

A Lost World: Sallie Robinson, the *Civil Rights Cases*, and Missing Narratives of Slavery in the Supreme Court’s Reconstruction Jurisprudence

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“It is the sound of vanishing—the music as it plays itself to silence, the train as it travels away, a voice left on magnetic tape.”¹

The Supreme Court tells stories about who and what we are—the sort of “knowledge about [the] past that is shared, mutually acknowledged and re-inforced by a collectivity.”² The Court is uniquely suited for this role: not just because of the moral authority it brings to the task of adjudication, and not just because of the rituals it uses for its decisionmaking, but also because the very act of telling and retelling in issuing decisions results in layers of these stories being deposited on and shaping constitutional doctrine. In time, and with each iteration—like sandy water flowing over sedimentary rock—these stories settle, gather together, harden, and become part of constitutional topography—sheer repetition makes them reified. These stories, a mix of fact and aspiration, a mingling of doctrine and metaphors, rubbed smooth of contradictions, translated for public consumption, even when hotly contested in the caverns of academia, keep us bound to a “conscious community of memory,”³—a pact about the larger lessons to be derived from our past. There is a federalism story about how the Founders’ experience with a distant, indifferent king led them to set up a government with defined limited federal power; a free-speech story about how our collective ability to think and speak freely contributes to an open marketplace of ideas; and a right-to-bear-arms story about how the Second Amendment serves as a bulwark against government tyranny. There is no equivalent story—at least none that the Court itself has had a role in telling—about how slavery and white supremacy shaped the American identity.

To the contrary, the singular effect—if not purpose—of the Supreme Court’s jurisprudence on the experience, status, and place of Black people in America has been to erase slavery from the constitutional stories

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1. JOHN BERGER & ANNE MICHAELS, *RAILTRACKS* 5 (2012).
2. See Joachim J. Savelsberg & Ryan D. King, *Law and Collective Memory*, 3 ANN. REV. L. & SOC. SCI. 189, 191 (2007) (defining collective memory).
3. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 5 (1982).

the Court tells about American democracy. The Court has managed this feat so successfully that the main role slavery plays in the collective constitutional imagination today is as remembrance of how its abolition affirmed the genius of the Framers' vision and redeemed the righteousness of the country's Founding. This act of willful forgetting began in earnest during Reconstruction, when, even as Black people roamed the countryside and searched newspaper ads for mothers, fathers, sons, and daughters sold away to distant plantations before the war, the Court explained that the Thirteenth Amendment abolished nothing more than involuntary servitude, that neither the Thirteenth nor the Fourteenth Amendment imposed an obligation upon the federal government to protect Black people from white violence, and that Black people's invocation of the Fourteenth Amendment's equality principle was akin to their wanting to become a special favorite of the law.

This Article is an attempt at digging up one story of slavery and trying to input it into the collective constitutional imagination. The Article uses one decision to tell the story—the Civil Rights Cases. It also uses one person—a woman named Sallie Robinson. Apart from those she loved and who loved her in return, Sallie lived out her days in relative obscurity, but that life—at least the pieces and fragments of it we can gather—is as legitimate a part of our constitutional myth making as the lives of the men on the Court whose writings hardly ever acknowledged that people like Sallie existed and mattered.

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I. SALLIE

This is a story in which the central character stays mostly hidden and silent, never showing her full face, never speaking in her own voice. Her name is Sallie.⁴ She was born into slavery in Tennessee in or about 1851. She survived the Civil War, got married, and had a son. In the early morning hours of May 22, 1879, she boarded a train at Grand Junction, Tennessee; her final stop: Lynchburg, Virginia. Though Sallie held a ticket for the first-class ladies' car, the train conductor directed her to the second-class smoking car because he believed that other first-class passengers would object to her presence. But soon after the train left Grand Junction, the conductor reconsidered, and when the train pulled into the next stop at Salisbury, Tennessee, Sallie transferred to the first-class car. She sat in the smoking car for only one stop—barely six miles and no more than fifteen minutes. When she returned home from Lynchburg, however, Sallie sued the railroad for violation of the Civil Rights Act of 1875, which made it a criminal offense to deny a person equal accommodation in public conveyances, inns, theaters, and other places of public amusement on account of their race, color, or previous condition of servitude.⁵ The Act also created a private right of action for such a violation.⁶

Sallie's suit against the railroad, *Robinson v. Memphis & Charleston Railroad Co.*, is one of the few cases under the Civil Rights Act of 1875 to go to a jury trial and for which a more or less complete record of the proceedings survive.⁷ Her case is also one of the six cases the United States Supreme Court originally joined under the rubric the *Civil Rights Cases*⁸ to decide that Congress lacked power

4. The details of what is known about Sallie Robinson's life and suit are discussed extensively later in the Article. See *infra* Parts III, VII, XII.

5. Civil Rights Act of 1875, ch. 114, §§ 1–2, 18 Stat. 335, 335–36.

6. *Id.* § 3.

7. See Transcript of Record, *Robinson v. Memphis & Charleston R.R. Co.* (The Civil Rights Cases), 109 U.S. 3 (1883) (No. 28).

8. 109 U.S. at 3. The final opinion reports five cases instead of six, as do most books and articles on the topic: *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson v. Memphis & Charleston Railroad Company*. *Id.* The Court initially accepted a sixth case, *United States v. Hamilton*, for review, docketing it as one of the cases to be joined with *Ryan*, *Stanley*, and *Nichols*. Brief for the United States at 1–2, *The Civil Rights Cases*, 109 U.S. 3 (Nos. 1, 2, 3 & 204). Indeed, during the October 1882 Term, the United States included *Hamilton* as part of the caption of its brief and discussed the facts of the case in body of the brief. See *id.* On the same day that the Court decided the five cases that make up the *Civil Rights Cases*, however, it dismissed *Hamilton* as outside of its jurisdiction. See *United States v. Hamilton*, 109 U.S. 63, 63 (1883). These six cases were certainly not the only ones to seek review of the Civil Rights Act of 1875.

under Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment to outlaw race-based discrimination by private actors in places of public accommodation.⁹ Sallie's story does not feature prominently in the Court's opinion; the events of her night on the train are sketched out in no more than five sentences at the start of the opinion, not referred to again in the majority opinion, and mentioned only in passing in the dissent.¹⁰ In fact, Sallie's name does not appear anywhere in the published opinion, not even in the caption, which was styled as "Robinson and wife" in reference to Sallie's husband, Richard, who joined her as a plaintiff in her suit, though he was not her companion on the trip from Grand Junction to Lynchburg.¹¹

9. See *The Civil Rights Cases*, 109 U.S. at 11–14, 20–25.

10. Here is the Court's complete statement of the facts of Sallie's case:

The case of Robinson and wife against the Memphis & Charleston R. R. Company was an action brought in the Circuit Court of the United States for the Western District of Tennessee, to recover the penalty of five hundred dollars given by the second section of the act; and the gravamen was the refusal by the conductor of the railroad company to allow the wife to ride in the ladies' car, for the reason, as stated in one of the counts, that she was a person of African descent. The jury rendered a verdict for the defendants in this case upon the merits, under a charge of the court to which a bill of exceptions was taken by the plaintiffs. The case was tried on the assumption by both parties of the validity of the act of Congress; and the principal point made by the exceptions was, that the judge allowed evidence to go to the jury tending to show that the conductor had reason to suspect that the plaintiff, the wife, was an improper person, because she was in company with a young man whom he supposed to be a white man, and on that account inferred that there was some improper connection between them; and the judge charged the jury, in substance, that if this was the conductor's *bona fide* reason for excluding the woman from the car, they might take it into consideration on the question of the liability of the company. The case was brought here by writ of error at the suit of the plaintiffs.

Id. at 4–5. For his part, Justice Harlan briefly mentioned Sallie in his dissent:

I beg to suggest that that precise question was substantially presented here in the only one of these cases relating to railroads—*Robinson and Wife v. Memphis & Charleston Railroad Company*. In that case it appears that Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power of Congress to regulate commerce?

Id. at 60 (Harlan, J., dissenting).

11. See Transcript of Record, *supra* note 7, at 1–2, 7–8. Under the doctrine of coverture, then in effect in Tennessee, the husband and wife became one in the eyes of the law, and the married woman was subjected to "both substantive and procedural disabilities." See LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 36 (1969). As a practical matter, this meant that a woman "could not sue or be sued; her husband had to be joined in any legal action. If any recovery was obtained through a suit, the money belonged to him." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 957 n.11 (1984). This legal disability applied to civil rights claims brought under federal law. See Whitney A. Brown, *The Illegality of Sex Discrimination in Contracting*, 32 BERKELEY J. GENDER L. & JUST. 137, 150 (2017). Thus, even though Sallie's husband did not suffer the injury himself, he had to be named in the suit for Sallie to be able to proceed as a plaintiff. Tennessee would not eliminate its common law coverture doctrine until 1913. See Married Women's Emancipation Act of 1913, ch. 26, 1913 Tenn. Pub. Acts 59 (codified at TENN. CODE ANN. § 36-3-504 (2020)).

The conventional take on the Court's race jurisprudence in the Reconstruction Era is that it sought to answer two fundamental questions: first, whether and in what form the Reconstruction Amendments created new federally protected rights benefiting citizens and newly freed Black people in particular, and second, whether and to what extent the Amendments recalibrated the balance of power between the states and the federal government in general and Congress in particular.¹² Whether one thinks the Court got these questions basically right or badly wrong depends a great deal on whether one believes that the Reconstruction Court was hostile to the cause of racial liberation and abandoned "the freed slaves to the prejudices of their former owners,"¹³ or whether one thinks that the Reconstruction Court has been unfairly maligned and that, in fact, its jurisprudence "supplied broad possibilities for the federal protection of black physical safety and voting rights."¹⁴

However, my view is that these two questions, framed as they are, at best elide and at worst obscure the far more basic and preliminary question: whether and to what extent the Reconstruction Amendments rewrote the 1787 Constitution from a social contract grounded in racial slavery to one based in civil freedom. In one form or another, every single race case that came before the Court during the Reconstruction Era was about slavery. Even when, as in *Blyew v. United States*,¹⁵

12. Eric Foner, arguably the foremost modern Reconstruction historian, best sums up the fundamental questions raised by the Reconstruction Amendments:

Reconstruction represented less a fulfillment of the Revolution's principles than a radical repudiation of the nation's actual practice for the previous seven decades. Indeed, it was precisely for this reason that the era's laws and constitutional amendments aroused such bitter opposition. The underlying principles—that the federal government possessed the power to define and protect citizens' rights, and that blacks were equal members of the body politic—were striking departures in American law. . . . The Reconstruction amendments transformed the Constitution from a document primarily concerned with federal-state relations and the rights of property into a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government.

Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 *YALE L.J.* 2003, 2006 (1999).

13. 1 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, FROM THE FOUNDING TO 1890*, at 480 (2d ed. 2002); see ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 587 (1988) (describing Harlan's dissent in the *Civil Rights Cases* as a "lonely voice" on the Court); WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869–1879*, at 295–96 (1979) ("As reconstruction was coming to an end on the political front, a similar fate was to befall it on the judicial front."); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 245 (1966) (arguing that the *Civil Rights Cases* validated the Compromise of 1877, which marked an end to Reconstruction).

14. PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 3 (2011). See generally MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* (2003).

15. 80 U.S. (13 Wall.) 581 (1872). *Blyew* concerned the prosecution in federal court of two white men for the axe-murder of four members of a Black family. *Id.* at 584–85. At the time, Kentucky law provided that Blacks were competent witnesses in criminal and civil proceedings in Kentucky courts only if they testified against other Blacks or Mulattoes. *Id.* at 581. The only eyewitness testimony against the defendants was the dying declaration of the sixteen-year-old boy who lived long enough to identify the murderers of his family. *Id.* at 585. Relying on Section 3 of the Civil Rights Act of 1866, which granted removal jurisdiction to federal courts in instances when state courts were unwilling to enforce

the question was one of a statutory interpretation rather than constitutional meaning, slavery remained the one constant. As Justice Harlan would recognize in his dissent in the *Civil Rights Cases*, the central challenge in each of these cases was whether the Reconstruction Amendments simply prohibited race-based slavery as an institution or established a new universal right to civil freedom throughout the United States.¹⁶

Yet slavery—both the historical facts of it, as well as the present and future “badges and incidents” of it¹⁷—barely registered in the Court’s jurisprudence at a time when one would have expected it to have been a central character in the Court’s race narrative.¹⁸ This was neither an oversight nor an accident, but rather

Section 1 violations, two defendants were indicted, Blyew and Kennard, in the United States District Court for the District of Kentucky. *Id.* at 582–83, 585. In overturning their convictions, the Supreme Court declined the invitation from the defendants’ counsel to treat the case as a clash between federal and state power. *Id.* at 595. Thus, the Court avoided reaching the constitutional question of whether Congress properly exercised its enforcement powers under Section 2 of the Thirteenth Amendment when it conferred federal removal jurisdiction under the 1866 Act. Rather, the Court reasoned that the sole question for decision was whether the federal court had jurisdiction over the case under the terms of Section 3 of the Act. *Id.* at 590. That section provided for federal jurisdiction in all civil and criminal offenses “affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act.” *Id.* at 582. Because the “affected” person in the case was the murdered sixteen-year-old, whose deathbed testimony was the key piece of evidence at trial, the Court concluded that only parties to an action and not witnesses qualified as “affected” persons under the Act so as to confer federal removal jurisdiction. *Id.* at 591–95.

16. See *The Civil Rights Cases*, 109 U.S. 3, 34 (1883) (Harlan, J., dissenting).

17. *Id.* at 20 (majority opinion) (conceding that Section 2 of the Thirteenth Amendment “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery”).

18. To the extent that the Reconstruction Court acknowledged slavery, it was to advance the notion that civil rights are the moral equivalent of special rights and that, no matter how formerly (and presently) persecuted or despised, racial minorities would do well to recognize when the time has come to just move on. Thus, less than twenty years after the end of the Civil War, Justice Bradley, writing for the majority in the *Civil Rights Cases*, lectured Black plaintiffs who had been denied access to public accommodations not to hide behind the federal government to vindicate their civil rights:

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.

Id. at 25. And, just a few years later, in *Hodges v. United States*, a 1906 case in which an armed mob of white men nearly lynched a group of Black applicants at a whites-only sawmill, the Court found it inappropriate for Congress to make the attempted lynching a federal crime because:

At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. . . . Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where they should make their homes.

203 U.S. 1, 19–20 (1906).

the natural—if not, inevitable—consequence of the restorative arc that the law in general and courts in particular always bend toward when telling stories.

The stories we tell only have two possible endings: things go back to the way they used to be, or things will never be the same; all's well that ends well, or the world as we knew it is no more; Dorothy clicks her heels and is back in Kansas,¹⁹ or Neo masters the code for the Matrix and goes to war against the machines;²⁰ restoration, or transformation. Either ending is capable of accommodating innumerable genres and countless plots. In restorative plots with happy endings, the superhero saves the city from destruction, the monster dies, love redeems, all is forgiven. Restorative plots with tragic codas are existential meditations about how “the earth turns and the sun inexorably rises and sets, and one day, for each of us, the sun will go down for the last, last time.”²¹ Gatsby dies, never having reached the green light, while Daisy and Tom go on with their careless lives;²² Anna Karenina does not rise from the train tracks;²³ Madame Bovary swallows arsenic.²⁴ Transformative plots with new beginnings are every story of paradise gained and love found: the light turns on the world in Genesis;²⁵ Mr. Darcy and Elizabeth Bennet settle down into Derbyshire;²⁶ “[E]verything’s all right,” Shane tells Joey, “[a]nd there aren’t any more guns in the valley.”²⁷ Transformative dystopian plots are always variations of humans cast out of paradise, victims of their own hubris or worst instincts: Adam and Eve condemned to a life of suffering and sorrow;²⁸ the last natural baby born in *The Children of Men*;²⁹ the young clones dying after their last organs are harvested for older donors in *Never Let Me Go*.³⁰

But while fiction and real life move easily between restorative and transformative endings, courts are most at home telling restorative stories. Even when—particularly when—courts confront transformative social moments, they inevitably translate them, however awkwardly, into restorative narratives. *Brown v.*

19. See generally THE WIZARD OF OZ (Metro-Goldwin-Mayer 1939).

20. See generally THE MATRIX (Warner Bros. 1999).

21. JAMES BALDWIN, THE FIRE NEXT TIME, reprinted in THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985, at 373 (1985).

22. See generally F. SCOTT FITZGERALD, THE GREAT GATSBY (1925).

23. See generally LYOF N. TOLSTOÏ, ANNA KARENINA (Nathan Haskell Dole trans., Thomas Y. Crowell & Co. 1899) (1878).

24. See generally GUSTAVE FLAUBERT, MADAME BOVARY: PROVINCIAL MANNERS (Eleanor Marx-Aveling trans., W. W. Gibbings 1901) (1856).

25. See generally Genesis 1:3.

26. See generally JANE AUSTEN, PRIDE AND PREJUDICE (Lerner Publ’g Grp., Inc. First Avenue eds. 2014) (1813).

27. SHANE (Paramount Pictures 1953); see *Brandon De Wilde: Joey Starrett*, IMDB, <https://www.imdb.com/title/tt0046303/characters/nm0001121> [<https://perma.cc/Y9W8-FF2G>] (last visited Feb. 15, 2021).

28. See generally Genesis 3:23–24.

29. See generally P. D. JAMES, THE CHILDREN OF MEN (Alfred A. Knopf, Inc. First American ed. 1993) (1992).

30. See generally KAZUO ISHIGURO, NEVER LET ME GO (Random House, Inc. First Vintage International ed. 2006) (2005).

Board of Education, arguably the most transformative decision the Supreme Court has ever rendered, tells a restorative story, in which racial segregation took root after Reconstruction because we misunderstood the true meaning of the Fourteenth Amendment.³¹ As such, holding “separate but equal” unconstitutional was not a transformation of American society but a restoration of the Equal Protection Clause to its rightful place in constitutional law.³²

There are, admittedly, methodological, institutional, cultural, and philosophical reasons for the law’s default to restorative narratives. Methodologically, *stare decisis*, the engine that drives the machine of judicial reasoning, is by nature restorative—in that it looks back to past cases to supply authoritative precedent for present cases. Institutionally, as an allegedly nonpolitical branch,³³ it is arguably the Court’s role not to bring about transformation but merely to provide constitutional imprimatur to change once it has already become a fact of social life and once the political branches have validated it through legislation. Culturally, the law’s “distinguishing commitments . . . to authority, hierarchy, [and] intellectual unity” render it, at bottom, a conservative institution that resists change and seeks to preserve what already exists.³⁴ And, philosophically, originalism and its adherents have turned constitutional interpretation into an Orpheus-like exercise, always turning for a backwards glance at something fated to vanish the very moment one’s eyes fall upon it.³⁵

31. See 347 U.S. 483, 490–91, 494–95 (1954).

32. See *id.* at 494–95.

33. The claim that the judiciary is a nonpolitical branch can mean any number of things. For one, it may simply refer to discrete doctrinal positions, such as the *Chevron* doctrine, according to which courts give substantial deference to administrative agencies and the authority delegated to them by Congress on the theory that the judiciary, as a nonpolitical branch, is ill-suited to balance competing political interests that go into policy decisions. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). For another, the claim may refer to the broader philosophical position that, as an unelected body, the court ought to be circumspect and temper any exercise of its counter-majoritarian force when it seeks to hold unconstitutional an executive or legislative action. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (Yale Univ. Press 2d ed. 1986). And for still another, it may refer to the normative claim that courts should be “above” politics. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., United States Court of Appeals for the District of Columbia Circuit) (“I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. . . . I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”). My point here is not to subscribe to any one view in the debate, though I admit to finding it difficult to take seriously the notion that judges who are appointed by political actors, confirmed by political actors, and desiring of maintaining their credibility with the wider public, can ever be anything resembling nonpolitical actors themselves.

34. See Gerald B. Wetlauffer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1587 (1990).

35. In the ancient Greek myth of Orpheus and Eurydice, Orpheus, the son of the god Apollo and the muse Calliope, descends to the underworld to rescue his dead wife, Eurydice. Hades, the ruler of the underworld, agrees to let Eurydice follow Orpheus back to the land of the living but only on the condition that Orpheus not look back at Eurydice—following behind him—until they both cross the threshold from the dead to the living. Orpheus agrees, but barely a few feet from the exit, he turns to make sure Eurydice is still behind him. In doing so, he is forced to watch helplessly as she vanishes back

But whatever the reasons for law's restorative narrative default, it does come at a particular cost: a restorative ending—in fiction, in life, in law—is a way of wiping the slate clean, of going home again, of regaining innocence, of forgetting. This forgetting is powerful and lasting because it uses the same tools by which law makes remembering powerful and lasting. Law is “an especially powerful institution for the creation of collective memory”³⁶ because the ritual processes that courts employ to decide cases, the iterative methods that law uses to turn precedent into a virtual “mnemonic” device,³⁷ and the coercive power with which the state enforces laws—such that, in a quite literal sense, “legal interpretation takes place in a field of pain and death”³⁸—all serve to stamp law narratives unto our collective memory. These very same ritual processes, mnemonic methods, and coercive apparatuses that harden collective memory into a national story also serve as equally effective tools for shared forgetting because what the law leaves out serves as a sign and symbol of the memories that are not worth cataloging and storing in our collective imagination.

Perhaps it is not surprising that Sallie's story is absent from Reconstruction. Sallie, like two of the other four plaintiffs included in the *Civil Rights Cases*—and indeed, like the vast majority of Black litigants during Reconstruction—was born into slavery.³⁹ Narrative theoretician and linguist James E. Young writes that the challenge of collective memory is how a nation “incorporate[s] its crimes

into the underworld. See OVID, *METAMORPHOSES* 207–08 (Charles Boer trans., Spring Publ'ns, Inc. 1989) (n.d.). Textual originalism “seeks to determine ‘the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted.’” James C Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 *YALE L.J.F.* 21, 21–22 (2016) (quoting Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1118 (2003)). This “‘objective social meaning’ (or ‘semantic meaning’) — the ‘meaning [words and phrases of the Constitution's text] would have had at the time they were adopted as law, within the [legal] and linguistic community that adopted’ them — ‘can typically be discovered by empirical investigation.’” *Id.* (alterations in original) (footnotes omitted) (first quoting Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POLY* 65, 66 (2011); then quoting Kesavan & Paulsen, *supra*, at 1131; and then quoting Barnett, *supra*). However, although it may well be possible to fix the meaning of a word or phrase at a particular time, that meaning is so ephemeral, so fragile, that, like Orpheus looking back at Eurydice, it changes and disappears the moment one looks at it.

36. Savelsberg & King, *supra* note 2, at 190.

37. See *id.* at 197–98. A mnemonic device refers to a tool or technique that helps to retain and retrieve information in human memory. See Francis S. Bellezza, *Mnemonic Devices: Classification, Characteristics, and Criteria*, 51 *REV. EDUC. RES.* 247, 247 (1981).

38. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986) (footnote omitted).

39. The other four companion cases consisted of *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, and *United States v. Singleton*. The *Civil Rights Cases*, 109 U.S. 3, 3 (1883). In *Stanley*, Bird Gee, who had been born into and escaped from slavery, was ejected from a hotel restaurant after the “waiters told him in no uncertain terms that [the owner] Stanley did not serve Negroes.” See LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 3 (1966). In *Ryan*, Charles Green, a Black man, went to the Maguire's New Theater in San Francisco when the doorkeeper informed him, “‘We don't admit no negroes into this theater[.]’ . . .” MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE* 218–19 (2004). In *Nichols*, W. H. R. Agee, a Black man, sought to stay at the Nichols House, an inn in Jefferson City, Missouri, but was refused by Samuel Nichols, the owner. See *Indictment Under the*

against others into its national memorial landscape,” when “state-sponsored memory of a national past aims to affirm the righteousness of a nation’s birth.”⁴⁰

Little by little, time after time, case by case, as it developed its Reconstruction jurisprudence, the Court cut away, shed, and left behind, like limbs thrown on the altar as a sacrifice, bits and pieces of the slavery story, such that today, slavery—again, both its historical facts and its badges and incidents—does not play a meaningful role in the constitutional stories we tell, except when remembrance of its abolition serves to reaffirm the righteousness of the nation’s rebirth after the Civil War. Finding these pieces, stitching them together—grafting them back unto the collective memory—is not some polemical jeremiad about the need to atone for the sins of slavery but rather a necessary examination of how our postbellum collective constitutional memory might have turned out differently had slavery played as central a role in constitutional narrative as the colonists’ rebellion against a distant tyrannical king played—and to this day, continues to play—in the collective memory of the Founding.⁴¹

My purpose here is to begin reincorporating Sallie’s story into the national jurisprudential landscape. Collecting these pieces is not straightforward, and so I will not offer, as an author would ordinarily be expected to do at this point, a conventional roadmap. There is no Part I that closely previews a Part II, conveniently leading to a

Civil Rights Bill—General Court Proceedings—Candidate for the Legislature, ST. LOUIS DAILY GLOBE-DEMOCRAT, Sept. 9, 1876, at 3 (reprinting in full the indictment brought against Nichols in the U.S. District for the Western District of Missouri). In *Singleton*, William R. Davis, a twenty-six-year-old business agent for the *Progressive American*, a weekly Black newspaper, bought two tickets for the matinee performance of Victor Hugo’s drama *Ruy Blas* at the Grand Opera House in New York City. WEINER, *supra*, at 216. When Davis, who had been born a slave in South Carolina of “full African blood,” arrived at the theater, the doorman refused to accept their tickets and directed them to the box office for a refund. *Id.* at 216–17.

40. JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* 2, 22 (1993).

41. The Civil Rights Act of 1875 and the legal actions it engendered during Reconstruction have been the subject of groundbreaking legal and historical scholarship, the most important category of which examines how gender, class, and social hierarchy, in addition to—and even instead of—race, played the primary role both in the motivation of Black plaintiffs to sue under the Act and the implacable opposition white people in the South and the North displayed toward passage and enforcement of the Act. *See, e.g.*, Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 *LAW & SOC. INQUIRY* 377, 383 (1999) (“It is important to note that the railroads’ initial responses to the challenges of postbellum train travel were generally based on class and gender assumptions rather than those of race.”); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 *MICH. L. REV.* 777 (2008); and Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to Plessy, 1855–1914*, 13 *LAW & HIST. REV.* 261, 266 (1995) (“Any attempt to understand the post-emancipation South must begin by acknowledging one point: The unwavering goal of white Southerners was to protect white womanhood, the embodiment of the idea of the South. Common carriers, particularly railroad and steamboat travel, quite naturally and almost immediately became one of the principal venues for the defense of this ideal.”). While I do cite to these pieces in this Article, my purpose here is not to engage with their theses, much less to challenge them. No doubt Mack is right that it is important to look at these cases through the lens of class, just as Welke is correct that gender explains much of the railroad litigation, and Scott is accurate that Reconstruction-era understanding of the taxonomy of political, economic, and social rights is the proper frame with which to analyze what she calls the road to *Plessy*. Mack, *supra*; Scott, *supra*; Welke, *supra*. However, in this Article, I am concerned with something altogether different, namely how the Court accounted—or failed to account—for slavery in building its race jurisprudence during Reconstruction.

Part III, before satisfyingly closing with a normative coda. Instead, this Article tells a discursive—even digressive—story; it jumps from past to present, from history to law, from Congress to the Supreme Court, from Sallie to railroad tycoons to barbecue restaurateurs, and back again. But like the Court’s own penchant for restorative narratives, the story will find its way back to where it began, even if, unlike the Court’s stories, it will not provide a resolution with all loose ends neatly tied up.

The story begins on a train.

II. A “GOOD-LOOKING MULATTO WOMAN”

The Memphis and Charleston Railroad departed from Memphis, Tennessee, and ran west to east for thirty-nine years across Mississippi and Alabama but never reached Charleston, South Carolina.⁴²

Out of a depot in Memphis,⁴³ a mile away from the site where, a century later, Martin Luther King Jr., standing on the balcony of Lorraine Motel on Mulberry Street at twilight, would call down one last time to one of his favorite musicians to “make sure [to] play ‘Precious Lord, Take My Hand,’ in the meeting tonight,”⁴⁴ the single-engine train pulled five coaches of freight and passengers out of the city.⁴⁵ Near the banks of the Mississippi, it headed east, past Fort Pickering, which was originally established to defend the Confederacy’s access to the river.⁴⁶ It was there that, after Union forces captured Memphis in 1862,

42. See PAUL HARNCOURT, *BIOGRAPHY OF THE MEMPHIS AND CHARLESTON RAILROAD* 7–8 (2005); John C. Mehrling, *The Memphis and Charleston Railroad*, 19 WEST TENN. HIST. SOC’Y PAPERS 21, 24 (1965). The Memphis and Charleston Railroad was completed in 1857, running a 271-mile stretch from Memphis, Tennessee, to Stevenson, Alabama, where it connected with the Nashville & Chattanooga Railroad. HARNCOURT, *supra*, at 7.

43. The Memphis and Charleston Depot stood at 32 North Lauderdale Street in Memphis. Paul R. Coppock, *The M & C Depot*, 21 WEST TENN. HIST. SOC’Y PAPERS 48, 48 (1967).

44. TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965–68*, at 763–64, 766 (2006). Here are the last moments of Dr. King’s life as Taylor Branch describes them:

[Ralph] Abernathy shouted from Room 306 for King to make sure [Jesse] Jackson did not try to bring his whole Breadbasket band, while Chauncey Eskridge was telling Jackson he should upgrade from turtleneck to necktie for dinner. Jackson called up to King: “Doc, you remember Ben Branch?” He said Breadbasket’s lead saxophonist and song leader was a native of Memphis.

“Oh yes, he’s my man,” said King. “How are you, Ben?” Branch waved. King recalled his signature number from Chicago. “Ben, make sure you play ‘Precious Lord, Take My Hand,’ in the meeting tonight,” he called down. “Play it real pretty.”

“Okay, Doc, I will.”

Solomon Jones, the volunteer chauffeur, called up to bring coats for a chilly night. There was no reply. Time on the balcony had turned lethal, which left hanging the last words fixed on a gospel song of refuge. King stood still for once, and his sojourn on earth went blank.

Id. at 766.

45. See Addie Lou Brooks, *The Building of the Trunk Line Railroads in West Tennessee, 1852–1861*, 1 TENN. HIST. Q. 99, 113 (1942); see also Mehrling, *supra* note 42, at 34–35 (providing statistics on the railroad’s income).

46. See *Fort Pickering: . . . Memphis’ Historic Civil War Fort*, HISTORIC-MEMPHIS, <https://historic-memphis.com/memphis-historic/pickering/pickering.html> [<https://perma.cc/HDJ2-VC5G>] (last visited Feb. 18, 2021).

thousands of runaway slaves and free Blacks settled under the protection of Black Union soldiers to raise families.⁴⁷ And it was there that over three days and nights beginning on May 1, 1866,⁴⁸ barely six months after the ratification of the Thirteenth Amendment, and less than a month after the enactment of the Civil Rights Act of 1866, mobs of whites, to the sounds of “[k]ill every nigger, no matter who, men or women,”⁴⁹ murdered almost fifty Black men, women, and children; wounded nearly a hundred more; raped five Black women; and set fire to ninety-one houses, four churches, and every one of the twelve Black schools in the city.⁵⁰

47. See Kevin R. Hardwick, “*Your Old Father Abe Lincoln Is Dead and Damned*”: Black Soldiers and the Memphis Race Riot of 1866, 27 J. SOC. HIST. 109, 111–12 (1993). Memphis served as a magnet for former slaves during the war because the presence of Black soldiers in Memphis both was a powerful symbol “of the victorious Union army” and helped “in the efforts of the former slaves to redefine their position within southern society.” *Id.* at 110. As a result, the city’s Black population increased dramatically in a relatively short period of time:

Memphis, like most southern cities, experienced a vast influx of former slaves during and after the war. By March 1863, General Stephen A. Hurlbut was writing from Memphis requesting instructions on what to do with “the vast number of worthless negroes” that congregated around the city. Hurlbut reported the presence of almost 5,000 black men and women directly dependent on federal forces, as well as “a very large number . . . not supported by the Govt.” In 1865, when a city census was taken, the population stood at 28,000 of whom 11,000 were blacks. Large numbers of black people lived in the suburbs of Memphis, however, and a Freedmen’s Bureau report of September 1865, estimated the total black population “in and about” the city at 16,000. In less than five years the black population of Memphis had expanded more than four-fold.

Id. at 111. White animosity toward Blacks was also exacerbated because “the majority of blacks lived outside of city jurisdiction, where they were not subject to Memphis’ notorious black laws, and could do as they pleased notwithstanding state black codes.” Bobby L. Lovett, *Memphis Riots: White Reaction to Blacks in Memphis, May 1865–July 1866*, 38 TENN. HIST. Q. 9, 10 (1979).

48. See HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH 61–62 (2009). “[The attacks] took place primarily in the neighborhood of South Memphis, and the assailants were mostly city policemen and the owners of small businesses such as grocery-saloons. Many of the attackers lived in South Memphis along with their victims.” *Id.* at 61 (footnote omitted).

49. *Id.* at 64. The *Appeal*, a Memphis newspaper, argued that the massacre was due to:

[T]he fact of the ‘irrepressible conflict’ that exists, deeply ingrained in human nature, whenever anything approaching to social equality of the black and white races is sought to be established. A political equality before the law . . . may be, and is accorded to the black man; but when the enfranchisement goes beyond this, and it is sought to establish a personal, social equality between the inferior and the superior races, the inextinguishable instincts . . . of the white race are awakened in their resistance to the innovation.

Id. at 65–66.

50. See *id.* at 62. For much of its history, Memphis made no acknowledgement of this massacre. See Adrian Sainz, *150 Years After Memphis Massacre, Marker Shows Struggle*, ASSOCIATED PRESS (May 31, 2016), <https://www.apnews.com/2ced6936aa4e4760aad6ce21d9b2080e>. In 2015, the Memphis Chapter of the NAACP petitioned the Tennessee Historical Commission for a marker, but after the Commission insisted that the words “race riot” be used to describe the massacre, the NAACP refused, reasoning that the phrase implied Blacks were equally to blame as whites. *Id.* On May 1, 2016, 150 years to the day when the massacre began, the Memphis NAACP and National Park Service, without the participation of the Tennessee Historical Society, installed a simple marker on federal property at Amy-Navy Park, at the corner of Second Street and G. E. Patterson Avenue in South Memphis, just steps

With over 271 miles of tracks laid down and maintained by slaves, who had no power to quit or go on strike and were cheaper to replace when they died in accidents during construction,⁵¹ the Memphis and Charleston ran through hills and valleys where Chickasaw, Creek, Cherokee, and Choctaw once lived, before the federal government forced tens of thousands on the Trail of Tears⁵² and paid the

away from where the massacre began. *See id.*; *see also* Christopher Blank, *Do the Words ‘Race Riot’ Belong on a Historic Marker in Memphis?*, NPR (May 2, 2016, 5:29 PM), <https://www.npr.org/sections/codeswitch/2016/05/02/476450908/in-memphis-a-divide-over-how-to-remember-a-massacre-150-years-later> [<https://perma.cc/N7MR-A868>]. The marker reads:

On May 1, 2 and 3, 1866, mobs of white men led by law enforcement attacked black people in the areas near South St. (aka Calhoun & G.E. Patterson). By the end of the attack, the mobs had killed an estimated 46 black people; raped several black women; and committed numerous robberies, assaults and arsons. A congressional investigative committee reported that four churches, twelve schools and 91 other dwellings were burned. Although no one was ever prosecuted for this massacre, it became a rallying cry in the battle over the nation’s reconstruction following the Civil War. Ultimately, the outrage that followed the massacre helped to ensure the adoption of the 14th Amendment to the United States Constitution.

Blank, *supra*; *see Sainz, supra*.

51. *See generally* Robert S. Starobin, *The Economics of Industrial Slavery in the Old South*, 44 BUS. HIST. REV. 131, 134–39 (1970) (explaining that slave labor across any number of industries, including railroads, tended to be cheaper, more efficient, and more profitable than free labor). The state charter for the Memphis and Charleston Railroad authorized the company to purchase and own as many slaves as should be necessary to construct the road and keep it in repair. Act of Feb. 2, 1846, ch. 182, §§ 1, 36, 1846 Tenn. Pub. Acts 266, 266, 275. When construction began on the Memphis and Charleston Railroad, a Memphis newspaper reported that the railroad had “150 hands employed, with 50 to 60 more by weeks end. Our hands as you are aware are Negroes, and are just becoming accustomed to the nature of this work.” *See HARNCOURT, supra* note 42, at 69. In this, the Memphis and Charleston was not unique; most southern rail lines prior to the war used slave labor. *See* Steven G. Collins, *Progress and Slavery on the South’s Railroads*, RAILROAD HIST., Autumn 1999, at 6, 17 (“The South’s rail managers had no problem incorporating slavery within their corporate framework. Progress and slaves went hand-in-hand in their minds. Few would have disagreed with B. Ayers, superintendent of the Memphis & Charleston, when he wrote in 1855, ‘The economy of slave labor upon Southern Roads has been frequently demonstrated’ and ‘it will no doubt be greatly to their advantage to own the labor required in working the road.’”). Some railroad companies “allowed stockholders to pay for their stock with slaves.” *Id.* Some railroads owned their slaves outright; others rented them. For example, the Nashville & Chattanooga Railroad owned more than \$128,000 worth of slaves, the Raleigh & Gaston Railroad purchased \$125,000 worth, and the South Carolina Railroad owned ninety slaves worth more than \$80,000. *Id.* Railroads that chose to rent slaves had to reimburse the owner if a slave was injured or died. For example, the Richmond & Danville paid \$1,379.44 for a slave killed in an accident. *Id.* at 17–18. The work of “grading, ditching, track laying, and track repair” done by slave labor was dangerous, and “[i]njury and disease claimed many casualties.” *Id.* at 20. Because slaves could neither voluntarily quit nor go on strike in protest, “rail managers praised slave labor” as “perfectly adapted to the construction of internal improvement,” and warned against the “vicissitudes” of free labor. *Id.* at 22.

52. Between 1830 and 1850, the U.S. Government removed over 100,000 Native Americans from their ancestral homelands located in parts of Alabama, Georgia, North Carolina, and Tennessee to areas west of the Mississippi River. *See* STANLEY W. HOIG, *THE CHEROKEES AND THEIR CHIEFS: IN THE WAKE OF EMPIRE 167–70* (1998). In the winter of 1831, the U.S. Army began the forced removal by expelling the Choctaw nation from its land altogether. The Choctaw made the journey to Indian Territory on foot, some bound in chains, and marched double file and without any food, supplies, or other help from the government. Thousands of people died along the way. It was, one Choctaw leader told an Alabama newspaper, a “trail of tears and death,” and to this day remains one of the worst human rights crimes in American history. *See Trail of Tears, HISTORY* (July 7, 2020), <https://www.history.com/topics/native-american-history/trail-of-tears> [<https://perma.cc/65Q4-KLHJ>].

very same railroad to transport the rest to reservations in the Western Territories.⁵³ At Corinth, Mississippi, the Memphis and Charleston connected with the Mobile and Ohio Railroad for Mobile, Alabama;⁵⁴ at Decatur, Alabama, with the Louisville and Nashville Railroad southward for Montgomery, Alabama, and northward for Nashville, Tennessee, and Louisville, Kentucky;⁵⁵ at Chattanooga, Tennessee, with the Virginia and Tennessee Railroad for Richmond and Norfolk, Virginia;⁵⁶ and at Grand Junction, Tennessee, with the Mississippi Central Railroad to Oxford, Mississippi, and then southward on to New Orleans, Louisiana,⁵⁷ as well as with the Illinois Central northward for St. Louis, Detroit, Chicago, Pittsburgh, and New York City.⁵⁸ In time, as the Memphis and Charleston connected to lines east, west, and north, it foretold the routes that, decades later, six million Black people would follow in a quest for political asylum within the borders of their own country out of the cotton fields of the South into the ghettos of the North,⁵⁹ seeking, like Richard Wright, “the

53. In a letter, dated January 20, 1873, the Acting Secretary of the Interior, Benjamin R. Cowen, wrote the Senate Chairman of the Committee on Indian Affairs, James Harlan:

I have the honor to transmit herewith an estimate of appropriation required to pay for transportation furnished by the Memphis and Charleston Railroad Company to eighty-five Cherokee Indians heretofore residing in the State of North Carolina, from Loudon, Tennessee, to the Cherokee Nation, in the Indian Territory, at the rate of \$25 for each person, in accordance with the terms of an agreement with the said company. . . .

S. MISC. DOC. NO. 42-40, at 1 (1873).

54. See William McBean, New Orleans and Ohio Railroad, Illinois Central Railroad Company & Mobile and Ohio Railroad Company, *A Map of a Part of the Southern & Western States Showing the Contemplated Route of the New Orleans & Ohio Railroad and the Central Railroad of Illinois*, LIBRARY OF CONGRESS, <https://www.loc.gov/resource/g4041p.r004740/> [<https://perma.cc/4ZDA-B4LS>] (last visited Feb. 20, 2021).

55. See *id.*; Edwin Thatcher, I. M. St. John & Louisville and Cincinnati Branch Railroad, *Map of Surveys for the Louisville & Cincinnati B'ch Railroad; I. M. St. John, Chief Eng', 1866*, LIBRARY OF CONGRESS, <https://www.loc.gov/item/98688701/> [<https://perma.cc/CCD2-BNG6>] (last visited Feb. 20, 2021).

56. See W.W. Blackford & Ritchie & Dunnivant, *Map & Profile of the Virginia & Tennessee Rail Road*, LIBRARY OF CONGRESS, <https://www.loc.gov/resource/g3881p.r005990/> [<https://perma.cc/Q7UH-Q7H7>] (last visited Feb. 20, 2021).

57. See Rand McNally and Company, *Railroad Commissioner's Map of Mississippi*, LIBRARY OF CONGRESS, <https://www.loc.gov/item/98688503/> [<https://perma.cc/4RGD-8QD5>] (last visited Feb. 20, 2021). At the time, Mississippi Central Railroad was a subsidiary of Illinois Central. See *A Brief Historical Sketch of the Illinois Central Railroad*, ILL. CENT. HIST. SOC'Y (Jan. 11, 2012), <https://web.archive.org/web/20120111034131/http://icrrhistorical.org/icrr.history.html> [<https://perma.cc/WQ7S-S3HB>].

58. See Rand McNally and Company, Illinois Central Railroad Company, *Map of Illinois Central R. R.*, LIBRARY OF CONGRESS, <https://www.loc.gov/resource/g4041p.r004310/> [<https://perma.cc/YR6V-S2KK>] (last visited Feb. 20, 2021).

59. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 6 (1991).

In 1940, 77 per cent of black Americans still lived in the South – 49 per cent in the rural South. . . . Between 1910 and 1970, six and a half millions black Americans moved from the South to the North; five million of them moved after 1940, during the time of the mechanization of cotton farming. In 1970, when the migration ended, black America was only half Southern, and less than a quarter rural; “urban” had become a euphemism for “black.” The

warmth of other suns.”⁶⁰ They rarely found the welcome asylum they sought, but the exodus produced A. Philip Randolph, Toni Morrison, James Baldwin, John Coltrane, Sam Cooke, Nina Simone, Miles Davis, Harold Washington, August Wilson, Michelle Obama, *Baby Please Don't Go, Love and Happiness, Bring it on Home to Me, The Fire Next Time, Beloved, and Jo Turner's Come and Gone.*

On March 28, 1857, two weeks after the United States Supreme Court held in *Dred Scott v. Sandford* that a life of slavery was the natural destiny of four million Black people and that, “as beings of an inferior order,” Black people were “altogether unfit to associate with the white race,”⁶¹ workers drove the last spike in the line near Corinth, Mississippi.⁶² On May 1, 1957, the Memphis and Charleston marked its grand opening with a special train to Charleston for a delegation of prominent Memphis citizens, carrying on board a barrel of water from the Mississippi River.⁶³ At the last stop in Stevenson, Alabama, passengers

black migration was one of the largest and most rapid mass internal movements of people in history – perhaps *the* greatest not caused by the immediate threat of execution or starvation. In sheer numbers it outranks the migration of any other ethnic group – Italians or Irish or Jews or Poles – to this country.

Id.

60. RICHARD WRIGHT, *BLACK BOY: A RECORD OF CHILDHOOD AND YOUTH* 228 (1937). “I was leaving the South to fling myself into the unknown . . .” *Id.* “I was taking a part of the South to transplant in alien soil, to see if it could grow differently, if it could drink of new and cool rains, bend in strange winds, respond to the warmth of other suns, and, perhaps, to bloom . . .” *Id.*

61. 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Reviewing the “public opinion in relation to that unfortunate race” at the time the Declaration of Independence and U.S. Constitution were adopted, the Court observed:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

Id.

62. See Brooks, *supra* note 45, at 111; Coppock, *supra* note 43, at 54.

63. HARNCOURT, *supra* note 42, at 87. In Memphis, the city similarly celebrated with what newspapers referred to as the Railroad’s Jubilee:

The Phoenix Company of firemen from Charleston brought their fire engine by rail all the way to Memphis. There were fireworks, a parade of militia units, speeches, balls, artillery salutes and similar displays on Friday, May 1. At noon on Saturday, May 2, the Charleston Firemen rolled their engine to the wharf at the foot of Court and pumped an arc of Atlantic water into the Mississippi. Ceremonies followed in Court Square. At least 25,000 persons took part in the event, a gigantic crowd for that day but completely justified by the vast rise in the importance of Memphis because of this first rail route between the eastern coast line and the river that carried the freight of the midcontinent.

Coppock, *supra* note 43, at 53–54 (footnote omitted).

transferred to the Nashville and Chattanooga Railroad bound for Atlanta, Georgia,⁶⁴ where they connected to the Charleston and Hamburg Railroad,⁶⁵ arriving in Charleston, South Carolina, on May 16, 1857.⁶⁶ There, railroad executives and government dignitaries gathered in Charleston Harbor and cheered as a fire engine pumped the barrel of Mississippi water into the Atlantic, which symbolized the marriage of river and ocean.⁶⁷

Nearby, less than a mile away from the ceremony, stood Emanuel African Methodist Episcopal Church, founded by slaves in 1818.⁶⁸ It burned to the ground in 1822 after one of its congregants, Denmark Vesey, a former slave who had bought his freedom by 1800,⁶⁹ was caught plotting a revolt in which he and his comrades planned to convince nine thousand of Charleston's slaves to kill the city's white inhabitants, set fire to its buildings, and escape by boat to Haiti, the country of the first and only successful slave revolution in the Americas.⁷⁰ Vesey was caught, hung, and his body buried in an unmarked grave.⁷¹

After the war, Mother Emanuel Church emerged from underground to send to Congress its pastor, Richard Cain, to be one of the first African-Americans to represent a South Carolina district in the House of Representatives and one of seven Black representatives who helped vote into law the Civil Rights Act of 1875.⁷² On June 17, 2015, 158 years after the Memphis and Charleston made the voyage back to Memphis with water from the Atlantic, Dylann Roof, a young white man, would murder nine congregants in the same Mother Emanuel Church;⁷³ nearby,

64. Brooks, *supra* note 45, at 111.

65. *Id.*

66. HARNCOURT, *supra* note 42, at 87.

67. *See id.*; Brooks, *supra* note 45, at 111–13. Like the name Memphis & Charleston Railroad, the marriage of river and ocean had more to do with poetic license than actual fact. The Memphis stop of the railroad was not on the river. In fact, “Memphis had subscribed \$500,000 to the railroad on condition that it would not be built to the river.” Brooks, *supra* note 45, at 111 n.68.

68. *See History*, MOTHER EMANUEL AFRICAN METHODIST EPISCOPAL CHURCH, <https://perma.cc/6BTK-ZCAC> (last visited Feb. 22, 2021).

69. DAVID ROBERTSON, DENMARK VESEY, THE BURIED HISTORY OF AMERICA'S LARGEST SLAVE REBELLION AND THE MAN WHO LED IT 40 (1999).

70. *See id.* at 4–5, 8.

71. *Id.* at 4, 148–50.

72. *See CAIN, Richard Harvey*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/10470> [<https://perma.cc/K3F7-92KA>] (last visited Feb. 22, 2021); *see also* Damon L. Fordham, *The Founder of Mother Emanuel*, CHARLESTON CHRON. (Mar. 1, 2018), <https://www.charlestonchronicle.net/2018/03/01/the-founder-of-mother-emanuel/> [<https://perma.cc/4WCL-BCV9>] (recounting Cain's support for the Civil Rights Act of 1875). The Civil Rights Act of 1875 was enacted in the forty-third Congress in February 1875 at a time when seven African-Americans served in the House. *See* IDA A. BRUDNICK & JENNIFER E. MANNING, CONG. RESEARCH SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870-2018, at 5 (2018).

73. Jelani Cobb, *Inside the Trial of Dylann Roof*, NEW YORKER (Jan. 30, 2017), <https://www.newyorker.com/magazine/2017/02/06/inside-the-trial-of-dylann-roof>; Jason Horowitz, Nick Corasaniti & Ashley Southall, *Nine Killed in Shooting at Black Church in Charleston*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/us/church-attacked-in-charleston-south-carolina.html>.

Barack Obama, the first Black President of the United States, would sing *Amazing Grace* in eulogy to the murdered parishioners.⁷⁴

When the war came, the North and South fought over the Memphis and Charleston in order to gain control of the Mississippi, each taking turns burning down stations and smashing equipment.⁷⁵ In the fall of 1864, General Nathan Bedford Forrest, who would later perjure himself before Congress during Reconstruction when he denied under oath any knowledge of the Ku Klux Klan,⁷⁶ made one last attempt to regain control of the Memphis and Charleston in Huntsville, Alabama, only to retreat and cede it to the Union by Christmas of that

74. President Barack Obama, Remarks in Eulogy for the Honorable Reverend Clementa Pickney (June 26, 2015) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2015/06/26/remarks-president-eulogy-honorable-reverend-clementa-pinckney> [<https://perma.cc/3SYJ-CLH2>]). In closing his eulogy of the murdered parishioners, President Obama talked of Clementa Pinckney, “Clem”, a pastor at Mother Emanuel and a senator of South Carolina’s 45th Senate District. *Id.*; see *Senator Clementa Carlos Pinckney*, S.C. LEGISLATURE, <https://www.scstatehouse.gov/member.php?code=1479545277> [<https://perma.cc/KE6H-MYWX>] (last visited Feb. 22, 2021):

What is true in the South is true for America. Clem understood that justice grows out of recognition of ourselves in each other. That my liberty depends on you being free, too. . . . That history can’t be a sword to justify injustice, or a shield against progress, but must be a manual for how to avoid repeating the mistakes of the past – how to break the cycle. A roadway toward a better world. He knew that the path of grace involves an open mind – but, more importantly, an open heart.

That’s what I’ve felt this week – an open heart. That, more than any particular policy or analysis, is what’s called upon right now, I think – what a friend of mine, the writer Marilyn Robinson, calls “that reservoir of goodness, beyond, and of another kind, that we are able to do each other in the ordinary cause of things.”

That reservoir of goodness. If we can find that grace, anything is possible. . . . If we can tap that grace, everything can change. . . .

Amazing grace. Amazing grace.

Obama, *supra*. And then he started singing *Amazing Grace* as the Church joined in. *Id.*; see C-SPAN, *President Obama Delivers Eulogy – Full Video (C-Span)*, YOUTUBE (June 26, 2015), <https://www.youtube.com/watch?v=x9IGyidtfGI>.

75. On March 13, 1862, the *Memphis Daily Appeal*, quoting the *Florence Gazette*, reported:

We learned yesterday that the Federals had landed a large force at Savannah, Tennessee. We suppose they are making preparations to get possession of the Memphis and Charleston railroad. They must never be allowed to get this great thoroughfare in their possession, for then we would indeed be crippled. . . . It must be protected. . . . If unavoidable, let them have our river, but we hope it is the united sentiment of our people that we will have our railroad.

Memphis Daily Appeal. [Volume], March 13, 1862, Image 1, LIBRARY OF CONGRESS, <https://chroniclingamerica.loc.gov/lccn/sn83045160/1862-03-13/ed-1/seq-1/> [<https://perma.cc/J3RT-53LH>] (last visited Feb. 23, 2021). When the war ended, the president of the railroad, Sam Tate, at a stockholders’ annual meeting in Huntsville, Alabama, on August 29, 1866, noted:

It will be the purpose of this Report, to give a brief history of the operations of your Company for the past five years, during the most of which time, war, with all its horrors, raged over the Southern states, and especially as its operations confined to the immediate vicinity of the line of your Road, and for three years of the time. It was practically the picket line of both armies, each seeming to vie with each other to see which could produce the greatest amount of destruction to your property.

HARNCOURT, *supra* note 42, at 122–23.

76. GEORGE CANTOR, *CONFEDERATE GENERALS: LIFE PORTRAITS 77–78* (2000).

year.⁷⁷ The Memphis and Charleston continued operation for a while after the war until, beset by declining traffic from the decline in cotton production, it fell into receivership in 1892,⁷⁸ merged into the Southern Railway in 1897,⁷⁹ ceased carrying passengers altogether, and eventually became what it remains today: part of the Norfolk Southern freight line, ferrying coal, wood pulp, and cement, among other things, from Des Moines, Iowa, to Jacksonville, Florida; from Detroit, Michigan, to Savannah, Georgia; from Buffalo, New York, to New Orleans, Louisiana.⁸⁰

In its prime, in the years before the war, the Memphis and Charleston, the “very backbone of the Confederacy,” was the pride of the South, the first rail connection between the Mississippi Valley and the Atlantic Coast.⁸¹ Today, few traces of it as a passenger railroad remain, with its depots long demolished, including the depot at Grand Junction, Tennessee, where after midnight on May 22, 1879, Sallie Robinson, a twenty-eight-year-old “good-looking mulatto woman” bought two first-class tickets bound for Lynchburg, Virginia, for herself and her nephew, Joseph Robinson, “a young man of light complexion, light hair, and light blue eyes.”⁸²

III. A FORTUNE TO LAST GENERATIONS

Sallie and Joseph probably began their journey a few days prior in or near Michigan City, Mississippi, an area in the upper northeast region of the state near

77. HARNCOURT, *supra* note 42, at 183–84.

78. *See id.* at 224.

79. *Id.*

80. *See A Line in Time*, NORFOLK SOUTHERN, <http://www.nscorp.com/content/nscorp/en/the-norfolk-southern-story.html> [<https://perma.cc/LD53-CCZA>] (last visited Feb. 23, 2021) (“Forms Norfolk Southern through consolidation of Norfolk and Western and Southern railways.”); *Shipping Options: Commodities A - Z*, NORFOLK SOUTHERN, <http://www.nscorp.com/content/nscorp/en/shipping-options.html> [<https://perma.cc/PN8N-M9L2>] (last visited Feb. 23, 2021); *System Map*, NORFOLK SOUTHERN, <http://www.nscorp.com/content/dam/nscorp/maps/2016-system-map-print.pdf> (last visited Feb. 23, 2021).

81. Letter from L. P. Walker to J. P. Benjamin, Secretary of War (Feb. 14, 1862), in *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 273, 273 (Gov’t Printing Office 1898). In a letter dated February 14, 1862, Confederate States Army Brigadier-General LeRoy Pope Walker wrote to the Secretary of War for the Confederacy Judah P. Benjamin:

Since my letter of the 6th instant I have been ordered by General Bragg to take charge of the defenses of North Alabama and the Memphis and Charleston Railroad. I have established my headquarters for the present time at this place, but with the district now organized it is impossible to adopt any system of defenses at all commensurate with the magnitude of the interests involved. The Memphis and Charleston Railroad is the very backbone of the Confederacy, and its possession by us is in imminent danger.

Id.; *see Judah Phillip Benjamin*, AM. BATTLEFIELD TRUST, <https://www.battlefields.org/learn/biographies/judah-phillip-benjamin> [<https://perma.cc/D6LV-V5LR>] (last visited Feb. 23, 2021); D. Johnathan White, *LeRoy Pope Walker*, ENCYCLOPEDIA OF ALA. (Oct. 3, 2011), <http://www.encyclopediaofalabama.org/article/h-1854> [<https://perma.cc/5AKJ-9ETM>].

82. Transcript of Record, *supra* note 7, at 7–8.

the border of Tennessee, barely seven miles from Grand Junction.⁸³ As they tried to enter the first-class car, also referred to as the “ladies’ car,” the conductor C. W. Reagin grabbed Sallie by the arm and pulled her back, telling them they could not enter.⁸⁴ Joseph explained that they had first-class tickets, but Reagin said that “it made no difference; that they must go in the [smoking] car.”⁸⁵ Once the train started, Reagin walked back to the second-class car, where Sallie and Joseph sat in the dark, and asked Joseph,

“Why did you [] try to take that girl into the ladies’ car[?]” [Joseph] replied, “She is my aunt”. . . . The conductor then said, “She is your aunt; then you are colored too?” [Joseph] replied “Yes, she is my aunt, and I am a colored man.” [At this, Reagin responded], “[T]hen you can take her into the ladies’ car, but wait till we stop at the first station.”⁸⁶

It took fifteen minutes for the train to cover the six miles to Salisbury, where Sallie and Joseph transferred to the first-class car.⁸⁷ At Knoxville, they disembarked and went to lodge a complaint in person with the railroad’s vice president, Colonel Charles McGhee,⁸⁸ who was later one of Tennessee’s richest men.⁸⁹

McGhee was born into a wealthy slave-holding family.⁹⁰ His paternal grandparents, Barclay and Jane McClanahan McGhee, came to Tennessee from Pennsylvania in 1787 as part of the great southwest Scots-Irish migration following the American Revolution.⁹¹ Barclay made his fortune supplying United States military forces sent to open up Cherokee land to white settlements.⁹² When he died in 1819, he likely left his three sons, including John McGhee, Colonel Charles McGhee’s father, a decent inheritance.⁹³ John increased that fortune when he married Betsy McClung, the daughter of Charles McClung, a wealthy landowner and one of the drafters of Tennessee’s 1796 Constitution,⁹⁴ which limited its Declaration of Rights to “free men.”⁹⁵ John and Betsy continued to build the family fortune by acquiring thousands of acres of Cherokee land and turning

83. Today, Michigan City is a community in Benton County, Mississippi, but at the time Sallie and her family may have resided there, it was a part of Tippah County. See BENTON COUNTY MISSISSIPPI GENEALOGY & HISTORY NETWORK, <https://benton.msghn.org/> [<https://perma.cc/R4KP-T9PB>] (last visited Feb. 23, 2021).

84. Transcript of Record, *supra* note 7, at 7–8, 11.

85. *Id.* at 8.

86. *Id.* at 9.

87. *Id.*

88. *Id.* at 8.

89. William Joseph MacArthur Jr., Charles McClung McGhee, Southern Financier 94 (Mar. 1975) (unpublished Ph.D. dissertation, University of Tennessee, Knoxville) (on file with Tennessee Research and Creative Exchange, University of Tennessee, Knoxville).

90. *See id.* at 10.

91. *Id.* at 1.

92. *See id.* at 2.

93. *See id.* (observing that Barclay and his sons “seemed to have prospered” as merchants).

94. *Id.* at 2–3.

95. TENN. CONST. of 1796, art. XI, § 26; *see id.* §§ 8, 14.

it into a plantation.⁹⁶ They had five children, three of whom survived childbirth: a daughter named Margaret and two sons, Barclay, and the youngest, Charles, born in 1828⁹⁷—the man whom Sallie Robinson would eventually try to see when her train stopped in Knoxville.

At John's death in 1851, Charles, now twenty-three, inherited twenty-nine slaves, several thousand acres of land, and cash and stock.⁹⁸ On the eve of the Civil War, he would turn that inheritance into one of the largest fortunes in the state, serving as the master of a plantation with at least sixty slaves;⁹⁹ in a state with a population of slightly over a million people,¹⁰⁰ "fewer than four hundred people [in Tennessee] owned more than fifty slaves."¹⁰¹ He did not join the military and never fought in the war, but he was a loyal Confederate, and in return, the Governor of Tennessee bestowed on him the title of colonel.¹⁰² He grew richer during the war as a meatpacker selling pork to the Confederacy,¹⁰³ and while the war cost him his slaves, it left the rest of his fortune, including his land holdings, mostly intact.¹⁰⁴ No longer a planter, he became a financier, speculating in railroads stocks and bonds.¹⁰⁵ In 1877, President Rutherford B. Hayes, who lost the popular vote in the 1876 campaign to Samuel Tilden, but won the Electoral College after promising to withdraw Union troops from the defeated Confederate states, undertook a Southern reconciliation tour.¹⁰⁶ At his Knoxville stop, Hayes was hosted by McGhee, who entertained the President in his home at a party for six hundred people.¹⁰⁷ Guests wandered through a fourteen-room Italianate mansion and grounds the length of a city block that were "ablaze with gas lights," while a band "played far into the night" on a platform that could accommodate a "hundred dancing couples."¹⁰⁸

McGhee would live a long life—not free of minor sorrows and even larger tragedies,¹⁰⁹ but one full of material comfort and social prestige. In his last years, he wintered in Florida and belonged to exclusive New York clubs, staying at the Plaza Hotel when he needed to be in the city.¹¹⁰ He lived to see his eldest daughter

96. MacArthur, *supra* note 89, at 4.

97. *Id.* at 1, 5.

98. *Id.* at 10.

99. *Id.* at 12.

100. The 1850 Census reported Tennessee's "Resident Population" at 1,002,717 people. *See Resident Population and Apportionment of the U.S. House of Representatives*, U.S. CENSUS BUREAU, <https://www.census.gov/dmd/www/resapport/states/tennessee.pdf> [<https://perma.cc/5WRV-VUTT>] (last visited Feb. 24, 2021) (listing Tennessee's resident population from 1789–2000).

101. MacArthur, *supra* note 89, at 12.

102. *See id.* at 14.

103. *Id.* at 13–14.

104. *Id.* at 16.

105. *See id.* at 24–25, 38–39, 80–82, 94.

106. WOODWARD, *supra* note 13, at 6–8, 17–18, 229.

107. MacArthur, *supra* note 89, at 95.

108. *Id.*

109. Among the tragedies McGhee suffered was the death of his daughter in childbirth. *See id.* at 266.

110. *Id.* at 265–66, 274.

married to the territorial governor of Wyoming,¹¹¹ though not long enough to see another daughter's husband, Lawrence D. Tyson, after whom one of Knoxville's all-white junior high schools would be named,¹¹² elected United States Senator from Tennessee in 1924.¹¹³ He died in Knoxville at the age of seventy-nine of pneumonia on May 5, 1907, no doubt with "the knowledge that he had endowed his descendants with a fortune which could last for generations."¹¹⁴ His descendants, in time, would come to include the twenty-eighth president of Harvard University.¹¹⁵

But back in May 1879, McGhee didn't meet with Sallie when she stopped in Knoxville to complain about how she had been treated on one of his trains.¹¹⁶ Perhaps he was away in New York on one of his frequent trips to meet with Wall Street speculators,¹¹⁷ or perhaps he thought of her as just another former slave who had made their way to Knoxville following the war, including presumably some who had once belonged to his own family. In fact, around the time Sallie tried to see McGhee, there lived in Knoxville a separate Black branch of the McGhee name.

Charles McGhee's father, John McGhee, owned a man by the name of Abraham McGhee.¹¹⁸ Abraham married Sarah McGhee, and together they had three sons.¹¹⁹ The oldest of Abraham and Sarah's children was likely born on the McGhee plantation and was named Barclay, perhaps after John's father and Charles's grandfather.¹²⁰ John McGhee sold Abraham and his family to John A.

111. *Id.* at 267.

112. Tyson Junior High School opened in 1936 in Knoxville, Tennessee, as a whites-only school. See John Shearer, *Office Workers Go Old School at Tyson Junior High Building*, KNOXVILLE NEWS SENTINEL (July 12, 2018, 8:25 AM), <https://www.knoxnews.com/story/shopper-news/bearden/2018/07/12/tyson-junior-high-made-into-office-space-holds-memorabilia-school/760026002/>. As recently as 1972, the school was the subject of a desegregation lawsuit. See *Goss v. Bd. of Educ.*, 340 F. Supp. 711, 723–24 (E.D. Tenn. 1972).

113. MacArthur, *supra* note 89, at 268–69.

114. *Id.* at 274.

115. Dr. Drew Gilpin Faust served as the twenty-eighth president of Harvard Univ. from July 2007 to June 2018. *Drew Gilpin Faust*, HARV. U., <https://www.harvard.edu/about-harvard/harvard-glance/history-presidency/drew-gilpin-faust> [<https://perma.cc/ZQQ3-HKT8>] (last visited Feb. 25, 2021). Dr. Faust is Lawrence Tyson's great-granddaughter. Drew Gilpin Faust, President of Harvard University, To Be "a Speaker of Words and a Doer of Deeds:" Literature and Leadership (Mar. 24, 2016) (transcript available at <https://www.harvard.edu/president/speeches-faust/2016/to-be-a-speaker-of-words-and-a-doer-of-deeds-literature-and-leadership/> [<https://perma.cc/RD4D-6T9M>]). Her father, McGhee Tyson Gilpin, was the son of Isabella Tyson Gilpin, Lawrence Tyson's daughter. *Tyson, Lawrence D.*, OUR CAMPAIGNS, <https://www.ourcampaigns.com/CandidateDetail.html?CandidateID=36697> [<https://perma.cc/VS9C-AGFW>] (last modified Sept. 9, 2007, 10:24 PM).

116. Transcript of Record, *supra* note 7, at 8 (noting that Sallie and Joseph called on "the general ticket agent, not finding Col. McGhee at home").

117. MacArthur, *supra* note 89, at 38, 95, 101.

118. See PAUL D. NELSON, FREDRICK L. MCGHEE: A LIFE ON THE COLOR LINE, 1861–1912, at 6 (2002) (noting that Abraham had been owned as a young man by the white McGhees).

119. *See id.*

120. *See id.*; MacArthur, *supra* note 89, at 1. Barclay McGhee, Abraham and Sarah's oldest son, was twenty-three years old in 1870 when Abraham died, which means that Barclay was born on or about 1847, approximately one year before John McGhee sold Abraham and his family. *Id.*

Walker, one of the wealthiest land and slave owners in Mississippi.¹²¹ Abraham and Sarah's two remaining sons perhaps were born on the Walker plantation in Mississippi: Matthew, in or about 1850,¹²² and Fredrick on October 28, 1861,¹²³ less than six months after the start of the Civil War.

The war came to the Walker plantation in northeastern Mississippi in February 1864, when Union forces led by General William Sooy Smith retreated back to Memphis after being defeated at West Point in Clay County, Mississippi, by the Confederate Army.¹²⁴ As the Union Army passed through Prairie Station, Mississippi, including the Walker plantation, thousands of slaves fled to join them.¹²⁵ After reaching Memphis, General Smith would write that "about 3,000 able-bodied negroes had taken refuge with us."¹²⁶ "[A]most certainly among" these 3,000 were Abraham, Sarah, and their three children, Barclay, Matthew, and Fredrick, who eventually made their way to a familiar place, Knoxville, the area where Abraham and Sarah had lived as enslaved persons of the white McGhees.¹²⁷

Fredrick, Abraham and Sarah's youngest son, would live to attend Knoxville College;¹²⁸ complete law school in Chicago; become the first Black member of the Minnesota bar; spend a lifetime defending Black men unfairly accused of crimes; and together with W.E.B. DuBois, serve as a founder of the Niagara Movement, the forerunner to the NAACP.¹²⁹ When he died in St. Paul on September 19, 1912, just "six weeks shy of his fifty-first birthday," Dubois eulogized Fredrick as a "staunch advocate of democracy," who defended "the rights of colored men" because "he knew by bitter experience how his own dark face had served as an excuse for discouraging him and discriminating unfairly against him."¹³⁰

Like the white McGhee patriarch, Fredrick died of pneumonia,¹³¹ but unlike Charles, he did not endow his descendants "with a fortune which could last for

121. See NELSON, *supra* note 118 at 5–6. The 1860 Census counts John A. Walker as owning 151 slaves in Monroe County, Mississippi. *Monroe County, Mississippi: Largest Slaveholders from 1860 Slave Census Schedules and Surname Matches for African Americans on 1870 Census*, ROOTSWEB, <http://freepages.rootsweb.com/~ajac/genealogy/msmonroe.htm> [<https://perma.cc/CAR2-9NFL>] (last visited Feb. 25, 2021).

122. NELSON, *supra* note 118.

123. *Id.* at 4–5.

124. *Id.* at 5; see CLAY MOUNTCASTLE, *PUNITIVE WAR: CONFEDERATE GUERRILLAS AND UNION REPRISALS* 89 (2009) (describing the Union's campaign in Mississippi).

125. NELSON, *supra* note 118, at 5.

126. *Id.* at 6.

127. *Id.*

128. Knoxville College was established in 1875 by the United Presbyterian Church to educate former slaves in Mississippi, Louisiana, and Tennessee. See *id.*; *Knoxville College History*, KNOXVILLE COLLEGE, <https://knoxvillecollege.edu/knoxville-college-history/> [<https://perma.cc/MK3A-L25K>] (last visited Feb. 26, 2021).

129. See NELSON, *supra* note 118, at 6–7, 203–04 ("When the twenty-nine colored men met at Niagara Falls in 1905 . . . Frederick L. McGhee of St. Paul was a central figure . . .").

130. *Id.* at 200, 202.

131. *Id.* at 200.

generations.”¹³² He left his widow, Mattie, and their only daughter, Ruth, a family home worth \$6,000 but encumbered by two mortgages; a piece of land in Wisconsin worth \$1,500 but also mortgaged; less than \$500 in the bank; and law books valued at \$900.¹³³ For a time, Ruth supported Mattie, working as a typist in St. Paul; the family left St. Paul for Washington, D.C. in 1919 and later moved to New York City, where Mattie died of stomach cancer in 1933.¹³⁴ Ruth herself died childless in St. Paul, Minnesota, in 1957.¹³⁵ Fredrick’s brother, Matthew, had died unmarried back in 1892, and no trace of the eldest brother, Barclay, remained past 1919.¹³⁶ Thus, “[As] far as anyone knows today, the genetic line begun by Abraham and Sarah McGhee on the John A. Walker farm in northern Mississippi lasted just one generation.”¹³⁷ But back in 1879, when Sallie stopped in Knoxville, Fredrick was barely eighteen years old, orphaned together with his two older brothers, and working as a laborer in the city after having run out of money for his schooling.¹³⁸ He presumably had no social contact with Charles McGhee, vice president of the Memphis and Charleston, President Rutherford B. Hayes’s party host, and head of a family that once owned and sold Fredrick’s own.¹³⁹

Not being able to meet with McGhee, Sallie and Joseph wrote to John A. Grant, the railroad’s superintendent, before continuing their journey to Lynchburg, Virginia.¹⁴⁰ Joseph signed the letter, not Sallie,¹⁴¹ though it appears she could read and write. “We wish to give the road no trouble,” Joseph wrote in a letter dated May 26, 1879, “but do think we are entitled to better treatment while passing over your line, and if the managers cannot guarantee and see that we get better treatment, we will resort to other authorities.”¹⁴² Grant did not reply, but two days later he referred the letter to Reagin, the conductor, with a short note and “request that he state the facts in this case and return this paper to the office as soon as possible.”¹⁴³ The next day, on May 29, 1879, Reagin wrote back to Grant:

I did at first refuse them admittance into the ladies’ coach, but after seeing their tickets and having some talk with them, I told them that they could return to

132. MacArthur, *supra* note 89, at 274.

133. NELSON, *supra* note 118, at 205. The probate proceedings that followed McGhee’s death listed his tangible personal property as consisting only of “four suits, two overcoats, one ruby ring, one gold watch and chain, one stickpin, plus household furnishings at home and in Wisconsin.” *Id.*

134. *See id.* at 205–06.

135. *See id.* at 206.

136. *See id.*

137. *Id.*

138. *Id.* at 4–7.

139. *See supra* notes 107–08, 119–21 and accompanying text.

140. Transcript of Record, *supra* note 7, at 8, 10.

141. *Id.* at 10.

142. *Id.*

143. *Id.*

the car, which they did at Saulsbury. As to using any violence, that I deny, or doing anything that would have hurt a child.¹⁴⁴

That seemed to be the end of the matter until about two months later when, on July 16, 1879, Sallie, together with her husband, Richard A. Robinson, sued the Memphis and Charleston Railroad Company in the United States Circuit Court for the Western District of Tennessee, seeking five hundred dollars in damages for violation of the Civil Rights Act of 1875.¹⁴⁵

IV. THE “QUINTESSENCE OF ABOMINATION”

The Civil Rights Act of 1875, the last piece of civil rights legislation Congress would enact during Reconstruction, was the brainchild of radical Republican Senator Charles Sumner,¹⁴⁶ who was “a staunch proponent of ending segregation dating back to the antebellum era.”¹⁴⁷ His initial bill, introduced in January 1870, “propose[d] to secure equal rights in,” among other things, “railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, . . . church institutions, . . . cemetery associations[,] . . . [and] juries.”¹⁴⁸

Over the next two years, Sumner reintroduced the bill on at least three occasions, and each time the bill failed—either in the Senate Judiciary Committee, where Committee Chairman Lyman Trumbull, a Democrat from Illinois, blocked the bill from reaching the full Senate,¹⁴⁹ or on the Senate floor, where Democrats filibustered it.¹⁵⁰ Meanwhile, in the House, first in 1872 and again in 1874, Representatives William Frye, a Republican from Maine, and Benjamin F. Butler, a Republican from Massachusetts, introduced bills similar in language to Sumner’s.¹⁵¹ Both failed to make it to the House floor for a vote.¹⁵²

When Sumner first introduced the bill, he had hoped to force a vote from Democrats by attaching it as a “rider” to an amnesty bill that would have permitted former federal and state elected officials who had joined the Confederacy to

144. *Id.*

145. *Id.* at 1–2.

146. See CONG. GLOBE, 41st Cong., 2d Sess. 323 (1870); Aderson Bellegarde François, *The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy, and Affirmative Action*, 57 HOW. L.J. 573, 575–76 (2014). With assistance from John Mercer Langston, and co-sponsor Representative Benjamin F. Butler, the Act was eventually passed by Congress in February 1875 and signed into law by President Ulysses S. Grant on March 1, 1875. Civil Rights Act of 1875, ch. 114, 18 Stat. 335. For an analysis of the history and debate of the Act, see generally François, *supra*.

147. François, *supra* note 146; see, e.g., *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 201–04 (1849) (summarizing Sumner’s arguments as counsel for the plaintiff that segregation in Boston public schools was “a violation of equality”).

148. CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870) (statement of Sen. Sumner).

149. See *id.* at 5314 (noting Committee’s agreement “to be discharged from [the bill’s] further consideration” and “indefinite postponement”); CONG. GLOBE, 41st Cong., 3d Sess. 1263 (1871).

150. See CONG. GLOBE, 42d Cong., 2d Sess. 3730–31 (1872).

151. *Id.* at 1116; 2 CONG. REC. 318 (1874).

152. See CONG. GLOBE, 42d Cong., 2d Sess. 2440–41 (1872).

regain eligibility for employment in state and national government.¹⁵³ The strategy failed¹⁵⁴ because at the time Radical Republicans were unwilling to join Democrats to form the two-thirds majority required to grant amnesty.¹⁵⁵ Indeed, in early 1872, the Senate approved the civil rights bill rider by a twenty-eight-to-twenty-eight vote, with Vice President Schuyler Colfax casting the tie-breaking vote.¹⁵⁶ However, the full amnesty bill, to which the civil rights rider was attached, again went down in defeat by two votes, with thirty-three “yeas” and nineteen “nays.”¹⁵⁷ Three months later, following a series of complicated procedural maneuvers in which Sumner’s civil rights bill was decoupled and then recoupled to the amnesty bill,¹⁵⁸ the amnesty bill obtained approval with a majority of votes, thirty-two to twenty-two—still falling short of the required two-third majority.¹⁵⁹ Later that month, when the bill was again up for a vote, Democrats engaged in a filibuster to prevent consideration of the bill.¹⁶⁰ In time, both parties grew weary of the many attempts to pass Sumner’s civil rights bill together with the amnesty bill. Senator George Edmunds lamented, “[T]his subject of civil rights and of amnesty . . . has been before the Senate three or four times, and both bills finally failed because gentlemen who were in favor of each separately would vote against both together.”¹⁶¹

In late 1873, Sumner renewed his attempts when he introduced his civil rights bill, while Butler introduced a civil rights bill in the House.¹⁶² In addition to inns, cemeteries, and juries, Sumner’s bill provided that no citizen would be denied on account of race, color, or previous condition of servitude equal access to “common schools and public institutions of learning.”¹⁶³ In the House, Representative Butler introduced a fairly identical version of the bill, providing for equal access to schools,¹⁶⁴ but it did not garner enough votes to pass.

153. CONG. GLOBE, 42d Cong., 2d Sess. 240–44 (1871).

154. *Id.* at 274.

155. See U.S. CONST. amend. XIV, § 3 (“No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.”).

156. CONG. GLOBE, 42d Cong., 2d Sess. 919 (1872); see *Schuyler Colfax, 17th Vice President (1869-1873)*, U.S. SENATE, https://www.senate.gov/about/officers-staff/vice-president/VP_Schuyler_Colfax.htm [<https://perma.cc/3WFW-QFGQ>] (last visited Feb. 27, 2021).

157. CONG. GLOBE, 42d Cong., 2d Sess. 928–29 (1872).

158. See *id.* at 3268.

159. *Id.* at 3270.

160. See *id.* at 3730–31.

161. *Id.* at 3729 (statement of Sen. Edmunds).

162. 2 CONG. REC. 10 (1874) (statement of Sen. Sumner); *id.* at 318 (statement of Rep. Butler).

163. *Id.* at 945.

164. *Id.* at 318 (statement by Rep. Butler). Butler’s version provided the following civil penalties:

[W]hoever, being . . . any public school supported in whole or in part at public expense or by endowment for public use, shall make any distinction as to admission or accommodation therein of any citizen of the United States because of race, color, or previous condition of

In the November 1874 elections, Republicans lost eighty-nine seats and their majority in the House, effectively ending Reconstruction in the South.¹⁶⁵ Lame-duck Republicans attempted to pass a version of Sumner's bill, but Republicans facing reelection in 1876 declined to continue their support for the bill, with one reasoning: "I do not want to go down with my party quite so deep as the bill will sink it if it becomes the law. . . ."¹⁶⁶ Debate resumed in February 1875 when the civil rights bill was presented with a provision allowing for separate but equal school facilities.¹⁶⁷ Ultimately, almost five years after Sumner first introduced the bill, after more than a dozen votes featuring vigorous debates, a shifting political climate, and Sumner's death, the civil rights bill would finally pass—but without the controversial public schools provision.¹⁶⁸

servitude, shall, on conviction thereof, be fined not less than \$100 nor more than \$5,000 for each offense; and the person or corporation so offending shall be liable to the citizens thereby injured in damages to be recovered in an action of debt.

Id.

165. See generally GILLETTE, *supra* note 13 (discussing Reconstruction in the South).

166. 3 CONG. REC. 982 (1875) (statement of Rep. Chittenden).

167. See *id.* at 938–39 (“[N]othing in this act shall be construed to require mixed common schools and public institutions of learning . . . nor to prohibit separate common schools for different races or colors, provided the facilities, duration of term, and equipments . . . shall be equal. . .”).

168. *Id.* at 1010–11. It is not much of a counterfactual leap to imagine what might have been had the school provision been enacted. After all, the Supreme Court's reasoning that Congress lacked power to reach private action under the Fourteenth Amendment certainly would not have stood in the way of a provision that aimed to forbid racial segregation in public schools. In the end, it took nearly eighty years for the Supreme Court to do with *Brown v. Board of Education* in 1954 what the drafters of the Civil Rights Act attempted to do in 1875. See 347 U.S. 483 (1954). But even then, we have barely managed to get back to 1875. As of this writing, nearly seventy years after *Brown*, American schools remain deeply segregated by race. Few decisions are deemed as historically and constitutionally significant as *Brown*. Legal scholars and historians have characterized it as “perhaps the most important judgment ever handed down by an American Supreme Court,” “the single most honored opinion in the Supreme Court's corpus,” and “nothing short of a reconsecration of American ideals.” Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 2*, 4 (Jack M. Balkin ed., 2001); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 713 (rev. ed. 2004); Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 974 (2005) (book review) (quoting MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 15 (1998)). But as seemingly sacrosanct as the decision has become, as ultimately implemented, the decision has failed in its stated purpose to achieve racial integration in public schools. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518–19 (1980); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976); Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 175–76 (2005); Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939, 942 (2008); Boyce F. Martin, Jr., *Fifty Years Later, It's Time to Mend Brown's Broken Promise*, 2004 U. ILL. L. REV. 1203, 1204, 1208–16 (2004). Moreover, as originally conceived, the decision sacrificed the practical outcome of educational equality for the symbolic goal of racial integration with whites. See Robert L. Carter, *The Conception of Brown*, 32 FORDHAM URB. L.J. 93, 98 (2004) (“[*Brown's*] target had been segregation. We thought that segregation was the evil that had to be bested and with segregation put beyond the pale, African-Americans would no longer be hobbled and scarred by racial discrimination. When we succeeded in securing that objective with the *Brown* decision, however, we found that we had misjudged the target. Segregation was but a symptom of the disease we

The debates over the 1875 Civil Rights Act are significant for a number of reasons, not the least of which is that they served as a legislative rehearsal for the intellectual foundations of Jim Crow. In time, the United States Supreme Court would give judicial imprimatur to the doctrine of “separate but equal,”¹⁶⁹ but a quarter of a century before *Plessy v. Ferguson*, the arguments for racial apartheid had already been perfected during the debates over Sumner’s bill. Thus, opponents of the civil rights bill maintained that it represented an unconstitutional encroachment of federal authority upon states’ rights;¹⁷⁰ that the Reconstruction Amendments intended to give newly freed slaves political and civil, but not social, equality;¹⁷¹ that the bill would be unacceptable to the majority of Southern citizens;¹⁷² and that the bill was an attempt to enforce the sort of social equality that both races would find repugnant.¹⁷³ The “next step,” they argued, would “be that [Blacks would] demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters.”¹⁷⁴ As Senator Joshua Hill of Georgia explained, he was “entitled, and so is the colored man, to all the security and comfort that either presents to the most favored guest or passenger,” but proximity to a person of a different race “does not increase my comfort or

had to best. Eliminating the concept of white supremacy had to be our target if we were to succeed in freeing people of color from the burden of racial bias.”). Or, as one scholar puts it, “*Brown* is of continuing significance mostly as a triumphal narrative that, ironically, serves as rhetorical support for the racial status quo and, only occasionally, as a dim reminder of a constitutional world that might have been.” LOUIS MICHAEL SEIDMAN, *CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS* 146 (2003).

169. *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

170. *See, e.g.*, 2 CONG. REC. 405 (1874) (statement of Rep. Durham).

171. *See* CONG. GLOBE, 42d Cong., 2d Sess. 3189 (1872) (statement of Sen. Trumbull).

172. *See* Finkelman, *supra* note 168, at 1013; *see also* Aderson Bellegarde François, *Borne Back Ceaselessly into the Past: Fisher v. University of Texas, the Freedmen’s Bureau Act, and the “Originalist” Meaning of Color Blindness*, 21 GEO. MASON L. REV. 313, 322–24 (2014) (overviewing debates over the Freedmen’s Bureau Bill in 1866).

173. Some Democrats even asserted that Blacks preferred segregation, stating, “[T]he negro is as much interested in keeping aloof from the white man as the white man is interested in keeping aloof from the negro.” 2 CONG. REC. app. 316 (1874) (statement of Sen. Merrimon). But perhaps Democrat Representative Harper came to the heart of the social relation objection when he stated on the floor of the House:

If Congress has the power to pass this bill and make it a law it has the power to enact laws to regulate the minutest social observances of domestic or fashionable life. If it has the right to say to my neighbor, “You must ride in the same car, eat at the same table, and lodge in the same room with a negro,” it can also say that you must not interpose an objection on account of his color to any advances he may make toward your children or family.

CONG. GLOBE, 42d Cong., 2d Sess. app. 372 (1872) (statement of Rep. Harper); *see* CONG. GLOBE, 40th Cong., 2d Sess. 2449 (1868) (statement of Rep. Beck) (“I can scarcely conceive of a more despotic, galling, and degrading provision in the fundamental law of a State pretending to be free,” referring to a proposed state constitutional provision in Louisiana and South Carolina that would “compel[]” poor whites to send their children to integrated schools); Steven A. Bank, Comment, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 306–07 (1995) (outlining opposition to the Act).

174. 2 CONG. REC. app. 343 (1874) (statement of Rep. Read).

security, nor does proximity to me on his part increase his; and therefore it is not a denial of any right in either case.”¹⁷⁵

On the other hand, proponents believed that the bill was a valid exercise of Congress’s power to enforce the Fourteenth Amendment¹⁷⁶ and that segregation based on race was “an ill-disguised violation of the principle of [e]quality,”¹⁷⁷ “an enactment of personal degradation,” and a form of “legalized disability or inferiority.”¹⁷⁸ One congressman stated that the “legitimate end” of segregation was “the subjugation of the weak of every class and race” and that he would “never give [his] vote or voice to the support of any such pernicious doctrine.”¹⁷⁹ During a colloquy with Senator Hill, Sumner himself pointedly contrasted segregation in railroad cars with the now-integrated Senate: “Why, sir, we have had in this Chamber a colored Senator from Mississippi;”¹⁸⁰ “but according to the rule of the Senator from Georgia we should have set him apart by himself; he should not have sat with his brother Senators.”¹⁸¹ Senator Hill responded, “No . . . it is under the institutions of the country that he becomes entitled by law to his seat here; we have no right to deny it to him,” to which Sumner replied, “Very well; and I intend to the best of my ability to see that under the institutions of his country he is equal everywhere.”¹⁸²

But by far, Republicans reserved the best of their arguments to assuage fears of compulsory private social mixing. Black Republicans, in particular, repeatedly assured Democrats that the “negro is not asking social equality. We do not ask . . . that the two races should intermarry one with the other.”¹⁸³ “[I]t is not social rights that [Blacks] desire. We have enough of that already. What we ask is protection in the enjoyment of *public* rights. Rights which are or should be accorded to every citizen alike.”¹⁸⁴ “We cannot engage in the industrial pursuits, educate our children, defend our lives and property in the courts, receive the comforts provided in our common conveyances . . . when we are circumscribed within the narrowest possible limits on every hand, disowned, spit upon, and outraged in a thousand ways.”¹⁸⁵ In sum, Blacks desired “to have the cloud of proscription removed from

175. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871) (statement of Sen. Hill).

176. *See, e.g., id.* 3192 (1872) (statement of Sen. Sherman).

177. *Id.* at 384.

178. 2 CONG. REC. 3452 (1874) (statement of Sen. Frelinghuysen).

179. 3 CONG. REC. 999 (1875) (statement of Rep. Burrows).

180. Sumner’s statement regarding “a colored Senator from Mississippi” referred to Senator Hiram Revels, the first African-American to serve in the Senate, sworn in on February 25, 1870, just twenty-two days following the ratification of the Fifteenth Amendment. *See* Senate Historical Office, *Hiram Revels: First African American Senator*, U.S. SENATE (Feb. 25, 2020), <https://www.senate.gov/artandhistory/senate-stories/First-African-American-Senator.htm> [<https://perma.cc/H6C4-Z7JV>].

181. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1872) (statement of Sen. Sumner).

182. *Id.*

183. 2 CONG. REC. 344 (1874) (statement of Rep. Rainey).

184. 3 CONG. REC. 944 (1875) (statement of Rep. Lynch).

185. 2 CONG. REC. 383 (1874) (statement of Rep. Ransier).

[their] horizon, that [they] may clearly see [their] way to intellectual and moral advancement.”¹⁸⁶

Not all Black Republicans went out of their way to reassure white Democrats that Blacks were uninterested in social rights, even if those rights indeed meant interracial mixing. Ten years prior to debates over the Act, back on August 8, 1865, during one of the first Colored Conventions,¹⁸⁷ Reverend James Lynch reminded reporters covering the convention, “We are not ashamed of the term ‘negro,’ but to call it a ‘negro convention’ is a lie . . . it is very hard to tell whether there is any pure blood or not, because white men used to love colored women very much. . . .”¹⁸⁸ Ten years later, the convention that met in Nashville in April 1874, as the bill was being debated in Congress, made it even more plain: “Should a colored man be punished simply because he happens to marry a white woman . . . or a colored woman a white man?”¹⁸⁹ Thus, the convention ended with a resolution warning the Republican politicians that Blacks would consider it a betrayal unless they supported the Act of 1875:

We consider the omission of the Republican party to enact this measure a base surrender of the rights of humanity to our insidious foe that has contested upon the avenues of civil life every right we enjoy, as they did every right of freedom on the field of battle. And we will use our utmost to stamp upon every demagogue who seeks to betray the privileges of our children the brand of the traitor Judas, as deserving politically a traitor’s doom, with whom we will never, never, join hands nor support, but will regard as our public and private enemy.¹⁹⁰

In spite of the warning, only a single member of Tennessee’s Republican delegation in the House voted in favor of the Act.¹⁹¹ That lone member: Representative Barbour Lewis, a native of Vermont and an abolitionist, who had first settled in the South as a military judge for occupied Memphis during the war on President Lincoln’s personal recommendation.¹⁹² Other than Lewis, every

186. 3 CONG. REC. 960 (1875) (statement of Rep. Rainey).

187. Starting in 1830 in the North and following the Civil War in the South, African-Americans met in state and national conventions to advocate for civil and political rights. These conventions came to be known as “Colored Conventions.” See *About the Colored Conventions*, COLORED CONVENTIONS PROJECT, <https://coloredconvention.org/about-conventions/s> [<https://perma.cc/6VYF-FA23>] (last visited Mar. 1, 2021); see also Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115, 2117–22 (1996) (discussing the work of the conventions).

188. Judy Bussell LeForge, *State Colored Conventions of Tennessee, 1865–1866*, 65 TENN. HIST. Q. 230, 231 (2006) (first alteration in original).

189. ALAN FRIEDLANDER & RICHARD ALLAN GERBER, *WELCOMING RUIN: THE CIVIL RIGHTS ACT OF 1875*, at 202 (2019).

190. *Id.* at 202–03.

191. See Riva Nowak Kitainik, *A Reexamination of the Civil Rights Act of 1875* (1970) (unpublished M.A. thesis, Hunter College, City University of New York) (on file with author).

192. Walter J. Fraser, Jr., *Barbour Lewis: A Carpetbagger Reconsidered*, 32 TENN. HIST. Q. 148, 149, 152–53 (1973).

other member voted no or abstained.¹⁹³ Perhaps the most vocal opponent among the state's congressional delegation was Senator William Brownlow, who predicted that the bill's school desegregation clause would cause "the whole school fabric in Tennessee [to] at once fall to the ground, as it will deserve to do."¹⁹⁴ Though Brownlow was at one time a "friend of the Negro,"¹⁹⁵ his opposition was not necessarily surprising. On the eve of the Civil War, Brownlow believed "free blacks should be forcibly sent to Liberia,"¹⁹⁶ that slavery was ordained by God because "the Scriptures clearly teach that it will exist even to the end of time,"¹⁹⁷ and that slavery had rescued Black people from "cruelty, starvation, and nakedness."¹⁹⁸ At the same time, Brownlow was an ardent unionist, arguing, "I will sustain Lincoln if he will go to work to put down the great Southern mob that leads off in such a rebellion."¹⁹⁹ Nominated for governor in January 1865 at a state constitutional convention convened to abolish slavery and renounce Tennessee's withdrawal from the Union,²⁰⁰ Brownlow would eventually support the disenfranchisement of white ex-Confederates and the enfranchisement of newly freed Blacks.²⁰¹

Yet, as Congress considered the 1875 Act, Brownlow, who believed in the Union but not in racial equality, warned that Black people should "[b]e careful upon insisting upon that which can do no good."²⁰² To Brownlow, Black people "seem[ed] to have reversed Taney's [*Dred Scott*] decision and proclaimed in substance that a white man has no rights which a negro is bound to respect."²⁰³ He went even further: "I do not believe that the personal freedom of all the white people of the South, and all their rights of self-government, should be sacrificed to accommodate a few thousand insolent negroes, or to gratify the caprices of negro-worshipping white men. . . ."²⁰⁴

We know that Brownlow was personally acquainted with Charles McGhee and paid particularly close attention to him as an important constituent. Indeed, McGhee

193. See Kitainik, *supra* note 191.

194. MARY NIALL MITCHELL, *RAISING FREEDOM'S CHILD: BLACK CHILDREN AND VISIONS OF THE FUTURE AFTER SLAVERY* 220 (2008).

195. Prior to the Civil War, William "Parson" Brownlow, a Methodist preacher, had been a proslavery ideologue. Kyle Osborn, *Reconstructing Race: Parson Brownlow and the Rhetoric of Race in Postwar East Tennessee*, in *RECONSTRUCTING APPALACHIA: THE CIVIL WAR'S AFTERMATH* 167 (Andrew L. Slap ed., 2010). After the war, he transformed himself into a radical Republican who championed Black enfranchisement because he saw the opportunity to align himself with the Republican Party in general and the Black vote in particular as a path to power. See *id.* First elected Governor of Tennessee in 1865, he was reelected in 1867, an election in which he received the vast majority of the Black vote. See generally *id.*

196. James C. Kelly, *William Gannaway Brownlow, Part I*, 43 TENN. HIST. Q. 25, 35 (1984).

197. *Id.* (citing E. MERTON COULTER, *WILLIAM G. BROWNLOW: FIGHTING PARSON OF THE SOUTHERN HIGHLANDS* 95 (University of Tennessee Press 1971)).

198. *Id.* at 38.

199. *Id.* at 39 (quoting W.G. BROWNLOW, *SKETCHES OF THE RISE, PROGRESS, AND DECLINE OF SECESSION; WITH A NARRATIVE OF PERSONAL ADVENTURES AMONG THE REBELS* 205–06 (Philadelphia, George W. Childs 1862)).

200. James C. Kelly, *William Gannaway Brownlow, Part II*, 43 TENN. HIST. Q. 155, 158–59 (1984).

201. Osborn, *supra* note 195, at 164–65.

202. FRIEDLANDER & GERBER, *supra* note 189, at 204.

203. *Id.*

204. *Id.* at 204–05.

and his railroad associates paid substantial bribes to Brownlow to facilitate their not-always-lawful speculations on railroad bonds.²⁰⁵ But there is no evidence to suggest that Brownlow's fierce opposition to the 1875 Act was motivated by concerns for its potential impact on the Memphis and Charleston. At the time of debate over the Act, though marriage between the races was unlawful, there was no constitutional or statutory provision in Tennessee requiring racial segregation in places of public accommodation. Rather, Brownlow's opposition to the Act, like that of the vast majority of whites in Tennessee and the South, seems to have been motivated by the perceived threat that race mixing in social settings, including railroad travel, posed to the social hierarchies that whites in general and white males in particular had come to take for granted prior to the war.²⁰⁶ Indeed, on March 24, 1875, a mere twenty days after passage of the 1875 Act, the Tennessee legislature abolished the common law rule requiring railroads and other common carriers to carry all persons with a valid ticket and replaced it with a new provision, permitting carriers at their discretion to deny service to anyone with or without cause.²⁰⁷

V. "NO LAW CAN SAY ALL MEN SHALL BE EQUAL SOCIALLY"

Once the Supreme Court handed down its decision invalidating the Act, a majority of white newspapers treated the decision not only as correct but inevitable.²⁰⁸ Indeed, numerous editorials commented that the legislation had been "a

205. See COULTER, *supra* note 197, at 380.

206. See Mack, *supra* note 41, at 381–82 ("Like other nineteenth-century Americans, Tennesseans first responded to the social spaces that railroad travel created by reorganizing them into the familiar [antebellum] world of patriarchy, where middle-class white women, when they entered the public sphere, remained under the protection of white men."); Welke, *supra* note 41, at 266 (describing postwar white Southerners' commitment to maintaining the existing social structure and their "unwavering goal" to "protect white womanhood"); see also Scott, *supra* note 41, at 781–82 (explaining how the "claim of equal standing in public," including railway travel, "directly challenged the effort to impose white supremacy").

207. Act of Mar. 24, 1875, ch. 130, § 1, 1875 Tenn. Pub. Acts 216, 216–17.

208. See CHARLES FAIRMAN, 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88, at 568–88 (1987). For example, the *New York Times* wrote:

Finally after eight years in which the law has been practically a dead letter, the Supreme Court has decided, as it was evident it must decide, that the act was unconstitutional. But while the law has, in one sense, been inoperative, in another it has been of great influence. . . . It has kept alive a prejudice against the negroes and against the Republican Party in the South. . . .

Id. at 571 (second alteration in original). According to the *New York Tribune*,

For practical purposes the Civil Rights Act of 1875 has ever been a dead letter. . . . It can hardly be doubted that these efforts, and occasional demands by colored citizens under the authority of the law, have tended to irritate public feeling, to keep alive antagonism between the races, and to postpone that gradual obliteration of that unreasonable race distinction which the march of events since emancipation has tended to bring about.

Id. A Philadelphia newspaper concluded, "There is no doubt that the . . . act did much to retard the healthy incorporation of the negro citizen into the body politic as a voter and taxpayer." *Id.* at 573 (alteration in original). A Baltimore newspaper predicted that the invalidation of the Act was unlikely to result in the denial of equal public accommodations for Black people: "It is conceded that in some localities the colored people may be denied certain privileges which have never been other than grudgingly granted them under the Civil Rights bill, but that this will be generally the case is not

dead letter” from its inception and that the Court’s decision was essentially an act of mercy, killing a statute that should have never been passed and was rarely used.²⁰⁹

In truth, however, Black people did aggressively test the application of the Act the moment it came into effect, with varying results and sometimes tragic consequences. Between 1865 and 1896, there were at least twenty-four reported federal cases of Black people using civil suits—mainly under the 1875 Act and later under the Fourteenth Amendment—to vindicate their rights to public accommodation.²¹⁰ These reported cases were a fraction of the total number of cases initiated under the Act.²¹¹ From newspaper reports, we know that many more actions were brought and resolved without a reported opinion.

For example, on March 5, 1875, barely four days after the Act’s enactment, a Black man filed a complaint against a saloon keeper in Wilmington, North Carolina, for refusing to sell him liquor; however, he had his case dismissed on the ground that the Act “did not apply to bar-rooms.”²¹² Five days later, on March 10, 1875, a Black man, citing the new Act, asked to be served at a bar in St. Louis, Missouri.²¹³ The bartender refused and chased him out at the point of a gun; when another Black man tried to intervene, the bartender shot him dead.²¹⁴ At around the same time, on March 12, 1875, four Black men filed a complaint with the United States Commissioner in Montgomery, Alabama, against Cal Wagner, a popular white minstrel entertainer, for refusing them admission to his show.²¹⁵ This likely was a deliberate test case because, as newspapers reported, “[t]he negroes who made the application for arrest are prominent politicians there, and two of them were defeated in the last election for county offices.”²¹⁶

dreamed of.” *Id.* at 574. In contrast, the Black press had a markedly different reaction to the decision. See generally Marianne L. Engelman Lado, *A Question of Justice: African-American Legal Perspectives on the 1883 Civil Rights Cases*, 70 CHI.-KENT L. REV. 1123 (1995). For example, on the day of the decision, an editor of the *New York Globe* wrote, “The colored people of the United States feel to-day as if they had been baptized in ice water. . . .” *Id.* at 1123 (quoting T. Thomas Fortune, *The Civil Rights Decision*, N.Y. GLOBE, Oct. 20, 1883, at 2, reprinted in LESLIE H. FISHEL, JR. & BENJAMIN QUARLES, *THE NEGRO AMERICAN: A DOCUMENTARY HISTORY* 315 (1967)). For further analysis of the Black press’s responses and “dissents” to unfavorable opinions, see generally David Wycoff, *Legislation Especially for the Negro?: The Black Press Responds to Early Supreme Court Civil Rights Decisions*, 3 YALE J.L. & LIBERATION 38 (1992).

209. See FAIRMAN, *supra* note 208, at 570–71, 574, 577, 580, 584.

210. Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the “Separate but Equal” Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17, 21 & n.19 (1984).

211. See, e.g., *id.*

212. *Civil Rights: The First Case in Wilmington, N.C., Dismissed — No Application to Barrooms*, N.Y. TIMES, Mar. 6, 1875, at 1.

213. *The Civil Rights Bill: Enforcing Recognition of Social Equality—A Negro Shot Dead*, N.Y. TIMES, Mar. 11, 1875, at 1.

214. *Id.*

215. *Civil Rights.: Arrest of a Theatre Proprietor Who Refused to Admit Negroes*, N.Y. TIMES, Mar. 13, 1875, at 1; see DAVID MONOD, *THE SOUL OF PLEASURE: SENTIMENT AND SENSATION IN NINETEENTH-CENTURY AMERICAN MASS ENTERTAINMENT* 222–23 (2016) (describing the popularity of minstrels, including “Happy” Cal Wagner).

216. *Civil Rights.: Arrest of a Theater Proprietor Who Refused to Admit Negroes*, *supra* note 215.

Weeks later, in what were likely the first recorded cases, the United States District Courts for the Eastern and Western Districts of North Carolina ruled that the Act was unconstitutional, with the western district court reasoning that “no law, human or divine, can compel” an innkeeper to accommodate all guests and that “no law can say all men shall be equal socially.”²¹⁷

In some instances, plaintiffs recovered, as was the case of a Black woman by the name of Laparte who recovered \$100 against the St. Louis and Iron Mountain Railroad in Little Rock, Arkansas, for refusing her a seat in the ladies’ car.²¹⁸ And in at least one instance, a defendant was criminally convicted. On August 18, 1883, the owner of a restaurant on Pennsylvania Avenue in Washington, D.C., was convicted under the Act for refusing service to a Black man.²¹⁹ Newspapers reported the case was

[I]n some respects a novel one, since it is the first attempt to enforce the penalty under the second section of the Civil Rights act, . . . and it is the first effort made to enforce the criminal provisions of the law in the Territory, where the Congress of the United States has exclusive and absolute legislative jurisdiction.²²⁰

But far more often, courts ruled that the Act was either inapplicable to the establishment in question or unconstitutional. For example, again during the same month the Act was passed, in March 1875, in Memphis, Tennessee, four years before Sallie would bring her own action, the United States circuit court instructed a grand jury, for jurisdictional reasons, not to return an indictment on the charge of denying equal enjoyment of public accommodations to a Black man.²²¹ As the court explained, “[T]he Federal Government had no power whatever to restrain such an offense as this.”²²²

These challenges were not only occurring in the South. In San Francisco, California, a Black man sued Swain’s restaurant after he and his two white friends were refused service.²²³ In September 1875, the Mount Moriah Cemetery Association in Philadelphia, Pennsylvania, refused to accept the funeral cortege of a Black man, a well-known caterer in the city, whose wife had purchased a plot for the burial.²²⁴ In Jersey City, New Jersey, the pastor of the African Methodist Episcopal Zion Church directed his counsel to take action against an ice-cream parlor owner who refused to serve him and his daughters; the owner,

217. *The North Carolina Judges on the Civil Rights Bill*, N.Y. TIMES, May 2, 1875, at 9.

218. *Judgment in a Civil Rights Case*, N.Y. TIMES, Dec. 14, 1875, at 1.

219. *At the National Capital: Convicted for Refusing Accommodation to a Colored Man*, N.Y. TIMES, Aug. 19, 1883, at 5.

220. *Id.*

221. *See Civil Rights: Charge of Judge Emmons, of the United States Circuit Court, in Memphis—Congress Does Not Give the Court Jurisdiction in Cases of Denial of Privileges in Inns and Theatres*, N.Y. TIMES, Mar. 23, 1875, at 7.

222. *Id.*

223. *See To Test the Civil Rights Act*, N.Y. TIMES, Sept. 10, 1883, at 2.

224. *See A Civil Rights Burial Case*, N.Y. TIMES, Sept. 29, 1875, at 1.

consulting his own counsel, argued that he “had a right to refuse or wait upon whom he chose” because, unlike an inn or hotel, an ice-cream parlor was not a place of public accommodation.²²⁵ Similarly, in March 1875, a court dismissed the indictment of the owner of a billiard hall in Trenton, New Jersey, who had been arrested for refusing to let two Black men play.²²⁶ The court maintained that, unlike an inn or a hotel, a billiard room did not represent the sort of public accommodation to which the Act applied.²²⁷ It reasoned,

The owner of a billiard saloon has a perfect right to say he will allow no one but Frenchmen to play, or that he will only allow Englishmen to play. No one can compel him to tell why he will not allow Germans or Spaniards, or colored men or anybody else to play. White men have been excluded because the proprietor chose to do it. The Civil Rights bill bestows no superior privileges. It is enough that the late servant is as his master.²²⁸

And yet, while the vast majority of jurisdictions refused to enforce the Act, Black plaintiffs continued to invoke the statute to demand equal public accommodations until the very end. Thus, on June 15, 1883, three months before the Supreme Court would invalidate the Act, the United States district court in Austin, Texas, held that it was unconstitutional in a suit brought by a Black woman against the Houston and Texas Central Railroad for denying her access to the non-smoking ladies’ car.²²⁹ The court presumably dismissed an additional “[n]ineteen suits of a similar nature” that “were dependent on the decision in [that] case.”²³⁰

VI. SINGING WITH “WONDERFUL PATHOS” THE “QUAINT, WEIRD, TOUCHING SONGS OF THE SLAVE CABIN”

Sallie’s case was the last case to reach the Supreme Court on the constitutionality of the 1875 Act. It joined five prior cases that had made their way to the Court starting a few months after passage of the Act: *United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *United States v. Hamilton*.²³¹

On October 10, 1875, Bird Gee, who had been born into and escaped slavery, sat down at the table in the dining room of a hotel in Kansas.²³² Later, Gee would

225. *Rights of Colored Men.: The Jersey City Case—What Is Said by Mr. Griffiths and Mr. Dohrman*, N.Y. TIMES, Sept. 2, 1879, at 8.

226. *Civil Rights in Trenton.: A Billiard Saloon Not Within the Provisions of the Civil Rights Law*, N.Y. TIMES, Mar. 26, 1875, at 12.

227. *Id.*

228. *Id.*

229. *See Against the Civil Rights Act*, N.Y. TIMES, June 16, 1883, at 1.

230. *See id.*

231. *See supra* note 9 and accompanying text; *infra* notes 262–69 and accompanying text.

232. *See MILLER, supra* note 39; *Our Topeka Letter: Various Items from the State Capital*, WATERVILLE TELEGRAPH, Apr. 14, 1876, at 2.

claim that he had simply stopped for a meal.²³³ His grandnephew, Loren Miller, who would serve as lead counsel in *Shelley v. Kraemer*, the Supreme Court's decision holding private race-based covenants unenforceable,²³⁴ would in time write a book recounting family lore that Gee was "a contentious man as far as his rights were concerned" and likely went to the restaurant "to test his rights under the Civil Rights Act of 1875, passed by Congress and signed by President Ulysses S. Grant only a few short months before."²³⁵ Whatever the reason Gee entered the hotel that day, when one of the guests apparently objected to sharing the table with a Black man, Murray Stanley, the son of the owner, David Stanley, ejected Gee from the restaurant.²³⁶ George R. Peck, the U.S. Attorney for the District of Kansas, "a veteran of Sherman's march to the sea" and future president of the American Bar Association,²³⁷ secured an indictment against Murray Stanley for violation of the Act.²³⁸ After Murray entered a demurrer, challenging the constitutionality of the Act, Judges Cassius Gaius Foster and John Forrest Dillon, both appointed to the bench by President Grant, sitting in circuit and unable to agree, filed a certificate of division to the Supreme Court.²³⁹

On January 4, 1876, Charles Green, a Black man, went to the Maguire's New Theater in San Francisco for a performance of the Tennessee Jubilee Singers, advertised as the "most superb colored company in America" who sang "with wonderful pathos and power the quaint, weird, touching songs of the slave cabin and the camp meetin' down in de wilderness."²⁴⁰ Although a "smash hit," the group was only a "knockoff" of the Fisk Jubilee Singers from Fisk University.²⁴¹ The school had been founded "barely six months after the end of the Civil War" and would, in time, serve as the alma mater of W. E. B. Dubois.²⁴² The company, still in existence today, toured the United States and Europe, introducing performance of Black spirituals to a wide audience at a time when minstrel shows of white performers in blackface had become one of the country's most popular forms of entertainment.²⁴³ When Green presented himself at the door along with a white male friend, the doorkeeper informed him, "We don't admit no negroes

233. See MILLER, *supra* note 39.

234. 334 U.S. 1, 2, 20 (1948).

235. MILLER, *supra* note 39.

236. *Our Topeka Letter: Various Items from the State Capital*, *supra* note 232; *The Civil Rights Cases*, BROWN COUNTY WORLD (Hiawatha, Kan.), Oct. 25, 1883, at 2.

237. *History of the United States Attorney District of Kansas*, U.S. DEP'T JUST., <https://www.justice.gov/usao-ks/history> [<https://perma.cc/6E6E-KT9Q>] (last updated Aug. 26, 2020).

238. Transcript of Record at 1–2, *United States v. Stanley* (The Civil Rights Cases), 109 U.S. 3 (1883) (No. 1).

239. See *id.* at 4–5.

240. WEINER, *supra* note 39, at 218.

241. *Id.*

242. *Fisk University History*, FISK UNIVERSITY, <https://www.fisk.edu/about/history/> [<https://perma.cc/WG76-AQTJ>] (last visited Mar. 4, 2021).

243. See *About the Fisk Jubilee Singers*, FISK JUBILEE SINGERS, <http://fiskjubileesingers.org/about-the-singers/> [<https://perma.cc/3N58-FNQ8>] (last visited Mar. 4, 2021); Mario Rups, *The Fisk Jubilee Singers: Preserving African American Spirituals*, SMITHSONIAN LIBR. & ARCHIVES (Feb. 22, 2018), <https://blog.library.si.edu/blog/2018/02/22/fisk-jubilee-singers/> [<https://perma.cc/BG5A-8YYZ>].

into this theater.”²⁴⁴ Green refused to leave, and when a small crowd gathered, the doorkeeper relented, telling him that they could sit in the cheaper balcony seats instead of the more expensive orchestra ticket he had already purchased.²⁴⁵ The U.S. Attorney initiated criminal proceedings against Thomas Maguire, the owner of the theater, but a jury acquitted him after the presiding judge excluded much of the evidence showing that the doorkeeper acted under Maguire’s directions in discriminating against Blacks.²⁴⁶ Following Maguire’s acquittal, the U.S. Attorney initiated a second action arising from the theater’s denial of equal access to another Black man, George Tyler; this time, instead of naming Maguire as the defendant, the indictment charged the doorkeeper, Michael Ryan, for violating Tyler’s rights under the Civil Rights Act of 1875.²⁴⁷

On May 22, 1876, W. H. R. Agee, a Black man, sought to stay at the Nichols House, an inn in Jefferson City, Missouri, but the owner, Samuel Nichols, refused.²⁴⁸ James Botsford, the U.S. Attorney for the Western District of Missouri, appointed by Ulysses S. Grant,²⁴⁹ obtained an indictment against Nichols for violating the 1875 Act.²⁵⁰ In response, Nichols initially entered a not-guilty plea, but he subsequently withdrew it and filed a demurrer to the indictment on the ground that the 1875 Act was unconstitutional and void.²⁵¹ The case was originally assigned to Judge Arnold Krekel, a former colonel in the Union Army appointed to the bench by President Lincoln.²⁵² On Nichols’s demurrer, Judge Krekel certified the question to the circuit court.²⁵³ He sat in circuit with Judge John F. Dillon, the very same judge who had certified the *Stanley* case.²⁵⁴ Unable to agree, they then certified the question to the Supreme Court as *United States v. Nichols*.²⁵⁵

On the morning of November 22, 1879, William R. Davis, a twenty-six-year-old business agent for the *Progressive American*, a weekly Black newspaper, bought two tickets for the matinée performance of Victor Hugo’s drama *Ruy Blas*, featuring the actor Edwin Booth, the “brother of President Lincoln’s

244. WEINER, *supra* note 39, at 219.

245. *Id.*

246. *Id.* at 220–23.

247. *Id.* at 223.

248. See *Indictment Under the Civil Rights Bill—General Court Proceedings—Candidate for the Legislature*, ST. LOUIS DAILY GLOBE-DEMOCRAT, Sept. 9, 1876, at 3 (reprinting in full the indictment brought against Nichols in the United States District Court for the Western District of Missouri).

249. See Ulysses S. Grant, Calendar: January 7, 1871, in 21 THE PAPERS OF ULYSSES S. GRANT: NOVEMBER 1, 1870–MAY 31, 1871, at 407, 407 (John Y. Simon ed., 1998).

250. Transcript of Record at 3–4, *United States v. Nichols* (The Civil Rights Cases), 109 U.S. 3 (1883) (No. 3).

251. *Id.* at 2, 4–5.

252. Dorris Keeven-Franke, *Arnold Krekel*, ST. CHARLES COUNTY HIST., <https://stcharlescountyhistory.org/2018/02/26/arnold-krekel/> [<https://perma.cc/SKN5-PTL9>] (last visited Mar. 4, 2021); *Krekel, Arnold*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/krekel-arnold> [<https://perma.cc/WSV5-33L7>] (last visited Mar. 4, 2021).

253. Transcript of Record, *supra* note 250, at 1, 3.

254. *Id.* at 6; see *supra* note 239 and accompanying text.

255. Transcript of Record, *supra* note 250, at 6.

assassin,” at the Grand Opera House in New York City.²⁵⁶ When Davis, who had been born a slave in South Carolina “of full African blood,” and his companion, described as a “bright octoroon, almost white” woman, arrived at the theater, the doorman refused to accept their tickets and directed them to the box office for a refund.²⁵⁷ Davis instead arranged for a young boy to buy two new tickets.²⁵⁸ With new tickets in hand, Davis and his female companion returned to the theater separately; she was admitted, but when he attempted to follow her, the doorman again refused and called the police to have Davis removed.²⁵⁹ Pressed by Davis, a U.S. Attorney for the Southern District of New York obtained an indictment against Samuel Singleton, the doorkeeper, for violating the 1875 Act.²⁶⁰ A two-judge panel split on the constitutionality of the Act and certified the case to the Supreme Court as *United States v. Singleton*.²⁶¹

Although these four cases, together with Sallie’s suit, would be joined in the Supreme Court’s final opinion, a sixth case was actually certified to the Court on the question of the constitutionality of the Act. On April 21, 1879, James Hamilton, a conductor for the Nashville, Chattanooga and Saint Louis Railway Company, refused to seat M. L. Porter, a Black woman traveling from Nashville to Lebanon, Tennessee, in the first-class ladies’ car for which she had purchased a ticket.²⁶² On May 10, 1879, James Warder, the U.S. Attorney for the District of Middle Tennessee, obtained an indictment against Hamilton, who moved to quash the indictment on the grounds that the Civil Rights Act of 1875 was unconstitutional.²⁶³ Judge David M. Key, a former lieutenant colonel in the Confederate Army and senator from Tennessee, who was appointed to the bench by President Hayes, certified the question to the circuit court.²⁶⁴ Key, who gained his senate seat in 1875 after Andrew Johnson’s death, did not have the chance to vote on the 1875 Act when the Senate approved it on February 27, 1875.²⁶⁵ But in an 1885 speech before the Tennessee Bar Association, two years after the Court invalidated the Act, Key subtly mocked the argument that whites found offensive the presence of Blacks in first-class cars:

So long as a colored passenger occupies a servile position, he may ride anywhere. Let a woman black as midnight be the nurse of a white child, or a man equally as dark be the servant of a white man [and] there is never the slightest objection to their having seats in the ladies car or any other. All the scents of Africa or from it are inoffensive; but let these same two persons by saving the

256. WEINER, *supra* note 39, at 216.

257. *Id.* at 216–17.

258. *Id.* at 217.

259. *Id.*

260. *Id.*

261. *Id.* at 218.

262. Certificate of Division at 1, *United States v. Hamilton*, 109 U.S. 63, 63 (1883) (No. 204).

263. *Id.* at 2.

264. *Id.*; see *David M. Key*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/David-M-Key> [<https://perma.cc/R3CC-ANTT>] (last updated Jan. 30, 2021).

265. See *David M. Key*, *supra* note 264.

wages earned in such service become the owners of property and undertake to travel upon their own business, and they will in many lines be turned out of the ladies car into the smoker as repulsive to those aboard the better car.²⁶⁶

Joining Key in certifying the case was Circuit Judge John Baxter, a native of Tennessee who had opposed secession and served as a delegate to the East Tennessee Convention in 1861, which considered creating a new union-aligned state of East Tennessee.²⁶⁷ Key and Baxter split on the constitutionality of the Act and filed a certificate of division with the Supreme Court on November 23, 1880.²⁶⁸ On October 15, 1883, the same day the Court issued its opinion on the consolidated *Civil Rights Cases*, the Court held that the certificate of division had been improperly granted because it “[could not] take cognizance of a division of opinion between the judges of a circuit court upon a motion to quash an indictment.”²⁶⁹

VII. “WHY DID YOU CALL [HER] GIRL?”

On January 27, 1880, Sallie’s case went to a jury trial before Judge Eli Shelby Hammond,²⁷⁰ a former lieutenant in the Confederate Army who was appointed to the bench in 1878 by President Hayes,²⁷¹ as part of his campaign to make amends to the South following Reconstruction.

Representing Sallie and her husband was William Mortimer Randolph,²⁷² former City Attorney for Memphis and future president of the Memphis Bar and Library Association.²⁷³ Born in Tennessee and raised in Arkansas, Randolph studied law under Augustus Garland, a future member of the Confederate States Congress, U.S. Senator, and Attorney General under President Grover Cleveland.²⁷⁴ Randolph himself would serve as Confederate States District Attorney for the Eastern District of Arkansas.²⁷⁵ After the war, he returned to Memphis, Tennessee, where he opened a law practice.²⁷⁶ He stayed out of politics because, as a former Confederate official, he could not vote.²⁷⁷ When, along with other former Confederates, he was re-enfranchised, he ran and lost as a

266. David M. Key, *The Legal and Political Status of the Negro* (July 2, 1885), in 54 J. NEGRO HIST. 288, 291 (1969).

267. See Charles F. Bryan, Jr., *A Gathering of Tories: The East Tennessee Convention of 1861*, 39 TENN. HIST. Q. 27, 30, 33, 35–36 (1980).

268. Certificate of Division, *supra* note 262, at 2–3.

269. *United States v. Hamilton*, 109 U.S. 63, 63 (1883); see *The Civil Rights Cases*, 109 U.S. 3, 3 (1883).

270. Transcript of Record, *supra* note 7, at 7.

271. Memorial: Hon. Eli Shelby Hammond, 137 F. iii, iii (1905).

272. Transcript of Record, *supra* note 7, at 2.

273. In Memoriam: William M. Randolph, 136 Ark. 611 app. at 622–23 (1918).

274. See *id.* at 620–21; WILLIAM S. SPEER, SKETCHES OF PROMINENT TENNESSEANS 222 (1888).

275. In Memoriam: William M. Randolph, 136 Ark. app. at 621.

276. *Id.*

277. JAMES ALEX BAGGETT, *THE SCALAWAGS: SOUTHERN DISSIDENTS IN THE CIVIL WAR AND RECONSTRUCTION* 239–40 (2003).

Republican candidate for Congress.²⁷⁸ In time, he settled into a successful practice of law.²⁷⁹ Among his partners was none other than Judge Hammond, who shared a law practice with Randolph before his appointment to the bench in 1878,²⁸⁰ two years before he presided over Sallie's case.

The trial lasted two days; the jury consisted of twelve men.²⁸¹ Randolph introduced and read into evidence the letter from Sallie and her nephew Joseph to the railroad, complaining about their treatment at the hands of the conductor; the note from the railroad superintendent, John Grant, to the conductor, C. W. Reagin, asking for an explanation; and the response from Reagin to Grant, insisting he had not harmed Sallie.²⁸² Randolph also likely had Sallie and Joseph testify in person: the transcript of the record, consisting of a handwritten summary rather than an actual transcribed record of the evidence, contains details of the encounter between Sallie, Joseph, and the conductor not included in Sallie and Richard's initial declaration and complaint, their amended declaration and complaint filed after a demurrer by the Memphis and Charleston, or the three letters introduced into evidence. For example, the evidence "tended to show" that Reagin grabbed her arm so roughly that "it was bruised, and remained so for a week or so,"²⁸³ that when Sallie and Joseph went into the smoking-car, they found that it "was as warm and the seats as good, but that it was dark, and [Sallie] could not see whether it was clean";²⁸⁴ and that she needed to be in the first-class car because "smoke made her sick."²⁸⁵

But perhaps the most conclusive indication that Sallie and Joseph appeared and testified at trial is that nowhere in the initial or the amended complaint are Sallie's and Joseph's physical features described.²⁸⁶ The initial complaint described Sallie and Richard as "citizens of the State of Mississippi."²⁸⁷ It also noted Sallie as Richard's wife but otherwise contains nothing about her age, her color, or her appearance.²⁸⁸ The amended complaint and declaration then added that she was "formerly held in a state of slavery, not as a punishment for crime whereof she had been convicted, but has been emancipated therefrom by law and by the Constitution of the United States."²⁸⁹ It further indicated that Richard and

278. *Id.* at 40.

279. *See* In Memoriam: William M. Randolph, 136 Ark. app. at 622.

280. SPEER, *supra* note 274.

281. Transcript of Record, *supra* note 7, at 7, 18–19.

282. *Id.* at 9–10.

283. *Id.* at 7–8. Although Sallie's complaint did allege that the conductor "took her by the arm and jerked her roughly around," there is no indication in either the complaint or the declaration that her arm "was bruised, and remained so for a week." *Id.* at 2, 8. Such information could have only come out through trial testimony.

284. *Id.* at 8.

285. *Id.*

286. *See id.* at 1–4.

287. *Id.* at 1.

288. *Id.* at 1, 3.

289. *Id.* at 4.

Sallie “also [were] persons of African descent.”²⁹⁰ Yet the transcript records that “Sallie J. Robinson was a young, good-looking mulatto woman about 28 years old, and that Joseph C. Robinson was a young man of light complexion, light hair, and light blue eyes.”²⁹¹ More telling still, Sallie’s and Joseph’s descriptions were not part of the presentation of plaintiffs’ evidence but instead as part of the evidence presented on behalf of the defendant railroad.²⁹² In other words, either the transcriber of the record chose to remark on Sallie’s and Joseph’s appearances, or the conductor himself testified that Sallie was a “good-looking mulatto woman” and that Joseph appeared white, in order to support his claim that he thought she was a prostitute.²⁹³

The Memphis firm of Humes & Poston, founded by William K. Poston, a Confederate veteran who, like Randolph, had been disenfranchised after the war,²⁹⁴ handled the defense for the Memphis and Charleston.²⁹⁵ First up was Reagin the conductor. He testified that at the time Sallie tried to enter the first-class car with Joseph, he assumed Joseph was white and that, having been a conductor for a long time, his experience was that “when young white men travelled in company with young colored women it was for illicit purposes, and that white men so travelling with colored women generally conducted themselves in an improper manner and in a manner objectionable to other passengers.”²⁹⁶ Asked to elaborate on exactly how white men traveling with colored women behaved, Reagin explained, “[T]hey generally laughed, and drank, and smoked, and acted disorderly.”²⁹⁷ In response to whether he had “ever excluded a white woman travelling with a white man” from the first-class car, Reagin said that he had and that, on one occasion, he could recall he afterwards found out that the woman was a prostitute.²⁹⁸ Reagin concluded his direct examination by explaining that:

[T]he railroad company had given no instructions to exclude on account of color; that any lady, white or colored, was entitled to go into the ladies’ car[;] . . . and that Joseph C. and Sallie J. Robinson could have done nothing sexually improper in that car without being observed, but might have conducted themselves so as to be offensive to passengers. . . .²⁹⁹

290. *Id.*

291. *Id.* at 8.

292. *Id.*

293. *See id.*

294. *See* Letter from Memphis Citizens Committee to President Andrew Johnson (May 28, 1866), in 10 THE PAPERS OF ANDREW JOHNSON: FEBRUARY-JULY 1866, at 544, 544–45 (Paul H. Bergeron ed., 1992).

295. *See* Transcript of Record, *supra* note 7, at 5.

296. *Id.* at 8.

297. *Id.* at 9.

298. *Id.*

299. *Id.*

On cross-examination, Sallie's counsel asked Reagin, "Why did you call Mrs. Robinson girl[?]"³⁰⁰ Reagin replied, "I did not do so as a term of opprobrium, but it is customary in this country to call young colored women girls, and I did it from force of habit. I do not think every colored woman wanting in virtue, and I want you to understand that."³⁰¹

After Reagin, the railroad put on two Memphis merchants, presumably white men, who testified that they frequently traveled on the Memphis and Charleston with Reagin as conductor and that "he was uniformly polite, courteous, and accommodating towards passengers."³⁰²

In his charge to the jury, Judge Hammond explained that the purpose of the Civil Rights Act of 1875 was "to secure to colored persons equality of right and privilege in the enjoyment of the accommodations mentioned by it,"³⁰³ and that "[i]f a colored person be denied or excluded from any of these for a cause not applicable alike to citizens of every race and color and regardless of any previous condition of servitude, the person aggrieved may recover."³⁰⁴ However, over plaintiffs' counsel Randolph's objections, Judge Hammond continued, "No other cause of exclusion, however wrongful or unjust, is denounced by the statute,"³⁰⁵ and "[t]he statute does not apply if any other reason furnishes the motive for exclusion."³⁰⁶ To make the point clear to the jury, Judge Hammond added, again over the objections from Randolph:

[I]f you find from the evidence that at the time the admittance was denied the conductor suspected her of being a prostitute travelling with a paramour and required them to remain out of the ladies' car until he could investigate that matter, . . . the company is not liable for this penalty.³⁰⁷

Having had all of his objections rejected, Randolph offered a number of alternative instructions, including that the jury should rule against the railroad if it found that Reagin excluded Sallie from the ladies' car either because he thought she was a Black woman traveling with a white man or because Sallie's skin color and the assumption that Joseph was white led Reagin to suppose that Sallie was a prostitute.³⁰⁸ Judge Hammond refused.³⁰⁹ Instead, the judge accepted and read to the jury five alternative instructions submitted by the railroad, including that:

If the proof shows that the conductor at first sent [Sallie] into another car on a suspicion of her being an improper person to go into the ladies' car, . . . the

300. *Id.*

301. *Id.*

302. *Id.* at 10–11.

303. *Id.* at 11.

304. *Id.*

305. *Id.*

306. *Id.* at 12.

307. *Id.* at 12–13.

308. *Id.* at 14–15.

309. *Id.* at 15.

plaintiff cannot recover, for the conductor was entitled to reasonable time to investigate the character of those he deemed suspicious persons. . . .³¹⁰

After deliberating for a few hours, the jury informed the court that it could not reach a decision and asked for further guidance.³¹¹ Judge Hammond reminded them that the law permitted the railroad to temporarily exclude Sallie from the ladies' car if the conductor suspected her of being an "improper character[]," and that, even if his assumption was wrong, "the carrier [would be] liable for damages at common law for wrongful suspicions, but not under [the] statute."³¹²

Raising one last objection, Randolph asked that the court also instruct the jury that the railroad should not be permitted to use the conductor's suspicions to warrant temporary exclusion as a defense unless it "establish[ed] affirmatively by the evidence . . . that such was the character and ground of the exclusion."³¹³ Judge Hammond again refused.³¹⁴ On January 28, 1880, the jury returned with a verdict for the railroad.³¹⁵

VIII. "A MERE CITIZEN" AND NOT "THE SPECIAL FAVORITE OF THE LAWS"

There is little description of the facts that made up the *Civil Rights Cases*, though Sallie's case does command five sentences of the Court's opinions.³¹⁶ This is all the more ironic considering that Sallie's case was so fundamentally different from the other four as to seem like a foreign object grafted unto them. First, except for *United States v. Hamilton*, which the Court ended up procedurally dismissing, all four cases involved intrastate activity, whereas Sallie's was a matter of interstate commerce. Even if one argued, as the U.S. Government ultimately would in its briefs, that the Nichols House and Stanley's hotel catered to all travelers and, therefore, necessarily served some interstate functions,³¹⁷ one could hardly say the same for San Francisco's Maguire theater or New York's Grand Opera House.³¹⁸

310. *Id.* at 17.

311. *Id.*

312. *Id.*

313. *Id.* at 18.

314. *Id.*

315. *Id.* at 18–19.

316. See *supra* note 10 and accompanying text.

317. Brief for the United States at 9, *The Civil Rights Cases*, 109 U.S. 3 (1883) (No. 26, 37 & 105).

318. While the Supreme Court's modern Commerce Clause jurisprudence permits federal regulation of intrastate activity if it has substantial effects on interstate commerce, this was not the case in 1883 when the Court decided the *Civil Rights Cases*. The Court would not develop the so-called "substantial effects" test until 1937, when it ruled that congressional power to regulate interstate commerce,

[I]s plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

But perhaps more to the point, the other companion cases, including *Hamilton*, were all federal criminal prosecutions of private actors, whereas Sallie's case was a civil suit between private parties. One of the through-lines in the Court's Reconstruction jurisprudence is the supposed reluctance to expand federal power, particularly in the sphere of criminal law enforcement. Thus, *Blyew v. United States*, a federal prosecution of two white men for the axe-murders of four members of a Black family;³¹⁹ *United States v. Cruikshank*, a federal prosecution of a white mob for the massacre of three hundred freedmen in Colfax, Louisiana;³²⁰ *Hodges v. United States*, a federal indictment of a white lynch mob;³²¹ and even *United States v. Reese*, a federal indictment of local Kentucky officials for refusing to accept ballots from Black voters,³²² all raised the supposedly unwelcome specter of Congress "set[ting] a net large enough to catch all possible offenders, and leav[ing] it to the courts to step inside and say who could be rightfully detained, and who should be set at large."³²³ But Sallie's case raised no such issue.

Arguably, the only common thread tying Sallie to the other four cases was the one question the Court would ultimately do its best not to answer: whether the Reconstruction Amendments, taken together, meant something more than the prohibition against formal discriminatory state action. Instead, the Court chose to take up the much narrower—and simpler—question of whether Congress had the power under Section 5 of the Fourteenth Amendment or Section 2 of the Thirteenth Amendment to enact the Civil Rights Act of 1875.³²⁴

In holding that Congress lacked the power to reach private discrimination, the Court reasoned that "[t]he first section of the Fourteenth Amendment[,] . . . after declaring who shall be citizens of the United States, and of the several States, is

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (citations omitted). Thus, at the time Sallie sued the Memphis and Charleston, her action fell squarely within the bounds of modern congressional Commerce Clause authority, whereas the other joined cases did not.

319. 80 U.S. (13 Wall.) 581, 583–85 (1872).

320. 92 U.S. 542, 544 (1876). After Louisiana's 1872 gubernatorial election, two candidates declared victory: William Pitt Kellogg, a Republican, and John McEnery, a Democrat. See CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 64–69 (2008). While the disputed election made its way through the federal courts, each camp attempted to appoint local officials. See *id.* at 65–66. In the parish that included Colfax, Louisiana, both sides made judicial appointments, and freedmen gathered at the parish courthouse to support and protect the Republican appointees. JAMES K. HOGUE, UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION 107–08 (2006). In what came to be known as the Colfax Massacre, three hundred white men, most mounted on horseback and armed with rifles, set fire to the courthouse and killed somewhere between sixty-four and several hundred freedmen as they tried to surrender. See *id.* at 109–11. The state made no effort to prosecute the white assailants. Following the massacre, white Democrats let loose a reign of terror over the county so as to foreclose any possibility of local prosecution. See LANE, *supra*, at 129 (describing a "new campaign to kill or expel Republicans").

321. See 203 U.S. 1, 2–4 (1906), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

322. See 92 U.S. 214, 215 (1876).

323. *Id.* at 221.

324. See The Civil Rights Cases, 109 U.S. 3, 8–10, 21 (1883).

prohibitory in its character, and prohibitory upon the States.”³²⁵ As such, “It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”³²⁶ “Positive rights and privileges,” the Court conceded, “are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges. . . .”³²⁷ In short,

[U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.³²⁸

As to congressional power under the Thirteenth Amendment, the Court acknowledged that Congress was not limited to enacting legislation directed at state action.³²⁹ But, the Court wondered, “[c]an the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant[?]”³³⁰ The answer, according to the Court, was that “such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State.”³³¹ And, in a coda to the end of Reconstruction that the Court would echo twenty years later in *Hodges*,³³² the majority concluded:

325. *Id.* at 10.

326. *Id.* at 11.

327. *Id.*

328. *Id.* at 13.

329. *See id.* at 20–21.

330. *Id.* at 24.

331. *Id.*

332. In *Hodges*, the Supreme Court dismissed an indictment under the Civil Rights Act of 1870 against white defendants for the attempted lynchings of a group of Black laborers. *Hodges v. United States*, 203 U.S. 1, 2–5 (1906); *see* Enforcement Act of 1870, ch. 114, §§ 6, 16, 16 Stat. 140. The Court held that such criminal prosecutions went beyond the power of the federal government, reiterating the sentiments of the majority in the *Civil Rights Cases* that it was high time Black people stopped looking to the federal government for special protection:

At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the Fifteenth it prohibited any State from denying the right of suffrage on account of race, color or previous condition of servitude, and by the Thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests

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.³³³

IX. THE RIGHTS OF FREEDOM AND AMERICAN CITIZENSHIP

The majority opinion in the *Civil Rights Cases* has, over the years, attained a nearly unassailable status as constitutional precedent.³³⁴ This is more than a little ironic, for in the context of the Court's Reconstruction-era jurisprudence, the decision did not break any new ground with respect to either the Thirteenth or the Fourteenth Amendment. As early as the *Slaughter-House Cases* in 1873, the Court had already laid the groundwork for a narrow reading of the Thirteenth Amendment,³³⁵ such that it seemed inevitable, not to say redundant, that it would conclude in the *Civil Rights Cases* that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination."³³⁶ Indeed, in *United States v. Cruikshank* in 1876,³³⁷ *Virginia v. Rives* in 1880,³³⁸ and again in *United States v. Harris* in 1883,³³⁹ the Court had either held or commented in dicta that the provisions of the Fourteenth Amendment "have reference to State action exclusively, and not to any action of private individuals."³⁴⁰

The majority opinion's exalted status as precedent is even more puzzling when one considers that the opinion utterly failed to engage, much less answer, the central question posed in every Reconstruction-era case where federal authorities or private litigants invoked the Reconstruction Amendments as sources of new positive rights: whether these "Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship" created new positive rights.³⁴¹ That is the precise question Justice Harlan in his

would be subserved, they taking their chances with other citizens in the States where they should make their homes.

Id. at 19–20.

333. *The Civil Rights Cases*, 109 U.S. at 25.

334. See, e.g., *United States v. Morrison*, 529 U.S. 598, 621–22 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 524–25 (1997); *Romer v. Evans*, 517 U.S. 620, 628 (1996); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1982) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 391 (1978) (Marshall, J., concurring in the judgment and dissenting in part); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 278 (1964) (Black, J., concurring); *Monroe v. Pape*, 365 U.S. 167, 238 (1961) (Frankfurter, J., dissenting in part).

335. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71–78 (1873).

336. *The Civil Rights Cases*, 109 U.S. at 24.

337. 92 U.S. 542, 554–55 (1876).

338. 100 U.S. 313, 318 (1880).

339. 106 U.S. 629, 638–40 (1883).

340. *Id.* at 639 (quoting *Rives*, 100 U.S. at 318).

341. *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

dissent sought to answer in what is arguably the single most carefully reasoned opinion on the Reconstruction Amendments the Supreme Court produced during the Reconstruction—and indeed any—Era.

Justice Harlan's dissent begins and ends with the proposition that the 1787 Constitution;³⁴² the Fugitive Slave Act of 1793;³⁴³ the Fugitive Slave Act of 1850;³⁴⁴ and the Court's own decisions in *Prigg v. Pennsylvania*,³⁴⁵ *Ableman v. Booth*,³⁴⁶ and *Dred Scott v. Sandford*³⁴⁷ committed not just slave states but the entire national government to the cause of slavery.³⁴⁸ That commitment meant, in essence, that because "the right of the master to have his slave . . . [was] guaranteed by the Constitution, the fair implication was that the national government was clothed with appropriate authority and functions to enforce it."³⁴⁹ And while no clause of the 1787 Constitution explicitly empowered Congress to enforce the master's right to his slave, the Court itself in *Prigg* made clear that Congress had implicit authority to do so because "a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection."³⁵⁰ Rather, insofar as the master had the right to his slave, that right was grounded in the Constitution, and Congress had both the authority and obligation to secure that right, as Justice Harlan quoted from *Prigg*, "It would be a strange anomaly and forced construction to suppose that the *national* government meant to rely for the due fulfilment of its own proper duties, and the rights which it intended to secure, upon State legislation, and not upon that of the *Union*."³⁵¹

The point of the Thirteenth Amendment, then, was not to alter the foundational principle that national rights require national enforcement, but rather to create a new national right, which would also be subject to national enforcement. If the 1787 Constitution created a national right of the master to own his slave, the Thirteenth Amendment, as well as the Fourteenth and Fifteenth Amendments, created a new national right "adopted in the interest of liberty" and "inhering in a state of freedom, and belonging to American citizenship."³⁵² The Thirteenth Amendment, according to Justice Harlan's inarguably correct reading, "did something more than to prohibit slavery as an *institution*, resting upon distinctions of race, and upheld by positive law. . . . [I]t established and decreed

342. See U.S. CONST. art. IV, § 2, cl. 3, *superseded* by U.S. CONST. amend. XIII.

343. Ch. 7, 1 Stat. 302, *repealed* by Act of June 28, 1864, ch. 166, 13 Stat. 200.

344. Ch. 60, 9 Stat. 462, *repealed* by Act of June 28, 1864, ch. 166, 13 Stat. 200.

345. 41 U.S. (16 Pet.) 539 (1842).

346. 62 U.S. (21 How.) 506 (1859).

347. 60 U.S. (19 How.) 393 (1857), *superseded* by U.S. CONST. amend. XIV.

348. See *The Civil Rights Cases*, 109 U.S. 3, 28–32 (Harlan, J., dissenting) (reviewing "the relations which formerly existed between the government, whether national or state, and the descendants, whether free or in bondage, of those of African blood").

349. *Id.* at 29.

350. *Id.* at 28 (citing *Prigg*, 41 U.S. (16 Pet.) at 612).

351. *Id.* at 29 (emphasis added) (quoting *Prigg*, 41 U.S. (16 Pet.) at 623).

352. *Id.* at 26.

universal *civil freedom* throughout the United States.”³⁵³ Civil freedom means that “the power of Congress under the Thirteenth Amendment is not necessarily restricted to legislation against slavery” but may be exerted against any and all actions “inconsistent with the fundamental rights of American citizenship.”³⁵⁴ In short:

We have seen that the power of Congress, by legislation, to enforce the master’s right to have his slave delivered up on claim was *implied* from the recognition of that right in the national Constitution. But the power conferred by the Thirteenth Amendment does not rest upon implication or inference. Those who framed it were not ignorant of the discussion, covering many years of our country’s history, as to the constitutional power of Congress to enact the Fugitive Slave Laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in the land, and to establish universal freedom, there was a fixed purpose to place the authority of Congress in the premises beyond the possibility of a doubt. . . . This court has uniformly held that the national government has the power, whether expressly given or not, to secure and protect rights conferred or guaranteed by the Constitution. . . . *That doctrine ought not now to be abandoned when the inquiry is not as to an implied power to protect the master’s rights, but what may Congress, under powers expressly granted, do for the protection of freedom and the rights necessarily inhering in a state of freedom.*³⁵⁵

If the Thirteenth Amendment made civil freedom and the rights inhering in American citizenship, taken altogether, a national right backed by the national authority of Congress, the Fourteenth Amendment, according to Justice Harlan, engineered an even more radical reconstruction of the Constitution in at least three ways. First, by providing that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States, and of the State wherein they reside,”³⁵⁶ Section 1 of the Amendment amounted to a “supreme act of the nation” that instantly brought Black people “into the political community known as the ‘People of the United States.’”³⁵⁷ Second, by providing that states may not infringe upon the privileges and immunities of citizens, nor deny persons due process and equal protection of the laws, and by empowering Congress with the authority to enforce Section 1, the Amendment “present[ed] the first instance in our history of the investiture of Congress with affirmative power, by *legislation*, to *enforce* an express prohibition upon the States.”³⁵⁸ Last, and most importantly, by providing in Section 5 that Congress has the power to enforce the provisions of Section 1, the Amendment gave Congress direct authority to legislate not just

353. *Id.* at 34.

354. *Id.* at 37.

355. *Id.* at 33–34 (second emphasis added) (citation omitted).

356. *Id.* at 46 (quoting U.S. CONST. amend. XIV, § 1).

357. *Id.*

358. *Id.* at 45.

with respect to the prohibitions against states infringing upon an individual's privileges and immunities, due process, and equal protection, but also with respect to the newly created right of American citizenship. As Justice Harlan put it, the Fourteenth Amendment granted Congress power, "in terms distinct and positive, to enforce 'the provisions of this article' of amendment; not simply those of a prohibitive character, but the provisions—all of the provisions—affirmative and prohibitive, of the amendment."³⁵⁹ This meant—and correctly so—that the majority's reading of congressional power under Section 5 as limited to state laws or acts performed under state authority was textually wrong: Section 5 also gave Congress the power to pass any laws to enforce the newly created right of citizenship, which includes those rights "fundamental in citizenship in a free republican government."³⁶⁰

In the end, Justice Harlan responded with his own coda to the majority's claim that Blacks had "emerged from slavery . . . by the aid of beneficent legislation" and must now "take[] the rank of a mere citizen, and cease[] to be the special favorite of the laws."³⁶¹ Justice Harlan reminded the Court that "[i]t is . . . scarcely just to say that the colored race has been the special favorite of the laws," because the Act of 1875 was intended "for the benefit of citizens of every race and color."³⁶² He noted that the "underlying purpose" of that Act and of other legislation,

[H]as been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.³⁶³

Thus, he ended as he began, with slavery:

I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slavery and the rights of the masters of fugitive slaves.³⁶⁴

Justice Harlan continued:

[I]f the recent amendments are so construed that Congress may not, in its own discretion, and independently of the action or non-action of the States, provide, by legislation . . . for the security of rights created by the national Constitution[,] . . . then, not only the foundations upon which the national supremacy has

359. *Id.* at 46 (quoting U.S. CONST. amend. XIV, § 5).

360. *Id.* at 47.

361. *Id.* at 25 (majority opinion).

362. *Id.* at 61 (Harlan, J., dissenting).

363. *Id.*

364. *Id.* at 53.

always securely rested will be materially disturbed, but we shall enter upon an era of constitutional law, when the rights of freedom and American citizenship cannot receive from the nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.³⁶⁵

However, for all of its bracing honesty that the Reconstruction Amendments had to be read and enforced on behalf of a newly freed people with the same vigor with which the country had enforced slavery for the benefit of their former masters; for all of its radical vision that the Thirteenth Amendment not only abolished the institution of slavery but also created a new fundamental right of civil freedom inhering in American citizenship; and for all of its plainly correct reading of congressional enforcement power under the Fourteenth Amendment as extending to the protection of citizenship rights against both private and state violations, Justice Harlan's dissent was missing one analytical element. Nowhere is there an unambiguous articulation of the relationship between the three main pillars of his Reconstruction doctrine: the fundamental right to universal civil freedom of the Thirteenth Amendment, the citizenship rights of the Fourteenth Amendment, and Congress's enforcement powers under both Amendments. Nearly twenty years after the *Civil Rights Cases*, he made the relationship clear in his dissent in *Hodges v. United States*:

[T]he liberty protected by the Fourteenth Amendment against state action inconsistent with due process of law is neither more nor less than the freedom established by the Thirteenth Amendment. . . . [S]uch liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of *all his faculties*. . . ." [T]hese rights . . . are embraced in the liberty which the Fourteenth Amendment protects against hostile state action, when such state action is wanting in due process of law. They are rights essential in the freedom conferred by the Thirteenth Amendment.³⁶⁶

Back in 1883 in Memphis, home of the Memphis and Charleston, newspapers received the Court's decision in the same way as did the vast majority of white-owned newspapers in both the South and North: with near unanimous approval.³⁶⁷ The *Daily Memphis Avalanche* commented that "[t]he unconstitutional civil rights law has been an injury to the colored citizen instead of a benefit and it is safe to predict that its abolition will clear the way for his fair and just treatment in many States."³⁶⁸ The *Memphis Public Ledger* wrote:

365. *Id.* at 57.

366. *Hodges v. United States*, 203 U.S. 1, 35–36 (1906) (Harlan, J., dissenting) (citation omitted) (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

367. See generally FAIRMAN, *supra* note 208 (collecting and excerpting editorials from national and local newspapers on the *Civil Rights Cases* decision).

368. *Id.* at 577.

Those who raise the clamor [against the decision] are a shoddy set of stuck up darkies, too proud to associate with the common, honest, hard working colored people, and altogether too trifling to earn a livelihood by honest toil. The colored masses raise no trouble on this score, and would prefer to be to themselves.³⁶⁹

The *Memphis Appeal*, quoting an editorial from the *Atlanta Constitution*, noted:

For years this bill has hung as a menace over the peace of our people. They have said but little about it because it was a subject on which but little could be said with prudence and wisdom. But without words they were determined that the social equality contemplated by this infamous and malignant bill could never, and should never be put into practice.³⁷⁰

X. LOCOMOTION BECAME RUNNING AWAY AND ENTERTAINMENT BECAME HARBORING

The day the Court announced its decision, Justice Bradley took more than an hour to read the opinion from the bench.³⁷¹ Justice Harlan also spoke from the bench but did not produce his dissent in the same session; he reportedly explained that:

[U]nder ordinary circumstances and in an ordinary case he should hesitate to set up his individual opinion in opposition to that of his eight colleagues, but in view of what he thought the people of this country wished to accomplish, what they tried to accomplish, and what they believed they had accomplished by means of this legislation, he must express his dissent from the opinion of the court.³⁷²

He promised to file the dissent “as soon as possible”;³⁷³ in fact, it appears he took some time to do so.³⁷⁴ Supposedly, he experienced a massive writer’s block and was not able to write until his wife finally intervened by placing on his desk the inkstand Chief Justice Roger Taney had used when writing the majority opinion in *Dred Scott v. Sandford*.³⁷⁵ “I have put some inspiration on your study table,” she reportedly told him.³⁷⁶ The inkstand apparently worked its magic, and “the words seemed to flow almost instantly.”³⁷⁷

369. *Id.* at 578 (alteration in original).

370. *Id.* at 576, 578.

371. *The Civil Rights Act Void: Declared Unconstitutional by the Supreme Court*, N.Y. TIMES, Oct. 16, 1883, at 2.

372. *Id.*

373. *Id.*

374. See LAWRENCE GOLDSTONE, *INHERENTLY UNEQUAL: THE BETRAYAL OF EQUAL RIGHTS BY THE SUPREME COURT, 1865–1903*, at 125 (2011).

375. WEINER, *supra* note 39, at 230.

376. *Id.*

377. *Id.*

Perhaps there is no reason to disbelieve Mrs. Harlan or the role the talismanic inkstand played in inspiring Justice Harlan's dissent, but there is also something a bit apocryphal about the story, particularly because the legal theories underlying the dissent had been outlined by a federal district court judge as far back as 1877, and had been clearly mapped out in the two briefs the United States submitted in 1879 and 1882 in defense of the Act.

On June 8, 1875, barely three months after passage of the Act, Judge Rensselaer Russell Nelson of the United States District Court for the District of Minnesota—the son of Supreme Court Justice Samuel Nelson,³⁷⁸ who had concurred on narrow grounds with Justice Taney's majority *Dred Scott* opinion³⁷⁹—ruled the Act constitutional following a grand jury indictment.³⁸⁰ Judge Nelson confessed, "I have no sympathy with this kind of Congressional legislation, and believe that the State Government should punish all wrong or outrage of this character committed within its limits. . . ."³⁸¹ However, he reasoned,

[A]s the Fourteenth Amendment creates citizenship and guarantees equality of all citizens before the law, I think Congress can provide for the punishment of individuals who deprive any person of the enjoyment of the rights of citizenship and legal equality solely on account of race or color. These rights and privileges are derived from the United States Government and are under its protection.³⁸²

In so reasoning, Judge Nelson cited the same case Justice Harlan would rely on years later for his proposition of expansive federal power to protect individual rights under the Reconstruction Amendments: *McCulloch v. Maryland*. Specifically, he explained:

In the case of McCullach [sic] versus The State of Maryland . . . the construction of the grant of legislative power under the Constitution, as it stood before the recent amendments, was fully discussed, and it was decided that within the grant of power to Congress for purposes of legislation it may select any proper

378. *Rensselaer R. Nelson, Associate Justice, Territorial Supreme Court, 1857-1858*, MINN. ST. L. LIBR., <https://mncourts.libguides.com/rnelson> [<https://perma.cc/9MBL-KHUV>] (last updated July 14, 2020, 9:02 PM).

379. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 457–59 (1857) (Nelson, J., concurring). Justice Nelson reasoned for a much narrower ruling than Chief Justice Taney's majority: Because every state is sovereign over all persons and property within its borders, the question of whether *Dred Scott* became free once he temporarily moved from Missouri to Illinois was to be determined purely by Missouri law. Illinois antislavery laws could no more control Missouri slave property than Missouri slave law could determine the fate of a free Illinois person. *Id.* at 459–65. That reasoning was the very basis upon which Justice Nelson had been originally tasked to write the majority opinion until Chief Justice Taney changed course and assigned himself the opinion. *See* DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 306–09 (1978).

380. *The Supplementary Civil Rights Bill Declared to Be Constitutional by a Democratic Judge*, N.Y. TIMES, June 9, 1875, at 1.

381. *Id.*

382. *Id.*

means of effecting the object in view, and may adopt any which might be appropriate and which were conducive to the end.³⁸³

The briefs the United States submitted in the *Civil Rights Cases* expanded upon Judge Nelson's reasoning.³⁸⁴ In the 1879 term, the United States' brief urged the Court to uphold the Act as a legitimate exercise of Congress's power to regulate commerce and to enforce the Citizenship Clause of the Fourteenth Amendment.³⁸⁵ Defendants Stanley, Ryan, and Nichols filed no brief. In the 1882 term, the United States again filed a brief, this time arguing that, in addition to the Fourteenth Amendment, the Act was a proper exercise of congressional power under the Thirteenth Amendment.³⁸⁶ As in the 1879 briefings, Stanley, Ryan, and Nichols filed no briefs in opposition, and neither did Singleton, whose action had now been joined to the three 1879 cases.³⁸⁷ For her part, Sallie Robinson filed a brief, defending the constitutionality of the Act.³⁸⁸ In its response, the Memphis and Charleston Railroad explicitly declined to argue that the Act was unconstitutional but instead maintained that Judge Hammond was correct to have instructed the jury that the Act did not apply to Sallie: "We think it is not necessary in this case to argue the constitutionality of the act of Congress, as, in our opinion, the case will be disposed of upon the grounds that it is not within either the letter or spirit of said act."³⁸⁹

Commentators often dismiss the Government's briefs in defense of the Act as unimpressive,³⁹⁰ particularly when compared to modern written advocacy before

383. *Id.* (citation omitted).

384. The parties' written briefs represent the best evidence for the advocates' positions before the Court because, while versions of case reports—and some scholars—note that oral argument took place on March 23, 1883, there's no evidence that the Court actually heard oral arguments in the case.

385. Brief for the United States, *supra* note 317, at 9–12.

386. Brief for the United States, *supra* note 8, at 15–16, 20–25.

387. *The Civil Rights Cases*, 109 U.S. 3, 5 (1883) ("The Stanley, Ryan, Nichols, and Singleton cases were submitted together. . . . There were no appearances and no briefs filed for the defendants.").

388. Brief for Plaintiffs in Error at 7–9, *The Civil Rights Cases*, 109 U.S. 3 (No. 28).

389. Argument and Brief of Humes & Poston for Defendant in Error at 5, *The Civil Rights Cases*, 109 U.S. 3 (No. 28).

390. See FAIRMAN, *supra* note 208, at 556–57. In assessing the Government's briefs, Fairman concluded that part of the reason the Court ruled the Act unconstitutional was because "[t]he law officers had not built up a strong and persuasive line of reasoning whereby the statute might be sustained. . . . The Court was left to its own reflections in deciding an issue which to the parties immediately involved seemed of little consequence." *Id.* Fairman then went on to contrast the work of the Government to that of John A. Campbell, the former Justice of the Supreme Court and lead counsel in the *Slaughter-House Cases*, suggesting that, although Campbell lost the argument in that case, "he gave an impressive demonstration of the impact a powerful argument may produce." *Id.* at 557; see William H. Pruden, *John Archibald Campbell (1811-1889)*, NEW GA. ENCYCLOPEDIA (Sept. 27, 2013), <https://www.georgiaencyclopedia.org/articles/government-politics/john-archibald-campbell-1811-1889> [https://perma.cc/UJ7B-4F2J]. It is, of course, more than a little ironic to hold up Justice Campbell as an example of civil rights advocacy. He voted in the majority in *Dred Scott v. Sandford* to hold that Black people by virtue of their race had no right to American citizenship. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 493 (1857) (Campbell, J., concurring). He resigned his seat on the Court to join the Confederacy and was arrested on suspicion of being part of the plot to assassinate President Lincoln. Simeon E. Baldwin, *John Archibald Campbell, Associate Justice of the United States Supreme Court*, 29

the Court. That criticism, however, tends to overlook the radical nature of the arguments contained in these briefs. The 1879 brief was co-authored by Assistant Attorney General Edwin Smith and Attorney General Charles Devens,³⁹¹ a former general in the Union Army whose troops were the first to occupy Richmond after its fall in 1865.³⁹² The Devens–Smith brief opened with a Commerce Clause argument that “[i]nns are provided for the accommodation of travelers” and therefore “are essential instrumentalities of commerce (especially as now carried on by ‘drummers’), which it was the province of the United States to regulate even prior to the recent amendments to the Constitution.”³⁹³

However, no doubt because the argument could not easily be extended to theaters, the brief did not use the Commerce Clause as its central thesis. Rather, it advanced two arguments grounded in the Reconstruction Amendments. First, to the extent that state action was a requirement of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the brief offered a broad reading of state-action doctrine, asserting that the “[hotel] business and that of conducting a theatre are carried on under a license from the State, through the intermediate agency of municipal authority, which is part of the machinery of the State, being delegated to this extent with the power of the State.”³⁹⁴ Second, insofar as state action was not a prerequisite for congressional enforcement under the Fourteenth Amendment’s Citizenship Clause, the brief maintained that “[e]quality before the law . . . is the privilege of American citizenship, conferred by the national Constitution; therefore, to be protected by national legislation.”³⁹⁵ Specifically, Devens and Smith argued that citizenship is a national right, and “[w]hat the United States had the right to give, it necessarily has the right and duty to preserve and protect.”³⁹⁶ As to whether the Clause conferred any substantive rights other than citizenship, the brief insisted it was entirely within Congress’s power to “legislate to compel the concession to [Black people] of such rights, *whatever they may be*, as are conceded to other citizens of the State, without dictating what those privileges may be.”³⁹⁷ Nor, the brief continued,

YALE L.J. 946, 946 (1920) (book review). His argument in the *Slaughter House Cases* was, in fact, an attempt to turn the Reconstruction Amendments into a poison pill against multiracial state governments that emerged in the South after the Civil War. The Government lawyers in the *Civil Rights Cases* were arguing in favor of the idea of racial equality. Campbell abided by no such principle. See ROSS, *supra* note 14, at 189.

391. Brief for the United States, *supra* note 317, at 21.

392. See GODFREY WEITZEL, RICHMOND OCCUPIED: ENTRY OF THE UNITED STATES FORCES INTO RICHMOND, VA. APRIL 3, 1865 CALLING TOGETHER OF THE VIRGINIA LEGISLATURE AND REVOCATION OF THE SAME 43 (Louis H. Manarin ed., Richmond Civil War Centennial Committee 1965).

393. Brief for the United States, *supra* note 317, at 9. The word “drummer” described a traveling salesman. It “later became the popular, slightly derogatory term for the traveling man” and “was used during the early part of the century to refer to men the wholesalers placed in depots and hotel lobbies to greet the visiting buyers.” Stanley C. Hollander, *Nineteenth Century Anti-Drummer Legislation in the United States*, 38 BUS. HIST. REV. 479, 481 (1964).

394. Brief for the United States, *supra* note 317, at 9.

395. *Id.* at 10.

396. *Id.* at 11.

397. *Id.* (emphasis added).

should such enlargement of Congress's power be deemed illegitimate for diminishing state power and encroaching upon state authority:

Both State and National Governments are mere machinery by which the individuals composing the nation secure life, liberty, rights, and privileges. From time to time, as experience demonstrates the necessity or expediency of so doing, the people may change the mutual adjustment, or even the essential character, of this machinery to accomplish the desired purpose.³⁹⁸

Part of the reason commentators often find the United States' briefs in defense of the Act wanting is that they contain long verbatim quotations from congressional debates on the constitutionality of the 1875 Act.³⁹⁹ But while these unedited quotes might not be the norm (or quite fit the form) of modern brief writing, they were carefully chosen to raise a question the majority completely evaded in its opinion: "What is it to be a citizen of the United States, if, being that, a citizen cannot be protected in those fundamental privileges and immunities which inhere in the very nature of citizenship?"⁴⁰⁰ When the United States rebriefed the case in the 1882 Term, it continued to defend the Act as fundamentally protecting the citizenship rights of Black people, but unlike the 1879 brief's focus on the Fourteenth Amendment's Citizenship Clause, the 1882 brief grounded the argument squarely in the Thirteenth Amendment's promise of civil freedom.⁴⁰¹ Solicitor General Samuel F. Phillips, who was born in New York but raised in North Carolina, and who defended both the Government's indictment of the white mob in *United States v. Cruikshank* and its indictment of state electors in *United States v. Reese*,⁴⁰² argued that the Thirteenth Amendment "forbids all sorts of involuntary personal servitude (except penal) as to all sorts of men, the word servitude taking some color from . . . the signification of the fourteenth and fifteenth amendments, which must be construed as *advancing* constitutional rights *previously existing*."⁴⁰³ Phillips termed that "previously existing" right as the right or power of locomotion⁴⁰⁴ and defined it as:

[T]he right of everybody to the *highway*, to the use of inns, and more lately to that of *passenger carriers*, and it stands ready to advance along the path of civilization and appropriate from time to time whatever of that sort human ingenuity may devise, and common sense may pronounce to be *an advantage which must be made common to all, or otherwise the "pursuit of happiness" will degenerate into a monopoly*.⁴⁰⁵

398. *Id.* at 10.

399. *See supra* note 390 and accompanying text.

400. Brief for the United States, *supra* note 317, at 19.

401. Brief for the United States, *supra* note 8, at 15–16, 20–25.

402. *United States v. Cruikshank*, 92 U.S. 542, 547 (1876); *United States v. Reese*, 92 U.S. 214, 215 (1876); *see Solicitor General: Samuel F. Phillips*, U.S. DEP'T JUST., <https://www.justice.gov/osg/bio/samuel-f-phillips> [<https://perma.cc/F9V6-UKVW>] (last updated June 3, 2020).

403. Brief for the United States, *supra* note 8, at 15.

404. *See id.* at 16.

405. *Id.* at 17.

Phillips continued that the denial of this previously existing right to locomotion “was a characteristic feature of the particular form of slavery abolished by the thirteenth amendment.”⁴⁰⁶ What is more, prior to the war, restraint upon enslaved Black people’s right to locomotion was not just imposed by state actors but also enforced by any and all whites, even those who had no ownership claim in the enslaved person. According to Phillips, a “requisite of the right to appropriate the use of another man was to become the master of his natural power of motion, and . . . to require the whole community to be *upon the alert* in aiding the master to restrain that power.”⁴⁰⁷ Thus, he concluded, “By a travesty upon ordinary and constitutional modes of speech, ‘locomotion’ became—‘running away’; and ‘entertainment,’—‘harboring.’”⁴⁰⁸ In other words, if a fundamental badge and incident of slavery was that both state and private actors had the power to restrain a Black person’s right to locomotion, the Thirteenth Amendment, in abolishing slavery, gave Congress the power to enact legislation enforcing a Black person’s right to locomotion against both state and private infringement. In this way, while Harlan’s dissent may have been more expansively radical in its definition of a new right to civil freedom guaranteed by the three Reconstruction Amendments read as a whole,⁴⁰⁹ Phillips’s brief had the virtue of locating the right as part of a preexisting constitutional tradition and pinning it down to the right of locomotion. But his argument had a greater virtue still. The challenge of the Court’s race jurisprudence during Reconstruction was always how to measure “the metes and bounds” of the rights, be they new or preexisting, that the Reconstruction Amendments granted to Black people. In his 1882 brief, Phillips proposed a simple solution to the problem: The metes and bounds of rights guaranteed to Black people *after* slavery were the same as were guaranteed to white men *during* slavery.⁴¹⁰

In so doing, Phillips merely reiterated the formulation that a number of supporters of the Act had advanced in Congress.⁴¹¹ And more than twenty years later, at least one federal judge would adopt that precise formulation in instructing a grand jury that lynching Black people was a violation of the Thirteenth Amendment.⁴¹² In *Ex parte Riggins*, a white mob in Huntsville, Alabama, set fire to a jail in an effort to flush out a Black prisoner by the name of Horace

406. *Id.* at 20.

407. *Id.*

408. *Id.* at 20–21.

409. See *supra* notes 341–66 and accompanying text.

410. As described above, Phillips makes clear that the restraint upon the movement of Black people was enforced (enjoyed) by white people, whether acting in a public or private capacity. See Brief for the United States, *supra* note 8, at 20. Similarly, courts may not countenance discriminatory acts by private actors because “[i]t shows not only his private views . . . but the views of whole communities of citizens, upon whom their history has naturally imposed these views.” *Id.* at 24.

411. See *supra* notes 176–86 and accompanying text.

412. See *Ex parte Riggins*, 134 F. 404, 407–08 (C.C.N.D. Ala. 1904), *reversed* by *Riggins v. United States*, 199 U.S. 547 (1905).

Maples.⁴¹³ They “succeeded in getting the sheriff to force Maples to jump from a second-story window into the mob below,” which then dragged him to the “town square and hanged him from a tree on the courthouse lawn.”⁴¹⁴ On October 11, 1904, Judge Thomas Goode Jones of the Middle and Northern Districts of Alabama delivered the charge, recommending that the grand jury indict the white mob.⁴¹⁵ Judge Jones, a Democrat, had been appointed to the bench by Republican President Teddy Roosevelt based on the recommendation of Booker T. Washington, who had endorsed Jones in his successful bid for governor of Alabama.⁴¹⁶ In his instructions, Judge Jones explained to the grand jury that the Thirteenth Amendment outlawed slavery and made Black people freemen, and “[w]hat constituted a freeman . . . was measured in the minds of [the] American people by the civil rights which were accorded the dominant race.”⁴¹⁷ Days later, a fellow federal judge wrote to Judge Jones, asserting, without explicitly agreeing with the charge’s legal merits, that Jones’s interpretation, if accepted, “[would] probably do more to restrain the crime [of lynching] than any remedy which has been suggested.”⁴¹⁸ The letter came from Judge Ely Hammond of the Western District of Tennessee, who about twenty years earlier, had presided over Sallie’s suit against the Memphis and Charleston.⁴¹⁹

Sallie, for her part, took the opposite approach from that which the United States adopted in its 1879 and 1882 briefs. Rather than merely gesturing toward the Commerce Clause, as the Government did, Sallie rested her defense of the 1875 Act first and foremost on the Commerce Clause.⁴²⁰ Admittedly, her brief argued extensively that Judge Hammond erred in failing to instruct the jury that it was a violation of the 1875 Act for the conductor to take her race into account in thinking her a prostitute and directing her to the second-class smoking car.⁴²¹ But prior to making her jury-instructions argument, Sallie devoted significant portions of her brief to showing that the Act fell squarely within Congress’s Commerce Clause power:

I do not propose to argue how far Congress, under the Fourteenth Amendment, may regulate commerce or travel confined to the limits of a single State and concerning only the citizens or inhabitants of that State. My case involves the rights of a citizen of one State traveling “by a public conveyance on land” through another State, for the purpose of reaching a place in a third State.⁴²²

413. BRENT J. AUCOIN, *A RIFT IN THE CLOUDS: RACE AND THE SOUTHERN FEDERAL JUDICIARY, 1900–1910*, at 64 (2007).

414. *Id.*

415. *Id.* at 53, 65–66.

416. *Id.* at 53.

417. *Id.* at 66 (third alteration in original).

418. *Id.* at 70 (second alteration in original).

419. *Id.*; see Transcript of Record, *supra* note 7, at 7.

420. Brief for Plaintiffs in Error, *supra* note 388, at 7–14.

421. *Id.* at 14–35.

422. *Id.* at 7.

Citing *Hall v. DeCuir*, in which the Court held void under the Commerce Clause a Louisiana law purporting to regulate interstate freight and passenger transportation,⁴²³ Sallie argued that “[t]he necessary inference from that decision is, that Congress exclusively had power to pass such legislation as the State of Louisiana had passed, and as the act of March 1, 1875, now under consideration, is such legislation, it must necessarily be valid.”⁴²⁴

Of course, it is now clear under *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung* that Congress does have the power under the Commerce Clause to prohibit racial discrimination by private actors engaged in interstate commerce or in intrastate commercial activity with interstate effects.⁴²⁵ However, even without the benefit of these modern precedents, it was equally clear back in 1875, as Sallie argued in her brief, that the power of Congress to outlaw racial discrimination by private actors engaged in interstate commerce was “beyond question.”⁴²⁶ Yet, in invalidating the Act, the majority insisted, in spite of Sallie’s argument, that the Commerce Clause question was not properly before the Court:

[W]hether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.⁴²⁷

XI. THREE McCLUNG BROTHERS

The epilogue to the *Civil Rights Cases* has, of course, passed into history. Eighty-five years after Sallie’s ride on the Memphis and Charleston, Congress

423. *Hall v. DeCuir*, 95 U.S. 485, 485–86, 490 (1878).

424. Brief for Plaintiffs in Error, *supra* note 388, at 9.

425. *Katzenbach v. McClung*, 379 U.S. 294, 295, 304–05 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964).

426. Brief for Plaintiffs in Error, *supra* note 388, at 7.

427. *The Civil Rights Cases*, 109 U.S. 3, 19 (1883). In his dissent, Justice Harlan correctly noted that Sallie’s case had, in fact, directly raised the question of Congress’s power to outlaw private discrimination on interstate commercial carriers:

The court, in its opinion, reserves the question whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another. I beg to suggest that that precise question was substantially presented here in the only one of these cases relating to railroads—*Robinson and Wife v. Memphis & Charleston Railroad Company*. In that case it appears that Mrs. Robinson, a citizen of Mississippi, purchased a railroad ticket entitling her to be carried from Grand Junction, Tennessee, to Lynchburg, Virginia. Might not the act of 1875 be maintained in that case, as applicable at least to commerce between the States, notwithstanding it does not, upon its face, profess to have been passed in pursuance of the power of Congress to regulate commerce? Has it ever been held that the judiciary should overturn a statute, because the legislative department did not accurately recite therein the particular provision of the Constitution authorizing its enactment?

Id. at 60 (Harlan, J., dissenting).

enacted the Civil Rights Act of 1964, which, among other things, purported to do that which the Reconstruction Congress had intended to do in 1875: ban private discrimination on the basis of race in places of public accommodation.⁴²⁸ In deciding the constitutionality of the 1964 Act, the Court took up the question it had claimed was not properly raised in the *Civil Rights Cases* and held in *Heart of Atlanta Motel* and *McClung* that Congress is empowered under the Commerce Clause to prohibit racial discrimination by private actors in places of public accommodation.⁴²⁹ Of the two cases, decided on the same day, *McClung* did the most to affirm Congress's Commerce Clause power to regulate public accommodations. The motel in *Heart of Atlanta Motel* was accessible to two interstate highways, advertised in national media, maintained billboard signs throughout the state beckoning interstate travelers, catered to out-of-state conventions, and routinely registered seventy-five percent of its guests as out-of-state visitors.⁴³⁰ So, it seemed a relatively straightforward conclusion that the motel engaged in activities that affected interstate commerce.⁴³¹ By contrast, Ollie's Barbeque in *McClung* was a family-owned restaurant in Birmingham, Alabama, that catered mostly to local customers; its only tangential connection to interstate commerce was the owners' practice of buying about half of the restaurant's food from a local supplier who procured it from out of state.⁴³²

At the time of the suit, Ollie McClung Sr. and Ollie McClung Jr., father and son, owned and ran the restaurant.⁴³³ It first opened in 1926 when Ollie Sr.'s father, James Ollie McClung, took over a local barbecue establishment and declared it, somewhat grandiosely, the "World's Best Bar-B-Q."⁴³⁴ Like the vast majority of white-owned establishments in Birmingham, Ollie's did not provide equal accommodation to Black people, though it did permit them to order take-out; they just could not eat at the restaurant.⁴³⁵ Most of Ollie's employees, including the cooks and waitresses, were Black.⁴³⁶ Years later, long after Ollie's had closed, Dora Bonner, a Black waitress who worked there for forty years, would recall how "Ollie Sr. always gave black employees food discounts which they used to supply civil rights rallies at churches including New Pilgrim Baptist Church."⁴³⁷ Mrs. Bonner spoke of Ollie Sr. as a good employer: "When we had

428. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

429. *McClung*, 379 U.S. at 295, 304–05; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 261–62.

430. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 243.

431. *Id.* at 258 ("One need only examine the evidence . . . discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.").

432. *See McClung*, 379 U.S. at 296.

433. Greg Garrison, *50 Years Ago, the U.S. Supreme Court Ruled Against Ollie's Barbecue, a Landmark in Desegregation*, AL.COM (Jan. 13, 2019), https://www.al.com/living/2014/12/50_years_ago_the_supreme_court.html [<https://perma.cc/92E4-BV4T>].

434. *Id.*

435. *Id.*

436. At the time of the suit, two-thirds of Ollie's thirty-six employees were Black. *McClung*, 379 U.S. at 296; ROBERT F. MOSS, *BARBECUE: THE HISTORY OF AN AMERICAN INSTITUTION* 213 (2010).

437. Garrison, *supra* note 433.

the march down in Selma, we provided the food. . . . He knew where it was going. He watched us box it up. He always treated us good. If he didn't, we wouldn't have worked here for 40 years."⁴³⁸ In an interview with the *New York Times* while the case was pending before the Court of Appeals for the Fifth Circuit, Ollie Sr. claimed that his restaurant grossed about \$350,000 per year and that, if forced to serve Blacks, he "would lose 75 to 80 per cent of that."⁴³⁹ He explained, "I would refuse to serve a Negro as well as a drunken man or a profane man or anyone else who would affect my business."⁴⁴⁰ Ollie's was, in fact, the only Birmingham restaurant to openly refuse to comply with the 1964 Act.⁴⁴¹ A year earlier, Birmingham's City Council had repealed a local ordinance requiring racial segregation in restaurants, with the intention that de facto segregation would continue.⁴⁴² No one sued Ollie's to force it to integrate; rather, apparently spurred on by the Birmingham Restaurant Association, Ollie Sr. initiated the action for a declaratory judgment that the Act was unconstitutional.⁴⁴³

As a preacher in the Cumberland Presbyterian Church in Birmingham, Alabama, Ollie Sr. claimed that his opposition to racial integration was not grounded in racial animosity toward Black people but in a belief that God had willed separation of the races: "I don't think that any Christian Negro would want to eat in this restaurant when he knows that it will hurt someone else."⁴⁴⁴ Once he lost in the Supreme Court, Ollie Sr. released a statement indicating that, although he disagreed with it, he would comply with the decision: "As law-abiding Americans we feel we must bow to this edict of the Supreme Court. We are deeply concerned that so many of our nation's leaders have accepted this edict which gives the Federal Government control over the life and behavior of every American."⁴⁴⁵ After Ollie Sr.'s death, his son continued to run the restaurant until it closed on September 10, 2001.⁴⁴⁶ Like his father, Ollie Jr. remained convinced that the 1964 Act is unconstitutional: "Don't interpret that as I want to go back to segregation. . . . If you look carefully at the ramifications of that case, and you look at constitutional law, what those nine justices did was remove the Tenth Amendment from the Constitution."⁴⁴⁷

438. *Id.*

439. *Cafe Owner Tells Plight*, N.Y. TIMES, Sept. 3, 1964, at 18.

440. *Id.*

441. *Birmingham Cafe Bows to Decision: Ollie McClung Now Says He Will Serve Negroes*, N.Y. TIMES, Dec. 17, 1964, at 46.

442. ANGELA JILL COOLEY, *TO LIVE AND DINE IN DIXIE: THE EVOLUTION OF URBAN FOOD CULTURE IN THE JIM CROW SOUTH* 130 (2015).

443. See Mark A. Johnson, *Pork Ribs & Politics: The Origins of Alabama Barbecue*, ALBBQHISTORY.ORG, <http://albbqhistory.org/> [https://perma.cc/B22M-RDX8] (last visited Mar. 18, 2021).

444. Michael Durham, *Ollie McClung's Big Decision*, LIFE MAGAZINE, Oct. 9, 1964, at 31.

445. *Birmingham Cafe Bows to Decision: Ollie McClung Now Says He Will Serve Negroes*, *supra* note 441.

446. See Garrison, *supra* note 433; Andrew Yeager, *Forced to Seat Blacks, Ala. Restaurant Complied with History*, NPR (Dec. 13, 2014, 9:42 AM), <https://www.npr.org/2014/12/13/370470745/forced-to-seat-blacks-ala-restaurant-complied-with-history> [https://perma.cc/XEL5-E3QC].

447. Garrison, *supra* note 433.

When it first opened in 1926, Ollie's Barbecue "was little more than a shack with a screen door."⁴⁴⁸ Barbecue soon became the family business because it offered the chance for James McClung and his family to maintain a solid middle-class foothold while gaining independence available to entrepreneurs.⁴⁴⁹ James was part of a large McClung clan in Georgia and Alabama, and part of an even larger McClung line that first settled in Pennsylvania before gradually spreading westward and southward at the time of the American Revolution.⁴⁵⁰ Once settled in Alabama, Georgia, Tennessee, and other southeastern states, various branches of the American McClungs grew apart.⁴⁵¹ However, all American McClung lines seem to have originated from three McClung brothers, James, John, and Robert, who fled religious persecution in Scotland and settled in Northern Ireland, later emigrating to the United States in the eighteenth century.⁴⁵² In time, the bloodlines of James, John, and Robert produced not just Ollie McClung Sr. from Alabama,⁴⁵³ whose suit in 1964 settled the question of whether Blacks had equal rights to places of public accommodation, but also Charles McClung McGhee, from Tennessee,⁴⁵⁴ Vice-President of the Memphis and Charleston, the man Sallie tried to see when she was denied public accommodation on one of his trains in the early morning hours of May 22, 1879.⁴⁵⁵

XII. SALLIE

It is probably safe to say that legal scholarship on the Supreme Court's race jurisprudence during Reconstruction will always vacillate between opposing poles: a Court openly hostile to the cause of Black liberation and a Court unfairly denied credit for protecting Black physical safety and voting rights. I, for one, do not find particularly interesting the question of whether the Court was a foe or a friend of Reconstruction; whatever the justices may have intended, the precedent they set, for better or for worse, speaks for itself. And I will not here pretend to stake some vague common ground of the Court being both the destroyer and savior of Reconstruction. At the end of the day, it seems to me that the Court's failure—both during Reconstruction and to this day—comes down to its inability

448. COOLEY, *supra* note 442, at 1.

449. *See id.*

450. *See* WILLIAM MCCLUNG, THE MCCLUNG GENEALOGY: A GENEALOGICAL AND BIOGRAPHICAL RECORD OF THE MCCLUNG FAMILY FROM THE TIME OF THEIR EMIGRATION TO THE YEAR 1904, at 7, 24, 224 (1904).

451. A genealogy of the McClungs, published in 1904, traced nine generations of the McClung line, including about 3,500 named individuals. *Id.* at 3. The author classifies the McClungs based on the state or city and state in which they settled. While some may have probably remained connected, others did not. In any event, there is no evidence the McClungs of Knoxville, Tennessee, maintained familial relations with those of Alabama. *See id.* at 3–4.

452. *See id.* at 7.

453. *See id.* at 224.

454. Recall that McGhee's mother was Betsy McClung, whose father, Colonel Charles McClung, emigrated from Pennsylvania to Knoxville, Tennessee, in 1788. *See id.* at 24; MacArthur, *supra* note 89, at 3, 5.

455. Transcript of Record, *supra* note 7, at 7–8.

or unwillingness to place slavery at the center of the stories it told—and tells—about the Constitution. For me, this is indeed a failure, though I imagine for others, it might be deemed a success, given that the removal of slavery from the collective constitutional memory leaves the field wide open for telling stories of the Constitution with happy restorative endings.

As I tried telling Sallie's story, a recurring image of the Court and slavery formed in my mind: It seemed as if, through *Blyew v. United States*, and *United States v. Cruikshank*, and *United States v. Reese*, and the *Civil Rights Cases*, the Court treated slavery as something to be slowly but inexorably sloughed off, cast aside, and left behind⁴⁵⁶—much like unclean detritus—until by the end of Reconstruction, almost nothing of it remained in the Court's jurisprudence and even less in our collective constitutional memory. I imagined then that in telling Sallie's story, I would turn around, walk back, track down the pieces, and put them back together. In this metaphor, of course, I would find Sallie around a corner somewhere back at the start. That did not quite happen. I was, as they say, starting so late and from so far back.

That Sallie remains a mystery is—in a strictly legal, if not scholarly, sense—an immaterial fact. Are there any facts about Sallie's life before or after her action against the Memphis and Charleston that would radically change our understanding of the *Civil Rights Cases* if we somehow found them buried in some private trove of family letters? Perhaps not. And yet, if I am being honest, while Sallie may not have been the material inspiration for this Article, at some point, and for reasons that are difficult to put into words, she became the only character in the story I truly cared about. And again, if I am being honest, I spent an incalculable amount of time thinking about her, trying to find her, trying to imagine her—probably far more than the time that I spent thinking about the route of the Memphis and Charleston Railroad, or the fortunes of Charles McGhee's descendants, or indeed even Justice Harlan's dissent. Little by little, Sallie became the repository of all that has always been—at least to me—indecipherable about the *Civil Rights Cases*, as if unearthing and retelling the details of her life would somehow say something, even if only metaphorically, about the Court's race jurisprudence during Reconstruction.

I wondered what business she had in Lynchburg, Virginia, or if indeed Lynchburg was her final destination in Virginia; why her nephew Joseph, rather than her husband Richard, was her companion on the trip; whether she had made the trip before, or whether it was something akin to a once-in-a-lifetime journey; whether it was her idea or Joseph's to go see McGhee; what it was about her background that led her to demand that the vice president of the railroad personally address her complaint; why she brought suit after being denied access to the first-class car for a mere fifteen-minute interval in what was no doubt a days-long

456. See *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876); *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872).

journey; how she came to hire one of the most prominent attorneys in Memphis; how much, if anything, it must have cost her to do so; what it must have felt like to sit in court and listen to the conductor tell the jurors that he took her for a prostitute; why she did not let the matter rest after losing in the district court but kept going all the way to the Supreme Court.

But beyond her case, I wondered too about Sallie's life: whether her father had been her first master; whether she had grown up with any siblings; whether she had been sold away from her mother; how she had fared during the war; whether buried in some newspaper somewhere was an advertisement from her, like from so many formerly enslaved people, that read: "Help me to find my people."⁴⁵⁷ I wondered where and how she came to marry Richard.⁴⁵⁸ I wondered whether their son, like Joseph, could have passed for white; whether he did, in fact, pass, becoming fully American, marrying away all traces of his Black past, perhaps eventually turning into as much of an American success story as the white McGhees—his descendants becoming governors, senators, captains of industry, university presidents, their names on libraries, museums, and hospital wings;⁴⁵⁹

457. After the Civil War, it was a common practice for Black people to place advertisements in newspapers looking for lost relatives. *See generally* HEATHER ANDREA WILLIAMS, *HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY* (2012). As late as 1879, almost fifteen years after the end of the Civil War, these advertisements could still be found in newspapers around the country. For example, a posting from July 17, 1879, two months after Sallie went to see Charles McGhee, read:

Dear Editor: I want to enquire for my father. He went from Franklin Co., Miss. about 1850 to Alabama with a man by the name of Doctor Baker, who was said to be his young master. My father's name was Milzes Young. I learned that after he left here he went by the name of Milzes Arbet. I now go by the name of Dock Young and am his youngest son. Address me in care of George Torrey, Union Church, Jefferson Co. Miss. Dock Young.

Id. at 160.

458. In their amended complaint against the railroad, only Sallie is described as having been born in slavery. *See* Transcript of Record, *supra* note 7, at 4. In all likelihood, Richard was born free in Virginia:

At the beginning of the Civil War there were in Virginia nearly sixty thousand free negroes. This number was far in excess of the number of free colored persons in any other of the great slave States. . . . It was in excess of the free negro population in any State, slave or free, with the exception of Maryland.

JOHN H. RUSSELL, *THE FREE NEGRO IN VIRGINIA 1619-1865*, at 9 (Cosimo, Inc. 2009) (1913). The majority of free Blacks in Virginia "were the descendants of white servant women who had children by slaves or free African Americans." *See* 1 PAUL HEINEGG, *FREE AFRICAN AMERICANS OF NORTH CAROLINA, VIRGINIA, AND SOUTH CAROLINA: FROM THE COLONIAL PERIOD TO ABOUT 1820*, at 1 (5th ed. 2005). Among the free Black families in Virginia who descended from white women were a number of Robinsons. *Id.* at 3 n.3, 1010–12. In all likelihood, Richard, being a Mulatto from Virginia, descended from one of these women.

459. In 1906, the financier J. P. Morgan hired a woman by the name of Belle da Costa Greene as his personal librarian to manage his vast collection of books housed in a library designed by McKim, Mead and White, the same architectural firm responsible for New York's original Penn Station. *See* HEIDI ARDIZZONE, *AN ILLUMINATED LIFE: BELLE DA COSTA GREENE'S JOURNEY FROM PREJUDICE TO PRIVILEGE* (2007); Caroline Weber, *Long Time Passing*, N.Y. TIMES (July 22, 2007), <https://www.nytimes.com/2007/07/22/books/review/Weber-t.html>. For forty-three years, Greene remained in charge of the library, even after it was made part of New York City's public library. *See* Weber, *supra*. She wielded enormous power in amassing a collection of rare manuscripts for the library. In 1939, she was

or whether the family stayed Black even though, as generations passed, it became ever more difficult to tell. I wondered whether Sallie lived long enough to learn in 1896, when she would have been forty-five, about *Plessy v. Ferguson*, constitutionalizing the doctrine of “separate but equal.”⁴⁶⁰ Perhaps she even lived until 1954—she would have been 103 years old—long enough to see the Supreme Court change course in *Brown v. Board of Education* and hold that “separate but equal” violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁶¹ I wondered whether, as she grew older, she passed on her story to her grandchildren and great-grandchildren about how their grandmother and great-grandmother, almost a century before Rosa Parks, stood up against segregation; or whether the genetic line begun by Richard and Sallie Robinson, like the one begun by Abraham and Sarah McGhee on the John A. Walker farm in northern Mississippi, ended with their son Richard Jr. and disappeared without a trace after just one generation.

I do not know in which of Schrödinger’s parallel universes Sallie lived to old age or died young, had a long line of descendants or was one of the last of her line, passed for white or stayed Black, saw the beginning of the end of Jim Crow or died under racial segregation, stayed in Mississippi or moved North to look for the warmth of other suns. No matter how long I searched for her, she remained a phantom, faint and tenuous, always walking away, turning this way, then that way, never showing her face, except for brief moments, when I would catch a quick but unmistakable glimpse. There she is in 1870, living with her husband in Tippah County, Mississippi; she is a homemaker, and he is listed as a carpenter; they have a son, nine-years-old at the time, who goes by Dick and attends school; Joseph, their nephew, lives with them and is also in school.⁴⁶² The family is doing

elected Fellow of the Medieval Academy of America, only the second woman to be so named. ARDIZZONE, *supra*. Greene lived most of her adult life as white, claiming Portuguese ancestry to explain her slight olive complexion. See Weber, *supra*. In truth, she was the daughter of two Black parents. Her father was Richard T. Greener, the first Black graduate of Harvard College and former Dean of Howard University School of Law, the very same Richard T. Greener whose opinion on the *Civil Rights Cases* was quoted in an October 16, 1883, article in the *New York Evening Post*. See KATHERINE REYNOLDS CHADDOCK, UNCOMPROMISING ACTIVIST: RICHARD GREENER, FIRST BLACK GRADUATE OF HARVARD COLLEGE 1, 79, 103 (2017).

460. 163 U.S. 537, 551–52 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

461. 347 U.S. 483, 494–95 (1954).

462. Sallie and her family appear on Schedule 1, page 4, lines 31–34 of the 1870 Census for Tippah County, Mississippi. See U.S. CENSUS BUREAU, POPULATION SCHEDULE FOR TIPPDAH COUNTY, MISSISSIPPI (1870) (on file with author). The family’s characteristics listed on the census page leave no doubt that this is Sallie: her husband is listed as Richard, which we know to be his name in the complaint against the Memphis and Charleston; she is listed as being twenty-two years old in 1870, which would make her thirty-one rather than about twenty-eight in 1879, as the transcript of record notes, but it is possible that as a former slave she was not certain of her age; she is also listed as Mulatto, and Joseph is listed as her nephew, close in age to her at eighteen years old, and Mulatto—all details corroborated by the record in her case before the Supreme Court. Compare *id.*, with Transcript of Record, *supra* note 7, at 1, 7–8. Tippah County was something of a relative oasis in Mississippi for Black people; in the “Deep South” state with the highest number of lynchings, whites lynched only one Black person between 1882 and 1930. See STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 38, 40–41 (1995).

well: they all can read and write; they do not own any real property but report \$1,000 in personal assets,⁴⁶³ the equivalent of about \$18,000 in present-day dollars. There she is again ten years later in 1880, in Benton County, Mississippi; by 1880, part of Tippah County had been reorganized and incorporated into Benton,⁴⁶⁴ and so it is likely the family had not moved. She is still a homemaker, but Richard is now a farmer;⁴⁶⁵ she and Richard have no other children; their son's full name is actually Richard, not Dick, no doubt after his father; Joseph still lives with them and is a teacher now.⁴⁶⁶

And then, she disappears. A fire destroyed much of the records of the 1890 census; fragments remain, but none contain any trace of Sallie.⁴⁶⁷ Sallie was a common first name for Black women during slavery; Robinson, an equally common family name. From the 1900 census forward, a number of Sallie Robinsons appear—many of the same approximate age and, some, like Sallie, even born in Tennessee—but none quite match her. Richard Sr., Richard Jr., and Joseph—her husband, son, and nephew—also disappear; their names were similarly common.⁴⁶⁸ In the 1900 census, one Sallie Robinson comes close to matching her: a widow, born in Mississippi, running a boarding house in Greenville, Mississippi, who has one living child and six children who were not.⁴⁶⁹ The 1870 and 1880 censuses did not record the number of nonsurviving children, if any; it is possible

463. See U.S. CENSUS BUREAU, *supra* note 462.

464. See BENTON COUNTY MISSISSIPPI GENEALOGY & HISTORY NETWORK, [https://benton.msghn.org/\[https://perma.cc/R4KP-T9PB\]](https://benton.msghn.org/[https://perma.cc/R4KP-T9PB]) (last visited Mar. 18, 2021).

465. In an 1879 local newspaper article about Sallie's suit, Richard Robinson is described as reverent, as well as a "large and successful planter" who was "widely and favorably known." *A Charge Against a Memphis and Charleston Railroad Official*, DAILY MEMPHIS AVALANCHE, July 15, 1879, at 3.

466. Sallie and her family appear on schedule 1, page 39, lines 17–20 of the 1880 Census for Benton County, Mississippi. See U.S. CENSUS BUREAU, POPULATION SCHEDULE FOR BENTON COUNTY, MISSISSIPPI (1880) (on file with author). Again, the characteristics listed on the form provide near absolute certainty that this is Sallie: her middle initial is listed as "J" and that of her husband as "A," which we know to be the case from their complaint against the railroad; the ages of the household members also match, as do their relationships to one another, and everyone in the family is listed as "Mulatto"—consistent with the facts contained in the 1870 Census schedule and the record of Sallie's case. Compare *id.*, with U.S. CENSUS BUREAU, *supra* note 462, and Transcript of Record, *supra* note 7, at 1, 7–8.

467. In January 1921, a fire destroyed a significant portion of the census records of 1890. See Kellee Blake, Prologue Magazine, "First in the Path of the Firemen": The Fate of the 1890 Population Census, Part 1, NAT'L ARCHIVES (Spring 1996), <https://www.archives.gov/publications/prologue/1996/spring/1890-census-1.html> [<https://perma.cc/B887-WQHP>]. The records and fragments that survived do not include those of Mississippi counties where Sallie and her family would have likely lived. See *Availability of 1890 Census*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/genealogy/decennial_census_records/availability_of_1890_census.html [<https://perma.cc/PE9V-95WE>] (last visited Mar. 18, 2021). In any event, a search of surviving census records for 1890 does not produce anyone in the United States resembling Sallie and her family.

468. Richard and Joseph were both born in Virginia, whereas Sallie was born in Tennessee. U.S. CENSUS BUREAU, *supra* note 462. It is likely that Richard was Joseph's blood uncle, while Sallie was his aunt by marriage.

469. See U.S. CENSUS BUREAU, POPULATION SCHEDULE FOR GREENVILLE, MISSISSIPPI (1900) (on file with author).

that Richard Jr. was not Sallie's only child, but other distinguishing characteristics do not match, and it is unlikely that the boarding house widow is Sallie.⁴⁷⁰

In the end—and for now—what I believe I know is that Sallie returned home to Michigan City, Mississippi, after her trip to Virginia.⁴⁷¹ She makes the return journey on the Virginia–Tennessee Railroad from Lynchburg, Virginia, to Chattanooga, Tennessee. At Chattanooga, she transfers to the Memphis and Charleston. She sits in the ladies' first-class car, this time unmolested by the conductor. At Grand Junction, Tennessee, she takes the Mississippi Central Railroad bound for Michigan City where she began. Richard is there to meet her; she walks off the train, out of the station, heading home. The train travels on; the sound of wheels on rail-tracks vanishing, playing itself into silence.

470. Freedmen Bureau's records and other transactions contain hundreds of Sallie Robinsons, but these are too incomplete to match with Sallie.

471. We know Sallie returned home after her trip from Lynchburg because she sued the railroad in Memphis, Tennessee, and because, as noted above, the 1880 Census found her back in Mississippi. Although it is possible she may have used another mode of transportation to return home, given the length of the journey, it is more than reasonable to suppose that she made the trip back via rail.