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Civil Disobedience, State Action, and Lawmaking Outside the Courts: Robert Bell’s Encounter with American Law

KENNETH W. MACK

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This article uses the well-known case of Robert Bell, who was convicted of trespass in one of the important sit-in cases of the 1960s and ended his career as Chief Justice of the Maryland Court of Appeals, to offer some thoughts about the state action doctrine, conflicts between law and morality, and outsider claims on the legal system. It critiques three conventional readings of Bell’s case, and his seemingly unlikely subsequent career.

Employing a historical analysis of the state action doctrine, which was the central issue when Bell’s case reached the Supreme Court, it argues that the case that supposedly originated the doctrine – the Civil Rights Cases decision of 1883 – did no such thing.

In addition, this article questions the view of cases like Bell’s as presenting a sharp conflict between law and morality, arguing that it is not even clear that Bell was violating Maryland’s trespass law.

Finally, the article questions a now-common way of making sense of the arc of Bell’s career – one which would see his rise to the Chief Justiceship as an example of “agency,” in which outsider views of law become, over time, accepted by the legal system. Bell’s case, it will be argued here, has a far more complicated set of lessons to teach, if we discard some conventional ways of reading it.
Civil Disobedience, State Action, and Lawmaking Outside the Courts: Robert Bell’s Encounter with American Law

KENNETH W. MACK

On June 17, 1960, a sixteen-year-old African-American high school student named Robert Mack Bell took a seat in Hooper’s restaurant in downtown Baltimore, and set off a controversy that would eventually draw in Supreme Court Justices, members of Congress, and the Attorney General of the United States as they struggled to come to terms with the consequences of his action and those of others like him. Bell didn’t envision any of this when he arrived at Hooper’s Restaurant seeking service. In fact, he was nervous. He thought about getting his mother’s permission before setting out, but chose not to.

Robert Bell had been drawn into the sit-in movement, which had broken out four months earlier when four black students at North Carolina A & T State University sat down at a segregated Woolworth’s lunch counter and refused to leave. Bell was student-body president at Baltimore’s all-black Dunbar High School, thus was naturally the person to ask when students at nearby Morgan State College were looking for volunteers to picket and perhaps sit in at downtown restaurants that did not serve African Americans. Bell dutifully complied, and soon found himself sitting quietly at Hooper’s along with eleven other students, reading their school books while the manager and the owner swore out a warrant for their arrest. At their criminal trial that fall, Bell and his fellow students were convicted of trespass.1

Bell’s lawyers, assisted by the NAACP, promptly appealed his conviction, claiming that his actions were protected by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. That argument seemed to place Bell on a collision course with the state action doctrine, which is generally taken to mean that “the effort to define and apply constitutional rights need not
even begin unless the complaining party first demonstrates that some government entity was responsible for the violation of her rights."

Private business owners were the ones choosing to discriminate, the argument went, and the only thing that Maryland authorities had done was to create and maintain trespass laws that allowed for private race discrimination. The doctrine, it was believed, could be traced back to the Supreme Court’s 1883 decision in the Civil Rights Cases, which is often regarded as a clear and unambiguous statement of the principle. When the sit-in cases began to reach the Supreme Court, the Justices worked hard to overturn the convictions while avoiding any major state action rulings. For instance, they often took note of the fact that the sit-ins took place primarily in states where law, public policy, or public officials were lending some support to segregated public accommodations. Thus, what seemed like mere private discrimination was in reality supported by discriminatory public law and within the scope of the Fourteenth Amendment. On that basis and others, the Justices began to invalidate the Southern sit-in protesters’ convictions.

When Bell v. Maryland reached the Justices in 1963, however, it was immediately evident that this case was different from what had come before it. Bell’s case was different, because Maryland had repealed most of its segregation laws during the 1950s. In fact, while his case was on appeal, both the Baltimore City Council and the state legislature enacted civil rights laws prohibiting segregated public accommodations in most of the state. Even the owner of Hooper’s restaurant professed to be morally opposed to segregation. By that time, events such as the mass arrests of child demonstrators in Birmingham, Alabama and President Kennedy’s civil rights bill, were making the legal status of segregated public accommodations an issue about which many Americans, and especially the Justices, could no longer equivocate. The Supreme Court, however, ducked the issue, and a divided Court chose to send Robert Bell’s case back to the Maryland courts to decide whether the state civil rights law retroactively voided the trespass prosecution. Bell’s trespass conviction was eventually overturned in the Maryland courts, and the Civil Rights Act of 1964 finally settled many of the contentious issues that the sit-in protesters had raised—not the least of which was the intense pressure the movement placed on the state action doctrine.

Robert Bell was not among those waiting for the resolution of his case. Instead, the teenager embarked on one of the more remarkable journeys in the history of American law. Bell returned to high school following his conviction, graduated from Morgan State College, and decided to go to Harvard Law School. After completing his studies, he returned to Baltimore, and at the age of thirty-one obtained an appointment as a judge in the Baltimore City District Court. As a young member of the judiciary, Bell would serve alongside many of those who had participated in his case. They included the prosecutor who had secured his criminal conviction, graduated from Morgan State College, and decided to go to Harvard Law School. After completing his studies, he returned to Baltimore, and at the age of thirty-one obtained an appointment as a judge in the Baltimore City District Court. As a young member of the judiciary, Bell would serve alongside many of those who had participated in his case. They included the prosecutor who had secured his criminal conviction, the lawyers from the state attorney general’s office who defended it, many of the Maryland judges who decided to uphold it, as well as one of his defense lawyers. All were now his colleagues on the bench. Judge Bell went about his work and continued to rise in the state judiciary, culminating in his appointment, in 1996, as Chief Judge of the Maryland Court of Appeals. It was now Chief Judge Bell’s task to oversee an entire court system that three decades earlier had defined him as a criminal—or so it seemed.

This essay asks a deceptively simple question: was young Robert Bell breaking the law? There are several conventional ways of reading a case like Bell’s: 1) as an episode of civil disobedience, 2) as a conflict between law and morality, or 3) as an instance of
lawmaking outside the courts. However it is framed, such familiar ways of looking at these kinds of controversies depend on the assumption that Bell was in violation of some law.

Lawbreaking was key to the way that contemporaries saw his case as well. Former President Harry Truman, for instance, who remained a hero to many civil rights advocates for his forthright stance against segregation, charged that the sit-ins were a Communist conspiracy and that the protesters were trampling on the business owners’ rights. The NAACP’s Thurgood Marshall also struggled to come to terms with civil rights activists who “violated the sacred property rights” of business owners, as one of his assistants later remembered, although Marshall ultimately decided to support the young protesters. Lawbreaking was key for Supreme Court Justice Hugo L. Black as well. The former Alabama Senator balked at a ruling that the sit-ins were protected by the Fourteenth Amendment, largely because he believed that the protesters were not protected by state trespass law, and thus were forcibly violating the business owners’ property rights to make their case.7

For observers, then and now, the striking image of students willing to go to jail for their beliefs caused many to downplay the simple question of whether the students were, in fact, violating the law. From the moment that the sit-ins broke out in February of 1960, the main questions asked of young people like Robert Bell was their attitude toward lawbreaking. That interpretation was buttressed by Martin Luther King’s famous 1963 “Letter from Birmingham Jail,” which seemed to pose neatly the choice between obedience to Christian morality or to segregationist Southern law. Just about every educated reader is familiar with classic examples of conflicts between law and morality, but perhaps in thinking through this familiar terrain we are sometimes too quick to conclude that the law itself creates a clear rule on the subject. This is very likely to be true of the moral conflicts that often generate constitutional cases that make it to the Supreme Court.

There were two main sources of law that might define Bell and his fellow students’ actions as legal or illegal—federal constitutional law, which might protect their actions from state prosecution, and state trespass law, which most people believed had been violated by their actions. With regard to constitutional law, the main question involved the state action doctrine—whether the state of Maryland, or the private business owner, was the real actor who was being accused of violating the Constitution. As was widely recognized at the time, the state action doctrine’s asserted distinction between public and private acts had been unraveling for decades, and courts seemed to invoke the doctrine primarily to carve out exceptions rather than to follow its commands. But most people assumed, as they do today, that if one looked far enough in the past, one could find some origin point for the doctrine itself, and that the sit-in students’ actions did not accord with its original meaning.8

Indeed, in recent years, the Supreme Court has continued to invoke reflexively the conventional idea that state action emerges from a simple reading of the text of the Civil Rights Cases and several other 1870s and 1880s decisions.9 What will be argued here, however, is that, even at its origin point, there was no coherent state action doctrine—at least as articulated in the form that we know today. Rather, one finds an unresolved conflict between competing ideas of the scope of constitutional protections, neither of which neatly matches state action as most people articulated it at the time of the sit-ins, or even today.10

Much clearer, seemingly, was the question of whether the sit-in students were in violation of state trespass law. Even today, law students routinely learn the accepted rule that, for the most part, private businesses that are open to the public have the right to exclude patrons, even for arbitrary reasons. There are
well-known exceptions to that rule, most prominently the civil rights laws, but, at the time that Bell sought service at Hooper’s, there was no state or federal civil rights law that applied to his actions. If the sit-in students’ actions raised murky constitutional issues, it seemed clear at least that they were trampling on the private property rights of the business owners, as defined by state law. However, as will be shown below, even the content of state trespass law was far murkier than it appeared, and this was particularly so in Maryland. Ironically, the very case thought to present clearly the question of law versus morality as applied to the sit-ins, was the case in which the baseline state trespass law was least clear of all.

To say that even the formal law that applied to cases like Robert Bell’s was unclear is also to introduce a complication into the way that historians have understood social movements such as the sit-ins. For decades, legal historians have analyzed protest movements as sites of legal pluralism, where unofficial interpretations of law propounded by outsider groups like the sit-in students are understood as legal interpretations, rather than mere extra-legal protest actions. That is, rather than choosing morality over compliance with the law, groups like the sit-in protesters were engaged in a contest over just what the law was that applied to the sit-ins. Sometimes, this extra-legal lawmaking results in changes in the official interpretation of law. 11 Bell’s story would seem to fit squarely within that framework, for as a Judge he quickly developed a reputation for going against the grain. Judge Bell was known for his Afro hairstyle, his Zodiac medallion that he wore to court in the 1970s, his famous dissents that held prosecutors to strict standards of procedural fairness, and his immaculately tailored clothes that he wears to this day. His elevation to the Chief Judgeship would seem to be the classic
story of outside-the-box legal consciousness eventually being accepted as a core part of the legal system. Along with the success of Bell and his fellow sit-in students in altering settled law—and eventually contributing to the enactment of the ’64 Act—Bell’s own career would seem to be clear evidence of the effectiveness of civil disobedience in challenging a legal system that clearly marked off the students’ actions as illegal.12

Yet, to view Bell’s actions at Hooper’s as the story of outsider views challenging official interpretations of law is to lose some of the context and complexity that surrounded his act and the legal career that followed it. The story that begins on that day at Hooper’s and reached its apogee with his elevation to the Chief Judgeship is far more complicated than this. Moreover, as indicated above, it is not even clear what was the formal law that applied to his case. In emphasizing the conflicts between outsiders like Bell and the legal system, scholars have sometimes lost sight of the contested-ness, the murkiness, of even widely accepted interpretations of official law such as the state action doctrine and ordinary trespass law. After decades of legal-historical and law-and-society scholarship in this vein, it is now relatively easy, and no longer controversial, to focus on outsider and subaltern views of law and their conflicts with more established sources of law-making and law interpretation. The ease with which one can now make such an interpretive move has sometimes led scholars to de-emphasize a point that needs re-emphasis: that “official law” is often shot through with contestation and conflict, even if lawyers and judges present it to the larger society as an island of certainty in an uncertain world.

Robert Bell’s case still has much to teach us, if we will discard some conventional ways of viewing his historic act and his subsequent conflict with law. The following essay might be viewed as an invitation to rethink some of those conventions—those surrounding the state action doctrine, the morality of civil disobedience, and the history of law and its interaction with the social world.

Did Constitutional Law Authorize Robert Bell’s Actions?

Were Robert Bell and his fellow sit-in students breaking the law? The obvious place to start is with the constitutional doctrine that may or may not have granted him a right to be free of race discrimination in Hooper’s restaurant. The restaurant’s refusal to serve him—which led to his prosecution—was because of his race. The question was, at least as most contemporaries interpreted it, whether it was some action by the state of Maryland that was really being challenged.

There was wide agreement that the origin of the state action doctrine—what Charles Black poetically called its fons et origo—was the 1883 majority opinion in the Civil Rights Cases, written by Justice Joseph P. Bradley; or that perhaps the doctrine originated in the Fourteenth Amendment itself, which reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.”13 Even legal historians have endorsed the proposition that the state action doctrine emerges from a straightforward reading of these words.14

The standard narrative of state action is that the official doctrine, as it emerged in the text of the Civil Rights Cases majority opinion, was relatively clear. The real action around state action would seem to come in the twentieth century, when social reform movements, as well as institutional changes such as the advent of the New Deal, began to put pressure on the doctrine’s formal separation of public and private.15

To do this, however, is to get the story exactly backwards, and to read nineteenth-century texts through twentieth (and now twenty-first) century eyes. It is to assume that,
if we look far enough into the past, we can find answers that avoid the complicated interpretive questions that are more familiar to us today. As will be shown below, however, Bradley’s 1883 opinion, and Justice Harlan’s dissent, emerged from twenty years of struggle and argument that preceded them—a context in which blacks seeking freedom, and whites sensing their world coming apart, argued intensely over what was, and should be, the substantive content of the law that applied to black freedom. Those arguments, and their resolution in the dueling opinions of Bradley and Harlan, had much to do with how far the Constitution extended to constrain the actions of individual citizens, but those arguments did not match the contours of modern state action.

A judicial opinion written in 1883 would supposedly define whether Bell and his fellow students were violating the law nearly eighty years later. What will follow here is a historical reconstruction of Bradley’s opinion, relying on both original research and existing scholarship. It is a reconstruction that will begin with the actual text of the opinion, and the history that led Bradley to produce this somewhat odd document that does not quite read like an elaboration of modern state action. That oddness was no accident, for the legal categories that animated Bradley and his colleagues on the Supreme Court are not those that would animate the 1960s-era Supreme Court as it considered the sit-in cases, nor the ones that govern us today.

What Justice Bradley and his colleagues decided in the *Civil Rights Cases* was that the Civil Rights Act of 1875, which required the operators of public accommodations to admit patrons without regard to race, was unconstitutional. Specifically, he decided that neither the Thirteenth nor the Fourteenth Amendment gave Congress the power to enact a public accommodations law. His majority opinion does, of course, contain the words that are quoted in modern discussions of state action, for instance, “[i]t is State action of a particular character that is prohibited” by the Fourteenth Amendment. “Individual invasion of individual rights is not the subject matter of the amendment.” There is also this: “until some State law has been passed, or some State action through its officers or agents has been taken,” there is no power for Congress to legislate under the Fourteenth Amendment. Bradley also set out the words that modern observers believe to be exceptions to the official doctrine, for instance, that Congress could regulate “customs having the force of law” under the Fourteenth Amendment, or that the Thirteenth Amendment “clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery.” Based on the conventional reading of Bradley’s opinion, it would seem to mean that Congress lacked the power to enact the 1875 Act because the statute applied to private business owners who chose to discriminate, rather than to public officials.

This is a traditional way of reading a judicial opinion—as a relatively accessible text from which we can derive a discrete holding that applies to modern controversies. But what one discovers if one applies even this type of reading to the entirety of the voluminous opinions in the case—without the assumption that one will find modern state action there—is how strange the opinions seem from a modern perspective. For instance, the dispute between Justices Bradley and Harlan is decidedly not about their different interpretations of a wall that separates public power from private life. Bradley’s majority opinion focused largely on the argument that if Congress could enact a public accommodations statute it would allow the body to create a “code of municipal law” regulating private rights—a phrase Bradley repeated twice—and “make Congress take the place of the State legislatures and to supersede them.” Justice Harlan’s dissenting opinion devoted most of its space to refuting that same proposition—arguing that the Amendments
did confer broad authority on Congress to pass the Civil Rights Act, but that such authority would not empower the federal government to create a “municipal code for all the States, covering every matter affecting the life, liberty, and property of the citizens of the several States.”

The Justices differed quite forcefully and powerfully in their readings of constitutional law, but they argued about federalism, not about public versus private life. They argued about whether freedom from discrimination in public accommodations was part of the citizenship rights that had been brought under federal protection by the Thirteenth, Fourteenth and Fifteenth Amendments, or whether it was left under control of the states. What was really at work in the sharply drawn argument between Harlan and Bradley was an attempt to close down a long-running debate that stretched back to the Civil War about the scope of federal versus state authority. In that debate, Bradley himself had taken a somewhat different position from the one he asserted in his majority opinion. By 1883, however, many things had occurred to change his mind.

The path that would lead to that famous opinion began nearly twenty years earlier, in the midst of the Civil War, as Republicans like Bradley tried to understand how slave emancipation might alter the constitutional beliefs under which they were prosecuting the war. A native of upstate New York, Bradley spent most of his life as a lawyer in Newark, New Jersey, where for three decades he represented railroads and other large corporations. During the war, he described himself over and over again at wartime political rallies as a “conservative” Republican who fully endorsed union policy based on the laws of war without altering the fact that “[t]he Constitution gives us no power to meddle” in local Southern institutions. The fundamental objective of the Republican party, he told his listeners again and again, was to suppress the rebellion, and reassert the prewar federal structure. For Bradley, questions of slavery and freedom for black Americans in the South remained firmly within the province of local, or as he later phrased it, “municipal” law. This was, of course, a standard lawyer’s move of asserting one’s allegiance to past traditions at times of great change—one that would reappear in a different guise a century later in the sit-in cases.

Asserting his allegiance to preserving the sphere of municipal law—as he would again in the Civil Rights Cases—was a useful device, because Bradley’s adopted hometown of Newark was an especially anti-black enclave. The ambitious, middle-aged lawyer ran for Congress in 1862, and much of what we know of his wartime beliefs comes from his Republican campaign rhetoric. The phrase “municipal law” would have been familiar to almost any political figure who—like both Bradley and Harlan—had lived through the Civil War-era political debates. Republicans deployed it over and over again during the war to indicate that they could accomplish emancipation under the laws of war, without disturbing the constitutional status of slavery, which was still defined by “municipal”—i.e., local, law. Bradley’s fellow New Jerseyans had deployed municipal law—the law of slavery—to hold a small number of African-Americans in bondage within the state as late as the 1850s. They initially refused to ratify both the Fourteenth and Fifteenth Amendments. On the campaign trail, Bradley declined even to endorse the Emancipation Proclamation, simply explaining that, regardless of its wisdom, Lincoln’s actions were justified under the laws of war.

Bradley’s assertions of conservative federalism were good strategy, for Democrats delighted in stirring up anti-black prejudice by arguing that emancipation would make black Americans into equal citizens with whites. As the Thirteenth Amendment was debated in Congress, Democrats reserved their strongest objection—other than appeals to race prejudice—for the claim that the
amendment was a radical revision of existing ideas of limited national power that had been written into the nation’s founding documents. They also argued that the amendment would confer both citizenship and a wide range of rights, including suffrage, on the freed slaves. This was, of course, strategic language designed to block the amendment, but even strategic language must ground itself in some plausible version of constitutional reality and this was an entirely plausible claim.21

Indeed, the political debates over the Thirteenth, Fourteenth, and Fifteenth Amendments, and the Civil Rights Acts, were filled with assertions that the Amendments undermined the conservative federalism that Bradley defended during the war. Once the Thirteenth Amendment had been ratified, white Southerners worried openly that the antislavery amendment might “give Congress the power of local legislation over negroes” extending to matters other than the bare prohibition of slavery. When Congress responded to the Black Codes and widespread anti-black violence with the Civil Rights Act of 1866, which guaranteed the nondiscriminatory right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,” it was a radical move, not least of which because the Act federalized matters that were conventionally thought to be matters of municipal law. Kentucky Senator Garrett Davis charged that the Civil Rights Act gave Congress “power to occupy the whole domain of local and State legislation” and would allow it “to pass a civil and criminal code for every State in the Union”—almost exactly the idea that Bradley would later deploy in the Civil Rights Cases.22

In 1870, Bradley’s initial political connections earned him one of President Grant’s nominations to fill vacancies on the Supreme Court. Upon joining the Court, Bradley was immediately assigned to the Fifth Judicial Circuit, which stretched from Florida to Texas. Each year, at the conclusion of the Supreme Court’s term in May, he spent about six weeks hearing cases there as a Circuit Judge, where he delivered groundbreaking interpretations of the meaning of the Civil War Amendments. Each year, he travelled through the South, where he was called upon to do what he had resolutely avoided during the war: render opinions on the constitutional claims that were being advanced by African-Americans.

During and after the war, African-Americans insisted that emancipation and the ratification of the Thirteenth Amendment raised the very issue that Bradley had done his best to avoid—upending municipal law and granting blacks a broad range of rights. In New Orleans, free people of color had insisted that emancipation, which had begun with the arrival of Union troops in 1862, conferred a broad range of rights on people of African descent, including access to streetcars. In Philadelphia, the local chapter of the Equal Rights League and other African-American groups viewed the Thirteenth Amendment as justification for a renewal of their campaign for equal access to streetcars. The movement quickly secured a decision from a local court that excluding African-Americans from streetcars was an actionable offense. In reversing what was taken to be settled law in Pennsylvania, the local judge stated that war and emancipation had altered what was taken to be settled municipal law: “the logic of the past four years has in many respects cleared our vision and corrected our judgment.”23 Boston lawyer John Rock became the first black man admitted to the Supreme Court bar on the day the Thirteenth Amendment was reported out of Congress. Both Rock and his sponsor, the antislavery Senator Charles Sumner, believed that this simple act, coming on the heels of emancipation, was an acknowledgement by the Court that blacks possessed a broad range of rights. “Streetcars would be open afterwards,” Sumner opined.24

On May 2, 1870, at the conclusion of his first term on the Supreme Court, Bradley set
out with his wife on the long train ride South for his first tour of the Fifth Judicial Circuit—and, indeed, his first extended exposure to Southern life. The trip would bring him face-to-face with the question of what the Civil War Amendments had done to basic citizenship rights, but not with the claims of black Americans. The former Newark lawyer traveled by train and steamboat, but probably saw little of the constant battles over railroad segregation that took place all over the South. He opened court in Galveston, Texas, where five years earlier freed slaves had initiated the Juneteenth celebrations marking emancipation, and just as the United States military was handing off authority to local government. He spent most of his time interacting with local lawyers and judges. White Southern lawyers liked him, and commented favorably on his judicial demeanor. With his docket of commercial cases, he remained relatively insulated from the citizenship claims of African-Americans. His principal exposure to those claims probably came from the man he would meet when Bradley convened court in New Orleans: Circuit Judge William Woods.25

Like Bradley, William Woods was a conservative Northern Republican who was trying to make sense of the constitutional revolution that had made slaves into full citizens. The two men would shape much of the road that would lead to the opinion in the *Civil Rights Cases*. Judge Woods, a transplanted Ohioan, had fought for the Union during the war, and stayed on in the South where he became a state official in Alabama. He was lucky enough to be appointed as a federal Circuit Judge when Congress expanded the federal judiciary in 1869, just before violence, intimidation, and murder overwhelmed many of his fellow Republican

Through the simple act of sitting down in segregated public accommodations, such as this diner, young African-Americans set in motion a constitutional controversy that would reach the highest levels of government.
Alabama officeholders as the Democratic party began to reclaim the state. Unlike Bradley, Woods had half a decade of direct experience with the fragile state of Southern municipal law when the two men teamed up in New Orleans to decide the case that would reach the Supreme Court as the *Slaughterhouse Cases.*

In the *Slaughterhouse Cases*, Bradley would famously deliver his first ruling on what the Fourteenth Amendment had done to the conservative federalism he had defended during the war—in a case that seemed to have nothing to do with race. It involved an ostensibly public health law that required New Orleans butchers to slaughter animals at the premises of the Crescent City Company, which lay downriver from the city’s water supply. A group of butchers challenged the slaughterhouse law, and hired former Supreme Court Justice John A. Campbell, who had resigned from the Court to fight for the confederacy, as a key part of their legal team. Campbell devised the argument that the Crescent City Company was a monopoly that prevented butchers from pursuing their trade, in violation of the Fourteenth Amendment and the Civil Rights Act.

But as always in New Orleans politics, much lay beneath the surface. Before the war, the Mississippi river city had been home to the largest slave market in the Americas, and was simultaneously the commercial center of the deep South and home to a population of mixed-race men of color, many of whom declared their allegiance to the confederacy before moving closer to the black side of the color line with the arrival Union troops in 1862. The slaughterhouse law in question was enacted in 1869 by the state’s first legislature in which both blacks and whites served, elected only after violence and murder squelched the first attempt to enfranchise the state’s African-Americans. How much of this Bradley understood is impossible to say, given the paucity of the evidence he left for us. On his first trip to the city three years before, he had adopted the viewpoint of the unreconstructed secessionists who had constituted his social circle there. He dismissed the freed slaves’ desire to leave their plantations and move about, with the quip: “off they go—to see the cities or other parishes—their vagrancy only limited by their means of locomotion.”

Many scholars have speculated about why Bradley decided that a group of white butchers could challenge a slaughterhouse law, using a constitutional amendment that had been enacted to make African-Americans into full citizens. Perhaps, in constitutionalizing a right to follow what he called “lawful industrial pursuits,” Bradley was moved by the circumstances of the industrial workers among whom he had campaigned in Newark. Perhaps he was moved by Campbell’s white supremacist-inflected arguments about the supposed corruption of the biracial legislature that passed the statute—an assertion that is often accepted uncritically by scholars.

Certainly, Bradley’s prior record left little indication that he was friendly to black citizenship claims. As a New Jersey lawyer, he had defended slave-owners against a legal challenge to slavery in that state. As the war loomed he had gone to Washington to promote a sectional compromise that would reassert the Missouri Compromise and allow slavery into the West. As late as 1862 he advocated colonization of freed slaves in another country. Whatever its reasons, there is hardly sufficient evidence to make a definitive judgment.

What can be stated with more assurance is that Bradley (and Woods) ruled broadly, and both men soon had to face up to the implications of their position for black citizenship claims. Assessing the butchers’ challenge, Bradley reasoned that the Fourteenth Amendment, in protecting the “privileges or immunities of citizens of the United States,” was intended to define and protect fundamental rights that must remain “absolutely unabridged, unimpaired” under municipal law. Which rights were they?
declined to say, but he thought it self-evident that among them are: 1) “the privileges of every American citizen to adopt and follow such lawful industrial pursuit . . . as he may see fit,” 2) the “privilege to be protected in the possession and enjoyment of his property,” and 3) the privilege “to have . . . equal protection of the laws.” Having said all this, Bradley agreed with the butchers’ association. The statute gave the Crescent City Company an “odious monopol[y]” on the slaughtering of animals, and prevented butchers from freely pursuing their trade. He issued an injunction directed to Crescent City to stop suing the recalcitrant butchers, and concluded that butchers could slaughter their animals anywhere they wished.

The Supreme Court Justice boarded a train for the return trip to Newark just after announcing his final opinion in the case, but both Bradley and Woods quickly became enmeshed in a renewed wave of anti-black violence that was sweeping the South as the Democratic party sought to overthrow biracial Republican local governments. The result was a new set of legal enactments that, once again, would come before Bradley as a test of the scope of the Civil War Amendments. In fact, while Bradley was still hearing cases on Circuit, Congress had responded to the spiraling violence with the first of the Enforcement Acts, which established criminal penalties for individuals and state officials who interfered with voting and other citizenship rights. (The statute was introduced in Congress just as Bradley was taking his seat on the Court in February.) In Woods’ adopted home state of Alabama, a violent election season was heating up, and would be the occasion for murder and assaults on black Alabamans and their white Republican allies. In New Orleans, no visitor could be unaware of the periodic street battles that had raged since the Massacre of 1866, where a white supremacist mob killed more than thirty-five members of a mostly black constitutional convention. The violent street battles would persist there for another decade, as the fragile bi-racial coalition held its ground, backed by federal law and federal troops.

Basic citizenship rights were under siege throughout the South as Bradley and Woods dealt with the aftermath of their ruling on the butchers’ claims, and Republicans responded with broad assertions of federal power under the new constitutional amendments. In up-country South Carolina that fall, black and white Republicans fell prey to overwhelming white supremacist violence and terrorism that made any question of prosecution under municipal law moot. In October, armed whites attacked a mostly black group of Republicans who had gathered at the county courthouse in Eutaw, Alabama, to organize for the fall elections. With the state’s Republican Governor looking on helplessly, the whites broke up the gathering, shot and killed several black participants, wounded over fifty, and forced the rest to run for the lives. Later that fall, prompted by continued assaults on what President Grant termed the basic rights to “life, liberty, and property” of American citizens, Congress responded with the Ku Klux Klan Act, which was intended to criminalize conspiracies among individuals to deprive citizens of many basic rights.

In December, Woods wrote Bradley from Alabama to ask for help in applying the constitutional interpretation they had propounded in New Orleans to the Eutaw murders, for which two individuals had been indicted under the Enforcement Act. Bradley wrote back twice in response to Woods, and framed the question as he would a decade later in the Civil Rights Cases—whether the new constitutional amendments reached matters that were traditionally governed by state law. In this case, could the defendants be federally indicted for an act that seemed like a “private municipal offense”—i.e., murder? First, Bradley wrote, the defendants were accused of interfering with “the right of suffrage,” which was “secured by the 15th Amendment,” and thus within the power
of Congress. Second, he concluded, the Fourteenth Amendment prohibited states from denying “equal protection of the laws.” Bradley added that “denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.” Since Congress could not force the states to protect basic citizenship rights, “the only appropriate legislation it can make is that which will operate directly on offenders.” With Bradley’s letters in hand, Woods wrote a sweeping opinion, quoting verbatim from the letters, and ruled that the indictments were constitutional. Woods’ (and Bradley’s) opinion would provide the basis for aggressive federal prosecutions responding to white supremacist violence throughout the South.35

The prewar federalism that Bradley had so confidently asserted in the 1860s was coming apart, and even in Washington, where he now spent much of his time, he could not escape it. That became clear in December 1871, when Blyew v. United States came before the Supreme Court. It was a horrific case. In 1868, two white men, after attending a Democratic party rally in Kentucky, had gone into the home of a black family and hacked most of them to death. The two men were indicted for murder in federal court under the 1866 Civil Rights Act. Murder was a state law crime, but the Act allowed the prosecution to be brought in federal courts in cases “affect[ing] persons” whose rights would be denied in state courts. Since state prosecution was impossible (blacks couldn’t testify), the two men would go free. Justice William Strong, in writing for the majority, took the time to write that “we cannot be expected to be ignorant of the condition of things which existed when the statute was enacted”—black Americans were denied basic rights in the courts. Congress could federalize ordinary crimes, he concluded, when state law denied basic rights, but the statute’s reach did not extend to this set of facts. Bradley disagreed strongly, and argued that Congress could provide “a remedy where the State refuses to give one.” “[W]here the mischief consists in inaction or refusal to act,” the Thirteenth Amendment empowered Congress to federalize what would normally be state level crimes. “Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race,” he stated. Here were the seeds of the much discussed “badges and incidents” language that he would deploy in the Civil Rights Cases. The Thirteenth Amendment empowered Congress to reach the actions of private individuals under its power to abolish slavery, he concluded, and to protect fundamental liberties when state law did not protect them.38

The conservative Republican Justice had traveled far from the positions he asserted during the war, and he was soon faced with what he believed to be his most important chance to set out the constitutional “law” that applied to black citizenship. It happened almost by accident, in response to the Colfax Massacre, which Eric Foner called “the bloodiest single act of carnage in all of Reconstruction.” On Easter Sunday, 1873, a group of armed whites had murdered more than 100 black men at the local courthouse in Grant Parish, where Republican officials had gathered after hotly disputed state and local
elections. A determined federal prosecutor brought a group of the participants to trial twice, before Judge Woods in New Orleans, in early 1874. The men were indicted under the Enforcement Act for interfering with constitutionally protected rights. The first trial ended inconclusively, but Woods brushed aside objections that the indictments were, in reality, for state-law crimes (like murder) and were thus outside of Congress’s power. The second trial began in May, just as Bradley’s schedule brought him to the city, and the Justice would preside over the proceedings for a few days with Woods before leaving town to continue his Circuit duties.

Once back in Washington, Bradley spent two weeks writing up an opinion that he understood—rightly—to be his most important to date. Under pressure from the federal prosecutor, he once again made the long trip back to New Orleans to deliver it in person. As always, he believed that the question was one of national versus state power: “the main ground of the objection is that the act is municipal in character, operating directly on the conduct of individuals, and taking the place of ordinary state legislation.” The basic problem was that murder was a state law crime, and the Civil War Amendments did not empower Congress to “pass an entire body of municipal law for the protection of person and property within the states.” Enforcement of municipal law remained the job of state governments.

However, he also sketched out an interpretation of the Civil War Amendments that was not limited by modern state action. The Thirteenth Amendment, for instance, gave Congress the power to protect certain fundamental rights—for instance the rights to contract, property, sue, and testify in the courts, and others set out in the Civil Rights Act of 1866—and to protect them from being deprived by individuals, not state actors. The Amendment not only eradicated slavery, but “required the slave should be made a citizen.

Joseph P. Bradley, who wrote for the Court in the 1883 Civil Rights Cases opinion, did not invent modern state action doctrine. He lived in a somewhat different constitutional world from the one that governed the sit-in cases of the 1960s.
and placed on an entire equality before the law with the white citizen.” For example, if an African-American desired to “lease and cultivate a farm” in a “neighborhood or community composed principally of whites” and “a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race,” the Amendment empowered Congress to prohibit that private, individual action. Under the Fifteenth Amendment, Congress could protect the right to vote from being denied because of race, “not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of state laws.”

With respect to the Fourteenth Amendment, however, he backtracked from the position he had asserted in his letter to Woods concerning the Eutaw case. Now he concluded, not based on the text of the Amendment, but on a complicated argument about natural rights that states are obligated to guaranty under their municipal law, that Congress could only protect privileges or immunities against “the acts of the state government themselves.”

42 Like many other things Bradley had done in New Orleans, appearances were deceiving. The Justice had also helped pronounce the end of Reconstruction in Louisiana. Having seemingly affirmed broad federal power to criminalize the defendants’ actions, he ruled that the indictments should be dismissed. Some of the charges against the defendants were matters reserved for the states to address through municipal law. Others might be the proper federal charges but the original indictments did not allege that the Colfax victims were deprived of rights because of “race, color or previous condition of servitude.” Woods disagreed, holding to the original position that he (and Bradley) had asserted in the Eutaw case, but the Supreme Court would eventually rule that the indictments had been properly dismissed when United States vs. Cruikshank reached that body.

Before departing an hour later for Washington, Bradley also released the defendants on bail and they exited the court to a raucous celebration. The trial had taken place in an atmosphere of murders and intimidation of the prosecution witnesses, and there was little chance for retrial. The Justice understood that he had done something momentous, and he printed and mailed copies of his opinion to his fellow Justices, the Attorney General, other public figures, newspapers and law journals. He had one more act to make in the debate over the fate of Reconstruction, casting the deciding vote on the commission that awarded the 1876 Presidential election to Rutherford B. Hayes.43

What, then, should one make of Justice Bradley’s subsequent opinion for the Court holding the Civil Rights Act of 1875 unconstitutional—the opinion that, eighty years later, would supposedly make young Robert Bell’s actions illegal? The federal public accommodations law had been bottled up in Congress for years before it finally passed, and was an affirmation of a basic claim that African-Americans had made since the war: that emancipation, and the Thirteenth Amendment, federalized a broad range of rights, including access to public accommodations. White Americans resisted this claim greatly, and cases that challenged the constitutionality of the Act began to pile up in the Supreme Court for half a decade before Bradley finally announced his majority opinion in 1883. By that time, William Woods had joined him on the Court, at Bradley’s urging, and had taken over his Fifth Circuit duties. In several well-known opinions, one even written by Woods, the Supreme Court had signaled its retreat from Reconstruction. Through particularly stingy readings of the Fourteenth and Fifteenth Amendments, the Court ruled that they did not empower Congress to criminalize the actions of individuals who committed ordinary state-law crimes.44
In the *Civil Rights Cases*, Bradley wrote an extensive opinion, followed by an equally extensive dissent by Harlan, summing up what both men thought was now settled law. Years earlier, Bradley had pronounced himself undecided on the difficult question of the 1875 Act’s constitutionality in a letter to Woods. But now he had modified his original views on what he called “the power of Congress to pass laws for enforcing social equality between the races.” “Social equality” was the contemporary watchword that whites used to justify their acquiescence to segregation while still professing themselves to be committed to equality. The question, as always for both Bradley and his fellow Justices, was federalism: whether the Thirteenth Amendment federalized a right to access public accommodations, which was traditionally defined by municipal law. Access to public accommodations, he concluded with some colorful language, was not one of those fundamental rights that had been federalized by the amendment.45

He framed the question much like he did in his Colfax opinion. “Under the Thirteenth Amendment, the legislation . . . to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.” That is, Congress could displace municipal law and directly protect fundamental liberties whose denial was an incident of slavery. What were the “necessary incidents” of slavery? Once again, he listed many of the rights defined in the Civil Rights Act of 1866: the right to be free of “[c]ompulsory service” and “restraint of . . . movement,” as well as the right “to hold property,” “to make contacts,” and to sue and testify in court, and others, but *not* access to public accommodations. What exactly were those basic rights that he believed were protected by the Thirteenth Amendment against deprivation by private actors? Based on existing historical evidence, it is impossible to tell much from his general observations. But his words would generate much work for twentieth, and now twenty-first, century lawyers, judges and constitutional theorists.46

Bradley’s Fourteenth Amendment ruling was much easier, given what he had concluded in the Colfax case, but he also used some expansive language that later observers, looking for state action, read into his views of the Thirteenth and Fifteenth Amendments, such as this: “civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful actions of individuals.” He said nothing about the Fifteenth Amendment, since the main provisions of the Civil Rights Act governed public accommodations, not voting. But the Justices had already made it clear that the Fifteenth Amendment applied to private individual actors so long as the interference with voting rights was because of race.47

The Civil Rights Act of 1875 was unconstitutional, Bradley wrote, because the rights it protected were municipal rights, and had not been federalized by the Civil War Amendments. The idea of the state action doctrine—a clear constitutional division between private right and state actors—is a later development. The story of that development is the tale of an invented history—a comforting history in which the questions presented in the state action controversies of the twentieth century—those over racially restrictive covenants, company towns, white primaries, and of course sit-ins—had already been decided. That story has yet to be completely told.

By the time Robert Bell walked into Hooper’s restaurant, it was widely understood that state action—the constitutional doctrine that might or might not define him as a lawbreaker—was in trouble. But it was also assumed that, if one went far enough back in history—to the text of the *Civil Rights Cases*—one could find an answer to the pressing constitutional questions presented by the sit-in movement. But that text—the long,
voluminous explorations of the meaning of the Civil War Amendments by Bradley and Harlan—seems to provide no definitive answer to the question of whether the Constitution binds private actors. This is not the place to identify a “holding” of the case and to argue about whether that holding resolved Bell’s case. Rather, it is only to say that the Court’s decision provides support for multiple views of what it decided. For those who are looking for evidence that the text that supposedly defines state action in fact simply does not define it, the evidence is there. Bradley made it clear that the Thirteenth and Fifteenth Amendments protected a broad range of rights from private action, and nothing in the full Supreme Court’s contemporary rulings showed that to be untrue. At the same time, it is also true that the Justices struggled with the question of how far the Amendments reached to constrain the actions of those they would have called “individuals” or “citizens.” The point is that the text that supposedly resolved Bell’s case eight decades later did no such thing. That is because the people who wrote it, and endorsed it, lived in a different constitutional world from the one that governed the sit-in cases of the 1960s.

Were Bell’s Actions in Violation of State Law?

If neither the Civil Rights Cases’ holding nor the textual command of the Constitution resolves the question of whether Bell and his fellow protesters were acting illegally, then surely they were in violation of state law. At least, that is the conclusion that many observers reached at the time, and that is the way their case has been remembered by historians. The claim that the students were acting contrary to state law seems fairly straightforward. Maryland had a criminal statute, defining and prohibiting trespass, and it seemed to contain no exception for the students’ activities. During their sit-in, Carroll Hooper, the restaurant owner, had the statute read to the protesters to make it clear to them that they were acting contrary to established law. (He had clashed with sit-in students before, and apparently had a copy of the trespass law on hand for just that purpose.) Some of the students chose to leave at that point, although Bell was among those who chose to stay. Hooper told the students that they had his sympathy, and that racial exclusion from restaurants was “an insult to human dignity.” He sincerely hoped it would end in the near future, he said. At their criminal trial, Hooper accused the students of “trying to legislate by terror . . . to force me to either serve or close.” He claimed to be merely exercising his prerogatives as a property owner, as defined in the statute.  

Hooper was not the only person to frame the sit-in question as legality versus illegality. Contemporary observers, ranging from former President Truman to Thurgood Marshall to Justice Hugo Black, struggled with the morality of the sit-ins because of the assumption that the students were deliberately violating state-law property rights. Propo- nents of segregation also did. In Atlanta, Lester Maddox, the owner of a popular restaurant called Pickrick, chased protesters away with a gun and became a folk hero among integration’s opponents. Framed as a supposed defense of his property rights rather than of segregation, his act would allow him to ride a wave of white populist sentiment all the way to the state governorship.  

Scholars, too, have tended to view the sit-in protesters as acting illegally. Over the past several decades, legal historians have framed claims like those of the sit-in protesters as an alternative source of lawmaking, engaged in by many minority groups whose claims were not recognized in positive law. Viewed this way, historians have sought to give minority groups “agency,” to rewrite their stories as those of law-makers who were excluded from the traditional lawmaking process. The most prominent published version of Bell’s story
has told the story of his case in this manner. His story, we are told, is analogous to that of a Vietnam War draft resister who was convicted for his beliefs, went to jail, then went to law school, and afterward was vindicated in the courts.\(^{50}\)

The sentencing judge at Bell’s criminal trial, however, told a slightly different story. After a vigorous argument by Robert Watts, a well-known local African-American lawyer who was defending the students, the judge told him: “I appreciate that comment, Mr. Watts. I agree with you [that] these people are not law-breaking people.” He told Watts that he would find the students guilty, but would only assess a token fine of ten dollars. He then suspended the fine. “[T]hey did not intend to deliberately violate the law but were seeking to establish a principle,” he concluded. The judge’s ambivalence about the students’ actions was shared by the Hooper’s employee who greeted them when they had asked for service. When they tried to enter front door, she stopped them and said, apologetically: “I’m sorry but we haven’t integrated as yet.” What both she and the trial judge were hinting at was the fact that, at the time of the protests, Marylanders were in the midst of an intense debate among themselves over the question of how public accommodations should be treated under state law.\(^{51}\)

On its surface, the state law applicable to the students was clear, but lurking in the background was a beguiling murkiness. As everyone knew, Hooper’s extended an open invitation to just about anyone who was orderly and sought to eat there during regular hours—except black Americans. Certain businesses that served the public were under a duty to serve almost anyone who was well-behaved and presented themselves during regular business hours. The sentencing judge summarized the law applicable to such businesses as follows: “the duty imposed by the early common law to serve the public without discrimination was later confirmed to exceptional callings where an urgent public need required its continuance, such as innkeepers and common carriers.” Railroads, for instance, were common carriers who had a duty to admit to rail transit anyone who presented themselves at their places of business—subject to reasonable rules governing tickets, schedules, proper conduct during transit, and the like. Innkeepers—proprietors of inns, hotels, motels, and similar establishments—were supposed to have a similar common law duty. Those duties were implicit exceptions to the trespass statute. That is, for businesses with a duty to serve the public, the trespass statute simply did not apply to people who were orderly and presented themselves during business hours. This rule was often cited in the sit-in court cases, much in the way that Bell’s sentencing judge did: there was an original common law rule that required certain types of businesses open to the public to admit most patrons, and that rule was later narrowed to focus on certain exceptions such as innkeepers and common carriers.\(^{52}\)

The creation of the distinction between innkeepers/common carriers and other businesses open to the public, as one might expect, had its roots in race discrimination cases from the Civil War era.\(^{53}\) In the antebellum era, there was widespread discrimination against free blacks who tried to attend theaters, eat at restaurants, and patronize streetcars and rail transit. The first reported case that decided whether such discrimination and exclusion was permissible was an 1858 Massachusetts case, McCrea v. Marsh, involving a black patron who had purchased a ticket for a lecture at the Boston Athenaeum. The Massachusetts Supreme Judicial Court ruled that the ticket was simply a revocable license, relying on the famous English case of Wood v. Leadbitter, where the court ruled that a racetrack had no duty to admit someone who had previously purchased a ticket for admission. Although English courts later rejected the Wood decision, the Wood opinion would become a regular citation in later American cases involving businesses open to the public.\(^{54}\)
The leading cases in this area, like *Wood*, were often disputes involving racetracks that wanted to exclude unsavory characters, but not cases involving racial discrimination.

The *McCrea* ruling was immediately followed by the war, the Civil War Amendments, and the Civil Rights Act of 1866, which raised the question of whether segregation and exclusion were still permissible in public accommodations and railroad travel. That question was hotly contested during Reconstruction, with the Civil Rights Act of 1875 as one chapter in that ongoing debate. After the Court invalidated the 1875 Act, many Northern states enacted their own laws requiring nondiscrimination in many places of public accommodation, although enforcement was uneven and the battle to integrate Northern accommodations would run straight through the 1950s and 1960s. In states without their own accommodations statutes, the law was taken to be more or less how the court would state it in *Bell*'s case: the duty to serve the public had once been broad, but had been narrowed to essential businesses like innkeepers and common carriers. Actual reported cases dealing with the question of race and access, however, were sparse outside the context of railroad transit.55

This is how things stood when Sara Slack, a black reporter for the New York *Amsterdam News*, stopped at a White Tower restaurant along Route 40 in Baltimore in July of 1957, ordered two hamburgers, apple pie, and coffee, and asked to sit down. Her subsequent federal lawsuit, challenging the restaurant’s refusal to let her eat inside the building, would wind its way through the federal courts over the next several years where it would intersect with the sit-in cases. The district court handed down its opinion rejecting her challenge only two weeks after the sit-in movement began in February 1960. By that time, everyone understood that the case had wider implications.56

Federal District Judge Roszel Thomsen looked for applicable Maryland cases involving race discrimination in businesses open to the public, other than railroads, and found little to guide him in his decision. He did find a 1948 case where the Maryland Court of Appeals had cited the *Wood* decision, but that, as one might expect, was yet another racetrack case that had nothing ostensibly to do with race. With the outbreak of the sit-in movement in 1960, Sara Slack’s lawsuit was joined by many other cases in the state and federal courts in Maryland. They were, arguably, cases of first impression. However, they were not treated that way. Judges tended to assume that state law was settled on the issue, even though there was little Maryland precedent on the books to back up that assumption. Thomsen and his colleagues were also influenced by the fact that Maryland law on the subject was being hotly debated outside the courts, where it seemed on the verge of being resolved in favor of nondiscrimination.57

By the early 1960s, just what was the Maryland law on the subject of segregation was increasingly open to question. The state legislature had repealed its laws requiring segregated rail, ship, and streetcar travel during the 1950s. By 1957, a public accommodations civil rights law was being debated in the Maryland legislature, and the state’s popular governor, Theodore McKeldin, had become a “frequent and outspoken critic of the discrimination policy followed by Baltimore hotels,” according to the local press. By 1960, Maryland’s race relations commission could report that in Baltimore the following changes had taken place:

Opening of all first-run movie theaters to Negroes; adoption of nondiscriminatory food service and room policies in all major hotels, with one exception; end of white-only service in nearly all department store activities, at many downtown drugstore lunch counters and at a slowly increasing number of restaurants.
That process was helped along by a series of controversies involving diplomats from newly independent African countries who were being refused service at restaurants along Route 40 while driving between Washington and the United Nations’ headquarters in New York. In June 1962, the Baltimore City Council enacted a city ordinance prohibiting race discrimination in public accommodations. That was followed the next year by a state public accommodations law, although the new statute exempted ten counties from its application, presumably because segregationist sentiment there was high.58

It was perhaps in everyone’s interest to present the question of whether Bell and his fellow students were trespassing as an easy one. State common law seemed fixed and knowable precisely because so much of the law applicable to Bell’s case was unknowable. Both the legislature and the city council had been locked in a debate since the late 1950s over whether race discrimination in public accommodations was, or should be, legally permissible. The lawyers in the cases that challenged discrimination reached instinctively for the Fourteenth Amendment because that legal theory could supply a comprehensive answer to the question of whether the sit-ins were legal throughout the South. Judges, too, had an interest in viewing the trespass issue as capable of being easily resolved. They knew that the vexing questions presented in the sit-in cases would soon be resolved by someone else—the city council, the state legislature, or the United States Supreme Court. In fact, Judge Thomsen would cite the vigorous debate taking place in the legislature and the city council as reasons for not taking action in response to Sara Slack’s petition to open up Baltimore restaurants to black patrons.59

The irony is that the messiness and flexibility of Maryland law made the Supreme Court’s job more difficult when Bell’s case reached that body. The Justices had decided the early sit-in cases by presuming that the trespass conviction was simply a subterfuge for white Southerners who were now on notice that their segregation statutes were unconstitutional. That seemed like a safe enough assumption where segregation clearly remained state policy. But Maryland was not Mississippi or, more accurately, the portions of Maryland that showed themselves to the outside world in the sit-in cases were not Mississippi. The state government was clearly acting to undo portions of its policy of segregation, and the Justices could hardly pretend that state authorities were acting to maintain it. Bell and his fellow students’ sit-ins would finally push Justice Black to draw the line with regard to the Fourteenth Amendment because of his concern that the protests were infringing on property rights. At the same time, however, it was also true that Bell’s case was the one case where it was least likely that the sit-in protesters were interfering with those settled expectations that we call by the name of property.

Were Bell and his fellow protesters violating state law? It is not my purpose to write a brief for the proposition that they were not, or to say that the judges were wrong to rule as they did. It is only to say that the moral clarity with which many people saw the case—from Justice Black to Thurgood Marshall to scholars today writing about protest movements—might be based on an assumption that is open to question. It is to say something that both well-trained lawyers and well-trained historians should know quite well—that the legal materials are often unlikely to give definitive answers to hotly contested issues like segregation in 1960s-era Maryland. It is to say that law itself is yet another, often unexamined, point of contention in cases of civil disobedience and other familiar instances when law is supposed to be in conflict with morality. This is just one of the many lessons that a sixteen-year-old youth and his fellow students had to teach
when they sat down and waited for service at Hooper’s.

**Was Bell Even Trying to Change the Law?**

If the origins of the state action doctrine, or the protesters’ status under state law, are difficult to resolve, then what might at least seem clearer is Judge Bell’s story itself. Bell, as I noted earlier, made a truly remarkable journey: from the nervous youth whose criminal conviction was affirmed all the way up to the state Court of Appeals, to the Chief Judge of that body, where he oversaw the entire court system he had once faced as a litigant. He taught the larger society a bit about law and the legal process along the way.

As a student at Harvard Law School, he led a session of his constitutional law seminar taught by the associate dean, Albert Sachs, after Sachs discovered that he was the Robert Bell of *Bell v. Maryland*. As a young Baltimore lawyer, he passed up the obvious routes to partnership at the prestigious firm of Piper Marbury and instead chose to work in a branch office delivering legal services to the community with which he was most familiar.

As a young judge, he sported a medallion over his robes and was known for what one news account called “a series of controversial rulings.” Judge Bell put prosecutors to the test for procedural fairness in a way that many in the system found controversial. As an appellate judge, he was known for his many, notable dissents from what a majority of his fellow judges had to say. When it came time for the Governor to choose the next chief judge, it was widely reported that another candidate was the “safe” choice and Bell was somewhat more controversial.60

The idea of Judge Bell’s story as the story of a rebel fits neatly with how legal historians have read the claims of people like himself. For the past quarter century, much historical writing has focused on the constitutional views of outsider groups, dissenters, subalterns, and how those dissenting views of law are sometimes, over time, recognized (or rejected) by the formal legal system.61 Bell’s story might fit here as well. After all, we might begin this history with the claims of African-Americans in the latter part of the Civil War. Predecessors of Judge Bell, like Boston lawyer John Rock, as well as millions of newly emancipated slaves, claimed rights as equal citizens, including the right to enter places that were open to nearly all of their fellow citizens but closed to them solely because of their race. Americans intensely debated those claims across the color line, eventually reaching a tentative resolution in the *Civil Rights Cases* and many other decisions that narrowly circumscribed black citizenship. In the 1950s and ’60s those claims were renewed by a new generation of African-Americans, including a young Robert Bell.

Rejected initially, in the person of Bell they made their way inside the legal profession and to the pinnacle of the court system that once defined him as an outsider.

This is an easy, and at this scholarly moment a somewhat tempting, reading of Robert Bell’s story. Perhaps for that reason alone it should be resisted. Moreover, something about this way of reading Bell’s story does not fit. For one thing, the case is called *Bell v. Maryland* only because, among those twelve young people who were arrested in June of 1960, Bell’s name came first alphabetically. Bell was certainly a leader among the young Baltimore African-Americans who had been fired up by the burgeoning sit-in movement, but if there had been an “Anderson” or an “Alexander” among the students, we might not think of this as Bell’s case at all.

Judge Bell himself has often minimized the idea that the sit-in case should be identified with him. In multiple interviews, he has emphasized that others really played a leading role in the sit-ins. After his first and only sit-in, he resolved to never do it again because he decided that he could not be non-violent. He
kept his distance from the legal proceedings. He did not testify and did not follow his case closely as it traveled through the appellate courts. He seems to have handed it off to his lawyers and simply gotten on with his life. He became a lawyer of course, but he has stated quite clearly that his decision to become an attorney was not prompted by the case. Rather it stemmed from watching the old television show, “Perry Mason.” Finally, there is his role as chief judge of the Maryland Court of Appeals. Judging from the tributes in a recent issue of the Maryland Law Review, what is perhaps his most famous legacy as chief judge are reforms covering such topics as access to justice, alternative dispute resolution, and family court reform—topics that have a somewhat tenuous relationship to the issues presented in Bell v. Maryland.62

Perhaps Bell’s story has a more difficult set of lessons to teach us about how we tell stories, how we construct legal precedents, and how we remember the past. History, of course, is a story that we create to organize the chaos of social reality—an artificial construct imposed on the past. The same is true for legal precedents. Our professional commitments require us to dig deep for the “reality” of law, or history, but that does not make it easy or simple. The easiest story to tell about Bell’s case, the story of protest and the claims of outsiders, remains a useful one. It is a story that allows us to see certain things we might not have seen before, but it is also a story that excludes. Bell was certainly a leader among the young people in Baltimore who wanted to do something about segregation, and he came to Hooper’s to change its policies and those of other establishments. But to view him as someone trying to change the law, as someone making claims on the legal system, or as someone articulating a dissenting view of law, is not quite right. Perhaps what Bell’s story reminds us is that what is often excluded from our stories of protest are the accidents, the happenstance events that sometimes make history, and sometimes jolt us into action. Perhaps what are often excluded are the stories of people who chose not to be rights-bearers, yet somehow, found themselves in the midst of great social change.

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ENDNOTES


2 Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief: Contemporary Constitutional Issues 51 (New York: Oxford University Press, 1996) (emphasis added). The Thirteenth Amendment, which prohibited slavery and involuntary servitude, is conventionally seen as one (very limited) exception, mainly applicable to circumstances that resemble slavery.

3 Christopher W. Schmidt, The Sit-Ins and the State Action Doctrine, 18 Wm. & Mary Bill of Rights J. 767, 791–95 (2010); McKenzie Webster, Note: The Warren Court’s Struggle with the Sit-In Cases and the Constitutionality of Segregation in Places of Public Accommodations, 17 J. Law & Politics 373 (2001).

4 In another Maryland case involving a well-known 1960 dispute at the Glen Echo Amusement Park, Chief Justice Warren relied on the fact that a park employee, who had been deputized as a county sheriff, arrested the black patrons. Griffin v. Maryland, 378 U.S. 130 (1964).


7 New York Times, Apr. 9, 1960, at 21; Derrick Bell, An Epistolary Exploration for a Thurgood Marshall Biography, 6 Harv. Blackletter L.J. 99 (1989); Schmidt, The Sit-Ins and the State Action Doctrine, at 797–98; Webster, Note, The Warren Court’s Struggle, at 394–95. There were other possible objections to the sit-in protesters’ actions. Marshall later complained that the young protesters were saddling the NAACP with legal costs,
since the organization felt an obligation to represent them in the courts. Others might object that regardless of the state of the law, it was more appropriate to go through the orderly process of legislation and litigation to change the law. Finally, many might say that if lawyers and judges generally believed that the sit-in students’ actions were not protected by state or federal law, then of course those beliefs/expectations constituted “the law,” and the students were acting illegally regardless of what century-old precedent said. I have grappled with all these questions, but am merely trying to state the legal dilemma as contemporaries stated it.

8 The 1960s-era views of the origin, and unraveling, of state action are summarized in: Charles L. Black, Jr., Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 84–95 (1967).

9 United States v. Morrison, 529 U.S. 598, 621–22 (2000). Michael Les Benedict pointed out long ago that the well-known decisions in United States v. Cruikshank (1876), and United States v. Harris (1883), which are sometimes cited as sources of the state action doctrine, stated quite clearly the Fifteenth Amendment applied to private individuals, and only required that the interference with voting rights was because of race. Michael Les Benedict, Preserving Federalism: Reconciliation and the Waite Court, 1978 Sup. Ct. Rev. 39, 72–75 (1979).

10 Federalism concerns lay behind many of the cases that are now cited as sources of state action, as will be argued below. But those concerns contained a markedly different set of assumptions than those which have undergirded the modern Supreme Court’s invocation of federalism as a limit on national power, as recent scholarship has shown. We cannot live in the world of law that the nineteenth century Americans imagined, just as their own ideas translate only unevenly into ours. See Maeve Glass, Bringing Back the States: A New Approach to Civil War Constitutional History, forthcoming Law & Soc. Inq. (2014); Alison L. La Croix, The Interbellum Constitution: Federalism in the Long Founding Moment, forthcoming 67 Stan. L. Rev. (2015).


13 Black, Foreword, at 84; U.S. Const. amend. XIV, § 1.

14 Schmidt, The Sit-Ins and the State Action Doctrine, at 779.

15 Seidman & Tushnet, Remnants of Belief, at 52.

16 109 U.S. 3, 11, 13 (1883).


18 109 U.S. 11, 13, 55.


23 Philip S. Foner, The Battle to End Discrimination against Negroes on Philadelphia Streetcars: (Part II) The Victory, 40 PA. HIST. 354, 360 (1973). Two years later, in a better-known decision, another local court would reject the claim that the Thirteenth Amendment required desegregation of streetcars—in a famous decision that would eventually find its way into the text of the opinion


29 Joseph P. Bradley to My Dear Daughter, April 30, 1867, box 3, folder 4, Bradley papers.


31 Bergen County Freeholders v. Poor Slaves, box 10, folder 1, Bradley papers; Whiteside diss., 91; Miscellaneouus Writings, at 146. In later correspondence, he mentioned Justice Washington’s much-debated definition of Article IV “privileges and immunities” in the 1823 Circuit opinion in Corfield v. Coryell. Joseph P. Bradley to W. B. Woods, Mar. 12, 1871, box 18, folder 2, Bradley papers; Joseph P. Bradley to Freylinghuysen, July 19, 1874, id.


33 1870 Diary, June 11, box 1, folder 7, Bradley papers; James K. Hogue, Uncivil War: Five New Orleans Street Battles and the Rise and Fall of Radical Reconstruction (Baton Rouge: Louisiana State University Press, 2006).


37 Although the formal issue before the Court was statutory interpretation, Bradley and Strong made it clear that larger constitutional concerns lay behind the ruling. Bradley responded to the majority’s invocation of its knowledge that blacks had been discriminated against in local court, with an assertion of the constitutional limits of his position: “I do not mean to be understood as saying something that I decline to do here. See Bell v. Maryland, 378 U.S. 226, 309–11 (Goldberg, J. concurring); the 14th Amendment belongs in federal court.” 80 U.S. at 586.

38 Blyew, 80 U.S. at 593, 601.

39 Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863–1877, at 530 (New York: Harper & Row, 1988), 2 F. Cas. 79, 81. The relevant section of the Enforcement Act that applied to most of the charges made it a federal crime to “band or conspire together . . . to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.” The indictments charged, among other things, that the defendants had been deprived of the right to peacefully assemble, to
be bear arms, to not be deprived of life, liberty and property with due process of law, as well as the rights secured by the 1866 Civil Rights Act. The defendants were also charged with interfering with the right to vote, in violation of the Enforcement Act.

40 1874 Diary, May 14 to 23, box 1, folder 8, Bradley papers; 25 F. Cas. 710.

41 1874 Diary, June 12, box 1, folder 8, Bradley papers. The Supreme Court had significantly narrowed the scope of the Fourteenth Amendment in its Slaughterhouse Cases opinion. Whether this influenced Bradley to change his mind is, like many things, impossible to tell from the evidence.

42 1874 Diary, July 3, box 1, folder 8, Bradley papers. The political scientist Pamela Brandwein has recently made a well-documented argument that, during the 1870s and 1880s, Supreme Court pursued a consistent jurisprudence that protected black rights under an approach that was centered on the power of Congress to protect against “state neglect.” Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction (New York: Cambridge University Press, 2011). I am sympathetic to her approach, but I differ somewhat from her in emphasizing federalism, and in my own belief that Bradley and his colleagues were in fact largely abandoning black rights in the South, and probably understood themselves to be doing exactly that. For documentation of the effect of his Cruikshank ruling on the spiraling white supremacist violence, see Pope, Snubbed Landmark, at 412–15.

43 The cases are sometimes cited as elaborations of the state action doctrine, but the cases are almost all about federalism. In the Colfax Massacre opinion, Chief Justice Waite ruled that the defendants had been indicted for what were, essentially, state law crimes and that the indictments were not worded carefully enough. In United States v. Harris, Woods invalidated part of the Ku Klux Klan Act of 1871, ruling that it covered state law crimes. In several other decisions, the Justices endorsed, in passing, Bradley’s change of heart about the scope of the Fourteenth Amendment in his Colfax opinion. The opinions made it clear that the Justices believed that the Fifteenth Amendment reached the actions of private individuals, so long as those individuals interfered with voting rights because of race. They said little about the Thirteenth Amendment, save Woods’ brief speculation that the Amendment might govern the actions of private individuals in Harris. United States v. Cruikshank, 92 U.S. 542 (1876); Virginia v. Rives, 100 U.S. 313, 318 (1880); Ex Parte Virginia, 100 U.S. 339, 346–47 (1880); United States v. Harris, 106 U.S. 629, 641 (1883).

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45 [untitled notes], box 18, folder 2, Bradley papers; Kate Masur, Civil, Political, and Social Equality after Lincoln: A Paradigm and a Problematic, 93 MARQUETTE L. REV. 1399 (2010).

46 109 U.S. at 22, 23. There is other language that would later be quoted by readers who wanted to find modern state action there, for instance, when discussing the Fourteenth Amendment: “[a]n individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror.” But he added later that: “Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation,” such as the Thirteenth Amendment.

47 109 U.S. at 17; Whiteside, Justice Joseph Bradley, at 259–61.

48 Trial Record, Bell v. Maryland, 29, 33, 37.


50 IRONS, COURAGE OF THEIR CONVICTIONS, at x. For my own thoughts on this trend, see Kenneth W. Mack, Law and Local Knowledge in the History of the Civil Rights Movement, 125 HARV. L. REV. 1018, 1034–36 (2012).

51 Trial Record, Bell v. Maryland, at 9, 10, 23.

52 Trial Record, Bell v. Maryland, at 9.


55 There were cases involving common carriers such as railroads, where the Maryland courts stated that segregation (but not exclusion) was permissible. But these were common carrier cases, which is why Judge Thompsons struggled with the question of the general rule for businesses open to the public. See Hart v. State, 60 A. 457 (Md. 1905).


57 Slack, 181 F. Supp. at 125–28; Griffin v. Collins, 187 F. Supp. 149 (D. Md. 1960); Drews v. Maryland, 167 A.2d 341 (Md. 1961). The Maryland courts even invalidated Baltimore’s first civil rights ordinance, on the basis that it conflicted with the state trespass law. Responding to the decision, the state legislature passed the state civil rights law and granted Baltimore authority to re-enact its own civil rights ordinance. MD. DAILY RECORD, Feb. 4, 1963; David S. Bogen, “Race and the Law in Maryland” 217 n. 30 (unpublished manuscript).

58 BALT. SUN, Feb. 5, 1957; Slack, 181 F. Supp. at 126 n. 11; Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy 152–53 (Princeton: Princeton University Press, 2000); Bogen, Race and the Law in Maryland, at 217. This is not to downplay the continuing battle for meaningful desegregation, as well as the segregationist sentiment in Baltimore and many parts of the state, particularly the rural Eastern Shore, which has been well documented. See Lee Sartain, Borders of
It is only to say that the formal legal rules being argued about in the sit-in cases were changing.


61 See, e.g., The Constitution and American Life; Mack, Law and Local Knowledge, at 1034.