle class rendered it increasingly difficult for carriers to assign respectable black travelers to what in fact were second-class accommodations and get away with it under the law. Custom and private regulation had proved inadequate to the task.

But for Northern victory in the Civil War and with it the end of slavery in the United States black women and men like Selina Gray, Ida B. Wells, and William Brinkley would not have even had a claim under the common law. Their common-law suits rested on their claim to the rights of citizenship. But the legal transformation wrought by the Civil War was broader, more revolutionary than this.[46] The Reconstruction Amendments and the Civil Rights Acts of 1866 and 1875 coupled a new individualism with a newly centralized federal authority. Were this the end of the story, the picture of an ascendant federal government sheltering its citizens would be complete. But Southern states did not simply surrender the banner of states' rights in the face of dramatic assertions of federal power any more than states elsewhere in the nation gave up their police power to that of the federal government in these years. Southern whites resisted black freedom and liberty, and railroads and other carriers were as hostile to the interposition of federal as state authority.

The years from secession through the 1880s were marked by a tug-of-war between state and federal power. The national government met Southern secession with a refusal to recognize the right to secede. At the war's end, when Congress essentially made ratification of the Thirteenth Amendment a condition for return of the former Confederate states to full participation in the union, Southern states swallowed the compromise and then quickly turned about and enacted what became known in the North as "Black Codes." These

[45] 38 F. 226 (1888).

[46] See James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York, 1988); Harold M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (Boston, 1973); Robert Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876* (New York, 1985); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York, 1988).

state statutes forced most blacks to remain as plantation laborers, circumscribed their most basic civil rights, and stamped them with the badge of slavery. In three states – Mississippi, Florida, and Texas – the codes mandated black exclusion from first-class (white) accommodations on railroads.[47]

Congress angrily lashed back with congressionally imposed state governments which abrogated the Black Codes and passed equal accommodation laws, the Fourteenth Amendment, and federal civil rights legislation (the Civil Rights Acts of 1866 and 1875) guaranteeing African-Americans' basic civil liberties and access to public accommodations. The Civil Rights Act of 1875 and state equal-accommodation laws (passed between 1868 and 1873) were specifically directed at private acts of discrimination, barring racial discrimination in inns, public conveyances, and places of amusement.[48] Intended to acknowledge and safeguard individual civil rights against private interference, they provided for suits by individuals as well as governmental suits to enforce their terms.

Yet state equal accommodations laws proved ineffective and vulnerable to challenge. Railroads found fertile ground for their claim

[47] Laws of Mississippi, 1865, pp. 231–32 (Ch. 74, sec. 6); Laws of Florida, 1865–66, at 25 (Ch. 1466, sec. 14); General Laws of Texas, 1866, p. 97 (Ch. 52). See Foner, *Reconstruction*, 199; Vernon L. Wharton, *The Negro in Mississippi, 1865–1890* (New York, 1965), 230; Lawrence D. Rice, *The Negro in Texas, 1874–1900* (Baton Rouge, 1971), 142, 145–46; C. Vann Woodward, *The Strange Career of Jim Crow*, 3rd rev. ed. (New York, 1974), 23–24.

[48] Between 1868 and 1873, Florida, Mississippi, Texas, Tennessee, South Carolina, Georgia, Louisiana, and Arkansas adopted equal-accommodation laws. Not all state antidiscrimination laws used the language of equal accommodations. Louisiana's law, for example, barred carriers "from making discriminations on account of race or color." Laws of Florida, 1873, pp. 25–26 (Ch. 1947); Laws of Mississippi, 1873, pp. 66–69 (Ch. 63); General Laws of Texas, 1871, p. 16 (Ch. 21); Laws of Tennessee, 1867–68, pp. 84–85 (Ch. 66); Laws of Arkansas, 1868, p. 39 (No. 15); ibid., 1873, pp. 15–19 (No. 12); Laws of South Carolina, 1868–69, p. 179 (No. 98); ibid., pp. 337–38 (No. 233); ibid., 1869–70, pp. 386–88 (No. 279); Laws of Louisiana, 1869, p. 37 (No. 38); ibid., 1870, Extra Session, p. 93 (No. 39); ibid., 1873, at 156–57 (No. 84); Public Laws of Georgia, 1870, p. 398 (No. 258); ibid., p. 427 (No. 289). See generally, Gilbert T. Stephenson, *Race Distinctions in American Law* (New York, 1910), 115–20. Section One of the Civil Rights Act of 1875 provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." The Civil Rights Act of 1875, Sec. 1, 18 Stat. 336 (1875).

that "equal accommodations" did not mean identical accommodations. In a suit brought by Wesley Gaines before the Georgia Railroad Commission challenging the exclusion of his niece from a ladies' car on the Georgia Railroad, for example, the commissioners began by noting that they "fully recognized" the "right of a carrier to provide separate cars for white and colored passengers." After examining the cars the railroad provided, the commissioners concluded that "those provided for the colored passengers were equally as good as those provided for the white passengers."[49]

More important in terms of the balance of federal and state power and its implications for individual and corporate rights, the interstate character of steamboat and railroad travel rendered state equal-accommodation laws vulnerable to constitutional challenge. In its first constitutional decision relating to the rights of blacks on common carriers – *Hall v. Decuir* (1877) – the United States Supreme Court held the Louisiana antidiscrimination law unconstitutional on the ground that it was a regulation of interstate commerce in violation of the commerce clause.[50] "There can be no doubt," Chief Justice Morrison R. Waite began his opinion for the Court, "but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states." Although Josephine Decuir was traveling only between two points within the state of Louisiana, the steamer on which she was traveling, the *Governor Allen,* ran on the Mississippi River from New Orleans to Vicksburg, Mississippi. Noting that while the statute "purports only to control the carrier when engaged within the State," Justice Waite insisted that "it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage." The Mississippi River passes through or along the borders of ten different states, Justice Waite noted. "It was to meet just such a case that the commercial clause in the Constitution was adopted." If the law were enforced, a passenger riding in the cabin set aside for white passengers while outside the state would suddenly be forced to share the

[49] See *Gaines v. Georgia Rail Road & Banking Co.*, Decision of the R.R. Commissioners, Sept. 6, 1888, *Record in Heard* (Exhibit G). The implicit acceptance of racial segregation in the laws led George Washington Cable to label them "freedmen's follies." George Washington Cable, "The Freedmen's Case in Equity," *Century Magazine* 29 (1885): 415. See also Foner, *Reconstruction,* 371–72; Wharton, *Negro in Mississippi,* 231.

[50] *Decuir,* 95 U.S. 485 (1877), rev'g. *Decuir v. Benson,* 27 La. Ann. 1 (1875). Josephine Decuir brought her action against John Benson, the master of the *Governor Allen.* The name in the case changed from "Benson" to "Hall" because Benson died during the proceedings and his administrator, Eliza Hall, continued the suit on behalf of his estate. To avoid confusion here, I have used *Hall v. Decuir* in all references to the case.

cabin with colored passengers when the boat entered Louisiana.[51] "No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business."[52]

Josephine Decuir's lawyer before the Supreme Court argued that surely if a captain has a right to exercise a police power over his boat, the state could not have less power to exercise its police power on behalf of its citizens.[53] The Court disagreed. Congress's power to regulate commerce "may be exercised without legislation as well as with it," Justice Waite explained. In the absence of legislation, Congress adopts as its own the regulations which prevail under the common law.[54] "Applying that principle to the circumstances of this case," he continued, "congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned."[55]

The Civil Rights Act of 1875 ultimately proved equally vulnerable to constitutional challenge.[56] As historian Stephen J. Riegel has shown, initially the act held great promise; African-Americans eagerly brought suit

[51] Ibid., 489.

[52] Ibid.

[53] Brief and Argument for Plaintiff in Error (Josephine Decuir), p. 13, *Record in Decuir.*

[54] The Supreme Court's insistence that Congress had not acted was somewhat peculiar. Three years after Decuir brought suit, but before her case reached the Supreme Court, Congress had enacted the Civil Rights Act of 1875, which was still law when Decuir's case came before the Court. Although the act would not have applied in *Decuir* because it was enacted after the case arose, the Court's insistence on congressional inaction with no mention of the later act suggests a studied distance from the act, which, in fact, the Court would later hold unconstitutional. For the defendant's arguments against the act's application, see Brief and Argument for Plaintiff in Error (Eliza Jane Hall, Administrator of John G. Benson), December 1876, *Record in Decuir,* pp. 53–54.

[55] *Decuir,* 95 U.S. 485, 490. The court reversed the verdict for Decuir and remanded the case to the Louisiana Supreme Court, which entered judgment for Benson's estate. *Decuir v. Benson,* No. 4829, April 30, 1878, Louisiana Division, New Orleans Public Library.

[56] The implications of the act's dramatic extension of federal statutory authority over individual civil rights, traditionally the domain of the state, are compellingly discussed in Robert J. Kaczorowski, *The Nationalization of Civil Rights: Constitutional Theory and Practice in a Racist Society, 1866–1883* (New York, 1987); and Robert J. Kaczorowski, "To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War," *American Historical Review* 92 (1987): 45–68.

under the act and federal officials brought many criminal actions under the act's terms.[57] Yet as railroads and other carriers' challenges to suits brought under the act showed only too well, where it served their self-interest carriers proved as adept at crafting arguments against federal power as they were in crafting arguments in support of federal power. In fighting against the Civil Rights Act of 1875, railroads fought the battle of the white South against federal intervention in local affairs. Railroad companies found ready support for their claims before Southern state legislatures and federal grand juries and courts. One month after the Civil Rights Act of 1875 became law, the Tennessee legislature abolished the common-law right to bring a lawsuit challenging exclusion from hotels, places of amusement, or public means of transportation. The law gave Tennessee railroads license to charge blacks first-class fare and then require them to ride in the smoking car.[58]

In lawsuits brought by blacks against railroads in federal court, railroads successfully argued that the act's requirement of "full and equal enjoyment" required only access to equal accommodations, not access to the same accommodations.[59] More damning still, railroads successfully argued that Congress had no authority under the Fourteenth Amendment to pass the Civil Rights Act of 1875, that the Fourteenth Amendment applied only to state action, not to the actions of "private" actors like common carriers.[60] "The fourteenth and the other amendments are limitations upon the power of the states," explained Judge Barr of the federal circuit court of Kentucky in 1882 in *Smoot v. Kentucky Central Railway Company*.[61] "If, therefore, a state has not

[57] The most common and most successful suits involved facilities such as inns, restaurants, and theaters that had completely excluded blacks. Stephen J. Riegel, "The Persistent Career of Jim Crow: Lower Federal Courts and the 'Separate But Equal' Doctrine, 1865–1896," *American Journal of Legal History* 20 (1984): 22–23; J. David Hoeveler, Jr., "Reconstruction and the Federal Courts: The Civil Rights Act of 1875," *Historian* 31 (1969): 604, 616. But lawsuits under the act also challenged common carriers' practices of relegating blacks to particular accommodations. See, e.g., *United States v. Dodge*, 25 F. Cas. 882 (D.C.W.D. Tex. 1877) (No. 14,976); *Cully v. Baltimore & Ohio R.R.*, 6 F. Cas. 946 (D. Md. 1876) (No. 3,466); *Smoot v. Kentucky Central Ry.*, 13 F. 337 (C.C.D. Ky. 1882); *United States v. Washington*, 20 F. 630 (C.C.W.D. Tex. 1883); *Robinson v. Memphis & Charleston R.R.*, consolidated in *The Civil Rights Cases*, 109 U.S. 3 (1883).

[58] Law of Tenn., 1875, pp. 216–17.

[59] Riegel, "'Separate But Equal' Doctrine, 1865–1896," 32.

[60] *Charge to Grand Jury – Civil Rights Act*, 30 F. Cas. 1005 (C.C.W.D. Tenn. 1875) (No. 18,260); *Cully v. Baltimore & Ohio R.R.*, 6 F. Cas. 946 (D. Md. 1876) (No. 3,466); *Smoot*, 13 F. 337 (C.C.D. Ky. 1882); *Washington*, 20 F. 630, 631–32 (C.C.W.D. Tex. 1883).

[61] *Smoot*, 13 F. 337, 343 (C.D. Ky. 1882).

attempted by its laws, officers, or agencies to overstep these limitations, no case arises for the exercise of the protecting and guaranteeing power of the national government."[62] Likewise, in *United States v. Washington,* decided in 1883, Judge Turner of the Federal Circuit Court for the Western District of Texas held that Congress had no power under the Fourteenth Amendment to enact the Civil Rights Act of 1875. The court insisted that a railroad's discrimination against blacks was not a violation of the Fourteenth Amendment for which the person had a constitutional claim. "It is not pretended that there is any unfriendly legislation against the colored man in this state, and it cannot be said that the act complained of is in any way connected with the instrumentalities used by the state in the administration of its government, either legislative, executive, or judicial."[63]

In October 1883, in *The Civil Rights Cases,* the United States Supreme Court approved the decisions of these lower federal courts.[64] Consolidating five cases brought under the act, including Sallie Robinson's suit against the Memphis and Charleston Railroad, the Court held that section one of the Civil Rights Act of 1875, as applied to the states, was unconstitutional.[65] Writing for the majority, Justice Bradley insisted that the express language of the Fourteenth Amendment was directed toward state action; "[i]ndividual invasion of individual rights is not the subject-matter of the Amendment." Such a power, if recognized, would essentially usurp the place of state legislatures.[66] Nor, held the court, did Congress have power under the Thirteenth Amendment to pass the Civil Rights Act of 1875. Certainly, the Court insisted, the act of an innkeeper or a common carrier in refusing accommodation did not impose "any badge of slavery or servitude upon the applicant."[67]

In his lone dissent, Justice John Marshall Harlan, a Southerner and former slaveholder, forcefully and eloquently made the case for federal power on behalf of African-Americans under the Reconstruction Amendments. The Thirteenth Amendment gave Congress the authority to "secure the enjoyment of such civil rights as were fundamental in freedom"; surely, he argued, these rights included the minimal guarantees of the Civil Rights Act of 1875.[68] Congress also had

[62] Ibid., 343–44.
[63] *Washington,* 20 F. 630, 631–32 (C.C. W.D. Tex. 1883).
[64] *The Civil Rights Cases,* 109 U.S. 836, 844 (1883).
[65] The Court struck down the rest of Section I of the Act in *Butts v. Merchants & Miners Transportation Co.,* 230 U.S. 126 (1913).
[66] *The Civil Rights Cases,* 109 U.S. 836, 839–40 (1883).
[67] Ibid., 843–44.
[68] Ibid., 847 (J. Harlan, dissent).

authority under the Fourteenth Amendment to pass the act. Common carriers, inns, and places of amusement, Justice Harlan insisted, were not simply private actors; each acted under license of the state and hence was an agent of the state. His argument had particular force with respect to common carriers, which had long been viewed as "instrumentalities of the State," public highways serving a public function and hence subject to governmental regulation. Denial of equal rights by a carrier, an inn, or a place of public amusement, he argued, therefore was a denial by the state within the meaning of the Fourteenth Amendment and subject to the terms of the Civil Rights Act of 1875.[69]

Neither the majority nor Justice Harlan dealt in much detail with the argument that the Court's opinion in *Hall v. Decuir* seemed to offer an obvious basis for supporting the act's constitutionality, at least as applied to common carriers: Congress's power under the Commerce Clause to regulate interstate commerce. Although the other four cases before the Court in *The Civil Rights Cases* involved discrimination in theaters, inns, and an opera house, Sallie Robinson's case involved interstate rail travel. Robinson, a resident of Mississippi, had been traveling from Grand Junction, Tennessee, to Lynchburg, Virginia, when she was denied access to the ladies' car. Robinson's lawyer, William Randolph, squarely presented the commerce clause argument to the court. "My case," he argued, "involves the rights of a citizen of one State traveling 'by a public conveyance on land' through another State, for the purpose of reaching a place in a third State." Independent of the power granted to Congress under the Fourteenth Amendment, the act, Randolph insisted, was a constitutional exercise of Congress's power under the Commerce Clause.[70] Justice Bradley dismissed the argument with a single sentence tucked in among his long explication as to why the Reconstruction Amendments could not support the law. Whether the commerce power could provide the basis for "a law regulating rights in public conveyances passing from one State to another," Justice Bradley insisted, was not before the Court, "as the sections in question are not conceived in any such view." In a sense, the Court was right: the act had been conceived to fulfill the promise of the Thirteenth and Fourteenth Amendments; nothing in the act referred to Congress's power under the Commerce Clause. And yet, Justice Bradley's quick dismissal of the Commerce Clause rang hollow coming only five years after the Court's opinion

[69] Ibid., 855.

[70] Statement of Case, Assignment of Errors, and Brief for Plaintiffs in Error (Richard and Sallie Robinson), p. 7, *Record in Robinson (The Civil Rights Cases).*

in *Hall v. Decuir* striking down the Louisiana antidiscrimination law as an interference with Congress's power to regulate interstate commerce.[71]

The Supreme Court's decision in *The Civil Rights Cases* is often viewed as the death knell of federal intervention on behalf of African-Americans in the South.[72] And, in fact, in the aftermath of the Court's 1883 decision, Congress passed no additional legislation directly aimed at protecting the rights of African-Americans. Yet the decision was part of a broader context in which the Court struck down both state and federal regulatory legislation on a broad range of subjects as it struggled to define the borders of state and federal power in modern America. Seen in this context, a final federal intervention was critical to the timing of Jim Crow: the Interstate Commerce Act. Following the Supreme Court's decision in *The Civil Rights Cases*, James E. O'Hara, a black Republican from North Carolina, offered an amendment to ban racial discrimination by railroads in interstate travel in the pending interstate commerce bill.[73] "Congress has legislated for the protection of property; it has provided by law how dumb brutes shall be cared for," Congressman O'Hara explained; "it must certainly follow that it unqualifiedly has the same right to regulate the use of passenger cars."[74] The amendment immediately ran into resistance from white Southern Democrats.[75] By the time they finished with O'Hara's simple amend-

[71] 109 U.S. at 842. In his dissent, Justice Harlan picked up the argument and insisted that the Court was not bound by Congress's failure to mention the Commerce Clause. Ibid., 856.

[72] For a review of the constitutional narrative, see Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York, 1987), 61–92.

[73] O'Hara's amendment did not explicitly mention race, but his clear intent was to prohibit racial discrimination by railroads. His amendment read: "And any person or persons having purchased a ticket to be conveyed from one State to another, or paid the required fare, shall receive the same treatment and be afforded equal facilities and accommodations as are furnished all other persons holding tickets of the same class without discrimination." *Cong. Rec.*, 48th Cong., 2 sess., 296–97 (Dec. 16, 1884). For a biographical sketch of O'Hara, see Eric Foner, *Freedom's Lawmakers: A Directory of Black Officeholders During Reconstruction* (New York, 1993), 164–65.

[74] *Cong. Rec.*, 48th Cong., 2nd sess., 297.

[75] Congressman Crisp of Georgia introduced an additional amendment that nothing in the act would prevent a railroad from "providing separate accommodations for white and colored persons." Clifton R. Breckinridge of Arkansas offered a substitute reading: "But nothing in this act shall be construed to deny to railroads the right to classify passengers as they may deem best for the public comfort and safety, or to relate to transportation between points wholly within the limits of one State." Ibid., 316, 317 (Dec. 17, 1884).

ment, the provision was a mass of contradictions; every statement demanding equality of accommodations was followed by a qualifying clause, every promise followed by the equivalent of a giant legislative "Not."[76] In the end the Interstate Commerce Act did not pass until the next Congress (1887). And although it did not explicitly address racial discrimination, section 3 of the act forbade railroads in interstate commerce from giving "unreasonable preference or advantage to" or imposing "unreasonable prejudice or disadvantage on" any particular person.[77] The Interstate Commerce Act inaugurated a new era of federal regulation.

African-Americans were quick to see the potential of section 3 of the act as a tool against racial discrimination on railroads. The act had not been law for more than a few months when William H. Councill and William H. Heard filed their petitions before the Interstate Commerce Commission established under the act, seeking redress for incidents of racial discrimination on Southern railroads. The commission adopted the rule which had evolved under the common law: railroads could segregate passengers by race, but the accommodations provided for each race had to be substantially equal. Applying the standard to the facts before it, the commission ruled in favor of both Heard and Councill. In its opinions, the commission highlighted the men's respectability and the complete unacceptability of the treatment they had received.[78]

For white Southerners, the ICC's decisions in *Council* and *Heard* were a slap in the face, a direct threat to white southerners' ordering of race relations. More generally, ICC jurisdiction over race on Southern rail-

[76] The final amended provision as approved by the House read: "And any person or persons having-purchased a ticket to be conveyed from one State to another, or paid the required fare, shall receive the same treatment and be afforded equal facilities and accommodations as are furnished all other persons holding tickets of the same class without discrimination. But nothing in this act shall be construed to deny to railroads the right to provide separate accommodations for passengers as they may deem best for the public comfort or safety, or to relate to transportation relating to points wholly within the limits of one State: Provided, That no discrimination is made on account of race or color; and that furnishing separate accommodations, with equal facilities and equal comforts, at the same charges, shall not be considered a discrimination." Ibid., 332 (Dec. 18, 1884). Charles Lofgren discusses the 1884 amendments in his monograph on *Plessy v. Ferguson;* see Lofgren, *The Plessy Case,* 141–42. See also Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York, 1983), ch. 1.

[77] Act of Feb. 4, 1887, 24 Stat. 379, 380 (sec. 3).

[78] *Heard v. Georgia R.R. Co.,* 1 I.C.C. 720, 721 (1887); *Council v. Western & Atlantic R.R. Co.,* 1 I.C.C. 339 (1887). The correct spelling of his name, which I use in the text, is Councill.

roads was one more marker of the loss of state control over railroads and with it the surrender of state authority to the dictates of a national, industrialized state. But if the Interstate Commerce Act was one more marker of the loss of state control over railroads, its application to passenger commerce also provided a model for Southern states to reassert control over railroads, over individuals, and over Southern courts. Three months after the Interstate Commerce Act became law, Florida passed the first state separate-coach law.[79] One year later, in 1888, Mississippi mandated that "all railroads carrying passengers in this State ... shall provide equal but separate accommodations for the white and colored races," imposed penalties on railroads and conductors who failed or refused to comply with the statute, and in the same enactment established a state railroad commission.[80] State separate-coach laws incorporated the common-law standard requiring that separate accommodations be equal, which had evolved in suits brought principally by black women. But under separate-coach laws, racial separation was no longer optional.

Railroad corporations were no more inclined to give up power over their property to state governments under Jim Crow than they had been to give up control of their property to state or federal governments or individuals under civil rights statutes or under the common law. It was one thing for carriers to decide, as a matter of company policy and regulation, to exclude black passengers from ladies' cars or to assign black passengers to a Jim Crow car or compartment. It was another matter altogether for the state to mandate complete racial separation and to impose the financial cost of providing racially segregated, equal accommodations upon carriers. In effect, state separate-coach laws forced carriers to act as agents of the state. Railroads fought separate-coach laws in court with every legal weapon at their disposal. The U.S. Supreme Court addressed more challenges to racial segregation on common carriers after state Jim Crow laws

[79] The Interstate Commerce Act became law in February 1887. Florida passed its separate-coach law in May of that year. Act of Feb. 4, 1887, 24 Stat. 379, 380 (sec. 3); Laws of Florida Chap. 3743 [No. 63], p. 116 (1887). Six years earlier Tennessee had passed a law mandating that railroads provide separate first-class accommodations for black passengers, but in contrast to later laws, the 1881 Tennessee statute did not require railroads to restrict blacks to separate accommodations. In 1891 Tennessee adopted a separate-coach law mirroring that which other states were adopting in the same period. Laws of Tennessee (1881), ch. 155, pp. 211–12; ibid. (1891), ch. 52, pp. 135–36. See Lofgren, *The Plessy Case*, 20–21; Joseph H. Cartwright, *The Triumph of Jim Crow: Tennessee Race Relations in the 1880s* (Knoxville, 1976), 104–7.

[80] Laws of Mississippi, Ch. 27, p. 48 (1888).

were passed than before in large measure because of railroads' resistance to Jim Crow.[81]

Having successfully invoked federal governmental power in the 1870s to challenge state power to pass antidiscrimination laws, carriers attempted to once again use federal power to their own ends in challenging state separate-coach laws. Challenging an indictment under the Mississippi separate-coach law, the Louisville, New Orleans & Texas Railway Company argued that the Supreme Court's decision in *Hall v. Decuir* rendered the Mississippi law an unconstitutional regulation of interstate commerce. In fact, the Mississippi law was, in essential respects, the mirror image of the Louisiana antidiscrimination statute which the Supreme Court had struck down in *Decuir.* Quoting from other Supreme Court decisions, the railroad's lawyers insisted that "in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations and not to a multitude of systems."[82]

The railroad's arguments fed the anger that had been building as states watched their local authority slip away literally on the tracks that they had so firmly believed would bring a new era of Southern economic prosperity. Defending the Mississippi law before the state supreme court in 1889, the state attorney general offered the state's perspective on the railroad's argument:

> The proposition advanced is, in short, that where a corporation is created by the state, primarily for the benefit of her own people, to serve as a common public carrier of freight and passengers, such a corporation is emancipated from state control, in the public interest, the very moment that, by connecting its line of railway with another extending beyond the state limits, it

[81] By 1920, the U.S. Supreme Court had decided eleven cases involving racial segregation on common carriers; eight of the cases came to the Court between 1890 and 1920. See *Railroad Co. v. Brown,* 84 U.S. 445 (1873); *The Civil Rights Cases,* 109 U.S. 3 (1883); *Hall v. Decuir,* 95 U.S. 485 (1877); *Louisville, New Orleans and Texas Ry. Co. v. Mississippi,* 133 U.S. 587 (1890); *Plessy v. Ferguson,* 163 U.S. 537 (1896); *Chesapeake & Ohio Ry. Co. v. Kentucky,* 179 U.S. 388 (1900); *Chiles v. Chesapeake & Ohio Ry. Co.,* 218 U.S. 71 (1910); *Butts v. Merchants & Miners Transportation Co.,* 230 U.S. 126 (1913); *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.,* 235 U.S. 151 (1914); *South Covington & Cincinnati Street Ry. Co. v. Kentucky,* 252 U.S. 399 (1920); *Cincinnati, Covington & Erlanger Ry. Co. v. Kentucky,* 252 U.S. 408 (1920). Before state courts as well, railroads vigorously resisted indictments and penalties for violations of state separate coach laws.

[82] Arg. of Yerger & Percy on behalf of L., N. O. & T. Ry. Co. quoting *Robbins v. Shelby Taxing District,* 120 U.S. 489 (1886), in *Louisville, New Orleans & Texas Ry. Co. v. State,* 66 Miss. 662, 664 (1889).

becomes engaged in interstate traffic; that the creature may thus lift itself above its creator.[83]

The phrase "that the creature may thus lift itself above its creator" invoked the image of Eve in the garden eating from the tree of knowledge; it invoked an image of the place God had assigned to the races; it invoked an image of Frankenstein. The bare idea of "the creature" lifting itself above its "creator" was absurd, impossible, a hideous violation of nature, the darkest of imaginings.

The Mississippi Supreme Court upheld the state separate-coach law. The court distinguished *Decuir* on two principal grounds: first, that *Decuir* had involved a steamboat licensed by the federal government to navigate on federal waters, not a railroad chartered by the state crossing the territory of the state; and, second, that the Mississippi law applied to "domestic" commerce and was thus solely within the state's police power to regulate.[84] On appeal, the U.S. Supreme Court in *Louisville, New Orleans & Texas Railway Company v. Mississippi* affirmed the Mississippi Supreme Court's decision in favor of the state, holding that a state statute mandating that railroads segregate black and white passengers did not violate the commerce clause.[85] The Court, intent on preserving some balance between state and federal power, accepted the Mississippi Supreme Court's rationale: *Decuir* did not apply because the Mississippi separate-coach law applied only to "domestic" commerce, to "intrastate" passengers.

If one did not look too closely, the fine line the Court drew between interstate and intrastate travel had a certain legal logic to it. The Commerce Clause in Article 1 of the Constitution gave Congress power to regulate commerce "among the several states"; individual states surely retained some power to regulate domestic commerce.[86] But passengers were not commerce; they were not so many boxes labeled "interstate white," "interstate black," "intrastate white," "intrastate black." And the line between interstate and intrastate passengers on railroads was anything but clear. By 1890, American railroads were as seamless as the Mississippi River and passed through as many, in fact, more states. Rail passengers traveling across state lines, while in Mississippi or any other state, sat side-by-side with those traveling only within the state. The enclosed, finite space of a steamboat before the Court in *Hall v. Decuir* had made painfully clear to the Court the implications for "commerce among the several states" of even regulating the

[83] 66 Miss. 662, 667–68 (1889) (Arg. of T. M. Miller, Miss. state att'y-gen'l).
[84] 66 Miss. 662, 670–76 (1889).
[85] *Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, 133 U.S. 587 (1890).
[86] U.S. Const. Art. I, sec. 8, cl. 3.

accommodations of passengers traveling solely within the state. The spatial elasticity of a train with seemingly endless possibilities for simply adding another car at the state line allowed the Court to avoid seeing or, perhaps more accurately, admitting its own inconsistencies.

The new regulatory order took hold quickly. By the time the Supreme Court decided *Plessy v. Ferguson* in 1896, long seen as the landmark of separate but equal, every Southern state except the Carolinas and Virginia had a separate-coach law in place. And by 1901 every state in the South required common carriers to segregate white and black passengers in railroad travel. From there Southern states turned to steamboats and streetcars and then to every facet of public life.[87]

Legislated racial segregation on railroads and other carriers built on the past, but it was not a return to the past or even a codification of the past. Jim Crow was modern.[88] State statutes required equal and

[87] See, e.g., Laws of Florida, 1887, p. 116 (Ch. 3743); Laws of Mississippi, 1888, pp. 48–49 (Ch. 27); ibid., p. 45 (Ch. 26, sec. 2) (waiting rooms); General Laws of Texas, 1889, pp. 132–33 (Ch. 108); ibid., 1891, pp. 44–45 (Ch. 41); ibid., p. 165 (Ch. 103) (clarifying the street railway exemption); Laws of Louisiana, 1890, pp. 152–54 (No. 111); ibid., 1894, pp. 133–34 (No. 98); Laws of Alabama, 1890–91, pp. 412–13 (Ch. 185); Laws of Arkansas, 1891, pp. 15–17 (Act 17); ibid., 1893, pp. 200–201 (Act 114); Laws of Tennessee, 1891, pp. 135–36 (Ch. 52); Laws of Georgia, 1890–91, pt. I, pp. 157–58 (No. 751); ibid., 1899, pt. I, pp. 66–67 (No. 369) (extending coverage to sleeping cars); Laws of Kentucky, 1891–93, pp. 63–64 (Ch. 40); Laws of South Carolina, 1898, pp. 777–78 (No. 483); ibid., 1903, p. 84 (No. 53) (clarifying freight train exemption); ibid., 1904, pp. 438–39 (No. 249) (extending coverage to steam ferries); ibid., 1906, p. 76 (No. 52) (separate station dining rooms); Public Laws of North Carolina, 1899, pp. 539–40 (Ch. 384); ibid., 1907, pp. 1238–39 (Ch. 850) (extending coverage to streetcars); Laws of Virginia, 1899–1900, pp. 236–37 (Ch. 226); ibid., p. 340 (Ch. 312) (steamboats); ibid., 1901, pp. 329–30 (Ch. 300) (strengthening the steamboat regulation); Laws of Maryland, 1904, pp. 186–87 (Ch. 109); ibid., pp. 188–89 (Ch. 110) (steamboats); Laws of Oklahoma, 1907–8, pp. 201–4 (Ch. 15). See, generally, Stephenson, *Race Distinctions in American Law,* 207–36; Pauli Murphy, comp. and ed., *States' Laws on Race and Color* (New York, 1951); Charles S. Mangum, Jr., *The Legal Status of the Negro* (Chapel Hill, 1940), esp. 181–222; Charles S. Johnson, *Patterns of Negro Segregation* (New York, 1943), esp. 44–51.

[88] Other scholars have made this point as well. See, in particular, Grace E. Hale, *Making Whiteness: The Culture of Segregation in the South, 1890–1940* (New York, 1998), esp. 121–38; Glenda E. Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896–1920* (Chapel Hill, 1996), xx; Edward L. Ayers, *The Promise of the New South: Life After Reconstruction* (New York, 1992), 136–46, 432–34; Walter E. Campbell, "Profit, Prejudice, and Protest: Utility Competition and the Generation of Jim Crow Streetcars in Savannah, 1905–1907," *Georgia Historical Quarterly* 70 (1986): 197–231. The historical reconstruction of Jim Crow began with C. Vann Woodward, *The Strange Career of Jim Crow,* 3rd rev. ed. (1957; New York, 1974).

separate accommodations for the races. The common-law mandate was different: "if separate, then equal." To see the two as the same not only elides the distinction between state and corporate regulation, but also dismisses the critical qualifier "if." The common law provided the rationale, became proof even of the reasonableness of segregating passengers by race, but it did not mandate. Under the common law, carriers had retained the right to withdraw their regulations. And carriers sometimes did withdraw or modify policies or, more often, simply selectively enforce regulations.[89] Moreover, even in the late 1880s there had been significant variation among states and on different types of carriers. Seen in this light, the shift from a private system of regulation to state-mandated segregation was significant. It made racial segregation mandatory, not permissible or negotiable, and it took the decision out of private hands, individual and corporate. If there were any remaining question that statutorily mandated segregation did not merely codify existing law, the criminal actions states brought against railroad and streetcar companies and against individuals during the Jim Crow era serve as a final rejoinder.[90] Jim Crow not only criminalized what previously had been in the private, regulatory domain, but in so doing, created a whole new statutory framework in which every word was subject to interpretation, spawning a mountain of litigation which dwarfed the number of suits which had preceded it.

The regime instituted by separate-coach laws was new, but it was not exceptional. State separate-coach laws were one element in a dramatic increase in railroad regulation by both state and federal gov-

[89] For discussion of black boycotts against streetcar companies, see August Meier and Elliott Rudwick, "The Boycott Movement Against Jim Crow Streetcars in the South, 1900–1906," in Meier and Rudwick, eds., *Along the Color Line: Explorations in the Black Experience* (Urbana, 1976), 267–89. For a discussion of successful protests against segregation in the North prior to the war, see Litwack, *North of Slavery*, pp. 107–9. On railroads, an incident and legal pressure, at best, generally only led companies to make unwritten exceptions to existing rules. See, e.g., Testimony of Chas. J. W. Johnson (witness for plaintiff), *Record in Houck*, p. 23.

[90] See, e.g., *State v. Hicks*, 11 S. 74 (La. 1892) (criminal prosecution against railway conductor for failure to segregate passengers on Pullman coach); *St. Louis & San Francisco Ry. Co. v. State*, 68 Ark. 250 (1900) (criminal prosecution for failure to provide separate waiting rooms for white and black passengers); *State v. Jenkins*, 124 Md. 376 (1914) (criminal prosecution against black male passenger); *Mammoth Cave R.R. Co. v. Commonwealth*, 176 Ky. 747 (1917) (criminal prosecution for failure to provide racially separate coaches); *South Covington & Erlanger Ry. Co. v. Kentucky*, 252 U.S. 408 (1920) (criminal prosecution against interurban streetcar company for failure to segregate passengers); *State v. Pearson*, 110 La. 387 (1921) (criminal prosecution against officers of streetcar company).

ernments which extended beyond the issue of race and beyond the borders of individual Southern states or the South as a region. The Interstate Commerce Act, which inaugurated the first federal regulatory agency, represented the culmination of a long struggle to protect the rights of the individual against the power of the railroad.[91] Railroads, in fact, had been the earliest subject of state administrative power.[92] Until the late 1880s the South lagged behind the rest of the nation in railroad regulation. The tremendous growth of Southern railroads during the 1880s, the shift to Northern control and management of Southern railroads, the failure of a system of private regulation to police the status hierarchy, and increasing public hostility toward railroads generally spurred Southern states to join the nationwide trend toward more and stricter regulation of railroads.[93]

Having defined the space of the railroad car as public, separate-coach laws wrested the regulation of space from corporations, the federal government, individuals, even the courts.[94] In the closing decades of the nineteenth century, states resorted to their power to regulate to protect public health and safety as the basis for regulating everything: the speed at which trains could pass through urban areas; the kinds of

[91] Act of Feb. 4, 1887 (Interstate Commerce Act), 24 Stat. 379. The most immediate impetus for passage of the Interstate Commerce Act was the U.S. Supreme Court's 1886 decision in *Wabash, St. Louis and Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886), striking down state regulation of railroad rates for interstate shipments as an unconstitutional regulation of interstate commerce.

[92] See, generally, Edward Chase Kirkland, *Industry Comes of Age: Business, Labor, and Public Policy, 1860–1897* (New York, 1961); John F. Stover, *American Railroads* (Chicago, 1961), 104–42; Alfred D. Chandler, Jr., ed. and comp., *The Railroads: The Nation's First Big Business, Sources and Readings* (New York, 1965), 185–210; Lee Benson, *Merchants, Farmers, and Railroads: Railroad Regulation and New York Politics, 1850–1887* (New York, 1969).

[93] Although a few Southern states, including Virginia, for example, had adopted railroad commissions prior to the 1880s, most had not. Kentucky established a commission in 1880, Tennessee in 1883, Mississippi in 1884, Florida in 1887 (the same year that it mandated equal but separate rail accommodations), Texas in 1892, and Louisiana not until 1898. *First Annual Report of the Railroad Commissioner of the State of Virginia* (Richmond, 1877), 5; *Report of the Railroad Commission of Kentucky to Dec. 1, 1880* (Frankfort, 1881), 3–4; *First and Second Annual Reports of the Railroad Comm'rs for the State of Tennessee* (Nashville, 1884); *Second Annual Report of the Railroad Commission of the State of Mississippi, 1887* (Jackson, 1887), 140; *First Annual Report of the Railroad Commission of the State of Texas for the Year 1892* (Austin, 1892), iii; *First Annual Report of the Railroad Comm'n of Louisiana, May 1st, 1900* (New Orleans, 1900), 5.

[94] On the "legal construction of publicity" and its consequences, see William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, 1996), 147–48.

lamps and heaters railroads could use in their coaches to avoid fire in case of accident; the use of certain types of braking and coupling devices to prevent personal injuries; prohibitions against spitting to prevent the spread of tuberculosis; the consumption of alcohol in day coaches; riding on the front or rear platform of a streetcar; separation of white and black passengers to avoid violence.[95]

The regulatory urge extended well beyond railroads. Jim Crow was exemplary of a broader process of early twentieth-century state formation. In the years from the late 1880s through the 1920s, state governments and the federal government used their police power to regulate a wide array of relationships that had in earlier years been seen as inappropriate for state intervention, best left in local hands, or simply beyond the power of the state. In one venue after another, authority was centralized. Much of the new regulation was intended to protect individual liberty in the age of the corporation. Yet, separate-coach laws, like other protective legislation, including protective labor laws limiting the hours of women's and children's work in industry and defining the conditions of work, limited autonomy to ensure individual liberty. Just as courts upheld state separate-coach laws, they upheld the vast majority of protective legislation.[96] Under separate-coach laws as under hours and conditions legislation, corporate autonomy was mediated by the expanded police power of the state to legislate on behalf of the health, safety, and welfare of its citizens.

Historians have long resisted seeing Jim Crow as part of the broader pattern of state regulation that marked the emergence of the modern American state. It has been all too easy, even tempting, to dis-

[95] The broad sweep of state legislation regarding passenger conduct and seating is captured by a booklet issued by the Pullman Company of state "laws, notices, and warnings" it was required by law to post in all cars. The Pullman Company, *Notice: This Book Contains All the Laws, Notices and Warnings Required by Law to Be Posted in This Car,* n.d., Pullman Archives, Operating Dep't., Office of the V.P. and Gen'l Manager, Box 2, Folder 27, Newberry Library, Chicago, Ill. On state regulation of railroads relating to safety, see Chapter 3. The U.S. Supreme Court upheld the bulk of state railroad regulation even after passage of the Interstate Commerce Act. See, e.g., *New York, New Hampshire & Hudson River R.R. Co. v. New York,* 165 U.S. 628 (1897) (J. Harlan) (state law re car heating); *Erb v. Morasch,* 177 U.S. 584 (1900) (ordinance speed limit); *Chicago, Rhode Island & Pacific Ry. Co. v. Arkansas,* 219 U.S. 453 (1911) (state statute re number of brakemen); *Hennington v. Georgia,* 163 U.S. 299 (1896) (Sunday law).

[96] Melvin I. Urofsky, "State Courts and Protective Legislation During the Progressive Era: A Reevaluation," *Journal of American History* 72 (June 1985): 63–91; William R. Brock, *Investigation and Responsibility: Public Responsibility in the United States, 1865–1900* (Cambridge, 1984), 58–87; Nancy Woloch, *Muller v. Oregon: A Brief History with Documents* (Boston, 1996).

miss Jim Crow as a relic of the past, an example of Southern exceptionalism, an aberration from the broader pattern of Progressive Era regulation.[97] Yet the evidence warrants taking more seriously southerners' own embrace of the Progressive label. Southern states defended separate-coach laws against challenges by railroads as in part a response to carriers' practices of compelling blacks who had paid first-class fare to ride in what were in fact second-class coaches. Florida inaugurated the wave of separate-but-equal legislation with a statute that quite firmly set out to protect the rights of respectable blacks. The Florida statute required railroads to sell first-class tickets to "all respectable persons of color," to furnish for them cars that were "equally as good, and provided with the same facilities for comfort" as those provided for white, first-class passengers, and not to "suffer or permit any white person to ride, sit or travel, or to do any act or thing, to insult or annoy any person of color" riding in the coach for first-class black passengers.[98] When the Louisville, New Orleans & Texas Railway Company challenged the Mississippi separate-coach law, the state angrily responded that states had an obligation to protect blacks against the injustices to which railroads had subjected them; "justice demanded that colored people should have equal accommodations. The civil rights bill has been declared unconstitutional, and this state of things must continue unless the states take up the subject as was done here."[99]

Separate-coach laws took prejudice, hatred, and the likelihood of violence when the races mixed for granted and sought an administrative solution. The solution was not so very different from other types of Progressive Era regulation. The language of prevention which pervaded Progressive legislation applied as much to separate-coach laws, as it did to the measures discussed in Part I relating to preventing accidental injury, such as laws demanding that streetcar conductors prevent women and children from alighting from moving cars and laws requiring streetcar drivers to keep a "vigilant watch" for others using the public way. It applied equally to laws banning spitting in public and laws banning passengers from riding on the platforms of streetcars. It was no accident that they were often part of the same statutory framework. When North Carolina extended Jim Crow to streetcars in 1907,

[97] See C. Vann Woodward, *Origins of the New South, 1877–1913* (1951; rpt., Baton Rouge, 1971), 369–95; J. Morgan Kousser, "Progressivism – For Middle-Class Whites Only: North Carolina Education, 1880–1910," *Journal of Southern History* 46 (May 1980): 168–94.

[98] Laws of Florida, 1887, ch. 3743 [No. 63], p. 116.

[99] *L., N.O. & T. Ry. Co. v. Mississippi*, 66 Miss. 662, 669 (1889) (arg. of T. M. Miller, state atty-genl).

for example, the same statute that made it a misdemeanor for a passenger willfully to sit in a seat other than one assigned to his or her race also made it a misdemeanor for a passenger to expectorate on a streetcar; to use loud, profane, or indecent language on a streetcar; or to stand on the front platform, fender, bumper, running-board, or steps of a streetcar when it was moving. The law provided that carriers could shield themselves from personal-injury suits by passengers injured while riding on the rear platform or running-boards of cars if they posted a placard in their cars stating, "Passengers are warned not to ride on this platform," and similar placards warning against riding on the running-boards of open cars, as well as the full text of the law "printed and framed" at each end of every car.[100]

Yet nowhere were the limits of protecting individual liberty through state regulation more baldly exposed than in Jim Crow. African-Americans vigorously resisted state separate-coach laws, bringing constitutional challenges in Louisiana, Kentucky, Florida, Tennessee, Maryland, and Oklahoma.[101] In *Plessy v. Ferguson,* the first of two challenges under the Thirteenth and Fourteenth Amendments to come before the Supreme Court, the court confronted the conflict between the undeniable right of the state under its police power to preserve social order and the equally undeniable right of the individual to freedom and equality. The court resolved the conflict by finding that there was no conflict: the Louisiana separate-coach law required accommodations that were separate and equal. Never had the simple conjunction "and" carried such weight.[102]

In rejecting the argument that separate could not be equal, the court confused the right implicit in the Thirteenth and Fourteenth Amendments to have race not be a point of distinction (the right to ride in a first-class coach unmarked by race) with a demand for social equality. Writing for the majority, Justice Henry Billings Brown charted a careful path between "distinctions" based on race and "discrimination" based on race; between civil and political equality (safeguarded by the Constitution), on the one hand, and social equality (beyond the power of law), on the other. "A statute which implies merely a legal distinction

[100] Laws of North Carolina, 1907, pp. 1238–39 (Ch. 850).

[101] *Anderson v. Louisville & Nashville R.R. Co.,* 62 F. 46 (Cir. Ct. D. Ky. 1894); *Plessy v. Ferguson,* 163 U.S. 537 (1896); *Morrison v. State,* 116 Tenn. 534 (1905); *Hart v. Maryland,* 100 Md. 595 (1905); *Patterson v. Taylor,* 51 Fl. 275 (1906); *Chiles v. Chesapeake & Ohio Ry. Co.,* 218 U.S. 71 (1910); *Maryland v. Jenkins,* 124 Md. 376 (1914); *McCabe v. Atchison, Topeka & Santa Fe Ry.,* 235 U.S. 151 (1914).

[102] *Plessy v. Ferguson,* 163 U.S. 537, 543–44 (1896). The most complete discussion of *Plessy* and the larger legal, intellectual, and social context is Lofgren, *The Plessy Case.*

between the white and colored races," he explained, "has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."[103] Turning to the Fourteenth Amendment, he explained that the equal-protection clause was not intended "to enforce social, as distinguished from political equality":

> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences.... If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[104]

What the Court overlooked was that but for race the idea that riding in the same coach imposed or supposed social equality would have seemed ludicrous to most Americans. In fact, riding in the same coach did not suppose any relationship among the passengers.

State-mandated segregation ran up against the fundamental American commitment to individual rights both in terms of physical and status mobility as a component of liberty and in terms of freedom of contract as a component of equality. As George Washington Cable noted in his 1885 essay "The Silent South," what African-Americans sought, and what segregation so cruelly denied them, was "the freedom for those of the race who can to earn the indiscriminative and unchallenged civil – not social – rights of gentility by the simple act of being genteel."[105] Under the regime of segregation blacks could not move freely from one coach to another; they could not buy passage in the white coach. When Justice Billings insisted that laws permitting or requiring racial segregation "did not necessarily imply the inferiority of either race to the other," he chose to ignore that separate could not be equal when the ground of separation – race – sanctioned an existing status hierarchy.

But if the court in *Plessy* failed to see that social and legal status were intertwined, the Court had not entirely abandoned the framework of individual rights embedded in the Fourteenth Amendment. In *McCabe v. Atchison, Topeka and Santa Fe Railway Company* (1914), the Court explained that the equal-protection clause of the Fourteenth Amendment barred states from allowing carriers to provide accommodations for one race not provided for the other. The Oklahoma law, before the Court in *McCabe,* excepted certain luxury cars (sleeping,

[103] *Plessy,* 163 U.S. 537, 543–44, 550–51. The Court's earlier decision in *The Slaughterhouse Cases,* 83 U.S. 36 (1873), ruled out challenges under the Privileges or Immunities Clause of the Fourteenth Amendment.

[104] Ibid., 543–44, 551–52.

[105] George Washington Cable, *The Silent South* (New York, 1907).

dining, and club cars) and allowed carriers to provide these cars for white passengers but not for persons of color because it was uneconomical to provide them for the latter. Writing for the Court, Justice Hughes explained that the Fourteenth Amendment's guarantee of equality cannot "depend upon the number of persons who may be discriminated against"; rather, "the essence of the constitutional right is that it is a personal one."[106] Even though Justice Hughes's admonition did not have any immediate impact because the Court had ruled as an initial matter that those bringing the suit had not met the requirements for injunctive relief, the Court's recognition that the right to equality did not depend on it being economical to provide equal accommodations that were separate laid a critical foundation for future constitutional challenges by African-Americans.

For whites, too, state-mandated segregation limited individual autonomy. In a context in which it has been easy to see "whites" and "whiteness" as monolithic and to see the state as the agent of all whites, it is important to recognize that the state imposed the regime of segregation on all southerners, white as well as black. Even though whites benefited directly from Jim Crow, the protection of their status came at a cost: the new regulatory order required individual submission to the will of the state. Whites felt the constraint on their freedom. Laws extending segregation to streetcars, for example, not only mandated that the races be separated, but regulated the very dynamics of seating: white passengers were to seat from the front of the car toward the rear; black passengers were to seat from the rear of the car toward the front. Some state laws went even further. The 1907 North Carolina statute, for example, mandated that whites boarding streetcars "shall, if necessary to carry out the purposes of this act, occupy the first vacant seat or unoccupied space in the aisle nearest the front" of the car and imposed on blacks the legal obligation to do the same from the rear of the car.[107] The physical mobility within the railroad car of the mid-nineteenth century that Americans and foreign visitors alike had commented on and that Americans, at least, had celebrated was narrowly circumscribed by the state in segregation laws.

Moreover, in however small a way, separate but equal forced whites to yield space to blacks. In particular, the power Jim Crow accorded to railroad and streetcar conductors galled whites. Before Jim Crow, steamboat captains and railroad and streetcar conductors had had the power to eject passengers who failed to pay their fare, resisted company regu-

[106] *McCabe*, 235 U.S. 151, 161–62 (1914).

[107] Laws of North Carolina (1907), ch. 850, sec. 2, pp. 1238–39; *Savannah Electric Co. v. Lowe*, 27 Ga. App. 350 (1921) (noting rule of state railroad commission for carrying out Georgia law mandating racial segregation on streetcars).

lations, or were causing trouble, but that power rarely operated against most whites. When carrier employees acted with callous disregard of their white passengers' finer feelings, especially white women's, courts had always been quick to sermonize on carriers' obligations to passengers.[108] By placing the power of the state behind conductors and ordering them to use it against passengers generally, white and black, who transgressed the command of the state for racially separate accommodations, Jim Crow drew the same reaction. In Charlotte Compton's 1904 suit against the Southern Light and Traction Company in Natchez, it rankled the Mississippi Supreme Court that a conductor, "'dressed with a little brief authority,'" should be able to demand that passengers, like Compton and her lady friends, move from one seat to another "may be as many as a dozen times, because the needs of the traffic required it." The court upheld a verdict for Compton against the company, saying that because the company had not complied strictly with the terms of the statute requiring a partition between the white and colored sections, the company could not rely on the statute as a defense against Compton's suit.[109] Two years later the Mississippi Supreme Court reached a similar result in the suit by Joseph Waldauer, who had insisted on riding on the rear platform of a Vicksburg streetcar – assigned by the company for black passengers' boarding and alighting – because he wanted to smoke.[110] In the case against M. J. Dicks, arrested when he refused to move from a seat in the rear of a streetcar in Augusta, Georgia, the judge demanded to know what right the conductor thought he had to arrest passengers, told him to use more discretion in the future, and dismissed the case on the ground that the statute was a state law that he as a municipal judge had no authority to enforce.[111] Yet if judges in some states were wary of the expanded authority granted to conductors and railway companies when exercised against white passengers, courts in as many others, in cases involving white as well as black passengers, interpreted segregation laws to give conductors the right to use force where passengers refused to comply with conductors' requests that the passenger take a particular seat or change seats.[112]

The racialized space of Jim Crow also created new perils of identity for whites. Under Jim Crow, conductors had the power, in fact, the

[108] See, e.g., *Jencks v. Coleman*, 13 F. Cas. 442 (C.C.D.R.I. 1835) (No. 7,258).
[109] *Compton v. The Southern Lt. and Traction Company*, 86 Miss. 269 (1905).
[110] *Waldauer v. Vicksburg Ry. and Lt. Company*, 88 Miss. 200 (1907).
[111] *Augusta Chronicle*, May 23 and 24, 1900, quoted in Roback, "The Political Economy of Segregation," 902–3.
[112] See, e.g., *Bradford v. St. Louis, Iron Mountain & Southern Ry. Co.*, 93 Ark. 244 (1910); *Little Rock Railway & Electric Co. v. Hampton*, 112 Ark. 194 (1914); *Carleton v. Central of Georgia Ry. Co.*, 155 Ala. 326 (1908).

legal obligation, to determine the race of every passenger. In Jane Brown's 1881 suit against the Memphis & Charleston Railroad, the court had summarily rejected the railroad's claim that conductors had the authority to determine and use the character for chastity of their female passengers as a basis for admitting them to or excluding them from the ladies' coach. To grant the carrier such power, the court had insisted, would have the result that no respectable woman could travel for fear of being wrongly labeled.[113] Yet that same type of power was now exercised by railroads under the authority of the state. In the minds of most whites, to be called black, regardless of the conductor's legal obligation to separate passengers by race and regardless of his good faith, was an actionable insult.

Some Southern state courts agreed, many did not. In *Wolfe v. Georgia Railway & Electric Company,* the Georgia Appellate Court held that a conductor's obligation under the law to assign passengers to the correct section of the car according to race did not shield the carrier from liability for mistakes in identifying a passenger's race. To accuse a white man of being a negro or a negro of being a white man was to cast the stain of miscegenation, of illegitimacy, on him, and on this ground alone the false accusation was actionable.[114] But courts in other states disagreed. As the Kentucky Supreme Court explained in 1906, "what race a person belongs to can not always be determined infallibly from appearances, and mistakes must inevitably be made." The court insisted that the separate-coach law did not intend to make the carrier "an insurer as to the race of its passengers. The carrier is bound to exercise ordinary care in the matter; but if it exercises ordinary care, and is not insulting to the passenger, it is not liable for damages." This said, the court reversed the verdict for Mrs. Louella Thurman, a white woman whom a brakeman on the Southern Railway had directed to ride in the colored coach in the mistaken belief that she was black.[115] In a similar case, also involving a white woman, decided five years later, the Virginia Supreme Court reached a similar result.[116] In its 1907 law applying Jim Crow to streetcars, the state of North Carolina expressly provided that carriers and their employees could not be held liable for mistakes in identifying the race of passengers.[117] It is tempting to read the rule of law in states like Kentucky, Virginia, and North Carolina as an indication of

[113] *Brown v. Memphis & C. R. Co.,* 5 F. 499, 501–2 (C.C.W.D. Tenn. 1880).

[114] *Wolfe v. Georgia Railway & Electric Co.,* 2 Ga. App. 499, 501–11 (1907). See also *May v. Shreveport Traction Co.,* 127 La. 420 (1910).

[115] *Southern Ry. in Ky. v. Thurman,* 121 Ky. 716 (1906).

[116] *Norfolk and Western Ry. Co. v. Stone,* 111 Va. 730, 733–34 (1911). See also *Virginia Ry. & Power Co. v. Deaton,* 147 Va. 576 (1927).

[117] Laws of North Carolina, 1907, p. 1239 (Ch. 850, sec. 8).

greater racial tolerance. Such an interpretation seems borne out by the fact that there were fewer lawsuits relating to Jim Crow in Virginia and North Carolina, although not in Kentucky. But the language of the decisions reflects another reason underlying the rule of no liability: racial labeling was part of the regulatory structure of space in the modern state. A conductor did not assign a racial label to create disorder, he assigned it to ensure order.

White and black southerners modified their subordination to state power through civil damage suits. There is nothing to suggest that states intended or anticipated individual damage suits under Jim Crow. Separate-coach laws were regulatory measures, not civil rights statutes. In contrast to the Civil Rights Acts of 1866 and 1875 and state equal-accommodation laws, state separate-coach laws did not create a private right of action. There was no provision saying that when a carrier violated the law an individual could bring a civil suit for damages.[118] On their face, separate-coach laws created duties, not rights. A violation of a separate-coach law was a criminal offense, a misdemeanor carrying a penalty with enforcement vested in the state. Yet during the Jim Crow era black and white women and men brought hundreds of suits against carriers. Like evidence of a train speeding through a town in violation of the statutory speed limit, violations of separate coach laws became evidence of wrongdoing that when coupled with proof of injury justified a verdict for the injured individual. Through the assertion of individual legal right in private damage actions against railroads, black and white southerners resisted the loss of individual control that state separate-coach laws seemed to dictate, manipulating state power to their own ends.

Blacks took the statutes that long had been seen as the source of their oppression and wielded them in pursuit of individual right. The act of bringing suit alone was an assertion of status. The surge of private damage suits they brought challenges the constitutional synthesis which has contributed to the picture of the years from the 1890s to the 1940s as

[118] The only separate-coach law which authorized passengers to bring civil suits for violations of the separate coach law was that of North Carolina. North Carolina's law was distinct in a second respect: nothing in the law provided for enforcement by the state. Laws of N.C. (1899) ch. 384, pp. 539–40. South Carolina's law imposed a penalty of $500 for violations of the statute to be collected through private suits and, after deducting the costs of the suit, paid into the general treasury. Laws of South Carolina No. 483, pp. 777–78 (1898). Every other state's law expressly made it a misdemeanor with a set penalty against carriers, conductors, and passengers who refused or failed to comply with the law. See, e.g., Laws of Mississippi (1888), ch. 27, sec. 3, p. 48.

years of restive subjection. Leaping from one constitutional touchstone to the next creates a picture of the irrelevancy of the day-to-day struggles for rights. Nothing could be further from the truth. Private damage suits brought by African-Americans for violations of separate-coach laws raised a myriad of issues, but most suits came within three broad categories: assault in enforcing the law, inferior accommodations, and failure to keep whites out of black coaches.

In suits brought by African-Americans, as well as those brought by whites, Southern state supreme courts sternly and uniformly challenged any suggestion that separate-coach laws gave railway or streetcar employees license to assault their passengers. In 1891, the Mississippi Supreme Court affirmed a judgment of $2,000 for Wesley Crayton, a black man, against the Louisville, New Orleans & Texas Railway Company. The evidence for Crayton showed that when he and his wife went to board the train at Halpin Station bound for Vicksburg, the conductor blocked the entrance and angrily exclaimed, "God damn you, niggers, get back, and go around." When Crayton said that he and his wife only wanted to pass into the car provided for colored people, the conductor rudely replied, "God damn you, get off," struck Crayton in the face, shoved him from the train to the ground, and immediately signaled to the engineer to start the train, leaving the Craytons stranded at the station until the next train arrived at midnight, over seven hours later.[119] In cases involving streetcars, courts also strongly warned carriers against assaults on passengers in the context of enforcing separate-coach laws. For example, in *Alexander v. New Orleans Railway & Light Company* (1912), the Louisiana Supreme Court affirmed a judgment (and even increased the damages from $50 to $250) for Joseph Alexander, a black longshoreman, whom a streetcar conductor had struck in the face with his bell punch when Alexander had the temerity to complain that the conductor had wronged him and that he was going to report the matter to the company. The court noted that conductors were authorized under the law to move the partition and even require passengers to move as the flow of white and black traffic demanded, but held that a conductor had no right under the law to force a passenger to give up his seat when there was no other seat available to him "and still less has the officer the right to assault the passenger who complains of such treatment."[120]

[119] *Louisville, New Orleans & Texas Ry. Co. v. Crayton*, 69 Miss. 152 (1891).

[120] *Alexander*, 129 La. 959 (1912). See also *Dallas Consolidated Electric Street Railway Company v. Gilmore*, 138 SW 1134 (1911) (affirming $200 verdict in favor of J. A. Gilmore, a black man whom the conductor had struck over the head with an iron switch rod after putting him off the car for refusing to move from a seat on which two white men were already seated).

As striking as appellate court opinions affirming the right of blacks to freedom from assault at the hands of carrier employees is the fact that white jurors reached verdicts for and awarded damages to black plaintiffs in these and in many other civil suits. With good reason based on the record of Southern courts rushing black criminal defendants to "justice," we have become accustomed to thinking of Southern courts in the era of Jim Crow as places of intimidation, lies, and hypocrisy.[121] Yet in civil suits, even those addressing an issue as fraught with passion as separate-coach laws, blacks won at least limited recognition of their rights as citizens.

They defended those rights, as well, in suits brought to demand that carriers meet the statutory mandate of equal accommodations for the races. The right to equal accommodations was no more new than the right to protection from assault at the hands of carrier employees; the common law, after all, had demanded "if separate, then equal." But the structure of accommodations had always meant that black women had a far greater chance of prevailing than black men, and the wrong they challenged was exclusion from ladies' accommodations. Separate-coach laws meant that the lot of blacks who had never had the means, the will, or the rights consciousness to challenge unequal accommodations became the lot of middle-class blacks. "Respectable" blacks were left with little choice but to fight for equality within accommodations assigned to blacks. And they did.

In a series of cases, for example, brought within the first few years after Texas adopted its separate-coach law, African-Americans challenged the inferior accommodations railway companies in the state provided for blacks. The Texas Court of Civil Appeals cautiously felt its way in determining the implications of the new law. In *Norwood v. Galveston, Harrisburg & San Antonio Railway Company,* decided in early 1896, the court, affirming a verdict for the railroad, held that a private individual who proved only that a railroad had violated the law could not recover; to recover damages, an individual must prove injury.[122] Although Robert Norwood had shown that there was no toilet, no vessel for drinking water, and no fire stove in the "negro" compartment, all of which the white compartment had, and that he was

[121] For a sense of the complete lack of justice for blacks in criminal proceedings during the Jim Crow era, see Neil R. McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (Urbana, 1989), 197–223 (McMillen follows his chapter on "Jim Crow's Courts" with a chapter titled "Judge Lynch's Court"); James Goodman, *Stories of Scottsboro* (New York, 1995). On lynching, see also Hale, *Making Whiteness,* 199–240; W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880–1930* (Urbana, 1993).

[122] *Norwood,* 34 SW 180 (Tex. Civ. App. 1986).

sick and needed these provisions, the court held that the question of whether he had suffered actual injury was before the jury and there was testimony to support their finding that he had not. Seven months later, in a similar case involving the same railroad, *Henderson v. Galveston, Harrisburg & San Antonio Railway Company* (1896), the court reversed a judgment for the railroad.[123] Although the court reiterated its holding from *Norwood* that "the separate coach act confers no new right upon a passenger, whether white or colored," it admitted that separate-coach laws had changed the common law. Under the common law the question of what facilities were necessary to passengers' comfort and safety was a question for the jury, but now, the court explained, if an individual showed that certain facilities were provided for whites that were not provided for blacks, all he need show was that he suffered injury as a result. Henderson, a presiding elder of the AME Church, proved that on a journey from San Antonio to Hondo City, he had wanted and needed a drink of water and could not get it; that due to the lack of a toilet, he had finally been forced to twice urinate from the steps of the platform when holding his urine had become unbearably painful. The court insisted that Henderson had met his burden and rebuked the railroad for arguing that Henderson should not have waited until he was in pain to urinate from the platform. The railroad "had no right to subject him to humiliation by making it necessary for him to go out on an open platform to do what self-respect and decency would have impelled him to do in a closet such as the company had furnished for white passengers."[124] The very next year, the Texas Court of Civil Appeals affirmed a verdict and judgment for Thomas W. Cain, a black minister from Galveston, who had brought suit against the Pullman Company and the International and Great Northern Railroad Company for requiring him to move from a sleeping car to a day coach provided for black passengers.[125]

In other states and before the Interstate Commerce Commission as well, African-Americans had at least limited success challenging the failure of carriers to provide equal accommodations for black passengers. For example, in 1919, in *Illinois Central Railroad Company v. Redmond*, the Mississippi Supreme Court affirmed a verdict for Augustus Redmond, a black manager of a drugstore in Jackson, holding that although separate-coach laws do not require "identical" accommodations for passengers of each race,

[123] *Henderson*, 38 SW 1136 (Tex. Civ. App. 1896).
[124] Ibid., 1136, 1137.
[125] *Pullman Palace-Car Co. v. Cain*, 40 SW 220 (Tex. Civ. App. 1897); *U.S. Manuscript Census, 1900*, Texas, Reel 1637, p. 40.

> they do require in plain and unambiguous language that the accommodations ... provided for passengers of one race shall be equal to those provided for passengers of the other race, from which it necessarily follows that, if separate toilets are provided for the sexes of the one race, separate toilets must also be provided for the sexes of the other, and if a place in which to smoke is provided for the one race, such a place must also be provided for the other.[126]

The issue, the court insisted, was not whether railroads were under a duty to provide accommodations like smoking compartments or separate toilets for the sexes, but that having provided these facilities for its white passengers, "and thereby add[ing] to their comfort and convenience," it became the duty of the company to provide the same facilities in its accommodations for black passengers.[127]

There is something profoundly saddening in the story of a black man forced to defend his constitutional right to equality by telling a group of white men in open court that the lack of a toilet left him in such pain that he had to urinate from the platform of a train. Yet the testimony is telling. "Equal" in these cases was not a matter of constitutional right, it was a matter of statutory duty, just as sounding the bell at a crossing or slowing to a certain speed within city limits were statutory duties. The testimony of black men like Henderson was no different from the intimate details of body functions shared by the victims of railroad and streetcar companies' negligence. Blacks did not win all or even most of their suits, but then neither did the men and women bringing suit for negligence or nervous shock, and neither did whites bringing suit for violations of Jim Crow laws. The victories, too, must be read with caution. There is too much evidence to the contrary to believe that a few victories led to any kind of revolution in the day-to-day dynamics and conditions of travel. With this caveat in mind, it is nonetheless critical to the overall picture of African-Americans' struggle for equality that the right to bring private damage suits meant that African-Americans were neither completely at the mercy of railroads determined to circumvent a system rife with economic

[126] *Redmond*, 119 Miss. 765, 782 (1919); *U.S. Manuscript Census, 1910*, Mississippi, Reel 742, p. 75.

[127] Ibid. The Mississippi Supreme Court noted with disapproval a conflicting decision of the Kentucky Court of Appeals. The Kentucky court had held that a railroad providing only one toilet in the colored compartment when it provided two toilets in the white coach did not violate the state separate-coach law. See *Louisville & Nashville R.R. Co. v. Commonwealth*, 160 Ky. 769 (1914).

inefficiencies nor dependent upon the state to enforce their statutory rights.[128]

But the laws' command went beyond mandating equal accommodations; they commanded as well that the accommodations be separate. In her civil damage suit against the Louisville & Nashville Railroad in 1893, Fannie Quinn, a black woman, asserted that she had "purchased a full fare first class passenger ticket ... and that by reason of said ticket the defendant guaranteed, and she was entitled to ... the associations only of her race and color...."[129] The company had violated its duty and her statutory right by allowing two drunk white men to enter and remain in the colored coach, where they insulted her in ways that left her ill. Implicit in her petition was the contention that the terms of the state separate-coach law were part of her contract for passage with the railroad. Yet nothing on her ticket noted that she was black, nothing on her ticket said she was entitled to ride in a coach exclusively set aside for black passengers. Quinn's argument, and that of others, male and female, who brought suit during the Jim Crow era, was that state separate-coach laws were part of the contract of passage. Blacks used private damage suits to argue that Jim Crow gave them a legal right to space in public transit from which whites were excluded.

Railroads resisted private actions for violations of separate-coach laws – whether brought by men or women, white or black – as vigorously as they resisted the power of the state to pass or enforce the laws in the first place. In Fannie Quinn's suit against the Louisville & Nashville Railroad, the railroad insisted that whether there was a separate-coach law in effect in Kentucky "cuts no figure in the case":

> The fact that colored passengers are permitted to ride in a white car or the white passengers to ride in the colored car gives no passenger a cause of action against the Railroad Company. No right of the passenger has been violated. All that he contracted

[128] Inferior accommodations often took the form of inadequate accommodations for the number of passengers. State courts upheld verdicts for black passengers suffering injury against carriers' claims that recovery should be denied in such cases because the individuals themselves had contributed to the risk of accident by riding on car platforms. See, e.g., *International & Great Northern R.R. Co. v. Williams*, 50 SW 732 (Tex. Civ. App. 1899) (affirming verdict of $5,500 for black man Charles Williams injured in fall from platform); *Jackson v. Natchez & Western Ry. Co.*, 114 La. 981, 988 (1905) (verdict for black woman injured in horrific accident affirmed despite fact that she had been riding on the car platform on grossly overloaded excursion).

[129] Petition, Oct. 30, 1893, *Record in Quinn*, pp. 2–3.

> for, was a first class passage from one point to another and the presence of a person of another color in the same car, in no way violates that contract.[130]

But courts uniformly rejected railroads' arguments against private damage suits. Reversing a verdict for the Louisville & Nashville Railroad in Fannie Quinn's suit, the Kentucky Court of Appeals held, "[W]e can not concur with counsel or the court below that the separate coach law has no application to the facts of this case." The "frequent disturbances" between white and black passengers often leading to serious injuries and danger to other passengers had led to the enactment of separate-coach laws as police regulations "in order to prevent, as far as possible, these altercations upon railroad trains and to check the disposition of those of the dominant race to oppress and humiliate those who were entitled to the protection of the law." The critical fact to the court was whether the carrier knew or should have known that a white passenger had gone into the colored coach.

> When the white passenger is assigned to the car set apart for those of another race the company will be held responsible for his bad conduct affecting the rights of other passengers, although the conductor may be ignorant of what is transpiring, and where the conductor or those managing the train know that one is in the wrong car, it is his duty to expel him, and by his consenting to his remaining the company becomes responsible for his conduct so long as he does remain.[131]

The court insisted that to refuse to hold the carrier liable to the passenger would render the separate-coach law "a dead letter." The injured passenger's only means of enforcing the statute would be through indictment by the state with the penalty belonging to the state.

White violence against African-Americans was endemic in the Jim Crow era. African-Americans' ability to pursue criminal actions against whites for acts of violence was limited both by the hostility of white prosecutors to their claims and by the all too legitimate fear of violent reprisals. In turn, the lack of any effective legal recourse against whites for acts of insult, terror, and violence legitimized and fed the cycle of violence. Statutory Jim Crow interposed an intermediary in white–black relations – the railroad. By holding

[130] Brief for Appellees (Louisville & Nashville R.R. Co.), *Record in Quinn*, pp. 8–9.

[131] *Quinn v. Louisville & Nashville R.R. Co.*, 17 Ky. Law Rptr. 811, 812–13 (1895).

the railroad responsible for the actions of whites on their trains, courts interpreting statutory Jim Crow, like the Kentucky Court of Appeals in *Quinn,* made it possible for African-Americans to challenge the kind of white insult, intimidation, and violence that in other settings went unredressed.

Underlying the decision of the Kentucky Court of Appeals in *Quinn* was the common-law obligation of carriers to protect the comfort and safety of their passengers. What separate-coach laws added was a statutory duty to assign white and black passengers to separate accommodations, which states imposed on the assumption that race-mixing led to violence. The statutory mandate imposed on conductors the knowledge that failure to remove white men from black coaches was likely to result in violence. The Kentucky Court of Appeals never backed away from its holding in *Quinn;* later cases affirmed the holding and other states followed Kentucky's lead.[132] And yet here, perhaps more than any other area, blacks' successes were limited. It was too easy for conductors not to "know" or remember knowing when it came to trial that a white man had gone into the colored coach. And without the conductor's knowledge, the benefits of the statutory proscription were lost. I suspect as well that jurors ruled against black claims – most of which were brought by women charging insult or violence at the hands of white men – because a judgment against the railroad was in a sense a judgment against white privilege in a way that it was not in cases relating to equal accommodations or even assault by a carrier employee. Whatever the statutory mandate, whites never relinquished their sense of right to move freely in space. As the name itself suggests, Jim Crow, to most whites, was supposed to be a limitation on black freedom, not on white freedom.

Whites were as quick to challenge incursions on their "rights" under Jim Crow as blacks were to challenge theirs. The hostility, contempt, and energy with which railroads resisted white claims provide a necessary antidote to the image, when only suits brought by blacks are examined, that railroads were simply motivated by racism. Whites not only brought suit challenging the right of conductors on trains or streetcars to demand that they give up their seat to black passengers and suits for mistaking their race, but whites, like blacks, insisted as well that separate-coach laws gave them a right to ride in coaches

[132] See, e.g., *Wood v. Louisville & Nashville R.R. Co.,* 101 Ky. 703 (1897); *Bailey v. Louisville & Nashville R.R. Co.,* 44 SW 105 (Ky. 1898); *Hale v. Chesapeake & Ohio Ry. Co.,* 142 Ky. 835 (1911); *Texas & P. Ry. Co. v. Baker,* 158 SW 263 (1913), 184 SW 664 (1916), 215 SW 556 (1919); *Chicago, Rock Island & Pacific R.R. Co. v. Sharp,* 87 Okla. 98 (1922).

from which blacks were excluded.[133] In her 1910 suit against the Alabama & Vicksburg Railway Company, Pearl Morris argued that the company had "willfully violated" the Mississippi separate-coach law by allowing three black men to take passage in the same Pullman sleeping car with her.[134] And in their 1914 suit against the Missouri, Kansas & Texas Railway Company, C. B. Weller and his wife, Lucille, insisted that they had purchased first-class tickets which entitled them to ride in a first-class coach "in which only white people were allowed to ride."[135] Their claims are particularly striking because most states' separate-coach laws included an explicit exception for "nurses" of the opposite race; in other words, separate-coach laws did not undermine the authority of whites to be accompanied by their black servants.[136] Yet there was no mistaking what whites meant in their civil damage suits: their challenge was to blacks riding in their own right in "white" coaches. As white journalist George Washington Cable had noted in 1890, "[t]he entire essence of the offense, any and everywhere the race line is insisted on," was "the apparition of the colored man or woman as his or her own master."[137]

Suits by whites demanding damages for the failure to enforce their statutory "right" to accommodations limited to others of their race mirrored similar claims by blacks. And yet they were not the same.

[133] *Missouri, Kansas & Texas Ry. Co. v. Ball*, 25 Civ. App. Rep. 500, 503 (1901); *Southern Ry. Co. v. Norton*, 112 Miss. 302 (1916); *Ammons v. Murphree*, 191 Miss. 238 (1941); *Weller v. Missouri, Kansas & Texas Ry. Co.*, 187 SW 374, 375 (1916); *Shelton v. Chicago, Rock Island & Pacific R. Co.*, 139 Tenn. 378 (1917); *Payne v. Stevens*, 125 Miss. 582 (1921). A number of the cases involving whites began with a fellow passenger telling a railway employee that a passenger in the coach was black. See, e.g., *Southern Ry. Co. v. Thurman*, 121 Ky. 716, 719 (1906); *Louisville & Nashville R.R. Co. v. Ritchel*, 148 Ky. 701 (1912); *Virginia Ry. & P. Co. v. Deaton*, 147 Va. 576 (1927).

[134] Declaration, March 26, 1910, Amended Declaration, Oct. 13, 1910, *Record in Pearl Morris*, pp. 2–4, 7–8. Railroads were as quick to resist white claims as they were to resist black claims. Eight and Further Plea, Ninth and Further Plea, Tenth and Further Plea, Feb. 8, 1911, *Record in Pearl Morris* (all alleging in one form or another no private right of action for violation of separate-coach law).

[135] *Weller v. Missouri, Kansas & Texas Ry. Co.*, 187 SW 374, 375 (1916).

[136] Although most state laws expressed the nurse exception in race-neutral terms, those that did not more accurately captured the intent of all. Compare Laws of Florida (1887), ch. 3743 – [No. 63], sec. 2, p. 116 ("provided, that nothing in this act shall be construed to prevent female colored nurses having the care of children or sick person from riding or traveling in such [white] car") with Laws of Louisiana (1890), No. 111, sec. 3, p. 153 ("provided that nothing in this act shall be construed as applying to nurses attending children of the other race").

[137] George Washington Cable, *The Negro Question* (New York, 1890), 21, 22.

Suits by blacks were intended to enforce their basic right to equality and human dignity; suits by whites were intended to enforce the existing status hierarchy of white over black. The difference in proof of injury in suits brought by blacks and whites highlight the distinction. Whereas blacks alleged injury as a result of the insulting and violent conduct of white men in colored coaches, whites alleged injury as a result of the mere presence of black men in white coaches. Only whites brought suit for being wrongfully compelled to ride in coaches assigned to the opposite race. There were no suits alleging insult for a black passenger mistaken as white, just as there were no suits by a black passenger assigned to the white coach. The violation implicit in forcing a white passenger to ride in a coach for black passengers was only too clear to most courts. As the Texas Court of Civil Appeals noted in 1901, "[t]o withhold from a white lady the right to ride in a coach such as the law requires to be provided for her race, and to compel her and her children to ride in one occupied by negroes ... constitute such a violation of law and breach of duty as render a common carrier of passengers liable in damages for such discomfort and humiliation as are proximately caused from such breach of duty."[138]

But if most courts agreed that carriers had no right to assign black passengers to white coaches or to force white passengers to ride in colored coaches, they also severely qualified those rights. Courts insisted, for example, that a white passenger could not recover if he or she had voluntarily ridden in the colored coach and excused railroads in cases where unavoidable circumstances, such as an unexpectedly large crowd or bad weather, prevented the company from providing separate coaches.[139] Nor did courts assume that physical proximity alone necessarily caused injury. In 1909, for example, the South Carolina Supreme Court affirmed a nonsuit in a case brought by a white woman, Julia A. Norris, and her husband, Benjamin, in which they had alleged that as a result of riding in a coach in which the front half had to be set aside for black passengers (whom Norris insisted were rowdy, drinking, and cursing) because of a shortage of space in the colored coach, she "became nervous" and "did not sleep any that night." On the issue of injury, the court resorted to the law of South Carolina on nervous shock, saying, "The law in this State does not allow recovery of damages for mental suffering in the absence of bodily injury."[140] In the Wellers' suit against the railroad

[138] *Missouri, Kansas & Texas Ry. Co. v. Ball*, 25 Tex. Civ. App. Rep. 500 (1901).
[139] *Chesapeake & Ohio Ry. Co. v. Austin*, 137 Ky. 611, 618 (1910); *St. Louis, Iron Mountain & Southern Ry. Co. v. Freeland*, 39 Okla. 60 (1913); *Chicago, Rock Island & Pacific Ry. Co. v. Allison*, 120 Ark. 54 (1915); *Anderson v. Gulf & Ship Island R.R. Co.*, 147 Miss. 164 (1927).
[140] *Norris v. Southern Ry.*, 84 S.C. 15, 21 (1909).

for the mental distress, anguish, and humiliation they suffered riding in a coach with black passengers, the Texas Court of Civil Appeals in San Antonio affirmed a verdict for the railroad. The railroad had introduced extensive evidence describing the impact of unusual flood conditions on its ability to provide sufficient cars for all its passengers, evidence that many of the passengers waiting to board at Austin had had to be turned away, and evidence that the conductor had posted a sign in the coach in which the Wellers rode designating one portion of the car for black and the other portion for white passengers. Writing for the court in *Weller v. Missouri, Kansas & Texas Railway Company* (1916), Judge Moursund emphasized,

> As it is a matter of common knowledge that white citizens of the South are daily thrown in contact with members of the negro race in almost every walk of life, and negroes are permitted by law to ride on street cars with whites, with only a sign to indicate the place where they are to sit, it seems clear that whether or not proximity to negroes in a coach or train causes mental anguish or humiliation depends to some extent upon the circumstances under which such proximity is brought about and maintained.[141]

The court refused to find that on proof of the facts themselves – whites and blacks riding in the same coach – the Wellers were entitled to damages. Citing its opinions in *Norwood* and *Henderson* (both cases brought by black men challenging the inferior conditions in black coaches), the court reiterated its holding that only on proof of special damages could an individual recover for a violation of the separate-coach law.[142] The Wellers did not meet that burden. Courts seemed to understand that part of the humiliation whites attributed to being forced to share accommodations with blacks was in fact anger at railroads for failing to provide adequate passenger service. The language of status coupled with separate-coach laws provided a statutory vehicle for whites to retaliate against the forces they felt arrayed against them, and they included the corporate power and indifference of railroads every bit as much as blacks.

Black and white, men and women modified their subordination to the state through individual suits, yet their actions also served the ends of the state. Individual suits furthered state interest in railroad compliance with the state's statutory mandate while freeing valuable state financial

[141] *Weller*, 187 SW 374, 375–76 (1916).

[142] The reliance of the Texas Court of Civil Appeals, in a case involving whites, on precedents developed in cases involving blacks presents one of the ironies of Jim Crow.

resources for other ends. Moreover, every private action invoking the law validated the law's legitimacy and hence the power of the state over railroads and individuals. Most important, private damage suits brought by whites in the twentieth century enabled states to do what they could not have done and passed constitutional scrutiny, namely, apply state Jim Crow laws to interstate travel. In this respect, private damage suits became critical vehicles for the extension of Jim Crow.

In practice, state separate-coach laws always had an impact well beyond the borders of any individual state. In 1877, in *Hall v. Decuir,* Chief Justice Waite had struck down the Louisiana antidiscrimination law on the ground that it violated the commerce clause, noting, "While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."[143] In its 1890 decision upholding the constitutionality of separate-coach laws against a challenge that they violated the commerce clause, the Court ignored its own earlier insight on the impact of state regulation of race in passenger accommodations on interstate commerce.[144] The Court's decisions created a distinction between carriers' regulations of interstate travel (constitutional) and state regulation of interstate travel (unconstitutional) that quickly became blurred in even the Court's logic. *Chiles v. Chesapeake and Ohio Railway* (1910), in which the United States Supreme Court upheld a decision of the Kentucky Court of Appeals for the Chesapeake & Ohio Railroad, was a critical decision.[145] Chiles, a black passenger traveling from Washington, D.C., to Lexington, Kentucky, had taken a seat in the rear coach of a train in Ashland, Kentucky, in the spring of 1904. The conductor promptly asked him to move to the compartment "set aside for his race by the statutes of Kentucky." In response to Chiles's insistence that he was a lawyer and knew his rights and that the state separate-coach law did not apply to him as an interstate passenger, Conductor Ridgeway told him that he "couldn't help that, that the statutes was laid down," and that he faced a penalty if he failed to comply with the law. The Chesapeake & Ohio responded to Chiles's lawsuit by saying that under its rules and regulations it separated all white and colored passengers. Yet testifying in the suit Chiles brought against the company, Conductor Ridgeway admitted, "The rules of the Company, or instructions was, when the law was passed, we were

[143] *Decuir,* 95 U.S. 485, 489 (1877).

[144] *Louisville, New Orleans and Texas Ry. Co. v. Mississippi,* 133 U.S. 587 (1890), aff'g, 66 Miss. 662 (1889); *Chesapeake and Ohio Ry. Co. v. Kentucky,* 179 U.S. 388 (1900), aff'g 51 SW 160 (Ky. 1899).

[145] *Chiles,* 218 U.S. 71 (1910), aff'g 125 Ky. 299 (1907).

to separate the colored and white races." "You do that without reference as to whether they are interstate passengers or not," the lawyer for the Chesapeake & Ohio Railway asked. "Yes sir," Ridgeway replied.[146] The Kentucky Court of Appeals chose to ignore that the regulation had been adopted in response to the state law and was intended to carry out the state law. The U.S. Supreme Court followed the state court's reasoning. "And we must keep in mind," Justice McKenna wrote for the Court, "that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant."[147] Turning to its earlier decision in *Decuir,* the Court reaffirmed the right of carriers to adopt reasonable rules regulating the conditions of passage and insisted that *Decuir* stood for the principle that "inaction of Congress was equivalent to the declaration that a carrier could by regulations separate colored and white interstate passengers."[148] The Court ignored the explicit evidence showing that the Kentucky separate-coach law had effectively determined the railroad's seating of all day coach passengers. As the evidence in other cases made clear, the Chesapeake & Ohio was typical; once railroads had exhausted their constitutional challenges to Jim Crow, they segregated all passengers traveling in day coaches, interstate as well as intrastate, on the basis of race.[149]

But just as economics dictated that railroads apply state separate-coach laws to all passengers, economics dictated that railroads would not segregate interstate passengers riding in Pullman or other luxury accommodations. Private damage suits brought by whites in state court gave states the opportunity to flex their muscles. Pearl Morris carefully tailored her 1910 suit asserting her "right" under the Mississippi separate-coach law to a coach from which blacks were excluded. Although she was an interstate passenger traveling on a

[146] Testimony of W. Ridgeway (conductor, witness for defendant railway), *Record in Chiles,* pp. 28–29, 32.

[147] *Chiles,* 218 U.S. 71, 75, 77 (1910). The Kentucky Separate Coach Law had also come under attack in two earlier cases. See *Anderson v. Louisville & Nashville R.R.,* 62 F. 46 (C.C.D. Ky. 1894); *Lander,* 104 Ky. 431, 443, 447 (1898).

[148] *Chiles,* 218 U.S. 77.

[149] See, e.g., *Anderson v. Louisville & Nashville R. Co.,* 62 F. 46 (C.C.D. Ky. 1894); Testimony of W. H. Tayloe (Gen'l Passenger Agent, Southern Ry. Co.), noting that the Southern Railway Company had adopted rules segregating white and black interstate passengers when Southern states passed their Jim Crow laws, *Record in Gaines,* pp. 488–89; *Stratford v. Midland Valley R.R. Co.,* 36 Okla. 127 (1912); *Illinois Central R.R. Co. v. Redmond,* 119 Miss. 765 (1919); *Washington, Baltimore & Annapolis Electric R.R. Co. v. Waller,* 239 F. 598, 601 (C.A.D.C. 1923).

through ticket from Vicksburg to New York City in the Pullman coach, and the black men she discovered on the coach when she boarded were also interstate passengers, Morris brought suit against the Alabama & Vicksburg Railway Company – a company whose line ended at Meridian, the state border – and insisted that the interstate character of her or the black men's travel mattered not a whit. With equal vehemence, the railway insisted that Mississippi's separate-coach law had no application to the case. The Alabama & Vicksburg Railway Company argued that it did not matter that Pearl Morris was from Mississippi or that for part of her journey she would be traveling within the state; she occupied federal space even when within Mississippi's state boundaries because she was an interstate passenger. The Commerce Clause of the U.S. Constitution as interpreted by the Supreme Court in *Hall v. Decuir* and *Louisville, New Orleans & Texas Railway v. Mississippi*, the railway argued, barred the court from applying the Mississippi separate-coach law to interstate travel.

The Mississippi Supreme Court chose to face the issue raised by Morris's suit head-on: the limits on states' rights to regulate interstate commerce. If the Alabama & Vicksburg Railway Company was right, the state of Mississippi and every other Southern state with a Jim Crow law would have had to admit that with respect to interstate travel state power was subordinate to that of the federal government and, in the absence of federal action, to that of railroad corporations. Seen in this light, it is not surprising that the Mississippi Supreme Court held that the state's separate-coach law applied to all passengers on all coaches within the state regardless of where their journeys began or would end. The court reasoned,

> A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian – black and white – would endanger the lives and disturb the peace of all persons passengers [*sic*] on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce.[150]

The Mississippi Supreme Court's decision in *Morris* reflected the fundamental realities of travel. If the state's expressed rationale for adopting Jim Crow, that is, safeguarding against violence stemming from the commingling of the races, was taken seriously, then the color line could not depend on the destination of a passenger. As the court itself recognized, "[i]f we should hold that the statute is inapplicable to interstate travelers, it seems to us that necessarily it must be condemned

[150] *Alabama & Vicksburg Ry. Co. v. Morris*, 103 Miss. 519 (1912).

altogether, as the theory upon which its wisdom and justice rests will thus be declared fanciful and without foundation in fact."[151]

The Mississippi Supreme Court's decision in *Morris* placed Mississippi at odds with other Southern states, such as Louisiana and Kentucky, which had explicitly held that their separate-coach laws did not apply to interstate passengers.[152] But before dismissing the decision in *Morris* as simply an example of the harshness of Jim Crow in the state of Mississippi, it is well to consider the implications of the *Morris* decision for interstate carriers in the South. Pearl Morris's journey had taken her through a number of states, including New York, where it was unlawful to segregate passengers on the basis of race, and Virginia, where Jim Crow did not apply to Pullman accommodations. Morris's suit gave Mississippi the opportunity to set itself up as a sort of policeman of Jim Crow in the South. On any line where even a portion of the journey was in the state of Mississippi, a white passenger forced to share luxury accommodations with a black passenger could bring suit in Mississippi.

Two years after the Mississippi Supreme Court's decision in *Morris*, another white woman, Mary L. Norton, traveling not from South to North as Morris had been, but from North to South, brought suit alleging that she had been forced to share Pullman sleeping accommodations with a black man. When Norton boarded the "Memphis Special" in Philadelphia there was a black man on the same coach who had boarded in New York. Both were bound for Memphis. But in Pennsylvania as in New York, she had no cause of action. In Virginia, she complained to the conductor and asked him to remove the black man from the car. The conductor refused on the ground that the black man was an interstate passenger. Norton was outraged and brought suit seeking actual and punitive damages. The conductor had not been rude; she simply found riding in a coach with a negro "disagreeable" and "unpleasant." Like

[151] Ibid. The Alabama & Vicksburg Railway Company appealed the Mississippi Supreme Court's decision to the U.S. Supreme Court. But after arguments and before a decision, the Railway Company asked the high court to dismiss the case. Petition for Writ of Error to the United States Supreme Court, Dec. 19, 1912, Writ of Error, Dec. 19, 1912, Writ of Error Dismissed on Motion of Plaintiff in Error, April 16, 1914, *Record in Pearl Morris.* The record is silent as to why the company withdrew its appeal. Yet what seems most likely is that the company settled the case. Although the Mississippi Supreme Court had upheld the verdict for Morris, it had reduced the damages from $15,000 to $2,000. Pearl Morris, a clerk in a dry-goods store, may have been willing to settle for far less.

[152] *State ex rel. Abbott v. Hicks,* 11 S. 74 (La. 1892); *Anderson v. Louisville & Nashville R.R. Co.,* 62 F. 46 (Cir. Ct. D. Ky. 1894).

Morris, she made the most of the fact that she was a woman, traveling without a male chaperone.[153]

The Southern Railway Company mounted a serious defense to Norton's suit, even to the point of noting in its brief before the Mississippi Supreme Court that it intended to pursue the case as a test case before the U.S. Supreme Court.[154] The railway argued that applying the law to interstate passengers violated the commerce clause and would amount to a taking of its property under the due process clause of the Fifth and Fourteenth Amendments, and that the Interstate Commerce Act prevented the states from addressing issues relating to the seating of interstate passengers.[155] And indeed blacks brought several suits before the Interstate Commerce Commission and in federal court under the Interstate Commerce Act in these same years alleging the denial of luxury or first-class accommodations in interstate travel.[156] The Mississippi Supreme Court rejected the Southern's arguments out of hand.

Norton was from Mississippi and brought suit there, but her journey on the Memphis Special had ended in Tennessee, and she relied on the law of Tennessee in pursuing her case against the Southern Railway Company. Her decision to bring suit in Mississippi may have stemmed from the fact that she was from Mississippi, but it could not have hurt that the Mississippi Supreme Court had interpreted Mississippi's separate-coach law favorably to her. But there was also authority in Tennessee for Norton's claim. She relied on an 1898 decision of the Tennessee Supreme Court *(Smith v. State)* affirming a judgment against a railroad conductor who had allowed interstate black passengers to ride in the same coach with white passengers. The Tennessee Supreme Court had explicitly held that the Tennessee separate-coach law was a reasonable police regulation and that it applied to both intra- and interstate travel.[157] The facts in *Norton* presented a different case from

[153] Declaration, Jan. 29, 1914, Deposition of Mrs. M. L. Norton, June 10, 1915, *Record in Norton*, pp. 1–10, 13–16.

[154] Statement of Facts and Brief for Appellant [Southern Ry. Co.], Aug. 15, 1916, pp. 3–4, *Record in Norton.*

[155] Ibid., 3–20.

[156] See, e.g., *Carrey v. Spencer, et al., Rec'r East Tennessee, Virginia, & Georgia R.R. Co.*, 5 I.C.C. Rep. 636 (1896); *Gaines v. Seaboard Air Line Ry.*, 16 I.C.C. 471 (1909); *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913); *Crosby v. St. Louis–San Francisco Ry. Co.*, 112 I.C.C. 239 (1926); *Harden v. Pullman Co.*, 120 I.C.C. 359 (1926).

[157] *Smith v. State*, 100 Tenn. 494 (1898). The case followed the same puzzling pattern that was true in *Morris*. Although the railroad appealed the adverse verdict to the U.S. Supreme Court, the Court dismissed the appeal on the railroad's motion. 182 U.S. 1256 (1900).

that in *Smith*. There were no intrastate passengers on the Memphis Special. The Southern Railway's Memphis Special was a luxury through train, with six Pullman coaches and no day coaches, running between New York and Memphis. Every passenger on the train was traveling from one state to another. Norton's suit essentially demanded that every carrier running luxury trains, or trains with luxury accommodations from the North, must reshuffle its passengers when it entered the Jim Crow South or face damage suits from whites. In 1916, in *Southern Ry. Co. v. Norton*, the Mississippi Supreme Court agreed. Affirming a verdict for Norton, the court held that the Tennessee separate-coach law, like that of Mississippi, applied to all travel while it was within state borders.[158] The most surprising aspect of the case was the silence that followed. Despite the railroad's stated determination to make the case a test case before the U.S. Supreme Court, there is no record of an appeal. The Mississippi Supreme Court's decision in *Norton*, like its earlier decision in *Morris*, was law.

The elaborate interstate network of railroads meant that no railroad with interstate lines running through Mississippi or Tennessee could ignore the decisions of the Mississippi Supreme Court. Nor, however, could railroads ignore the Interstate Commerce Commission. In one sense, the facts of *Morris* particularly were exceptional: few blacks sought Pullman passage in the South, and fewer still got it. But if exceptional in factual pattern, the decisions in *Morris* and *Norton* were law and the law had dramatic implications for railroads, their passengers, and the balance between state and federal power. That balance would hold for nearly half a century.

The legal precedent established in cases like *Morris* and *Norton* applying state Jim Crow laws to interstate travel was constitutionally vulnerable from the start; in time, it would provide the opening for the first victories against Jim Crow. Gender was as salient to that process as it was in the construction of Jim Crow. In 1946, a case by an African-American woman named Irene Morgan reached the U.S. Supreme Court. Citing its decision in the 1878 case of *Hall v. Decuir*, the U.S. Supreme Court held that a state statute that required racial segregation of interstate bus passengers imposed an improper burden on interstate commerce and was unconstitutional.[159] The Mississippi Supreme Court's 1910 decision in *Morris* had been part of a broader shift at the beginning of the twentieth century from cor-

[158] *Southern Ry. Co. v. Norton*, 112 Miss. 302, 306 (1916).

[159] See *Morgan v. Virginia*, 328 U.S. 373 (1946). More generally, see Barnes, *Journey from Jim Crow*.

porate to state regulation, under the authority of state police power. The U.S. Supreme Court's decision in *Morgan*, thirty years later, in 1946, marked a second critical shift in the exercise of the police power in twentieth-century America: the shift from the police power of the state to that of the federal government.

Answering the question of why it took so long to exercise federal authority over the internal ordering of public transit when Congress and the Interstate Commerce Commission had been regulating safety since the turn of the century brings us back to the importance of both the structure of public transit and its social meaning, the kinds of questions discussed earlier in this book. The constant interchanging of cars on trains in interstate transit demanded that safety features such as brakes and couplers be uniform across the country and simultaneously supported different standards both in some safety matters and in the internal ordering of space – after all, cars were continually being added to and taken off trains. The U.S. Supreme Court's surrender of the spatial ordering of public transit to state authority also confirmed, as nothing else could, that travel was a fundamental expression of personhood, of status. The solution of equal but separate accommodations preserved the fiction of individual liberty safeguarded for all, while in fact safeguarding the status of whites alone.