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**PRECURSORS OF ROSA PARKS: MARYLAND
TRANSPORTATION CASES BETWEEN THE CIVIL
WAR AND THE BEGINNING OF
WORLD WAR I**

DAVID S. BOGEN*

When Rosa Parks refused to move to a seat in the back of the bus in Montgomery, it sparked a boycott and was a critical event in the Civil Rights movement.¹ But Mrs. Parks was not the first African American to resist segregation. Mary Anderson, Aaron Bradley, Josephine Carr, Harriet E. Cully, John W. Fields, Professor W. H.H. Hart, Ellen Jackson, Annie A. Jakes, James Jenkins, Reverend Harvey Johnson, Reverend Robert McGuinn, the Stewart sisters, Alexander Thompson, and Thomas W. Turner were among the many teachers, ministers, businessmen, and ordinary citizens who refused to accept second class treatment on Maryland's waterways and rails.² The Montgomery boycott succeeded in part because federal courts struck down the Alabama state law requiring segregation on the buses;³ however, nearly a century earlier, the legal landscape for African Americans was far less supportive.

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1. See CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* 108-31 (1983) (discussing the Montgomery bus boycott and its effect on segregation in transportation in other southern cities).

2. See *infra* notes 27-35 and accompanying text (discussing Anderson and Jackson); *infra* notes 36-55 and accompanying text (discussing Bradley); *infra* notes 56-57 and accompanying text (discussing Jakes); *infra* notes 67-91 and accompanying text (discussing Thompson); *infra* notes 94-99 and accompanying text (discussing Fields); *infra* notes 100-109 and accompanying text (discussing Carr); *infra* notes 115-122 and accompanying text (discussing Cully); *infra* notes 130-145 and accompanying text (discussing the Stewart sisters and Johnson); *infra* notes 146-158 and accompanying text (discussing McGuinn); *infra* notes 210-224 and accompanying text (discussing Hart); *infra* notes 246-250 and accompanying text (discussing Turner); *infra* notes 252-259 and accompanying text (discussing Jenkins).

3. *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (1956). The *Browder* court held that the law violated both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Id.*

The Supreme Court took a limited view of the Civil War Amendments.⁴ It struck down the Civil Rights Act of 1875, which had attempted to prohibit discrimination in public accommodations.⁵ Despite the elimination of federal statutory protection, African Americans fought segregation in Maryland transportation by protest, boycott, and litigation.⁶ Using federal common law in diversity suits and admiralty, they initially had federal court support, and their resistance to segregation helped keep transportation in Maryland largely integrated through the end of the nineteenth century.⁷

The very victories that compelled private companies to provide equal facilities were turned against the victors when the Supreme Court later cited them as a basis to uphold the Louisiana segregation ordinance in *Plessy v. Ferguson*.⁸ After *Plessy*, Maryland began to mandate segregation in transportation.⁹ African Americans fought back in every way imaginable, but the courts upheld state mandated segregation of intrastate transit, and interstate transportation companies maintained segregation to make it easier to comply with the state law for segregation of intrastate passengers.¹⁰ When the Court of Appeals of Maryland upheld the state statutes,¹¹ the only recourse left was to fight for physical equality in treatment. State and federal courts and agencies were not very sympathetic to claims of discrimination in the beginning of the twentieth century, however, allowing companies to

4. See, e.g., *United States v. Cruikshank*, 42 U.S. 542, 543 (1876) (holding that the Fourteenth Amendment does not prevent encroachment of individual rights by private citizens); *Slaughter-House Cases*, 83 U.S. 36, 58-59 (1873) (holding that the Privileges and Immunities Clause of Fourteenth Amendment did not apply to fundamental rights).

5. *Civil Rights Cases*, 109 U.S. 3, 25-26 (1883).

6. See, e.g., *Protest Against "Jim Crow" Cars*, AFRO-AM. LEDGER (Balt.), Feb. 22, 1902, at 4 (discussing opposition to the passage of Maryland's "Separate Car Bill"); *James Crow Enters Maryland and Creates Disturbances and Gets Into Court*, AFRO-AM. LEDGER (Balt.), July 16, 1904, at 4 (discussing a boycott of railroads and steamships, and early legal challenges to the "Separate Car Law").

7. See, e.g., *infra* notes 63-91 and accompanying text (discussing one attack against segregation under the federal law of common carriers).

8. 163 U.S. 537, 548 (1896) (citing *The Sue*, 22 F. 843 (D. Md. 1885)); see *infra* text accompanying notes 180-192.

9. See, e.g., 1904 Md. Laws, ch. 109 (requiring railroads to provide separate cars for black and white passengers).

10. See, e.g., *Two Baltimoreans File Suit Against W.B. & A. Railroad*, AFRO-AM. LEDGER (Balt.), Feb. 14, 1919, at 2 (noting railroad policy of segregating interstate passengers and two early legal challenges).

11. *Hart v. State*, 100 Md. 595, 615, 60 A. 457, 463 (1905) (finding statutes mandating segregation valid as applied to intrastate passengers but unconstitutional as applied to interstate travelers). *Id.*; see also *State v. Jenkins*, 124 Md. 376, 92 A. 773 (1905) (upholding the 1908 segregation statute).

escape the apparent requirements of equality in the law by making promises of improvement.¹²

At first, white lawyers represented the men and women who resisted racial discrimination.¹³ With the admission of the first African-American attorney to the Maryland bar in 1885,¹⁴ leadership passed to African-American attorneys. As segregation tightened its grip around the nation, men like Warner T. McGuinn and W. Ashbie Hawkins (for all African-American attorneys in Maryland prior to World War II were men) fought valiantly for equality.¹⁵ They created the tradition of legal struggle for equal rights in Maryland from which Thurgood Marshall emerged to provide the leadership that ultimately defeated segregation.¹⁶

I. CIVIL RIGHTS ACT OF 1866

Prior to the Civil War, segregation in transportation was primarily a Northern phenomenon, which was on the decline.¹⁷ In the South, slaves rode with their masters so as to be available to provide services,¹⁸ while laws to prevent escapes discouraged solo travel by blacks of any status.¹⁹ If transportation facilities did not exclude free blacks,

12. See, e.g., *Officers Admit Color Discrimination*, AFRO-AM. LEDGER (Balt.), Dec. 9, 1911, at 1 (reporting on a complaint filed with the Public Service Commission by W. Ashbie Hawkins for poor accommodations for blacks on a steamship, and noting that the railroad's attorney admitted discrimination and promised to take whatever action the Commission ordered). Hawkins' complaint was dismissed by the Public Service Commission, although the Commission recommended that the railroad improve the accommodations it provided African Americans. *Hawkins v. Balt., Chesapeake & Atl. Ry.*, 3 Md. Pub. Serv. Comm. Rpts. 49, 52 (1912).

13. See, e.g., *Right of Colored People to Travel on the Passenger Cars*, BALT. WEEKLY SUN, July 14, 1866, at 2 (reporting that Archibald Stirling, Jr. acted as counsel for Annie A. Jakes when she challenged segregation on Baltimore's street cars).

14. Everett Waring was admitted to the Supreme Bench of Baltimore on October 10, 1885. David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Attorneys*, 44 MD. L. REV. 939-1046 (1986).

15. See, e.g., *Protest Against "Jim Crow" Cars*, *supra* note 6, at 4 (reporting on the delegation opposed to the "Separate Car Bill," which was led by McGuinn, Hawkins, and others).

16. See J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 146-47 (1993) (describing McGuinn and Hawkins as pioneers); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 61-62 (1998) (describing McGuinn as a mentor to Marshall).

17. See BARNES, *supra* note 1, at 2 (noting that segregation in transportation first flourished in the North before the Civil War, but had been successfully challenged by litigation, boycotts, and legislative advocacy by 1865); LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860*, at 97-100, 106-12 (1961) (discussing segregation and racial prejudice in the North prior to the Civil War and efforts to combat it).

18. VERNON LANE WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890*, at 230 (1947).

19. RICHARD C. WADE, *SLAVERY IN THE CITIES: THE SOUTH 1820-1860*, at 266-67 (1964).

they were likely to segregate the few who traveled.²⁰ Slavery's abolition was swiftly accompanied by the rise of broader segregation.²¹

The enactment of the Civil Rights Act on April 9, 1866, spurred African-American resistance.²² The Act provided that citizens of every race and color were entitled to the same right to make and enforce contracts as was enjoyed by white citizens.²³ This created a plausible argument that discrimination in offering contracts for public accommodations violated the federal statute.²⁴ However, there were strong counterarguments that the Act applied only to government action, that the "right to contract" referred only to agreements between willing parties, and that basic rights protected by the statute did not extend to access to public accommodations.²⁵ Early attempts in

20. *Id.*; see also HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH 1865-1890*, at 182 (1978) (noting segregation on railroads and steamships and, in New Orleans, the use of separate streetcars for blacks and whites instead of the exclusion of blacks altogether).

21. RABINOWITZ, *supra* note 20, at 182-84; BARNES, *supra* note 1, at 2-3 (discussing the rise of systematic segregation in transportation in the South after the Civil War).

22. *Baltimore*, *BALTIMORE GAZETTE*, Apr. 18, 1866, at 1; see, e.g., *Colored Persons Claiming Equal Rights of Railroad Travel, etc.*, *BALT. SUN*, May 17, 1866, at 1 (reporting on a case brought by Mary J.C. Anderson and Ellen G. Jackson under the Civil Rights Act of 1866 where they were ejected from a ladies' waiting room at a train station); Richard Paul Fuke, *Black Marylanders 1864-66* (1973) (unpublished Ph.D. thesis, University of Chicago).

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

24. The U.S. District Court in Mobile, Alabama applied the Act to railway discrimination and held that riding on a privately owned city railroad car was a private right protected by the federal law. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876*, at 8 (1985). The Iowa Supreme Court held several years later that the Act applied to discrimination in transportation. *Coger v. North West Union Packet Co.*, 37 Iowa 145, 160 (1873) (holding that black passengers of Steamship held equal rights as white passengers). However, the Act was not widely interpreted and used in this way. KACZOROWSKI, *supra*, at 8 (noting that judges were not in general agreement that the Act extended to public accommodations); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869*, at 70-72 (1990) (noting the debate on whether the Act extended to public accommodations and discussing the arguments for and against).

25. There was substantial contemporary understanding that the Act only applied to governmental discrimination and not private acts. See MALTZ, *supra* note 24, at 75-78. The Supreme Court did not hold that the Act applies to private acts of discrimination until 1968. *Jones v. Mayer Co.*, 392 U.S. 409, 413 (1968) (sale or rental of real estate). Further, given the northern origins of segregation in transportation, it was difficult to argue that it was a "badge of slavery" that might be within the ambit of the 1866 Act. The enactment of the Civil Rights Act of 1875 prohibiting discrimination in transportation also indicated that the Civil Rights Act of 1866 did not effectively prohibit such discrimination. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1427-28 (1996) (noting the argument that the Act of 1866 was not intended to extend to public accommodations).

Maryland to vindicate rights to public accommodations through the statute were fruitless.²⁶

Mary J.C. Anderson and Ellen G. Jackson, black Maryland school teachers from counties north of Baltimore, tested train depot segregation. They filed a complaint seeking the arrest of a station master who tossed them out of the ladies' waiting room.²⁷ This was intended as a test case because the teachers acted with "legal advice backed by judicial opinion."²⁸ They may have chosen to proceed in state court because of doubt whether the federal court had jurisdiction.²⁹ Section three of the Civil Rights Act provided jurisdiction of "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts . . . of the State . . . the rights secured to them by the first section of this act."³⁰ They may have feared that federal courts would not take jurisdiction under the Civil Rights Act unless the state courts refused to enforce the provisions of section one of the Act.³¹ Prosecution for assault in state court would not raise a jurisdictional problem, and they apparently believed that the 1866 Civil Rights Act eliminated

26. See *infra* notes 27-35 (discussing one such unsuccessful attempt to employ the Civil Rights Act of 1866 to combat discrimination in access to public accommodations).

27. *Colored Persons Claiming Equal Rights of Railroad Travel, etc., supra* note 22, at 1.

28. *Another Civil Rights Case—Railroad Privileges to Colored Persons*, AM. COMMERCIAL ADVERTISER, May 16, 1866, at 4. Section 2, the criminal enforcement portion of the Civil Rights Act of 1866, required the defendant to be acting under color of law, which would have been difficult to show. Ch. 31, § 2, 14 Stat. 27. That may be part of the reason why Anderson and Jackson chose to proceed in state court.

29. See MALTZ, *supra* note 24, at 73-74 (noting the arguments for and against expansive jurisdiction under the Act and the resulting confusion over whether the Act granted jurisdiction to the federal courts only in cases where state courts refused to enforce its provisions).

30. Ch. 31, § 3, 14 Stat. 27. There was some question whether a criminal prosecution of the perpetrator of assault was "a cause affecting" the person whose rights were denied (the victim), and thus whether the federal courts had jurisdiction over such cases. KACZOROWSKI, *supra* note 24, at 11. The Supreme Court ultimately held that federal courts did not have jurisdiction over such cases. *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 595 (1872). Further, in Jackson and Anderson's case, the state was willing to arrest the station master or conductor for assault, and a federal court might not have found that a jury verdict of not guilty denied the victim's rights. See DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 1865-1868*, at 114 (1979) (noting the reluctance of federal judges to proceed against state officials who at least nominally investigated crimes against blacks, even though those officials failed to bring about justice).

31. MALTZ, *supra* note 24, at 74 (noting contemporary understanding that federal courts possessed "quasi-appellate" jurisdiction in cases where state courts refused to enforce section one of the Act). "[The Freedman's] Bureau officials also found that Congress's civil rights act, narrow in conception and indifferently administered by officials of the Johnson administration, did not, save in a few instances, allow them to have cases involving freedmen tried outside of state courts." NIEMAN, *supra* note 30, at 148.

any defense based on enforcement of railway company policy.³² The case was scheduled to come before Judge Hugh Lennox Bond of the Baltimore Criminal Court, the state judge most sympathetic to civil rights.³³ The station master requested a jury, however, and the case was not further mentioned in the papers.³⁴ Maryland's all white juries would have been unlikely to convict.³⁵

Aaron Bradley spearheaded the next attack on segregation.³⁶ Bradley, along with Mary G. Hutt and James H. Davis, filed a petition in federal court for an injunction against the Baltimore City Passenger Railway Company to prevent it from operating.³⁷ By requesting equitable relief, Bradley hoped to avoid a jury, which thwarted the chances of success in state criminal proceedings.³⁸ The Baltimore City Passenger Railway was the largest of the various horsecar lines that furnished the city with local transportation.³⁹ Under company policy, blacks were required to stand on an uncovered platform outside the covered portion of the horse-drawn railway car.⁴⁰ Bradley and the others

32. See *Another Civil Rights Case—Railroad Privileges to Colored Persons*, *supra* note 28, at 4 (noting that the suit was intended as a test case and that the railroad would "assume the act of the officer as its own," as it was carried out pursuant to company policy).

33. *Colored Persons Claiming Equal Rights of Railroad Travel, etc.*, *supra* note 22, at 1. On Judge Bond, see KACZOROWSKI, *supra* note 24, at 68 (noting that Judge Bond was opposed to slavery and supported equal rights).

34. *Proceedings of the Courts*, BALT. SUN, May 21, 1866, at 1; BALT. GAZETTE, May 21, 1866, at 2.

35. Maryland did not ratify either the Fourteenth or the Fifteenth Amendment. BARBARA JEANNE FIELDS, *SLAVERY AND FREEDOM ON THE MIDDLE GROUND: MARYLAND DURING THE NINETEENTH CENTURY 133-34* (1985). The legislature even removed jurisdiction in apprenticeship cases from Judge Bond, the only judge in the state likely to issue writs of habeas corpus on behalf of freedmen. *Id.* at 139, 151. Maryland law barred blacks from serving on juries until 1880, when the Supreme Court declared a similar West Virginia law unconstitutional in *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879). See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 371; see also Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 889-90 (1994) (discussing discrimination by white jurors against black litigants in the years following the Civil War).

36. *Civil Rights—Action Against the City Passenger Railway Company*, BALT. SUN, May 24, 1866, at 4.

37. *Id.* Specifically, they sought to prevent the railway from running past the Douglass Institute on Lexington Street, near where the plaintiffs lived and where the rail company refused to accept black passengers. *Id.*

38. The Seventh Amendment does not preserve the right to a jury trial where a court is exercising its equity jurisdiction. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830) (noting that the Seventh Amendment was intended to "embrace all suits which are not of equity and admiralty jurisdiction").

39. SHERRY H. OLSON, *BALTIMORE: THE BUILDING OF AN AMERICAN CITY* 161 (1980).

40. See *Baltimore City Passenger Railway, Who Shall Ride in the Cars, Suit in the United States Court*, BALT. AM. & COMMERCIAL ADVERTISER, Apr. 30, 1870, at 1 (reporting on the case of Alexander Thompson, who was ejected from a seat in the covered portion of a car and forced onto the uncovered platform).

claimed that this policy violated the railway's terms of operation, as laid out in its charter.⁴¹

U.S. District Court Judge William Fell Giles, noting that some complainants were Baltimore residents, stated that the jurisdiction of the federal court applied only to suits between citizens of different states.⁴² Judge Giles may have been referring to the petition's claim of rights under Article IV of the Constitution because such rights were only available to citizens of other states.⁴³ More likely, he thought the jurisdictional provisions of the Civil Rights Act required a showing that relief was unavailable in state courts.⁴⁴ Without a specific grant of jurisdiction, there were only two grounds for federal jurisdiction—admiralty for maritime discrimination and diversity when the plaintiff was from another state.⁴⁵ The petitioners withdrew the petition—leaving the impression that citizens could not successfully sue in the federal court of their own state.⁴⁶

Bradley immediately filed an amended petition as the sole plaintiff to enjoin the trolley car from going past his schoolroom and office in the Douglass Institute,⁴⁷ claiming diversity of citizenship as a citizen of Massachusetts.⁴⁸ The newspapers reported that Bradley claimed to be admitted to the Massachusetts bar, but he appeared in his capacity as plaintiff.⁴⁹ Bradley contended that the street car company refused

41. *Civil Rights*, BALT. SUN, May 23, 1866, at 1.

42. *Civil Rights—Action Against the City Passenger Railway Company*, *supra* note 36, at 4.

43. See *Civil Rights Case*, AM. & COMMERCIAL ADVERTISER, May 25, 1866, at 4 (noting that Bradley alleged a violation of Article IV, § 2 Privileges and Immunities Clause). Article IV, section 2 of the U.S. Constitution provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2. Some of the drafters of the Civil Rights Act of 1866 and of the Fourteenth Amendment believed that the article imposed a duty on the states to grant everyone fundamental rights, including their own citizens. DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 44-46 (2003). Nevertheless, the Supreme Court held that the clause only entitled citizens of other states to be treated as if they were citizens of the state—preventing discrimination based on state of citizenship but not conferring any other rights. *Id.* at 69-70; *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868).

44. See *Civil Rights*, *supra* note 41, at 1 (noting that Judge Giles held that the Criminal Court of Baltimore was the proper court in which to bring the action).

45. U.S. CONST. art. III, § 2 (stating that “[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies . . . between Citizens of different States . . .”).

46. *Civil Rights—Action Against the City Passenger Railway Company*, *supra* note 36, at 4.

47. The Douglass Institute was formed by three African-American partners who converted a three-story brick building into a hall for meetings and public entertainment. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 566 (1935).

48. *Civil Rights Case*, *supra* note 43, at 4.

49. *Civil Rights*, *supra* note 36 at 1. Aaron Alpeoria Bradley was admitted to the Massachusetts bar in 1856; he was the third black lawyer to be admitted to that bar. SMITH, *supra*

to let him ride in violation of his privileges and immunities under Article IV, took private property without compensation, and maintained a common nuisance in violation of privileges granted from the government for use of its highways without regard to color or race.⁵⁰ Judge Giles ruled that injunctive relief was not appropriate and dismissed the petition, stating that the proper remedy was damages in a case at law before a jury.⁵¹ Giles said that he would hear argument on the proper construction of the Constitution and the civil rights bill if the suit were brought as an action at law for damages, but Bradley indicated that he would pursue the matter no further.⁵²

The afternoon of the day he filed his petition against the city passenger railway in federal court, Bradley also filed suit in state court against the Baltimore and Ohio Railroad Company for ejecting him from a railroad car on a trip from Washington to Baltimore "in contempt of a law of the United States on account of his color, race,

note 16, at 100. A reconstruction military commission in Georgia convicted him of sedition in 1865 for stating that it was not a crime for freed slaves to seize the property of their former masters, and he was sentenced to a year of hard labor at Fort Pulaski. *Id.* at 192-93. Savannah papers reported that he was released in January of 1867. *Id.* at 193. He was elected to the Georgia Constitutional Convention in 1867 where he was the most militant delegate demanding black rights, calling, among other things, for an end to discrimination on public carriers. EDWARD L. DRAGO, *BLACK POLITICIZATION AND RECONSTRUCTION GEORGIA* 41-43 (1982). After Secretary of War Edwin M. Stanton ordered Bradley's release in 1867, his application for admission to the Georgia bar was rejected. Nonetheless, in 1868, Bradley was elected to the Georgia state senate. *Id.* at 193. The timing suggests that the Maryland plaintiff assumed Bradley's identity, but the description of a "dignified colored Boston lawyer," *Civil Rights, supra* note 41, at 1, sounds like Bradley, and the confrontational assertion of rights fits his character. See SMITH, *supra* note 16, at 193 (describing Bradley as "uncompromising"). Perhaps he was allowed to leave Georgia during 1866 instead of being confined there, or maybe he did not begin serving his term until the middle of the year. The true explanation is elusive.

50. *Civil Rights Case, supra* note 43, at 4.

51. *The Civil Rights Case in the United States District Court*, AM. & COMMERCIAL ADVERTISER, May 26, 1866, at 4.

52. *Id.* The first report in the *Sun* suggested that Giles told Bradley that the federal court had no jurisdiction and the proper tribunal for assault was the Criminal Court of Baltimore. *Civil Rights, supra* note 41, at 1. One report in the *American & Commercial Advertiser*, meanwhile, said Giles' dismissal on the jurisdictional issue indicated that the federal court had no jurisdiction over the streets of the city. *Application for an Injunction—Another Phase in the Civil Rights Bill*, AM. & COMMERCIAL ADVERTISER, May 23, 1866, at 4. The petition as reported in that newspaper on May 25 had references to nuisance and assault. *Civil Rights Case, supra* note 43, at 4. Giles may have remarked that both of those issues are matters of state law. See *The Civil Rights Case in the United States District Court, supra* note 51, at 4 (noting that Judge Giles held that Bradley had not presented a case for equitable relief, and that the proper remedy would be an action at law). The Douglass Institute directors repudiated the suit, which sought to enjoin the trains from passing the institute. *Civil Rights Case, supra* note 43, at 4 (reporting that the directors placed an advertisement in *The American* to state that Bradley's suit was brought without their knowledge or consent).

&c.”⁵³ This time he sought damages, so the suit avoided the discretion inherent in requests for equity.⁵⁴ But Judge Hayward held that Bradley had no cause of action.⁵⁵

The following month, Mrs. Annie A. Jakes, the wife of a “well-known colored barber and waiter,” charged a conductor of the Baltimore City Passenger Railway with assault for ejecting her from a railway car.⁵⁶ Unionist leader Archibald Stirling, Jr. appeared as her counsel, but the defendant demanded a jury trial in state court and the case was not further reported.⁵⁷

Thus, within a few months of the enactment of the Civil Rights Act of 1866, litigants understood that most of the doors had been shut. The federal court seemed to think that actions for assault were for the state to deal with,⁵⁸ but state juries would never convict anyone criminally for enforcing company segregation policies.⁵⁹ The federal courts said that diversity of citizenship was necessary to get into federal court, and that actions under the Civil Rights Act of 1866 were at best debatable, while state courts seemed to think racial discrimination by private companies was appropriate.⁶⁰

The Fourteenth Amendment was ratified in 1868 and was understood to make the Civil Rights Act into a constitutional requirement.⁶¹

53. *Civil Rights—Before Justice Hayward*, BALT. SUN, May 23, 1866, at 1. John H.B. Latrobe appeared for the railroad and argued that under state law the B & O had the authority to make rules for travel. *Id.* He noted that white men had never objected to being excluded from cars for ladies. *Id.* Perhaps because Latrobe’s argument for railway discretion referred to gender discrimination, the *American & Commercial Advertiser* thought Hayward rejected the suit because Bradley was trying to get into the ladies’ car. *Application for an Injunction—Another Phase in the Civil Rights Bill*, *supra* note 52, at 4. African Americans were generally confined to second class or smoking cars. RABINOWITZ, *supra* note 20, at 191. There were sometimes separate cars for ladies and the men who accompanied them. See Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the “Separate but Equal” Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17, 25 (1984) (discussing a case where a black man was removed from a car designated for ladies and those traveling with them). Often, the non-smoking white male would occupy such cars as well. Thus, the first class car often was referred to as the “ladies’ car.” JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877*, at 284 (1965).

54. *Civil Rights—Before Justice Hayward*, *supra* note 53, at 1.

55. *Id.*

56. *Right of Colored People to Travel on the Passenger Cars*, *supra* note 13, at 2.

57. *Id.*

58. See *Civil Rights*, *supra* note 41, at 1.

59. See Alschuler & Deiss, *supra* note 35, at 889-90 (noting discrimination by white jurors against black litigants in the years after the Civil War).

60. See *supra* notes 36-55 and accompanying text (discussing federal and state cases brought by Aaron Bradley).

61. KACZOROWSKI, *supra* note 24, at 13 (recognizing that judges understood the Fourteenth Amendment to be identical to the Civil Rights Act of 1866 in its purpose, meaning, and scope).

The Amendment, however, did not directly affect segregation by transportation companies, because they were private stock companies and the Amendment only prohibited state governments from denying equal protection.⁶²

II. FEDERAL COMMON LAW IN ADMIRALTY AND DIVERSITY JURISDICTION CASES

With the reluctance of the courts to apply the Civil Rights Act to alter the racially discriminatory practices of a private carrier, the most attractive remaining basis for any suit was the common law principle that common carriers must accept all passengers who paid the fare and did not misbehave.⁶³ Unfortunately, the law of common carriers did not require the carrier to provide the seat of the passenger's choice as long as the carrier furnished appropriate accommodations.⁶⁴ Common carrier suits nonetheless attacked the carriers' failure to provide passengers with the class of accommodations for which they were willing to pay.⁶⁵ By making the cost of segregation high enough, this tactic could drive carriers to integrate.⁶⁶

On October 30, 1869, Alexander Thompson, an African-American citizen from New York claiming diversity of citizenship, filed suit in federal district court to recover damages against the railway for ejection from a rail car.⁶⁷ Archibald Stirling, Jr., newly appointed U.S. Attorney for Maryland, and George C. Maund, were his counsel before Judge Giles.⁶⁸ The railway company demurred to the complaint.⁶⁹

The railway company's lawyer, Arthur W. Machen, offered two basic arguments at the April 1870 term of the court. First, Machen

62. See MALTZ, *supra* note 24, at 102-06 (discussing the state action limitation).

63. Riegel, *supra* note 53, at 31.

64. *Id.* (noting that the law also allowed carriers to make regulations for safety and comfort and that racial segregation was considered just a reasonable regulation); *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867) (holding that a black woman removed from a train for refusing to move to a seat in the section designated for black passengers could not recover where the seat she was requested to move to was adequate in terms of safety and comfort).

65. See Riegel, *supra* note 53, at 30-31 (citing *McGuinn v. Forbes*, 37 F. 639, 641 (D. Md. 1889)); *Houck v. S. Pac. Ry. Co.*, 38 F. 226, 228 (C.C.W.D. Tex. 1888); *The Sue*, 22 F. 843, 844 (D. Md. 1885); *Gray v. Cincinnati S. R.R. Co.*, 111 F. 683, 685-86 (C.C.S.D. Ohio 1882).

66. See *The Sue*, 22 F. at 848 (holding that if it is too costly for carriers to provide equal accommodations, they have no duty to separate black and white passengers).

67. *Baltimore City Passenger Railway, Who Shall Ride in the Cars? Suit in the United States Court*, *supra* note 40, at 1.

68. *Baltimore City Passenger Railway: Who Shall Ride in the Cars? Test Case in United States Circuit Court*, *BALT. AM. & COMMERCIAL ADVERTISER*, Apr. 30, 1870, at 1.

69. *Id.*

claimed that railways were free to choose whom they would carry and under what conditions because the railway charter did not expressly limit the exercise of such property rights.⁷⁰ At the least, railroads could make any reasonable decision to separate the races.⁷¹ Before the War, the Michigan Supreme Court had held that steamships could reserve all the cabins for whites and force African Americans to travel on deck.⁷² The Baltimore Criminal Court's decision in Bradley's suit against the B & O seemed to approve racial separation on railroads.⁷³ In addition, a Pennsylvania lower court had upheld as a reasonable measure a trolley rule like that of the trolley in Baltimore, which excluded blacks from the inside of the car.⁷⁴ Machen cited *The West Chester and Philadelphia Railroad Company v. Miles*,⁷⁵ where the Supreme Court of Pennsylvania reversed a judgment for a woman who had been forced to move to a seat reserved for colored passengers.⁷⁶ The Pennsylvania court held that separation of the races was a reasonable use of the railroad's property rights over its facilities, and that the trial court should rule that if the seat was not inferior to the one she was asked to leave, the plaintiff could not recover.⁷⁷ The references to property rights helped Machen's argument, but the requirement that the seat not be inferior posed an obstacle to his client's position.⁷⁸ Well-established common law principles required common carriers to take all passengers,⁷⁹ and a federal court applying federal common

70. *Who Shall Ride in the Cars? Suit in the United States Court*, *supra* note 40, at 1.

71. *Id.*

72. Day v. Owen, 5 Mich. 520, 526-27 (1858) (holding that a common carrier steamship must accept passengers, but that it was a reasonable regulation to require blacks to take inferior accommodations on deck and exclude them from cabins).

73. See *supra* notes 53-55 and accompanying text (discussing the court's ruling that Bradley had no cause of action in his suit against B & O).

74. *Goines v. M'Candless*, 4 Phila. R. 255, 255, 257-58 (1861) (giving discretion to the railroad to make "rules for the comfort and convenience" of the passengers).

75. 55 Pa. 209 (1867).

76. *Id.* at 215.

77. *Id.* at 211-12, 215. The incident arose before the enactment of a state law prohibiting racial discrimination in transport, and the Pennsylvania court pointed to the law as evidence that separation had been permissible prior to its enactment. *Id.* at 215.

78. *Who Shall Ride in the Cars? Suit in the United States Court*, *supra* note 40, at 1 (stating that Thompson was ejected from a seat and compelled to stand on the platform).

79. See, e.g., *Jencks v. Coleman*, 13 F. Cas. 442, 443-44 (C.C.D. R.I. 1834) (No. 7, 258) (holding that steamboats are common carriers required to take passengers unless there is a reasonable basis for refusal); *Pearson v. Duane*, 71 U.S. 605, 615 (1866) (holding that common carriers are obliged to carry all passengers who apply unless there is sufficient excuse for refusal).

law in diversity jurisdiction after the Civil War was unlikely to concede the railroad more power than had the Pennsylvania common law.⁸⁰

The company's second argument was that when the railway was chartered in 1859, African Americans were not citizens according to the *Dred Scott* decision.⁸¹ At that time, custom and usage would have considered integrated transportation a nuisance.⁸² Under the law in 1859, the railway had no obligation to carry blacks and in fact was encouraged to discriminate.⁸³ Machen argued that the Railway Company could continue to discriminate because its charter had not changed since 1859.⁸⁴ He concluded that if there was no right of action at common law when the railway was chartered, there could be none a decade later.⁸⁵

After hearing this argument, Judge Giles told plaintiff's counsel that they need not even argue the case.⁸⁶ He denied the demurrer, noting that the situation was very different than when the trolley company began operating.⁸⁷ At that time, slaves had no rights, and because color was presumptive evidence of slavery, carriers had stringent rules to prevent slave escapes.⁸⁸ With the end of slavery, the reason for such rules had disappeared, and the Fourteenth Amendment assured citizenship for African Americans.⁸⁹ Thus, the common carrier could no longer refuse to accept African Americans who sought passage.⁹⁰ Judge Giles ruled that although separate seating would be permissible, there was no justification for a common carrier to treat passengers who paid the same fare to inferior seating.⁹¹

The Baltimore City Passenger Railway responded immediately by providing separate cars for African Americans to sit inside—limiting blacks to those cars marked with a sign permitting colored passen-

80. Before the landmark case of *Erie v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that federal courts should apply "general" law, irrespective of local laws, when ruling on cases where jurisdiction was based in diversity. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 23 (1842).

81. *Baltimore City Passengers Railway: Who Shall Ride in the Cars? Test Case in United States Circuit Court*, *supra* note 68, at 1.

82. *Id.* (noting that under the law in 1859, integrated cars "would have been declared a nuisance").

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

gers.⁹² About one car in three permitted African Americans to ride, but the railway permitted whites to ride in all cars.⁹³ In February of 1871, John W. Fields, a black barber visiting Baltimore from Virginia, was ejected from a car that did not have such a sign.⁹⁴ He responded by filing suit in United States circuit court, with Mr. Presstman as his attorney.⁹⁵ The case was tried before Judge Giles and Judge Hugh Lennox Bond (appointed to the Fourth Circuit Court of Appeals by President Ulysses Grant as a reward for his conduct during the Civil War and on the bench in Baltimore).⁹⁶

Judge Bond charged the jury that if the company refused to transport Fields solely because he was black, he should be awarded damages.⁹⁷ That charge marked the end of segregation on horsecar trolleys, because afterwards the trolley companies found it too expensive to have separate cars for African Americans in the same numbers and with the same convenience as cars restricted to whites.⁹⁸ Thus, Fields' victory integrated municipal transit in Baltimore.⁹⁹

The next year Judge Giles heard another transportation case.¹⁰⁰ On May 14, 1872, Ms. Josephine Carr, an African-American school teacher from Kent County, boarded the steamer *Chester* in Baltimore, intending to travel to Crumpton in Kent County.¹⁰¹ Upon boarding, she took a seat in the main cabin.¹⁰² After the steamer left Baltimore, she was asked to move, refused, and then was dragged to the forward

92. *A Righteous Decision*, BALT. AM. & COMMERCIAL ADVERTISER, Apr. 30, 1870, at 2.

93. *The Rights of Colored Passengers on the Chesapeake Steamers*, BALT. AM. & COMMERCIAL ADVERTISER, June 19, 1872, at 2. Because African Americans could only ride in every third car, they would have to wait nearly fifteen minutes for a car on some lines, and up to thirty on others. *Id.*

94. *The Right of Colored People to Ride in the City Passenger Cars—Damage Case*, BALT. SUN, Nov. 10, 1871, at 4.

95. *Id.*

96. Kermit L. Hall, *Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871-1872*, 33 EMORY L.J. 921, 933-34 (1984).

97. *The Street Car Case*, BALT. AM. & COMMERCIAL ADVERTISER, Nov. 13, 1871, at 4. Rulings instructing the jury were made jointly by Giles and Bond, although Bond delivered them alone. *Id.* Fields came from Richmond, where protests and litigation over horsecar railway discrimination were contentious. *The Right of Colored People to Ride in the City Passenger Cars—Damage Case*, *supra* note 94, at 4; RABINOWITZ, *supra* note 20, at 184.

98. See Jack Greenberg, *Reflections on Leading Issues in Civil Rights, Then and Now*, 57 NOTRE DAME L. REV. 625, 635 (1982) (recognizing "the idea of bringing a number of separate-but-equal suits for the purpose of making segregation too expensive to maintain").

99. JEFFREY BRACKETT, NOTES ON THE PROGRESS OF THE COLORED PEOPLE OF MARYLAND SINCE THE WAR 64 (1890).

100. *The Rights of Colored Passengers on the Chesapeake Steamers*, *supra* note 93, at 2 (noting a case brought before Judge Giles by Josephine Carr).

101. *Id.*

102. *Id.*

cabin by the captain, Edward Young, and one of the passengers, John Nicholson.¹⁰³ She refused to stay there and moved to the bow, where she stood until the ship reached Chestertown.¹⁰⁴ Ms. Carr got off the boat there, without having reached her destination farther up the Chester River.¹⁰⁵ On May 31, with Stirling as her attorney, she filed a libel against the ship in admiralty, reciting the assault.¹⁰⁶

The captain admitted the facts, but argued that "the immemorial usage and custom of confining the colored passengers to the forward cabin and the forward deck" excused his actions.¹⁰⁷ Judge Giles awarded Ms. Carr twenty-five dollars in compensatory damages.¹⁰⁸ Giles was reported to have noted the "great changes that have taken place in the country," and to have relied upon the Passenger Railway cases in ruling that common carriers cannot make distinctions as to color in transporting passengers.¹⁰⁹

III. THE UNCONSTITUTIONALITY OF FEDERAL AND STATE ANTI-DISCRIMINATION LAW

In 1875 Congress adopted a Civil Rights Act that provided:

all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of . . . public conveyances on land or water, . . . subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color.¹¹⁰

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* Admiralty jurisdiction included suits on maritime contracts for carrying passengers. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427-28 (1867). Admiralty jurisdiction applied even when the vessel operated entirely intrastate. *The Belfast*, 74 U.S. (7 Wall.) 624, 641-42 (1869). Maritime liens were available in actions *in rem* under admiralty law as a remedy for failure to give a passenger proper accommodations. *Gleason v. The Willamette Valley*, 71 F. 712, 719-20 (N.D. Cal. 1896); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 35, 629 (2d ed. 1975) (stating that tortious conduct aboard a ship can give rise to a maritime lien).

107. *The Rights of Colored Passengers on the Chesapeake Steamers*, *supra* note 93, at 2.

108. *Id.* The Captain was represented by Ferdinand Latrobe, subsequently the long time mayor of Baltimore. *Id.*

109. C. Christopher Brown, *The African-American Experience on Maryland's Eastern Shore: 1860-1915* ch. 6, 16-17 (1996) (unpublished manuscript on file with the author).

110. Civil Rights Act, ch. 114, 18 Stat. 335, 336 (1875).

This enabled Maryland citizens to sue in federal courts to secure equality in transportation, but its enactment was also an indication that the Civil Rights Act of 1866 did not address the same problem.¹¹¹

There is some support in legislative history for the proposition that the 1875 Act was merely intended to prevent exclusion of blacks along the lines of common carrier principles rather than to require integration.¹¹² Many of the federal judges who interpreted the statute found that the "full and equal enjoyment" required by the Act could be satisfied by "separate but equal" treatment.¹¹³ Other courts held the statute beyond congressional power.¹¹⁴ In Maryland, in *Cully v. Baltimore & Ohio Railroad*,¹¹⁵ Harriet E. Cully was the lead plaintiff in a case brought by eighteen Marylanders who sued the railroad for forcing them to ride in separate and inferior accommodations.¹¹⁶ They were represented by Archibald Stirling, Jr., who argued that the new Civil Rights Act of 1875 entitled them to damages.¹¹⁷

Judge Giles distinguished his earlier decisions in *Thompson and Fields* on the grounds that those cases arose in diversity jurisdiction.¹¹⁸ He did not mention *The Chester*, perhaps because he thought maritime cases were not relevant to railway transport.¹¹⁹ Giles cited the *Slaughter-House Cases*¹²⁰ for the proposition that rights to travel on a railroad were a privilege of state citizenship, rather than a privilege of citizens of the United States.¹²¹ Consequently, he held, the Act of Congress

so far as it seeks to inflict penalties for the violation of any or all rights which belong to citizens of a state, and not to citizens of the United States as such, was the exercise of a power

111. See Civil Rights Act, ch. 31, 14 Stat. 27 (1866). The Civil Rights Act of 1866 did not specifically address the right to equal accommodations. *Id.*

112. Riegel, *supra* note 53, at 35-36.

113. *Id.* at 34 (citing *Green v. City of Bridgeton*, 10 F. Cas. 1090, 1093 (S.D. Ga. 1879)); *Charge to the Grand Jury-Civil Rights Act*, 30 F. Cas. 999, 1000-02 (C.C.W.D.N.C. 1875).

114. *Charge to the Grand Jury-Civil Rights Act*, 30 F. Cas. at 1006; *Smoot v. K. Cent. Ry. Co.*, 13 F. 337, 343 (C.C.D. Ky. 1882).

115. 6 F. Cas. 946 (D. Md. 1876) (No. 3,466).

116. *Id.* at 946.

117. *Id.* at 946, 948.

118. *Id.* at 946-47.

119. Alternatively, Judge Giles may have forgotten the details—his descriptions in *Cully* of *Thompson* and *Fields* get the citizenship of the parties wrong, probably because he was writing without the benefit of printed versions of the previous decisions, and was too pressed to look up the papers and slip opinions for the five-year old cases. Compare *Baltimore City Passenger Railway, Who Shall Ride in the Cars, Suit in the United States Court*, *supra* note 40, at 1, and *The Right of Colored People to Ride in the City Passenger Cars—Damage Case*, *supra* note 94, at 4, with *Cully*, 6 F. Cas. at 947.

120. 83 U.S. 36 (1872).

121. *Cully*, 6 F. Cas. at 947.

not authorized by any provision of the constitution of the United States.¹²²

Supreme Court rulings discouraged any state laws prohibiting segregation in transport (although Maryland was unlikely to enact a public accommodations law in any event).¹²³ This time the Commerce Clause was the culprit.¹²⁴ In 1877, in *Hall v. DeCuir*, the Supreme Court struck down a Louisiana statute that prohibited all common carriers within the state from making rules that discriminated on account of race or color.¹²⁵ The Court said:

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, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be.¹²⁶

Congress, however, did not base its regulation of public conveyances on the Commerce Clause.¹²⁷ The Civil Rights Act of 1875 applied to intrastate as well as interstate commerce, and the Supreme Court held it unconstitutional in the *Civil Rights Cases*¹²⁸ in 1883, just as Judge Giles had done in Maryland seven years earlier.¹²⁹

122. *Id.* at 948. Because Giles decided that Congress lacked power to enact the Civil Rights Act of 1875, he would have been very unlikely to find that the Civil Rights Act of 1866 applied to places of public accommodation, or that it would have been constitutional if it did so.

123. *E.g.*, *Hall v. DeCuir*, 95 U.S. 485, 490-91 (1877) (holding that states did not have authority to prohibit racial discrimination in interstate transport).

124. *Id.* at 489.

125. *Id.* at 490-91.

126. *Id.* at 489-90.

127. KACZOROWSKI, *supra* note 24, at 173 (noting that the Civil Rights Act of 1875 was based on Congress' power under the Equal Protection Clause of the Fourteenth Amendment).

128. 109 U.S. 3 (1883).

129. *Cully v. Baltimore & Ohio R.R.*, 6 F. Cas. 946, 948 (D. Md. 1876) (No. 3,466). The United States Supreme Court did not put the final nail in the coffin of the federal Civil Rights Act of 1875 until 1913. *See Butts v. Merchs. & Miners Transp. Co.*, 230 U.S. 126 (1913). Mrs. Mary F. Butts, an African-American woman from Everett, Massachusetts, brought suit under the Act in United States district court in Massachusetts against the Merchants and Miner's Transportation Corporation, a Maryland corporation that ran ships between Boston and Norfolk, Virginia. *Id.* at 130. Although Mrs. Butts paid first class fare, the company forced her to take second class accommodations. *Id.* She argued that the *Civil Rights Cases* only invalidated the Civil Rights Act with respect to acts within the

IV. SEPARATE BUT EQUAL COMMON CARRIER LAW
PRESERVING INTEGRATION

Cully and the *Civil Rights Cases* meant that any redress for unequal treatment by common carriers must be sought in state courts controlled by unsympathetic Democratic judges or in a federal suit where admiralty jurisdiction or diversity of citizenship existed. On August 15, 1884, the Stewart sisters, Martha, Mary, Lucy, and Winnie, bought first class tickets on the steamer *Sue* going from Baltimore to Kinsale, Virginia in order to visit relatives in Westmoreland County.¹³⁰ These four women members of the Reverend Harvey Johnson's congregation were forced to move to clearly inferior accommodations on the *Sue*.¹³¹ The sleeping cabins in the stern were reserved for white passengers and had an attendant.¹³² The forward cabins had no attendant, dirty sheets, few pillows, no washing conveniences, and no key to lock the doors.¹³³ Even worse, the passageway to the cabin was obstructed by cattle.¹³⁴ Because the forward cabins were so bad, they stayed up all night in the saloon rather than going below decks to the cabin.¹³⁵ The steamer was owned by a Virginia company, and Reverend Johnson obtained the services of Stirling and attorney Alexander Hobbs to bring a damage suit in admiralty in federal court on his parishioners' behalf.¹³⁶

Counsel argued both that segregation was unlawful and that the steamship company failed to provide equal accommodations.¹³⁷ Judge Morris declared that states could not affect the boat's regulations because the vessel was in interstate commerce and that no federal statute applied.¹³⁸ He concluded that the owner's rights were

jurisdiction of the states. *Id.* at 132-33. She further argued that because Congress had power to legislate with respect to boats on navigable waters under admiralty jurisdiction, the Act should be held valid with respect to those areas where Congress had plenary jurisdiction—i.e., the high seas, the District of Columbia, and the territories of the United States. *Id.* The Supreme Court unanimously ruled against her, holding that the Act was not severable and was unconstitutional as a whole. *Id.* at 138.

130. DAVID C. HOLLY, *TIDEWATER BY STEAMBOAT: A SAGA OF THE CHESAPEAKE: THE WEEMS LINE ON THE PATUXENT, POTOMAC, AND RAPPAHANNOCK* 173 (1991).

131. Elaine Freeman et al., *A Study of Leadership in the Baltimore Negro Community 17-18* (1968) (unpublished M.A. thesis, George Washington University) (on file with the George Washington University library).

132. *The Sue*, 22 F. 843, 847 (D. Md. 1885).

133. *Id.* at 846.

134. *Id.* at 846-47.

135. Holly, *supra* note 130, at 173.

136. Freeman, *supra* note 131, at 17-18 (citing Warner T. McGuinn, *The Brotherhood of Liberty*) (unpublished manuscript).

137. *The Sue*, 22 F. at 844.

138. *Id.*

governed by "common law."¹³⁹ Morris concluded that segregation was a reasonable regulation within the power of the company under federal common law, citing *Hall v. DeCuir*.¹⁴⁰ Nevertheless, following the street trolley decisions of his predecessor Judge Giles, Judge Morris held that the ship had no right to provide inferior accommodations on the basis of race to persons paying the same fare.¹⁴¹ He awarded the plaintiffs one hundred dollars in damages.¹⁴²

Reverend Johnson saw the need for lawyers who would fight for the rights of African Americans, and he raised the money to hire Hobbs to represent Charles Wilson in the lawsuit that opened the bar for black lawyers in the state in 1885.¹⁴³ Although the court held that the limitation to whites only was unconstitutional, Wilson did not gain admission to the bar.¹⁴⁴ Reverend Johnson then went to Howard University where he recruited Everett J. Waring in October of 1885 to come to Baltimore to commence practice.¹⁴⁵

One of Waring's cases revealed the limitations of Morris' opinion in *The Sue*. Reverend Robert McGuinn, a black Baptist minister from Annapolis, purchased a ticket on July 6, 1887, for travel from Baltimore to Millenbeck, Virginia, on the steamer *Mason L. Weems*.¹⁴⁶ At supper, Reverend McGuinn sat at a table reserved for white passengers.¹⁴⁷ When they saw him there, the white passengers refused to eat with him.¹⁴⁸ The captain, Thomas J. Cooper, asked him to move to another table, but McGuinn refused to budge.¹⁴⁹ The captain then moved the white passengers to another table.¹⁵⁰ A passenger later assaulted McGuinn, and threats were made to throw the minister overboard.¹⁵¹ The captain told the passengers to leave McGuinn alone; but, fearing for his safety, Reverend McGuinn left the vessel at Monakon before it arrived at his destination.¹⁵² McGuinn hired Waring to

139. *Id.* (citing *Hall v. DeCuir*, 95 U.S. 485, 490 (1877)).

140. *Id.*

141. *Id.* at 846-48.

142. *Id.* at 848.

143. *Admitted to the Bar, Decision in the Wilson Case, A Colored Man May Practice Law*, BALTIMORE SUN, Mar. 20, 1885.

144. A. BRISCOE KOGER, *THE NEGRO LAWYER IN MARYLAND* 2-3 (1948).

145. Bogen, *supra* note 14, at 1041.

146. *McGuinn v. Forbes*, 37 F. 639, 639 (D. Md. 1889).

147. *Id.* at 640.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

sue the captain and the owners of the ship, Georgeanna Williams and Matilda S. Forbes, for damages based on mistreatment.¹⁵³

Judge Morris dismissed the complaint.¹⁵⁴ Citing *The Sue*, Judge Morris said that when persons pay first class fare, the carrier must make “a bona fide effort” to furnish the same accommodations regardless of race.¹⁵⁵ Nevertheless, Judge Morris said, “[w]hen public sentiment demands a separation of the passengers, it must be gratified to some extent.”¹⁵⁶ Judge Morris explained that Reverend McGuinn got the table he wished and the same food as others and the captain was not responsible for the behavior of the other passengers.¹⁵⁷ Judge Morris said there was some ground to suspect that the officers of the boat did not protect the minister sufficiently from the threats of other passengers, but there was not enough proof to find liability.¹⁵⁸

Meanwhile, Congress had enacted the Interstate Commerce Act in 1887 to deal with rate discrimination by railroads.¹⁵⁹ The Act included a provision making it illegal for railroads to subject any person “to any unreasonable or undue prejudice or disadvantage in any respect whatsoever.”¹⁶⁰ Although the clause was designed to deal with discriminatory freight rates, the Interstate Commerce Commission held that it applied to treatment of passengers as well.¹⁶¹ Early decisions of the Commission held that separation of the races was permissible, but indicated that substantial inequality in treatment would violate the Act.¹⁶² The effect of the statute on passengers was to extend the law of common carriers to the federal level for interstate railroads.¹⁶³

153. *Id.* at 639-41.

154. *Id.* at 641.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. BARNES, *supra* note 1, at 6.

160. *Id.* (quoting the Interstate Commerce Act, 49 U.S.C. § 3(1) (1887) (repealed)).

161. *Councill v. W. & Atl. R.R. Co.*, 1 I.C.C. 638, 641 (1887).

162. *Id.*; *Heard v. Ga. R.R. Co.*, 1 I.C.C. 719, 722 (1888). The Commission ruled for the plaintiff in *Heard* on the grounds that the car for blacks was unequal, but stated that “[I]dentity . . . in the sense that all must be admitted to the same car and that under no circumstances segregation can be made, is not indispensable to give effect to the statute.” *Id.*; see also *Heard v. Ga. R.R. Co.*, 2 I.C.C. 508 (1889); *Edwards v. Nashville, C & St. Louis Ry. Co.*, 12 I.C.C. 247 (1907).

163. Compare *The Sue*, 22 F. 843, 848 (D. Md. 1885) (requiring a common carrier to make a bona fide effort to prevent actual discrimination in segregated accommodations), with *Councill*, 1 I.C.C. at 641 (preventing a railroad from unduly discriminating while segregating passengers under the Interstate Commerce Act).

Thus federal law, both statutory and common law, left segregation within the discretion of the transportation companies as long as the physical conditions of the segregated facilities were equal.¹⁶⁴ In municipal railways, where blacks constituted only a small proportion of the customers and single cars were involved, separate facilities were not economical and the cars were integrated.¹⁶⁵ Larger means of transport were more capable of reserving space or cars for members of one race and were more likely to operate a segregated system.¹⁶⁶ In Maryland, the insistence on real equality in conditions by the federal court and the costs of such treatment combined to produce substantial integration in transport.

V. STATE-MANDATED SEGREGATION

Toward the end of the nineteenth century, the practice of segregation in transportation was codified in a variety of municipal ordinances.¹⁶⁷ When reconstruction ended, Mississippi, whose reconstruction legislation prohibiting segregation had been invalidated as applied to interstate travel, replaced that law with one that mandated segregation.¹⁶⁸ The Louisville, New Orleans and Texas Railway Company was indicted for violating a Mississippi statute that stated that "all railroads carrying passengers in this State . . . shall provide equal, but separate, accommodation for the white and colored races."¹⁶⁹ The railway argued that the statute was unconstitutional on the basis of *Hall v. DeCuir*,¹⁷⁰ but the Mississippi Supreme Court limited the Mississippi statute to apply solely to commerce within the state.¹⁷¹ In *Louisville, New Orleans & Texas Railway Co. v. Mississippi*,¹⁷² the Supreme Court upheld the railroad's conviction.¹⁷³ The *Louisville* court carefully noted that it was deciding only whether a separate car had to be provided, not whether the state could require anyone to

164. *E.g.*, *Heard*, 1 I.C.C. at 722.

165. *See id.* at 721.

166. *See, e.g.*, Klarman, *supra* note 35, at 396 (explaining that segregation was often the result of railroad company policy rather than state coercion).

167. *See* BARNES, *supra* note 1, at 6-8 (discussing the proliferation of Jim Crow laws in transportation during the last years of the nineteenth century).

168. *Louisville, New Orleans & Tex. Ry. Co. v. Mississippi*, 133 U.S. 587, 588 (1890).

169. *Id.* (quoting now-repealed Mississippi statute of 1888).

170. 95 U.S. 485 (1877).

171. *Louisville*, 133 U.S. at 591.

172. *Id.* at 587. Justices Harlan and Bradley dissented on the grounds that they believed the Mississippi statute was a regulation of commerce forbidden under *Hall v. DeCuir*. *Id.* at 592-95 (Harlan & Bradley, J.J., dissenting).

173. *Id.* at 592.

ride in that car.¹⁷⁴ Because the only injury was to the railroad in having to put an extra car on, the sole question addressed by the Court was whether that burden violated the dormant commerce clause:

No question arises under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause.¹⁷⁵

With the *Louisville* decision removing the impact of *Hall* and the negative implications of the commerce clause on state regulations of transportation, more states passed laws requiring segregation, including the Louisiana law challenged in *Plessy v. Ferguson*.¹⁷⁶ The petitioner in *Plessy* claimed that the segregation law violated the Fourteenth Amendment.¹⁷⁷ When the case reached the Supreme Court, there was little precedent for state laws on segregation.¹⁷⁸ Instead, there was precedent under common carrier law for the proposition that passengers were entitled to equal treatment from private transport companies, but that separation of the races was consistent with equality.¹⁷⁹

The Supreme Court upheld the Louisiana law, citing eleven cases for the proposition that “[s]imilar statutes for the separation of the two races . . . were held to be constitutional.”¹⁸⁰ In fact, not a single cited case involved such a statute.¹⁸¹ All but one of the cases, which included *The Sue* and *McGuinn v. Forbes*, was a challenge to the discriminatory policy of the carrier in which the courts had simply found

174. *Id.* at 589.

175. *Id.* at 591.

176. 163 U.S. 537 (1896).

177. *Id.* at 542.

178. A number of cases upheld school segregation against Fourteenth Amendment challenges, but the provision of services by the state could be distinguished from regulation of private businesses. Regulatory laws were “protection of the laws” in a way that provision of services may not have been. Further, the provision of benefits raises the issue of the state as a market participant rather than regulator. We would not make such distinctions for equal protection purposes today, but it was not so clear in 1896 that segregation in state-provided benefits necessarily fell under the same rules of equality as state laws requiring private persons to segregate.

179. *Plessy*, 163 U.S. at 548.

180. *Id.*

181. *See, e.g.*, *Day v. Owen*, 5 Mich. 520, 520-22 (1858) (listing charges against a common carrier with no mention of a statute analogous to the *Plessy* statute).

that segregation was permissible under the common law of carriers or the statutory law of the Interstate Commerce Act.¹⁸² Counsel had cited them for the proposition that segregation was a reasonable regulation by the carrier, not for holding that it was a reasonable regulation of the state.¹⁸³ Counsel argued that what was reasonable for the carrier should not be a violation of equal protection when required by the state, but the Supreme Court conflated the argument and asserted falsely that the cases held the statutes constitutional.¹⁸⁴

The only statute in any of these cases which required a carrier to act on the basis of color was the statute in *People v. King*.¹⁸⁵ In citing this case, the Supreme Court got things exactly backward.¹⁸⁶ That statute *prohibited* racial discrimination: "no citizen of this state can, by reason of race, color or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility or privilege furnished by inn-keepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement."¹⁸⁷ The New York Court of Appeals said the law was identical in import to the Civil Rights Act of 1875.¹⁸⁸ Further, the Court said it was similar to the Mississippi "Civil Rights Act" of 1873, and the Louisiana Constitution and laws of 1870 and 1871.¹⁸⁹ The Court then upheld the conviction of a roller rink proprietor for refusing to sell a ticket to a colored person in violation of the law, finding that the law was constitutional.¹⁹⁰

The United States Supreme Court had become so used to the proposition that segregation was appropriate in transportation that it did not even consider closely the difference between requiring segregation and prohibiting discrimination, between the carrier's right to

182. See *McGuinn v. Forbes*, 37 F. 639 (D. Md. 1889); *Houck v. S. Pac. Ry.*, 38 F. 226 (W.D. Tex. 1888); *Logwood v. Memphis & Co. R.R.*, 23 F. 318 (W.D. Tenn. 1885); *The Sue*, 22 F. 843 (D. Md. 1885); *People v. King*, 18 N.E. 245 (N.Y. 1888); *Chesapeake & Ohio R.R. v. Wells*, 4 S.W. 5 (Tenn. 1887); *Memphis & Co. R.R. v. Benson*, 4 S.W. 5 (Tenn. 1887); *Chi. & N.W. Ry. v. Williams*, 55 Ill. 185 (1870); *West Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209 (1867); *Day v. Owen*, 5 Mich. 520 (1858); *Heard v. Ga. R.R. Co.*, 3 I.C.C. 111 (1889).

183. See *Plessy*, 163 U.S. at 548-49; see also *Day*, 5 Mich. at 525-26 (finding the segregation by the common carrier, not the state, to be reasonable).

184. *Plessy*, 163 U.S. at 548.

185. 18 N.E. 245 (N.Y. 1888).

186. See *Plessy*, 163 U.S. at 548 (citing *King* for the proposition that states have held constitutional statutes mandating segregation of the races).

187. *King*, 18 N.E. at 245.

188. *Id.* at 246.

189. *Id.*

190. *Id.* at 249.

segregate and the state's right to require the carrier to segregate.¹⁹¹ In confusing the command of the Constitution with common law rules, it rendered a disastrous decision that would take more than half a century to reverse.¹⁹²

After *Plessy*, segregation laws flourished.¹⁹³ In Maryland, Democratic legislators introduced a bill in 1902 to require segregation in transport.¹⁹⁴ The African-American community organized to defeat it.¹⁹⁵ Attorney Warner T. McGuinn chaired the "General Committee on the Separate Car Law."¹⁹⁶ He led a delegation to the legislature, which included attorneys Ashbie Hawkins, Harry Cummings, Dr. William Bishop, and C.H. King of Annapolis.¹⁹⁷ McGuinn addressed the Committee on Corporations and presented a petition signed by more than one thousand colored and white citizens of Baltimore opposing the bill.¹⁹⁸ The railroads and steamship companies joined the protest, preferring to operate their business in the most economically efficient manner.¹⁹⁹ The coalition defeated the bill in 1902.²⁰⁰ Nevertheless, the combined opposition of the black community and the transportation companies was overwhelmed two years later.²⁰¹

Riding the crest of a wave of racial prejudice, the Maryland legislature in 1904 enacted a law that required segregated cars on steam-powered railroads and separate quarters on ships.²⁰² The law did not apply to local transportation, where the trolleys had moved from horsepower to electric power in the 1890s.²⁰³ The new law required segregation on all steam-operated railroads with limited exceptions

191. See *Plessy*, 163 U.S. at 548-49 (discussing only the state's right to segregate after citing numerous decisions dealing with the right of common carriers to segregate).

192. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy* fifty-eight years later).

193. See BARNES, *supra* note 1, at 10 (noting that many states passed railroad segregation statutes in the wake of *Plessy*).

194. *Big Test Against Jim Crow Cars*, AFRO-AM. LEDGER (Balt.), Feb. 22, 1902, at 4.

195. *Id.*

196. *Notices*, AFRO-AM. LEDGER (Balt.), Feb. 15, 1902, at 5.

197. *Big Test Against Jim Crow Cars*, *supra* note 194, at 4.

198. *Id.*

199. Warner McGuinn, speaking for the delegation noted "Railroad and steamboat companies have alike joined in the protest." *Id.* at 4. Two years later, an ad in the *Afro-American Ledger* for the Baltimore & Annapolis Short Line R.R. Co. began with "This Company did what it could to prevent the passage of what is called the Jim Crow Law." *Round Bay*, AFRO-AM. LEDGER (Balt.), Apr. 16, 1904, at 5.

200. See *Big Test Against Jim Crow Cars*, *supra* note 194, at 4 (noting opposition to Jim Crow laws). Maryland's Jim Crow transportation laws were enacted two years later. See 1904 Md. Laws 186-87, ch. 109, § 1-7; ch. 110, § 1-3.

201. *James Crow*, AFRO-AM. LEDGER (Balt.), July 16, 1904, at 1.

202. 1904 Md. Laws 186-87, ch. 109, § 1-7; ch. 110, § 1-3.

203. See OLSON, *supra* note 39, at 210-11.

for express trains that did not stop in the state, parlor or sleeping cars (where the number of black passengers might be too small to maintain a separate car without great financial injury to the railroad), and for nurses and officers in charge of prisoners.²⁰⁴ As an article in the *Afro* said:

So afraid were they that they could not be kept away from the colored people, that they passed a law to separate the colored and white on steam boats and on steam cars. They would likely have passed such a law for the street cars, but we understand that the trolley managers held up both hands, and after having their pockets rifled to the tune of numerous thousands of Uncle Sam's promises to pay, were allowed to go on their way, sadder but wiser as to the ways of an average Democratic legislatureman.

However, the steamboat men and the steam railroad men, refused to stand and deliver, and so they passed what they were pleased to call a "Separate Car Law" to keep the whites and blacks apart in the daytime and in places where men mostly congregate.²⁰⁵

To fight the railroad segregation law, the black community, led by the Maryland Suffrage League and the *Afro-American Ledger*, organized a boycott of the railroads.²⁰⁶ The railroads had made a practice of giving a rebate to churches who chartered railroad cars for annual meetings.²⁰⁷ This rebate was a significant base for the support of the church, and the boycott deprived the churches of this much needed revenue.²⁰⁸ After eight months, the demand for revenues overcame the principle of resistance to the law, and the boycott collapsed.²⁰⁹

Professor William H.H. Hart of Howard Law School decided to test the law.²¹⁰ He was arrested for refusing to occupy the car assigned

204. 1904 Md. Laws 187, ch. 109, § 7.

205. *James Crow Enters Maryland and Creates Disturbances and Incidents and Gets Into Court*, AFRO-AM. LEDGER (Balt.), July 16, 1904, at 4.

206. *See id.*

They are refusing to ride on the railroads and steam boats, except where they must do so. The few calloused individuals, who have so far forgotten themselves as to arranged excursions, have found to their cost that the people have decided that the excursion season is about over with them for the present at least. They positively decline to go on them.

Id.; *see also Railroads Losing Patronage*, AFRO-AM. LEDGER (Balt.), Aug. 27, 1904, at 1 (noting that the "Separate Car Law" was causing the railroads to lose black patrons).

207. William George Paul, *The Shadow of Equality: The Negro & Baltimore, 1864-1911*, at 287-88 (1972) (unpublished Ph.D. dissertation, University of Wisconsin).

208. *Id.*

209. *Id.*

210. *Hart v. State*, 100 Md. 595, 60 A. 457 (1905); KOGER, *supra* note 14, at 9.

to colored passengers.²¹¹ Hart and an unidentified African-American lawyer from Maryland did the preparation for the case,²¹² although it was presented by a white attorney, Henry McCulloch.²¹³ The main ground of contention was the effect to be given *Hall v. DeCuir*.²¹⁴ McCulloch argued that any state regulation of interstate passengers which required either segregation or integration would be an impermissible burden on interstate commerce.²¹⁵ The Attorney General for the State responded that *Hall* applied only to requiring integration, and that segregation was within the legitimate police powers of the state.²¹⁶ The Court of Appeals held that the statute was unconstitutional as applied to passengers like Hart who were traveling interstate.²¹⁷ Referring to trips between Virginia and Pennsylvania, the court pointed out that over a short trip, passengers would have to be separated for six miles, then allowed to mingle in West Virginia, separated again in Maryland, and again allowed to mingle in Pennsylvania.²¹⁸ Thus, there would be at least three changes in that short distance.²¹⁹ The Court concluded that this was too much of a burden on interstate commerce to be sustained under the police powers of the states, and it reversed the judgment against Hart.²²⁰

But dicta in the opinion, citing *Plessy v. Ferguson*, stated that the law could be constitutionally applied to intrastate passengers: “[W]e see no difficulty in sustaining the law in so far as it applies to intrastate passengers.”²²¹ The Court said that the statute was valid as it affected commerce wholly within the state, but was invalid as to interstate passengers “and must be construed as not applying to them.”²²² The Court even suggested to the railroads that segregation might be a good idea:

If it be necessary for the comfort and safety of the passengers, and especially for the preservation of order, in portions of the State where the two races are anything like equally

211. *Hart*, 100 Md. at 600, 60 A. at 457.

212. KOGER, *supra* note 14, at 9.

213. *Hart*, 100 Md. at 596, 60 A. at 457; see KOGER, *supra* note 14, at 9 (stating that the records do not show any negro as an attorney of record).

214. *Hart*, 100 Md. at 608, 60 A. at 460.

215. *Id.* at 596, 60 A. at 457.

216. *Id.* at 599, 60 A. at 457; see *id.* at 599 (summarizing the attorney general's argument).

217. *Id.* at 613, 60 A. at 462-63.

218. *Id.*, 60 A. at 463.

219. *Id.*

220. *Id.* at 613-14, 60 A. at 463.

221. *Id.* at 614, 60 A. at 460.

222. *Id.* at 615, 60 A. at 460.

divided in numbers, or the feeling between the races is such as to make it desirable to keep them separated, the carriers themselves have full authority to do so as we have seen above. They could undoubtedly adopt such regulations, even on inter-state trains, as would relieve them and their passengers from all danger and inconvenience on account of the two races travelling together, by having separate cars or compartments on trains doing local business.²²³

Thus, despite Hart's victory, the railroads continued to operate segregated trains.²²⁴

In 1908, the segregation laws were extended to require separate toilets and separate sleeping cabins on steamships.²²⁵ A new statute was adopted to apply to electric railways operating more than twenty miles beyond an incorporated town (the twenty mile rule exempted municipal transit in Baltimore from the requirement).²²⁶ Because many such railways had only one car, the statute provided for designation of separate seats.²²⁷ A seat for two passengers was defined as a separate seat:²²⁸

When the seats in any car, coach or compartment shall all be occupied, but not filled, and the increased number of passengers can not be accommodated with separate seats, the conductor . . . is hereby authorized to assign passengers of the same color to the vacant seats, and he can, with the permission and consent of the occupant, assign a passenger of the other color to the unoccupied seats, but not otherwise.²²⁹

All the segregation statutes also contained express prohibitions against "discrimination."²³⁰

The federal courts were no longer a good venue to challenge segregation—the United States Supreme Court had upheld segregation statutes in *Plessy* and *Louisville* and the state statute²³¹ displaced the common law principles that the federal courts had used sympatheti-

223. *Id.*

224. *See infra* notes 246-275 and accompanying text (discussing challenges to the continued practice of segregating train passengers).

225. 1908 Md. Laws 85, ch. 617.

226. 1908 Md. Laws 88, ch. 248, § 1.

227. *Id.*

228. *Id.*

229. *Id.* ch. 248, § 5.

230. *See, e.g.*, 1904 Md. Laws 186, ch. 109.

231. 1908 Md. Laws 85, ch. 617 (requiring steamboat companies to "provide separate toilet, or retiring rooms, and separate sleeping quarters for white and colored passengers").

cally in the nineteenth century.²³² Although the federal Interstate Commerce Commission heard complaints about discrimination in interstate travel, it did not award damages and was unsympathetic to the claims.²³³ For example, African Methodist Episcopal ministers complaining about second class treatment in trains were unsuccessful in two cases before the Interstate Commerce Commission in 1909 despite showing mistreatment or different treatment.²³⁴

In 1910, Maryland established the Public Service Commission and granted it power over common carriers.²³⁵ Like the federal Interstate Commerce Commission, the primary concern of the Maryland Public Service Commission was rate regulation, but it also had power to hear complaints about service.²³⁶ Shortly after its establishment, W. Ashbie Hawkins represented several plaintiffs before the Public Service Commission protesting against the segregated conditions both in boats and trains under the Jim Crow law.²³⁷

Hawkins filed a complaint with the Public Service Commission in December of 1911, against the Baltimore, Chesapeake and Atlantic Railway for discrimination on their steamboats the *Avalon* and the *Joppa*.²³⁸ He stated that staterooms for colored passengers on boats were all inside cabins that were more cramped and poorly ventilated than accommodations for whites, and that colored people only got what remained of the food because they were only allowed to eat after

232. See *supra* notes 86-109 and accompanying text (discussing cases in which federal courts required equal treatment of all passengers).

233. E.g., *Gaines v. Seaboard Air Line Ry.*, 16 I.C.C. 471, 476 (1909) (holding that undue discrimination was not proven when complainants alleged unequal treatment in meals and sleeping accommodations on account of their race); *Cozart v. S. Ry. Co.*, 16 I.C.C. 226, 231 (1909) (finding no unjust discrimination when black train patrons were denied seats in first class).

234. *Gaines*, 16 I.C.C. at 474-76 (finding it a reasonable practice to serve negro dinner patrons last because there were fewer interstate travelers of color). The Commission also found that the reluctance of agents to sell tickets for sleeping cars to African-American patrons was not severe enough to lead to an order because agents would eventually sell such tickets. *Id.*; see also *Cozart*, 16 I.C.C. at 231 (holding that denial of first-class seats did not amount to a pattern or practice of discrimination).

235. JOHN PHILIP HILL & ARTHUR R. PADGETT, ANNOTATED PUBLIC SERVICE COMMISSION LAW OF MARYLAND 3 (1913).

236. HENRY G. BURKE, THE PUBLIC SERVICE COMMISSION OF MARYLAND 124, 131-57 (1932). In a study of the Public Service Commission of Maryland, the author devoted a chapter to valuation and rate cases, *id.* at 131-57, but mentioned racial complaints only once, when listing the complaints in cases to vacate orders of the Commission. *Id.* at 124-25.

237. *Officers Admit Color Discrimination*, AFRO-AM. LEDGER (Balt.), Dec. 9, 1911, at 1; *Attorney Hawkins Makes Appeal*, AFRO-AM. LEDGER (Balt.), Feb. 17, 1912, at 8.

238. *Complaints to Public Service Commission: Lawyer Hawkins Objects to Discrimination on the Boats of the B.C. & A. Railway*, AFRO-AM. LEDGER (Balt.), Dec. 2, 1911, at 4.

whites.²³⁹ Hawkins also complained that ministers of the African Methodist Episcopal church and their wives who had taken a steamboat to Cambridge for a meeting were forced to sit in a salon all night because there were not enough staterooms available to them.²⁴⁰ The Commission dismissed the complaint.²⁴¹ The Commissioners said that the arrangement of the boat meant that all cabins could not be outside cabins, and that some first-class cabins were inside cabins.²⁴² Because some first-class cabins occupied by whites were inside cabins, it was not a denial of first-class treatment to restrict colored passengers to the inside cabins, although the Commission admitted that the assignment was the worst that could be made.²⁴³ The number of staterooms set aside was reasonable because it was more than adequate most of the time, and thus there was no violation of the law.²⁴⁴ Hawkins appealed the decision to the Court of Common Pleas, without success.²⁴⁵

Later that year, Thomas Turner, a Baltimore school teacher, complained about the dirty conditions for African Americans on the railroad in a letter to the Public Service Commission.²⁴⁶ He also complained that the only compartments in which African Americans could ride were a vestibule to or a partition in the smoking area for white men.²⁴⁷ Hawkins represented Turner before the Commission.²⁴⁸ The Public Service Commission dismissed the complaint about dirty conditions on the grounds that improvements had been made so an order was not necessary.²⁴⁹ However, the Commission ordered the Baltimore, Chesapeake and Atlantic Railroad to provide

239. *Id.*

240. *Id.*

241. *Hawkins v. Baltimore, Chesapeake & Atl. Ry. Co.*, 3 Md. Pub. Serv. Comm'n 49, 52 (1912).

242. *Id.* at 51.

243. *See id.* (noting that "while the rooms assigned to colored passengers are first class according to the layout of the steamers and thus a technical compliance with the law is obtained, yet the assignment is confined to the inferior of the two first-class rooms . . . on account of the surroundings . . ." which included an adjoining smoking room, the men's toilet, and loud swinging doors).

244. *Id.*

245. *Attorney Hawkins Makes Appeal*, *supra* note 237, at 8.

246. *Shocking Conditions on B.C. & A. Railroad*, *AFRO-AM. LEDGER* (Balt.), Dec. 14, 1912, at 1.

247. *Id.*; *B.C. & A. Railway Before Public Service Board*, *AFRO-AM. LEDGER* (Balt.), Feb. 1, 1913, at 1.

248. *Id.*

249. *Turner v. Balt., Chesapeake & Atl. Ry. Co.*, 4 Md. Pub. Serv. Comm'n 101, 102 (1913).

seating (with partitions) in nonsmoking as well as smoking cars to assure greater equality in the future.²⁵⁰

In 1914, Ashbie Hawkins represented James Jenkins,²⁵¹ who was prosecuted for refusing to occupy a seat designated for colored passengers on the Washington, Baltimore & Annapolis Electric Railroad.²⁵² The defendant demurred to the indictment for the failure to allege that he was an intrastate passenger.²⁵³ The trial court sustained the demurrer, but the state appealed to the Court of Appeals.²⁵⁴ Here Hawkins was joined on the brief by George McMechen.²⁵⁵ They argued that the court should take judicial notice that the railway company was engaged in interstate commerce between Baltimore and Washington, D.C.²⁵⁶ They argued further that the 1908 statute should be invalid as a whole because its language did not distinguish between interstate and intrastate passengers.²⁵⁷ The Court of Appeals upheld the 1908 statute, construing it to apply only to intrastate passengers.²⁵⁸ It then found that interstate travel was an affirmative defense that must be raised by the defendant.²⁵⁹

When the Democratic legislature attempted to pass another statute that would extend the Jim Crow provisions to Baltimore municipal transit, the African-American community organized again to defeat the bill.²⁶⁰ W. Ashbie Hawkins was one of the leaders this time.²⁶¹ But the laws of 1908 and the decision of the court in *Jenkins* had already brought segregation to transportation throughout Maryland.²⁶² Al-

250. *Id.* at 103.

251. *State v. Jenkins*, 124 Md. 376, 377, 92 A. 773, 773 (1914). Hawkins acted as counsel for the fledgling NAACP. Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 311 (1983); NAACP BALTIMORE CITY BRANCH, BALTIMORE BRANCH HISTORY, at <http://www.naacpbaltimore.org/history.html> (last visited Mar. 5, 2004). Warner T. McGuinn also served the Baltimore NAACP branch. Lucia A. Silecchia, *Things Are Seldom What They Seem: Judges and Lawyers in the Tales of Mark Twain*, 35 CONN. L. REV. 559, 563 n.15 (2003).

252. *Jenkins*, 124 Md. at 378, 92 A. at 773.

253. *Id.* at 378-81, 92 A. at 773-74.

254. *Id.* at 378, 92 A. at 773.

255. *Id.* at 377, 92 A. at 773.

256. *Id.* at 380-81, 92 A. at 774.

257. *Id.* at 383, 92 A. at 775.

258. *Id.* at 381, 92 A. at 774.

259. *Id.* at 384, 92 A. at 775. The court remanded the case so that Jenkins could be tried on the indictment. *Id.*

260. *Will Oppose "Jim Crow" Cars: Colored Citizens Up in Arms Against Proposed Separate Car Law Introduced in Legislature*, AFRO-AM. LEDGER (Balt.), Apr. 4, 1914, at 1 (reporting a threatened boycott of the street cars should the bill become law).

261. *Id.*

262. See 1904 Md. Laws 186-89, chs. 109, 110 (requiring racially segregated railroad cars and quarters on steamships); *Jenkins*, 124 Md. at 81, 92 A. at 774.

though the state could not require the segregation of interstate passengers,²⁶³ it might enforce the decisions of the railroad with respect to such passengers.²⁶⁴ But the railroad was likely to segregate interstate passengers to correspond with the treatment they were required to give intrastate passengers.²⁶⁵

The indifference of the Maryland Public Service Commission and the federal courts to the plight of African Americans on segregated transport did not end resistance. For example, in 1919, Warner T. McGuinn represented the publisher of the *Afro-American Ledger*, Carl J. Murphy, and Louis Davenport in suits against a railway company in their respective local courts for \$5000 each because of the conditions on the electric line between Baltimore and Washington.²⁶⁶ These cases, however, had to focus on provisions of the statutes requiring equal treatment rather than defeating segregation.²⁶⁷

In succeeding years, African Americans continued to battle for their rights on public transport, but the set of decisions culminating in *Jenkins* diverted the fight for decades into controversy over the conditions of the segregated cars rather than seeking integration directly.²⁶⁸ It would be another four decades until another Marylander, Elmer Henderson, would succeed in getting the United States Supreme Court to hold that segregative dining practices on the railroads could not be equal.²⁶⁹ His victory in integrating interstate travel marginalized the state's attempt to segregate transportation within the state and contributed to the repeal of Maryland's transportation segre-

263. *Jenkins*, 124 Md. at 381, 92 A. at 774.

264. *Hart v. State*, 100 Md. 595, 614-15, 60 A. 457, 463 (1905).

265. *See id.* at 615, 60 A. at 463 (suggesting that carriers should segregate passengers on interstate trains to "relieve" the carrier from the "danger and inconvenience on account of the two races travelling together").

266. *Two Baltimoreans File Suit Against W.B. & A. Railroad*, *AFRO-AM. LEDGER* (Balt.), Feb. 14, 1919, at 2.

For more than a year, the electric line has been forcing interstate passengers to ride in separate coaches in violation of the law and arresting and maltreating others who insisted that the provisions of the law be carried out.

The case of Mrs. Coleman of Washington, who received \$20 damages in the Superior Court of this city last summer is regarded as only the beginning, and the outcome of the two cases now on the docket will determine whether the company is to continue its policy of illegal jim crow, or whether it is to act within the law.

Id.

267. BARNES, *supra* note 1, at 16; *see also Two Baltimoreans File Suit Against W.B. & A. Railroad*, *supra* note 266, at 2 (characterizing the conditions on the train as "notorious").

268. *See BARNES*, *supra* note 1, at 16 (stating that for thirty years, southern blacks sought only to equalize transit accommodations rather than to undo segregation).

269. *Henderson v. United States*, 339 U.S. 816, 825-26 (1950). The Court held that the railway's dining regulations violated the Interstate Commerce Act and so did not reach the constitutional issues. *Id.*

gation laws in 1951.²⁷⁰ Even more crucially, forty years after the *Jenkins* case, Thurgood Marshall, who grew up in Baltimore hearing about both Warner T. McGuinn and W. Ashbie Hawkins,²⁷¹ successfully litigated in *Brown v. Board of Education*,²⁷² where the Court held that segregation by the state was inherently unequal.²⁷³ Following *Brown*, laws requiring racial segregation of passengers on buses in Montgomery, Alabama were struck down in the *Browder* decision, a case brought by participants in the Montgomery bus boycott.²⁷⁴ Thus, the generations of protesters and lawyers who resisted segregation in transportation in Maryland played their role in making it possible for a woman in Montgomery, Alabama to change the world.²⁷⁵

270. 1951 Md. Laws, ch. 22; see BARNES, *supra* note 1, at 82.

271. See WILLIAMS, *supra* note 16, at 15-60 (discussing Marshall's childhood and education).

272. 347 U.S. 483 (1954).

273. See *id.* at 495 (concluding that "[s]eparate educational facilities are inherently unequal").

274. *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956) (holding that "there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation").

275. BARNES, *supra* note 1, at 108-15 (discussing Rosa Parks' refusal to vacate her seat for a white passenger, her subsequent arrest, and the bus boycott movement in Montgomery).