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The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change

Paul Finkelman*

INTRODUCTION

The Vice President of the United States was meeting with his former Senate colleague, the arch-segregationist John Stennis of Mississippi. In 1963, no one in Congress embodied racism and segregation more than Senator Stennis. And no state symbolized the violent and murderous opposition to racial equality more than Mississippi, which led the nation in creating civil rights martyrs even before the murders in Philadelphia, Mississippi.¹ One protest song of the 1960s famously described Mississippi as “the land you’ve torn out the heart of.”²

Vice President Lyndon B. Johnson knew Stennis would never support the civil rights legislation proposed by President Kennedy, but he wanted Stennis to understand his deep hostility to segregation. So Johnson described how his personal cook—who Johnson pointed out was “a college graduate”³—and her husband would drive his official car, “the Cadillac limousine of the Vice President of the United States,” from Washington to Texas.⁴ Because they were black, the Wrights could not find motels where

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1. See *Civil Rights Martyrs*, S. POVERTY L. CENTER, <http://www.splcenter.org/civil-rights-memorial/civil-rights-martyrs> (last visited Mar. 11, 2014) [<http://perma.cc/7VBQ-TKRA>] (archived Apr. 9, 2014).

2. See Phil Ochs, *Here’s to the State of Mississippi*, on THERE BUT FOR FORTUNE (Elektra Records 1989), available at <http://www.metrolyrics.com/heres-to-the-state-of-mississippi-lyrics-phil-ochs.html> [<http://perma.cc/D9ME-YJVA>] (archived Apr. 9, 2014).

3. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 889 (2002) [hereinafter CARO, *MASTER OF THE SENATE*].

4. *Id.*

they could stay or restaurants where they could dine.⁵ Johnson personalized this for the senator from Mississippi, noting that when “[t]hey drove through your state and when they got hungry, they stopped at grocery stores on the edge of town in colored areas and bought Vienna sausages and beans and ate them with a plastic spoon.”⁶ Stennis knew all about this sort of segregation in his home state, and he mumbled that he was sure they could find some place to eat.⁷ But Johnson, the sometimes crude master politician from rural Texas, ended his jawboning with a story about driving across Mississippi for which Stennis had no response: “[W]hen they had to go to the bathroom, they would stop, pull off on a side road, and Zephyr Wright, the cook of the Vice President of the United States, would squat in the road to pee. And you know, John, that’s just bad. That’s wrong.”⁸

For Lyndon Johnson, segregation had become personal. It was not just a violation of people’s rights. It was “bad.” It was “wrong.” When Johnson became president, the struggle for passage of the Civil Rights Act of 1964 became personal, and the experience of his cook became part of Johnson’s persona and his stock of stories to illustrate his politics and passions.⁹

In the end, passage of the 1964 Act was a personal triumph for Johnson, who twisted arms, lobbied senators, and showed all his political skills.¹⁰ Although he was a native white Texan, Johnson

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* Johnson offered a more sanitized version of this story in his autobiography, *The Vantage Point*. LYNDON B. JOHNSON, *THE VANTAGE POINT* 154 (1971). Johnson told various versions of this story to many people. The events probably took place when Johnson was actually Senate majority leader, but Johnson, ever the storyteller, changed the date for Stennis. When he was vice president, some of his other black staffers, including Eugene Williams and Helen White Williams, drove Johnson’s car across the South, and thus the experience of the Wrights was repeated over and over again, and Johnson knew about their humiliations as well. *Id.* at 154–55.

9. The 1964 Civil Rights Act was [a]n Act [t]o enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a (2006)).

10. The most recent book on the law, *The Bill of the Century: The Epic Battle for the Civil Rights Act*, argues that Johnson, and also Martin Luther King, Jr., are

never felt comfortable with segregation or racism. “I never had any bigotry in me,” he told one biographer, and the evidence to support this contention seems clear.¹¹ When he ran the National Youth Administration (NYA) in Texas from 1935 to 1937, he provided jobs and aid to students at the state’s four historically black segregated colleges, who had previously been “conspicuously excluded from federal and state aid programs.”¹² One black leader recalled that civil rights organizations “began to get word up here that there was one NYA director who wasn’t like the others. He was looking after Negroes and poor folks and most NYA people weren’t doing that.”¹³ Thus, as a young man in his first political job in deeply segregated Texas, Johnson “put together special NYA programs for the black young, often financed by secret transfers of money from other projects.”¹⁴

When he first came to the Senate, Johnson joined the arch-segregationists in opposing President Truman’s civil rights initiatives on lynching and fair employment.¹⁵ His first speech in the Senate was made in support of the southern filibuster to block passage of President Harry S Truman’s bill to create a Fair Employment Practices Commission.¹⁶ But in 1956, he was one of only three senators from the former Confederacy¹⁷ who refused to

overly praised for their role in the passage of the law and that “neither deserves all the credit, or even the bulk of it,” for the passage of the law. CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* 3 (2014). Risen correctly notes that many other politicians played key roles, especially the Republican minority leader in the Senate, Everett Dirksen, House Republicans John V. Lindsay and William McCulloch, and Deputy Attorney General Nicholas Katzenbach. *Id.* However, it seems clear that without Johnson’s active and enthusiastic support the law might never have passed.

11. DORIS KEARNS, *LYNDON JOHNSON AND THE AMERICAN DREAM* 230 (1976).

12. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 364 (1982).

13. KEARNS, *supra* note 11, at 231. Unfortunately, Kearns does not say who this civil rights activist was, and her footnote is to a secondary source (with no page number), which does not in fact contain any of this information. It seems that Kearns read this interview somewhere, even though her book does not specify where.

14. *Id.*

15. CARO, *MASTER OF THE SENATE*, *supra* note 3, at 212–15.

16. KEARNS, *supra* note 11, at 106.

17. The other two senators were Estes Kefauver and Albert Gore, Sr., both of Tennessee. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 752 (1975).

sign the Southern Manifesto¹⁸ against the Supreme Court's decision in *Brown v. Board of Education*.¹⁹ By 1957, he was providing "effective leadership in the fight for civil rights laws."²⁰ Less than a decade later, he would "ram to passage the great Civil Rights Acts of 1964 and 1965."²¹ However much he may have bobbed and weaved on civil rights in his first term in the Senate—he admitted "that civil rights was not one of my priorities in those days"—Johnson never played the race card in Texas politics and never supported expansions of racism or segregation.²² As he said, "I'm not prejudiced nor ever was."²³ This was not a self-serving claim but an accurate assessment of his entire career with regard to race relations.

Johnson knew segregation was wrong, and coming from his hardscrabble roots in the Texas hill country, he understood that ending poverty and race discrimination was "not just [for] Negroes, but really it is [for] all of us."²⁴ Thus he argued that civil rights legislation was necessary because all Americans "must overcome the crippling legacy of bigotry and injustice."²⁵ His epiphany may have come over the story of Mrs. Wright, but Johnson knew, as only a southerner could, the pain, evil, and absurdity of segregation—that it was "bad" and "wrong."²⁶ In retelling the same story—in a less crude manner—to the civil rights leader James Farmer,²⁷ Johnson noted (as he had to Senator Stennis) that Mrs. Wright was a college

18. *Declaration of Constitutional Principles [The Southern Manifesto]*, 102 CONG. REC., S4, 459–60 (1956). Only senators and representatives from the former Confederate states signed the Manifesto. *Id.* at 460. For a full text and discussion of the Manifesto, see *Southern Manifesto on Integration (March 12, 1956)*, PBS, http://www.pbs.org/wnet/supremecourt/rights/sources_document2.html (last visited Apr. 7, 2014) [<http://perma.cc/S3EH-96ZL>] (archived Apr. 9, 2014); *Historical Highlights: The Southern Manifesto of 1956 (March 12, 1956)*, U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/HistoricalHighlight/Detail/35388> (last visited Apr. 7, 2014) [<http://perma.cc/9ANW-56TS>] (archived Apr. 9, 2014).

19. See 347 U.S. 483 (1954).

20. CARO, MASTER OF THE SENATE, *supra* note 3, at 1009.

21. *Id.*

22. KEARNS, *supra* note 11, at 232.

23. *Id.*

24. ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT xx (1990) (quoting Lyndon Baines Johnson, Speech before Congress on Voting Rights (Mar. 15, 1965), available at millercenter.org/president/speeches/detail/3386 [<http://perma.cc/FQ6Z-5TJ6>] (archived Apr. 9, 2014)).

25. *Id.*

26. CARO, MASTER OF THE SENATE, *supra* note 3, at 889.

27. Farmer was a co-founder and the first national director of CORE (Congress of Racial Equality). *James Farmer*, CORE, http://www.core-online.org/History/james_farmer.htm (last visited Apr. 7, 2014) [<http://perma.cc/ARJ7-TMWS>] (archived Apr. 9, 2014).

graduate but was barred from restaurants or bathrooms along southern highways.²⁸ Johnson told Farmer, “Well, that hurt me, that almost brought me to tears, and I realized how important public accommodations were.”²⁹ Because of Mrs. Wright’s experience, Johnson vowed “that if ever I had a chance I was going to do something about it.”³⁰ That “something” would be the Civil Rights Act of 1964.³¹

I. THE JOINT COMMITTEE ON RECONSTRUCTION: THE BEGINNING OF CIVIL RIGHTS

The 1964 Civil Rights Act was necessary because of the failure of the nation to protect civil rights a century earlier. Between 1862 and 1875, Congress revolutionized American race relations. In 1862 Congress prohibited the military from returning fugitive slaves, whether from enemy masters, loyal masters in the Confederacy, or masters in the border states and provided that any officers returning fugitive slaves could be court-martialed and dismissed from military service.³² Shortly after this, Congress abolished slavery in the District of Columbia³³ and the federal territories.³⁴ In July 1862, Congress provided for the confiscation (and emancipation) of slaves owned by Confederates³⁵ and authorized the enlistment of black soldiers.³⁶ These laws marked

28. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 489 (2012) [hereinafter CARO, *THE PASSAGE OF POWER*].

29. *Id.*

30. *Id.*

31. The scholarship on the history of the civil rights movement is huge. Key places to start include: KLUGER, *supra* note 17, at 752; RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* (2007); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972*, at 71 (1990). For recent books on the passage of the Act, see TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* (2014); RISEN, *supra* note 10.

32. An Act to make an Additional Article of War, 12 Stat. 354 (1862).

33. An Act for the Release of certain Persons held to Service or Labor in the District of Columbia, 12 Stat. 376 (1862).

34. An Act to secure Freedom to all Persons Within the Territories of the United States, 12 Stat. 432 (1862).

35. An Act to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other Purposes, 12 Stat. 589–60 (1862).

36. An Act to amend the Act calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions, 12 Stat. 599 (1862). See Paul Finkelman, *Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071, 2120 (2013).

the beginning of the end of slavery in the United States and the slow movement towards providing legal protections and rights for African Americans.

At the end of January 1865, the House of Representatives finally passed the Thirteenth Amendment with the necessary two-thirds majority and sent it on to the states.³⁷ Illinois ratified it the next day, and ten months later, three-quarters of the states had joined in ending all slavery in the United States.³⁸

The Thirteenth Amendment was remarkable in many ways. It was the first time that an amendment specifically gave Congress enforcement powers.³⁹ It was the first amendment that directly impacted private as well as government behavior. It was not merely a limitation on government action but on all action.⁴⁰ Its sweeping language—“[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”⁴¹—limited the national government, the states, and private actors. It was the first Constitutional provision to alter the status of individuals in the nation—transforming millions of slaves into free people. It was also the first time that the Constitution directly affected the ownership of private property, converting millions of chattels into free people, who now owned themselves. It has also been among the more successful additions to the Constitution because no state has ever tried to openly counter the Thirteenth Amendment by adopting legislation to recreate slavery or authorizing the buying and selling of human beings.⁴²

37. “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . .” U.S. CONST. art. V.

38. U.S. CONST. amend. XIII. “Amendments . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States . . .” U.S. CONST. art. V.

39. U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

40. In contrast to the First Amendment, for example, which begins “Congress shall make no law . . .” U.S. CONST. amend. I.

41. U.S. CONST. amend. XIII, § 1.

42. The one exception to this was the practice by some southern states to use debt as a way of coercing people to work in what was considered peonage. Federal courts and the Supreme Court struck down these laws in a variety of cases from Alabama, Georgia, and Florida. *See* Peonage Cases, 123 F. 671 (M.D. Ala. 1903); *Bailey v. Alabama*, 219 U.S. 219 (1911); *United States v. Reynolds*, 235 U.S. 133 (1914); *Taylor v. Georgia*, 315 U.S. 25 (1942); *Pollock v. Williams*, 322 U.S. 4 (1944); *see also* PETE DANIEL, *IN THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901–1969* (1972); William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J. S. HIST. 31 (1976). In *United*

Many in Congress believed that the total defeat of the Confederate armies, the conclusion of the Civil War, the complete destruction of the Confederate government, the Emancipation Proclamation, and the adoption of the Thirteenth Amendment would lead to fundamental equality and fairness.⁴³ However, Congress instead heard continuous reports of violence directed at the recently emancipated slaves, southern blacks who had been free before the War began, U.S. Army soldiers stationed in the South, northern teachers, ministers, and other humanitarian activists working with former slaves, and southern white unionists.⁴⁴ In mid-December 1865, Congress took steps to create the Joint Committee on Reconstruction to investigate conditions in the South.⁴⁵ Six months later, the Committee published its mammoth report—running nearly 800 pages—detailing the terrorism of former Confederate soldiers and the massive criminal violence they perpetrated on southern blacks and their white allies.⁴⁶

The Report of the Committee contained seemingly endless testimony about the abuse of blacks and white unionists (from the North and the South) in the former Confederate states. Numerous army officers, judges, politicians, and others testified about beatings, murders, and even some attempts to keep blacks in bondage or sell them in Cuba where slavery was still legal.⁴⁷ General Rufus Saxton

States v. Kozminski, 487 U.S. 931 (1988), the Court oddly held that the psychological coercion of mentally disabled persons who were working without pay, underfed, and afraid to leave their employers' property did not violate the Thirteenth Amendment. This reflected an earlier Second Circuit case, *United States v. Shackney*, 333 F.2d 475 (1964), which held that threats of deportation did not constitute coercion for migrant workers who feared leaving a farm and thus believed they were held in involuntary servitude. *Kozminski* involved a farmer in Michigan, and *Shackney* involved a farm in Connecticut. See *Kozminski*, 487 U.S. at 934; *Shackney*, 333 F.2d at 476.

43. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875*, at 386–438 (1982).

44. In 1860, there were more than 250,000 free blacks in slave jurisdictions, including the District of Columbia, but the 11 Confederate states had only about 125,000 free blacks, with 104,000 of them concentrated in Virginia, North Carolina, and Louisiana. U.S. CENSUS BUREAU, TABLE A-19[:] RACE FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES: 1860 (2002), available at <http://www.census.gov/population/www/documentation/twps0056/tabA-19.pdf> [<http://perma.cc/K4VK-BESV>] (archived Apr. 9, 2014).

45. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 30-39 (1866). The House first passed a resolution to create the committee on December 5, 1865. *Id.* at iii. The committee was established by a joint resolution of the House and Senate on January 12, 1866. *Id.*

46. *Id.*

47. *Id.* PT. III: GEORGIA, ALABAMA, MISSISSIPPI, ARKANSAS, at 43.

reported that in Edgefield County, South Carolina, one “freedman [and] three children, two male and one female, were stripped naked, tied up, and whipped severely” and a woman was given a hundred lashes while tied to a tree.⁴⁸ Another man was whipped with a stick, while two children were also whipped.⁴⁹ General George Armstrong Custer noted that in Texas more than 500 former Confederates had been charged with murdering blacks or white unionists, but no one had been convicted.⁵⁰ Blacks, however, were routinely convicted and jailed for minor offenses.⁵¹ Custer reported, “[I]t is of weekly, if not of daily, occurrence that freedmen are murdered. Their bodies are found in different parts of the country,” but no whites were ever charged in these cases, even when their identities were known.⁵² From Georgia, General Charles Howard (whose brother, Major General Oliver Otis Howard, was the head of the Freedmen’s Bureau) told of attempts to illegally transport free blacks to Cuba where they could be sold as slaves.⁵³ Some southern planters refused to admit that their now-emancipated slaves were in fact free, telling them that the Emancipation Proclamation was a myth.⁵⁴ The Assistant Commissioner of the Freedmen’s Bureau in Louisiana reported that “I have had delegations to frequently come and see me—delegations composed of men who, to my face, denied that the proclamation issued by President Lincoln was a valid instrument,” and “[c]onsequently they have claimed that their negroes were slaves and would again be restored to them.”⁵⁵ The former slave owners—who insisted that they were still slaveholders—believed that “the Supreme Court would pronounce” the Emancipation Proclamation “invalid.”⁵⁶ A minister from Chicago reported that in the vicinity of Jackson, Mississippi, at least one black was murdered every day in a two-month period and that every day two to three blacks were murdered in the rest of the state.⁵⁷ This witness

48. *Id.* PT. I: VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, at 233.

49. *Id.* at 233.

50. *Id.* PT. IV: FLORIDA, LOUISIANA, TEXAS, at 75.

51. *Id.*

52. *Id.*

53. *Id.* PT. III: GEORGIA, ALABAMA, MISSISSIPPI, ARKANSAS, at 43 (testimony of General Charles Howard). See *Oliver O. Howard*, CIV. WAR TR., <http://www.civilwar.org/education/history/biographies/oliver-howard.html> (last visited Apr. 7, 2014) [<http://perma.cc/G5BA-U3XC>] (archived Apr. 9, 2014); WILLIAM S. MCFEELY, *YANKEE STEPFATHER: GENERAL O. O. HOWARD AND THE FREEDMEN* (1968).

54. REPORT OF THE JOINT COMMITTEE, PT. III: GEORGIA, ALABAMA, MISSISSIPPI, ARKANSAS, at 42.

55. *Id.* PT. IV: FLORIDA, LOUISIANA, TEXAS, at 79.

56. *Id.*

57. *Id.* at 64.

catalogued numerous horrendous murders of blacks throughout Alabama, including whites slitting the throats of young black children.⁵⁸

Parts of Louisiana had been under the control of the United States since 1862, and the U.S. Army had troops throughout the state.⁵⁹ This military presence probably reduced the amount of violence against blacks, northerners, and unionists. But almost everyone who testified about conditions in Louisiana asserted that if the army left, it would be disastrous for blacks and the many white unionists in the state. Thus, a former naval officer from Massachusetts, who became involved in business in the South, reported that there was “a very large class of . . . people in Alabama, Mississippi, and Louisiana” who would shoot or murder blacks.⁶⁰ A lawyer in New Orleans reported that among most whites there was “strong opposition . . . to the education and moral improvement of the blacks”⁶¹ and most whites in the state believed that blacks would only work “by the application of physical force.”⁶² The implication was clear: Whites wanted to create a new form of coercive labor, supported by a legal superstructure and physical violence.

Even with the army in the state, violence was common. A Freedman’s Bureau official in the state noted that people who worked for him were threatened with murder and “driven back to the boats” when they attempted to dock in a rural area to set up schools for blacks.⁶³ He reported schools being burned down and white teachers being frightened away.⁶⁴ The only schools for blacks he could establish in some parts of the state were on military bases.⁶⁵ Others reported strong opposition to any blacks owning real estate in Louisiana, even though free blacks in the state had owned

58. *Id.* at 65.

59. The city of New Orleans fell to combined forces of the United State Navy and Army on April 27–28, 1862. See Terry L. Jones, *The Fall of New Orleans*, N.Y. TIMES OPINIONATOR (Apr. 25, 2012, 12:30 PM), http://opinionator.blogs.nytimes.com/2012/04/25/the-fall-of-new-orleans/?_php=true&_type=blogs&_r=0 [<http://perma.cc/E7XS-RT9Z>] (archived Apr. 9, 2014). A few days later the state capital, Baton Rouge, fell to American forces. Terry L. Jones, *The Battle of Baton Rouge*, N.Y. TIMES OPINIONATOR (Aug. 3, 2012, 9:30 PM), <http://opinionator.blogs.nytimes.com/2012/08/03/the-battle-of-baton-rouge> [<http://perma.cc/XG7D-Z4WS>] (archived Apr. 9, 2014).

60. REPORT OF THE JOINT COMMITTEE, PT. III: GEORGIA, ALABAMA, MISSISSIPPI, ARKANSAS, at 4.

61. *Id.* at 24.

62. *Id.*

63. *Id.* PT. IV: FLORIDA, LOUISIANA, TEXAS, at 79.

64. *Id.*

65. *Id.* at 79–80.

real estate before the War.⁶⁶ A Freedmen's Bureau official said that "[t]he feeling there [in Louisiana] is unanimous that they shall not own an inch of land or have any schools" but that most Louisiana whites were more "hostile" to black land ownership than education.⁶⁷ Many of the people who reported on Louisiana agreed with Captain D.E. Haynes, an army veteran and sheriff under military authority, that Union men and black veterans were "not safe" in Louisiana and only the presence of the U.S. Army protected them.⁶⁸ Haynes asserted that "[i]f there were no interference from a superior power," the former slaves in Louisiana "would be in a worse condition than they were when in a state of slavery."⁶⁹ Since the end of the War, Haynes had been shot at and his house had been burned by Confederate veterans who had become terrorists.⁷⁰ A Freedmen's Bureau official in Louisiana reported that the police in New Orleans arbitrarily and illegally arrested blacks and "conducted themselves towards the freedmen, in respect to violence and ill usage, in every way equal to the old days of slavery."⁷¹ This official predicted that if the army left, the whites "would return to the old system of slavery," although many other whites in the state had an alternative future in mind.⁷² If the army left, the blacks

will be murdered It will not be persecution merely; it will be slaughter; and I doubt whether the world has ever known the like. These southern rebels, when the power is once in their hands, will stop with nothing short of extermination. Governor [James Madison] Wells himself told me that he expected in ten years to see the whole colored race exterminated, and that conviction is shared very largely among the white people of the south. It has been threatened by leading men there that they would exterminate the freedmen. They have said so in my hearing.⁷³

The committee learned of new southern laws—passed by former Confederates—that discriminated against blacks (and sometimes their white allies) in voting,⁷⁴ property ownership, working

66. *Id.* at 56.

67. *Id.* at 82.

68. *Id.* at 60–61.

69. *Id.* at 62.

70. *Id.*

71. *Id.* at 79.

72. *Id.* at 83.

73. *Id.*

74. The Florida Constitution, for example, did not allow people who had moved into the state while soldiers to vote and limited the franchise and jury service to whites. *Id.* at 26. The Georgia and Arkansas Constitutions similarly

conditions and contracts, and court proceedings.⁷⁵ Mississippi made it a crime to sell real estate to blacks and also criminalized hiring blacks who had previously been hired by someone else.⁷⁶ Such laws were designed to make blacks landless peasants, tied to their old plantations like serfs. In Louisiana, there was a revival of patrols that resembled antebellum slave patrols and the use of other antebellum procedures to arrest blacks who did not have proof of employment.⁷⁷ Other patrols, made up of white militiamen who were mostly former Confederate soldiers, were used “to prevent the negroes from going from one place to another,” just as slave patrols had been used.⁷⁸

Perhaps most pernicious were the vagrancy laws of these post-Confederate regimes, which were designed to recreate slavery as much as possible. Alabama’s law “Concerning Vagrants and Vagrancy” allowed for the incarceration in the public work house of any “laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.”⁷⁹ Mississippi’s Civil Rights Act of 1865 provided that if any laborer quit a job before the end of the contract period, he or she would lose all wages earned up to that time.⁸⁰ “This allowed employers to mistreat and overwork laborers, knowing they dare not quit. Indeed, a shrewd employer could purposefully make life miserable for workers at the end of a contract term, in hopes that they would quit and forfeit all wages.”⁸¹ Any blacks “with no lawful employment or business” in Mississippi would be considered vagrants and could be

prevented blacks from voting or serving on juries. *Id.* PT. III: GEORGIA, ALABAMA, MISSISSIPPI, ARKANSAS, at 85–86.

75. For example, both Mississippi and Alabama allowed blacks to testify in court only if at least one of the parties was black or if a white was prosecuted for harming a black. 1865 Ala. Acts 90 (“[p]rotect[ing] Freedmen in Their Rights of Person and Property in this State”); 1865 Miss. Laws 82 (“an Act for conferring Civil Rights on Freedmen, and for other purposes”). However, if a white southerner murdered another white, blacks could not be witnesses at the trial. For restrictions on black testimony in Georgia, see REPORT OF THE JOINT COMMITTEE, PT. III: GEORGIA, ALABAMA, MISSISSIPPI, ARKANSAS, at 85–86.

76. REPORT OF THE JOINT COMMITTEE, PT. IV: FLORIDA, LOUISIANA, TEXAS, at 52.

77. *Id.* at 79.

78. *Id.* at 83.

79. 1865 Ala. Acts 90 (“an Act for amending the Vagrant Laws of the state”). See also Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389, 403 (2004).

80. 1865 Miss. Laws 82 (“an Act for conferring Civil Rights on Freedmen, and for other purposes”). See also Finkelman, *supra* note 79, at 403.

81. Finkelman, *supra* note 79, at 403.

fined up to \$50.⁸² Blacks who could not pay the fine would be forcibly hired out to whomever would pay the fine, thus creating another form of unfree labor.⁸³ The same Act created a \$1 poll tax for all free blacks.⁸⁴ Anyone not paying the tax could also be declared a vagrant and thus assigned to some white planter to work at hard labor.⁸⁵ These laws also prohibited blacks from renting land or houses in towns or cities,⁸⁶ in effect forcing blacks into the countryside where they would become agricultural peasants.

The murderous and barbaric violence, openly homicidal intentions of whites, new laws, and repressive application of old law detailed by these witnesses underscored the refusal of many southern whites to accept black freedom or the outcome of the War that they had started. Major General John W. Turner reported that in his military district in Virginia “all of the [white] people” were “extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property before the laws, the right to testify in courts, etc.”⁸⁷ Turner noted that whites were “reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing.”⁸⁸ They would only “concede” such rights to blacks “if it is ever done, it will be because they are forced to do it.”⁸⁹

II. THE LEGISLATIVE AND JUDICIAL RESPONSE TO SOUTHERN TERRORISM

Congress responded to this voluminous testimony with the Civil Rights Act of 1866 and the Fourteenth Amendment, which was passed in 1866 and ratified in 1868.⁹⁰ In 1870 and 1871, Congress

82. 1865 Miss. Laws 86 (“An Act for regulating the relation of Master and Apprentice, as it related to Freedmen, Free Negroes, and Mulattoes”). See also Finkelman, *supra* note 79, at 403.

83. 1865 Miss. Laws 86. For a discussion of this law before the Joint Committee, see REPORT OF THE JOINT COMMITTEE, PT. IV: FLORIDA, LOUISIANA, TEXAS, at 143. See also a similar law in Florida, entitled *An Ordinance on Vagrancy*, Act of Nov., 4, 1865, reprinted in REPORT OF THE JOINT COMMITTEE, PT. IV: FLORIDA, LOUISIANA, TEXAS, at 32–33.

84. 1865 Miss. Laws 86.

85. 1865 Miss. Laws 90. See also Finkelman, *supra* note 79, at 403.

86. Most of these laws are reprinted throughout the REPORT OF THE JOINT COMMITTEE.

87. REPORT OF THE JOINT COMMITTEE, PT. I: VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, at 4.

88. *Id.*

89. *Id.*

90. Civil Rights Act of 1866, An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication, 14 Stat. 27 (1866).

passed a series of statutes, often called the Ku Klux Klan Acts, designed to combat white terrorist organizations and violence.⁹¹ These laws were effective in helping to suppress the Klan in South Carolina and elsewhere,⁹² but in the end the Supreme Court undermined their value and generally prevented the national government from using its powers—and the post-War legislation and amendments—to protect blacks from the growing violence in the South.⁹³

In 1875, Congress passed what would be the last civil rights legislation of the period, guaranteeing blacks equal access to public facilities, such as restaurants, hotels, and modes of public transportation.⁹⁴ This law to a great extent covered many of the public accommodations protections that would later be incorporated into the Civil Rights Act of 1964.⁹⁵ Had the federal government enforced and implemented the 1875 law, the wrongs of segregation might never have developed. But this is not what happened.

In 1883, the Court gutted this statute in *The Civil Rights Cases*, holding that the Fourteenth Amendment did not allow Congress to regulate private behavior.⁹⁶ The Court viewed the Fourteenth Amendment in the narrowest way possible, arguing that “[i]t is State

91. Enforcement Act of 1870, An Act To enforce the Right of Citizens of the United States to vote in the several States of the Union, and for other Purposes, 16 Stat. 140 (1870); The Second Enforcement Act, An Act to amend an Act approved May thirty-one, eighteen hundred and seventy, entitled “An Act To enforce the Rights of Citizens of the United States to vote in the several States of this Union, and for other Purposes,” 16 Stat. 433 (1871); The Third Enforcement Act, An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, 17 Stat. 13 (1871).

92. See generally LOU FAULKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872* (1996).

93. See *Blyew v. United States*, 80 U.S. 581 (1871); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883). One lone exception to this dismal record of the Court is its decision in *Ex parte Yarbrough*, 110 U.S. 651 (1884), where the Court, under the Fifteenth Amendment, upheld the prosecution of Klansmen for beating a former slave to prevent him from voting.

94. The Civil Rights Act of 1875, An Act to protect all citizens in their civil and legal rights, 18 Stat. 335 (1875).

95. The Civil Rights Act of 1964, An Act To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes, Pub. L. No. 88-352, 78 Stat. 241, 243 (codified as amended at 42 U.S.C. § 2000(a) (2006)).

96. *The Civil Rights Cases*, 109 U.S. 3 (1883).

action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”⁹⁷ The Court found that there was no “state action” involved when a restaurant refused to serve blacks, a hotel or inn refused to rent rooms to blacks, or a streetcar provided separate seating for blacks, even though such businesses were licensed by the State, regulated by the State, and classically considered *public* accommodations.⁹⁸ The Court cynically ended its opinion by asserting that:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.⁹⁹

The Court ignored the fact that blacks were being treated in a “special” manner only to the extent that they were beginning to face massive discrimination throughout the South and less massive but still humiliating discrimination in the North. The Court’s own jurisprudence from the same year illustrated this. In *United States v. Harris*, the Court held that the national government could not prosecute white members of a mob that had broken into a jail and killed one black man and severely beaten three others.¹⁰⁰ The Court’s narrow reading of the Fourteenth Amendment’s enforcement clause thus precluded the national government from protecting the civil rights of African Americans (or anyone else).

Justice John Marshall Harlan dissented in both cases.¹⁰¹ Significantly, Harlan was a former slave owner from Kentucky.¹⁰² At this time he was the only native southerner on the Court¹⁰³ and

97. *Id.* at 11.

98. *Id.* at 24–25.

99. *Id.* at 25.

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

101. *The Civil Rights Cases*, 109 U.S. at 33 (Harlan, J., dissenting); *Harris*, 106 U.S. at 644 (Harlan, J. dissenting).

102. On Harlan’s early life, see LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* (1999).

103. In 1880 President Hayes appointed William B. Woods to the Court. See *William B. Woods, 1881-1887*, SUPREME CT. HISTORICAL SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/william-woods-1881-1887> (last visited Apr. 10, 2014) [<http://perma.cc/B64W-F39G>] (archived May 12, 2014). Woods was a native of Ohio and had been a Brevetted Major General in the U.S. Army, but had remained in the South at the end of the War, where he briefly practiced law and entered politics before President Ulysses S.

the only member of the Court who had firsthand experience with slavery and southern racism. He knew that blacks were the “special favorite” of southern lawmakers, only to the extent that southern whites seemed to be working especially hard to find new ways to discriminate against them. In *The Civil Rights Cases*, he argued that the Fourteenth Amendment allowed the national government to protect the rights of blacks to equal accommodations.¹⁰⁴ Citing antebellum jurisprudence that protected slavery,¹⁰⁵ Harlan argued that the newly amended Constitution allowed the national government to protect the rights of former slaves.¹⁰⁶ Harlan stressed that the Thirteenth Amendment was designed to do more than merely end slavery.¹⁰⁷ He argued that “it established and decreed universal *civil freedom* throughout the United States” and this freedom included equal access to public facilities.¹⁰⁸ He further argued that segregation—the denial of access to public facilities—was a holdover from slavery:

That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation, the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable.¹⁰⁹

Harlan reminded his fellow justices that every one of them agreed that “the Thirteenth Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form.”¹¹⁰ He noted that before the passage of the Fourteenth Amendment, Congress had passed the Civil Rights Act of 1866, which

Grant appointed him to a federal judgeship in 1869. *Id.* It is not clear that Woods had any real sense of southern culture or the deep racism and hostility southern blacks faced as Reconstruction came to an end. See Thomas Baynes, Jr., *William B. Woods*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES*, 1789-1995 (Clare Cushman ed., 2d ed. 1995).

104. *The Civil Rights Cases*, 109 U.S. at 33–62 (Harlan, J., dissenting).

105. *Id.* at 34–35 (citing *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Ableman v. Booth*, 62 U.S. 506 (1859)).

106. *Id.* at 35.

107. *Id.* at 38.

108. *Id.* at 34.

109. *Id.* at 35.

110. *Id.*

undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the Thirteenth Amendment Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.¹¹¹

Harlan hammered home the argument that equality in the public sphere was the hallmark of freedom and any deprivation of that equality—whether based on statute or private action—violated both the Thirteenth and Fourteenth Amendments.¹¹² Harlan ended by denouncing the absurd contention by the majority that blacks had become the “special favorite of the laws”:¹¹³

My brethren say, that when a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more.¹¹⁴

For the rest of the 19th century, with only an occasional rare exception, African-American civil rights received special *disfavor*

111. *Id.* at 35–36.

112. *See id.* at 33–62.

113. *Id.* at 61.

114. *Id.*

before the Supreme Court.¹¹⁵ Indeed, the late 19th century Court became the special enemy of African Americans.¹¹⁶

Two early transportation cases illustrate how the Court's jurisprudence almost always harmed civil rights and blacks. In 1878, in *Hall v. DeCuir*,¹¹⁷ the U.S. Supreme Court struck down a Louisiana statute that prohibited segregation on modes of public transportation, including ships, traveling within the state.¹¹⁸ The Court concluded that forcing the ship to provide equal accommodations for blacks in *intrastate* commerce would burden interstate commerce because ships coming into or leaving the state might have to reassign passengers to different seats.¹¹⁹ This ruling could be seen as "race neutral" because it left seating on the boat entirely in the hands of the ship owners as they passed from one state to another. Under the Court's logic the states were precluded from regulating race in interstate commerce.

However, a dozen years later, the Court upheld a Mississippi law that mandated railroad segregation on trains that traveled in interstate commerce.¹²⁰ The inconsistency of these two cases is obvious from their facts. *DeCuir* was on a Louisiana boat in Louisiana waters when she was denied access to the first-class cabin, even though she had paid for the right to use it.¹²¹ The Court ignored both her civil rights and her contract rights.¹²² But the Louisville, New Orleans, and Texas Railway Company clearly had trains traveling in interstate commerce.¹²³ The railroad protested Mississippi's segregation law because the law affected the ability of the railroad to sell tickets to whomever wanted to buy them and prevented the conductors from seating people in the most economic or efficient manner.¹²⁴ The Court's jurisprudential inconsistency was

115. In *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court upheld the prosecution of members of the Ku Klux Klan who beat a former slave to prevent him from voting in a federal election. Here, the Court upheld enforcement laws under the Fifteenth Amendment.

116. See 1 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 539–67 (2011).

117. *Hall v. DeCuir*, 95 U.S. 485 (1878).

118. An Act To enforce the Thirteenth Article of the Constitution of this State, and regulate the Licenses mentioned in said thirteenth article, Act No. 38, 1869 La. Acts 37 (rules for conduct adopted by common carriers shall "make no discrimination on account of race or color"). The Louisiana Supreme Court upheld this law in *DeCuir v. Benson*, 27 La. Ann. 1 (1875).

119. *Hall*, 95 U.S. 485.

120. *Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, 133 U.S. 587 (1890).

121. *Hall*, 95 U.S. at 490.

122. See *id.* at 487–91.

123. See *id.*

124. *Id.*

blatant and defied rational explanation. But its social consistency was clear: Laws supporting civil rights were suspect; laws creating racial inequality and the subordination of blacks were generally permissible, unless they were shockingly and outrageously discriminatory.¹²⁵

In *Plessy v. Ferguson*, the most infamous segregation case of the period, the Court abandoned the state action distinction it had developed in *The Civil Rights Cases*.¹²⁶ Here the discrimination—a requirement of separate seating for blacks on a train that only traveled within the state of Louisiana—was based on a state law.¹²⁷ There was no interstate commerce issue here, and there was obviously state action. This would seem to be exactly the kind of situation the Court had in mind in *The Civil Rights Cases*, when the Court said that “[i]t is State action of a particular character that is prohibited.”¹²⁸ But the Court now had new standards. State action that separated people by race was not discriminatory as long as the facilities were “equal.”¹²⁹ The concept of “equal” was a legal fiction at the time and would remain so until the Court finally overturned the separate but equal doctrine six decades later.¹³⁰

Following *Plessy*, the Court continued its war on African Americans, upholding all sorts of discrimination on narrow, technical grounds or without regard to the nature of the southern laws or their consequences. When state laws effectively prohibited blacks from serving on juries, the Court found no discrimination because the qualifications were race “neutral.”¹³¹

125. The one example of this—and it is the only example in this period—is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which involved Chinese-Americans in California. In this case, the Court held that a San Francisco ordinance, which required that laundries be in brick buildings—unless the sheriff approved an exemption—was unconstitutional because the sheriff exempted virtually all white-owned laundries and never exempted those owned by Chinese immigrants and their American-born children. *Id.*

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

127. *Id.* at 540.

128. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

129. *Plessy*, 163 U.S. at 550–51.

130. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (striking down separate but equal in the context of legal education, holding that a law school created for black students could *never* be equal to the existing University of Texas School of Law); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (striking down separate but equal as applied to public schools); *Gayle v. Browder*, 352 U.S. 903 (1956) (formally reversing *Plessy* in holding unconstitutional segregation in intrastate public transportation). On the importance of *Sweatt* to dismantling segregation, see Paul Finkelman, *Breaking the Back of Segregation: Why Sweatt Matters*, 36 T. MARSHALL L. REV. 7, 7–37 (2010).

131. See *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898). A fourth case

Mississippi, the home of the future Senator Stennis, led the South in cleverly preventing blacks from reaching the ballot box or the jury box. Mississippi's 1890 Constitution was explicitly designed to eliminate black voting, as even the Mississippi Supreme Court acknowledged.¹³² Known as the "Disfranchisement Constitution," it was remarkably effective. As Benno Schmidt noted:

The new state constitution imposed a variety of suffrage qualifications designed to disfranchise blacks. Some, like the poll tax, tended to exclude many blacks automatically; others, like the literacy test and the requirement to "be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar," or the requirement to demonstrate "a reasonable understanding of the duties and obligations of citizenship," transparently invited invidious manipulation.¹³³

Because jury selection was tied to voter registration, the Constitution eliminated virtually all black jurors from the state. *Williams v. Mississippi* challenged this situation on behalf of an African American named Henry Williams, who faced execution after being indicted by an all-white grand jury and convicted by an all-white petit jury.¹³⁴

In rejecting Williams's claim of discrimination, the Court unblushingly quoted Mississippi's highest court, which had openly declared that the purpose of the 1890 state constitution was to discriminate against blacks and that "[w]ithin the field of permissible action under the limitations imposed by the federal constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race."¹³⁵ The Supreme Court might have concluded that this passage proved that Mississippi's constitution and laws violated the Fourteenth and

from Louisiana led to the same result. *See Murray v. Louisiana*, 163 U.S. 101 (1896).

132. In *Williams*, the Supreme Court quoted the Mississippi Supreme Court's assertion that "[w]ithin the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race." 170 U.S. at 222.

133. Benno C. Schmidt, *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1462 (1983) (quoting MISS. CONST. of 1890 § 264).

134. *Williams*, 170 U.S. 213. *See also Murray*, 163 U.S. 101.

135. *Williams*, 170 U.S. at 222 (quoting *Ratliff v. Beale*, 20 So. 865 (Miss. 1896)) (internal quotation marks omitted).

Fifteenth Amendments. But the Court saw no constitutional problem with a state that openly declared that its laws and new Constitution were designed to disfranchise black voters.¹³⁶ Nor was the Court concerned with the assertion of Mississippi's justices that:

By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory within narrow limits, without forethought, and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.¹³⁷

Rather than expressing any concern that Mississippi's actions might have been based on racism and a conscious desire to violate the Fourteenth and Fifteenth Amendments, Justice Joseph McKenna, writing for the majority, determined that

nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done within the field of permissible action under the limitations imposed by the federal Constitution, and the means of it were the alleged characteristics of the negro race,¹³⁸ not the administration of the law by officers of the state.¹³⁹

Astoundingly, the Court concluded: "It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi; nor is there any sufficient allegation of an evil and discriminating administration of them."¹³⁹

This dismal history set the stage for the age of Jim Crow in the first half of the 20th century. In *The Civil Rights Cases*, the Court determined that the national government had no power to protect blacks from private discrimination, even when that discrimination was done under the color of law and with the cooperation of state officials and when the state—through its law enforcement agencies

136. *Id.*

137. *Id.* at 222 (quoting *Ratcliff*, 20 So. at 868) (internal quotation marks omitted).

138. *Id.* (internal quotation marks omitted).

139. *Id.*

and courts—would enforce this private discrimination.¹⁴⁰ Significantly, in this period almost all of the northern states passed state civil rights and equal accommodation laws to prohibit such behavior.¹⁴¹ But the Court, although dominated by northerners,¹⁴² followed the South's lead in supporting racism and segregation.¹⁴³ Indeed, the only consistent opponent of segregation on the Court in this period was the former slave owner from Kentucky, John Marshall Harlan.

III. VOTING AND RIGHTS

Blacks, of course, might have resisted new modes of segregation through the political process. But in most of the South, white terrorists and local white law enforcement authorities combined to prevent them from voting. By the end of the century, legislation and new constitutions in Mississippi, Louisiana, and the other former Confederate states had effectively disfranchised virtually all black voters in the South.¹⁴⁴ In the 1870s and 1880s, the federal

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

141. For a discussion of these laws and their enforcement, see David McBride, *Mid-Atlantic State Courts and the Struggle with the "Separate but Equal" Doctrine: 1880–1939*, 17 RUTGERS L.J. 569 (1986); Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973 (2005) [hereinafter Finkelman, *In Defense of Brown*]; Paul Finkelman, *The Promise of Equality and the Limits of Law: From the Civil War to World War II*, in THE HISTORY OF MICHIGAN LAW 187–213 (Paul Finkelman & Martin J. Hershock eds., 2006) [hereinafter Finkelman, *The Promise of Equality and the Limits of Law*].

142. From 1877 to 1888 Harlan was the only southerner on the Court. See *Timeline of the Justices*, SUPREME CT. HIST. SOC'Y, <http://www.supremecourt.history.org/history-of-the-court> (last visited Apr. 7, 2014) [<http://perma.cc/PB4M-55SQ>] (archived Apr. 9, 2014); see also *John Marshall Harlan*, SUPREME CT. HIST. SOC'Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/john-marshall-harlan-1877-1911> (last visited Apr. 7, 2014) [<http://perma.cc/TD47-X3EJ>] (archived Apr. 9, 2014). From 1888 to 1909, the Court had only two southerners, Harlan and various other justices: Lucius Quintus Cincinnatus Lamar of Mississippi (1888–1893); Howell Jackson of Tennessee (1893–1895); and Edward Douglass White of Louisiana (1895 until after Harlan's death in 1911). See *Timeline of the Justices*, *supra*. In 1909 a third Southerner, Horace Lurton of Tennessee, was appointed to the bench. *Id.*

143. For a short history of the Court's overwhelming support of racism and segregation in this period, see 1 UROFSKY & FINKELMAN, *supra* note 116, at 539–67.

144. The classic study of this issue is: J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974). "Between 1890 and 1908, every state in the Deep South adopted a new state constitution, explicitly for the purpose of disenfranchising blacks. Various devices were used—poll taxes, literacy tests, arbitrary registration practices, felony disenfranchisement (for only those crimes

government tried to stop this violence, but in cases like *United States v. Cruikshank*, which came out of Grant Parish, Louisiana, the Court refused to allow the federal government to protect black voters,¹⁴⁵ and in *Williams v. Mississippi*, the Court ignored the intentional discrimination against black voters in the Mississippi Constitution.¹⁴⁶

But states did not initially resort to constitutional amendments when plain old fraud (mixed with intimidation) would do the trick. The history of voting in South Carolina, which had a black majority at the end of the Civil War, illustrates this. Starting in 1870, significant numbers of blacks voted in the state because of federal statutes, federal enforcement of voting rights, and the ratification of the Fifteenth Amendment. Indeed, significant black voting throughout the former Confederate states led to the election of more than 2,000 black officeholders in this period.¹⁴⁷ From 1870 until 1882, black political participation in South Carolina was particularly significant. Thus, for four consecutive sessions of Congress in the 1870s, South Carolina sent two or more of its black citizens to the U.S. House of Representatives.¹⁴⁸ These political successes reflected the fact that African Americans constituted about 60% of the state's population.¹⁴⁹

that blacks disproportionately committed).” *Race, Voting Rights, and Segregation: Rise and Fall of the Black Voter, 1868-1922, On the Eve of Complete Black Disfranchisement, 1900*, U. MICH., <http://www.umich.edu/~lawrace/votetour6.htm> (last visited Apr. 7, 2014) [<http://perma.cc/AR9W-2S4E>] (archived Apr. 9, 2014).

145. *United States v. Cruikshank*, 92 U.S. 542 (1876).

146. *Williams v. Mississippi*, 170 U.S. 213 (1898). See *supra* notes 131–42 and accompanying text.

147. ERIC FONER, *FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION* xi (1996).

148. JENNIFER MANNING & COLLEEN J. SHOGAN, CONGRESSIONAL RESEARCH SERVICE, *AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870-2012*, at 56 (2012), available at http://www.senate.gov/CRSReports/crs-publish.cfm?pid=0E%2C*PLW%3C%20P%20%20%0A [<http://perma.cc/LP64-785E>] (archived Apr. 9, 2014). Robert C. DeLarge, Joseph Rainey, and Robert B. Elliott served in the 42nd Congress; Elliott, Rainey, Richard H. Cain, and Alanzo Ransier served in the 43rd Congress; Rainey and Robert Smalls served in the 44th Congress, and Cain, Rainey, and Smalls served in the 45th Congress. *Id.* See FONER, *supra* note 147, at 254–57 (listing all as coming from South Carolina and providing short biographies of these officeholders).

149. In 1870 the U.S. Census found 290,000 whites in South Carolina and 415,000 blacks; in 1880 there were 319,000 whites in the state and 604,000 blacks. U.S. CENSUS BUREAU, TABLE 55[.] SOUTH CAROLINA - RACE AND HISPANIC ORIGIN: 1790 TO 1990 (2002), available at <http://www.census.gov/population/www/documentation/twps0056/tab55.pdf> [<http://perma.cc/B2HM-55HW>] (archived Apr. 9, 2014).

More than 300 blacks served in public office in South Carolina from 1870 until 1876, when Reconstruction formally ended.¹⁵⁰ These included State Supreme Court Justice Jonathan J. Wright, Lieutenant Governors Richard H. Gleaves and Alonzo J. Ransier, Speakers of the State House of Representatives Robert B. Elliott and Samuel J. Lee, Secretaries of State Francis L. Cardozo and Henry E. Hayne, and Congressmen Richard H. Cain, Robert C. DeLarge, Robert B. Elliott, Joseph H. Rainey, Alonzo J. Ransier, and Robert Smalls.¹⁵¹

As Reconstruction came to an end, some localities in the state adopted schemes to prevent blacks from voting in primaries.¹⁵² In 1878, the State instituted the use of separate ballot boxes for state and federal elections in an attempt to confuse black voters and prevent their ballots from being counted.¹⁵³ Many of the black voters were illiterate former slaves. They understood who they wanted to vote for—Republican members of the Party of Lincoln, who supported black rights—even though they could not necessarily read.¹⁵⁴ The new law provided detailed regulations for where elections could be held, including naming stores and other buildings as polling places on a county-by-county basis.¹⁵⁵ However, this statute ended with the following language: “The word precinct in this Act shall be construed to embrace an area sufficient to provide for holding elections for members of Congress and Presidential Electors at different stations from those stations where elections are held for State and County officers.”¹⁵⁶ This law allowed election officials to move federal ballot boxes to new locations in an attempt to confuse black voters. The Legislature also required separate ballot boxes for state and federal elections, even if the election was at the same polling place.¹⁵⁷

150. FONER, *supra* note 147, at 254–57.

151. AMERICAN POLITICAL LEADERS, 1789–2005, at 378 (C.Q. Press eds., 2005); FONER, *supra* note 147. On Reconstruction in South Carolina, see generally THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION (1979).

152. Orville Vernon Burton, Terence R. Finnegan, Peyton McCrary & James W. Loewen, *South Carolina*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 231 (Chandler Davidson & Bernard Grofman eds. 1994) [hereinafter Burton et al., *South Carolina*].

153. An Act to Amend an Act Entitled “An Act to Establish by Law the Voting Precincts in the Various Counties in This State”, 1877–78 S.C. Acts 565. See also Burton et al., *South Carolina*, *supra* note 152.

154. See generally KOUSSER, *supra* note 144.

155. 1877–78 S.C. Acts 565.

156. *Id.*

157. An Act to Alter and Amend the Law in Relation to Elections, 1877–78 S.C. Acts 632.

In 1882, the white majority in the South Carolina Legislature refined this system further with an insidiously brilliant innovation known as the “Eight Box Ballot Law.”¹⁵⁸ This law was designed to reduce the number of black voters and prevent many of the ballots of the remaining voters from being counted. One of the leading historians of black voting in the South described the new rules and policies:

South Carolina led the way in manufacturing legal obstructions to keep the Negro from the polls. In 1882 its lawmakers enacted a registration measure requiring individuals of voting age to enroll between May and June of that year or to risk permanent exclusion from the suffrage lists. Minors were to be enfranchised when they reached the age of twenty-one if a registrar found them qualified. In addition, citizens were compelled to register each time they moved, a stipulation designed to penalize migrating black sharecroppers and tenants.¹⁵⁹

The Eight Box Ballot Law was “one of the most clever stratagems” adopted in this period to eliminate the black vote,¹⁶⁰ and “its provisions illustrate how ingenious southern authors could twist seemingly neutral devices for partisan and racist purposes.”¹⁶¹ Thus,

[u]nder this rule, ballots for individual offices had to be placed in separate ballot boxes. Put your ballot in the wrong box, and it would not be counted. Although the boxes were usually labeled properly, this meant little to illiterate black voters unable to read the labels. And if this were not enough, many election supervisors shifted the boxes around periodically. Countless wrongly placed—and hence uncounted—ballots were the result.¹⁶²

At the same time, the election judges would offer help and guidance to the large number of illiterate white voters who would have been equally confused by the complicated ballot box scheme.¹⁶³

158. An Act to Amend Title II. (Entitled) “Of Elections” of Part I. (Entitled) “Of the Internal Administration of the Government” of the General Statutes, 1881–82 S.C. Acts 1110.

159. STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 6 (1976).

160. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 35 (1999).

161. *Id.*

162. CHARLES L. ZELDEN, *VOTING RIGHTS ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS* 75 (2002).

163. See KOUSSER, *supra* note 144; KOUSSER, *supra* note 160, at 35.

These schemes could not entirely eliminate black voting, and with blacks constituting 60% of the state, as late as the 1890s there were some blacks in the South Carolina Legislature and representing the State in Congress.¹⁶⁴ A bizarre work of gerrymander created a single Congressional district that snaked through six counties from Columbia to the coast and managed to include about 82% of the state's black voters, assuring that there would usually be a single black Republican in Congress but also eliminating any meaningful black political participation in the rest of the state.¹⁶⁵ Some blacks also served in the state Legislature, but the number of black officeholders was miniscule and hardly reflected the state's nearly 60% black majority in 1890.¹⁶⁶ Despite this huge black majority, by the 1890s South Carolina was essentially a one-party state, with white Democrats controlling virtually all of state politics. For example, of the 160 delegates elected to the state constitutional convention in 1895, 154 were white Democrats and 6 were black Republicans,¹⁶⁷ despite the fact that blacks constituted nearly 60% of the state's population.¹⁶⁸ This new Constitution effectively ended black voter participation.¹⁶⁹

When subterfuge, confusing ballot boxes, and heavy-handed tactics of registrars did not work, white South Carolinians used fraud, intimidation, and violence to undermine the black ballot. Sometimes election officials moved ballot boxes to a new location on the day of the election, letting whites but not blacks know what was going on.¹⁷⁰ It was not uncommon for white militia companies to parade "around town just before voting day to scare away blacks."¹⁷¹ Between 1868 and 1876, seven black state legislators were murdered in South Carolina.¹⁷² Federal prosecutions in 1871 and 1872 temporarily suppressed racist violence and the Ku Klux Klan,¹⁷³ but peace did not last, as organized mobs and terrorists—often led by former Confederate generals such as Matthew Calbraith Butler and Martin Witherspoon Gray—attacked and murdered blacks to suppress their political participation.¹⁷⁴ In 1876, "over

164. ZELDEN, *supra* note 162, at 75.

165. Burton et al., *South Carolina*, *supra* note 152, at 193–94.

166. ZELDEN, *supra* note 162, at 75.

167. George B. Tindall, *The Question of Race in the South Carolina Constitutional Convention of 1895*, 37 J. NEGRO HIST. 277, 277 (1952).

168. In 1890, there were 462,008 whites in the state and 689,936 blacks. U.S. CENSUS BUREAU, *supra* note 149.

169. *Id.*

170. LAWSON, *supra* note 159, at 7.

171. *Id.*

172. Burton et al., *South Carolina*, *supra* note 152, at 193–94.

173. See generally WILLIAMS, *supra* note 92.

174. Burton et al., *South Carolina*, *supra* note 152, at 192–93.

seven hundred armed and mounted Democrats in red shirts seized control of the county courthouse” in Edgefield County, preventing blacks from voting.¹⁷⁵ In 1882, an armed white mob prevented blacks from voting in Darlington County.¹⁷⁶ In the aftermath of *United States v. Cruikshank*, there was little chance that the federal government could put a stop to this violence or that the Supreme Court would allow prosecutions of those who committed the violence.

In 1895, South Carolina completed its disfranchisement of blacks with a new Constitution that contained 15 separate sections on voting rights.¹⁷⁷ The new Constitution “required all voters to read and explain any section of the state constitution provided by the local voting registrar, as well as [meet] a two-year residency requirement.”¹⁷⁸ The Constitution required proof of property ownership, payment of poll taxes, and provided disfranchisement for a long list of crimes but for restoration of the right to vote with a pardon by the Governor.¹⁷⁹ These provisions eliminated some white voters, but registrars had great discretion in the questions they asked and the answers they accepted, which allowed them to approve illiterate and uneducated white voters and eliminate all but the most persistent and well-educated black voters. When the state constitutional convention began, the *Charleston News and Courier* accurately noted: “The present Constitutional Convention has been called to accomplish the overthrow of negro suffrage. Nobody tries to conceal it, nobody seeks to excuse it.”¹⁸⁰

The results of the laws and constitutional changes to disfranchise blacks from 1882 to 1895 were predictable and dramatic. In 1880, it is estimated that 77% of all adult black men in South Carolina voted in the presidential election; in 1892, following the implementation of the new rules of 1882, only an estimated 17% of black men voted.¹⁸¹ In 1900, only 4% of potential black voters cast ballots, and by 1912 this was further reduced to 2%.¹⁸²

What happened in South Carolina was hardly unique. Starting in the 1870s, all the former slave states began a concerted attack on

175. *Id.* at 193.

176. LAWSON, *supra* note 159, at 7.

177. Tindall, *supra* note 167.

178. ZELDEN, *supra* note 162, at 77.

179. S.C. CONST. of 1895, art. II, § 1–15.

180. J. MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 104 (2002).

181. RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 128 (2004).

182. *Id.*

black voting.¹⁸³ By 1910, every former Confederate state had adopted new constitutions, laws, or both, which effectively eliminated black voting.¹⁸⁴

IV. TOWARD A JIM CROW WORLD

The Supreme Court's race jurisprudence in the late 19th and early 20th centuries sent a clear signal to the South: Virtually all forms of private race discrimination were constitutional and not in conflict with the Thirteenth or Fourteenth Amendments. Nor did the Court find laws mandating segregation unconstitutional. Rather than striking down the many badges of servitude the South created, the Court blithely approved them. Once in a while, the Court found that the Fifteenth Amendment limited some forms of violence¹⁸⁵ or voting discrimination that were too obviously race-based to be ignored.¹⁸⁶ But in other cases, the Court easily allowed race discrimination in voting, just as it allowed state-mandated or sanctioned race discrimination in all other aspects of southern life.¹⁸⁷

Segregation even trumped the early 20th century Court's almost religious devotion to freedom of contract under the Due Process Clause of the Fourteenth Amendment. In 1905, in *Lochner v. New York*, the Court struck down a New York law limiting the hours that a baker could work on the grounds that the law interfered with the baker's "liberty of contract," which the Court found was a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment.¹⁸⁸ However, three years later in *Berea College v. Kentucky*,¹⁸⁹ the Court upheld a Kentucky law that prevented Berea College, a private institution of higher learning, from operating on an integrated basis.¹⁹⁰ It is virtually impossible to square the liberty-of-contract arguments in *Lochner* with the outcome in *Berea College*. Under the analysis the Court provided in *Lochner*, the trustees of Berea College presumably had the right to contract with whomever they wanted to sell their product: a college

183. See *supra* note 142.

184. See *supra* note 142.

185. Ex parte Yarbrough, 110 U.S. 651 (1884).

186. In *Guinn v. United States*, 238 U.S. 347 (1915), the Court struck down Oklahoma's "grandfather clause," which allowed any man to register to vote if he would have been able to vote in 1867, which was before the adoption of the Fourteenth and Fifteenth Amendments.

187. *Williams v. Mississippi*, 170 U.S. 213 (1898); *Giles v. Harris*, 189 U.S. 475 (1903).

188. 198 U.S. 45 (1905).

189. 211 U.S. 45 (1908).

190. *Id.*

education. Similarly, the purchasers of this product—the students—had a right to contract to buy the product. If whites and blacks chose to buy an education in an integrated context, the students should have had such a right under *Lochner*. But the *Berea College* Court did not see anything in either the Equal Protection Clause of the Fourteenth Amendment or the right to contract under the Due Process Clause of the same amendment that would allow a private college to sell its product to anyone who wanted to purchase it.¹⁹¹ The decision in *Berea College* underscores the racial bias of the Court in this period and its refusal to honestly interpret and enforce the Fourteenth Amendment. Blacks and white integrationists did not apparently have freedom of contract.

What followed was a world of racial discrimination that seems almost incomprehensible today but should be remembered and understood. Between 1890 and the early 1950s, almost every aspect of life in the South was completely segregated. The majority of blacks, virtually 70%,¹⁹² lived in the South where segregation was deeply entrenched in the law and culture.¹⁹³ Blacks in the North did not face the day-to-day de jure segregation of the South, but they lived in a society in which informal and de facto segregation affected their lives in myriad ways. But despite racial prejudice, most northern states banned discrimination and segregation. In 1947, the President's Committee on Civil Rights reported that "New York State, in particular, has an impressive variety of civil rights laws on its statute books"¹⁹⁴ and "[a] few other states and cities have followed suit, especially in the fair employment practice field."¹⁹⁵ This report actually understated the state of civil rights in the North.¹⁹⁶ As noted above, starting in the 1880s—in response to the Supreme Court's decision in *The Civil Rights Cases*¹⁹⁷—most of the northern states had passed civil rights laws and equal

191. *Id.*

192. The exact amount is 68%. U.S. CENSUS BUREAU, TABLE A-9[:] RACE FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES: 1950 (2002).

193. The best definition of the "South" is the 15 states that had slavery in 1860 plus West Virginia and Oklahoma. All of these states had mandatory segregation until forced to give it up by the Supreme Court and Congress. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985).

194. TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 18 (U.S. Gov't Printing Office 1947) [hereinafter THESE RIGHTS].

195. *Id.*

196. JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 375–79 (1959).

197. *The Civil Rights Cases*, 109 U.S. 3 (1883).

accommodations laws.¹⁹⁸ Such laws were on the books at the time the Civil Rights Act of 1964 was being debated.¹⁹⁹ However, many privately owned businesses ignored such laws and rarely had to defend their actions in the courts. Blacks reported that, despite laws that prohibited discrimination, it was “difficult to find a meal or a hotel room in the downtown areas of most northern cities.”²⁰⁰ Enforcement of such laws was lax, and businesses “discouraged [blacks] from patronizing places by letting them wait indefinitely for service, charging them higher prices, giving poor service, and publicly embarrassing them in various ways.”²⁰¹ Although illegal, “whites only” signs could be found in some places in the North.²⁰² But generally such signs were unnecessary because some businesses simply refused to accommodate or serve blacks.

By the 1950s, de jure segregation was gone virtually everywhere in the North.²⁰³ However, throughout the North, de facto segregation was common in housing, which led to the de facto separation of the races in many public schools.²⁰⁴ Before the *Brown* decision some parts of the North, especially southern Illinois and Indiana, routinely segregated local schools despite state laws that prohibited such practices.²⁰⁵

198. For a discussion of these 19th century laws and their enforcement, see McBride, *supra* note 141; Finkelman, *In Defense of Brown*, *supra* note 141. On the laws in Michigan, see Paul Finkelman, *The Promise of Equality and the Limits of Law*, *supra* note 141.

199. Titles and excerpts from many of these laws are conveniently collected in PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* (1951) [hereinafter *STATES' LAWS*]. For example, see public accommodation laws, antidiscrimination laws, fair employment laws, and general civil rights laws in California, *id.* at 56–57; Colorado, *id.* at 59–62; Connecticut, *id.* at 63–70; Illinois, *id.* at 123–42; Indiana, *id.* at 143–154; Iowa, *id.* at 156; Kansas, *id.* at 159–61; Maine, *id.* at 197; Massachusetts, *id.* at 213–26; Michigan, *id.* at 227–30; Minnesota, *id.* at 231–36; Montana, *id.* at 257; Nebraska, *id.* at 260–62; New Hampshire, *id.* at 267; New Jersey, *id.* at 268–88; New Mexico, *id.* at 291–300; New York, *id.* at 301–28; Ohio, *id.* at 352–55; Oregon, *id.* at 379–86; Pennsylvania, *id.* at 387–94; Rhode Island, *id.* at 396–405; Utah, *id.* at 458–59; Washington, *id.* at 493–501; Wisconsin, *id.* at 514–20. Jack Greenberg of the NAACP, writing at the end of the decade, found even more statutes because some northern states passed new equal accommodation statutes as a positive response to *Brown v. Board of Education* and the civil rights movement. GREENBERG, *supra* note 196, at 375–79.

200. *THESE RIGHTS*, *supra* note 194, at 78.

201. *Id.*

202. *Id.*

203. Paul Finkelman, *The Radicalism of Brown*, 66 U. PITT. L. REV. 35, 41 (2004).

204. *Id.*

205. See DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954* (2005); KLUGER, *supra* note 17, at 169–70.

However bad conditions were for blacks in the North, it was the South where segregation was most virulent and oppressive, and of course that is where seven out of ten blacks lived in 1950 and six out of ten lived in 1960.²⁰⁶ It has been nearly a half-century since the courts and Congress began the process of desegregating America. It is easy to forget how thoroughly segregated the American South was before the passage of the 1964 Civil Rights Act. Some descriptions of this era are useful.

In his classic book, *The Strange Career of Jim Crow*, the great southern historian C. Vann Woodward surveyed the early development of segregation in the South. He quoted a South Carolina newspaper, which in 1898 attacked the growing segregation with an argument of *reductio ad absurdum*:

If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss. It would be advisable also to have a Jim Crow section in county auditors' and treasurers' offices for the accommodation of colored taxpayers. The two races are dreadfully mixed in these offices for weeks.²⁰⁷

Woodward then noted that within a few years, except for the “Jim Crow witness stand, all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible.”²⁰⁸

Before the Civil Rights Act of 1964, virtually every facet of life in the South was segregated. Southern blacks faced discrimination at every turn in their lives.²⁰⁹ If born in a hospital, southern blacks

206. In 1950 there were 15,042,286 blacks in the nation and 10,255,407 lived in the South; in 1960 there were 18,860,117 in the nation and 11,311,607 lived in the South. CAMPBELL GIBSON & KAY JUNG, U.S. CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES (2002), available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html> [<http://perma.cc/TKL8-RMGF>] (archived Apr. 9, 2014).

207. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 68 (3d ed. 1974).

208. *Id.* at 68–69.

209. There is no single source for all the segregation statutes in the South at the state level, and most of the local ordinances are buried in local codes that may or

entered the world in a separate hospital²¹⁰ or in a separate ward of a hospital.²¹¹ For example, Charity Hospital in New Orleans accepted black patients but put them in separate wards, and until the 1960s, Tulane Hospital would not accept blacks at all.²¹² These hospitals were usually segregated by custom, rather than law, but as with many aspects of segregation, law and custom worked in tandem.²¹³ Black doctors were often prohibited from practicing on the Negro wards if whites were also in the hospital.²¹⁴ But only black nurses could work on such wards, and they could not work on wards where there were white patients.²¹⁵ When they died, southern blacks would be buried in segregated cemeteries.²¹⁶ In 1944, the Swedish sociologist Gunnar Myrdal found that “[s]egregation is practically complete in the South for . . . cemeteries.”²¹⁷ As the President’s Committee noted, in the South “it is generally illegal for Negroes to attend the same schools as whites; attend theaters patronized by whites; visit parks where whites relax; eat, sleep or meet in hotels, restaurants, or public halls frequented by whites.”²¹⁸ The Committee

may not be published. However, two books published in the 1950s give summary lists of many of these laws. See GREENBERG, *supra* note 196, at 372–400; STATES’ LAWS, *supra* note 199.

210. Pauli Murray found that only two states, Mississippi and South Carolina, mandated segregation in public hospitals. STATES’ LAWS, *supra* note 199, at 17. This illustrates the gap that sometimes existed between statutes and practice. Everywhere in the South, private and public hospitals were segregated. This was accomplished by statute, local ordinance, administrative practice, interpretation of statutes, and custom. Furthermore, because no federal laws—or southern state laws—prohibited private discrimination, private hospitals segregated patients, or refused to treat blacks, without any need for legislation. For a summary of laws regulating admission of blacks to hospitals in the South, see GREENBERG, *supra* note 196, at 373.

211. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 635 (9th ed. 1944).

212. JOHN E. SALVAGGIO, NEW ORLEANS’ CHARITY HOSPITAL: A STORY OF PHYSICIANS, POLITICS, AND POVERTY 188–89 (1992).

213. GREENBERG, *supra* note 196, at 87–88, 89–91.

214. MYRDAL, *supra* note 211, at 635–36 (“Negro wards are mostly inadequate and inferior, and Negro doctors are not allowed to treat their patients there.”).

215. GREENBERG, *supra* note 196, at 373 (citing a Mississippi law on where nurses could practice).

216. In many places, cemeteries were segregated by local ordinance, custom, or the decision of the cemetery owner. North Carolina had a statute requiring this kind of segregation. STATES’ LAWS, *supra* note 199, at 329.

217. MYRDAL, *supra* note 211, at 635. By contrast, after World War II, some northern states prohibited such discrimination. See *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 77 (1955) (noting that after this suit was filed, the Iowa Legislature banned discrimination on the basis of race in cemeteries).

218. THESE RIGHTS, *supra* note 194, at 79.

noted that this was “only a partial enumeration” of what was a “highly refined” legally required pattern of discrimination that “cut[] across the daily lives of southern citizens from cradle to the grave”²¹⁹ and the system “brand[ed] the Negro with the mark of inferiority and assert[ed] that he [was] not fit to associate with white people.”²²⁰ As Lyndon Johnson came to understand through the experience of his cook and her husband, the indignities of segregation could be as pernicious as the actual denial of services and accommodations.²²¹

Segregation profoundly affected criminal justice in the South. With the exception of a few large cities, there were virtually no black police officers in the South.²²² Most southern blacks lived in fear of law enforcement officers, especially those in rural areas and small towns, where policing was segregated and often oppressive. Police brutality toward blacks was the norm, and only the most egregious cases ever reached the federal courts where some relief might be found. By 1950, “some two-score southern cities” had at least a few black police officers,²²³ but for most of the South, the law had a white face, a billy club, and a license to brutalize and kill blacks.²²⁴ By 1959 there were 808 black officers reported in 13 southern states, with just 60 in all of Louisiana, including 28 in New Orleans.²²⁵

If arrested, blacks went to segregated jails. When convicted, they were sent to segregated jails, prisons, chain gangs, or reform schools.²²⁶ In Florida, it was illegal for any sheriff or other law enforcement officer to handcuff or chain blacks and whites together, while in Georgia black and white prisoners were to be kept separate

219. *Id.*

220. *Id.*

221. CARO, MASTER OF THE SENATE, *supra* note 3, at 889.

222. THESE RIGHTS, *supra* note 194, at 61. Myrdal noted that before World War II there were fewer than 150 black policemen in the Deep South. MYRDAL, *supra* note 211, at 542–43. There were no black police officers in Mississippi, South Carolina, Louisiana, Georgia, and Alabama, even though at the time nearly 40% of the black population of the nation was in those states. *Id.*

223. THESE RIGHTS, *supra* note 194, at 61.

224. ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972, at 79 (1995). See MYRDAL, *supra* note 211, at 527, 542, 566, 1342 for discussions of southern white policemen killing and brutalizing blacks.

225. Elliott Rudwick, *Negro Police Employment in the Urban South*, 30 J. NEGRO EDUC. 102, 108 (1961). This table did not include Missouri, Maryland, Delaware, or West Virginia, which would probably have raised the numbers.

226. Examples of statutes requiring segregation in jails are found in STATES' LAWS, *supra* note 199, at 31–32 (Alabama), 45 (Arkansas), 84–85 (Florida), 114 (Georgia), 238, 247 (Mississippi), 480 (Virginia); GREENBERG, *supra* note 196, at 396–97.

“as far as practicable.”²²⁷ Other southern states had similar laws and rules.²²⁸ Segregated facilities meant that black prisoners would face worse conditions than their white counterparts. No matter how bad jail and prison conditions were for whites, they would always be worse for blacks. As Myrdal noted, because of segregation, southern state officials could “purchase less food and equipment for Negroes than for whites and . . . discriminate in other ways.”²²⁹ In addition, “[t]he wardens and guards are, in all cases, Southern poor whites” who had little sympathy or empathy for black prisoners.²³⁰ Furthermore, a convict leasing system gave county and state officials an economic incentive to vigorously prosecute all black lawbreakers because convicts were laborers who could be rented out to various southern businesses.

In court, blacks were invariably represented by white attorneys,²³¹ if they had representation at all.²³² In the Scottsboro cases, the Supreme Court mandated that counsel be provided for capital defendants,²³³ but in *Betts v. Brady*—decided well before the Civil Rights Revolution of the 1950s and 1960s—the Court refused to extend this seemingly fundamental aspect of due process to non-capital cases.²³⁴ Thus, countless poor blacks (and whites) went to prison with no meaningful defense. Significantly, the dissent in *Betts* came from Hugo Black, who earlier in his life had been a police

227. STATES' LAWS, *supra* note 199, at 85, 114–15.

228. Examples of statutes requiring segregation in jails are found in STATES' LAWS, *supra* note 199, at 31–32 (Alabama), 45 (Arkansas), 84–85 (Florida), 114 (Georgia), 238, 247 (Mississippi), 480 (Virginia).

229. MYRDAL, *supra* note 211, at 555.

230. *Id.*

231. On the small number of black lawyers in the South, see J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944 (1993); Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 161–209 (1994). In some capital cases the NAACP was able to provide legal counsel. See CHARLES ZELDEN, THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION 24–42 (2013); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012); KLUGER, *supra* note 17, at 146–54, 212–37.

232. Before *Gideon v. Wainwright*, 372 U.S. 335 (1963), the states were not required to provide counsel for indigent defendants. In *Gideon*, 23 states filed amicus briefs (or signed on to an amicus brief) urging that the Court reverse *Betts v. Brady*, 316 U.S. 455 (1942), and mandate that all criminal defendants be guaranteed counsel. *Gideon*, 372 U.S. 335. Only one of the states—Georgia—was from the Deep South. However, two states from the Deep South—North Carolina and Alabama—filed amicus briefs in support of not requiring counsel for indigent defendants. *Id.* at 335–36.

233. *Powell v. Alabama*, 287 U.S. 45 (1932).

234. *Betts*, 316 U.S. 455.

court judge in Birmingham, Alabama.²³⁵ Like Lyndon Johnson's experience with segregation in the 1950s and 1960s, Black had firsthand experience with the horrors of southern justice—particularly when it involved blacks—and understood the danger to civil rights and due process when defendants were without counsel.²³⁶ On the eve of the passage of the 1964 Civil Rights Act, Justice Black had the enormous satisfaction of writing the opinion in *Gideon* overturning *Betts*.²³⁷

Yet, even when they had attorneys, black defendants almost always had white lawyers who might, or might not, offer a spirited defense. While some white attorneys represented their black clients with zeal and passion worthy of the fictional Atticus Finch,²³⁸ others were dilatory or worse.²³⁹ In the age before *Gideon v. Wainwright*, poor defendants were not guaranteed a lawyer in non-capital cases; thus, many blacks faced the court system without any formal legal advice or help.²⁴⁰ They faced white judges and all-white juries. In the Deep South, prison often meant laboring on a chain gang or in a rural work camp, where life was truly Hobbesian: brutal and short.²⁴¹ Occasionally from the 1930s to the 1960s, civil rights organizations, like the NAACP Legal Defense and Education Fund, were able to send lawyers—often pioneering black lawyers like Charles Hamilton Houston and Thurgood Marshall—to vigorously represent black criminal defendants.²⁴² The Civil Rights Act of 1964 would not cure all of these problems and in fact had little to say about criminal justice. But the law helped generate a change in political culture that would matter. Moreover, the 1964 Act set the stage for the Voting Rights Act of 1965, which would eventually

235. ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 29–32 (1997). See also KLUGER, *supra* note 17, at 209–10.

236. NEWMAN, *supra* note 235, at 29–32. On Black and the reversal of *Betts*, see ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964). Lewis notes that this was a rare example when Black took the opportunity to write a majority opinion to vindicate an earlier dissent. Anthony Lewis, *Hugo Black and the First Amendment*, in JUSTICE HUGO BLACK AND MODERN AMERICA 251 (Tony Freyer ed., 1990).

237. NEWMAN, *supra* note 235, at 528; *Gideon*, 372 U.S. 335.

238. HARPER LEE, *TO KILL A MOCKINGBIRD* 10 (1960).

239. The failure of white Alabama lawyers to offer any sort of meaningful defense for their clients is detailed in *Powell v. Alabama*, 287 U.S. 45 (1932). See also DAVID J. BODENAHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* (Kermit L. Hall ed., 1992); DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1979).

240. *Gideon*, 372 U.S. 335.

241. See generally MATTHEW MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928* (1996).

242. ZELDEN, *supra* note 231; MACK, *supra* note 231; KLUGER, *supra* note 17, at 212–37.

change southern politics and lead to much more substantive justice for blacks.

Beyond the criminal justice system, in 1964 virtually all other facilities were equally segregated. Southern states segregated homes for the aged,²⁴³ orphanages,²⁴⁴ and homes or institutions for juvenile delinquents.²⁴⁵ Industrial schools were segregated where they existed at all for blacks. Louisiana had three industrial schools: one each for young white males, white females, and black males.²⁴⁶ Black female youthful offenders were not offered the option of learning a skill or trade as part of their rehabilitation.²⁴⁷ In most southern states, African Americans with a hearing problem, a mental illness, or tuberculosis went to special institutions for blacks only.²⁴⁸ State schools for the blind were segregated in the South even though, presumably, most of the students could not actually see each other.²⁴⁹ Louisiana not only required separate buildings to house and educate black and white blind children, but also that they be “on separate ground.”²⁵⁰ While all these institutions were in theory “separate but equal,” in practice they were never equal. No matter how bad conditions might be for whites, they were invariably worse for blacks.

As the South became increasingly industrialized, segregation helped keep blacks economically marginalized. South Carolina provided \$100 fines and up to 30 days imprisonment at hard labor for textile factory managers or owners who failed to follow elaborate rules for racial separations.²⁵¹ The law set out in great detail that no company engaged in textile or cotton manufacturing—

243. STATES’ LAWS, *supra* note 199, at 71 (Delaware). This appears to be the only statutory regulation of such institutions, probably because very few states had homes for aged blacks.

244. *Id.* at 71 (Delaware), 343 (North Carolina), 369 (Oklahoma), 439 (Tennessee), 445 (Texas).

245. *Id.* at 23 (Alabama), 40 (Arkansas), 72 (Delaware), 75 (District of Columbia), 79 (Florida), 90 (Georgia), 176 (Louisiana), 239 (Mississippi), 338 (North Carolina), 369 (Oklahoma), 409 (South Carolina), 430 (Tennessee), 445 (Texas), 464–65 (Virginia).

246. *Id.* at 176–77.

247. *Id.*

248. *Id.* at 42–43 (Arkansas), 72 (Delaware), 75 (District of Columbia), 175–76 (Louisiana), 239 (Mississippi), 338–39 (North Carolina), 369, 370–71 (Oklahoma), 409 (South Carolina), 430, 437 (Tennessee), 445, 448 (Texas), 463–64, 476 (Virginia).

249. *Id.* at 175 (Louisiana), 239 (Mississippi), 338 (North Carolina), 369 (Oklahoma), 445 (Texas), 463–64 (Virginia).

250. *Id.* at 175.

251. *Id.* at 414–15. *See also* WOODWARD, *supra* note 207, at 98. This law was part of the South Carolina Code of 1952 and on the books until the 1964 Act. GREENBERG, *supra* note 196, at 383.

the most important industry in the state—could allow members of the

different races to labor and work together within the same room, or to use the same doors of entrance and exit at the same time, or to use and occupy the same pay ticket windows or doors for paying off its operatives and laborers at the same time, or to use the same stairway and windows at the same time, or to use at any time the same lavatories, toilets, drinking water buckets, pails, cups, dippers or glasses.²⁵²

Other states had similar rules.²⁵³ In Arkansas, Oklahoma, Tennessee, and Texas, mines were required to have separate shower facilities, clothing lockers, or both for workers when they emerged from the ground.²⁵⁴ These laws did more than just humiliate blacks, deny them dignity, and remind them of their inferior legal status. The laws also prevented them from advancing in their jobs or even getting jobs. Separate facilities for blacks meant that business owners would have to invest more money in their mills, mines, and factories if they wanted to hire blacks. Where possible, it made greater economic sense simply to hire only whites, leaving blacks outside the growing industrial job market. Some of this changed during World War II, as blacks found jobs in some southern industries, but job discrimination in the South was profound. This was even true in federal employment, where discrimination was theoretically illegal. In 1963, blacks made 37% of the population of Birmingham, but of 2,000 federal employees (outside of the post office and the Veterans Administration) there were only 15 blacks—less than 1% of the total.²⁵⁵

Everywhere in the South, public accommodations were segregated by law, custom, and public pressure—separate, but never actually equal.²⁵⁶ The South required that there be separate drinking fountains, restrooms, motels, hotels, elevators, bars, restaurants, and lunch counters for blacks.²⁵⁷ These were some of the issues Lyndon Johnson encapsulated in his short conversation with Senator Stennis. These rules not only separated blacks but constantly humiliated them.

252. STATES' LAWS, *supra* note 199, at 414.

253. GREENBERG, *supra* note 196, app. A, at 374 (listing some of these laws, which were on the books in 1964).

254. STATES' LAWS, *supra* note 199, at 372 (Oklahoma), 437 (Tennessee), 452 (Texas); GREENBERG, *supra* note 196, at 383.

255. GRAHAM, *supra* note 31, at 71.

256. THESE RIGHTS, *supra* note 194, at 76.

257. *Id.*

Taxis served whites or blacks, not both.²⁵⁸ Waiting rooms at bus stations, train stations, and airports were separate as well. At theaters, blacks sat in separate sections at the back or in the balcony. Practice on these issues always varied. While many states mandated separate waiting rooms at train and bus stations, in others it was done by common practice. Florida found yet one more way to segregate, separate, and humiliate blacks by requiring that railroads also provide separate ticket windows for black travelers.²⁵⁹ All of these rules, laws, and practices made travel for blacks inconvenient or impossible. Moreover, they compounded the lack of dignity that the southern states perpetuated on blacks.

Trains had separate cars for blacks,²⁶⁰ and buses reserved the last few rows for blacks, always keeping them, symbolically, at the back of the bus. The Jim Crow seating in trains and buses was perhaps the most obvious indignity that blacks faced, and it was “a common observation that the Jim Crow car is resented more bitterly among Negroes than most other forms of segregation.”²⁶¹ Such rules reflected the Supreme Court’s decisions in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*²⁶² and *Plessy v. Ferguson*.²⁶³ But in the wake of World War II, the Supreme Court abandoned this jurisprudence. In *Morgan v. Virginia*,²⁶⁴ *Henderson v. United States*,²⁶⁵ and *Boynton v. Virginia*,²⁶⁶ the Court reversed its old ruling in *Louisville Railroad*, holding that state-mandated segregation in interstate transportation violated the Commerce Clause.²⁶⁷ A few years later, in *Bob-Lo Excursion Co. v. Michigan*, the Court upheld a Michigan law that required integration and equal accommodations in transportation, even if the mode of transportation traveled in interstate and international commerce.²⁶⁸

258. STATES’ LAWS, *supra* note 199, at 32–34 (Alabama), 117 (Georgia), 191 (Louisiana), 375 (Oklahoma), 619 (Mobile, Alabama local ordinance), 628 (Atlanta local ordinance). The Georgia statute allowed taxis to carry people of both races “under such conditions of separation of the races as the [Georgia Public Service] Commission may prescribe.” *Id.* at 117. It is impossible to imagine how that might have operated. Other states segregated all commercial vehicles, which would have included taxis.

259. STATES’ LAWS, *supra* note 199, at 87.

260. The only exceptions were in Delaware, Missouri, and West Virginia. MYRDAL, *supra* note 211, at 635.

261. *Id.*

262. 133 U.S. 587 (1890).

263. 163 U.S. 537 (1896).

264. 328 U.S. 373 (1946).

265. 339 U.S. 816 (1950).

266. 364 U.S. 454 (1960).

267. *Id.*

268. 333 U.S. 28 (1948).

In this case, the Court affirmed a Michigan law that applied to an excursion boat that traveled to Canada.²⁶⁹ This was a long overdue rejection of *Hall v. DeCuir*, in which the Court had struck down a Louisiana law passed during Reconstruction that mandated integration on steamships.²⁷⁰ Finally, in a case stemming from the Montgomery bus boycott, the Court formally reversed *Plessy v. Ferguson* when it struck down a city ordinance in Montgomery, Alabama, which required segregation on public buses.²⁷¹

These decisions had virtually no effect on much of the South. Some bus and train companies voluntarily stopped requiring segregation after these decisions, but in 1959—just five years before Congress would pass the Civil Rights Act—Jack Greenberg of the NAACP Legal Defense and Education Fund noted that

none of the Southern travel segregation statutes has been repealed and many continue to be enforced—either by explicit government directive or through the more subtle pressures of society. Sometimes violent, terroristic efforts have been made to retain the old system and these have been followed by governmental edict to maintain segregation for the purpose of keeping peace. Some laws forbid nonsegregation on intrastate carriers, although an equally important purpose appears to be to retain as much segregation as possible on interstate vehicles. In a sense, therefore, segregation is “law” for local carriers in many Southern cities, as it is for other activities, notwithstanding legal prescripts to the contrary.²⁷²

In 1961, a group of civil rights activists—known as “Freedom Riders”—were beaten and nearly killed as they rode integrated buses into the South.²⁷³ Their buses were firebombed as the nation looked on in horror.²⁷⁴ Southern white lawlessness appeared on the nightly news, and the federal government seemed to lack the legal power—and perhaps the will—to enforce the law. In the summer of 1961, police in New Orleans harassed the Riders when their bus trips terminated in the city.²⁷⁵ “In the most blatant incident, police arrested three Freedom Riders in a private home, beat them up, and

269. *Id.* at 40.

270. 95 U.S. 485 (1878).

271. *Gayle v. Browder*, 352 U.S. 903 (1956).

272. GREENBERG, *supra* note 196, at 84.

273. *See generally* ARSENAULT, *supra* note 31.

274. *Id.* at 145–47 *passim* (including pictures of the burning of a bus at Anniston, Alabama).

275. FAIRCLOUGH, *supra* note 224, at 278. Freedom riders were also mobbed in Shreveport and then arrested. *Id.* at 288.

then charged them with vagrancy, battery, and attempted escape.”²⁷⁶ Interstate and intrastate transit in the South thus remained segregated, despite Supreme Court decisions. Only federal laws that emphatically rejected all segregation in interstate and intrastate transit, and more powerful law enforcement, would end the brutality and humiliation and also, of course, provide restaurants, lunch counters, and bathrooms for interstate travelers. This underscores why Lyndon Johnson could tell James Farmer that the experience of his cook and other black staffers in crossing the South made him realize “how important public accommodations were” and convinced him that he could never “take out the public accommodations section” of the Civil Rights bill.²⁷⁷

Beyond public accommodations, schools, and the workplace, everything else was segregated. Louisiana required separate ticket windows and entrances at circuses and tent shows.²⁷⁸ The law required that these ticket offices be at least 25 feet apart.²⁷⁹ Southern states banned interracial meetings of fraternal orders, while cities and states followed Birmingham’s segregation of “any room, hall, theatre, picture house, auditorium, yard, court, ball park, public park, or other indoor or outdoor place.”²⁸⁰ Mobile had a 10:00 p.m. curfew for blacks.²⁸¹ Florida stored textbooks from black and white schools in different buildings,²⁸² and New Orleans segregated its red light district, even though prostitution itself was illegal.²⁸³ New Orleans allowed white men to visit prostitutes of either race, but required that black men only patronize black women.²⁸⁴ Texas specifically prohibited interracial boxing, and most cities and towns segregated seating at baseball parks, as well as the games on the fields.²⁸⁵ Local ordinances or customs made it illegal or unlikely that

276. *Id.* at 278.

277. CARO, *THE PASSAGE OF POWER*, *supra* note 28, at 489.

278. STATES’ LAWS, *supra* note 199, at 171.

279. *Id.*

280. *Id.* at 615.

281. Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 869, 904 (1909). *See also A Brief History of Jim Crow*, CONST. RTS. FOUND., <http://www.crf-usa.org/black-history-month/a-brief-history-of-jim-crow> [<http://perma.cc/D7YV-BZT3>] (archived Apr. 9, 2014).

282. STATES’ LAWS, *supra* note 199, at 82.

283. ALECIA P. LONG, *THE GREAT SOUTHERN BABYLON: SEX, RACE AND RESPECTABILITY IN NEW ORLEANS, 1865–1920*, at 192–99 (2004) (discussing a 1917 ordinance requiring non-white prostitutes to move out of Storyville to another district).

284. *See id.* at 196–97 (describing how white men would visit houses where women of both races were strippers and prostitutes, but black men were not formally allowed to see the shows or participate in sex with the white women).

285. STATES’ LAWS, *supra* note 199, at 443.

blacks and whites would compete against each other in sporting events, but some states made certain this would not happen. Georgia specifically segregated billiard rooms and poolrooms.²⁸⁶ Montgomery, Alabama, in a local ordinance, required that liquor stores sell to either blacks or whites but not both,²⁸⁷ while Birmingham retail stores could sell to people of all races.

Most southern states and many cities segregated public recreation areas.²⁸⁸ South Carolina and Oklahoma segregated public parks and playgrounds, but in other places they were segregated by local ordinances or local practice.²⁸⁹ Some states solved the problem of segregation by simply not providing facilities for blacks. Thus, in 1954 there were no state parks for blacks in Louisiana, Mississippi, and Texas, although some municipalities provided parks for blacks.²⁹⁰ In 1952, nine southern states had a total of 12 state parks for blacks and 180 for whites, although some towns and cities also had parks for blacks.²⁹¹ In Louisiana, it was illegal for blacks and whites to reside in the same building, and the existence of "separate entrances or partitions" would not be a defense to a charge under this law.²⁹² Oklahoma provided for "segregation of the white and colored races as to the exercises of rights of fishing, boating, and bathing,"²⁹³ as well as "to the exercise of recreational rights" at parks, playgrounds, and pools.²⁹⁴ The State authorized the public service commission "to require telephone companies . . . to maintain separate booths for white and colored patrons."²⁹⁵ When the Courts began to require that public recreation facilities be integrated, some states and cities simply chose to close their parks and swimming pools.²⁹⁶

Even the sacred was not protected from the need of southern whites to separate themselves from blacks: Tennessee required that

286. *Id.* at 89.

287. GREENBERG, *supra* note 196, at 91 n.42.

288. *Id.* at 374.

289. STATES' LAWS, *supra* note 199, at 417 (South Carolina), 372 (Oklahoma).

290. GREENBERG, *supra* note 196, at 80.

291. *Id.*

292. *Id.* at 188.

293. *Id.* at 370.

294. *Id.* at 372.

295. *Id.*

296. *Id.* at 374. The Supreme Court upheld the legality of such a closing in *Palmer v. Thompson*, 403 U.S. 217 (1971), accepting the argument of the city of Jackson, Mississippi, that operating an integrated swimming pool would lead to violence and riots, and thus under traditional police powers, the local government could close the pool. By this time, the city had integrated all other recreational facilities. *Id.*

houses of worship be segregated.²⁹⁷ Texas and North Carolina segregated their public libraries by statute, and other states did not have such laws because presumably they did not imagine blacks using libraries.²⁹⁸ Nevertheless, when blacks tried to use public libraries, they were either refused access or forced into segregated facilities.²⁹⁹ Georgia never seemed to tire of finding things to segregate and thus provided that the names of white and black taxpayers be made out separately on the tax digest in its 1937–1938 legislative session.³⁰⁰ As Judge William H. Hastie of the Third Circuit concluded, “The catalog of whimsies was long.”³⁰¹ These “whimsies,” codified by law, reminded blacks over and over again that in the American South, and much of the North, they could not expect equal treatment anywhere in society, even in houses of worship! Segregation harmed people in myriad ways, but at the heart of segregation was the denial of dignity to African Americans.

Beyond the statutes, the “whimsies” manifested themselves as customs and extralegal forms of segregation. C. Vann Woodward was unable to find a statute requiring separate Bibles in courtrooms, but that was the practice everywhere.³⁰² As Woodward noted, writing in 1956:

[I]t is well to admit, and even to emphasize, that laws are not an adequate index of the extent and prevalence of segregation and discriminatory practices in the South. The practices often anticipated and sometimes exceeded the law. It may be confidentially assumed—and it could be verified by present observation—that there is more Jim Crowism practiced in the South than there are Jim Crow laws on the books.³⁰³

What the historian Woodward described for the turn-of-the-century and beyond, the economist Gunnar Myrdal observed in the 1940s. His classic study of American race relations, *An American Dilemma*, detailed the existence of an elaborate, pernicious, and

297. William H. Hastie, *Toward an Equalitarian Legal Order, 1930-1950*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 20 (1973). No one apparently ever challenged this law on First Amendment grounds.

298. STATES' LAWS, *supra* note 199, at 342 (North Carolina), 450 (Texas); MYRDAL, *supra* note 211, at 634.

299. JOHN HOPE FRANKLIN, RACE AND HISTORY 289 (1989) (describing his use of the North Carolina State Archives while a graduate student; when he arrived to use this state facility, the institution had to create a special research room for blacks).

300. STATES' LAWS, *supra* note 199, at 115.

301. Hastie, *supra* note 297, at 20.

302. WOODWARD, *supra* note 207, at 102.

303. *Id.* (emphasis omitted).

pervasive system of segregation throughout the American South.³⁰⁴ Myrdal noted:

Every Southern state and most Border states have structures of state laws and municipal regulations which prohibit Negroes from using the same schools, libraries, parks, playgrounds, railroad cars, railroad stations, sections of streetcars and buses, hotels, restaurants and other facilities as do the whites. In the South there are, in addition, a number of sanctions other than the law for enforcing institutional segregation as well as etiquette. Officials frequently take it upon themselves to force Negroes into certain action when they have no authority to do so.³⁰⁵

Significantly, Myrdal followed this description of the South by noting that the Supreme Court prevented, at that time, any federal intervention to stop this discrimination.³⁰⁶ Myrdal wrote, "As long as the Supreme Court upholds the principle established in its decision in 1883 [*The Civil Rights Cases*] to declare the federal civil rights legislation void, the Jim Crow laws are to be considered constitutional."³⁰⁷

In the South, private discrimination supplemented the laws. Such discrimination was not only legal everywhere but often required by law. Blacks could usually shop at the same department stores as whites, but they had to take separate elevators—usually the freight elevators—to the different floors.³⁰⁸ They might buy the same clothing as whites but were usually not allowed to try on the clothing before purchasing it.³⁰⁹ Even when spending their money to enrich white businesses, humiliation and indignity surrounded African Americans in the South before 1964.

In many ways, the free market did not work for southern blacks. Indeed, segregation shows that modern economic theory and

304. MYRDAL, *supra* note 211, at 635.

305. *Id.* at 628.

306. *Id.* at 628–29.

307. *Id.*

308. STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WAS* 224–25 (1959). Kennedy notes that non-whites attempting to purchase clothing or other goods in a southern department store might:

1. Be ejected,
2. Be insulted,
3. Be served only after all the whites have been served,
4. Be intercepted by a shop walker whose job it is to direct all non-whites to basement counters,
5. Be denied the privilege of trying on clothes,
6. Be required to try on clothing in the privacy of your own home,
7. Be required to put on a cloth skullcap before trying on millinery.

Id. at 225.

309. *Id.* at 224–25.

neoclassical theory simply does not always work. Profit could not overcome racism. Thus, financial institutions in the South, such as banks, simply refused to let blacks open accounts or use their services.³¹⁰ Banks often refused to extend credit to blacks, even to military veterans seeking housing loans under the GI Bill of Rights.³¹¹ Similarly, Myrdal found that in the South, the white administrators of the Federal Home Loan Bank “misused administrative power,” and “[i]t can almost be taken for granted that the temptation to discriminate against the Negro in many cases has been too strong to resist.”³¹² When John Kennedy became president, he issued an executive order banning racial discrimination in Federal Housing Authority (FHA) and Veterans Administration (VA) loans, which affected about a quarter of mortgages on new houses, but his authority did “not apply to commercially financed housing.”³¹³

Despite a few court victories in the 1940s and 1950s, the day-to-day life for southern blacks was humiliating and often frightening. They were denied equal educational opportunity, despite the desegregation decisions on higher education and public schools.³¹⁴ Decent housing was often impossible to find, despite decisions striking down certain kinds of housing discrimination.³¹⁵ As noted above, rulings on interstate transportation had not affected buses and trains entering the South or traveling solely within the region. None of these decisions were able to really end segregation. The Court could rule, as it did in *Gayle v. Browder*, that a city could not segregate its buses because this was a denial of the equal protection of the laws.³¹⁶ But such a ruling did not prohibit a private bus company from discriminating. After the courts ordered the desegregation of the public buses in Montgomery, Alabama, “a group of white citizens proposed to set up a private bus line, called the ‘Rebel Line.’ Its obvious purpose was to furnish transportation for white persons only.”³¹⁷ Under the Court’s ruling in *The Civil Rights Cases*, the Fourteenth Amendment did not extend to private

310. THESE RIGHTS, *supra* note 194, at 68.

311. *Id.*

312. MYRDAL, *supra* note 211, at 273.

313. GRAHAM, *supra* note 31, at 65.

314. *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950) (ordering the admission of an African American to the graduate school at the University of Oklahoma); *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering the admission of an African American to the University of Texas School of Law); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958).

315. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that courts could not enforce racially restrictive covenants).

316. *Gayle v. Browder*, 352 U.S. 903 (1956).

317. GREENBERG, *supra* note 196, at 85.

actors,³¹⁸ and this private bus company might have been plausibly permissible. Indeed, in the 1940s, Alabama, Kentucky, and Maryland had not required segregation of streetcars but left “the practice of Jim Crowing . . . to the streetcar companies.”³¹⁹ While this may have been an economic decision, it was a potent model for the entire South in the wake of decisions reversing *Plessy*.

More importantly, leaving segregation in the hands of private actors made a great deal of sense for the South in the 1950s. By the eve of the 1964 Act, courts had ordered integration of most public facilities in the South, such as schools, public transportation, and even recreational facilities. Although these decisions had little effect on actual practice, sooner or later they might be enforced. But as long as the Court’s decision in *The Civil Rights Cases*, limiting the reach of the Fourteenth Amendment to a narrowly defined notion of “state action,” remained viable, private actors were free to discriminate. In the North and West, equal accommodations laws made such discrimination illegal, and these laws were changing—albeit slowly—the structure of northern and western society. But in the South, striking down mandatory segregation laws would not change the society because, as Jack Greenberg noted in 1959, “[t]he largest part of segregation . . . is enforced by custom or proprietors.”³²⁰ The only way to end this sort of discrimination was through a national public accommodations law, which is what happened in 1964.

V. LOOKING AT ONE STATE: LOUISIANA

A careful examination of Louisiana on the eve of the passage of the 1964 Act illustrates the depth of segregation in America. Louisiana offers a useful example, in part because of intensive research done by scholars on that state³²¹ and in part because of how Justice William O. Douglas detailed the nature of segregation there in his concurring opinion in *Garner v. Louisiana*.³²² The state was not a bastion of violent segregation like its neighbor, Mississippi. The Southern Poverty Law Center, for example, cites only two civil rights murders in Louisiana, as compared to nearly 20 in

318. *The Civil Rights Cases*, 109 U.S. 3 (1883).

319. MYRDAL, *supra* note 211, at 635.

320. GREENBERG, *supra* note 196, at 91–92.

321. The most important research done on this era in Louisiana is the truly brilliant book, *Race & Democracy: The Civil Rights Struggle in Louisiana, 1915–1972*. FAIRCLOUGH, *supra* note 224.

322. *Garner v. Louisiana*, 368 U.S. 157, 176–85 (1961) (Douglas, J., concurring).

Mississippi.³²³ Moreover, the state had a large free black population before the Civil War and a large black middle class after World War II.³²⁴ Segregation in New Orleans was pervasive and at times vicious, but at the same time, the city probably had more pockets of racial tolerance than almost anywhere else in the Deep South,³²⁵ by the 1950s, private, segregated education—largely through the Catholic Church—allowed middle-class black Catholics to gain a first-class elementary and secondary education.³²⁶ But like the rest of the Deep South, segregation in Louisiana was the rule, with all its humiliation and lack of dignity, stifling of economic opportunity, denial of political rights, and ever-present potential for citizen and state-sponsored violence.

Consider a high school student living in New Orleans, Louisiana, when the 1964 Act was being debated. Her birth in the late 1940s would have taken place in a segregated hospital or the special black wing of an integrated hospital. Throughout her early life before 1964, any black she knew who went to a hospital would have gone to a segregated one or the segregated wing of one. The perpetual lack of dignity for blacks even affected recordkeeping in hospitals because records for blacks were segregated from those for

323. *Civil Rights Martyrs*, *supra* note 1.

324. FAIRCLOUGH, *supra* note 224, at 48–49.

325. Despite bans on interracial sex and segregation in restaurants and bars, the jazz culture and what might be called the “vice culture” in New Orleans led to a fair amount of interracial tolerance and contact in the Crescent City. See CHARLES B. HERSCH, *SUBVERSIVE SOUNDS: RACE AND THE BIRTH OF JAZZ IN NEW ORLEANS* 14, 19 (2007). For the modern period, see LONG, *supra* note 283, at 192–99. The background to this world is set out in JUDITH KELLEHER SCHAFFER, *BROTHERS, DEPRAVITY, AND ABANDONED WOMEN: ILLEGAL SEX IN ANTEBELLUM NEW ORLEANS* (2009).

326. FAIRCLOUGH, *supra* note 224, at 87; *Parochial Schools: Separate and Superior*, TIME, Jan. 1, 1965, available at <http://content.time.com/time/magazine/article/0,9171,841713,00.html> [<http://perma.cc/4H83-7623>] (archived Apr. 9, 2014); John Pope, *St. Mary's Celebrates Milestone on Road to Recovery from Hurricane Katrina*, TIMES-PICAYUNE (Apr. 5, 2011), available at http://www.nola.com/education/index.ssf/2011/04/st_marys_celebrates_milestone.html [<http://perma.cc/LL7A-GJVZ>] (archived Apr. 9, 2014); *History*, ST. MARY'S ACAD., <http://www.smaneworleans.com/site30.php> (last visited Mar. 18, 2014) [<http://perma.cc/8HHL-8PQC>] (archived Apr. 9, 2014) [hereinafter *History of St. Mary's Academy*]; Breaux, *History and Description of St. Mary's Academy, an African American Girl's School in New Orleans, Louisiana*, available at <http://louisdl.louislibraries.org/cdm/ref/collection/LWP/id/5145> [<http://perma.cc/V9C-N2RM>] (archived Apr. 9, 2014); Thomas Sowell, *Patterns of Black Excellence*, 43 PUB. INT. 26 (1973), available at http://www.nationalaffairs.com/doclib/20080527_197604302patternsofblackexcellencethomassowell.pdf [<http://perma.cc/GA35-NDD2>] (archived Apr. 9, 2014).

whites.³²⁷ This humiliation extended to workers in the hospitals where “there [were] certain telephones only white people [could] use and certain ones only black people [could] use.”³²⁸

While she was growing up, Louisiana would have offered few non-menial jobs for blacks. In 1943, just before she was born, the city of Shreveport, Louisiana, refused to accept “\$67,000 in federal funds for a health center” because the city would not agree to “a hiring quota of twelve blacks for every hundred workers.”³²⁹ This is just one of countless examples of employment discrimination that was pervasive in Louisiana and the rest of the South in the 1940s and 1950s. It is also another illustration of the failure of neoclassical theory to explain segregation and racism. Southern whites were willing to deprive themselves of economic opportunity and advancement in order to maintain racial subordination. It was the way of the world at that time and in that place.

All of her schooling would have been segregated, whether she attended public or private schools. For black Catholics who could afford the tuition, there were numerous parochial grammar schools and three excellent Catholic high schools in New Orleans: St. Augustine opened in 1951 and was created to educate young men from black Catholic families,³³⁰ St. Mary’s Academy offered a similar education for black Catholic girls,³³¹ and Xavier University Preparatory High School served both Catholic black girls and boys.³³² However, the majority of the city’s Catholic schools were closed to blacks until 1962.³³³ This was also true for all other high schools in the state, whether public or parochial. In 1940 there were only 39 public high schools for blacks in the entire state and 8 Catholic schools.³³⁴ This contrasts with 383 high schools for whites.³³⁵ But without tuition, or if she was not Catholic, our hypothetical student would have attended a poorly funded and poorly maintained segregated public school. It was, of course, illegal for blacks and whites to attend the same schools in New Orleans or

327. SALVAGGIO, *supra* note 212, at 190–91. See also JONATHAN ROBERTS & THOMAS J. DURANT, JR., A HISTORY OF THE CHARITY HOSPITALS OF LOUISIANA: A STUDY OF POVERTY, POLITICS, PUBLIC HEALTH, AND THE PUBLIC INTEREST (2010).

328. SALVAGGIO, *supra* note 212, at 191.

329. FAIRCLOUGH, *supra* note 224, at 87.

330. *Parochial Schools: Separate and Superior*, *supra* note 326; Sowell, *supra* note 326.

331. Pope, *supra* note 326; *History of St. Mary’s Academy*, *supra* note 326; Breaux, *supra* note 326.

332. FAIRCLOUGH, *supra* note 224, at 37.

333. *Id.* at 257.

334. *Id.* at 37.

335. *Id.*

anywhere else in the state. Simply glancing at the physical structures of the white and black public schools would have alerted anyone to the sharp contrast and the incredibly unequal educational opportunities offered to blacks by Louisiana's public schools. Outside of New Orleans only Baton Rouge's St. Francis Xavier Elementary and High School offered a full education for black Catholic children whose parents could afford to send them there.³³⁶ Otherwise, black children went to segregated and utterly unequal schools in that city and everywhere else in the state.

Growing up in New Orleans, she would have been aware of the dangers that police posed to African Americans throughout the state but perhaps not have known the details. In 1942, A.P. Tureaud—a leader of the NAACP in the state and a shrewd civil rights lawyer—reported that police brutality was “happening every day” and that “[i]n recent times we have had cases of the police actually killing Negroes while handcuffed right here in New Orleans.”³³⁷ As Adam Fairclough, the most important historian of civil rights in Louisiana, noted, “That policemen could arrest, beat, and kill blacks without cause or provocation underlined black powerlessness in the cruellest [sic] possible manner.”³³⁸ Even when they were not killed or severely beaten, the constant threat of such violence was another aspect of the humiliation and denial of dignity that came with segregation. While some southern cities had black policemen at this time, New Orleans did not have any until 1950, when two blacks were hired.³³⁹ These two officers were not allowed to wear uniforms—they were denied the dignity of the uniform of their new position—and were only allowed to work with juveniles in black neighborhoods.³⁴⁰ By 1960 there were just 28 black officers in the city.³⁴¹ Such a small number of black officers meant that almost all policing in the city—and the state where there were only a total of 60 black officers³⁴²—was carried out by whites who had few constraints on their use of violence against blacks.

Under Attorney General Robert F. Kennedy, the Justice Department began to investigate police brutality in the state, but real success against police brutality could not come until federal civil rights legislation enhanced the power of the national government to investigate and prosecute race-based criminal behavior by the

336. Sowell, *supra* note 326.

337. FAIRCLOUGH, *supra* note 224, at 79.

338. *Id.*

339. *Id.* at 106, 153.

340. *Id.* at 153.

341. Rudwick, *supra* note 225, at 108.

342. *Id.*

police.³⁴³ Equally important, a meaningful change in southern policing of blacks could only come after the Civil Rights Act eliminated the structure of segregation that allowed the police to stop a black for almost *anything*. Warren Court decisions on criminal due process of course fundamentally altered police practice at this time,³⁴⁴ but without the Civil Rights Act, policemen all over the South would still have been able to arrest and harass blacks for violating the seemingly endless series of laws regulating race. Further, had the 1964 Act not opened up all public accommodations, police in segregating states would have still been able to arrest blacks—on trespass and similar charges—for trying to integrate businesses whose proprietors insisted on remaining segregated. Finally, in the wake of the 1964 Act and the Civil Rights movement the number of black police officers in New Orleans and the state of Louisiana would increase.³⁴⁵

As she grew up in New Orleans, or anywhere else in the state, the high school student would have been barred from playgrounds where whites played and would have had trouble finding a place where blacks could play. “Blacks had long complained about the chronic shortage of parks and playgrounds, a deeply felt grievance in this densely populated city that endured subtropical temperatures for much of the year.”³⁴⁶ As of 1954, there were no state parks for blacks in Louisiana, although the state had set aside 7,000 acres of land for parks for whites.³⁴⁷ Some cities and towns did have parks for blacks, but they were separate and unequal. Louisiana required segregation in all “public parks, recreation centers, playgrounds, community centers, swimming pools, dance halls, golf courses, skating rinks, and all other recreational facilities.”³⁴⁸ In 1954, New Orleans finally gave blacks access to a part of Lake Pontchartrain at Lincoln Beach³⁴⁹ and two years later opened Pontchartrain Park for blacks.³⁵⁰ In Baton Rouge, however, there were no swimming pools

343. FAIRCLOUGH, *supra* note 224, at 307.

344. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

345. *See* W. MARVIN DULANEY, BLACK POLICE IN AMERICA 103 (1996).

346. FAIRCLOUGH, *supra* note 224, at 83.

347. GREENBERG, *supra* note 196, at 80.

348. *Id.* at 374.

349. ANDREW W. KAHRL, THE LAND WAS OURS: AFRICAN AMERICAN BEACHES FROM JIM CROW TO THE SUNBELT SOUTH 141–54, 227 (2012).

350. FAIRCLOUGH, *supra* note 224, at 152. *See also* 1955: Pontchartrain Park Opens in New Orleans, TIMES-PICAYUNE (Nov. 28, 2011, 11:59 PM), http://www.nola.com/175years/index.ssf/2011/11/1955_pontchartrain_park_opens.html [<http://perma.cc/H9Y6-F9UG>] (archived Apr. 9, 2014). However, the privately owned amusement park at Pontchartrain Beach remained closed to blacks until the passage

for blacks until private money was raised to build one in the 1950s.³⁵¹ Before then, “Negro boys were drowning in creeks, lakes, drainage ditches and, of course, the Mississippi River.”³⁵² In 1963, the year before the Civil Rights Act, an attempt to integrate the public pools in Baton Rouge led to police violence and arrests.³⁵³

Access to other forms of entertainment and recreation were equally constricted. Had the student gone to the circus, she would have been forced into a separate line at the ticket window and when entering the circus tent.³⁵⁴ She could never have used the facilities, amusements, or concessions at the lovely Audubon Park or the spacious City Park in New Orleans, although blacks were apparently allowed to stroll through the grounds of these parks.³⁵⁵ In the 1930s and 1940s, they would not have been allowed to sit on the benches, but by the 1960s this rule was gone.³⁵⁶ However, young black children could not ride on the amusements, play on the swings, or enjoy the pony ride. Storyland, built in the 1950s in City Park, offered delights to white children, but of course it was closed to blacks until after the passage of the 1964 Civil Rights Act. The humiliation of segregation affected the youngest children as well as the oldest, and growing up in New Orleans, black children quickly learned that the tantalizing rides and other adventures at the two

of the 1964 Act, even though it operated on land leased from the Orleans Parish Levee Board. *See also 1957: Pontchartrain Beach and Lincoln Beach in New Orleans*, TIMES-PICAYUNE (Nov. 30, 2011, 11:59 PM), http://www.nola.com/175years/index.ssf/2011/11/1957_pontchartrain_beach_and_l.html [<http://perma.cc/Q682-X77A>] (archived Apr. 9, 2014).

351. Interview by Esteban Herrera, Jr., with Judge Trudy M. White, Baton Rouge City Court, Div. “B”, available at <http://ci.baton-rouge.la.us/dept/citycourt/bios/interview-judge-white.pdf> [<http://perma.cc/3AKJ-FYKZ>] (archived Apr. 9, 2014).

352. *Id.*

353. *5 Negroes Arrested in Battle with Baton Rouge Police*, PARK CITY DAILY NEWS, July 24, 1963, available at <http://news.google.com/newspapers?nid=1697&dat=19630724&id=U7QdAAAAIBAJ&sjid=UUEAAAAIBAJ&pg=1823,1639560> [<http://perma.cc/GEU4-2AQC>] (archived Apr. 9, 2014).

354. STATES’ LAWS, *supra* note 199, at 171.

355. *See* FAIRCLOUGH, *supra* note 224, at 83–84.

356. This information is in part based on the recollections of Louisiana State University’s Paul M. Hebert Law Center Vice Chancellor Raymond T. Diamond, who grew up in segregated New Orleans and recalls the segregation in these parks until after the passage of the 1964 Act. *See* E-mail from Raymond T. Diamond, LSU Law Center Vice Chancellor, to Paul Finkelman, LSU Law Center Justice Pike Hall, Jr., Visiting Professor (Feb. 11, 2014, 11:33 AM) (on file with the *Louisiana Law Review*). Professor Diamond later served on the Orleans Parish Levee Board, which regulated the privately owned Pontchartrain Beach Amusement Park, from which he was banned as a child until after 1964. *Id.*

major city parks were closed to them. The hypothetical student might have gone swimming in the only public pool for blacks, which served a black population of nearly 200,000.³⁵⁷ Our hypothetical teenager would have been prohibited from entering some movie theaters and forced to sit in segregated seating or in a segregated balcony.

Shopping in downtown would have been an ordeal. Until 1958, when Judge Skelly Wright ordered the integration of the city's bus system, the hypothetical black resident of New Orleans would have had to ride at the back of a city bus in a "colored section," and if there was no more room in that section, the driver could refuse to allow blacks to board the bus.³⁵⁸ By 1960, the buses had been legally integrated, but most blacks chose, either out of habit or out of fear, to sit in the back.³⁵⁹ Had she lived in Baton Rouge, she might have heard of the 1953 bus boycott there—the first of its kind in the nation.³⁶⁰ The two-week boycott in June 1953 led to a mixed result.³⁶¹ Under a compromise, blacks would fill seats from the back of the bus forward, and whites would fill seats from the front of the bus to the back.³⁶² This would usually prevent the situation that had often occurred of black patrons standing in the back of the bus while numerous seats remained empty in the white section. However, this compromise also provided that the first two rows of the bus would be exclusively reserved for whites.³⁶³ This result had the practical effect of providing much more seating for black riders but preserved the humiliation of segregation and continued to deny blacks fundamental dignity. They still could not sit anywhere they wanted. They still had to start sitting in the back of the bus. They still were not considered "good enough" to sit next to a white person, and if there were no whites on the bus—except the driver, because all of the drivers were white at this time—the first two rows would remain vacant and reserved for whites, even if there was a substantial number of blacks standing behind those two rows.³⁶⁴ Although this compromise had enormous practical value to those blacks who

357. *Id.*; FAIRCLOUGH, *supra* note 224, at 83–84. See also KAHRL, *supra* note 349.

358. *Morrison v. Davis*, 252 F.2d 102 (1958); FAIRCLOUGH, *supra* note 224, at 156–57.

359. GREENBERG, *supra* note 196, at 84–85 n.15.

360. *The First Civil Rights Bus Boycott*, AFR. AM. REGISTRY, http://www.aaregistry.org/historic_events/view/first-civil-rights-bus-boycott (last visited Mar. 12, 2014) [<http://perma.cc/S3XV-QKKU>] (archived Apr. 9, 2014).

361. FAIRCLOUGH, *supra* note 224, at 156–62 (describing the bus compromise).

362. *Id.*

363. *Id.*

364. *Id.* at 156–57.

would no longer have to stand when riding, like other aspects of segregation, the bus compromise in Baton Rouge reaffirmed the inferiority of blacks and their lack of personal dignity, even when they were paying the same fare as whites to ride on the same buses.

Our hypothetical student could not have tried on clothes in stores serving whites,³⁶⁵ and she might have been forced to ride a freight elevator between floors. She would know to eat at home before venturing downtown because most restaurants and lunch counters in the principal shopping area were strictly segregated and would be closed to her. Bathrooms were always a problem, as Lyndon Johnson pointed out to Senator Stennis.

In *Brown*, the Supreme Court declared segregated public schools to be unconstitutional, but public schools in New Orleans remained totally segregated until the early 1960s.³⁶⁶ In 1956, a federal district court ordered the integration of the New Orleans schools,³⁶⁷ but it was not until 1960 that six-year-old Ruby Nell Bridges became the first black child to integrate a primary school in Louisiana, or anywhere else in the Deep South, when she entered William Frantz Elementary School in New Orleans.³⁶⁸ In 1960, Ruby Bridges's historic and courageous walk to that school—protected from a hate-filled crowd by federal marshals—made national headlines. The facts surrounding the marshals escorting Bridges to the school later inspired Norman Rockwell's famous painting, "The Problem We All Live With," which appeared in *Look Magazine*³⁶⁹ and was seen by millions of Americans.³⁷⁰ Every day she faced a gauntlet of white women screaming obscenities and curses and threatening the six-year-old girl. It was a "cacophony of profanity and abuse spewed out" by a mob of white women.³⁷¹ The novelist John Steinbeck, observing the protesters outside Franz school, was revolted by their raw hatred. "No newspaper had printed the words these women shouted. It was indicated that they were indelicate, some even said obscene. . . . But now I heard the words, bestial and filthy and

365. *Id.* at 156 (describing department store boycotts where women could not try on clothes).

366. *Bush v. Orleans Parish Sch. Bd.*, 138 F. Supp. 336, 337 (E.D. La. 1956).

367. *Id.*

368. FAIRCLOUGH, *supra* note 224, at 248–49.

369. Norman Rockwell, *The Problem We All Live With*, *LOOK*, Jan. 14, 1964, at 23–24. For image, see "*The Problem We All Live With*," Norman Rockwell, 1963. *Oil on canvas, 36" x 58"*. *Illustration for "Look," January 14, 1964*, NORMAN ROCKWELL MUSEUM, http://www.nrm.org/wordpress/wp-content/uploads/2011/07/Problem_web.jpg [<http://perma.cc/Y6FV-XCG7>] (archived May 16, 2014) (not reproduced here for copyright reasons).

370. See Paul Baier, *What Is the Use of a Law Book Without Pictures or Conversations*, 34 J. LEGAL ED. 619 (1984).

371. FAIRCLOUGH, *supra* note 224, at 248–49.

degenerate.”³⁷² Bridges suffered an eating disorder because of “one particular threat, reiterated daily in a shrill, insistent voice . . . a woman’s shout of, ‘We’re going to poison you until you choke to death.’”³⁷³

Unlike parts of Virginia, New Orleans did not close its schools like extreme segregationists wanted,³⁷⁴ but only the threat of contempt citations forced the state board of education and other local and state officials to pay teachers.³⁷⁵ A full history of school desegregation in New Orleans is well beyond the scope of this Article, in part because the Civil Rights Act of 1964 only indirectly affected schooling.³⁷⁶ Nevertheless, from the perspective of blacks, the humiliation of Ruby Bridges by crowds of adult white women, the refusal of the State or the City to offer real protection to her, and the fact that she was alone in a school room for an entire year simply underscored the nature of segregation and dramatically illustrated the indignities perpetrated even on young children.

For an entire year, Ruby Bridges was the only student in her classroom, as angry white parents pulled their children out of school rather than send them to a classroom with one black six-year-old child.³⁷⁷ That year, Ruby Bridges’s father lost his job because his daughter had integrated a school.³⁷⁸ Her grandparents, who were sharecroppers in Mississippi, were forced to leave the farm they had been on for 25 years because the landowner knew that their granddaughter had integrated the schools in New Orleans.³⁷⁹ Such was the racial climate in New Orleans and Mississippi and throughout the Deep South at the time President Kennedy proposed the Civil Rights Act.

When Ruby Bridges entered a previously all-white elementary school in 1960, very few blacks voted in Louisiana. African Americans in the heavily black Seventh Ward formed the Seventh Ward Civil League to increase black voter registration, but they had limited success.³⁸⁰ In the 1940s, there was some increased voting and voter registration among blacks.³⁸¹ But there was also intense

372. *Id.* at 248 (quoting John Steinbeck) (internal quotation marks omitted).

373. *Id.* at 249.

374. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964).

375. FAIRCLOUGH, *supra* note 224, at 243–51.

376. For detailed discussion of the ordeal of Ruby Bridges, see *id.* at 234–64.

377. Interview by Charlayne Hunter-Gault with Ruby Bridges Hall (Feb. 18, 1997), available at http://www.pbs.org/newshour/bb/social_issues-jan-june97-bridges_2-18 [<http://perma.cc/86ZF-AQMU>] (archived Apr. 9, 2014).

378. *Id.*

379. *Id.*

380. FAIRCLOUGH, *supra* note 224, at 23–25.

381. *Id.* at 54–55, 104–24.

opposition to black voting in Louisiana, and most African Americans in that state had no real opportunity to vote until after the passage of the Voting Rights Act of 1965.³⁸²

While growing up in New Orleans, every public park, recreation center, swimming pool, sports facility, restaurant, lunch counter—to name just the most common businesses and facilities—would have been either closed to the hypothetical black resident of New Orleans or open only on a segregated basis.³⁸³ However, she could have used the public library and even the same books as whites.³⁸⁴ This made New Orleans more progressive than some of the other southern cities. But inside the library, the drinking fountains and restrooms were segregated, and the prominent signs would have reminded her of the pervasive segregation of her home state and city. She would also have had to use separate drinking fountains and public toilet facilities everywhere else in the city and state as well.³⁸⁵ The indignity of segregation would have been everywhere. The blacks she knew would have patronized segregated barber shops and beauty salons and used segregated elevators if they entered downtown stores.³⁸⁶ A useful summary of the segregation laws of Louisiana is found in Justice William O. Douglas's concurring opinion in *Garner v. State of Louisiana*.³⁸⁷ Justice Douglas noted that “[t]here is a deep-seated pattern of segregation of the races in Louisiana, going back at least to *Plessy v. Ferguson*.”³⁸⁸ In a footnote, he then quoted C. Vann Woodward's *The Strange Career of Jim Crow*:

“In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism eventually extended to virtually all forms of public transportation, to sports and recreations, to hospitals,

382. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971 (2006)).

383. See *Garner v. Louisiana*, 368 U.S. 157, 180 (1961) (Douglas, J., concurring).

384. See FAIRCLOUGH, *supra* note 224, at 166.

385. *Garner*, 368 U.S. at 180 (Douglas, J., concurring).

386. *Id.*

387. *Id.* at 179–81.

388. *Id.* at 179.

orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.”³⁸⁹

Justice Douglas next summarized the segregation laws of Louisiana in 1960, only six years after *Brown*:

Louisiana requires that all circuses, shows, and tent exhibitions to which the public is invited have one entrance for whites and one for Negroes. No dancing, social functions, entertainment, athletic training, games, sports, contests and “other such activities involving personal and social contacts” may be open to both races. Any public entertainment or athletic contest must provide separate seating arrangements and separate sanitary drinking water and “any other facilities” for the two races. Marriage between members of the two races is banned. Segregation by race is required in prisons. The blind must be segregated. Teachers in public schools are barred from advocating desegregation of the races in the public school system. So are other state employees. Segregation on trains is required. Common carriers of passengers must provide separate waiting rooms and reception room facilities for the two races and separate toilets and separate facilities for drinking water as well. Employers must provide separate sanitary facilities for the two races. Employers must also provide separate eating places in separate rooms and separate eating and drinking utensils for members of the two races. Persons of one race may not establish their residence in a community of another race without approval of the majority of the other race. Court dockets must reveal the race of the parties in divorce actions. And all public parks, recreation centers, playgrounds, community centers and “other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted” must be segregated.³⁹⁰

Douglas went on to note that

[t]hough there may have been no state law or municipal ordinance that in terms required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana’s custom. Segregation is basic to the structure of Louisiana as

389. *Id.* at 179 n.1 (quoting WOODWARD, *supra* note 207, at 7).

390. *Id.* at 180–81 (citations omitted).

a community; the custom that maintains it is at least as powerful as any law.³⁹¹

VI. EQUALITY, DECENCY, AND DIGNITY: THE CENTRAL MEANING OF CIVIL RIGHTS

A year before the passage of the Civil Rights Act, Rev. Martin Luther King, Jr., was arrested in Birmingham, Alabama, facing various charges for protesting segregation in a state that, along with Mississippi, had come to represent the hate of southern racism and violence of the segregating South. While in jail, he wrote a letter to a group of southern clergymen who had suggested that his protests against segregation were “unwise and untimely.” His letter is a masterpiece in the history of social protest and thoughtful opposition to discrimination. It was a catalyst—one of many—that led to passage of the Civil Rights Act the next year. The letter eloquently expressed the pain and humiliation of segregation. In this letter, Dr. King described the nature of segregation and articulated why blacks could no longer wait for equality.³⁹² More eloquently than Johnson’s conversation with Stennis, Dr. King shows why segregation was “bad” and “wrong”:

[W]hen you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can’t go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children . . . when you have to concoct an answer for a five-year-old son who is asking, “Daddy, why do white people treat colored people so mean?”; when you take a cross-country drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading “white” and “colored”; when your first name becomes “nigger,” your middle name becomes “boy” (however old you are) and your last name becomes “John,” and your wife and mother are never given the respected title “Mrs.”; when you are harried by day and haunted by night by the fact that you are Negro, living constantly on tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer

391. *Id.* at 181.

392. Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), reprinted in MARTIN LUTHER KING, *WHY WE CAN’T WAIT* 92–93 (1963).

resentments; when you are forever fighting a degenerating sense of “nobodiness”—then you will understand why we find it difficult to wait.³⁹³

The 1964 Civil Rights Act, which is celebrated and reconsidered in this symposium, was the most dramatic and powerful possible answer to this letter. When Lyndon Johnson signed the law, Dr. King was standing behind him.³⁹⁴ Both men understood that the national government was finally confronting and fighting the badness and wrongness of segregation—the constant humiliation and denial of dignity of people because of their race—nearly a century after the Civil War and the three amendments that followed it had given the government the tools to bring about legal equality. In a sense, the 1964 Act was the proper response—98 years later—to General Turner’s testimony before Congress: Major General John W. Turner reported that in his military district in Virginia “[a]ll of the [white] people” were “extremely reluctant to grant to the negro his civil rights—those privileges that pertain to freedom, the protection of life, liberty, and property before the laws, the right to testify in courts, etc.”³⁹⁵ Turner noted that whites were “reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing.”³⁹⁶ They would only “concede” such rights to blacks “if it is ever done, it will be because they are forced to do it.”³⁹⁷ Finally, the federal government would do the right thing—the legal, correct thing—and force the nation to give all Americans their civil rights.

393. *Id.*

394. The picture of President Johnson signing the Act is famous and has been published in numerous places. A recent example of this is PURDUM, *supra* note 31, at photo opposite 211.

395. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, PT. II: VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, H.R. REP. NO. 30-39, at 4 (1866).

396. *Id.*

397. *Id.*