Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott

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I have had a little something to do with lawyers since the 1955 Montgomery bus boycott.

Martin Luther King, Jr.1

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INTRODUCTION

Martin Luther King, Jr., demonstrated a keen appreciation for both the power and the limits of law.2 The movement in which he played such a central role—the Civil Rights Movement of 1955-1968—produced, as Harry Kalven, Jr. once quipped, “the first revolution in history conducted, so to speak, on advice of counsel.”3 King displayed attentiveness to legal symbolism in the first speech that he gave as a civil rights leader. Urging the blacks of Montgomery, Alabama, to boycott the city’s buses to protest racially-motivated mistreatment, he invoked legal and religious icons to inspire their collective defiance. “We are not wrong,” he told his audience at the Holt Street Baptist Church on the evening of December 5, 1955, because “if we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong.”4

Beginning that evening, and over the next thirteen years, King’s activities placed him at or near the center of controversies that dramatically altered the nation’s legal landscape. From the Montgomery Bus Boycott arose Gayle v. Browder,5 the Supreme Court decision that invalidated de jure segregation in intrastate transportation and thereby effectively overruled Plessy v. Ferguson.6 Protest campaigns in Birmingham and Selma constituted crucial links in the chain of events that culminated in the Civil Rights Act of 1964,7 the Voting Rights Act of 1965,8 and the Supreme Court decisions upholding these legislative initiatives.9

These and related campaigns also gave rise to cases that significantly affected legal doctrines regulating freedom of expression. King claimed repeatedly that “the great glory of American democracy is the right to pro-

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2. In an issue of the Columbia Law Review dedicated to Martin Luther King, Jr. soon after his assassination, the editors aptly noted that for lawyers, King’s life and death should have a distinct significance. Symposium in Memory of Dr. Martin Luther King, Jr., 68 COLUM. L. REV. 1011 (1968); see also Greenberg, Martin Luther King, Jr., and the Law, 114 CONG. REC. 17109 (1968) (“The striking thing about Martin King, particularly for his lawyers, is that his life helped determine the outer reaches, the full potential of law in his time, while simultaneously defining its limits and disabilities.”); McGee, Book Review, 21 U.C. DAVIS L. REV. 453 (1988) (“Although [King] was neither a lawyer nor a judge, surely he belongs in the pantheon of American constitutional giants.”).
4. Speech by Martin Luther King, Jr., at Holt Street Baptist Church, Montgomery, Alabama (December 5, 1955) [hereinafter King Speech], reprinted in EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS—A READER AND GUIDE 45 (C. Carson, D. Garrow, V. Harding & D. Hine eds. 1987).
5. 352 U.S. 903 (1956).
6. 163 U.S. 537 (1896).
test for right." The Civil Rights Movement tested his hypothesis by staging protest activities that forced courts to create or refine doctrine involving a wide array of First Amendment concerns, including symbolic speech, the public forum, freedom of association, libel, and rules governing mass demonstrations. The disciplined peacefulness of the civil rights activists and the underlying decency of their demands helped to create an atmosphere conducive to judicial liberality. The result was not only a beneficial transformation in the substantive law of race relations, but also a blossoming of libertarian themes in First Amendment jurisprudence. In the context of the First Amendment, as in many other areas, the struggle for racial justice produced ramifications that extended far beyond its point of origin. Once loosed, liberty, like equality, was an idea not easily cabined.

On the other hand, King and his allies suffered significant defeats in the legislative, executive, and judicial arenas. They were forced to compromise on key issues in order to obtain passage of federal civil rights legislation. Activists discovered that the willingness of Presidents Kennedy and Johnson to invest political capital on behalf of the Movement often lagged behind their promises. And Movement activists failed to

10. King Speech, supra note 4, at 45.
17. See D. Bell, And We Are Not Saved 51-74 (1987); Freund, The Civil Rights Movement and the Frontiers of Law, in The Negro American 363 (T. Parsons & K. Clark eds. 1965); Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers L. Rev. 387, 389 n.6 (1967) ("One of the most fascinating areas of the evolution of our constitutional law yet to be explored is the catalyzing effect of the myriad forms of struggle for Negro freedom and equality upon the development of constitutional rights and liberties applicable to all citizens—white and black alike.").
19. See Statutory History of the United States: Civil Rights—Part II (B. Schwartz, ed. 1970). Professor Schwartz notes, for instance, the evisceration of the Civil Rights Act of 1957, id. at 837 (it was "so watered down in the Senate as virtually to destroy the statute's substantive impact"); the emasculation of the Civil Rights Act of 1960, id. at 935 (like its predecessor, the 1960 act was "so weak that its effect upon civil rights was primarily symbolic"); the defeat in Congress in 1966 of efforts to enact national legislation prohibiting racial discrimination in housing, id. at 1629; and the compromise open-housing measure that was finally enacted in 1968 in the aftermath of Martin Luther King, Jr.'s assassination.
persuade the Supreme Court that racial discrimination in places of public accommodation violated the federal constitution;\(^{21}\) the outlawing of "private" discrimination in businesses open to the public occurred through the intervention of the Civil Rights Act of 1964,\(^ {22}\) a less aggressive law in certain respects than the Reconstruction-era legislation it was meant to replace.

Despite the centrality of King's role, it would be erroneous to conflate, without qualification, his career and the history of the Movement.\(^ {23}\) The Movement consisted of a mass of local initiatives that received inspiration and guidance from a striking array of figures who, at one time or another, diverged quite markedly from King. One thinks, for instance, of such vital leaders as Roy Wilkins, James Farmer, Robert Moses, John Lewis, Stokely Carmichael, Fred Shuttlesworth, and Fannie Lou Hamer.\(^ {24}\) King, however, is the person most widely identified in the public imagination with the Civil Rights Movement.\(^ {25}\) The Movement would probably have transformed America without his presence.\(^ {26}\) But it is hard to believe that history's replacement could have offered the eloquence, vision, and moral gravity that King provided.\(^ {27}\)

\(^ {21}\) See, e.g., Bell v. Maryland, 378 U.S. 226 (1964); see also Paulsen, The Sit-In Cases of 1964: "But Answer Came There None," 1964 Sup. Ct. Rev. 137 (analyzing Court's avoidance of what was then "one of this nation's most troublesome constitutional questions: To what extent does the Fourteenth Amendment forbid the states to support private choice, when under the Constitution that choice could not be made by the state itself . . .?").


\(^ {24}\) See J. Farmer, Lay Bare the Heart (1985); J. Forman, The Making of Black Revolutionaries (1972); R. Wilkins, Standing Fast (1982).


\(^ {26}\) During the bus boycott in Montgomery, King declared that if he "had never been born this movement would have taken place. . . . I just happened to be here. . . . [T]here comes a time when time itself is ready for change." Quoted in D. Garrow, supra note 23, at 56.

\(^ {27}\) See, e.g., Civil Disobedience: Theory and Practice (H. Bedau ed. 1969); Revolution and the Rule of Law (E. Kent ed. 1971). Nothing better indicates the extraordinary range of King's talents than that he participated in the making of the American legal tradition not only as a civil rights activist but also as an intellectual. His "Letter From A Birmingham Jail," for instance, is widely anthologized and properly acknowledged as one of the great contributions in this century to the theory and practice of civil disobedience. See J. Ansbro, Martin Luther King, Jr.: The Making of a Mind (1982); H. Walton, The Political Philosophy of Martin Luther King, Jr. (1971); Davis, Pride and Prejudice, The New Republic, Jan. 5, 1987 (complaining that "[t]he image of King as an intellectual was virtually obliterated by the movement he became the spokesman for").
This Article focuses upon legal issues that shaped and were in turn shaped by Martin Luther King's first campaign as a civil rights leader: the boycott in 1955–1956 of segregated buses in Montgomery, Alabama. In Section I, I describe the legal status of the Negro in the South in 1955. This overview portrays the legal and extra-legal situation southern blacks faced on the eve of the boycott and provides a baseline against which to measure what King and the Movement accomplished.

In Section II, I describe the origins and early development of the Montgomery Bus Boycott and of the organization that guided it, the Montgomery Improvement Association (MIA), as well as King's entrance into national prominence as the MIA's president. I emphasize two points in particular. The first is the striking modesty of the protest's initial demands. Although the boycott began one and a half years after the Supreme Court invalidated de jure segregation in public schooling, King and the MIA did not initially demand the abolition of de jure segregation on Montgomery's buses; they primarily demanded courtesy and formal even-handedness, taking for granted the continued existence of racial separation. The second is the considerable extent to which the white power structure, exemplified by the bus company's attorney, a Harvard-trained lawyer named Jack Crenshaw, inadvertently radicalized King and the MIA. Crenshaw stubbornly maintained that the MIA's initial requests were impossible to satisfy within the confines of existing state and local law. His reading of the relevant statutes cut off avenues of compromise. In response, and to many people's surprise, the leaders of the MIA demanded more—and won more—than they had originally even contemplated.

In Section III, I discuss litigation ignited by the boycott. I focus on two cases in particular. *State v. King* involved King's conviction for violating an Alabama anti-boycotting statute. I examine his prosecution as a socio-political event and show how, ironically, it furthered the cause of the protest. I then examine the doctrinal issues raised by the prosecution—statutory vagueness, selective prosecution, the authority of states to regulate political boycotts—and relate them to constitutional law as it stood in 1956 and as it stands today. In the second case, *Gayle v. Browder*, the Supreme Court affirmed a three-judge district court's decision striking down state and local statutes in Alabama requiring racial segregation aboard intrastate vehicles. I examine the difficulties that faced the three southern, white judges who had to decide whether to extend *Brown*, and the strategy behind the Supreme Court's disposition of the case.

Finally, in Section IV, I explore the achievements of the boycott and its

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29. See infra text accompanying notes 151–169.
associated litigation. Although I note in some detail the limits of the boy-
cott’s short run accomplishments, I conclude by emphasizing the manifold
ways in which, over the long run, the experiences gained, the attention
won, and the inspiration generated by King and his associates strength-
ened a Movement that produced tremendous changes that continue to re-
verberate in our society. Viewed against a backdrop of slightly more than
thirty years, the boycott in Montgomery can rightly be deemed not only
the starting point of Martin Luther King’s public career but also, per-
haps, its most impressive moment.

Guiding my analysis of specific events, developments, and problems are
two broad methodological aims. The first is to add a lawyer’s vision to the
During the 1960’s, the Movement was the subject of considerable com-
mentary by practicing attorneys and legal academics. Since then, it has
received relatively little attention from the legal community. The most il-
luminating recent studies have mainly consisted of work by historians,
journalists, political scientists, and sociologists. I draw upon that work
liberally in the pages that follow and hope that my study will nourish
such undertakings. The reason why reappraisal of the Movement from
the perspective of a legal academic is potentially enlightening is that, all
too often, scholars without legal training either shy away from questions
that appear to require technical legal expertise or neglect topics that are

32. See, e.g., A. Cox, M. Howe & J. Wiggins, Civil Rights, the Constitution, and the Courts (1967); H. Kalven, supra note 3; Legal Aspects of the Civil Rights Movement (D. King & C. Quick eds. 1965); Southern Justice (L. Friedman ed. 1965); Pollitt, Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days, 1960 Duke L.J. 315; Powell, supra note 16.


likely to be of special concern to the legal imagination: the substance and application of legal doctrine, the relationship between case law at a given point in the past and prevailing contemporary trends, litigation strategies, and lawyerly performance.

My second aim is to write about the legal ramifications of the struggle against segregation without falling victim to either the illusion that what happened had to happen or the notion that the losing side—the side supporting de jure segregation—was wholly bereft of morality or reason. Both of these tendencies represent seductive strands of “victor’s history” which, if indulged, obscure important aspects of the past. I attempt to respect segregationists in the sense of taking their ideas seriously; after all, Martin Luther King did. Some segregationists thought long and hard about the peculiar form of racial hierarchy they sought to maintain. We can benefit from attention to their views, particularly their insistence that segregation represented “a way of life.” That conception of segregation is far more attuned to the fluid, hydra-headed nature of the segregation regime than the static and formalistic conception that has so thoroughly and unfortunately dominated the legal imagination.

I. WHAT MARTIN LUTHER KING WAS UP AGAINST: THE LEGAL STATUS OF THE SOUTHERN NEGRO IN 1955

At mid-century, as throughout the history of the United States, the racial subordination of blacks constituted an explosive national problem. The South, however, was the locus of the most intense and visible racial struggles. In the 1950's, Southern society was beginning to experience with increasing severity a sharp tension created by the urgency of black aspirations and the inertia of the established order. In racial terms, the most striking aspect of the status quo was segregation—the relegation of blacks on the basis of race to a separate and subordinate sphere in every arena of social interaction.


36. Charles Black’s great essay, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960), is an effort to explain segregation as a way of life. For a celebrated article displaying the narrow and formalistic conception of segregation that remains influential, see Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959).


38. For useful analyses of segregationist thought and practices, see J. Cell, The Highest Stage of White Supremacy (1982); J. Dollard, Caste and Class in a Southern Town (1937); C. Johnson, Patterns of Negro Segregation (1943); I. Newby, Jim Crow’s Defense: Anti-Negro Thought in America, 1900–1930 (1965).
A. Segregation in the Public Sphere

Segregation was a way of life determined in large part by whites who virtually monopolized state power and used that power to subjugate blacks. Although the Fifteenth Amendment to the Constitution prohibited states from disenfranchising persons on account of race, the White South openly and successfully used private power and state authority to deny the Negro the ballot. On the one hand, terroristic violence and economic intimidation dissuaded many blacks from exercising their rights to political participation. On the other hand, literacy tests, poll taxes, permanent disenfranchisement upon conviction for certain crimes, creation of super-majoritarian districting schemes, “grandfather clauses,” and “white primaries” provided “legal” means of disenfranchisement. By the mid-1950’s, some of these impediments had been invalidated. But several of the most effective obstacles to black participation remained untouched. In 1956, only 25 percent of all black adults in the South were registered to vote as compared to 65 percent of all white adults. Moreover, black voting was largely confined to urban areas. In many rural areas, black voters were virtually non-existent; in Mississippi in 1955, fourteen rural counties with large black populations had no black registered voters. Although less oppressive than in Mississippi, the environment in Alabama for Negro participation in electoral politics was also dismal. In 1960, only 9.1 percent of the voting age blacks in Montgomery County were registered, in comparison to 46.1 percent of the voting age whites. In two


40. See S. LAWSON, BLACK BALLOTS, supra note 39, at 15, 130-32.

41. South Carolina v. Katzenbach, 383 U.S. 301, 310-15 (1966) (cataloguing devices and ploys used to exclude blacks from participation in southern politics); see also S. LAWSON, BLACK BALLOTS, supra note 39, at 1-139.

42. See, e.g., Terry v. Adams, 345 U.S. 461 (1953) (declaring unconstitutional rule of private political association prohibiting black participation in vote to select candidate in major party primary); Smith v. Allwright, 321 U.S. 649 (1944) (declaring unconstitutional rule of major state political party excluding black participation in party primary); Guinn v. United States, 238 U.S. 347 (1915) (declaring unconstitutional provision exempting descendants of those who voted before enactment of Fifteenth Amendment from literacy requirements).

43. See J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 134 (1959); D. GARROW, PROTEST AT SELMA, supra note 33, at 11.

44. D. GARROW, PROTEST AT SELMA, supra note 33, at 9.

45. See VOTING: 1961 COMMISSION ON CIVIL RIGHTS REPORT 23-27 (1961). Describing what it was like for a black to try to register, Martin Luther King observed that “[a]t the registration office are separate lines and separate tables for voters according to race. The registrars servicing Negro lines move at a noticeably leisurely pace, so that of fifty Negroes in line, as few as fifteen may be reached by the end of the day.” M.L. KING, STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 29 (1958).
other Alabama counties populated predominantly by blacks, none were registered.46

The success of white supremacists in negating black political participation produced all sorts of collateral consequences burdensome to Negroes. The elimination of Negro voters freed white politicians to ignore or to attack their black constituents at little or no political cost. At the national level, white supremacists in Congress stymied federal legislation aimed at relieving the oppression of the Southern Negro. On scores of occasions between 1920 and 1950, the Southern bloc in Congress succeeded in killing federal anti-lynching legislation.47 At the local level, white supremacists turned every lever of state power into an instrument of racial oppression. There was little that Negroes could do through conventional politics to oust officials who hired only whites as agents of the state—e.g., prosecutors, tax-assessors, jury commissioners, or police officers. In Montgomery in 1954, the hiring of four blacks to the previously all-white police force was considered a noteworthy breakthrough. But even such a minimal change as this triggered extreme white resentment. To placate enraged whites, the Montgomery Police Chief stated that the new black policemen were “just niggers doing a nigger’s job.”48

White officials, reflecting their own personal biases as well as the social dynamics that placed them in office, exercised discretion in ways that almost invariably slighted black interests. What this meant concretely was that blacks typically received inferior public goods and services. The separate and unequal character of segregated public schooling has been well-publicized.49 But what has not been adequately appreciated is the all-inclusive extent of systematic inequity. From sewer service to lighting to the upkeep of streets to law enforcement to recreational facilities, blacks could realistically expect to receive fewer resources because of racial bias.50

Political subordination was facilitated by stigmatizing beliefs regarding the alleged moral and intellectual inferiority of Negroes.51 One asserted

50. On municipal services, see Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) (en banc) (per curiam); C. Haar & D. Fessler, The Wrong Side of the Tracks 27–54 (1986). On recreational facilities, see McKay, Segregation and Public Recreation, 40 Va. L. Rev. 697 (1954). In 1952, nine southern states set aside 12 public parks for blacks, 180 for whites. Id. at 704. In Louisiana, Mississippi, and Texas there were no public park facilities available to Negroes, although those states made available 7,000, 10,972, and 58,126 acres of park land, respectively, for whites to use. Id. at 703.
reason for excluding blacks from activities which ideally required responsibility, honesty, and intelligence was that they simply lacked such traits. Tremendous effort was expended toward eliminating blacks as jurors, for instance, not only because their presence might have made a difference in certain categories of cases—e.g., interracial disputes—but also because it was simply not “fitting” for blacks to participate in the administration of justice, because they were incapable of conducting themselves properly.  

B. Segregation in the Private Sphere

Deep-seated contempt also expressed itself in governmental commands requiring racial separation even in “private” contexts in which individual whites and blacks might themselves desire to interact. In the mid-1950’s, Southern statute books were full of laws that punished interracial sex with enhanced penalties and that prohibited or rendered void interracial marriages. The quasi-religious punctiliousness with which local governments stamped segregation upon the social fabric of their jurisdictions is vividly illustrated by a city ordinance in Montgomery which declared it unlawful to conduct a restaurant or any other place for the serving of food . . . at which white and colored people are served in the same room, unless such white and colored people are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher and unless a separate entrance from the street is provided for each compartment.

It was virtually inevitable, of course, that state-enforced racial subordination would condition the racial mores of private parties even in areas left unregulated by statute. In the job market, for instance, the racial prejudice of employers and labor unions, along with the consequences of

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53. For a comprehensive list of state statutes, see J. Greenberg, supra note 43, at 396. It was not until McLaughlin v. Florida, 379 U.S. 184 (1964), that the Supreme Court invalidated a state statutory scheme that provided for a greater possible punishment for interracial cohabitation than intraracial cohabitation.

54. It was not until Loving v. Virginia, 388 U.S. 1 (1967), that the Supreme Court invalidated state-imposed prohibitions against interracial marriage.

55. Nesmith v. Alford, 318 F.2d 110, 119 n.10 (5th Cir. 1963) (quoting Montgomery, Ala., Code ch. 10 § 14 (1952)).
historical deprivations, combined to create a system of occupational stratification under which blacks were relegated to the lowest paying and least prestigious positions. In a typical Southern city in the 1950's, at least 75 percent of the black men labored as unskilled workers in contrast to 25 percent of the white men. While 50 percent of black working women labored as domestics, less than one percent of white working women were so employed. In Montgomery in 1950, the median income for whites was $1730, for blacks $970. In a city of about 106,000—60 percent white and 40 percent black—three physicians, one dentist, two lawyers, and one pharmacist occupied the top of the black occupational hierarchy. By contrast, the white population boasted 144 physicians and surgeons, 43 dentists, 189 lawyers and judges, and 62 pharmacists. Ministerial service was the one professional occupation in which the numbers of blacks compared favorably with the number of whites: 92 black clergymen and 95 white.

What one analyst wrote in 1967 applied *a fortiori* to the state of affairs a decade earlier:

> In the South, Negro employment opportunity is rigidly prescribed by traditions in race relations. The practice of dividing the work market into “white jobs” and “Negro jobs” has been clearly defined, and practices governing use of the Negro labor force have been reduced to observable “laws.” For example, Negroes seldom work side by side with whites in the South, particularly in jobs that carry advantages in income, responsibility, potential for upgrading, and cleanliness. This is the case whether on the assembly line or elsewhere in the plant or business. Negroes rarely, if ever, supervise whites in the South, and opportunity for them to apply themselves at tasks commensurate with their skills and abilities is overwhelmingly confined to segregated areas of the economy that provide services to other Negroes.

Mrs. Rosa Parks' experience was characteristic. Although she was one of a small number of black high school graduates in Montgomery, she

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58. Id.


found herself unable to obtain employment in which she could put to full use her educational training and abilities; all she could obtain were menial jobs.  

C. The Etiquette Of Segregation

Segregation also conditioned etiquette—the micropolitics of day-to-day living. The essential function of segregationist racial etiquette was to define and maintain the social distance necessary to highlight the social superiority of whites in relation to blacks. It counselled blacks to enter a white person's dwelling from the rear, but imposed no reciprocal expectation. It required blacks and whites to dine separately under all circumstances. And it warned black men to show absolutely no sexual interest in white women while tolerating white men's sexual attraction to black women. As one observer commented, "[I]n the social framework of the southern region there is no place for the discussion of sex relations involving a white woman and a Negro man. Even a rumor of this kind threatens the security of the Negro." Brutally illustrating the degree to which the race line in sexual affairs remained dangerously charged in the mid-fifties, particularly in the rural Deep South, was the killing in August 1955—three months before the advent of the Montgomery Bus Boycott—of a black youngster in LeFlore County, Mississippi. Raised in Chicago, Illinois, and therefore unfamiliar with the racial etiquette of southern segregation, fourteen year-old Emmett Till made the fatal mistake of whistling at a white girl. For that infraction, he was bludgeoned and shot in the head. Still more instructive is that an all-white jury acquitted those charged with Till's murder even though the evidence pointed overwhelmingly to their guilt.

63. See Thornton, supra note 48, at 175; see also L. Yeakey, supra note 60, at 12-14.
64. See generally C. Johnson, supra note 38, at 117-55; R. Wright, The Ethics of Living Jim Crow, in UNCLE TOM'S CHILDREN (1936).
66. Id. at 123-36.
67. Id. at 143-45. Illustrating the strength of the taboo against interracial dining, Johnson recounts how a party of white men and their Negro guide solved the problem of maintaining segregated dining on a small fishing boat. "At noon they all ate; but for the comfort of the party a stick was laid across the boat between the Negro and the whites, and lunch and conversation took place without strain." Id. at 143.
68. Id. at 146.
70. Cf. C. Johnson, supra note 38, at 272: The Negroes who live ... in a particular locality know what can and cannot be done; the stranger from another city of the South is less certain of details but knows the broad pattern; the Negro from the North is lost and, unless escorted by a native, is almost certain to get into trouble.
71. See S. Whitfield, supra note 69, at 33-50; see also EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965, supra note 4, at 37-58.
D. Segregation's Limits

Although segregation privileged whites at the expense of blacks, it did not represent a complete victory for white supremacy. Rather, it embodied an uneasy compromise between the racial egalitarianism that emerged powerfully during the First Reconstruction and the white supremacist re-action that followed. On the one hand, after dismantling the First Reconstruction during the last three decades of the nineteenth century, whites in the South largely succeeded in disenfranchising blacks. On the other, the guarantee of the Fifteenth Amendment stood in the way of a formal color bar in electoral politics. Similarly, white power structures in southern locales largely succeeded in materially and psychologically crippling black communities. Yet, the fact that, at least formally, the states owed blacks services equal to those provided to whites represented a nagging reminder that the Civil War and Reconstruction had successfully imposed certain limitations on the use of power by whites. Although the White North largely abandoned the Southern Negro to his former masters after the collapse of Reconstruction, the specter of northern intervention in southern affairs remained a potent enough deterrent to exercise some degree of restraint over white southern policymakers.

Segregation, moreover, never wholly succeeded in legitimating itself. Some blacks embraced it. But many more recognized segregation as a form of oppression and, with a few white allies, challenged it whenever they thought they could reasonably do so without paying too high a cost. At the turn of the century, for instance, blacks used boycotts to fight the introduction of segregation to municipal transportation. Between 1900 and 1907, blacks boycotted segregated streetcars in at least twenty-seven cities, including Montgomery. This precursor to the boycott of 1955–56 lasted two years—from 1900 to 1902—and compelled a private streetcar company to disregard, at least temporarily, the City's segregation ordinance. The blacks' victory, however, was short-lived; segregationist practice was soon reimposed. Even the memory of the temporary victory was lost;

72. On Reconstruction's beneficial influence upon the onerously oppressive regime that superseded it, see E. Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 602-03 (1987) ("Reconstruction closed off even more oppressive alternatives than the Redeemer's New South.").
73. See J. Kousser, supra note 39.
75. See, e.g., J. Kousser, supra note 39, at 45–46 (fear of federal intervention helped to limit range of means used to disenfranchise Negroes); Rable, supra note 47 (fear of federal intervention helped motivate white southern politicians to take action against lynching).
78. A similar response occurred during the boycott of 1955–1956. See infra text accompanying notes 267–89.
neither Martin Luther King nor any of the other leaders of the later boy- 
cott mentioned the earlier struggle.\textsuperscript{79} Still, the very occurrence of these 
twenty-seven turn-of-the-century boycotts vividly indicates the presence of 
an active black resistance even during the worst periods of segregationist 
repression.

Another manifestation of resistance was litigation aimed at challenging 
various features of the segregation regime. This litigation, much of it 
directed by the National Association for the Advancement of Colored People 
(NAACP), attacked a wide spectrum of practices including racial exclu- 
sion in the composition of juries,\textsuperscript{80} residential segregation,\textsuperscript{81} voting dis- 

\textsuperscript{82} crimination,\textsuperscript{83} and segregation in interstate transportation.\textsuperscript{85} The capstone 
of this effort was \textit{Brown v. Board of Education},\textsuperscript{84} the most famous Su- 

\textsuperscript{86} preme Court decision of the twentieth century, the case in which the Jus- 
tices unanimously held that \textit{de jure} segregation in public schooling vio- 

\textsuperscript{87} lated the Constitution.

Viewed collectively, these suits embody the most successful campaign of 
social reform litigation in American history. But inasmuch as officials fre- 
quently ignored or evaded judicial decisions, one must be careful not to 
exaggerate the consequences of victorious lawsuits. Rulings often promised 
far more on paper than the legal machinery delivered in the crucible of 
day-to-day living. By 1955, however, the cumulative weight of Supreme 
Court precedent had combined with other important trends and develop- 
ments, such as a general revulsion against racism in the aftermath of the 
Holocaust and a felt need to compete with the Soviet Union for the hearts 
and minds of people of color in Africa and Asia,\textsuperscript{86} to shift white public 

\textsuperscript{88} opinion, putting proponents of segregation squarely on the defensive.\textsuperscript{86}
E. Segregationist Counter-Attacks

Segregationist defensiveness, however, displayed itself aggressively. Authorities attempted to eliminate the NAACP by applying some of the same tactics that states and the national government had previously employed against left-wing organizations. States tried to force local chapters of the NAACP to disclose their membership lists, enacted statutes that prohibited the NAACP from urging blacks to use its legal staff to seek redress through litigation, and disseminated derogatory propaganda.

urbanization of southern blacks, and the creation through northward migration of strategic blocs of black voters. See D. McAdam, Black Insurgency, supra note 33, at 65–116. Other important developments that both reflected and encouraged progressive reforms in race relations included President Roosevelt’s creation of the Fair Employment Practices Committee (FEPC) that sought to prevent a threatened march on the nation’s capitol protesting racial discrimination, see H. Garfinkel, When Negroes March: The March on Washington Movement in the Organizational Politics for FEPC (1959); publication of Gunnar Myrdal’s An American Dilemma, see D. Southern, Gunnar Myrdal and Black-White Relations: The Use and Abuse of An American Dilemma, 1944–1969 (1987); Jackie Robinson’s crossing of the color line in organized baseball, see J. Tygiel, Baseball’s Great Experiment: Jackie Robinson And His Legacy (1984); and President Truman’s order to desegregate the armed forces, see B. Nalty, Strengthen for the Fight: A History of Black Americans in the Military 235–54 (1986).


89. See, e.g., Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (reversing contempt conviction for refusing to divulge information contained in NAACP membership lists to state legislative committee investigating infiltration of communists into various organizations); Louisiana ex rel. Gremlion v. NAACP, 366 U.S. 293 (1961) (affirming injunction prohibiting state from enforcing law requiring NAACP to file with state lists of its officers and members); Bates v. City of Little Rock, 361 U.S. 516 (1960) (reversing conviction of NAACP officials found to have violated state law requiring production of membership lists); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (reversing judgment for contempt of court for refusal to produce membership lists); States also enacted laws that attempted to force members of the NAACP to identify themselves publicly. See, e.g., Shelton v. Tucker, 364 U.S. 479 (1960) (invalidating Arkansas statute requiring every public school teacher to file annual affidavit listing every organization to which he or she has belonged within preceding five years); see also Freedom of Association, supra note 88, at 234–35 (describing statewide registration laws of Arkansas, South Carolina, Tennessee, Texas, and Virginia enacted after the School Segregation Cases).

90. See, e.g., NAACP v. Button, 371 U.S. 415 (1963) (invalidating state statute prohibiting solicitation of legal business by any person or organization not a party to a case and having no pecuniary interest in it). For a comprehensive discussion of state action aimed at crippling the NAACP’s ability to litigate cases, see Inclining Litigation, 3 Race Rel. L. Rep. 1257 (1958).

Apart from governmental intimidation, social pressure generated by white segregationists dissuaded many attorneys from representing civil rights activists or raising legal issues that challenged racist practices. See United States ex rel. Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir.), cert. denied, 361 U.S. 850 (1959) ("As Judges of a Circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."); Oppenheim, The Abdication of the Southern Bar, in Southern Justice, supra note 32, at 127; Note, Negro Defendants and Southern Lawyers: Review in Federal Habeas Corpus of Systematic Exclusion of Negroes From Juries, 72 Yale L.J. 559 (1963).
about the organization. Moreover, in the wake of *Brown*, the political leadership of the Southern states engaged in "massive resistance" that included resolutions by state legislatures declaring the Supreme Court's judgment "null, void and of no effect," laws that imposed sanctions against anyone who actually implemented desegregation, subterfuges that evaded or drastically slowed desegregation, and school closing plans that authorized the suspension of public education and the disbursement of public funds to parents and children for use in obtaining education in "private," segregated facilities.

Although at mid-century, politics in the South remained predominantly "white folk's business," a segregationist reaction was prompted by NAACP victories in the courts along with an increase in black voter registration. To stem further increases, the Deep South states used two maneuvers in tandem: one tightened registration requirements, while the

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91. On May 29, 1956, in House Concurrent Resolution Number Nine, the Louisiana Legislature provided for the continuation of a joint legislative committee to conduct investigations, make studies, provide information and draft legislation for the purpose of "carrying on . . . the fight to maintain segregation of the races. . . ." 1 RACE REL. L. REP. 755 (1956). According to the Race Relations Law Reporter, this Committee "aired considerable testimony unfavorable to the NAACP. . . ." Freedom of Association, supra note 87, at 229. South Carolina, Virginia, Georgia, Florida, Mississippi, and Arkansas also used legislative investigative committees to probe and besmirch the NAACP. Id. at 228-33.

92. Perhaps the best known document promulgated by the congressional arm of the massive resistance movement was The Southern Manifesto, 102 CONG. REC., No. 43, 3948, 4004 (1956), reprinted in 1 RACE REL. L. REP. 455 (1956) (19 southern Senators and 77 southern members of House of Representatives pledge "to use all lawful means to bring about a reversal of [Brown] . . . and to prevent the use of force in its implementation"). Senator Harry F. Byrd of Virginia has been credited with coining the term "massive resistance." See F. Wilhoit, The Politics of Massive Resistance 55 (1973).


94. See 1 RACE REL. L. REP. 450-51 (1956) (describing Georgia statute providing that any state officer failing to enforce state segregation laws would be subject to discharge and forfeiture of retirement and other benefits).


96. See, e.g., Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) (invalidating scheme whereby public schools in Prince Edward County were closed while white children received tuition grants and tax concessions to attend private segregated schools); see generally School Closing Plans, 3 RACE REL. L. REP. 807 (1958).

97. Although 75 to 80 percent of southern Negroes remained unregistered in 1954, the number who were registered represented a four-fold increase since 1940. See S. Lawson, Black Ballots, supra note 39, at 129.
other augmented the discretion of local registrars. Tightening registration requirements enabled states to exclude a disproportionate number of blacks by even-handed application of race-silent criteria. Augmenting the discretion of registrars enabled states to (1) cheat on behalf of whites who would otherwise have been excluded by the elevated criteria and (2) exclude blacks who, if fairly evaluated, could satisfy the new standards.98

In some areas, officials did more than slow or stop black progress; they rolled it back. In Louisiana, for instance, parish registrars were encouraged by a legislative committee to search the registration applications of Negroes for errors that could be used as the basis for revoking registration. Applying this method, registrars removed ten to eleven thousand blacks from voting rolls in twelve parishes between 1956 and 1957.99

Accompanying the reaction of state governments were responses by private persons and organizations. A new group, the White Citizen’s Council,100 engaged in a campaign to “persuade” blacks who had registered to strike their names “voluntarily” from the voting roles. In Sunflower County, Mississippi, the Council’s efforts caused black registration to fall from 114 to zero within a matter of months.101

Economic coercion played an important role in dissuading blacks from voting or exercising other rights purportedly guaranteed by the Constitution.102 Also influential was the willingness and ability of whites to resort to violence in defense of the old order. Between 1955 and 1959, 210 incidents of racial violence were recorded in the eleven states of the Old Confederacy.103 This catalogue of terror included six murders, twenty-nine assaults with firearms, forty-four beatings, and sixty bombings.104 To put the matter more concretely it involved

98. See id. at 86-139; see also United States v. Alabama, 192 F. Supp. 677 (M.D. Ala.), aff’d, 304 F.2d 583 (5th Cir.), aff’d, 371 U.S. 37 (1962) (finding that on basis of race registrars delayed processing black registrants, offered special assistance to whites, graded blacks more stringently, failed to mail registration certificates to blacks, and failed to notify rejected black applicants); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), aff’d, 336 U.S. 933 (1949) (invalidating Boswell Amendment providing that only persons who could “understand and explain” any article of the Constitution to reasonable satisfaction of Board of Registrars may qualify to vote); United States v. Louisiana, 225 F. Supp. 353 (1963), aff’d, 380 U.S. 145 (1965) (same).


100. The Council movement was born in 1954 in Mississippi as a direct off-shoot of white resistance to Brown v. Board of Education. It spread throughout the South but was most popular and effective in the deep South. Like the Ku Klux Klan, the Council movement was a decentralized federation of local organizations that differed in style and substance. Unlike the Klan, the Council conducted its operations publicly and sought and received support from middle-class, “respectable” white southerners. See generally N. MCMILLAN, supra note 76.

101. See D. GARROW, PROTEST AT SELMA, supra note 33, at 9.

102. See N. MCMILLAN, supra note 76, at 216 (describing economic coercion in Humphrey's County, Mississippi); M. Price, supra note 99, at 20-21, 42; Lewis, The Negro Voter in Mississippi, 26 J. NEGRO EDUC. 343 (1957).

103. See M. BELKNAP, supra note 20, at 29.

104. Id.
a raid by more than a hundred sheeted men into the black section of Maplesville, Alabama, that left six Negroes injured . . . the castration of a Negro handyman in Birmingham, Alabama, as part of a Klan ceremony . . . the flogging of a white school teacher in Camden, South Carolina, because he had allegedly made a favorable reference to desegregation . . . the shotgun displayed by a robed Klansman as a motorcade of some one hundred cars drove through a Negro residential section in Summerville, Georgia . . . the dynamiting of a white physician's home in Gaffney, South Carolina, because the physician's wife had written an article favoring racial justice . . . the Negro woman who withdrew her suit against a North Carolina school board after receiving threats that her children would never return if they attended the white school . . . [and] the flogging of a white sawmill worker in Stanton, Alabama, because he was accused of "associating too freely with Negroes." 105

Such was the state of affairs in the South at mid-century.

II. REBELLION IN MONTGOMERY

No events better epitomized the struggle of Southern blacks against segregation during the Second Reconstruction than the boycotts directed against Jim Crow seating on buses, "one of the few places . . . where blacks and whites were segregated under the same roof and in full view of each other." 106 The most famous of these boycotts occurred in Montgomery. 107

A. The Spark

The spark that ignited the boycott was the refusal of a black woman—Rosa Parks—108—to follow a driver's directive that she relinquish her

105. N. BARTLEY, supra note 37, at 208 (footnotes omitted).
106. A. MORRIS, supra note 33, at 17.
107. The first of these boycotts erupted in Baton Rouge, Louisiana. In March 1953, blacks successfully petitioned the City Council of Baton Rouge to pass an ordinance that rescinded the old system in which Negroes were prohibited from ever sitting in seats reserved for whites, even if those seats were empty. Under the old system, "every public bus had a 'colored section' section in the back and a 'white section' in the front. If the white section filled up, blacks had to move farther toward the back, carrying with them the sign designating 'colored.' When blacks filled up the colored section, however, they had to stand even though seats in the white section were vacant." Id. at 17. That ordinance, however, never became effective. First, the state Attorney General concluded that the ordinance conflicted with Louisiana's segregation laws. Second, the bus drivers, all of whom were white, insisted that blacks continue to sit in the back of buses. The black community responded by boycotting the buses. Its consumer strike lasted a week, was joined by about 90 percent of the black bus-riding public, and imposed heavy financial losses on the bus company. The boycott came to an end with a compromise: small sections of the bus at the front and the rear were reserved on a racial basis while the remainder of the seats were allocated on a basis of first-come-first-served. Id. at 17-25.
108. The particular victim of the arrest mattered to the evolution of the events that followed. Rosa Parks had long been active in civil rights activity and was known, respected, and liked by many within the black community. King used her standing within the community as further evidence of the intolerable nature of existing practices. "Just the other day," he reminded the congregation that ratified the call for a general boycott of the buses, "one of the finest citizens in Montgomery—not one of
seat and move further back into the rear, "black" section of the bus. The seat she occupied was located in the first row of the black section, a row filled by three blacks besides Mrs. Parks. According to one version of the facts, the bus driver demanded that Mrs. Parks and the other blacks on her row vacate their seats to accommodate several white passengers. In this account, a sense of segregationist equity informed the driver's decision. On this predominantly black route, the bus company allocated ten seats to the whites and twenty-six to the blacks. But on this particular run, the driver "undertook to readjust the seating to a more equitable ratio . . . by altering the racial division to fourteen white [seats] and twenty-two black." A slightly different version of the facts suggests that

the finest Negro citizens but one of the finest citizens in Montgomery—was taken from a bus and carried to jail and arrested because she refused to get up to give her seat to a white person. . . . Mrs. Rosa Parks is a fine person. And since it had to happen, I'm happy it happened to a person like Mrs. Parks, for nobody can doubt the boundless outreach of her integrity. Nobody can doubt the height of her character, nobody can doubt the depth of her Christian commitment. . . ."

See King Speech, supra note 4, at 44; see also Brown, Finding Rosa Parks, in READY FROM WITHIN: SEPTIMA CLARK AND THE CIVIL RIGHTS MOVEMENT (1986); H. RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 54 (1977) (quoting E.D. Nixon as saying that "[i]f there ever was a person that we woulda been able to break the situation that existed . . . Rosa L. Parks was the woman to use"); J. ROBINSON, THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT 43 (1987) (Mrs. Parks "was respected in all black circles"); Greenfield, Rosa Parks, 3 Ms. 71 (Aug. 1974).

109. Reportorial, autobiographical and scholarly accounts that I have found particularly useful include C. BARNES, supra note 33, at 108-31; T. BRANCH, supra note 33, at 143-205; D. GARROW, supra note 23, at 11-82; M.L. KING, supra note 44; J. ROBINSON, supra note 109; H. SITKOFF, supra note 32, at 41-68, Gardner, Montgomery Bus Boycott Interviews, 9 S. EXPOSURE 13 (Spring 1981); Nixon, How It All Started, 1 LIBERATION 10 (1956); Reddick, The Bus Boycott in Montgomery, 3 DISSENT 107 (1956); Thornton, supra note 48; L. Yeakey, supra note 60.

110. Thornton, supra note 48, at 194-95. Professor Thornton's rendition of the facts receives some support from the agreed stipulation of facts that later served as the predicate for Mrs. Parks' trial in the Circuit Court of Montgomery County, Alabama. See Transcript, at 8, 16, Parks v. Montgomery (No. 4559) (1956) (hereinafter Parks Transcript):

The defendant was sitting on one of the first dual seats immediately behind those occupied by white passengers and all seats assigned to whites were occupied and all standing room in that section was taken. Negroes were also standing in the negro section. The evidence is in dispute as to whether or not there were vacant seats in the negro section. In order to take on more white passengers who were at that time waiting to board the bus the driver, the agent in charge, requested the passengers on the row of seats immediately in the rear of the white section to give up their seats to white passengers. This would have made four more seats available to whites and under such reassignment the white section would have been increased to fourteen seats and the negro section decreased to twenty-two seats. The defendant, a negro, refused to move in accordance with the request of the bus driver, the agent in charge, and was arrested for such refusal.

Considerable ambiguity surrounded actual seating policy of the company. In Rosa Parks' trial, the parties stipulated that the bus she was on was divided into simply two sections, one white, one black. Later, however, during Martin Luther King's trial for organizing the boycott of the buses, see infra text accompanying notes 184-266, the manager of the bus company testified that on predominantly black routes, the buses were divided into three sections: a section reserved for whites at the front of the bus, a section reserved for blacks at the back of the bus, and an undesignated middle-section that was allocated on a first-come, first-served basis. See Transcript at 241-42, State v. King, No. 7399 (Ala. Ct. App. 1956) (hereinafter King Transcript). In actuality, the drivers appear to have allocated seats in the middle section on an ad hoc basis, which meant typically that blacks were allowed to sit in those seats only when whites had no use for them. Id. at 244-45; see also L. Yeakey, supra note 60, at 204-05 ("in Montgomery there was a clear cut inviolable rule consistently and uniformly applied to both blacks and whites").
the driver demanded that all of the blacks in Mrs. Parks' row vacate their seats in order to accommodate only one white passenger. According to this version, the driver's demand stemmed from an unwritten rule of Jim Crow etiquette which prohibited blacks and whites from occupying seats on the same row at the same time.\textsuperscript{111}

Whatever version accords with the reality of the driver's conduct and motivation, there is no disagreement about the nature of Mrs. Parks' response. While the three blacks on either side of her relinquished their seats as ordered, she stayed put. "I felt it was just something I had to do," she later recalled.\textsuperscript{112} Her refusal to move, however, was more than a personal whim.\textsuperscript{113} As Martin Luther King observed, she had been "tracked down by the \textit{Zeitgeist}."\textsuperscript{114} "She was anchored to that seat by the accumulated indignities of days gone by and the boundless aspirations of generations yet unborn."\textsuperscript{115} When police officers boarded the bus and demanded that she move, she again refused. "Why do you push us around," she asked. "I don't know," one of the officers replied, "[b]ut the law is the law, and you are under arrest."\textsuperscript{116}

Mrs. Parks' arrest elevated to new levels widespread dissatisfaction within Montgomery's black community. By the early 1950's, segregation on the buses had become a flashpoint of frustration and anger.\textsuperscript{117} In 1952, a black man was shot and killed by the Montgomery policy in an altercation over bus fare.\textsuperscript{118} In 1953, in a similar dispute, a white driver beat a black woman.\textsuperscript{119} The source of deepest resentment, however, was not episodic outrages but rather the ordinary degradations of Jim Crow practice—standing up over empty seats reserved for whites only, confronting drivers who refused to make change for Negroes, entering buses from the rear after paying fares at the front, encountering abuse for forgetting even

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\footnote{111. See D. Garrow, \textit{supra} note at 11 ("Montgomery's customary practice of racial preference demanded that all four blacks would have to stand in order to allow one white man to sit, since no black was allowed to sit parallel with a white."); L. Yeakey, \textit{supra} note 60, at 251; J. Robinson, \textit{supra} note 108, at 43; M.L. King, \textit{supra} note 45, at 43; cf. G. Stephenson, \textit{Race Distinctions in American Law} 230 (1910) (describing North Carolina statute prohibiting blacks and whites from sitting on same bench and Virginia law barring blacks and whites from sitting side by side unless all other seats were taken).}
\footnote{112. \textit{Quoted in} H. Sitkoff, \textit{supra} note 33, at 42.}
\footnote{113. Although Mrs. Parks did not plan on this particular evening to stage a protest, it is not quite accurate to term her refusal to move as spontaneous. As she later stated, "I had almost a life history of being rebellious against being mistreated because of my color." \textit{Or.} \textit{Quoted in} H. Raines, \textit{supra} note 108, at 35. She had long been active in the local chapter of the NAACP and had attended, just a few months before her arrest, the Highlander Folk School, a remarkable institution in Tennessee that trained scores of union organizers and civil rights activists. \textit{Id.}; \textit{see also} J. Glen, \textit{Highlander: No Ordinary School}, 1932-1962 136-37 (1988); Brown, \textit{supra} note 108.}
\footnote{114. M.L. King, \textit{supra} note 45, at 44.}
\footnote{115. \textit{Id.}}
\footnote{116. \textit{Quoted in} D. Garrow, \textit{supra} note 23, at 12.}
\footnote{117. A decade before Mrs. Parks' arrest, Gunnar Myrdal observed that Jim Crow travel was "resented more bitterly . . . than most other forms of segregation." G. Myrdal, \textit{An American Dilemma} 635 (1944); \textit{see generally} C. Barnes, \textit{supra} note 33.}
\footnote{118. J. Robinson, \textit{supra} note 108, at 21-22.}
\footnote{119. \textit{Id.} at 22.}
\end{footnotes}
momentarily the code of the color bar. Jo Ann Gibson Robinson recalled with seering vividness the pain she suffered at the hands of a driver who assailed her for sitting (mistakenly) in a seat reserved for whites:

I leaped to my feet, afraid he would hit me, and ran to the front door to get off the bus. . . . Tears blinded my vision; waves of humiliation inundated me; and I thanked God that none of my students was on that bus. . . . I could have died from embarrassment. . . . In all these years I have never forgotten the shame, the hurt, of that experience. The memory will not go away.

B. The WPC's Modest Proposals

In the early 1950's, a black women’s civic organization—the Women's Political Council (WPC)—took the lead in seeking to secure better treatment for blacks from the bus company. The WPC requested and obtained meetings with city and bus company officials to convey complaints and requests. It simply asked for “fairness” within the bounds of segregation. On May 21, 1954—four days after the announcement of Brown v. Board of Education—the WPC requested not an end to the enforcement of segregation laws but merely the cessation of certain practices that were not compelled by statute: ousting blacks from seats outside the reserved “white sections” of buses and requiring blacks to enter buses through the rear after paying in the front. Despite the modesty of the WPC's requests, it received little satisfaction. The WPC informed city officials that a boycott was in the offing unless something was done to better the situation. Yet in March and October 1955, two black teenagers were arrested for refusing to relinquish their seats. Then came the arrest of Rosa Parks.

The WPC took the lead in initiating a boycott by blanketing black
neighborhoods with leaflets that urged Negroes to forego riding the buses on the day of Mrs. Parks’ trial:

Another Negro woman has been arrested and thrown in jail because she refused to get up out of her seat on the bus for a white person to sit down. . . . If we do not do something to stop these arrests, they will continue. The next time it may be you, or your daughter, or mother. . . . We are, therefore, asking every Negro to stay off the buses Monday in protest of the arrest and trial. Don’t ride the buses to work, to town, to school, or anywhere. . . . You can . . . afford to stay out of town for one day. If you work, take a cab, or walk. But please, children and grown-ups, don’t ride the bus. . . .

The call for a one-day boycott elicited a dramatic response: on December 5, 1955, the vast majority of the black bus-riding public—seventy percent of the bus company’s clientele—refrained from using the buses. Emboldened by success, leading figures in the black community created a new umbrella organization—the Montgomery Improvement Association (MIA)—to coordinate the protest and press for its continuation. The key figure in this process was E.D. Nixon, the local elder statesman of civil rights activists. Nixon was a Pullman porter who had long been active in the Brotherhood of Sleeping Car Porters, the first black union to wrest a collective bargaining agreement from a major company, and a leader of local and state chapters of the NAACP. He marshalled the support of churchmen and other influential blacks, used his contacts with the local white press to publicize what was happening, and provided the protest in its earliest phase with the prestige of his own reputation.

C. King’s Role

Although Nixon was the best-known of the dissidents who founded the MIA, King was selected to preside over it. He was younger, better educated, more articulate, and a member of the clergy—a position that gave him a strong institutional base of support. King was also relatively unscorched by one of the features of black life in Montgomery that had long
stifled effective responses to racial oppression: bitter personal jealousies and animosities. He had not resided in Montgomery long enough to be identified strongly with any given faction or to rub many people the wrong way. He was the consensus choice of Montgomery’s black dissident elite and quickly gained the support of the city’s black masses as well.

King was born and raised in Atlanta, Georgia, in a solidly middle-class family that wielded considerable influence due to its heritage of leading churchmen; King’s father and maternal grandfather were well-known pastors. He was educated at Morehouse College, Crozer Theological Seminary, and Boston University, where he earned his doctorate. At the time of Rosa Parks’ arrest, King was engaged in his first pastorship as the minister of the Dexter Avenue Baptist Church. He had resided in Montgomery for only a little more than a year and was only twenty-six years old.131

King’s selection as president of the MIA was quickly vindicated by the speech he delivered the night of Mrs. Parks’ trial. Before an overflow audience at the Holt Street Baptist Church, he delivered, largely extemporaneously, a short but impassioned address that sounded many of the major themes upon which he would elaborate during the remainder of his life. He did so with the mix of patriotism and outrage, simplicity and sophistication that make his speeches among the most memorable in American history.132 “My friends,” he began:

we are here this evening for serious business. We are here in a general sense because first and foremost, we are American citizens, and we are determined to acquire our citizenship to the fullness of its meaning. We are here because of our deep-seated belief that democracy transformed from thin paper to thick action is the greatest form of government on earth. But we are here in a specific sense because of the bus situation in Montgomery. We are here because we are determined to get the situation corrected.”133

King’s speech aroused a tremendous swell of enthusiasm. It expressed sen-

131. King was not a complete unknown. From the beginning of his stay in Montgomery, King had shown a strong interest in community affairs; a few months before Mrs. Parks’ arrest, he had been offered (but declined) the position of president of the local chapter of the NAACP. Still, King was less well-known than other, more senior figures such as Nixon or Reverend Ralph Abernathy, the person who suggested the name of the MIA and who became King’s closest friend.

There exists a large biographical literature on King. The most incisive and extensive single work to appear thus far and the starting point for further investigation is David Garrow’s BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, supra note 23; see also L. BENNETT, JR., WHAT MANNER OF MAN: A BIOGRAPHY OF MARTIN LUTHER KING, JR. (3d ed. 1968); T. BRANCH, supra note 33; D. LEWIS, KING: A CRITICAL BIOGRAPHY (1970); L. REDDICK, CRUSADER WITHOUT VIOLENCE: A BIOGRAPHY OF MARTIN LUTHER KING, JR. (1959).

132. King recalled later that he had only about twenty minutes beforehand to think about his remarks. M.L. KING, supra note 45, at 59.

133. King Speech, supra note 4, at 44.
timents that had long lain dormant: "[T]here comes a time when people get tired of being trampled over by the iron feet of oppression." It articulated an urgent yearning for dignity: "We are here to save ourselves from the patience which makes us patient with less than freedom and justice." It stressed the moral and legal righteousness of the protest. "My friends," King declared:

don’t let anybody make us feel that we ought to be compared in our actions with the Ku Klux Klan or the White Citizens Councils. There will be no crosses burned at any bus stops in Montgomery. There will be no white persons pulled out of their homes and taken out to some distant road and murdered. There will be nobody among us who will stand up and defy the Constitution of this nation.

The boycott lasted 382 days, from December 5, 1955, to December 21, 1956,37 far longer than its organizers initially thought possible.38 As King later observed:

Many of the Negroes who joined the protest did not expect it to succeed. When asked why, they usually gave three answers: "I didn’t expect Negroes to stick to it," or, "I never thought we Negroes had the nerve," or, "I thought the pressure from the white folks would kill it before it got started." 139

But to the surprise of many, the boycott was consistently effective. Upwards of ninety percent of the black, bus-riding population—some 40,000 Negroes—honored the plea to stay off the buses.140 To transport the boycotters, the MIA created an alternative transportation network connected by about eighty to ninety dispatch and pick-up stations all over Montgomery.141 Initially, this alternative system of transportation depended almost wholly on labor and automobiles donated to the MIA on a part-time basis. But soon the system took on an air of semi-permanence as the MIA hired drivers, bought vehicles, and forged a remarkably effective transportation service that operated, according to the White Citizens Council, with “military precision.”

134. Id.
135. Id.
136. Id. at 45.
137. For a useful chronology of the boycott and events surrounding it, see J. Robinson, supra note 108, at 185-86.
138. According to Reverend Ralph Abernathy, none of the boycott’s leaders initially believed that it could last for more than four days. See Thornton, supra note 48, at 197-98 n.37.
140. See D. Garrow, supra note 23, at 52; M.L. King, supra note 45, at 53-54; A. Lewis, PORTRAIT OF A DECADE 61 (1964); F. Schulke & P. McPhee, KING REMEMBERED 41 (1986).
142. Quoted in A. Lewis, supra note 140, at 63.
The success of the MIA’s transportation system reflected the extraordinary sense of political commitment that suffused and mobilized the black community.\textsuperscript{143} Black Montgomery psychologically declared its independence from the white power structure and became, in important respects, self-governing. King and the other key figures in the MIA provided direction. But the boycott movement was, throughout its existence, a strikingly democratic phenomenon. As one friendly observer commented, “If there was ever an indigenous mass movement, this was it.”\textsuperscript{144} To keep the community abreast of developments, the MIA published a newsletter. And to ensure an ongoing and active rapport between leaders and led, the MIA sponsored weekly mass meetings that rotated from church to church. The meetings, King later explained:

cut across class lines. The vast majority present were working people; yet there was always an appreciable number of professionals in the audience. Physicians, teachers, and lawyers sat or stood beside domestic workers and unskilled laborers. The Ph.D’s and the no “D’s” were bound together in a common venture. The so-called “big Negroes” who owned cars and had never ridden the buses came to know the maids and the laborers who rode the buses every day. Men and women who had been separated from each other by false standards of class were now singing and praying together in a common struggle. . . .\textsuperscript{145}

For those who seek in the American past glimpses of communities in which self-determination constituted a liberating passion rather than a distasteful chore, black Montgomery in 1955–1956 is a fine example. That community was probably never more free than during the boycott. So high was the level of engagement, so deep was the urge to reform, “so profoundly had the spirit of the protest become a part of the people’s lives that sometimes they even preferred to walk when a ride was available. The act of walking, for many, had become of symbolic importance.”\textsuperscript{146}

King’s greatest contribution to the boycott movement lay in his ability to conceptualize and articulate a morally attractive vision of the protest. Two aspects of that vision were particularly influential. One had to do with his attentiveness to the morality of process. Arguing in Gandhi-like fashion that the means are the ends in the making, King emphasized in countless interviews, speeches, and articles the nonviolent, unembittered, redemptive character of the protest. “The Negro must work passionately and unrelentingly for full stature as a citizen,” King maintained, “[b]ut he

\textsuperscript{143} On the social psychology of the boycott, see Valien, The Montgomery Bus Protest as a Social Movement, in RACE RELATIONS: PROBLEMS AND THEORY 112 (1961).
\textsuperscript{144} L. REDDICK, supra note 131, at 113.
\textsuperscript{145} M.L. KING, supra note 45, at 86.
\textsuperscript{146} Id. at 77–78.
must not use inferior methods to gain it. He must never come to terms with falsehood, malice, hate, or destruction.\textsuperscript{147}

The second feature of King's contribution had to do with placing the protest in a framework that enlarged its meaning, that transformed it from a parochial to a universal struggle. It is true that he made frequent appeals to racial pride over the course of the boycott, challenging his black constituency to strike a blow for the betterment of the Negro's fortunes.\textsuperscript{148} But he also emphatically portrayed the boycott as a more ambitious and inclusive undertaking. "We are not struggling merely for the rights of Negroes," he declared one evening at a MIA prayer meeting.\textsuperscript{149} "We are determined to make America a better place for all people.\textsuperscript{150}

D. The Radicalizing of King and the MIA

The Montgomery story might have turned out far differently had the Montgomery City Lines been served by a different legal advisor. During the first few weeks of the boycott, at meetings sponsored by the Alabama Council on Human Relations (ACHR), the MIA attempted to negotiate a settlement on the basis of reforms that avoided directly challenging the legitimacy of \textit{de jure} segregation.\textsuperscript{151} But the Company's attorney, Jack Crenshaw, successfully thwarted all attempts to compromise.\textsuperscript{152} Although he assured the MIA that, of course, the Company would discipline discourteous employees brought to its attention, he was unwilling to concede

\textsuperscript{147}. See id. at 214; see also King, \textit{Walk for Freedom}, 22\ Fellowship 5, 6 (May 1956), reprinted in \textit{A Testament of Hope}, supra note 138, at 82:
[T]his is a movement of passive resistance, and the great instrument is the instrument of love. We feel that this is our chief weapon, and that no matter how long we are involved in the protest, no matter how tragic the experiences are, no matter what sacrifices we have to make, we will not let anybody drag us so low as to hate them.

\textsuperscript{148}. See King Speech, supra note 4, at 46:
[As] we prepare ourselves for what lies ahead, let us go out with a grim and bold determination that we are going to stick together. . . . [So that] [right here in Montgomery when the history books are written in the future, somebody will have to say, 'There lived a race of people, black people, fleecy locks and black complexion . . . who had the moral courage to stand up for their rights.

See also King, supra note 139, at 76 ("We Negroes have replaced self-pity with self-respect and self-depreciation with dignity.").

\textsuperscript{149}. See B. Rustin, \textit{Montgomery Diary}, in \textit{Down the Line: The Collected Writings of Bayard Rustin} 57 (1971).

\textsuperscript{150}. Id. (emphasis added).

\textsuperscript{151}. See J. Robinson, supra note 108, at 80 ("Dr. King pointed out that the Negro delegation was interested in obtaining not changes in present segregation laws, but greater justice and better treatment for black people on the buses."). In April 1956, six months into the boycott and two months after filing suit challenging the constitutionality of segregation on the buses, King wrote: "The basic question of segregation in intrastate travel is already before the courts. Meanwhile we ask only for what in . . . most other cities of the South is considered the southern pattern. We seek the right, \textit{under segregation}, from the rear forward on a first-come, first served basis." King, supra note 139, at 76.

\textsuperscript{152}. See M.L. King, supra note 45, at 111. According to Professor Thornton, Crenshaw's rigidity characterized the disposition of all the white attorneys. "From the outset," Thornton maintains, "the most inflexible of the whites were the lawyers. . . . [T]hey repeatedly displayed an absolutist predisposition that precluded compromises." Thornton, supra note 48, at 225–26.
that there even existed a problem with drivers' demeanor toward black passengers.\textsuperscript{153} He reported that the Company did not anticipate hiring any black bus drivers.\textsuperscript{154} Most importantly, in terms of the evolution of the protest, he insisted from the outset that the MIA's proposals regarding altered seating arrangements contradicted state and municipal segregation statutes.\textsuperscript{155} According to Crenshaw, "[i]f [the blacks] don't like the law we have to operate under, . . . they should try to get the law changed, not engage in an attack on our company."\textsuperscript{156}

Crenshaw's argument powerfully strengthened the position of hard-line segregationists. At least one of the city commissioners appears to have favored compromising on the basis of the MIA's initial demands on seating.\textsuperscript{157} But Crenshaw assailed compromise on the basis of both policy and legality. Compromise was unwise, he contended, because it would only feed black defiance. "If we granted the Negroes these demands," he warned, "they would go about boasting of a victory they had won over the white people."\textsuperscript{158} Compromise was illegal, he insisted, because the city ordinance as written could simply not accommodate the reformed seating arrangement the MIA proposed.\textsuperscript{159}

The Code of Alabama provided that all transportation companies carrying passengers for hire "shall at all times provide equal but separate accommodations on each vehicle for the white and colored races."\textsuperscript{160} The Code further declared that the agent in charge of any vehicle "is authorized and required to assign each passenger to the division of the vehicle designated for the race to which the passenger belongs."\textsuperscript{161} The City of Montgomery's Code articulated essentially the same rule: "[A] bus line in the city shall provide equal but separate accommodations for white people and negroes . . . by requiring [employees to assign passenger seats] . . . in such manner as to separate the white people from the negroes."\textsuperscript{162} Nothing in the language of either of these provisions expressly precluded a system, in which, on a first-come, first-served basis, whites occupied seats from front to back and Negroes from back to front until all seats

\begin{thebibliography}{9}
\item 154. See M.L. King, \textit{supra} note 45, at 112 (quoting Crenshaw as stating "we have no intention now or in the foreseeable future of hiring 'niggers' [sic]"); \textit{see also} D. Garrow, \textit{supra} note 23, at 25-26; J. Robinson, \textit{supra} note 109, at 81. Later, an official of the bus company claimed that the reason there were no black drivers was that no black applicants had applied for a position. \textit{See King Transcript, supra} note 111.
\item 155. See D. Garrow, \textit{supra} note 23, at 25, 29; M.L. King, \textit{supra} note 45, at 111-12; J. Robinson, \textit{supra} note 108, at 78-81.
\item 156. \textit{Quoted in} Thornton, \textit{supra} note 48, at 201.
\item 157. \textit{Id.} at 202-03.
\item 158. \textit{Quoted in} M.L. King, \textit{supra} note 45, at 112.
\item 159. See Thornton, \textit{supra} note 48, at 201-03.
\item 161. \textit{Id.}
\item 162. \textit{Id.} at 710-11 n.2 (quoting Montgomery, Ala., Code ch. 6 § 6 (1952)).
\end{thebibliography}
were taken. Moreover, a seating plan of precisely this sort was already in effect in other segregated southern transportation systems including, most notably, Mobile, Alabama.\textsuperscript{163}

Segregationists in Montgomery objected to this plan, however, on the grounds that it made no provision for what to be done if a bus filled with Negroes who then departed at various times were left with only a scattered and mixed array of seats available for incoming white passengers.\textsuperscript{164} The MIA countered this objection by saying that if its plan were put into effect, Negroes would voluntarily move to vacant seats in the rear of the bus, while whites would move to vacant seats in the front. The MIA insisted that "at no time, on the basis of its proposal, will both races occupy the same seat."\textsuperscript{165} Its assurances, however, were deemed inadequate. Crenshaw's reading of the relevant statutes frustrated the MIA's impulse to stop short of attacking the state's enforcement of racial separation \textit{per se}. "We are not asking an end to segregation," King repeatedly stated early in the boycott. "That's a matter for the Legislature and the courts. We feel that we have a plan within the law."\textsuperscript{166} By blocking compromise, Crenshaw helped to radicalize King and the MIA.\textsuperscript{167}

The attack on the boycott was supported by other hardliners. These were people wholly committed to an unstinting defense of the old order. In their eyes, more was at stake in Montgomery than money or convenience. "What they are after," Mayor Gayle declared in reference to King and the MIA, "is the destruction of our social fabric."\textsuperscript{168} Acting on that belief, the commissioners ended negotiations and instead imposed a "get tough" policy aimed at crushing the protest. Gayle vowed that the City Commission was "not going to be part of any program that will get Negroes to ride buses again at the destruction of our heritage and way of life."\textsuperscript{169}

City officials sought to break the boycott in three ways. First, they urged the white community to take a unified and aggressive stance toward the boycotters. Only a miniscule number of whites in Montgomery publicly supported the MIA.\textsuperscript{170} Those who did are noteworthy precisely be-
cause of their peculiarity: they were isolated, ostracized rebels.\textsuperscript{171} Both of Montgomery’s white-owned newspapers attacked the MIA editorially. No predominantly white organization in the city associated itself with the boycott. The white ministerial association in the city refused even to meet with King.\textsuperscript{172} At the same time, perhaps because they expected the boycott to fold quickly, white supremacists at both the leadership and grass-roots levels initially found it difficult to take the boycott seriously enough to be genuinely alarmed. Upon realizing, however, that they confronted a protest movement that would not easily be subdued, white leaders increasingly began to mobilize the white population. Mayor Gayle, for instance, urged white employers to stop chauffering their boycotting employees and to avoid paying them “‘blackmail money’ in extra weekly transportation fares.”\textsuperscript{173} More importantly, he and the other commissioners joined the Montgomery affiliate of the White Citizens’ Council,\textsuperscript{174} an action that both reflected and accelerated its rapidly rising popularity.\textsuperscript{175} On February 10, 1956, at a Council rally featuring Senator James O. Eastland of Mississippi, twelve thousand whites filled the state coliseum in Montgomery in what was then one of the largest political gatherings in the history of the state.\textsuperscript{176}

No officials publicly encouraged private white violence against the boycotters, and when violence occurred, they quickly condemned it. On the other hand, a foreseeable consequence of the commissioners’ “get tough” policy was to unleash certain well-developed violent impulses.

\textsuperscript{171} One of these rebels was Juliette Morgan, a librarian, whose letter to the editor of the Montgomery Advertiser represents a remarkable instance of individual courage and an eloquent tribute to the protest. “It is hard to imagine,” she wrote:

\textit{a soul so dead, a heart so hard, a vision so blinded and provincial as not to be moved with admiration at the quiet dignity, discipline, and dedication with which the Negroes have conducted their boycott. . . . Their cause and their conduct have filled me with great sympathy, pride, humility, and envy. I envy their unity, their good humor, their fortitude, and their willingness to suffer for great Christian and democratic principles, or just plain decent treatment.}

\textit{Quoted in J. Robinson, supra note 108, at 102-03. After the publication of her letter, Morgan was engulfed by slurs and threats. A little less than two years later she committed suicide. Id. at 103; D. Garrow, supra note 23, at 635 n.15.}

\textsuperscript{172} See M.L. King, supra note 45, at 209; J. Robinson, supra note 108, at 101-04.

\textsuperscript{173} J. Robinson, supra note 108, at 119-20. According to Virginia Durr, many white women rejected the Mayor’s plea. “They said, okay, if [he] wants to come out here and do my washing and ironing and cleaning and cooking and look after my children, he can do it, but unless he does, I’m going to get Mary or Sally or Suzy.” \textit{Outside the Magic Circle: The Autobiography of Virginia Foster Durr, supra note 170, at 282.}

\textsuperscript{174} See M.L. King, supra note 45, at 126; J. Robinson, supra note 108, at 112, 119. When the Police Commissioner joined, the Montgomery Advertiser noted that “in effect, the Montgomery police force is now an arm of the White Citizens Council.” D. Garrow, supra note 23, at 52.

\textsuperscript{175} See N. McMillen, supra note 76, at 42-44.

\textsuperscript{176} See N. Bartley, supra note 37, at 106; Maund, \textit{Monster Rally at Montgomery}, Nation, Feb. 18, 1956, at 128.
MIA leaders were threatened, and verbal intimidation was quickly superseded by potentially lethal force as bombs were detonated at the homes of King and Nixon.

A second strategy involved efforts to resuscitate the divisiveness that had characterized the political life of black Montgomery before the boycott. Rumors were planted accusing King of exploiting the boycott for personal gain. Leading white citizens suggested to older, conservative blacks that they were being unfairly overshadowed by an ambitious, young outsider. Mayor Gayle attempted to bypass King and the MIA altogether by reaching an agreement with three black ministers unaffiliated with the protest to end the boycott. These measures, however, were largely ineffective. Support for King within virtually all sectors of the black community grew over the course of the struggle. Not only did blacks, following the direction of the MIA, disregard the alleged settlement, but, under community pressure, the three ministers who met with the Mayor publicly disavowed having reached an agreement in the first place.

A third strategy involved harassment and punishment. The local military draft board reclassified the draft status of Fred Gray, the MIA's principal local attorney. The local prosecutor initiated (but later dropped) criminal proceedings against Gray for brawling. The police, aided by deputized unemployed bus drivers, ticketed black motorists in unprecedented numbers for speeding, waiting too long at stop signs, not waiting long enough, or overloading vehicles with passengers. King himself was arrested and jailed for allegedly driving thirty miles per hour in a twenty-five mile per hour zone.

177. See M.L. King, supra note 45, at 132-34.
178. See D. Garrow, supra note 23, at 59-62; M.L. King, supra note 45, at 135-38.
179. See D. Garrow, supra note 23, at 54-55.
180. Gray was issued an induction order but successfully petitioned to have it cancelled by the Director of the Selective Service System. The Director's cancellation order only had the effect of remanding the case to the local draft board for re-evaluation. The authorities in Montgomery refused, however, to reopen the case, and three members of the draft board resigned to protest the Director's intervention. See 2 Rack Rel. L. Rep. 255 (1957) (exchange of letters between Senator Richard Russell of Georgia, Chairman of the Armed Services Committee of the United States Senate, and General Lewis B. Hershey, Director of Selective Service System, regarding draft status of Fred D. Gray); J. Robinson, supra note 108, at 141; Interview with Fred D. Gray in Tuskegee, Alabama (Aug. 26, 1988) [hereinafter Fred Gray Interview].
181. Gray was accused of including a woman as a plaintiff in a lawsuit without her authorization. The suit led to the invalidation of bus segregation statutes. See Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), aff'd, 352 U.S. 903 (1956). It seems likely that the woman was coerced by her employer into making the charge. See D. Garrow, supra note 23, at 63-64; L. Redick, supra note 131, at 120-21; J. Robinson, supra note 108, at 142-43; B. Rustin, supra note 149, at 55, 56. Some have suggested that the case was dropped because the state prosecutor determined that he lacked jurisdiction over the matter since the suit Grey filed was a federal action. L. Redick, supra note 131, at 120-21; Fred Gray Interview, supra note 180.
182. J. Robinson, supra note 108, at 123.
III. THE BOYCOTT IN COURT

A. The Trial of Martin Luther King

As the boycott wore on, courts became a central locus of struggle. Increasing their pressure, authorities prosecuted King for violating a state law that criminalized conspiring "without a just cause or legal excuse" to hinder a business.\(^{184}\) Eighty-nine MIA dissidents were also indicted, but King was the only one tried.\(^{185}\)

Intended to suppress the Negro rebellion, the prosecution had precisely the opposite effect. It spurred the black community to further displays of unity, confidence, and self-sacrifice.\(^{186}\) Defendants joyously turned themselves in to the police.\(^{187}\) As King put it, "[t]hose who had previously trembled before the law were now proud to be arrested for the cause of freedom."\(^{188}\) Being arrested or jailed pursuant to the protest had become a badge of honor. The day the boycott leaders were arraigned, most of Montgomery’s blacks shunned all motor transportation as a gesture of respect and solidarity.\(^{189}\)

The prosecution also advanced the cause of the boycott by elevating it to a major item of national and international news. For the first time, King and the boycott movement appeared on the front page of the New York Times and received notice by network television.\(^{190}\) The heady feeling of being at the center of the world’s attention further encouraged Montgomery’s rebellious black population.

The trial took place in the Circuit Court of Montgomery, Alabama, lasted four days—March 19–22, 1955—and was presided over by Judge Eugene W. Carter, who also served as the finder of fact since both parties consented to a non-jury trial. Judge Carter was familiar with the case; he had, on his own motion, brought to the attention of the grand jury the

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184. ALA. CODE § 54, tit. 14 (1940) (presently codified as ALA. CODE § 13A-11-122 (1975)) reads in pertinent part:
   Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business shall be guilty of a misdemeanor.

185. Thornton, supra note 48, at 225.

186. At the time, a magazine correspondent presciently predicted that in bringing the prosecution, the white Establishment had made a “fatal mistake” for “the indictments made martyrs out of the leaders of the movement and completely fused the Negro citizens into a jubilant, hymn-singing, firmly determined group.” See Alabama . . . Why Race Relations Could Grow Even Worse, NEWSWEEK, March 5, 1956, at 24, 26.

187. See M.L. King, supra note 45, at 146 (“At the jail, an almost holiday atmosphere prevailed. . . . No one had tried to evade arrest. Many Negroes had gone voluntarily to the sheriff’s office to see if their names were on the list [of defendants], and were even disappointed when they were not.”); L. Reddick, supra note 131, at 137–38.

188. M.L. King, supra note 45, at 146.


question of whether the boycott violated state law.\textsuperscript{191} He was familiar with the case in a broader sense as well. After Rosa Parks’ conviction in the city Recorder’s Court, she had appealed to the Circuit Court, where Judge Carter again found her guilty of violating state and municipal law.\textsuperscript{192} His decision involved more than simply following precedent. He was himself an ardent segregationist who once sponsored a resolution at his church barring Negroes from the premises unless they were performing janitorial services.\textsuperscript{193}

The prosecutor, County Solicitor William Thetford, recalls having disfavored bringing criminal actions against the boycott leaders.\textsuperscript{194} His reluctance was not based on any qualms regarding the legalities of the matter. He simply believed that criminal prosecution would prove to be inadequately repressive since conviction would probably result in only small fines or brief jail sentences, a price the boycott leaders were gladly willing to pay. He therefore counselled the bus company to take action itself against the MIA.\textsuperscript{195}

Crenshaw vetoed Thetford’s recommendation. He declined to seek an injunction because doing so would have entailed, in his view, abandoning the Company’s position as an innocent, neutral party.\textsuperscript{196} It is difficult to fathom what he had in mind. Bringing the suit that Thetford suggested would not have necessitated directly taking sides with respect to the primary substantive issue in question—state-mandated racial segregation. All the Company needed to argue was that it was being irreparably injured by a boycott that violated state law and that its rights could only be secured by equitable relief. For the reasons Thetford outlined, obtaining injunctive relief would have been a more effective avenue of attack against the boycott. Inexplicably, Thetford waited several months (by which time, it was too late to matter) before he followed a variant of his own advice and sought an injunction in the name of the City against the MIA.\textsuperscript{197} That delay played a crucial role in the outcome of events.

The attorneys for the defense—Fred Gray, Arthur Shores, Peter Hall, and Orzell Billingsley—were the leading black attorneys in the state.\textsuperscript{198}

\begin{enumerate}
\item \textsuperscript{191} See D. Garrow, \textit{supra} note 23, at 63; J. Robinson, \textit{supra} note 108, at 141; Thornton, \textit{supra} note 48, at 224.
\item \textsuperscript{192} See Parks Transcript, \textit{supra} note 110, at 4–5.
\item \textsuperscript{193} See Montgomery Boycott: New Phase, \textit{The Nation}, Feb. 25, 1956, at 149.
\item \textsuperscript{194} See Thornton, \textit{supra} note 48, at 224 n.60.
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Id.
\item \textsuperscript{197} See infra text accompanying notes 290–93.
\item \textsuperscript{198} Fred Gray was particularly important in the litigation associated with the boycott. A native of Montgomery, he was well-acquainted with most of the major actors in the drama and was naturally looked to for legal assistance when trouble arose. Prohibited by segregation from attending law school in Alabama, Gray earned his law degree at the Western Reserve University Law School in Cleveland, Ohio, in 1954. When he represented Rosa Parks and then Martin Luther King, he was only twenty-five years old and one year out of law school. Gray subsequently participated in a number of important civil rights cases arising in Alabama. See, \textit{e.g.}, Gomillion v. Lightfoot, 364 U.S. 339
\end{enumerate}
The NAACP volunteered its General Counsel, Robert Carter, to help with the defense, but Judge Carter would not allow him to participate in the examination of witnesses. The judge justified his decision on the grounds that the case involved only a misdemeanor, that Carter was not a member of the Alabama Bar, and that the defendant was adequately represented by local counsel.

1. The Prosecution's Case-In-Chief

The prosecution's case-in-chief consisted of testimony that was apparently intended to show that the MIA was founded for the sole purpose of sustaining the boycott, that it was well-organized and funded, that King controlled the organization, that the MIA had rejected compromises offered by the Company and the City, and, finally, that Negroes stayed off the buses largely because of physical intimidation by the MIA. To establish the most damning of these allegations—the charge of intimidation—the prosecution first called ten whites as witnesses, each of whom testified that he was driving or riding on a bus in early December 1955 when it was struck by stones or gunfire. None of these witnesses offered testimony identifying or even describing the alleged assailants. They merely noted that the attacks occurred in black neighborhoods. Because no testimony linked either the MIA or King to the violence, the defense per-
sistent objection to this testimony on the grounds that it lacked any reasonable evidentiary relationship to the indictment. Their objections, however, were typically overruled.201

The prosecution also called as witnesses three blacks who claimed to have been harassed by boycotters. The first, Willie Carter, claimed that he was told that he would be beaten if he rode on a bus.202 Judge Carter sustained an objection to his testimony on the grounds that it failed to reveal a link between the person who allegedly threatened Carter and either King or the MIA.203

Quickly thereafter, however, Judge Carter abandoned conventional evidentiary standards. Ernest Smith testified that a week after the boycott began, a man tried forcibly (albeit unsuccessfully) to prevent him from boarding a bus.204 This testimony should have met the same fate as Willie Carter’s, for again no connection was established between the alleged altercation205 and King or the MIA. Judge Carter, however, overruled defense objections to Smith’s testimony.207

The third witness, Beatrice Jackson, testified that in February 1956, she was attacked by a man (presumably black) who allegedly hit her, cut her finger, and threatened that if he caught her riding a bus again he was going “to cut [her] damn throat.”208 Her testimony, too, was devoid of anything that linked her alleged assailant to either King or the MIA. But, over objections, Judge Carter admitted it into evidence as well.209

2. The Defense

The case-in-chief of the defense consisted primarily of putting the Montgomery City Lines on trial. First, the defense elicited testimony indicating that for several years prior to the boycott, the Negro community had expressed its dissatisfaction to the Company and the city commissioners. Next, it brought to the stand witnesses who testified about racially

201. See King Transcript, supra note 110, at 161-212.
202. Id. at 213-16.
203. Id. at 216.
204. According to Smith, the incident amounted to this:
I went to step on the bus and a man standing there just pulled me back and said I wasn’t going to get on. I got down and turned around and knocked him down. I got on the bus and when it turned the corner he still was laying down there.
Id. at 217. Smith went on to testify that after this altercation he was not bothered again. Id. at 217-18.
205. Id. at 216-22.
206. No corroborating evidence was offered supporting Smith’s account. Moreover, cross-examination revealed that he was a courthouse employee. Id. at 217. These considerations do not establish that Smith was lying. They should give one pause, however, before accepting his story at face value.
207. Id. at 218.
208. Id. at 223.
209. Id. at 224.
motivated mistreatment they had seen or suffered on the buses. During Sadie Brook's examination, for instance, the following exchange occurred:

Q: Have you heard the drivers call the negroes any names?
A: I have.
Q: What are some names you heard?
A: "Black bastard," and "back up nigger, you ain't got no damn business up here, get back where you belong."210

Memories of verbal insults emerge repeatedly in the testimony of other defense witnesses as well:

Q: Have you heard the bus drivers call the negroes any names?
A: Yes, sir, I have.
Q: What do they call them?
A: They call them niggers.
Q: What else do they call them, have you heard any other expressions?
A: Yes, sir, . . . "Apes."211

In addition to verbal insults, witnesses recounted other bitter memories. Richard Jordan spoke of the time that he and his obviously pregnant wife were forced to vacate two otherwise unoccupied seats in the white section of the bus.212 Martha Walker recalled an occasion on which she and her husband, a blind veteran who was on his way to obtain treatment at a Veterans Administration hospital, left a bus because the driver had rudely ordered them to the rear of the vehicle.213 Joseph Alford testified that a bus driver directed him to enter a bus by the rear after he had paid in the front; the bus then pulled off before he had a chance to reach the back door.214

The second aspect of King's defense received far less elaboration than the first. It was based upon testimony regarding King's and the MIA's commitment to moral suasion rather than physical intimidation. Reverend Robert Graetz, one of the few white Montgomerians to support the boycott publicly, testified that he had never heard King or any other member of the MIA threaten anyone who decided to ride the buses.215 King himself stated that he neither practiced nor encouraged violence, and that, with respect to influencing other blacks' commuter habits, his only advice had been "let your conscience be your guide."216

210. Id. at 362; see also id. at 368, 370.
211. Id. at 374; see also id. at 368, 370, 379, 396, 403, 409, 414, 439-40, 456, 458, 462-63, 470, 476-77, 479, 481-82.
212. Id. at 363.
213. Id. at 392-93.
214. Id. at 477.
215. Id. at 484.
216. Id. at 494.
3. The Benefits of the Trial Despite the Verdict

Although the verdict, as expected, went against King, his constituents derived significant benefits from the trial, just as they had benefitted from the mass indictments. Trials presented one of the few arenas in the South where black professionals could meet their white counterparts in open competition. The tenacious defense offered by King’s attorneys bolstered their own confidence and, by extension, the self-esteem of the black community as a whole. His lawyers provided a substantial psychological victory when they matched, or frequently outshined, their white counterparts, and when they succeeded in eliciting respect even from hardline segregationists. Silent applause erupted from the blacks in the courtroom when Mayor Gayle answered “No, sir,” to a question propounded by one of “their” attorneys.216

The trial also facilitated the public airing of two aspects of southern race relations which, according to segregationists, did not even exist: the systematic mistreatment of Negro citizens and widespread opposition among Negroes to the segregation regime. Solicitor Thetford called to the stand as rebuttal witnesses bus drivers who swore that they had never called blacks “niggers” nor encountered any racial difficulties. One recounted that he had even been accused by whites of showing undue favoritism to blacks.219 Others testified that they had applied the customs and rules of segregation even-handedly, ousting whites from seats in the black section of the bus just as blacks had been ousted from seats in the white section. These efforts of rebuttal, however, were no match for the testimony given by the black Montgomerians who related the outrages committed against them. Their testimony further eroded the myth of symmetry that had long sustained the separate but equal doctrine. It belied the comforting assertion of the white power structure that, except for the agitation of a few troublemakers, segregation was acceptable to both whites and blacks. This testimony helped to create the image that, more than any other, publicized the iniquity of segregation: the image of a bus driver ordering a person to the back of the bus on account of nothing more than the color of her skin.

4. Problems in the Defense

The conduct of the defense was not without its problems. The first was rather straightforward: the transcript of the trial reveals that in several

217. King was assessed court costs and fined $500. Id. at 577. When he indicated that he would not pay the fine, Judge Carter sentenced him “to hard labor in Montgomery County for 140 days for the fine and 246 additional days for the [court] cost.” Id. at 2. Later, someone paid the fine on King’s behalf. Fred Gray Interview, supra note 180.

218. See L. REDDICK, supra note 131, at 142.

219. King Transcript, supra note 110, at 512.
instances defense attorney Orzell Billingsley wholly neglected to familiarize himself with his own witnesses. On one occasion, for instance, he called to the stand for purposes of illustrating recent driver misconduct a woman who testified, to his evident surprise, that she had not ridden a bus since 1946.220

The second problem is more complicated. It stems from the ambivalence of a defense torn between a strategy of putting the Company on trial and a strategy of evading the prosecution's charges by denying the allegation that King and the MIA had organized a boycott. Throughout the trial, witnesses friendly to the defense claimed that they were unable to recall what King had stated at MIA mass meetings or even whether he had spoken at all at meetings they had attended. Some witnesses suggested, moreover, that the boycott was not really a boycott at all but rather a concatenation of individual decisions that happened to have been made at around the same time.

The most striking example of this strategy of evasion was King's own testimony. He claimed, for instance, that he had not urged Montgomerians to refrain from riding the buses.221 But, as the prosecution pointed out, the founding resolution of the MIA expressly called upon “every citizen in Montgomery, regardless of race, color or creed, to refrain from riding buses” until a suitable understanding had been established with the Company.222

The problem with the strategy of evasion was that it rested upon an obvious falsity.223 This raises the thorny question whether, or to what extent, King and his allies owed a moral obligation of truthfulness to institutions that oppressed them.224 Lying would seem to pose something of a quandary for a protest that derived much of its inner and outer strength from its sense of moral purity.225 Furthermore, given that King's conviction was virtually certain no matter how he portrayed his role in the protest, the question arises why he adopted a position at trial so at odds with the candid defiance and plain-spoken eloquence that had helped to make the boycott the extraordinary event it had become. Perhaps he deemed evasion necessary to protect participants in the protest; to have been open and forthright on the witness stand might have risked exposing vulnerable people to extra-legal retribution.226 Perhaps, if pressed, King would also

220. Id. at 445; see also id. at 397–401, 435–37.
221. Id. at 494.
222. Id. at 501.
223. See T. Branch, supra note 33, at 185 (“defense testimony flirted with perjury”).
226. It was necessary, for instance, to keep secret the crucial role that Jo Ann Gibson Robinson played in writing, producing, and distributing the first leaflets calling for a boycott. Had her role been publicly acknowledged, she would certainly have been dismissed from her position as a teacher at the state-funded, all-black Alabama State College. Dismissal, after all, was the fate that befell other
have noted that he was being tried, after all, in a court that lacked basic elements of justice. Although the nature of King’s testimony raises an interesting philosophical problem, I shall not pursue it here. At this point, I simply want to establish that this aspect of King’s defense is problematic and that the eventual victory of King and the MIA in the battle of Montgomery does not mean that everything they did was necessarily proper or efficacious; victors sometimes triumph despite themselves.

The law under which King was convicted exemplified the long-standing antipathy of the Alabama state government to dissident mass movements. It was enacted in 1921 as part of a package of anti-union statutes, one of which—a law that completely prohibited picketing—was invalidated in 1940 by the United States Supreme Court in *Thornhill v. Alabama.* Had King’s attorneys succeeded in having the conviction of their client reviewed in a federal forum, the case might have become *Thornhill II.* They raised a variety of constitutional objections to his prosecution, the most persuasive of which included the following: (1) the anti-boycotting statute deprived King of due process of law by failing to apprise him precisely of the wrong he was charged with committing; (2) because King was “selectively” prosecuted, the application of the law denied him due process and equal protection; and (3) the statute on its face and as applied abridged rights protected by the First Amendment.

By the time of King’s trial, it was well-established as a matter of federal constitutional law that due process required a statute to be sufficiently clear to provide fair warning to the citizenry and guidance to judicial personnel charged with determining whether a violation had, in fact, occurred. Twenty years before King’s prosecution, the president of a labor union in Alabama was charged and convicted of picketing a business...
“without just cause or legal excuse.” In the course of invalidating that statute, the Supreme Court stated in *Thornhill v. Alabama* that “[t]he phrase ‘without just cause or legal excuse’ does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning either inherent or historical.” Three years later, the Supreme Court of Alabama faced the argument that this very infirmity afflicted the state’s anti-boycotting law; after all, it too conditioned the application of criminal law on whether the activity in question was undertaken without “just cause.” Citing *Thornhill*, the Court of Appeals of Alabama invalidated the statute. The court of appeals was reversed, however, by the state supreme court. In an opinion that did not add specific content to the statute’s amorphous language, the Supreme Court of Alabama simply declared that the statute’s prohibition against interfering with another’s business “without just cause” was the same as prohibiting “unlawful interference”—as if the mere invocation of the word “unlawful” solved the problem of vagueness. The difficulty with the statute was its indefiniteness. The Supreme Court of Alabama failed to resolve that difficulty but simply papered over it with a term as amorphous as the one it purported to clarify.

The second objection raised by King’s attorneys was that their client had been singled out for prosecution in a manner that was fundamentally unfair. This claim is related to the earlier point regarding vagueness. Because the statute was so indefinite, it greatly enhanced the risk that officials would use the law to target political rivals or enemies. Justice Frank Murphy had anticipated this problem in *Thornhill* when he decried “[t]he existence of . . . a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure. . . .” That state officials were “out to get” King and the MIA for constitutionally dubious purposes is, in one sense, rather obvious. The White Citizens Councils systematically and openly boycotted those who resisted segregation. Nevertheless to say, however, the Councils had no reason to fear state prosecution. For King and the MIA the situation was different. Announcing King’s indictment, the grand jury declared: “We are committed to segregation by custom and by law,” and “we intend to maintain it.”

A court willing to act upon the obvious might have invalidated King’s conviction on the grounds that, whatever the underlying merits of the case, Montgomery officials prosecuted King not to effectuate the state’s anti-

233. 310 U.S. at 100.
235. 244 Ala. at 55, 14 So. 2d at 233.
236. 310 U.S. at 97–98.
238. *Quoted in L. Reddick, supra* note 131, at 136; see also D. Garrow, *supra* note 23, at 64.
boycotting statute, but rather to “get tough” with anti-segregationist dissidents. But where officials are charged with selective prosecution, courts have rarely been willing to recognize the obvious.\textsuperscript{239} Beset by difficult problems involving institutional competence and community safety, judges have condemned invidious prosecution in the abstract but have generally declined to use judicial remedies against such wrongs.\textsuperscript{240}

Any knowledgeable observer of the crisis in Montgomery would have recognized that the primary motivation behind King’s prosecution had little or nothing to do with the state’s antipathy to boycotts. But it would have been difficult to prove in a legal sense that the prosecution had improperly focused on King while allowing others to violate the law. A small number of prosecutions had been brought (albeit a decade earlier) against persons other than black anti-segregationists.\textsuperscript{241} Furthermore, it could truthfully be said with respect to King and his co-defendants that no other group in Alabama history had ever staged such a large and well-publicized boycott. Finally, the grand jury’s affirmation of segregation simply reflected a conclusion implicit in the indictment itself; insofar as segregation constituted a lawful policy of the state, opposition to it provided no “just cause” for a boycott.\textsuperscript{242}


\textsuperscript{240} [T]he right [to nondiscriminatory enforcement of criminal law] seems likely to remain more a matter of theory than of practical relief in most instances of discrimination, unless the courts exercise more flexibility in judging attempts to prove discriminatory enforcement. The problems of proof—including the unlikelihood of obtaining direct proof, the difficulty of amassing sufficiently persuasive statistical evidence to support an inference of intent to discriminate, and the improbability of securing evidence of motive sufficient to transform a showing that others have not been prosecuted into proof of purposeful discrimination—are somewhat prohibitive in themselves and may be insurmountable in the face of the present judicial reluctance to be persuaded that state enforcement agencies have in fact violated the constitutional right to nondiscrimination.

Comment, \textit{supra} note 239, at 1141. Particularly relevant to our concerns is that another criminal prosecution of Martin Luther King helped give rise to this Comment. In 1960, he became the only person who, until then, had ever been prosecuted for income tax perjury in Atlanta, Georgia. \textit{Id.} at 1103 n.1.

\textsuperscript{241} See Lash v. State, 244 Ala. 48, 14 So. 2d 229, \textit{cert. denied}, 320 U.S. 784 (1943); Three v. State, 31 Ala. App. 133, 16 So. 2d 195 (1943).

\textsuperscript{242} A related issue implicating the fairness of King’s trial involves the role of Judge Carter. He was, see \textit{supra} text accompanying notes 191–93, a prime mover in obtaining an indictment from the grand jury. Viewed realistically, his conduct represented nothing less than an effort to bring all of his resources to bear against the boycott. But the presumption of judicial regularity and the evidentiary and substantive rules that surround it make proving allegations of judicial bias an exceedingly difficult task. The record in King’s prosecution appears to lack the “smoking gun” quality of evidence that courts require before accepting claims of judicial misconduct. And while it may seem unfair that Judge Carter decided the question of King’s guilt after having played a role in obtaining his indictment, the case law “generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . .”. 2 K. DAVIS, \textit{ADMINISTRATIVE LAW TREATISE} § 13.02, at 175 (1958). This applies in the context of criminal as well as administrative proceedings. See
The third objection raised by the defense was that the prosecution violated King's First Amendment rights. Whether, or to what extent, a state may properly regulate consumer boycotts poses difficult legal questions.\textsuperscript{243} Boycotting, like any other political tool, can be used for both bad and good causes; wielded by the MIA, it aided desegregation, but wielded by White Citizens Councils, it aided the old order.\textsuperscript{244} Politically-motivated boycotts implicate weighty values, including freedom of association, expression, and political participation.\textsuperscript{245} But they also can impose heavy, perhaps even crippling, economic losses upon society\textsuperscript{246} and coerce individuals into speech or silence, action or inaction that they would otherwise avoid.\textsuperscript{247} Thus, no ahistorical, noncontextual, normative judgment can properly be made about a political boycott \textit{per se}; its legitimacy depends upon the circumstances in which it occurs.

King was taken aback initially by criticism which equated the MIA's boycott with those sponsored by the White Citizens Councils. He was forced, he later recalled,

to think seriously on the nature of the boycott. Up to this time I had uncritically accepted this method as our best course of action. Now certain doubts began to bother me. Were we following an ethical course of action? . . . Is it true that we would be following the

Withrow v. Larkin, 421 U.S. 35, 56–57 (1975); Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 1359 (5th ed. 1980) ("[i]t is not objectionable that the trial judge was involved in some prior proceedings in the case"). How a federal forum would have responded to a challenge to Judge Carter's conduct would have depended on the degree to which his prior actions constituted investigation as distinct from prosecution itself. But based on the record, it is doubtful that even a court sympathetic to King would have been willing to find judicial bias of a sort that entitles a defendant to reversal of his conviction.


244. See supra text accompanying notes 237–38; see also The Political Boycott, supra note 243, at 1076 ("Imagine that the Ku Klux Klan in a small southern town has organized a boycott to encourage merchants to join in pressuring the local government to abandon its plan to more fully integrate the work force and that the boycott victims are black-owned businesses.").


246. See Political Boycott Activity, supra note 243, at 659 ("Within a highly organized, industrial, and free market society the potential significance of [political boycott activity] is enormous.").

247. See The Political Boycott, supra note 243, at 1076 ("A political boycott is a coercive mode of expression that, regardless of its goals, deprives its victims of their freedom to speak and to associate as they please.").
course of some of the White Citizens Councils? Even if lasting practical results came from such a boycott, would immoral means justify moral ends? Each of these questions demanded honest answers.248

King eventually concluded that the substantive differences between the two organizations constituted the most relevant line of distinction. "Our purposes," King declared, "were altogether different".249

We would use [the boycott] to give birth to justice and freedom, and also to urge men to comply with the law of the land; the White Citizens Councils used it to perpetuate the reign of injustice and human servitude, and urged men to defy the law of the land.250

Had King's attorneys argued the issue, they would probably have insisted that, in this particular case, the organized, peaceful withdrawal of patronage, effected without picketing or any other sort of confrontational activity, constituted a form of speech entitled to First Amendment protection. Whether they would have prevailed in a federal forum is a close question, an examination of which reveals another facet of the ambiguous legal and moral climate that King confronted. On the one hand, in a series of cases involving efforts to suppress civil rights protests, the Supreme Court repeatedly invoked the First Amendment to rule in favor of besieged dissidents.251 In 1963, for example, in a decision that finally cleared the way for the NAACP to operate in Alabama after being shut down by the state for seven years, Justice Harlan characterized as a "doubtful assumption" the proposition that "an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law. . . ."252 On the other hand, with respect to Negroes' resort to anti-discrimination consumer boycotts, judges in the 1950's—including some Supreme Court Justices253—"appear[ed] inclined to apply the same rigid limitations on economic coercion that stifled labor boycotts in the first decades of the century."254 Courts issued injunctions and awarded damages on the basis

248. M.L. King, supra note 45, at 50.
249. Id. at 50–51.
250. Id. at 51.
251. See supra notes 11–16.
254. Anti-discrimination Boycotts, supra note 243, at 397–98. During the 1950's, the Court's response to protests by organized labor was decidedly less protective than its response had been during the late 1930's and early 1940's. See Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189, 219 (1984); Political Boycott Activity, supra note 243, at 663–71. This tendency affected the disposition of Hughes v. Superior Court, 339 U.S. 460 (1950), and may well have affected the Court's handling of King's case had it been preserved for federal review. One factual difference that would have strengthened King's case is that unlike Hughes and other boycotting cases, no picketing was involved in the Montgomery boycott.
of findings that without "just cause" the instigators of a given boycott had interfered with the legitimate expectations of a targeted enterprise. What was deemed to constitute "just cause" was notably vague and on that ground alone raised (or should have raised) constitutional problems. The concept was defined more by the absence of certain prescribed features than by the presence of a given characteristic. Three elements commonly viewed as incompatible with just cause were (1) violence, (2) actions against secondary parties, and (3) attempts to obtain goals that contravened public policy. Viewing King's prosecution through the prism of these elements casts light on certain of the boycott's neglected dimensions.

The issue of violence can be dealt with quickly. We have already seen that, fairly considered, none of the prosecution's evidence linked King or the MIA with any violent actions. Nearly all of the violence that did take place was directed against the boycott and not in support of it.

A bit more complicated is whether the boycott was a secondary boycott, a widely outlawed genre of concerted activity in which one party boycotts a neutral party for the purpose of forcing the neutral party into supporting the boycotters' demands against the primary target of their action. To some extent, the boycott of the buses in Montgomery resembles a secondary boycott, for the MIA boycotted the Company even though its ultimate complaint was with the City and the state; after all, these were the entities that enacted the segregation laws, not the Company. On the other hand, on matters besides desegregation, what precludes the protest from properly being deemed a secondary boycott is that the MIA and the Company were directly at odds with one another. After all, the MIA demanded two things that were wholly within the Company's own power to provide: courteous treatment by drivers and the employment of Negro drivers on predominantly black routes. The Montgomery protest, in other words, was not one in which a boycott was imposed upon an "innocent," neutral party; the Company was as much a target of black anger as the city government.

255. See supra text accompanying notes 229-35.
256. Anti-discrimination Boycotts, supra note 243, at 399.
257. See supra notes 202-09.
258. Even Judge Carter acknowledged that King had worked hard to prevent violence and expressly refrained from sentencing him to jail for precisely that reason. Thornton, supra note 48, at 227.
259. For a brief but useful introduction to the idea of the secondary boycott in the employment context, see A. Cox, D. Box & R. Gorman, Labor Law: Cases and Materials 721-89 (9th ed. 1981). Secondary boycotting has frequently been outlawed at common law and by state and federal statutes. Id. at 721-22. For a recent judicial discussion that displays the continuing hostility of the legal machinery to secondary boycotts, see NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980).
260. See Anti-discrimination Boycotts, supra note 243, at 406 n.61 ("[A]s in the case of the secondary boycott, the victim of the boycott to end segregation required by statute is not primarily responsible for the boycotter's grievance.").
The third analytical wrinkle implicating the "just cause" test involves determining whether the MIA's demands conflicted with public policy. The demand for desegregated seating clearly contradicted Alabama's expressed commitment to racial separation. Federal courts would soon find that commitment to be a violation of the Constitution. But by boycotting in advance of that decision, the MIA put the bus company to a difficult choice between: (1) enforcing segregation and thereby incurring the heavy financial losses caused by the boycott, or (2) disregarding state law and thereby risking criminal sanctions and the loss of its franchise in the event segregation was upheld. Some judges may have considered the imposition of that choice as itself a form of illicit coercion. After all, the MIA marshalled the black community's economic power in a way that damaged a utility important to the entire community and did so although a judicial forum was available to resolve the controversy. On the other hand, it is difficult to generate much sympathy for the Company. It had neglected to discipline its own offensive drivers. It had helped to back itself into a corner by stubbornly insisting via Jack Crenshaw that the MIA's initial demands on seating were incompatible with existing segregation laws. It conducted itself for much of the boycott as an active arm of the state.

There is little doubt that if the prosecution were re-enacted today the federal judiciary would reverse King's conviction. One basis for this proposition is NAACP v. Claiborne Hardware Co., a 1982 decision in which the Supreme Court reversed a million-dollar judgment against the NAACP that resulted from a suit by white businessmen in Port Gibson, Mississippi, who accused the local affiliate of the NAACP and its parent organization of maliciously interfering with their businesses by sponsoring a boycott. The Court held that the First Amendment protected the non-violent aspects of the NAACP's boycott. The seven-year boycott in Port Gibson began in 1966 to protest injustices similar to those underlying the rebellion in Montgomery a decade before. The contexts are certainly

261. Frederick S. Ball, an influential segregationist attorney in Montgomery, argued this point strongly in a letter to the editor of the Montgomery Advertiser demanding the boycott leaders' indictment:

An individual has the right to ride a bus or not as he or she sees fit and that right should not be interfered with and should be protected by the police. . . . But when certain so-called leaders call a group together and organize a boycott, they are taking the law into their own hands and should be prosecuted. Whether the bus company or its drivers have or have not always themselves obeyed the law and given colored passengers their rights is not the question at all, because two wrongs do not make a right and there is always legal redress against the bus company for anything it does wrong. The question is whether the officials whose duty it is to enforce the law are going to sit idly by and permit the illegal destruction of a transportation system which is most certainly needed by both races.

Quoted in Thornton, supra note 48, at 221. See also Anti-Discrimination Boycotts, supra note 243, at 405-07.


263. The NAACP's demands in Port Gibson, Mississippi, in 1966—more than a decade after the boycott in Montgomery—illustrate the painfully slow pace of change that confronted impatient activists in the Deep South throughout the Second Reconstruction. Describing the petition bearing the
distinguishable. The case against King involved a criminal prosecution; the case against the NAACP, a civil action. The case against King was predicated on nothing more specific than that he had led a political boycott lacking "just cause." The case against the NAACP was far more clearly based on findings that the boycott had been enforced, in part, by physical intimidation and violence directed by protesters against blacks who continued to patronize white-owned establishments. Each of these distinctions would favor King. If the civil suit against the NAACP in *Claiborne Hardware* violated the First Amendment, the same would be true *a fortiori* with respect to Alabama's criminal prosecution of Martin Luther King. Although elements in the prosecution of King may have enabled federal appellate courts to turn it into a vehicle for broadening *Thornhill* or anticipating *Claiborne Hardware*, the case actually amounted to nothing in terms of clarifying or creating federal constitutional doctrine. The case never made it to a federal forum; King lost his right to appeal because his attorneys filed the required papers tardily. In addition, there were no follow-up prosecutions, a consequence, according to King, of a deal in which the state dismissed charges against whites accused of perpetrating acts of racial violence.

demands, Justice John Paul Stevens relates that:

it called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens.

See *Claiborne Hardware*, 458 U.S. at 899.

264. The Supreme Court's articulation of the underlying facts of *Claiborne Hardware* was generous to the petitioner. See, e.g., *Claiborne Hardware*, 458 U.S. at 912 ("Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens."). For an interpretation of the facts that highlights the physically coercive features of the boycott, see NAACP v. *Claiborne Hardware Co.*, 393 So. 2d 1290, 1297-1300 (Sup. Ct. Miss. 1981). Both the United States Supreme Court and the Supreme Court of Mississippi accentuated the facts that best supported their respective judgments. However, it is clear that the boycott in Port Gibson was carried out with far less commitment to non-violent moral persuasion than its predecessor in Montgomery. King appealed to the moral conscience of his constituency. In Port Gibson, by contrast, boycott leader Charles Evers informed his constituency that "if we catch you going in those racist stores we're gonna break your damn neck." Brief of Respondents, NAACP v. *Claiborne Hardware Co.*, reprinted in 131 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW—1981 TERM SUPPLEMENT 164 (P. Kurland & G. Casper eds. 1983); see also *Claiborne Hardware*, 458 U.S. at 934-40.


266. After the MIA succeeded in desegregating Montgomery's buses, the homes of various MIA leaders were bombed. See infra text accompanying note 349. King maintains that charges against some of those suspected of participating in the bombings were dropped in conjunction with the decision to forego prosecuting his co-defendants. M.L. *KING*, *supra* note 45, at 183-84. Fred Gray suggests that the authorities decided that, in light of the defense mounted on King's behalf, it would simply be too expensive to proceed against the others. Fred Gray Interview, *supra* note 180.
B. City of Montgomery v. Montgomery City Lines

After King’s trial, three other court cases significantly affected the course of the boycott. The first, *City of Montgomery v. Montgomery City Lines*,267 displayed a deep fissure in the white power structure. At the beginning of the boycott, the Company and the city commissioners responded in concert to the MIA’s challenge. As the economic pressure on the Company increased, however, that unity deteriorated. Because blacks constituted at least seventy percent of the Company’s riders,268 their withdrawal of patronage constituted a potentially crippling loss of revenues. To stem its losses, the Company suspended service over the Christmas holidays in 1955, reduced service thereafter, and obtained an increase in fares.269 As the financial pinch intensified, the Company distanced itself from its earlier embrace of segregationism.270 “We would be tickled if the law were changed,” the Company’s president declared early in April 1956. “We are simply trying to do a transportation job, no matter what the color of the rider.”271 Later that same month, the Company attempted to avoid further financial losses by publicly directing its drivers to discontinue enforcing segregation.272 One consequence of the Company’s action was the resignation of its counsel Jack Crenshaw, the lawyer whose advice had helped create the impasse from which Montgomery City Lines sought to extricate itself.273

City and state authorities reacted strongly. Commissioner Sellers announced that police would arrest bus drivers who permitted desegregation and passengers who sat with passengers of another race.274 The President of the Alabama Public Service Commission informed the parent company of Montgomery City Lines that its subsidiary must adhere to state policy regarding segregation in transportation “or suffer the consequences.”275 Finally, when Montgomery City Lines refused to rescind its new policy, the City sought an injunction in the county court to prohibit the Company from disregarding city and state segregation requirements.276

Montgomery City Lines claimed that it had “no choice”277 but to disregard state and local law because of a ruling—*Flemming v. South Caro-
lina Electric & Gas Co.\(^{278}\)—in which a federal court of appeals had held that South Carolina's requirement of segregation on buses violated the Constitution. As part of its decision, the court of appeals reinstated the complaint of a Negro woman who had sued the local bus company for damages because its agents had compelled her to change seats pursuant to the unconstitutional state law. The Supreme Court summarily dismissed the bus company's appeal.\(^{279}\) Montgomery City Lines interpreted the Supreme Court's action as a ruling invalidating segregation in intrastate transportation.\(^{280}\) The company claimed that Flemming meant that it too would be legally vulnerable to suits for damages if it continued to enforce segregation.

Perhaps fear of damage awards did really motivate the company's action. At the hearing on the City's application for an injunction, the company lawyer stated that if Montgomery City Lines continued to enforce segregation, it risked being subjected "to damage suits [that] could be multiplied almost beyond belief."\(^{281}\) Even if authentic, however, that fear was probably unwarranted. Lily-white juries would have posed an imposing obstacle to any campaign aimed at reforming racially discriminatory corporate conduct by threat of litigation.\(^{282}\) In any event, lawsuits seeking individual damage awards do not appear to have been seriously considered.

\(^{278}\) 224 F.2d 752 (4th Cir. 1955), appeal dismissed, 351 U.S. 901 (1956). For a useful description of the Flemming litigation and its role in the desegregation of southern transit, see C. Barnes, supra note 32, at 117-20.

\(^{279}\) See South Carolina Elec. & Gas Co. v. Flemming, 351 U.S. 901 (1956).

\(^{280}\) See 1 Race Rel. L. Rep. at 535. This view was widely shared and disseminated. See, e.g., N.Y. Times, Apr. 25, 1956, at 1, col. 8. There was a basis for this view. The summary order announcing dismissal cited Slaker v. O'Connor, 278 U.S. 188 (1929), a case in which the Court had held that appeals based on frivolous grounds and intended to cause delay would be dismissed. Commentators realized, however, that the Court's action might have merely represented a rather routine dismissal of an appeal from a nonfinal order; after all, the court of appeals decision had only paved the way for a trial on the merits. See The Bus Bust, Time, May 7, 1956, at 36 (describing initial reports on Flemming as "one of the biggest U.S. news snafus in years"); see also C. Barnes, supra note 33, at 119; J. Greenberg, supra note 43, at 83 n.9; L. Yeakey, supra note 60, at 528-29. Although they did not publicly note their beliefs at the time, Chief Justice Earl Warren along with Justices Hugo Black and William O. Douglas disagreed with their colleagues and voted to affirm the court of appeals. C. Barnes, supra note 33, at 244-45 n.34.

\(^{281}\) See Transcript of Hearing, City of Montgomery v. Montgomery City Lines, reprinted in 1 Race Rel. L. Rep. 539, 545 (1956). In the wake of Flemming, bus companies in several important cities, including Richmond and Norfolk, Virginia, Durham and Greensboro, North Carolina, and Houston and Dallas, Texas, announced that they would no longer enforce segregated seating. See C. Barnes, supra note 33, at 119-20; J. Greenberg, supra note 43, at 83 n.9. However, in the core of the deep south—South Carolina, Georgia, Florida, Mississippi, Louisiana, and Alabama—politicians blocked movement toward desegregation. C. Barnes, supra note 33, at 120.

\(^{282}\) In Spears v. Transcontinental Bus System, 226 F.2d 94 (9th Cir. 1955), cert. denied, 350 U.S. 950 (1956), a black who was ordered to the back of a bus on account of race in Mississippi attempted to avoid bringing his case before what would undoubtedly have been an all-white southern jury by bringing suit in California where he had purchased his ticket. Although the plaintiff was riding on a vehicle owned and operated by Continental Southern Lines, a subsidiary of the Transcontinental Bus System, Inc., he attempted to sue Transcontinental itself. A federal district court, supported by a court of appeals, ruled that the plaintiff had sued "the wrong defendant." Id. at 97. Because Transcontinental did not exercise authority over Continental Southern's operating procedures, but merely (!) owned it, the courts reasoned that the former, as the parent company, should not be held responsible for the policies enforced by its subsidiary.
as an option by the MIA. What would have constituted (and perhaps did, in fact, constitute) a more realistic fear was the financial burden the boycott imposed; faced with the prospect of indefinite rebellion by its Negro customers, the Company may well have been seeking some face-saving way to capitulate. 285

The Company, however, received no support from the Circuit Court of Montgomery County, for Judge P.J. Jones ordered it to continue enforcing state and local segregation laws. Judge Jones rejected Flemming, contending that it was “not well reasoned [and] not sound law.” 284 It was, he maintained, “simply the guess of the Fourth Circuit Court of what the United States Supreme Court will hold.” 288 Quoting the language of an 1899 Alabama Supreme Court decision, he asserted that “[i]t is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well known customary repugnances which are likely to breed disturbances by a promiscuous sitting.” 286 He did acknowledge the existence of Brown v. Board of Education—but only barely. 287 Far more relevant to him were the limitations imposed upon the federal government by the Tenth Amendment:

The Circuit Court of Montgomery County, Alabama, mindful of its obligation to support and maintain the United States Constitution, must declare that under the Tenth Amendment . . . the power to regulate the intra-state carriage of passengers on buses in Alabama is a power reserved to the State of Alabama. It has never surrendered this power to the United States government nor given it to the Supreme Court at Washington, and this Court will not be a party to filching the power from the State. 288

Judge Jones’ injunction remained in effect until the Supreme Court itself decided whether Jim Crow seating aboard intrastate buses remained constitutionally permissible. 289

C. City of Montgomery v. Montgomery Improvement Association

The second case involved the City’s belated attempt to obtain an injunction against the operation of the MIA’s transportation system. The City

283. According to Professor Barnes, “many transit lines used Flemming as the occasion to . . . abandon[] Jim Crow.” C. BARNES, supra note 33, at 119.
284. 1 RACE REL. L. REP. at 537.
285. Id.
286. Id. at 536 (quoting Bowie v. Birmingham Ry. & Elec. Co., 125 Ala. 397 (1899)). Interestingly enough, Judge Jones never mentions Plessy v. Ferguson.
287. See 1 RACE REL. L. REP. at 537.
288. Id. at 538–39.
argued that the MIA lacked a license and other requirements\textsuperscript{290} for operating a transportation system. There was little doubt that, absent some sort of unusual intervention, the City would obtain the relief it sought; after all, the case would be adjudicated by Judge Carter. The MIA attempted to elicit intervention by applying to federal court for an injunction restraining the City from taking legal action in state court against the car pool operation. But Federal District Judge Frank Johnson rejected the MIA’s motion, concluding that the boycotters were not being “threatened with any injury other than that incidental to the enforcement of city ordinances” and that their rights could adequately be protected by the normal course of litigation.\textsuperscript{291}

In the wake of Judge Johnson’s abstention, Judge Carter granted, as expected, the injunction requested by the City.\textsuperscript{292} The Negro community would probably have been unable to carry on its boycott much longer without an alternative transportation system. However, on November 13, 1956—the very day that Judge Carter enjoined the MIA from continuing to operate its car pools—the Supreme Court of the United States, in Gayle v. Browder,\textsuperscript{293} vindicated the boycotters’ legal theory that \textit{de jure} segregation on the buses violated the federal constitution.

D. Gayle v. Browder

\textit{Gayle v. Browder} was the most significant of the suits that arose from the Montgomery Bus Boycott. Fred Gray filed it February 1, 1956, two days after King’s home was bombed for the first time.\textsuperscript{294} Gray had previously asserted the unconstitutionality of bus segregation as a defense to the prosecution of Mrs. Parks, but had lost the right to appeal that issue because of a procedural mishap.\textsuperscript{295} In \textit{Gayle}, Gray reasserted the claim but

\textsuperscript{290} MIA officials applied for a license to operate a transportation system but were refused one by city officials. L. Yeakey, \textit{supra} note 60, at 497.


\textsuperscript{292} City of Montgomery v. Montgomery Improvement Ass’n, \textit{reprinted in 2 Race Rel. L. Rep.} 123 (1956).

\textsuperscript{293} 352 U.S. 903 (1956).

\textsuperscript{294} See D. Garrow, \textit{supra} note 23, at 61.

\textsuperscript{295} See Parks v. City of Montgomery, 92 So. 2d 683 (Ala. Ct. App. 1957). According to the Court of Appeals of Alabama, prosecutions for violations of municipal ordinances were “quasi criminal” in nature and governed by the rules of state civil appellate procedure rather than criminal appellate procedure. The latter did not require that assignments of error be placed in the record filed on appeal; the former did require assignments of error. Because no errors were assigned in Parks’ appeal, the court of appeals ruled that there existed nothing for it to review, and it therefore affirmed Park’s conviction. Gray feared throughout that the local or state judges would find some way to sabotage his effort to seek a full adjudication of Park’s claim. Fred Gray Interview, \textit{supra} note 180. Lamont Yeakey reports that E.D. Nixon had told Gray of an earlier case challenging the constitutionality of bus segregation in which the state courts delayed action so long that the plaintiff died in the interim thereby mooting the litigation. L. Yeakey, \textit{supra} note 60, at 502. The rule that the Court of Appeals invoked, however, seems to have been a bona fide regulation that it had invoked before in non-racial contexts against other appellants. See, \textit{e.g.}, Griffith v. City of Birmingham, 39 So. 2d 693 (Ala. Ct. App. 1948); Elkornes v. City of Mobile, 37 So. 2d 433 (Ala. Ct. App. 1948).
this time in a federal, as opposed to a state, court and on behalf of a plaintiff instead of a defendant.

Why did the MIA wait almost two months after Mrs. Parks’ conviction before again challenging the constitutionality of bus segregation? King, Gray, and other MIA leaders were certainly aware of the opportunity for legal attack via motions for declaratory judgment and injunctive relief. Clifford Durr, a progressive white lawyer in Montgomery, urged this course of action, as did Robert Carter and other NAACP activists. Indeed, the NAACP refrained from providing financial support to the boycott in its early stages precisely because the MIA refused initially to include within its demands the abolition of segregation. King later expressed a preference for handling racial conflict through negotiation or mass action rather than litigation. At the time of the boycott, however, neither he nor any of the other leaders of the MIA articulated clearly the strategic calculations that led them to delay initiating the court proceedings which ultimately destroyed the legal basis of the City’s recalcitrance.

One consideration that helps to explain the protesters’ initial reluctance to sue is that they actually believed that the white power structure would strike some sort of compromise with them once it perceived the depth of their dissatisfaction with the situation on the buses. A concomitant part of that expectation and strategy involved requesting something that the local authorities could deliver legally—the amelioration, as distinct from the abolition, of segregated seating. It took time for King and his associates to realize that even that modest reform would appear imprudent and threatening in the eyes of many whites insofar as it represented a public demand that had been buttressed by black collective action.

Another consideration involved the social meaning of lawsuits. In Montgomery in 1955, filing a lawsuit challenging the constitutionality of

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296. See D. Garrow, supra note 23, at 59; L. Yeakey, supra note 60, at 501-03.
298. Speaking in 1957, soon after the beginning of desegregated seating aboard buses in Montgomery, King stated that “[w]herever it is possible, we want to avoid court cases in this integration struggle.” Quoted in D. Garrow, supra note 23, at 87. On some occasions when he expressed this view, he seems to have been suggesting that because of the confrontational character of litigation, it should be resorted to only after other modes of persuasion had failed. Id. On other occasions, he argued that litigation was not confrontational enough. Id. at 91 (quoting King as saying that blacks should “not get involved in legalism [and] needless fights in lower courts,” for that is “exactly what the white man wants the Negro to do. Then he can draw out the fight. . . . We must move on to mass action.”).
299. Fred Gray suggests that two months does not really constitute “delay.” Fred Gray Interview, supra note 180. His point would be well-taken in certain contexts. But in this instance, given the urgency of the ongoing boycott and the MIA’s explicit reluctance to bring the suit, the term “delay” seems appropriate.
300. See Thornton, supra note 48, at 230-31 (“bus seating had been one of the areas in which blacks had genuinely expected that they would be able to make progress”).
state and local segregation statutes was a radical act. Many observers now tend to regard the legalistic attack on segregation as a rather conservative tactic. But at that time, the lawsuit was equally, if not more, provocative as the mass boycott. The boycott simply involved, after all, a mass withdrawal from the color line. It involved doing on a mass basis what individual blacks who owned cars had long done. In contrast, the suit attacking the constitutionality of segregation actually envisioned erasing and crossing the color line. The reason that King and the MIA resisted the NAACP’s offer to help in such a suit is that they sought to avoid the reputation that made the NAACP “enemy number one” to segregationists throughout the Deep South. They knew, as Taylor Branch observes, “that white Alabama would react [to the filing of a suit] as the social equivalent of atomic warfare.”

Gayle was brought as a class action on behalf of four named plaintiffs and “all other Negroes similarly situated.” Each of the named plaintiffs had either been asked by a driver or police officer to comply with the targeted segregation laws or had actually been arrested.504 It may appear in retrospect that Gayle should have been an easy case. After all, the Supreme Court had already decided Brown v. Board of Education.506 Brown, however, meant something far different in 1956 than it does now. Presently, it looms as a grand transformative decision, “not only a major event in the history of race relations . . . but also a significant moment in American jurisprudence.” In 1956, however, its scope was uncertain.

In Brown, Chief Justice Earl Warren declared for a unanimous Court that “in the field of public education the doctrine of ‘separate but equal’ has no place.” Clearly, the Court could have condemned all statutes requiring racial segregation, but that is not what it chose to do. Rather, the Court left open the possibility that de jure segregation might still “have a place” in fields other than education.

Several federal district judges refused to extend Brown outside the con-
text of public schooling. In *Lonesome v. Maxwell*,\(^{308}\) for example, a federal district judge denied relief to white and black plaintiffs who sought to enjoin Maryland and the City of Baltimore from segregating blacks at beaches, bath houses, and swimming pools. The opinion bears none of the hallmarks of segregationist defiance. It reflects a careful effort to understand *Brown*, that is, to determine whether the Justices meant to erase *de jure* segregation altogether or only in public schooling. Noting that the Justices in *Brown* had repudiated the separate but equal doctrine in only one particular context, the district court decided that, at least with respect to recreational facilities, *Plessy* was still good law.\(^{309}\)

By the time that the three-judge panel\(^{310}\) in *Gayle* was ready to announce its decision, the district court in *Lonesome* had already been reversed by a court of appeals that was subsequently affirmed by the Supreme Court.\(^{311}\) By that time, the Court had reversed a district court’s refusal to extend *Brown* to public golf courses.\(^{312}\) Yet despite the tilt of Supreme Court precedent, disposing of *Gayle* proved to be a difficult and controversial undertaking.

Judges Richard T. Rives\(^{313}\) and Frank Johnson\(^{314}\) forged the majority that invalidated the city ordinance and state statute compelling segregation in intrastate transportation. They believed that in light of *Brown* and subsequent decisions extending *Brown* to other settings, they could no longer “in good conscience perform [their] duty as judges by blindly following [*Plessy*].”\(^{315}\) They concluded that *Plessy* had been impliedly overruled and that there existed “no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery. . . .”\(^{316}\)

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310. A three-judge district court was impanelled pursuant to 28 U.S.C. § 2281 which required three-judge courts to adjudicate requests for injunctions against state statutes that allegedly violated the federal constitution. See Browder v. Gayle, 142 F. Supp. 707, 713 (M.D. Ala. 1956).
314. Judge Johnson, like Judge Rives, was a native Alabamian. He probably adjudicated more high-profile civil rights cases during the civil rights movement than any other federal district judge. He often sided with black claimants and gained a well-earned reputation as a jurist committed to the protection of federal constitutional rights. See J. Bass, *supra* note 313; J. Peltason, *supra* note 313; F. Read & L. McGough, *supra* note 313; T. Yarbrough, *Judge Frank Johnson and Human Rights in Alabama* (1981).
316. *Id.*
Seybourn Lynne wrote a passionate dissent. He noted that the Supreme Court had not seen fit to repudiate Plessy explicitly and complained that the willingness of lower court judges to disregard Supreme Court precedent in the absence of express directions from the Justices constituted "[a] comparatively new principle of pernicious implications." He acknowledged that "the trend of [the Court's] opinions [was] to the effect that segregation is not to be permitted in public facilities furnished by the state itself. . . ." But he insisted that "it does not follow that [segregation] may not be permitted in public utilities holding non-exclusive franchises."

A strong allegiance to stare decisis and hierarchical authority within the federal judiciary would seem to counsel allowing only the Justices themselves to overrule Supreme Court precedent. Furthermore, as noted above, the Brown opinion itself invited a rather narrow reading. Judge Lynne, however, should have been put on notice by the Court's subsequent decisions that the Court meant for Brown to extend beyond the schoolhouse. Moreover, his attempt to distinguish Gayle on the basis of the bus company's non-exclusive franchise was wholly specious; the nature of a given carrier's franchise was irrelevant since the city and state laws in question compelled all carriers to segregate passengers on the basis of race.

The district court rendered its decision on June 5, 1956. But the ruling led to no concrete change in the conduct of the parties, for the panel stayed its judgment and award of relief during the pendency of the City's appeal to the Supreme Court. For five months after the district court's decision, the boycott dragged on. Then, finally, on November 13, 1956, the Supreme Court issued a per curiam opinion affirming the district court: Per Curiam: The motion to affirm is granted and the judgment is affirmed. Brown v. Board of Education . . . Mayor and City Council of Baltimore v. Dawson . . . Holmes v. Atlanta. The Court's summary disposition of Gayle represented the continuation.
of a strategy the Justices informally formulated immediately after Brown: policing Brown's enforcement and enlarging its ambit in as low-key and uncontroversial a manner as possible. The Court's injunction that Brown be implemented "with all deliberate speed" was one facet of this strategy. Another facet was total avoidance. The Court simply refused, for instance, to consider a case involving the constitutionality of a state anti-miscegenation statute even though it had to torture jurisdictional rules to do so. A third element of this strategy was summary treatment of cases involving the validity of segregation statutes outside the context of public schooling. Between 1955 and 1960, the Court was forced, on occasion, to confront in a direct and plenary manner the political story that Brown precipitated. In 1958, for instance, in a dramatic special session, the Court denied a request from a local school board to further delay desegregation even though the board accurately warned that enforcing Brown would risk violence. By and large, however, the Justices strove to avoid public prominence.

The Court's resort to summary dispositions entailed certain costs. Summary dispositions nourished accusations that the Justices were conducting themselves in an unprincipled and high-handed manner. Moreover, the failure to explain the basis for their decision retarded public understanding—and perhaps the Justices' own self-understanding—of just what it was about de jure segregation that made it in all circumstances incompatible with the Constitution. One can also understand how, from a certain perspective, the Court's judgment is disturbingly bare in light of the grandiloquent protest that gave rise to the case; Gayle fails even to mention that it was effectively overruling Plessy v. Ferguson.

325. For a thoughtful and comprehensive discussion of this aspect of the Court's post-Brown decisionmaking, see Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, 68 Geo. L.J. 1, 60-73 (1979).


329. See Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 4 (1957) (by resorting to peremptory rulings, Justices withdrew from "the arena in which lies the Court's real strength, the arena of reason and documentation" and instead gave battle "with the weapon that is its opponents' choice: the bare assertion."); see also Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 98-100 (1959); Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77 (1958); Wechsler, supra note 36, at 22–23.

330. Professor Walter Dellinger has memorably articulated this point in lectures he has given on race relations law. See, e.g., Summary of Comments by Walter Dellinger, in AFRO-AMERICAN AND
Ultimately, though, a united Court armed the boycotters with the legal backing that they desperately sought and needed. Whatever costs were associated with the form of the judgment were probably worth paying if the alternative would have been a substantial crack in the Court’s unanimity. Moreover, to some, the very muteness of Gayle spoke volumes insofar as it indicated that, at least for the Justices, the constitutional question of *de jure* segregation was no longer open to real debate.

The Supreme Court’s decision did not immediately end the boycott. The City petitioned the Court to reconsider their ruling and indicated that it would demand the enforcement of segregation on the buses until all of its legal avenues for relief had been exhausted. The commissioners were determined to sustain the life of Jim Crow seating to the bitter end. In contrast, upon learning of the ruling, the MIA immediately decided to suspend the boycott, though it requested boycotters to delay an actual return to the buses until all legal resistance by city officials had been overcome. In the meantime, the MIA prepared the black community for the imminent prospect of desegregated seating, emphasizing in speeches and leaflets the desirability of peace and good-will.

On December 17, the Court rejected the City’s petition, and on December 20, the official papers announcing the Court’s action were delivered to city officials.

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THE EVOLUTION OF A LIVING CONSTITUTION 22 (symposium of The Smithsonian Institution and The Joint Center for Political Studies March 15–16, 1988).

331. See D. Garrow, supra note 23, at 80–81.

332. Id.

333. See M.L. King, supra note 45, at 163–69. A mimeographed list of “Suggestions for Integrated Buses” read in part:

- Within a few days the Supreme Court Mandate will reach Montgomery and you will be reboarding integrated buses. This places upon us all a tremendous responsibility of maintaining, in face of what could be some unpleasantness, a calm and loving dignity befitting good citizens and members of our race. If there is violence in word or deed it must not be our people who commit it.

- For your help and convenience the following suggestions are made. Will you read, study and memorize them so that our non-violent determination may not be endangered.

  - Not all white people are opposed to integrated buses. Accept good-will on the part of many.

  - The whole bus is now for the use of all people. Take a vacant seat.

  - Remember that this is not a victory for Negroes alone, but for all Montgomery and the South. Do not boast! Do not brag!

  - Do not deliberately sit by a white person, unless there is no other seat.

  - If cursed, do not curse back. If pushed, do not push back. If struck, do not strike back, but evidence love and good-will at all times.

  - In case of an incident, talk as little as possible, and always in a quiet tone. Do not get up from your seat! Report all serious incidents to the bus driver.

  - According to your own ability and personality, do not be afraid to experiment with new and creative techniques for achieving reconciliation and social change.

  - If you feel you cannot take it, walk for another week or two. We have confidence in our people. GOD BLESS YOU ALL.

Id. at 164–69.

334. Quoted in id. at 172.

335. Id. at 170.
Early the next morning, Martin Luther King, Jr., and other leaders of the boycott boarded a bus and without incident occupied seats near the front in the section that had previously been reserved for whites only.336

IV. THE LIMITATIONS AND ACHIEVEMENTS OF THE MONTGOMERY BUS BOYCOTT

The Montgomery Bus Boycott has attained a secure and honored niche in the Nation's public memory. Indeed, it has become something of a legend. One problem with making legends is that the process engenders a distortive sentimentality. We must thus be careful to prevent admiration for the boycott from exaggerating its accomplishments. The concerted withdrawal of Negro patronage is not what finally desegregated the buses; successful litigation constituted the decisive action.337 The economic pressure of the boycott forced Company officials to break ranks with the city commissioners. Its moral pressure impelled a few white Montgomerians to commit the apostasy of actually siding with King. But the boycott on its own did not succeed in inducing the political authorities to make any substantial concessions.338

Even within the small social space created by the boycott and its attendant litigation, the transition from segregation was slow and difficult. Browder largely stilled official resistance to desegregation aboard local buses. Moreover, many white Montgomerians quietly accepted the new dispensation.339 But others bitterly and vocally resisted, refusing to sit beside Negroes or in what was formerly the Negro section of buses. An elderly man who stood in the front of a bus despite the presence of vacant

336. Id. at 172-73. Ralph Abernathy, E.D. Nixon, and Rosa Parks were among those who joined King for the occasion. Also present was Glenn Smiley, a white southern clergyman from Texas who had come to Montgomery to lend aid to the MIA. Referring to Smiley, King later recalled that he "rode the first integrated bus in Montgomery with a white minister, and a native Southerner, as my seatmate." Id. at 173.

337. As Professor Barnes notes:
Ironically, it was the Court ruling in Browder, not the boycott, that finally won desegregation on Montgomery's buses. . . . White authorities remained impervious to the adverse publicity the boycott brought them, to the economic losses it caused local business, and to the moral pressures of nonviolent resistance. They yielded only when faced with a final mandate from the Supreme Court.
C. Barnes, supra note 33, at 124; see also A. Lewis, supra note 140, at 71 ("Social protest did not win a victory unaided in Montgomery. In the end, the determined Negroes of Montgomery had help from the Supreme Court.").

338. The bus company was a different matter. It quietly hired black drivers soon after the end of the boycott. Moreover, there is little mention in the memoir literature about driver discourtesy after the boycott. If racial mistreatment by drivers had remained an appreciable part of life on the buses, it seems safe to assume that that fact would have been mentioned.

339. This is how King describes his encounter with a driver the morning that Montgomery's black community returned to the buses:
The bus driver greeted me with a cordial smile. As I put my fare in the box he said:
"I believe you are Reverend King, aren't you?"
I answered: "Yes I am."
"We are glad to have you this morning," he said.
M.L. King, supra note 45, at 173.
seats in the rear spoke for a substantial number of whites when he stated that he "would rather die and go to hell than sit behind a nigger." Some die-hards even went so far as to incorporate a private club—the Rebel Club—for the purpose of providing a transportation system available only to whites.

Blacks were often the victims of segregationists' retribution. The evening that the Supreme Court decided *Browder*, forty carloads of robed and hooded Ku Klux Klansmen rode through Negro neighborhoods honking horns and shining lights into residences. White "traitors" were targeted as well. The Alabama Association of White Citizens Councils urged "the real white people of Alabama never to forget the names Rives and Johnson." The judges were deluged with threatening calls and letters. A cross was burned on Judge Johnson's lawn and the gravesite of Judge Rive's son was desecrated.

Segregationist resentment expressed itself in other potentially lethal forms. Two days after the inauguration of desegregated seating, someone fired a shotgun through the front door of King's home. A day later, on Christmas eve, white men attacked a black teenager as she exited a bus. Four days after that, two buses were fired upon by snipers. In one sniper incident, a pregnant woman was shot in both legs. Then, on January 10, 1956, bombs destroyed five black churches and the home of Reverend Robert S. Graetz, one of the few white Montgomerians who had publicly sided with the MIA.

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340. Id.
341. The Rebel Club never explicitly stated that its policy would be racially exclusionary, but that was clearly the purpose of the undertaking. Membership dues were only one dollar but no one could become a member unless approved by the club's president or vice-president and its board of directors. The Rebel Club requested that the City of Montgomery grant it a license to transport its members on a regular basis throughout the city along scheduled routes. The city commissioners petitioned the federal district court for an opinion as to whether granting the Rebel Club's request would comply with its previous order enjoining the city's enforcement of segregation on the buses. See 2 RACE REL. L. REP. at 412-15 (1957). The commissioners' petition for instruction was dismissed on the grounds that federal courts have no jurisdiction to give advisory opinions. Id. at 412. Judges Rives and Johnson indicated, however, that in their view, if the city granted a franchise to the Rebel Club, the city would be under an affirmative obligation to see to it that the club did not discriminate between passengers on the basis of race. Id. The Rebel Club's plans then appear to have been abandoned.
344. See id. at 78-83; T. YARBROUGH, *supra* note 314, at 56-61.
348. See L. Yeakey, *supra* note 60, at 634.
349. Id. at 86; M.L. KING, *supra* note 45, at 175-76. Some white segregationists strongly and sincerely condemned the violence. Governor James E. Folsom announced a $2,000 reward for information leading to the apprehension of the perpetrators. See D. GARROW, *supra* note 23, at 87. Nonetheless, King and others charged publicly and privately that local officials were not doing all that they could to prevent the violence. Id.

Several whites suspected of perpetrating the bombings were arrested and prosecuted. At their trial,
The City Commission suspended bus service for several weeks on account of the violence. When the violence subsided and service was restored, many black Montgomerians enjoyed their newly recognized right only abstractly; they avoided the anxiety-producing friction that attended what the segregationists called "race mixing." The boycott had involved communal withdrawal from the presence of the color line. But for a black rider actually to cross the color line was a different matter that involved an exercise of individual will and personal vulnerability that for many proved immensely and understandably daunting. For others, the problem involved a loss of that heightened sense of duty which, during the protest, had generated such glorious departures from normalcy. In the aftermath of the boycott the gravitational pull of old habits exerted their force: "When we first started getting back on the buses I sat up front," one former boycotter recalled, "but then I began sitting in the back—I wasn’t afraid or nothing: it’s just that I was accustomed to it."

To the extent that the color line was crossed, the breach extended only to the buses. In practically every other setting, Montgomery remained overwhelmingly segregated, largely because of the popularity (among whites) of sentiments like those expressed by Mayor Gayle when he stated in response to the decision bearing his name:

The recent Supreme Court decisions . . . have seriously lowered the dignified relations which did exist between the races in our city and in our state. . . . The difficulties [which the invalidated laws were] meant to prevent and the dignities which they guard are not changed here in Alabama by decisions of the Supreme Court. . . . To insure

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their defense attorneys called King as a witness and asked him, among other things, whether he had plotted the bombings to attract contributions to the MIA and whether he had once been intimate with a white woman. An all-white jury found the defendants not guilty. Id. at 94.

350. See D. Garrow, supra note 23, at 87.
351. One way that blacks had traditionally sought to minimize the humiliations visited upon them by the Jim Crow regime was to avoid situations in which they would have to be subject to the color line. As Professor Johnson noted, "[t]he most common type of response to the personal implications of the race system is that of avoidance. There is manifest in this behavior not only a precautionary effort to avoid certain types of racial contact, but an attempt to avoid conforming to the patterns of expected behavior." C. Johnson, supra note 38, at 267 (emphasis in original). In Montgomery, this traditional individual remedy was transformed into a collective enterprise.

353. Id. According to one historian of the boycott, "desegregated seating emerged on Montgomery’s buses gradually. When blacks first returned to the buses, high school and college students and the better-educated and professional people freely took seats at the front. However, older blacks and those who worked as laborers and in domestic service tended to sit in the rear." C. Barnes, supra note 33, at 123; see also M.L. King, supra note 45, at 182.

354. Five months after the end of the boycott, The New Republic observed that "for a variety of reasons (some imposed, some willful, some subconscious) the Negro community in Montgomery is now more segregated than it was before the protest against bus segregation began." Black and White Dominos, supra note 352, at 4.
355. See M.L. King, supra note 45, at 181–89.
public safety, to protect the peoples of both races, and to promote order in our city we shall continue to enforce segregation.\textsuperscript{356}

Underscoring their commitment to the old order, the city commissioners adopted, on March 19, 1957, a city ordinance declaring it:

unlawful for white and colored persons to play together, or, in company with each other . . . in any game of cards, dice, dominoes, checkers, pool, billiards, softball, basketball, baseball, football, golf, track, and at swimming pools, beaches, lakes or ponds or any other game or games or athletic contests, either indoors or outdoors.\textsuperscript{357}

In the early 1960's, Montgomery began formally to rescind such laws, but even that sometimes failed to deprive them of their power. In March 1960, one week after Montgomery rescinded its ordinance requiring segregation in restaurants, ten white college students from Illinois, their professor and his wife, and four Negroes associated with the MIA were arrested in a black-owned restaurant merely for eating together and talking with one another.\textsuperscript{358} A little over a year later, in May 1961, President Kennedy was forced to dispatch federal marshalls to Montgomery to quell violence directed against an interracial group of “Freedom Riders” who sought to test whether southern jurisdictions were complying with federal laws that prohibited racial discrimination in interstate transportation. Resentful of the MIA's success in formally desegregating intrastate transportation, hard-line segregationists became apoplectic in the face of interracial groups of “outsiders” whose stated purpose was to exercise all of the legal rights they possessed as travellers in interstate commerce. The following description of the attack against the Freedom Riders helps to illustrate the extent to which King's hopes for reconciliation in a desegregated Montgomery were still virtually utopian more than five years after Gayle.

[A] mob of several hundred launched a vicious assault on the riders. A number of the youths were severely beaten, and one black seminary student . . . was knocked unconscious with baseball bats. John Lewis [a leading activist who is now a member of the United States House of Representatives] was hit by a wooden crate and while lying in the street was served with a state court injunction against the journey by an Alabama official. The mob assailed reporters and photographers, black passersby, and whites who appeared sympathetic to the protesters. One black who was not a Freedom Rider was doused with kerosene and set afire. John Seigenthaler [an aide to United States Attorney General Robert Kennedy] was clubbed from

\textsuperscript{356} Quoted in L. Yeakey, supra note 60, at 621.
\textsuperscript{357} Montgomery, Ala., Ordinance 15-57 (1957), reprinted in 2 RACE REL. L. REP. 714 (1957).
\textsuperscript{358} See Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963); Durr, Sociology and the Law: A Field Trip to Montgomery, Alabama, in SOUTHERN JUSTICE, supra note 32.
behind while attempting to help one rider get away and was left unconscious on the sidewalk for nearly half an hour. White ambulances refused to come to the scene.\textsuperscript{366}

Even with respect simply to intrastate transportation, segregation did not immediately end throughout the South in the wake of \textit{Gayle}. Some places did desegregate rather quickly. At the beginning of 1957, the Southern Regional Conference (SRC) reported that 21 southern cities had ended compulsory segregation in local buses without court action.\textsuperscript{360} But other municipalities adopted many of the same stalling tactics that effectively stymied enforcement of \textit{Brown}. In some jurisdictions the color line in seating remained intact as officials insisted that they would maintain segregation on city buses until courts specifically invalidated their local ordinances.\textsuperscript{363} It was not until 1957–1959 that litigation brought desegregation to the buses of such major southern cities as Miami,\textsuperscript{362} New Orleans,\textsuperscript{363} and Atlanta.\textsuperscript{364} In other jurisdictions, officials sought to avoid desegregation by abandoning openly segregatory laws while enlarging the discretionary powers of bus drivers who then proceeded to recreate Jim Crow patterns. The City Commission of Tallahassee, Florida, for instance, replaced a traditional segregation ordinance with one that made it a crime to occupy any seat or standing area other than one expressly assigned by the bus driver.\textsuperscript{366} The drivers allowed the rear of the bus to be non-segregated, but refused to assign blacks to seats in what had previously been formally designated as the white section.\textsuperscript{366}

In still other jurisdictions, the color line remained intact pursuant to a strategy of privatization, which entailed rescinding official requirements for racial separation and allowing private parties to shoulder the burden. \textit{Boman v. Birmingham Transit Co.},\textsuperscript{367} a case arising from Birmingham, Alabama, shows the move to privatization, displays the way in which some district judges were willing to allow that strategy to succeed, and

\textsuperscript{359} C. Barnes, supra note 33, at 163.
\textsuperscript{360} See A. Morris, supra note 33, at 67.
\textsuperscript{361} See C. Barnes, supra note 33, at 125.
\textsuperscript{366} See C. Barnes, supra note 33, at 128. A group of blacks disregarded a driver's directions, were arrested, and raised as a defense the claim that the ordinance was a mere subterfuge imposed to avoid \textit{Gayle}. They were convicted, see Speed v. City of Tallahassee (Fla. Cir. Ct. 1957), reprinted in 3 Race. Rel. L. Rep. 37 (1958), and never succeeded in having these convictions reviewed by a state appellate court. Perhaps it was the lack of state appellate review that caused the Justices to deny the defendants' petition for Supreme Court review. Speed v. City of Tallahassee, 356 U.S. 913 (1958).
King's Constitution

anticipates the doctrinal issues that awaited courts when the Civil Rights Movement broadened its attack to include not only *de jure* segregation but racial discrimination that, in an important sense, really was "private." After being sued by blacks who were intent upon enforcing *Gayle*, officials in Birmingham replaced the city's traditional segregation ordinances with new provisions making no mention of race. These provisions authorized carriers to "promulgate such rules and regulations for the seating of passengers . . . as are reasonably necessary to assure the speedy, orderly, convenient, safe and peaceful handling of passengers." 368 They also provided that a willful refusal to obey the request of a driver enforcing the company's seating policy constituted a breach of the peace. At the same time that city officials made these changes, the bus company painted signs in the front and rear of its buses which read: "White Passengers seat from front, Colored Passengers from Rear." 369 Soon after the signs were painted, a group of blacks disregarded them by occupying seats near the front of a bus. When the blacks refused to obey the driver's request that they move to the back, they were arrested for breach of the peace and related infractions. 370 They subsequently sued the bus company and the Birmingham Board of City Commissioners, charging, among other things, that the signs violated the Constitution by designating seating according to race.

Judge Harlan Grooms 371 held that the racially designated seating did not violate the constitutional rights of the plaintiffs because it did not constitute state action. He emphasized that according to settled law the Fourteenth Amendment constrained only governmental and not private decisions involving race. According to Judge Grooms, the arrangement challenged in *Boman* was that of a private business and thus "a matter between the Negroes and the Transit Company." 372 In his view, the city could no longer be charged with supporting segregation on the buses. The new ordinance mentioned no racial discrimination on its face. Moreover, the judge noted that "[t]he evidence wholly fails to reveal that [city officials] had formed any policy, actually or tacitly, to apply [the new ordinance] in a racially discriminatory manner." 373 He recognized that the incident leading to the arrest of the plaintiffs arose only six days after the enactment of the new ordinance, but concluded that this one incident showed no pattern of discriminatory state action. The arrest, moreover,

368. 4 RACE REL. L. REP. at 1028 n.1.
369. Id. at 1028.
370. A federal district judge described the scene as follows: "Plaintiffs, upon taking their seats in the front portion of the bus, did nothing but sing and try to have a good time. There was no cursing, disorder, loud, or boisterous noises while they were on the bus." Id. at 1029.
371. Judge Grooms, an Eisenhower appointee, was a committed segregationist. See J. PELTASON, supra note 313, at 84.
372. 4 RACE REL. L. REP. at 1031.
373. Id.
had been made without the knowledge or permission of the city commissioners. True, the company's signs did perpetuate racial separation. But the decisive point to Judge Grooms was that segregation remained intact on the buses not because of any official action but rather because it was desired by the company.

The district court's judgment was reversed by a panel of the Fifth Circuit that included the court of appeals' most progressive members on matters of race—Judges Elbert Tuttle and John Minor Wisdom—and its most reactionary member—Judge Ben F. Cameron. Over Cameron's dissent, Tuttle and Wisdom held that Birmingham was legally implicated in the bus company's racial policy. While their opinion purported to recognize the limits of the state action doctrine, it actually demonstrated that doctrine's accordion-like pliability:

Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons, would not effect a denial of constitutional rights if not enforced by force or by threat of arrest and criminal action. Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal... we conclude that the Bus Company to that extent became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the plaintiffs' constitutional rights.

This language can be read narrowly to embrace only those situations in which municipalities expressly delegated to franchise holders the power to make seating rules and explicitly criminalized infractions of such rules. On the other hand, it could be read broadly to embrace any situation in which a private bus company sought to enforce racial separation by calling upon public police—the situation in which most bus companies and

374. Judge Ben F. Cameron was the most ardent segregationist on the Court of Appeals for the Fifth Circuit. He was a Mississippian who was appointed to the bench in 1955 by President Eisenhower under the sponsorship of the long-time Chair of the United States Senate Judiciary Committee, Senator James O. Eastland. See J. Bass, supra note 313; J. Peltason, supra note 313; F. Read & L. McGough, supra note 313.

375. Judge Cameron's dissent is an illuminating example of white, elite, segregationist thought in the 1950's. Certainly one of its most interesting features is the assertion that segregation was good for and desired by most reasonable blacks. According to Cameron, decisions subverting segregation have not been in harmony with the thought and desires of the people, the vast majority of whom, in both races, know that their common problems can best be worked out if they are left alone to continue the unbroken improvement in relationships which has taken place in the last eight decades... The rank and file of Negroes, realizing the hardship under which they labor by reason of the head-start of several centuries enjoyed by white people, and proud of their race and its accomplishments, resent the efforts of the agitators, who do not understand, to confer a status upon them which is achieved and can only be maintained only under force of the heavy hand of the law.

202 F.2d at 28-29.

376. See 280 F.2d at 535.
other private businesses would find themselves if confronted by anti-segregationist demonstrators. This, however, is not the place to explore state action theory and the problem raised by so-called “private” racial discrimination. That issue posed the main theatre of struggle in the next phase of King’s career, the phase memorably punctuated by the “Letter from a Birmingham Jail,” the “I Have a Dream” speech at the March on Washington, and the Civil Rights Act of 1964. For present purposes, the importance of _Boman_ resides in the vivid way it illustrates the recalcitrance of the old order. Because of white resistance, the conquest of segregation was forced to proceed inch by inch and issue by issue with exhausting and embittering exactitude.

Montgomery and its aftermath teach lessons that reflect certain truths about the Civil Rights Movement as a whole. One is that the Movement wrought deep and lasting changes in the United States. Another is that law, litigation, and lawyers played a significant and frequently praiseworthy role in accomplishing the Movement’s aims. Certain currents in the historiography of the Movement suggest that it may be useful to argue self-consciously in favor of these propositions even though some observers may well consider them obvious.

Some commentators resist the suggestion that the Civil Rights Movement was largely successful. Their resistance derives from two sources. One is a fear that emphasizing the success of the Movement will only facilitate complacency in a political culture prone to self-congratulation. The other is a bitter disappointment with patterns of income, housing, education, health-care, and vulnerability to crime that remain racially disparate.

Those who emphasize continuities in the subordinate position of the Negro both before and after the Second Reconstruction, are often willing to concede that the Movement succeeded in removing formal impediments that prevented blacks from enjoying opportunities on the same basis as whites. But they insist that that success was shallow, a boon only to those blacks who possessed the wherewithal to walk through newly-opened doors. King himself articulated this view late in his career,

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378. See, e.g., R. Allen, _Black Awakening in Capitalist America_ (1969). According to Allen, “[p]erhaps the most significant indication of the middle-class nature of the civil rights movement was the fact that it did absolutely nothing to alleviate the grim plight of the poorest segments of the black population.” _Id_. at 27. For a useful analysis of class dynamics within the civil rights movement see J. Bloom, _supra_ note 33; see also Lewis, _The Origins and Causes of the Civil Rights Move, in The Civil Rights Movement in America, supra_ note 23, at 11 (“[U]ntil the mid-1960’s, civil rights politics was largely a middle-class affair. . . . There were good reasons why just plain folk called [the NAACP] the ‘National Association for the Advancement of Certain People.’”). _Cf_. Chafe, _One Struggle Ends, Another Begins, in The Civil Rights Movement in America, supra_ note 23, at 140 (“The primary feature of the 1970’s and early 1980’s has been an almost schizophrenic pattern of progress and decline for former victims of discrimination, with those who are above a certain economic level able to take advantage of the triumphs of the 1960’s, while those below a certain
questioning the value of having the right to buy a hamburger at a restaurant if one lacked the money to purchase it. Others have even suggested that the eradication of formal barriers coupled with the perpetuation of substantive inequality has actually resulted in a net *loss* for blacks as a group. On the one hand, the demise of rigid, formalized racial barriers have allowed the most resourceful blacks to “escape” confinement in all-black institutions, depriving these potential bases of power of valuable talent and leadership. On the other hand, formal reforms in laws and practices have induced large numbers of whites (and a substantial number of blacks as well) into believing that “racism is dead” and that, therefore, any further difficulties experienced by blacks as a group is either “their own fault” or indicative of incapacity.

As to the role of law, courts, and lawyering, the perspective against which I argue views the legal apparatus as having been either largely irrelevant—a mere recorder of results determined in other arenas—or largely confining. According to this perspective, the legal apparatus de-radicalized the Movement by channeling powerful energies into readily controllable, legalistic forms. This strand in the historiography of the Civil Rights Movement is critical even of the lawyers who worked on behalf of the Movement. Too often, the argument runs, the lawyers’ tendency was to subordinate the aspirations of their clients to the dictates of legalism.

While I find much of value in this perspective on the Movement, the thrust of my analysis is different in significant respects. First, I emphasize that formal rights matter. What are now sometimes referred to as “mere” formalities were anything but “mere” in the context that King confronted. Negroes were willing to struggle to be called “Mr.” or “Miss” or have the right to sit anywhere on a bus because formal racial distinctions exercise a symbolic power that is real, albeit subtle and nonquantifiable. Invidious racial distinctions stigmatize those upon whom they are branded with baleful consequences that ramify throughout the society, corrupting both those who are privileged and those who are victimized. It does make a difference—a huge difference—that largely because of reforms won by the economic level have found the texture of their lives deteriorating to the point of resignation and defeat.”

379. M. King, Where Do We Go From Here? (1968).
380. See R. Allen, supra note 378; H. Cruse, Plural But Equal (1987). One also detects this message, albeit in nuanced form, in Professor Derrick Bell’s influential writings. See D. Bell, supra note 16; D. Bell, supra note 17.
381. See, e.g., K. Bumiller, The Civil Rights Society (1988); Moore, Brown v. Board of Education: The Court’s Relationship to Black Liberation, in Law Against the People: Essays to Demystify Law, Order and the Courts 62–64 (R. Lefcourt ed. 1971) (“The needs of Blacks are fundamentally incompatible with the central role and function of the judicial system. . . . When Blacks look closely at American jurisprudence on questions of race, they find that little progress, if any, has been made after generations of litigation.”); Steel, Nine Men in Black Who Think White, N.Y. Times Mag. (Oct. 1968).
Movement, blacks are legally protected in the most significant domains against invidious racial discrimination. It makes a difference even when those laws are evaded and even to those who, lacking resources, cannot take advantage of their rights. Frederick Douglass put it best in the course of responding to those who suggested that the loss incurred by the partial invalidation of the Civil Rights Act of 1875 was of little real significance because the bill could not be enforced anyway. "There is some truth in all this," Douglass observed, "but it is not the whole truth. [The Act] like all advance legislation, was a banner on the outer wall of American liberty, a noble moral standard, uplifted for the education of the American people. There are tongues in trees, books, in the running of brooks,—sermons in stones. This law, though dead, did speak." The law created by the pressure of the Civil Rights Movement also speaks, has widely been heard, and is still very much alive.

There are hard empirical facts that can be marshalled to support the proposition that in terms of employment, voting, and education, the Movement effected a remarkable transformation in the power and opportunities available to black Americans. That proposition is not defeated by pointing out that more affluent blacks have been the ones most able to benefit from the demise of formal racial restrictions. First, in at least some notable contexts, the poorer sectors of black communities were the ones most directly benefitted by desegregation; prior to the struggle in Montgomery, middle-class blacks had avoided Jim Crow seating by driving their own cars. Second, those who deprecate the accomplishments of the Movement by reference to the consistently dismal state of the black underclass measure the Movement by indicia that fail to correspond to its primary aim. The central goal of the Civil Rights Movement was to eradicate racial barriers that impeded the aspirations of blacks. Over time, some Movement leaders, including King himself, became increasingly aware of the intimate relationship between racial and socio-economic impediments and tried to broaden and reorient the Movement's aims; indeed, some of the Move-

382. The loss referred to was the Supreme Court's invalidation of the public accommodations section of the Civil Rights Act of 1875. See The Civil Rights Cases, 109 U.S. 3 (1883). Contrary to what some have believed, the Act was not a dead-letter but was invoked with enthusiasm by a considerable number of black litigants. See Franklin, The Enforcement of the Civil Rights Act of 1875, & PROLOGUE 225 (1974); Riegel, The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate But Equal" Doctrine, 1865-1996, 28 AM. J. LEG. Hist. 17 (1984).


385. See C. JOHNSON, supra note 38.

386. Speaking in 1967, King maintained that racial oppression was closely, perhaps inextricably, linked to class stratification:

The black revolution is much more than struggle for the rights of Negroes. It is forcing
ment's personnel joined the "war against poverty." But for the most part the Movement remained focused rather narrowly on racial as distinct from class discrimination and achieved in that concededly limited area rather remarkable results.

Another reason for emphasizing, as I do, change over continuity, is that the most impressive and consequential accomplishment wrought by the Movement is now so often overlooked: the transformation of the consciousness of millions of Americans, but particularly southern blacks. The arduous, painful, and dangerous process of creating new rights and exercising old ones forced blacks to confront not only their oppressors but also themselves. More specifically, they were forced to confront and overcome the inhibiting feelings of inferiority that oppression often breeds. That is why to Martin Luther King, the primary importance of the Montgomery Bus Boycott resided in its demonstration "to the Negro . . . that many of the stereotypes he had held about himself are not valid." In Montgomery, as in other locales, the act of attempting to change the world broke the spell of Negro acquiescence.

Law played a central part in this as in other aspects of the Movement's struggle. King and his associates met defeat of various sorts in the legal arena. But much of the current thinking about law and its relationship to the Movement unduly minimizes the benefits that blacks received through their participation in state and federal judicial forums. Litigation served as the Negro's most successful and aggressive form of political activity throughout the first half of this century. And even after that activity was supplemented by other forms of protest—boycotts, sit-ins, marches, riots—litigation continued to serve valuable functions apart from helping to shape the legal issues at stake. Courtrooms provided one of the few contexts in American history in which a cadre of Negroes—the Movement's black lawyers—bested whites in an intellectual-professional setting on a consistent and highly-public basis. When Alabama prosecuted King for

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Quoted in Chafe, supra note 378, at 136; see also Rustin, From Protest to Politics, in The Radical Papers 347 (I. Howe ed. 1966).

387. For criticism of this feature of the Movement, see Kahn, Problems of the Negro Movement, in The Radical Papers supra note 386, at 148; Rustin, supra note 386.

388. See, e.g., M.L. King, supra note 45, at 172 (describing peculiar sadness many felt at triumphant conclusion of year-long bus boycott, "our twelve months of glorious dignity"); H. Raines, supra note 108, at 78 (describing how he felt during participation in sit-in demonstration, protester recalls that "I probably felt better on that day than I've ever felt in my life").

389. See King, supra note 139, at 75, 76.

390. One can hear echoes of the cultural importance of this development in the militant insistence of some commentators that black lawyers be given their due in histories of the struggle against racial oppression. See G. McNeel, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights (1983); G. Ware, William Hastie: Grace Under Pressure (1984); Kennedy, A Reply to Philip Elman, 100 Harv. L. Rev. 1938 (1987).
violating the state's anti-boycotting statute, his attorneys transformed a hostile courtroom into an empowering forum in which the target of state power fared better politically than the state itself. Similarly invigorating was *Gayle v. Browder.* To be sure, the judicial victory alone would not have been nearly as significant without the mass boycott from which it arose, for the boycott facilitated active participation on a scale impossible for any lawsuit. At the same time, it is important to appreciate that without the suit and the eventual support of the Supreme Court, the boycott may well have ended without attaining any of its expressed goals, a result that may have been cruelly discouraging. In retrospect, it appears that King and the MIA reaped the best of both extra-legal protest and litigation, the grass-roots participation generated by the former and the official legitimation bestowed by the latter.

The successes of the legal struggle helped to create a state of mind that was absolutely essential to the Movement, a consciousness that King articulated with more power and grace than anyone: a sentiment of righteous outrage. As Barrington Moore aptly observed:

People are evidently inclined to grant legitimacy to anything that is or seems inevitable no matter how painful it may be. Otherwise the pain might be intolerable. The conquest of this sense of inevitability is essential to the development of politically effective moral outrage. For this to happen, people must perceive and define their situation as the consequence of human injustice: a situation that they need not, cannot, and ought not to endure.\(^{391}\)

By winning in court and forcing segregationists to go outside the law to maintain their power, the Movement’s litigators helped to erode the facade of inevitability that surrounded the segregation regime and to create the perception of a gap between right and reality, authority and force.\(^{392}\) Here it is useful to recall the speech with which King launched the boycott in Montgomery. “We are not wrong,” he told his listeners. For “if we are wrong, then the Supreme Court of this Nation is wrong.”\(^{393}\)


\(^{392}\) Commenting on the effects of *Brown* and other legal reforms, Judge Robert Carter notes: [T]he psychological dimensions of America’s race relations problem were completely recast. Blacks were no longer supplicants seeking, pleading, begging to be treated as full-fledged members of the human race. . . . They were entitled to equal treatment as a right under the law; when such treatment was denied, they were being deprived—in fact robbed—of what was legally theirs. As a result, the Negro was propelled into a stance of insistent militancy.


\(^{393}\) See supra text accompanying note 4.
The boycott made black Montgomerians aware of themselves as a community with obligations and capacities to which they and others had previously been blind. On the eve of the boycott, few would have imagined the latent abilities that resided within that community. The protest elicited and clarified those abilities. On the eve of the boycott, few black Montgomerians would have considered themselves as persons with important political duties. The protest inculcated and enlarged their sense of responsibility. Moreover, by publicizing their willingness and ability to mobilize united opposition to Jim Crow practices, the protesters in Montgomery contributed a therapeutic dose of inspiration to dissidents everywhere. Later developments would attest to the influence of the boycott as a role model that encouraged other acts of rebellion. Participants in subsequent protests remember Montgomery as a distinct, encouraging presence.

With the whole world watching, black Montgomerians grew in stature to fill the roles that fate and their own efforts had created for them. Indicative of the community’s growth was the steadfast support that enabled Martin Luther King to emerge as the leader of the boycott movement. Factionalism had previously crippled potential black leaders. During the boycott, however, that problem was largely overcome. Promoting King's leadership constituted an achievement along another dimension as well. For the support he received displayed not only an impressive unity but also good judgment. King vindicated the tremendous investment staked upon his ability to lead and represent the black dissident community of Montgomery. He did so by recognizing not only the power but also the limits of law. “The enforcement of the law,” he later observed, “is itself a

394. See J. Bloom, supra note 33, at 138–39 (The boycott “was the most important confrontation of the decade. . . . It inspired blacks to challenge white supremacy elsewhere. . . . It became a unifying point not only for blacks in Montgomery, Alabama, but for blacks across the nation.”).

James Forman who became a leader in SNCC recalls the effect of the boycott on blacks he knew in Chicago:

Some friends and I had spent hours and hours in the barber shops . . . trying to talk people out of these self-destructive attitudes, these self-fulfilling prophecies of ‘we can’t get together.’ When the Montgomery bus boycott came along, you could hear people in the barber shops saying, ‘Well, at least people in Montgomery are sticking together.’

J. Forman, supra note 24, at 85.

As for himself, Forman maintains that “[t]he boycott woke me to the real—not merely theoretical—possibility of building a nonviolent mass movement of Southern black people to fight segregation.” Id.; see also S. Cagin & P. Dray, We Are Not Afraid: The Story of Goodman, Schwerner and Chaney and the Civil Rights Campaign for Mississippi 48 (1988); D. McAdam, supra note 33, at 233 (describing effect of Montgomery on participants in effort to register black voters and organize freedom schools in Mississippi in the summer of 1964); H. Zinn, SNCC: The New Abolitionists 18 (1964); Chafe, supra note 378, at 113 (describing influence of Montgomery on student sit-in movement). The Reverend Jesse Jackson acknowledged the extent to which the Montgomery Bus Boycott continues to occupy a special place in the sentiments of many Americans when he introduced Rosa Parks to the audience immediately prior to making his speech to the Presidential Nominating Convention of the Democratic Party in July, 1988.

form of peaceful persuasion. But the law needs help.” 396 He continually provided that help by presenting to the nation in a most attractive form the case for protest and against segregation. No one in his generation would prove to be as talented as he in the art of public persuasion. And no period in his illustrious career would prove to be more impressive or consequential than the year of the boycott, what King once described as “our twelve months of glorious dignity.” 397

396. M.L. King, supra note 45, at 216.
397. Id. at 172.