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I. INTRODUCTION

The U.S. Supreme Court's 1896 decision in *Plessy v. Ferguson*[1] has long stood as an ignominious marker in U.S. law, symbolizing the nation's highest legal sanction for the physical separation by race of persons in the United States. In ruling against thirty-four-year-old New Orleans shoemaker Homer Adolph Plessy's challenge to Louisiana's Separate Railway Act of 1890,[2] the Court majority declared that

> we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment.[3]

One commentator on the Court's treatment of African-American civil rights cast the *Plessy* decision as "the climactic Supreme Court pronouncement on segregated institutions."[4] Historian C. Vann Woodward dubbed the Court ruling "the national decision against equality."[5] Justice John Marshall Harlan's vigorous and oft-quoted lone dissent in the case prophesied that the majority decision handed down on Monday, 18 May 1896, would "in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."[6] In the Court's 1857 decision in *Dred Scott v. Sandford*,[7] to which Justice Harlan referred, Chief Justice Roger B.

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

2 1890 La. Acts 152.

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

4 CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 3 (1987) (quoting Ralph T. Jans, Negro Civil Rights and the Supreme Court, 1865-1949 199 (1951) (Ph.D. dissertation, University of Chicago)). Lofgren's masterful study provides a comprehensive review of the decision's contemporary and historical reception. *See* LOFGREN, *supra*, at 3–6.

5 C. VANN WOODWARD, AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH/SOUTH DIALOGUE 229 (1983).

6 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

7 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

Taney infamously declared that African-Americans "had no rights which the white man was bound to respect"[8] and further asserted that African-Americans had never been and could never be citizens of the United States.[9] And indeed, the seven to one majority decision in *Plessy*, which Massachusetts-born Justice Henry Billings Brown[10] authored, was lambasted in time as "a compound of bad logic, bad history, bad sociology, and bad constitutional law."[11]

In an inspired illustration of the power of legal history, historian Charles F. Lofgren has shown that "simply condemning the decision promotes an understanding neither of it nor of America in the late nineteenth century."[12] Focusing on aspects of what he described as "the constitutional-legal context of southern race relations and American racism from the end of the Civil War to the turn of the century,"[13] Lofgren further explained that "[t]he *Plessy* case has not been well understood."[14] He clarified much about the case in its origins and development and particularly its fit with the dominant, orthodox, popular, and (pseudo)scientific thinking of its day.[15] Lofgren's corrective focus on the law and practice of transportation segregation and on the emerging legal issues in the case, like other foci however, left in the shadows a central element of the *Plessy* case that has proven as persistent in its being ignored and in its being important.

Segregation has towered as the center of *Plessy*, yet it was more the tip than the substance of the challenge. The issue of individual identity in the social construction of race formed the core of Plessy's case. The source of personal identity was the crucial issue at which Plessy's original and ultimate challenge aimed. He and his supporters worked at raising questions in the nation's highest court about the relation of law and racial identity. They hoped to press an answer to a fundamentally important question: Who has authority to decide a person's racial identity, the person or government?

Justice Henry Billings Brown's majority opinion dismissively noted the identity issue, at least tangentially. "The power to assign [a passenger] to a particular coach obviously implies the power to determine to which race the passenger belongs,"[16] Justice Brown conceded. Also implicated was "the

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[8] *Id.* at 406.

[9] *Id.* at 411, 426.

[10] *See* Robert J. Glennon Jr., *Justice Henry Billings Brown: Values in Tension,* 44 U. COLO. L. REV. 553, 566–601 (1973).

[11] ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, AND THE SUPREME COURT 101 (1960).

[12] LOFGREN, *supra* note 4, at 4.

[13] *Id.* at 5.

[14] *Id.*

[15] David W. Southern, *The* Plessy *Case: A Legal-Historical Interpretation. By Charles A. Lofgren*, 74 J. AM. HIST. 1364, 1364–65 (1988) (book review).

[16] Plessy v. Ferguson, 163 U.S. 537, 549 (1896).

power to determine who, under the laws of the particular state, is to be deemed a white, and who a colored, person,"[17] he noted. But Justice Brown skirted the issue by declaring that "[t]his question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case."[18]

This article aims to parse the strategy, shape, and substance of the question "indicated in the brief of the plaintiff in error"[19] and its origins and careful development by Plessy, his supporters, and his attorneys in the record of the case. It probes obscured arguments about the law of racial identity with which Plessy and his collaborators hoped to prevail, not only against the thickening divide of segregation but against government-imposed racial identity. Their reasoning pushed varied points but rested on the underlying principle that race was indeterminate. Missing that point has left the efforts in *Plessy* misunderstood and misused.

Pursuing the racial identity issue was the road not taken in *Plessy*. As with several crucial components of a soundly reasoned analysis of the issues raised in the case, Justice Brown's majority opinion (and Justice Harlan's famous dissent) gave short shrift to the law's determining the racial cast of personal identity. The decision left the American nation to sickening segregation and subsequent rejection of possible paths to explore something more than insubstantial notions of a "color-blind" constitution.[20]

Part II reaches back to Civil War and Reconstruction race relations and rights issues to outline political and social developments that gave rise to what became *Plessy v. Ferguson* and the Louisiana statute that it challenged, the Separate Car Act of 1890. Tracing the roots of opposition to racial segregation in public accommodations to the federal Civil Rights Act of 1866 and forward to Louisiana's constitution of 1869, the article attends to the role of the New Orleans Creole community whose members reveled in distinguishing themselves as "persons of color." It evidences a coalition of interests within the African-American community on issues of civil rights and highlights not merely distinguishable groups but groups recognizing, and at times touting, their differences within the social and legal construction of what often has appeared in simple form of race as a monolith of persons of African descent. In illustrating the prominence of "free men of color"[21] among postbellum Louisiana's African-American leaders, the article focuses

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17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 559 (Harlan, J., dissenting).

21 David C. Rankin, *The Origins of Black Leadership in New Orleans During Reconstruction*, 40 J. S. HIST. 417, 427 (1974) ("Over three-fourths of the privileged free colored class from which so many of these leaders sprang were mulatto in 1860.").

particularly on Louisiana's one-time acting Governor Pinckney Benton Stewart Pinchback[22] and on Louis A. Martinet and Rodolphe L. Desdunes, two leaders in the New Orleans Creole community. These men showed the legacy of mixed heritage in Louisiana and the recognition in state law of racial identity as a matter of reputation and property. Personal valuation and individual integrity appeared attached to the reputation of a person's racial identity.

Part III unfolds the behind-the-scenes efforts of the Citizens' Committee to Test the Constitutionality of the Separate Car Law.[23] Commonly called the *Comité des Citoyens* because of its Creole connections, this was the group that choreographed and orchestrated what became the Plessy case.[24] It retained as lead counsel[25] nationally-known Albion Winegar Tourgée[26] to craft the case along with James C. Walker, an unheralded attorney in New Orleans.

Part IV treats the work the *Comité*, mostly through Martinet, did with Tourgée and Walker to lay out a test case using Rodolphe L. Desdunes's twenty-one-year-old son, Daniel F. Desdunes.[27] A challenge to the Separate Car Act[28] that a group of blacks unrelated to the *Comité* brought in *Abbott v. Hicks*[29]—which the Louisiana Supreme Court decided in May 1892—short-circuited *State v. Desdunes*[30] and sent the *Comité* in search of a new plaintiff, who turned out to be Homer A. Plessy.

Part V relates the process of getting Plessy to and through the Louisiana courts and on to the U.S. Supreme Court, which from the beginning was the *Comité*'s desired forum for its arguments on race and color identity as bases for legal discrimination.[31] Part VI treats the

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[22] JAMES HASKINS, PINCKNEY BENTON STEWART PINCHBACK (1973).

[23] 1890 La. Acts 152; LOFGREN, *supra* note 4, at 29–30.

[24] LOFGREN, *supra* note 4, at 29–43. CITIZENS' COMMITTEE TO TEST THE CONSTITUTIONALITY OF THE SEPARATE CAR LAW, REPORT OF PROCEEDINGS FOR THE ANNULMENT OF ACT 111 OF 1890 (1897) (available at the Amistad Research Center in New Orleans).

[25] LOFGREN, *supra* note 4, at 30. See the succession of letters from Martinet to Tourgée: five in October 1891, dated 5, 11, 25 and 28, and one dated 7 December 1891. DEAN H. KELLER, AN INDEX TO THE ALBION W. TOURGÉE PAPERS IN THE CHAUTAUQUA COUNTY HISTORICAL SOCIETY (1964); Albion W. Tourgée, Albion W. Tourgée Papers (unpublished papers, on microfilm at Chautauqua County Historical Society, Westfield, New York) [hereinafter Tourgée Papers].

[26] THEODORE L. GROSS, ALBION W. TOURGÉE (1963); OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE (1965); Sidney Kaplan, *Albion W. Tourgée: Attorney for the Segregated*, 49 J. NEGRO HIST. 128, 128–33 (1964).

[27] LOFGREN, *supra* note 4, at 33.

[28] 1890 La. Acts 152.

[29] Abbott v. Hicks, 11 So. 74 (La. 1892).

[30] State v. Desdunes, No. 18,685 (Section A, Criminal District Court, Parish of Orleans 1892) (photocopy available in case file at Archives and Manuscripts Department, Earl K. Long Library, University of New Orleans along with information files against Desdunes filed on 14 March 1892 and his plea dated 19 March 1892 and marked "filed" on 21 March 1892) [hereinafter *Desdunes Case File*].

[31] *Ex parte* Plessy, 11 So. 948, 948–49 (La. 1892); LOFGREN, *supra* note 4, at 43.

preparation for Plessy's hearing in the U.S. Supreme Court, analyzing the brief Walker and Tourgée presented to unpack their argument about race and color identify within the historical development of miscegenation that produced what they called "a mixed community."[32] Part VII concludes discussion of the legal disposition of the questions of the state's role in racial identity as the *Plessy* Court saw it.

II. REACHING BACK TO CIVIL WAR AND RECONSTRUCTION RACE RELATIONS AND RIGHTS ISSUES

The development of what became *Plessy v. Ferguson* began most immediately at the start of the Louisiana legislature's 1890 session in May[33] with opposition to a bill to require that

> all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations.[34]

Members of the American Citizens' Equal Rights Association (ACERA)[35] that former Louisiana Governor Pinckney Benton Stewart Pinchback[36] helped organize[37] in Louisiana and Tennessee denounced the proposed law.[38]

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[32] 13 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE U.S.: CONSTITUTIONAL LAW 35 (PHILLIP B. KURLAND & GERHARD CASPER eds., 1975) [hereinafter, LANDMARK BRIEFS].

[33] LOFGREN, *supra* note 4, at 28. For many details of events and for direction to sources of information, the discussion presented here is heavily indebted to Lofgren's masterful study and to the rich collection of materials in OTTO H. OLSEN, THE THIN DISGUISE: TURNING POINT IN NEGRO HISTORY; *PLESSY V. FERGUSON*, A DOCUMENTARY PRESENTATION, 1864–1896 (1967).

[34] 1890 La. Acts 152.

[35] *Id.* The American Citizens' Equal Rights Association appeared in various states in the aftermath of the Civil War. Among the earliest appearances was that of the American Citizens' Equal Rights Association for the State of California evidenced in its official organ, a newspaper titled *The Elevator*. Published in San Francisco with an inaugural issue dated 7 April 1865, *The Elevator* published at least through 12 March 1869. Microfilm of that issue appears in the two-reel "Negro Newspaper" collection done by the Library of Congress Photoduplication Service for the Committee on Negro Studies of the American Council of Learned Societies, 1947. See also the story of the Georgia Equal Rights Association (GERA) that began in the fall of 1865 with its primary goal "to aid in securing for all, without regard to race or color, equal political rights." RUTH CURRIE-MCDANIEL, CARPETBAGGER OF CONSCIENCE: A BIOGRAPHY OF JOHN EMORY BRYANT 59 (1987); Lee W. Formwalt, *The Origins of African-American Politics in Southwest Georgia: A Case Study of Black Political Organization During Presidential Reconstruction* 1865–1867, 77 J. NEGRO HIST. 211, 211–22 (1992).

[36] HASKINS, *supra* note 22.

[37] Roland C. McConnell, *Review of Pinckney Benton Stewart Pinchback, by James Haskins*, 59 J. NEGRO HIST. 396, 397–98 (1974) (book review).

[38] LOFGREN, *supra* note 4, at 28.

"Citizenship is national and has no color,"[39] insisted ACERA's memorial to the Louisiana legislature filed on 24 May 1890.[40]

Pinchback's association with ACERA and the identity of leading signers of the May 24 memorial related opposition to the Separate Car Bill back to contentious issues from the years immediately after the Civil War. Pinchback's presence at the start and the persistence of Louis A. Martinet and Rodolphe L. Desdunes, two leaders in the New Orleans Creole community that reveled in distinguishing themselves as "persons of color," evidenced something of a coalition of interests within the African-American community on issues of civil rights. Making race a basis of discrimination rankled those who shared descent from Africa because the practice collapsed all persons together in the same position. But not all those who shared descent from Africa shared the same rationales in opposing race-based segregation: that was a lesson to become clear in the developments that produced the *Plessy* case.

The identity and attached ideologies of Pinchback, Martinet, and Desdunes also illustrated the tripartite distinction of "race, color, and previous condition of servitude."[41] The concept appeared in different form in the Civil Rights Act of 1866,[42] the first federal statute enforcing what a majority of Congress then perceived as personal rights stemming from the outlawing of slavery in the Thirteenth Amendment.[43] The Act spoke of "race and color, without regard to any previous condition of slavery."[44] The altered form became constitutional parlance in the Fifteenth Amendment.[45] And it would be repeated in subsequent civil rights statutes[46] although the

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[39] OLSEN, *supra* note 33, at 47.

[40] *Id.* at 47–50; LOFGREN, *supra* note 4, at 28.

[41] U.S. CONST. amend. XV. *See also* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965) (discussing the crafting of the language of the Fifteenth Amendment to the U.S. Constitution); Note, *Title VII—Discrimination on Basis of "Race" or "Color"— Federal Court Recognizes Cause of Action for Intraracial Bias*—Walker v. IRS, *713 F. Supp. 403 (N.D. Ga. 1989)*, 103 HARV. L. REV. 1403 (1990) (noting that specific references to both "race" and "color" in Title VII of the Civil Rights Act of 1964 indicated congressional intent to establish the two terms as distinct elements in a Title VII claim).

[42] Civil Rights Act of 1866, 14 Stat. 27 (1866).

[43] *See also* Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976) (describing the Civil Rights Act of 1866, as enacted, to implement the Thirteenth Amendment's "affirmative declaration that all vestiges of slavery would be illegal").

[44] Civil Rights Act of 1866, §1, 14 Stat. 27 (1866).

[45] U.S. CONST. amend. XV.

[46] *See, e.g.*, Civil Rights Act of 1964, title VII, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17). *See also* Note, *supra* note 41 (discussing the court's acceptance of Title VII of the Civil Rights Act of 1964 as a basis for recognizing a discrimination claim by a light-skinned African-American employee against his or her dark-skinned African-American supervisor).

Civil Rights Act of 1875 was closer to repeating the 1866 phrasing of "race and color, and regardless of any previous condition of servitude."[47]

None of the three grounds completely covered the others. They were distinct. Not everyone designated to be of the same race was of the same color. Nor did all of the same race or even of the same color share the same "previous condition of servitude." Not all designated "black" had, for example, been slaves. Some distinguished by color as other than black—as "mulatto," for example—had been slaves and others not.

In short, within the social and legal construction of what often appeared in simple form as the monolith of race were clustered and scattered blocks and pieces forming not merely distinguishable groups but groups recognizing, and at times touting, their differences. To identify Pinchback, Martinet, and Desdunes as "blacks" or as "Negro," for example, marked them only in a dichotomous set of categories to separate them from "white." Such marking showed no differences among the men or between them and others in the category black or Negro. The thrust of such marking pushed against recognizing individuality or personality. Rather, it perpetuated as primary a perception of identity in community and experience that was external, not necessarily internal. It imposed an arbitrary and common identity that men such as Pinchback, Martinet, and Desdunes refused to accept.

Not black in color or even dark, Pinchback, Martinet, and Desdunes were of "mixed blood," as one phrase of their time put it. None were ever enslaved. Considerable privilege in fact advantaged each. They were not from the fields, which in Louisiana and elsewhere was where the "blacks" were. All three recognized their African descent, and all three demonstrated unyielding commitment to securing those of African descent equality under law. Indeed, equality under law was the theme of *Crusader*, Martinet's New Orleans-based weekly newspaper that he opened in 1889. The theme resounded in the columns Desdunes contributed to *Crusader*. And it marked Pinchback's remarkable public career beginning with his being an equal rights crusader from the Civil War era.

The son of a white Mississippi slave-holding plantation owner and a slave woman manumitted before she bore her child in Macon, Georgia, in May 1837, the free-born Pinchback came of age in Ohio.[48] He returned South during the Civil War and served with the celebrated Corps d'Afrique into which the First Regiment of the Louisiana Native Guard were organized.[49] The unit was later designated the Seventy-third Regiment U.S. Colored Troops.[50]

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[47] Civil Rights Act of 1875, § 1, 18 Stat. 335 (1875).

[48] HASKINS, *supra* note 22.

[49] *See generally*, ROLAND C. MCCONNELL, NEGRO TROOPS OF ANTEBELLUM LOUISIANA: A HISTORY OF THE BATTALION OF FREE MEN OF COLOR (1968) (discussing the pre-Civil War role of Blacks

After the war, Pinchback helped to organize the Republican Fourth Ward club in New Orleans,[51] which was the South's largest city (with a population of 170,000 in 1860)[52] and leading port. It was also the first major Confederate city the Union captured in April 1862.[53] He became a growing political force[54] in a city whose black population more than doubled from 24,000 in 1860[55] to at least 50,000 in 1870.[56] As a delegate to the state convention of 1867–1868, he helped write Louisiana's constitution of 1868,[57] which among other things outlawed racial discrimination in public accommodations. It declared,

> All persons shall enjoy equal rights and privileges upon any conveyance of a public character; and all places of business or public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed of a public character, and shall be open to the accommodation and patronage of all persons without distinction or discrimination on account of race or color.[58]

The new framework was "a constitution that guarantees to you, to me, and to all men equal privileges and rights, civil and political," black advocates declared.[59]

Pinchback was elected to the state senate in 1868, became the chamber's president pro tempore, and succeeded to being lieutenant governor in 1871 when the black incumbent, Oscar J. Dunn,[60] died under

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in the South); Mary F. Berry, *Negro Troops in Blue and Gray: The Louisiana Native Guards, 1861–1863*, 8 LA. HIST. 165, 165–190 (1967); Alice Dunbar-Nelson, *People of Color in Louisiana: Part II*, 2 J. NEGRO HIST. 51, 69 (1917) (discussing the First Regiment of the Louisiana Native Guard).

[50] Dunbar-Nelson, *supra* note 49, at 69. *See also* Alice Dunbar-Nelson, *People of Color in Louisiana: Part I*, 1 J. NEGRO HIST. 361, 361–376 (1916).

[51] Agnes S. Grosz, *The Political Career of Pinckney Benton Stewart Pinchback*, 27 LA. HIST. Q. 527, 532 (1944).

[52] U.S. BUREAU OF THE CENSUS, POPULATION OF THE UNITED STATES IN 1860, at 195 (1864).

[53] GERALD M. CAPERS, OCCUPIED CITY: NEW ORLEANS UNDER THE FEDERALS, 1862–1865, at 25 (1965).

[54] Grosz, *supra* note 51, at 531–32.

[55] U.S. BUREAU OF THE CENSUS, *supra* note 52, at 195.

[56] U.S. BUREAU OF THE CENSUS, A COMPENDIUM OF THE NINTH CENSUS 53 (1872).

[57] *See, e.g.*, JOURNAL OF THE LOUISIANA STATE CONVENTION, 1867–1868, at 129–130 (noting Pinchback's presence and activity at the Convention).

[58] LA. CONST. art. XIII (1868).

[59] A.E. Perkins, *Oscar James Dunn*, 4 PHYLON 102, 109–10 (1943) (quoting REPUBLICAN, Jan. 16, 1868, at 1).

[60] *Id.* Born a slave in Louisiana probably in 1820 or 1821 rather than 1825 as often reported, Dunn apprenticed as a plasterer and became a fugitive slave. *Id.* at 105 (citing 7 APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY 255 (1889)). In June 1868, Dunn became the first African-American to hold public executive office in the United States by becoming lieutenant governor—a position for which Pinchback nominated him. *Id.* at 109 (quoting REPUBLICAN, Jan. 15, 1868). *But cf.* Rankin, *supra* note 21, at 437 (disputing that Dunn was a slave).

mysterious circumstances that left more than a few suggesting murder by poisoning.[61] Dunn was something of a rising star in the national Republican ranks as his name appeared as a possible vice presidential running mate for President Ulysses S. Grant's re-election bid in 1872.[62] The possible political shenanigans that may have cost Dunn his life may also have snuffed Pinchback's political career, for although elected to both the U.S. House of Representatives and to the U.S. Senate in 1872 and 1873, Pinchback never officially sat in either chamber. Charges of election fraud and irregularities returned him to Louisiana where, as lieutenant governor, he became the first African-American to serve as governor of a state when impeachment proceedings against sitting Governor Henry Clay Warmoth made Pinchback Louisiana's chief executive from 9 December 1872 to 13 January 1873. His weekly newspaper, the New Orleans *Louisianian*, persistently promoted civil equality.[63]

Pinchback necessarily engaged in common cause with Dunn, whom the fair-skinned mulatto described "as black as the ace of spades."[64] They were in the same party. They stood on the same base of support—Louisiana's population of black voters. They pursued much the same political agenda although they reportedly differed markedly in habits, temperament and character.[65] They worked with an African-American political leadership that for the most part contrasted markedly in complexion and social community with the African-American political base.[66]

Overwhelmingly, postbellum Louisiana's African-American political leaders, at least those in New Orleans, then the state capital, were "free men

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[61] *See generally*, Marcus B. Christian, *The Theory of the Poisoning of Oscar J. Dunn*, 6 PHYLON 254 (1945). The chief attending physician listed the official cause of Dunn's death as "congestion of the brain." Perkins, *supra* note 59, at 117. Long after the fact and clearly hearsay, an assistant keeper of Vital Records for the City of New Orleans said, "Oscar J. Dunn was poisoned, you know. Of course, it was difficult to fix the guilt." *Id.* at 116–17.

[62] Perkins, *supra* note 59, at 118 (quoting COURIER-JOURNAL, Nov. 23, 1871). In noting the death, the Louisville *Courier-Journal* wrote that

> at the time of his death, Dunn was the acknowledged leader of the Grant wing of the Louisiana Republicans, and was engaged in a movement which, there are many reasons to believe, had for its object the elevation of his name to the place of Vice-President upon the Republican ticket next year, or in 1876 at the farthest.

Id.

[63] Thomas J. Davis, *Louisiana*, *in* THE BLACK PRESS IN THE SOUTH, 1865–1979 151, 160 (1983).

[64] WILLARD B. GATEWOOD, ARISTOCRATS OF COLOR: THE BLACK ELITE, 1880–1920 171 (1990).

[65] Perkins, *supra* note 59, at 115.

[66] *See generally* Rankin, *supra* note 21.

of color,"[67] not men who were ever slaves. That condition, as well as their characteristically fair complexions as what were called "light-colored mulattoes,"[68] distinguished them from dark-skinned ex-slaves.[69] Louisiana differed significantly in that regard from other slave states where ex-slaves in fact dominated postbellum African-American political leadership.[70] One historian noted that "free Negroes had enjoyed certain advantages in antebellum New Orleans which eased their path to political predominance during Reconstruction."[71]

Indeed, Louisiana's Supreme Court broadly distinguished those noted in city directories and other publications with what the New Orleans *Picayune* newspaper in 1860 described as "the mystic letters—f.m.c."[72] In the 1856 case of *State v. Harrison*,[73] the court held that Louisiana's one-hundred-section "Act relative to slaves and free colored persons"[74] treated "two distinct objects"[75] and thus was void for violating Article 115 of the state constitution,[76] which read, "Every law enacted by the Legislature, shall embrace but one object, and that shall be expressed in the title."[77]

The *Harrison* court declared further that "the slave, and the free colored person—[were] two classes which it is impossible to confound in legal parlance."[78] The court explained that

> in the eye of the Louisiana law, there is (with the exception of political rights, of certain social privileges, and of the obligations

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[67] *Id.* at 420–27 (noting that "over three quarters of the privileged free colored class from which so many of these leaders sprang were mulatto in 1860"). *See also* Bardolph, *supra* note 21 (giving a broader view of Negro politicians).

[68] Rankin, *supra* note 21, at 426.

[69] *Id.* at 420–22, 425–27.

[70] *Id.* at 420. *See also id.* n.10 (identifying studies arguing for dominance of ex-slave leadership in the postbellum period called Reconstruction). *See, e.g.*, AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO: AN INTERPRETIVE HISTORY OF AMERICAN NEGROES 152–53 (1966) (discussing the political role of ex-slaves in the post-Reconstruction South); ALRUTHEUS AMBUSH TAYLOR, THE NEGRO IN THE RECONSTRUCTION OF VIRGINIA 5–7 (1926) (emphasizing the close connection and interaction between free blacks and whites in Virginia); VERNON L. WHARTON, THE NEGRO IN MISSISSIPPI, 1865–1890, at 164 (1965).

[71] Rankin, *supra* note 21, at 420.

[72] *Id.* at 421.

[73] State v. Harrison, 11 La. Ann. 722 (1856).

[74] *Id.* at 722.

[75] *Id.* at 723.

[76] *Id.* at 722–23.

[77] *Id.* (quoting LA. CONST. art. 115 (1853)). The article replicated Article 118 in the constitution Louisiana crafted in convention in 1844 and 1845 and adopted by election to be effective on January 25, 1846. 4A SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 5 (William F. Swindler ed., 1975). *See Harrison*, 11 La. Ann. at 722–23 (discussing the reasons for Article 115 and quoting an explication provided in Walker v. Caldwell, 4 La. Ann. 297, 298 (1849), by then-Chief Justice Eustis, a prominent member of the Louisiana's 1845 constitutional convention).

[78] *Harrison*, 11 La. Ann. at 724.

> of jury and militia service) all the difference between a free man of color and a slave, that there is between a white man and a slave."[79]

For emphasis, the court elaborated differences in capacity to contract, inherit, and testify at trial.[80] "The free man of color is capable of contracting. He can acquire by inheritance and transmit property by will. He is a competent witness in all civil suits,"[81] Justice Alexander McKenzie Buchanan wrote for the court. He explained,

> The slave, on the contrary, is the object of contracts, not a legal party to contracts. He may be sold or mortgaged, but he cannot sell or mortgage. He can neither inherit, nor make a will, because he can possess nothing as owner. He is inadmissible as a witness in any civil suit whatever. If accused of crime, he is tried by a special tribunal, to which the safeguards of the common law are unknown.[82]

The court's view sectioned the Pelican State's people into something akin to three castes—whites, free people of color, and slaves.[83]

The distinctions the court noted in 1855 hardly ceased with the emancipation decreed in the Thirteenth Amendment in 1865.[84] Nor did the distinctions exist only in the court's eyes or only in whites' eyes,[85] for that matter. African-Americans recognized differences among themselves, and the differences included those of condition and color as well as character.[86] "Race" and "color" were not the same, even to persons of African descent who sometimes used the terms synonymously. At least some African-

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[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See* Laura Foner, *The Free People of Color in Louisiana and St. Domingue: A Comparative Portrait of Two Three-Caste Societies*, 3 J. SOC. HIST. 417 (1970) (contrasting Louisiana's three-caste system to that of the rest of the South).

[84] U.S. CONST. amend. XIII.

[85] IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 198 (1975); Robert Brent Toplin, *Between Black and White: Attitudes Toward Southern Mulattoes, 1830–1861*, 45 J. S. HIST. 185, 194 (1979). Whites, particularly southern whites, perceived differences among African-Americans on the basis of color. Berlin and Toplin note a preference among southern whites for lighter-skinned African-Americans. Toplin wrote that southern whites tended to consider dark-skinned African-Americans "idle, lazy, [and] insolent," but tended to consider light-skinned African-Americans, especially the mixed offspring called "mulattoes," to be "industrious, hard-working," and "worthy of trust." Toplin, *supra*, at 194.

[86] *See* E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 274 (MacMillan Co. 1957) (1949) (discussing persistent color prejudice among African-Americans).

Americans expected not to be treated the same as all other African-Americans.[87] They rejected lumping.

Indeed, at least a few of Louisiana's free people of color were antebellum slaveholders.[88] Most distanced themselves, however, from slavery and from slaves, particularly in their lineage. They tended characteristically to boast, as one-time internal revenue assessor and New Orleans police commissioner[89] Blanc F. Joubert did, of "never" being a slave and that "none of my family were."[90] If they acknowledged some slave lineage, they tended to put the kinship generations removed, as the New Orleans leader Joseph A. Raynal illustrated in declaring, "I am descended from five or six generations of freemen."[91] And more than a few, while acknowledging their African ancestry, declined to identify themselves as African-American. Joubert, for example, by one report "claims to be a frenchman [sic] and not an African."[92] In another report Joubert accepted being of "both races,"[93] noting with at least a hint of displeasure that "they call me in Louisiana a colored man."[94] Yet he simultaneously discounted his African ancestry by declaring, "I cannot tell you whether I am a white man or a colored man."[95] And, indeed, one observer described Joubert as "a fine looking man and instead of being black he is whiter than the majority of men down here."[96]

Their mixed heritage loomed as a large legacy for many. For some, ancestry induced at least ambivalence, if not anxiety. The New Orleans cigarmaker Octave Belot, who according to contemporaries could "very easily pass for a white man,"[97] declared that "I cannot trace my origin to any colored family."[98] In reply to a question as to what his racial identity was, one of Belot's New Orleans confreres, J. B. Esnard, said, "I cannot answer that; I do not know exactly."[99] Some rested on official records to indicate

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87 Toplin, *supra* note 85, at 193 (stating that the tendency among light-skinned blacks, particularly mulattoes, was to "consider themselves superior to the other slaves").

88 Rankin, *supra* note 21, at 421, 436 (listing names of twenty-three of New Orleans's postbellum African-American political leaders who held slaves in antebellum Louisiana). *See also* BERLIN, *supra* note 85 (giving a broader perspective on antebellum African-American slaveholders); LARRY KOGER, BLACK SLAVEOWNERS: FREE BLACK SLAVE MASTERS IN SOUTH CAROLINA, 1790–1860 (1985).

89 ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 124 (1993).

90 Rankin, *supra* note 21, at 422.

91 *Id.*

92 FONER, *supra* note 89.

93 Rankin, *supra* note 21, at 428 (quoting REPUBLICAN, May, 13 1871).

94 *Id.*

95 *Id.* (quoting NEW ORLEANS TIMES, Oct. 11, 1874).

96 FONER, *supra* note 89, at 124.

97 Rankin, *supra* note 21, at 427.

98 *Id.*

99 *Id.* at 428.

identity.[100] More than a few rejected the judgment of others and sued to have official records of birth and race identify them or their relatives according to their own view—usually not as black or colored but as white. Joubert's family, in fact, sued the New Orleans Board of Health[101] to have him categorized as white in line with his French father[102] with whom he may have lived in Paris from 1859 to 1864.[103] Such suits over racial identity were not uncommon,[104] not only in Louisiana but throughout the United States.[105]

The Louisiana Supreme Court became more than familiar with issues of racial identity. Indeed, the author of the court's opinion, when it handled the *Plessy* case in 1893,[106] authored the court's leading decision treating racial identity,[107] or more precisely racial mis-identity, as actionable slander.[108] In the 1888 case of *Spotorno v. Fourichon*[109] from the Civil District Court for Orleans Parish[110] where New Orleans sat,[111] the court held that "[u]nder the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a negro is calculated to inflict injury and damage."[112] The court further explained that it was passing no judgment on what it identified as the dominant thinking but was "concerned with these social conditions simply as

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[100] *Id.* (quoting Mrs. Josephine Davis's comments on her husband Cooper Edgard Charles Davis's heritage: "On the question of his race, I am unable to testify positively. . . . I will have to abide by whatever the records show concerning him").

[101] *Id.*

[102] FONER, *supra* note 89, at 124.

[103] *Id.*

[104] Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 Yale L.J. 109 (1998). *See also* Ariela J. Gross, *"Like Master, Like Man": Constructing Whiteness in the Commercial Law of Slavery, 1800–1861*, 18 CARDOZO L. REV. 263 (1996).

[105] *See* F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION (1991). University of Southern California law professor and historian Ariela J. Gross has illumined the question of race in court in her essay, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*. *See* Gross, *supra* note 104. My thanks to Professor Gross for sharing here work with me.

[106] *Ex parte* Plessy, 11 So. 948 (La. 1892).

[107] Louisiana Justice Charles E. Fenner authored the decisions. Perhaps worth noting here is Justice Fenner's championing of democratic elements of Louisiana's heritage and, particularly its civil code—in contrast to the common law. *See* Charles Erasmus Fenner, The Civil Code of Louisiana as a Democratic Institution (unpublished manuscript, on microfilm at the Law Collection, Library of Congress, Washington, D.C.). *See also* Charles E. Fenner, Charles E. Fenner Papers (unpublished papers, on file with Southern Historical Collection, Manuscripts Department, Library of the University of North Carolina at Chapel Hill). Justice Fenner served as officer in the Confederate Trans-Mississippi Department and as a Reconstruction-era politician before being elevated to the Louisiana Supreme Court. LOFGREN, *supra* note 4, at 43, 46–59; Eric J. Sundquist, *Mark Twain and Homer Plessy*, 24 REPRESENTATIONS 102, 107 (1988).

[108] Spotorno v. Fourichon, 4 So. 71 (La. 1888).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.* (noting that charging a white man with being a Negro is actionable slander).

facts. They exist," the court noted, "and for that reason we deal with them."[113]

The opinion in *Spotorno v. Fourichon*[114] reached back to the 1869 case of *Toye v. McMahon*[115] for authority on whether such slander was actionable under Louisiana's 1868 constitution.[116] In the case from the Fourth District Court of New Orleans,[117] Louis Toye sued Thomas McMahon for slander for allegedly "stating publicly at a meeting of the Hackmen's Benevolent Association that he, plaintiff, 'was a colored man,' meaning thereby a person of African origin."[118] Evidencing the dichotomous racial segregation of the day, Toye alleged further that McMahon's statement "caus[ed] him to be 'disgracefully expelled from the association'"[119] by his fellow white drivers of horses and of the two- or four-wheeled public carriages or cabriolets most frequently called, in shortened form, "cabs."[120] Toye swore that he had no African ancestry.[121] He averred that he was a "British subject of pure white, or Caucassian blood."[122]

Toye v. McMahon[123] and *Spotorno v. Fourichon*[124] illustrated that Louisiana law recognized racial identity as a matter of reputation and also as a matter of property. Personal valuation and individual integrity appeared attached to the reputation of a person's racial identity. The valuation varied, and character and class mattered in that variation in the eyes of the juries in *Toye v. McMahon*[125] and *Spotorno v. Fourichon.*[126] Character and class also mattered greatly to men such as Pinchback, Louis A. Martinet, Rodolphe L. Desdunes, and their confreres in the New Orleans Creole community whose persistent and significant self-reporting highlighted the ambivalence of their ancestry.

As the postbellum Creole leader Blanc F. Joubert illustrated in asserting that he was of "both races"[127] while also declaring, "I cannot tell you whether I am a white man or a colored man,"[128] the basic classification

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113 *Id.*
114 *Id.*
115 Toye v. McMahon, 21 La. Ann. 308 (1869).
116 Spotorno v. Fourichon, 4 So. 71, 71 (La. 1888) (citing *Toye*, 21 La. Ann. at 308).
117 *Toye*, 21 La. Ann. at 308.
118 *Id.*
119 *Id.*
120 OXFORD ENGLISH DICTIONARY (2d ed. 1989).
121 Toye v. McMahon, 21 La. Ann. 308, 308 (1869) (quoting Toye's statement "that he is a British subject of pure white, or Caucasian blood").
122 *Id.*
123 *Id.*
124 Spotorno v. Fourichon, 4 So. 71 (La. 1888).
125 *Toye*, 21 La. Ann. at 308.
126 *Spotorno*, 4 So. at 71.
127 Rankin, *supra* note 21, at 428.
128 *Id.*

of Creole of color overlapped the dichotomous designations of black and white. In regard to reputation derived from racial identity, the self-concept of men such as Joubert exceeded the conventional pairing opposing black and white. They aspired to the distinction of their mixed heritage. They reveled in their self-concept and the society associated with it as well as in a sense of distinct culture.[129] Creoles saw themselves as of a particular class higher than the low status ascribed to the blacks of the fields who formed the mass of ex-slaves.[130]

Attorneys such as Pinchback and Martinet, who was also a physician,[131] other professionals, and craftsmen such as shoemaker Homer Plessy resembled common blacks neither in color nor in socio-economic class. As the constructed scale of segregation increasingly collapsed distinctions of social style and personal substance into a unitary category called "blacks" or "colored," such Creoles of color vigorously resisted. In concert with others denied civil rights because of race, they protested on principle that in the United States "citizenship is national and has no color."[132] They protested on practical grounds too. Like anyone else, they wanted what they paid for; if they purchased first class accommodations, then they wanted to be provided with first class accommodations and not to be relegated to another class because of race.[133] They protested more personally also to be recognized for who they were, for their reputation, their self-concept, and their personal identity. They fought against having their individuality or their collective character made a creature of the collectivized state-control of segregation. Thus did Martinet, Desdunes, and other Creoles of color join the American Citizens' Equal Rights Association in denouncing

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[129] *See generally*, RODOLPHE LUCIEN DESDUNES, NOS HOMMES ET NOTRE HISTOIRE: NOTICES BIOGRAPHIQUES ACCOMPAGNÉES DE REFLEXIONS ET DE SOUVENIRS PERSONNELS, HOMMAGE A LA POPULATION CRÉOLE, EN SOUVENIR DES GRANDS HOMMES QU'ELLE A PRODUITS ET DES BONNES CHOSES QU'ELLE A ACCOMPLIES [OUR PEOPLE AND OUR HISTORY: A TRIBUTE TO THE CREOLE PEOPLE OF COLOR IN MEMORY OF THE GREAT MEN THEY HAVE GIVEN US AND OF THE GOOD WORKS THEY HAVE ACCOMPLISHED] (Sister Dorothea Olga McCants trans., Louisiana State University Press 1973) (1911).

[130] WILLARD B. GATEWOOD, ARISTOCRATS OF COLOR: THE BLACK ELITE, 1880–1920, at 149–81 (1990) (treating "the role of the color scale as a stratifier in the black community").

[131] FONER, *supra* note 89, at 142; Nils R. Douglas, Who Was Louis A. Martinet? (1966) (unpublished manuscript, on file with Amistad Research Center).

[132] OLSEN, *supra* note 33.

[133] *See, e.g.*, DeCuir v. Benson, 27 La. Ann. 1, 2 (1875). In *DeCuir*, Josephine DeCuir of Pointe Coupe Parish, Louisiana, sued Captain John C. Benson of the Mississippi River steamboat *Governor Allen* for denying her a berth in the ladies' cabin for a trip upriver from New Orleans in July 1872. *Id.* DeCuir sued on the basis of the equal accommodation provision in the Louisiana Constitution, LA. CONST. art. XIII (1869), as enforced by An Act to Enforce the Thirteenth Article of the Constitution of this State, and to Regulate the Licenses Mentioned in Said Thirteenth Article, 1869 La. Acts 37. *Decuir*, 27 La. Ann. at 2. She won at trial and the Louisiana Supreme Court upheld her award of $1000 in damages and the State's power to outlaw racial discrimination in public accommodation. *Id.* at 6.

Louisiana's Separate Car Act[134] in 1890 and in organizing the Citizens' Committee to Test the Constitutionality of the Separate Car Law[135] in September 1891.[136]

III. CREATING A COLORLESS RECORD FOR A TEST CASE

Martinet acted as the engine of the Citizens' Committee to Test the Constitutionality of the Separate Car Law.[137] "I have nearly all the work [of] our Committee to do & it keeps me busy,"[138] he noted in October 1891. "Matters would progress more rapidly if other members of our Committee would take some of this work on them,"[139] he chafed. With Desdunes and other Creoles of color apparently aggravated with the American Citizens' Equal Rights Association's lack of more forceful action in opposing Louisiana's Separate Car Act[140] in the more than fourteen months after its passage, Martinet had pushed to organize the separate committee.[141] As the group they called the *Comité des Citoyens* proceeded to choreograph and orchestrate what became the *Plessy* case, Creole members began to dominate the committee.[142]

To craft the case, Martinet secured nationally-known Albion Winegar Tourgée[143] as lead counsel for the committee.[144] Converted to the antislavery cause during his twice-wounded service as a U.S. Army lieutenant in the Civil War,[145] Tourgée became an equal rights crusader after the War.[146] Moving from his roots in Ohio's Western Reserve in 1865, he relocated to Greensboro, North Carolina. He practiced law and tried his hand at politics, becoming a delegate to North Carolina's 1868 constitutional convention. He then became a state superior court judge and so leading a Republican advocate against class and race oppression that the Ku Klux Klan

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134 1890 La. Acts 152; LOFGREN, *supra* note 4, at 28–29.

135 LOFGREN, *supra* note 4, at 28–29.

136 *Id.* at 29–30.

137 *Id.*

138 *Id.*

139 *Id.* at 30.

140 1890 La. Acts 152.

141 LOFGREN, *supra* note 4, at 29–30.

142 *Id.* at 29–43; Report of the Proceedings for the Annulment of Act No. 111 Commonly Known as the Separate Car Law (Sept. 5, 1891) (unpublished report, on file with Amistad Research Center).

143 OLSEN, *supra* note 26; GROSS, *supra* note 26.

144 LOFGREN, *supra* note 4, at 30. See the succession of letters from Martinet to Tourgée: five in October 1891, dated 5, 11, 25 and 28, and one dated 7 December 1891. KELLER, *supra* note 25; Tourgée Papers, *supra* note 25.

145 James M. McPherson, Book Review, 71 AM. HIST. REV. 1078, 1078–79 (1966) (reviewing OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE (1965)).

146 *See generally* Monte M. Olenick, *Albion W. Tourgée: Radical Republican Spokesman of the Civil War Crusade* 23 PHYLON 332 (1962).

and other white supremacists repeatedly threatened his life and ran him out of the state in 1879.[147] Tourgée's eloquent and energetic advocacy of equality was not silenced.[148] His novels such as *A Fool's Errand, by One of the Fools* (1880) and *Bricks Without Straw* (1880) exposed the South's continuing racial prison and pilloried the national, and particularly the Republican Party's, retreat from real Reconstruction to assure the promises of the Thirteenth and Fourteenth Amendments. Critical acclaim hailed Tourgée as the "Victor Hugo of America,"[149] in comparison to the great French tragicomic, Romantic novelist, and poet who authored such classics as *Les Misérables* (1880) and *Notre Dame de Paris* (1831), translated as "The Hunchback of Notre Dame."[150]

A prolific polemicist, Tourgée's non-fiction was also pointed. His 1880 companion to *Fool's Errand*, titled *Invisible Empire: A Concise Review of the Epoch, with Many Thrilling Personal Narratives and Startling Facts of Life at the South, Never Before Narrated for the General Reader, All Fully Authenticated*, revealed his talent at exposé.[151] His profound advocacy of equality showed in his 1892 pamphlet *Is Liberty Worth Preserving?*[152]

Reflecting on the strength of Tourgée's writing, the *Monitor* newspaper in Concord, New Hampshire, mused that "[i]t may be well to inquire, in view of the power here displayed, whether the long-looked-for native American novelist who is to rival Dickens, and equal Thackeray, and yet imitate neither, has not been found."[153] Even some who disputed his view acknowledged his talent: in commenting on *Fool's Errand*, the *Raleigh Observer*, a leading newspaper in North Carolina's capital, declared it a "powerfully written work, and destined, we fear, to do as much harm in the world as 'Uncle Tom's Cabin,' to which it is, indeed, a companion piece."[154]

Comparing the potential of Tourgée's work with that of Harriet Beecher Stowe was indeed powerful. Her *Uncle Tom's Cabin; or, Life Among the Lowly* aimed to "make this whole nation feel what an accursed thing slavery is!"[155] when it appeared serially in 1851–1852 in the

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[147] Theodore L. Gross, *The Fool's Errand of Albion W. Tourgée*, 19 PHYLON 240 (1963).

[148] *See* George J. Becker, *Albion W. Tourgée: Pioneer in Social Criticism*, 19 AM. LITERATURE 59 (1947) (discussing some of Tourgée's works after his return to the North).

[149] Archibald Henderson, Book Review, 9 MISS. VALLEY HIST. REV. 247 (1922) (reviewing ROY F. DIBBLE, ALBION W. TOURGÉE (1921)).

[150] *See generally* ALBERT W. HALSALL, VICTOR HUGO AND THE ROMANTIC DRAMA (1998); MATTHEW JOSEPHSON, VICTOR HUGO, A REALISTIC BIOGRAPHY OF THE GREAT ROMANTIC (1942).

[151] ALBION WINEGAR TOURGÉE, THE INVISIBLE EMPIRE (Louisiana State University Press 1989) (1880).

[152] ALBION WINEGAR TOURGÉE, IS LIBERTY WORTH PRESERVING? (1892).

[153] Henderson, *supra* note 149.

[154] *Id.*

[155] THOMAS F. GOSSETT, UNCLE TOM'S CABIN AND AMERICAN CULTURE 89–90 (1985) (quoting a letter of Harriet's sister-in-law, Mrs. Edward Beecher).

Washington, D.C., antislavery newspaper *National Era*.[156] Many blessed or cursed Stowe's work for achieving her aim, in at least the northern section of the nation.[157] Comparing Tourgée to the great, popular English novelist Charles Dickens marked Tourgée again for capturing the conscience of his day, as Dickens did.[158] Similarly, the comparison to English novelist and journalist William Makepeace Thackeray, best known for his novel *Vanity Fair* (1847–1848), marked Tourgée's ability to see social shortcomings.[159]

Securing Tourgée as counsel boosted the committee's cause because the case would have a nationally recognized advocate.[160] His counsel came from afar, however: his law practice was located in western New York State's Chautauqua County and he held a position as Honorary Professor of Legal Ethics at Buffalo Law School.[161] Therefore, the committee also needed local counsel.[162] On 29 December 1891, it settled for James C. Walker, an unheralded attorney in New Orleans who worked mostly criminal matters and whom Martinet described to Tourgée as "a conscientious & painstaking lawyer."[163]

The committee wanted someone of more stature than Walker,[164] perhaps someone of the light-skinned elite, such as former Governor Pinchback, or even another white advocate such as Thomas J. Semmes,[165] a leader of the New Orleans bar and a former president of the American Bar Association[166] founded in 1878 as the nation's premier voluntary association of lawyers and judges.[167] But means appeared to be a problem. "We do not wish to obligate ourselves beyond our ability,"[168] Martinet cautioned. Semmes reportedly required a $2500 retainer.[169] Pinchback's fee demands probably also exceeded the committee abilities.[170] In any case he was soon

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[156] *Id.* at 147.

[157] *See* EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 3–4 (1962); John R. Thompson, *Uncle Tom's Cabin* 18 S. LITERARY MESSENGER 630, 638 (1852).

[158] *See generally* Michael Goldberg, *From Bentham to Carlyle: Dickens' Political Development*, 3 J. HIST. IDEAS 61, 61–76 (1972).

[159] *See generally* JOHN REED, DICKENS AND THACKERAY: PUNISHMENT AND FORGIVENESS (1995); BARBARA HARDY, THE EXPOSURE OF LUXURY: RADICAL THEMES IN THACKERAY (1972).

[160] *See generally* Kaplan, *supra* note 26.

[161] *Id.* at 129.

[162] LOFGREN, *supra* note 4, at 30.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *See* ROBERT W. MESERVE, THE AMERICAN BAR ASSOCIATION: A BRIEF HISTORY AND APPRECIATION (1973). *See also* EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK (1953).

[168] LOFGREN, *supra* note 4, at 30.

[169] *Id.*

[170] *See* HASKINS, *supra* note 22.

to move from New Orleans to more lucrative practice in Washington, D.C.[171] So, the committee hired Walker for a fee of $1000.[172]

Martinet and Walker each corresponded with Tourgée on the strategy to construct the committee's test case.[173] Their emerging plan fixed color as a central element. As *Plessy* student Charles A. Lofgren summarized, "setting up the case around a light-complexioned Negro, the arbitrariness of the classification would be accentuated."[174] Martinet revealingly noted a significant tactical problem in the committee putting forward a too white-looking colored person: no one might challenge the person! Martinet observed that as far as the Crescent City and its environs, "people of tolerably fair complexion, even if unmistakably colored, enjoy here a large degree of immunity from the accursed prejudice."[175]

Martinet's comment unveiled the fact that riding in whichever car he or his confreres chose was not the driving concern in contesting Louisiana's Separate Car Act of 1890,[176] at least not for the light-skinned Creoles of color who dominated the *Comité des Citoyens*.[177] They had choices and options. Their color could shield them in significant part from segregation if they so chose. Many could "pass," after all, crossing the color line as they desired.[178] What they most desired, however, was legal recognition of their identity. Their interest lay in neither disguise nor deception. Crucial to them was the twist of law that had come to impose identity on them. They refused the governing whites' effort to create individual identity and to straightjacket all people into identities regardless of whether such identities differed from or disrupted personal self-identity. From the outset, Martinet and Desdunes had declared, "We'll make a case, a test case, and bring it before the Federal

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[171] FONER, *supra* note 89, at 127. Pinchback removed to the national capital in 1893 "and became a prominent member of the Four Hundred, as the city's black elite was called. He was renowned for his lavish entertainments and elegant demeanor." *Id.*

[172] LOFGREN, *supra* note 4, at 31.

[173] See the letters from Martinet to Tourgée, dated 25 and 28 October 1891 and 7 and 28 December 1891, from Walker to Tourgée, dated 2 and 21 January 1892, 25 February 1892, and 14 March 1892, and from Tourgée to Walker, estimated by Lofgren as 14 January 1892. KELLER, *supra* note 25; LOFGREN, *supra* note 4; Tourgée Papers, *supra* note 25.

[174] LOFGREN, *supra* note 4, at 31.

[175] *Id.*

[176] 1890 La. Acts 152.

[177] LOFGREN, *supra* note 4, at 31.

[178] *See, e.g.*, NELLA LARSEN, PASSING (1997) (illustrating passing); GRAHAM WATSON, PASSING FOR WHITE: A STUDY OF RACIAL ASSIMILATION IN A SOUTH AFRICAN SCHOOL (1970) (illustrating passing under apartheid). *See* BERNARD W. BELL, THE AFRO-AMERICAN NOVEL AND ITS TRADITION 78, 91, 106–110 (1987) (discussing the history of the literary theme of blacks "passing" for white); JUDA BENNETT, THE PASSING FIGURE; RACIAL CONFUSION IN MODERN AMERICAN LITERATURE (1996) (exploring the social and cultural history of passing); PASSING THE FICTIONS OF IDENTITY (Elaine K. Ginsberg ed., 1996) (focusing on the history of passing); WERNER SOLLORS, NEITHER BLACK NOT WHITE YET BOTH; THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE (1999) (exploring the theme of passing); Sundquist, *supra* note 107, at 102–28 (discussing "passing" and its relation to the *Plessy* case).

Courts."[179] The ground they saw in July 1890—"the right [of] a person to travel"[180]—was shifting to the right of a person to his essential self, to his identity.

Martinet, Desdunes, and other members of the *Comité* came to see the test case they sought to construct as a challenge to the then constricting socio-political process constructing race in a dichotomy of white and black, or white and colored, or more essentially of white and not-white.[181] They aimed to defy what they viewed as the absurd racial reductionism of the Separate Car Act[182] and the white supremacist segregation such reductionism represented.[183] Their own self-identities not merely challenged, but confounded and subverted the dichotomous identity politics segregation sought to secure. New Orleans's Creoles of color, and the population of mixed blood that miscegenation had created throughout America,[184] stood as a prism to reflect multiple, not dichotomous, categories of identity.

For many Creoles of color, their self-view represented identity as changing and contingent, rather than as fixed and unitary.[185] Indeed, the fluidity of identity ran fast in their view with how arbitrary and thin all categories of race were. They opposed the collective collapsing of personal identities into a binary color cluster. They refused the identity segregation sought to impose on them, and they disputed the state's authority to use its power to so intrude on their personal identity.

An irony of which Martinet and others of the *Comité* were perhaps unaware nevertheless irritated the lining of their emerging argument against a dichotomous color hierarchy. From one perspective, the Creole argument harkened back to antebellum distinctions that privileged the lighter-hued. Not only in New Orleans, but particularly in Charleston, South Carolina, Mobile, Alabama, and other cities with prominent mixed-blood communities, the dominant society extended to lighter-skinned African-Americans

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[179] OLSEN, *supra* note 33, at 29 (quoting the NEW ORLEANS CRUSADER, July 19, 1890); LOFGREN, *supra* note 4, at 29.

[180] LOFGREN, *supra* note 4, at 29.

[181] *See* GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890–1940 (1998).

[182] 1890 La. Acts 152.

[183] *See* HALE, *supra* note 181.

[184] *See, e.g.*, Frederick Ludwig Hoffman, *Race Amalgamation, in PLESSY V. FERGUSON*: A BRIEF HISTORY WITH DOCUMENTS 76–101 (Brook Thomas ed., 1997) (excerpting Frederick Ludwig Hoffman, *Race Traits and Tendencies of the American Negro, in* 11 PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 1 (Macmillan 1896), and noting that racial amalgamation, particularly between blacks and whites, was an issue of the day). Hoffman's writing illustrates the so-called scientific racism of the day.

[185] *See* JOHN BLASSINGAME, BLACK NEW ORLEANS 1760–1880 (1973); DESDUNES, *supra* note 129 and accompanying text; Davis, *supra* note 63, at 152–176 (containing historic examples of Black press); Henry Dethloff & Robert C. Jones, *Race Relations in Louisiana 1877–1898*, 9 LA. HIST. 311, 311–14 (1968) (discussing Creoles).

economic and social advantages the darker-skinned lacked.[186] Such advantages occurred also in the countryside and on plantations. Being lumped in a racial dichotomy thus denied what at least some mixed-bloods or Creoles may have thought of as traditional privilege.[187] In some ways then they appeared less as transgressing traditional categories than as conserving or preserving the complex subtlety of a mixed blood racial system that slavery generated.[188]

While attacking the falsity of segregation's racial dichotomy, Martinet and the *Comité* stood, perhaps trapped, at the center of alternative visions of identity in the hybrid of U.S. culture. While they mocked the masquerade of color-consciousness, they were also models of color-consciousness. They simultaneously evidenced the deprivation and privilege in the continuity and change of a social system that distinguished among blacks, whites, mulattoes, and the many gradations from quadroons to octoroons, one that presumed to measure persons by blood.[189]

The metric was straightforward, if not simple. So-called pure-blooded persons were either black or white. Those with one black parent and one white parent were mulatto. Those with only white parents but one black and three white grandparents (thus one-quarter black) were quadroon. Those with only white parents and grandparents but with one black and seven white great-grandparents (thus one-eighth black) were octoroon. Proportion of "white" blood identified all.[190]

Recognized gradations were neither accidental nor incidental. In such a scheme, attitudes on individual difference reflected fundamental racial attitudes based on what anthropologist later termed hypo-descent.[191] Blacks

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[186] *See* BERLIN, *supra* note 85 and accompanying text; Toplin, *supra* note 85 and accompanying text.

[187] *See* Edward Larocque Tinker, *Cable and the Creoles*, 5 AM. LIT. 313, 313–16 (1934). *See generally* GEORGE WASHINGTON CABLE, THE GRANDISSIMES: A STORY OF CREOLE LIFE (C. Scribner's Sons 1893); GEORGE WASHINGTON CABLE, THE CREOLES OF LOUISIANA (Scribners 1884) (discussing the sensitivities and shadows of Creole New Orleans including the quadroons balls of the rue d'Orleans); GEORGE WASHINGTON CABLE, OLD CREOLE DAYS (Scribners 1879); GRACE KING, CREOLE FAMILIES OF NEW ORLEANS (Macmillian 1921); GRACE KING, NEW ORLEANS: THE PLACE AND THE PEOPLE (Macmillan 1895).

[188] *See* CARL N. DEGLER, NEITHER BLACK NOR WHITE; SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES (1971). *See also* JUDITH R. BERZON, NEITHER WHITE NOR BLACK: THE MULATTO CHARACTER IN AMERICAN FICTION (1978).

[189] *See* DAVIS, *supra* note 105.

[190] *Id. See also* Sidney Kaplan, *The Octoroon: Early History of the Drama of Miscegenation* 20 J. NEGRO EDUC. 547, 547–57 (1951).

[191] *See* DAVIS, *supra* note 105, at 5 (describing hypo-descent as "meaning that racially mixed persons are assigned to the status of the subordinate group"); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, (college ed. 1964) ("The prefix *Hypo* derives from Greek and means under or less than or beneath."). *See also* HOWARD M. BAHR, BRUCE A. CHADWICK, & JOSEPH H. STAUSS, AMERICAN ETHNICITY 27–28 (1979); MELVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 56 (1964); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2067 (1993).

lay beneath whites and weighed down descent, for the dominant society deemed blacks the lower order. The epitome of hypo-descent became popularly known as the one drop rule: Any African admixture created a person of color.[192] Regardless of degree, the rule declared anyone with a traceable African ancestor to be of African ancestry—in the language of segregation and Louisiana's Separate Car Act, "colored."[193]

IV. TAKING COLOR TO COURT: A FIRST TRIAL

To test the law of color, Rodolphe L. Desdunes offered up his twenty-one-year-old son, Daniel F. Desdunes.[194] An octoroon, Daniel exactly fit the profile of person the *Comité* wanted to present to the court. He appeared indistinguishable from those called "white," and it was on that appearance the *Comité* rested its case against the pivotal racial classifications in Louisiana's Separate Car Act.[195] Who was to say what Daniel's identity was? That was the central question the *Comité* wanted decided—not merely by a local court, but by the nation's highest court.[196]

Working with Walker and Tourgée, the *Comité* carefully orchestrated Daniel Desdunes's arrest on 24 January 1892 for violating Louisiana's Separate Car Act[197] by boarding a Louisville and Nashville Railroad (L & N) train with a first-class ticket for passage from New Orleans to Mobile and then taking a seat in a car reserved for whites only.[198] Everything was prearranged. Indeed, getting the action underway required some collusion at least to alert an L & N conductor to identify the indistinguishable Daniel Desdunes as not "white" and to proceed with his arrest.[199] The senior Desdunes no doubt worried about his son's safety. Martinet early insisted on crafting a scenario "without personal danger."[200] He and perhaps others on the *Comité* negotiated with L & N managers to agree on details for a danger-free arrest and complaint filing that would secure the essential elements of the test case being created.

The railroad officials eagerly agreed to work with the *Comité*. "The roads are not in favor of the separate car law owing to the expense entailed,"

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192 *See* DAVIS, *supra* note 105, at 4–6 (defining the "one drop rule").

193 1890 La. Acts 152.

194 LOFGREN, *supra* note 4, at 33.

195 1890 La. Acts 152.

196 LOFGREN, *supra* note 4, at 31–32.

197 1890 La. Acts 152.

198 LOFGREN, *supra* note 4, at 32–33.

199 *Id.* at 31–32.

200 See the letter from Martinet to Tourgée, dated 5 October 1891. KELLER, *supra* note 25; LOFGREN, *supra* note 4; Tourgée Papers, *supra* note 25.

Martinet explained to Tourgée in December 1891.[201] The L & N and other lines feared public backlash if they directly opposed the law, and they appeared delighted to let the *Comité* carry the load against the act while allowing their hands in the matter to remain unseen. So the *Comité* was assured of L & N's cooperation and especially that the confrontation and arrest of the *Comité*'s proxy would occur without "force or violen[ce]."[202]

Daniel F. Desdunes acted out the script Walker and Tourgée carefully drafted to carry forward *State v. Desdunes*[203] in the Orleans Parish Criminal District Court. His plea challenged the Separate Car Act[204] for violating the U.S. Constitution on multiple grounds.[205] To start, using a clear Fourteenth Amendment approach, Desdunes averred that he was a U.S. citizen and argued that Louisiana unconstitutionally had moved to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"[206] and used race to condition his rights by directing it to be the basis for refusal of service on a common carrier.

Invoking the Commerce Clause,[207] Desdunes pled further that the common carrier in his case (L & N) engaged in interstate traffic. That character, he argued, put it beyond the state's authority, as the U.S. Supreme Court had decided in 1877 in *Hall v. DeCuir*,[208] which also arose in Louisiana. In *DeCuir*, the Court held unconstitutional an 1869 Louisiana statute[209] "requiring those engaged in inter-state commerce to give all persons travelling in that state, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color."[210] The Court held that the 1869 act directly interfered with, and imposed a direct burden on, interstate commerce. Desdunes's pleadings invoked the *DeCuir* argument against the 1890 act.[211]

Desdunes's pleadings treating transportation law retraced a line of cases reaching back before the Civil War[212] and included the *Civil Rights*

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201 *Id.*

202 *Id.*

203 *See Desdunes Case File, supra* note 30.

204 1890 La. Acts 152.

205 *See* LOFGREN, *supra* note 4, at 35 (summarizing the "central constitutional argument"). *See also Desdunes Case File, supra* note 30.

206 U.S. CONST. AMEND. XIV, § 1.

207 U.S. CONST. art. I, § 8, cl. 3.

208 Hall v. DeCuir, 95 U.S. 485 (1877).

209 An Act to Enforce the Thirteenth Article of the Constitution of this State, and to Regulate the Licenses Mentioned in Said Thirteenth Article, 1869 La. Acts 37. *See also* LA. CONST. art. XIII (1869) (providing that that "All persons shall enjoy equal rights and privileges upon any conveyance of a public character").

210 *Hall*, 95 U.S. at 487.

211 LOFGREN, *supra* note 4, at 35.

212 *Hall*, 95 U.S. at 487–91.

Cases of 1883,[213] in which the U.S. Supreme Court struck down the anti-discrimination, public accommodations provisions of the Civil Rights Act of 1875.[214] But in treating Louisiana's use of race in its 1890 Separate Car Act,[215] the *Desdunes* pleadings reached out further to fresh grounds regarding racial identity.

Pointing to section two of the 1890 act,[216] Desdunes challenged the state's authority to delegate any power to determine racial identity.[217] By what authority could a train conductor or other private person act with official state sanction to decide a passenger's race? Determining race was "a scientific and legal question of great difficulty,"[218] the pleadings stated. Such identity was at least a question for judicial determination. Louisiana's Act to allow a non-judicial process, indeed the musing of mere private persons or even such as might be deputized for the purpose, to decree racial identity violated the Fourteenth Amendment's ban that "[n]o state . . . shall deprive any person of life, liberty, or property, without due process of law,"[219] the pleadings argued. Moreover, the Act's provision for criminal penalties amounted, in the defendant's view, to "the imposition of punishment without process of law and the denial to Citizens of the United States of the equal protection of the laws."[220]

The Desdunes pleadings aimed only "to prepare a basis" for the full argument Tourgée, Walker, and the *Comité* were working to offer.[221] How the full argument would have unfolded in *State v. Desdunes* remained only for speculation, however, for the case failed to develop as the *Comité* desired.[222] On 25 May 1892, the Louisiana Supreme Court short-circuited it by deciding *Abbott v. Hicks*,[223] a challenge to the 1890 Separate Car Act[224] brought by a group of blacks unrelated to the *Comité*.[225]

Martinet, the junior and senior Desdunes, and their confreres were not the only ones working against the statute. A group that attorney Percy Roberts represented[226] beat the *Comité* to court. Aiming at segregation without aiming to reach the law's implications for identity, the challenge in

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213 The Civil Rights Cases, 109 U.S. 3 (1883).
214 Civil Rights Act of 1875, § 1, 8 Stat. 335 (1875).
215 1890 La. Acts 152.
216 *Id.*
217 *See* LOFGREN, *supra* note 4, at 35 (summarizing the "central constitutional argument").
218 *Id.*
219 U.S. CONST., amend. XIV, § 1.
220 LOFGREN, *supra* note 4, at 35.
221 *Id.*
222 LOFGREN, *supra* note 4, at 32–35.
223 Abbot v. Hicks, 11 So. 74 (La. 1892).
224 1890 La. Acts 152.
225 LOFGREN, *supra* note 4, at 40–41.
226 *Abott*, 11 So. at 74.

Abbott[227] rested solely on Commerce Clause grounds that the U.S. Supreme Court indicated in *Hall v. Decuir*[228] in holding unconstitutional the 1869 Louisiana anti-discrimination in public accommodations statute.[229]

Interstate character was the determinative point Roberts argued in *Abbott*.[230] The black passenger admitted into the Texas & Pacific Railway Company car reserved for whites was, Roberts showed, "an interstate passenger, that is, a passenger traveling from a point in the State of Louisiana to his destination in the State of Texas."[231] On the basis of the uncontested fact of the interstate character of the passenger and of the carrier, Louisiana's Supreme Court heeded the lessons taught in its reversal in the *Hall v. Decuir* case.[232] It also heeded the instruction in the federal high Court's more recent pronouncement on 3 March 1890 in *Louisville, New Orleans and Texas Railway Company v. Mississippi*[233] that a state separate car statute could "appl[y] solely to commerce within the State."[234]

Reviewing the state's Separate Car Act then, the Louisiana Supreme Court held that "the statute has no application to interstate passengers, or if it has, that it is, as to them, unconstitutional and void." That undercut the *Comité*'s developing case in *State v. Desdunes*.[235] In fact, no substantive case remained. The state's high court had declared void an aspect of the act on which the *Comité* premised its case. His carefully orchestrated arrest on 24 January 1892 put Daniel Desdunes in exactly the character considered in *Abbott*: his first-class ticket on the L & N from New Orleans, Louisiana, to Mobile, Alabama, made him "an interstate passenger, that is, a passenger traveling from a point in the State of Louisiana to his destination in [another

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227 *Id.*

228 Hall v. DeCuir, 95 U.S. 485, 485 (1877).

229 Abbot v. Hicks, 11 So. 74, 76 (La. 1892).

230 *Id.* at 74–75.

231 *Id.* at 74.

232 *Hall*, 95 U.S. at 485.

233 Louisville, New Orleans & Tex. Ry. Co. v. Mississippi, 133 U.S. 587 (1890), *aff'g* 6 So. 203 (1889) (upholding as valid 1888 Miss. Laws 48, which provided, "That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations"). In light of *Hall*, the Mississippi Supreme Court, as Justice David J. Brewer put it for the affirming U.S. Supreme Court majority,

> held that the statute applied solely to commerce within the state; and that construction being the construction of the statute of the state by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a state, and not interfering with commerce between the states, then, obviously, there is no violation of the commerce clause of the federal constitution.

Id. at 591.

234 *Id.*

235 *See Desdunes Case File, supra* note 30.

state]"[236] on an interstate carrier.[237] On 9 July 1892, newly installed Criminal District Court Judge John H. Ferguson without opinion essentially dismissed the state's case against Daniel Desdunes.[238]

V. PLESSY GOES TO COURT IN LOUISIANA

The *Comité* needed a new case. The turn in *State v. Desdunes*[239] deflated enthusiasm among those who poured so much into making the effort. In fact, eyeing the prospect of a fresh case to reach the ends originally hoped for, Martinet confided, "I do not entertain the same favorable results as hopefully as in the Desdunes [case]."[240] The senior Desdunes again secured a proxy—a thirty year-old[241] Creole of color shoemaker of his acquaintance who was, like the junior Desdunes, visually indistinguishable from whites. The man's name was Homer Adolph Plessy, and the *Comité* put him on a road to the U.S. Supreme Court in June 1892, even before the Desdunes case officially closed.[242]

On Tuesday, 7 June 1892, on the *Comité*'s instruction, Plessy purchased an East Louisiana Railway (ELR) ticket for first-class passage from New Orleans to Covington, Louisiana. The two-hour trip, wholly within Louisiana, followed a circuitous seventy-mile route that Lake Pontchartrain's six hundred square miles then imposed on land passage from the Crescent City on its south shore to its north side where Covington sat as the line moved west from Slidell, Pearl River, Hickory, and Abita Springs.[243]

Plessy boarded the scheduled 4:15 p.m. train at the Press Street station and sought to enter a coach reserved for whites on the wholly intrastate ELR.[244] He had no intention of taking the ride. His script called for his not leaving New Orleans. As with Daniel Desdunes's arrest almost six months earlier, the *Comité* carefully orchestrated Plessy's confrontation. It arranged to identify Plessy for ELR conductor J. J. Dowling and to have

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[236] Abbott v. Hicks, 11 So. 74, 74–75 (La. 1892).

[237] *Id.*

[238] LOFGREN, *supra* note 4, at 40 n.21.

[239] *See Desdunes Case File*, *supra* note 30.

[240] *See* LOFGREN, *supra* note 4, at 40 n.21 (observing that while the letter is dated 4 July, "its composition continued in stages through 29 August").

[241] *See* LOFGREN, *supra* note 4, at 41 (describing Plessy as "a thirty-four-year-old" at the time of his arrest even though Plessy was born in March 1862). Thus, Plessy was thirty years old at the time of his arrest in June 1892 and thirty-four years old when the U.S. Supreme Court delivered its opinion in 1896. *See* TIMES PICAYUNE, Mar. 4, 1925, at 8 (printing Plessy's obituary and stating, "Plessy—on Sunday, March 1, 1925, at 5:10 a.m., Homey A. Plessy, 63 years, beloved husband of Louise Bordenave"). *See also* Keith Weldon Medley, *The Sad Story of How 'separate but equal' was Born*, SMITHSONIAN, Feb. 1994, at 117 (quoting Plessy's obituary).

[242] LOFGREN, *supra* note 4, at 41.

[243] *See generally* Medley, *supra* note 241.

[244] *See* LOGREN, *supra* note 4, at 41.

New Orleans Detective Chris C. Cain on hand to take Plessy into custody on Dowling's complaint that Plessy refused the conductor's command under the Separate Car Act[245] to remove himself from the car reserved for whites only.

The script played out perfectly. Cain arrested Plessy and took him for booking at New Orleans's Fifth Precinct Station on Elysian Fields Avenue about a half-mile from the Press Street station. The criminal complaint Cain filed charged Plessy with having "unlawfully, insisted on going into a coach to which, by race, he did not belong."[246] If found guilty, Plessy faced a fine of twenty-five dollars or not more than twenty days in the parish prison.[247]

Walker guided Plessy on the path tested earlier with Daniel Desdunes.[248] He interposed a plea to jurisdiction on 20 July, answering the information filed against Plessy by arguing that the Orleans Parish Criminal District Court lacked authority in the case because the Separate Car Act[249] violated the U.S. Constitution. Judge John H. Ferguson overruled Plessy's jurisdictional plea and ordered Plessy to plead to the facts in the information. As directed by counsel, Plessy refused to plead to the facts. In fact, he declined to state his race; he neither admitted nor denied he was colored or white.[250] Judge Ferguson warned Plessy that he faced fine or imprisonment unless either a writ of prohibition or certiorari arrested judgment and in effect sustained his constitutional argument against the statute.[251]

Walker, Tourgée, and the *Comité* took heart. The proceedings were going as they planned. They had properly pled the statute's unconstitutionality and been overruled, which allowed them to take Plessy's case to Louisiana's Supreme Court on a writ of prohibition, as had occurred in *Abbott v. Hicks*.[252] And they did so, moving against the trial court judge, John H. Ferguson. The question then, in the words of the state high court exercising its supervisory jurisdiction, was "whether the judge [Ferguson] is

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[245] 1890 La. Acts 152.

[246] Affidavit of C. C. Cain, *Ex parte* Plessy, 11 So. 948 (La. 1892) (No. 11,134) (on file with Archives and Manuscripts Division, Archives of the Supreme Court of the State of Louisiana, Earl K. Long Library, University of New Orleans); *Ex parte* Plessy, 11 So. 948, 951 (La. 1892).

[247] *See* 1890 La. Acts 152, 153.

[248] LOFGREN, *supra* note 4, at 40.

[249] 1890 La. Acts 152.

[250] LANDMARK BRIEFS, *supra* note 32, at 6–7.

[251] *See* State v. Plessy, No. 19,117 (Criminal District Court, Parish of Orleans 1892) (photocopy available in the Amistad Research Center, New Orleans); LOFGREN supra note 4, at 41. See *State v. Plessy*, No. 19,117 (Criminal District Court, Parish of Orleans 1892), and *Ex parte Plessy*, 11 So. 948 (La. 1892), for details on proceedings reported here and above. *See also* LOFGREN, *supra* note 4, at 28–42. Notice that neither the information nor the plea averred Plessy's race or color. *See* Plessy v. Ferguson, 163 U.S. 537, 540 (1896).

[252] Abbott v. Hicks, 11 So. 74 (La. 1892).

exceeding the bounds of judicial power by entertaining a prosecution for a crime not created by law."[253]

In *Ex parte Plessy*,[254] the Louisiana Supreme Court responded to Plessy's "plea of the unconstitutionality of the statute."[255] It dismissed as "argumentative"[256] most of Walker and Tourgée's fourteen-point petition for Plessy. Justice Charles Fenner summarized the petition in his opinion for the unanimous court. The "whole gravamen of [Plessy's] plea" was, Justice Fenner wrote,

> [t]hat the statute in question establishes an insidious distinction and discrimination between citizens of the United States, based on race, which is obnoxious to the fundamental principles of national citizenship, perpetuates involuntary servitude, as regards citizens of the colored race, under the merest pretense of promoting the comforts of passengers on railway trains, and in further respects abridges the privileges and immunities of the citizens of the United States, and the rights secured by the thirteenth and fourteenth amendments of the federal constitution.[257]

Justice Fenner then barely paused in dismissing each element of the plea's Thirteenth and Fourteenth Amendment claims.[258]

The Separate Car Act[259] was a legitimate "exercise of the police power"[260]—the residual, sovereign right of the state to act "in the interest of public order, peace, and comfort,"[261] Justice Fenner explained. Repeating the prevailing doctrine of the day that equal application satisfied the Equal Protection Clause of the Fourteenth Amendment,[262] Justice Fenner declared that the segregation act "impairs no right of passengers of either race, who are secured that equality of accommodations which satisfies every reasonable claim."[263]

Justice Fenner went further to insist that race was a legitimate basis for governmental distinctions. The principle permeated the law, not only in Louisiana but throughout the United States. Justice Fenner noted that "[t]o hold that the requirement of separate, though equal, accommodations in

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253 *Ex parte* Plessy, 11 So. 948, 948 (La. 1892).

254 *Id.*

255 *Id.* at 949.

256 *Id.*

257 *Id.*

258 *Id.*

259 1890 La. Acts 152.

260 *Ex parte* Plessy, 11 So. 948, 951 (La. 1892).

261 *Id.*

262 U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

263 *Plessy*, 11 So. at 951.

public conveyances, violated the Fourteenth Amendment, would, on the same principles, necessarily entail the nullity of statutes establishing separate schools, and of others, existing in many states, prohibiting intermarriage between the races."[264]

If race was not a legitimate basis for any one legal distinction, then it was not a legitimate basis for any legal distinction, the court agreed. With an eye on broad-based segregation, it recognized that "[a]ll are regulations based upon difference of race; and, if such difference cannot furnish a basis for such legislation in one of these cases, it cannot in any."[265] Thus, the Louisiana high court ruled the state's Separate Car Act of 1890[266] constitutional and denied Plessy relief from criminal prosecution.[267]

The result was exactly as Tourgée, Walker, and the *Comité* had hoped. The highest court in the state had issued a final ruling. That enabled an appeal to the Supreme Court of the United States. From the beginning the nation's highest court was the desired forum for the *Comité*'s argument on race and color as bases for legal discrimination.[268]

VI. PLESSY GOES TO THE U.S. SUPREME COURT

The test case that the *Comité des Citoyens* developed against Louisiana's Separate Car Act of 1890[269] touched and concerned many issues—many discussed in depth long afterward.[270] Central to the *Comité*'s concerns were its much less discussed ideas and theories that individual identity lay as the abused core of its case. In the two briefs that the *Comité* caused to be filed in the U.S. Supreme Court during the October 1895 term for Plessy as plaintiff in error against Judge John H. Ferguson,[271] race and color as elements of identity figured as fundamental constructs of the arguments. A persistent question echoed throughout: Who has authority to decide a person's identity?

The two briefs appeared to arise from arrangements Tourgée made to sign on as co-counsel for the U.S. Supreme Court argument his long-time

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264 *Id.*

265 *Id.*

266 1890 La. Acts 152.

267 *Ex parte* Plessy, 11 So. 948, 951 (La. 1892).

268 *Id.* at 80–82; LOFGREN, *supra* note 4, at 43.

269 1890 La. Acts 152.

270 *See* LOFGREN, *supra* note 4, at 1–60.

271 LANDMARK BRIEFS, *supra* note 32, at 3–80. Tourgée and Walker appeared on one brief with Walker's name alone on the cover as "Of Counsel for Plaintiff in Error," *id.* at 27, but "*ALBION W. TOURGEE, of Counsel for Plaintiff in Error*" appeared as the sign off, *id.* at 63. "Brief of James C. Walker" also appears. *Id.* at 64–80. S. F. Phillips and F. D. McKenney appeared on the lead brief as "Attorneys for Plaintiff in Error." *Id.* at 3.

friend,[272] former U.S. Solicitor General Samuel F. Phillips.[273] A veteran of battle in the nation's high court, Phillips had argued (unsuccessfully at it turned out) for the U.S. government in the *Civil Rights Cases* of 1883[274] to uphold the anti-discrimination, public accommodations provisions of the Civil Rights Act of 1875.[275] Tourgée eagerly drew on Phillips's experience and on his practicing in the nation's capital where he could oversee details such as printing and filing the briefs. Much as Walker served as local counsel to be on the ground in New Orleans, Phillips was local counsel in Washington, D.C., preparing the *Plessy* case for the high Court. Thus, Phillips and his law partner F. D. McKenney[276] appeared on the lead brief as "Attorneys for Plaintiff in Error."[277] Tourgée and Walker appeared on a second brief with Walker's name alone on the cover as "Of Counsel for Plaintiff in Error."[278]

The Phillips brief attended mostly to arguing that Louisiana's Separate Car Act of 1890[279] violated "[t]he XIVth Amendment, by abridging the privileges and immunities of Plessy in his character as a citizen of the United States."[280] Emphasizing injury, inequity, and the right to travel, Phillips declared in summary:

> we submit that the *separation* required by the statute is necessarily in the nature of *mayhem* of a right to move about this country quite inseparable from any proper definition of the term "citizen of the United States," or from any proper catalogue of his privileges. No statute can be constitutional which requires a citizen of the United States to undergo policing founded upon Color at every time that *intra-state* occasions require him to use a railroad—a policing, that is, which reminds him that by law he is either of a superior or an inferior class of citizens. As already suggested, either classification is *per se* offensive, and technically an injury to any citizen of the United States as *such*.[281]

Right of transit more than race lay as the foundation of the Phillips brief.[282]

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[272] Tourgée probably became acquainted with Phillips during their post Civil War years in North Carolina. Phillips served as a delegate to the North Carolina constitutional convention in 1865. *See* J. G. DE ROULHAC HAMILTON, RECONSTRUCTION IN NORTH CAROLINA 120–21 (1906).

[273] LOFGREN, *supra* note 4, at 148.

[274] The Civil Rights Cases, 109 U.S. 3 (1883).

[275] Civil Rights Act of 1875, § 1, 18 Stat. 335 (1875).

[276] *See* LOFGREN, *supra* note 4, at 245 n.37.

[277] LANDMARK BRIEFS, *supra* note 32, at 3.

[278] *Id.* at 27.

[279] 1890 La. Acts 152.

[280] LANDMARK BRIEFS, *supra* note 32, at 9. *See also,* LOFGREN, *supra* note 4, at 164–72.

[281] LANDMARK BRIEFS, *supra* note 32, at 15.

[282] *See* LOFGREN, *supra* note 4, at 164–72 (discussing Phillips's brief).

Directed apparently by Tourgée to discuss the color issue, Phillips appeared either unable or unwilling to embrace[283] the core argument that Tourgée, Walker, and the *Comité* had been developing about the invalidity of race and color as legally recognizable facts. Rather, Phillips's argument accepted the fact of race and color but disputed the consequence the fact of race and color could constitutionally have in law. "The record of the information does not show whether Plessy is *White* or *Colored*,"[284] Phillips noted. He took the information's failure to show race or color as an opportunity to argue in the alternative for Plessy that "it may be that at the time alleged he was a White man insisting upon a seat . . . or, *vice versa*, a Colored man insisting upon a seat."[285] That race or color were indeterminate did not enter his argument. Phillips's point was "that it is not competent for a statute to give *force of law* to mere social inequalities turning upon Color."[286] More fully stated, Phillips submitted to the Court "that for citizens of the United States any State statute is unconstitutional that attempt, because of personal Color to hinder, even if by insult alone, travel along highways, between any points whatever."[287]

The Walker-Tourgée brief reached the race or color issue in its opening assignment of errors.[288] Its first point on the issue was that Louisiana's law itself left race and color indefinite: "Neither the said statute, nor the law of the state of Louisiana, nor the decision of its courts have defined the terms 'colored race' and 'persons of color,'" the brief stated.[289] Then, as in the pleadings in *State v. Desdunes*, Walker and Tourgée attached their challenge to the fact that "the law in question has delegated to conductors of railway trains the right to make such classification and made penal a refusal to submit to their decision."[290] They next made the point that "[r]ace is a question of law and fact which an officer of a railroad corporation cannot be authorized to determine."[291] In the last of their total of twelve enumerated assignment of errors, they concluded that "[t]he state had no power to authorize the officers of railway trains to determine the question of race without testimony, and to make the rights and privileges of citizens to depend on such decision, or to compel the citizen to accept and submit to

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283 See Raymond Wolters, *Segregation, Integration, and Pluralism: Approaches to American Race Relations*, 29 HIST. EDUC. Q. 123, 124 (1989) (discussing Phillips's acceptance of elements of racial segregation in anti-miscegenation laws and in separate school laws).

284 LANDMARK BRIEFS, *supra* note 32, at 9.

285 *Id.*

286 *Id.*

287 *Id.* at 13.

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.*

such decision."[292] Absence of fixed legal standards, improper delegation, and lack of due process invalidated the statute, the brief argued.

In elaborating on the questions arising in the case, the Walker-Tourgée brief went directly to determination of race. It posed the ultimate question toward which its argument tended: "Has the State the power under the provisions of the Constitution of the United States, to make a distinction based on color in the enjoyment of chartered privileges within the state?"[293] Leading to that question, Walker and Tourgée repeated their questions of delegation and, most significantly, of determination. "Is the officer of a railroad competent to decide the question of race? Is it a question that *can* be determined in the absence of statutory definition and without evidence?"[294] In rhetorical form, Walker and Tourgée offered the essence of the argument they and the *Comité* had labored to deliver: "Is not the question of race, scientifically considered, very often impossible of determination?"[295]

Who was to tell who was who? Who was to determine identity? And who was to bear whatever liability attached to mis-identifying a person? Those questions persisted throughout the Walker-Tourgée brief, although in more ponderous legal language. Attaching the liability question to questions of source of identity, Walker and Tourgée rhetorically asked, "Has the State the power under the Constitution to authorize any officer of a railroad to put a passenger off the train and refuse to carry him *because* he happens to differ with the officer as to the race to which he properly belongs?"[296] The argument for Plessy was clearly that, if anything, law must privilege self-identification.

Calling clearly for judicial notice of what they described as the "mixed community"[297] represented in the *Comité* and its proxy Plessy, Walker and Tourgée emphasized the absence of fixed standards. "Our contention is that no individual or corporation could be expected or induced to carry into effect this law, in a community where race admixture is a frequent thing and where the hazard of damage resulting from such assignment is very great,"[298] they stated. Miscegenation was a fact. "It is," they argued, "a question for the Court to determine upon its knowledge of human nature and the condition affecting human conduct."[299]

Along with the fact of miscegenation, Walker and Tourgée argued also that "in any mixed community, the reputation of belonging to the

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292 *Id.*
293 *Id.*
294 *Id.* at 32–33.
295 *Id.* at 33.
296 *Id.*
297 *Id.* at 35.
298 *Id.*
299 *Id.*

dominant race, in this instance the white race, is *property*, in the same sense that a right of action or of inheritance is *property*."[300] Also, the reputation attached to identity had "actual pecuniary value"[301] of which misidentification deprived a person, the brief insisted. The property argument reached to attach the identity elements to the Fourteenth Amendment Due Process Clause.[302] It cast racial misidentification under Louisiana's Separate Car Act of 1890[303] as a deprivation of property "without due process of law."[304]

Walker and Tourgée's argument that race mattered—as reputation and as property—was at least awkward. Their tact pushed them, if not simultaneously then alternately, to admit race as a fact and to deny race as a fact. On denial, they reflected the cultural claims of their de facto client—the *Comité des Citoyens* with its roots in the history and hubris of New Orleans's Creoles of color. Walker and Tourgée wrote directly that

> plaintiff also insists that a wholesale assortment of the citizens of the United States, resident in the state of Louisiana, on the line of race, is a thing wholly impossible to be made, equitably and justly by any tribunal, much less by the conductor of a train without evidence, investigation or responsibility.[305]

Finally, Walker and Tourgée came to the *Comité*'s core point. It was not that the train conductor could not distinguish "on the line of race." Such distinction was "a thing wholly impossible to be made, equitably and justly by any tribunal."[306] Again, appealing to admission of reality, Plessy's attorneys wrote,

> The Court will take notice of the fact that, in all parts of the country, race-intermixture has proceeded to such an extent that there are great numbers of citizens in whom the preponderance of the blood of one race or another, is impossible of ascertainment, except by careful scrutiny of the pedigree.[307]

"Careful scrutiny of the pedigree" of persons was not where the *Comité* or Walker and Tourgée wanted to rest their argument, however. They wanted to push further into appearance and individuality. For, the Plessy brief

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300 *Id.*
301 *Id.*
302 U.S. CONST. amend. XIV, § 1.
303 1890 La. Acts 152.
304 U.S. CONST. amend. XIV, § 1.
305 LANDMARK BRIEFS, *supra* note 32, at 37.
306 *Id.*
307 *Id.*

continued, "even if it were possible to determine preponderance of blood and so determine racial character in certain cases, what should be said of those cases in which the race admixture is equal. Are they white or colored?"[308]

Here in full was the *Comité*'s identity issue represented in the person of Homer Adolph Plessy. On instruction, he declined to identify himself by race in Louisiana's trial court. In his petition for re-hearing he described himself as "of mixed Caucasian and African blood, in the proportion of one-eighth African and seven-eights Caucasian."[309] His brief by Walker and Tourgée to the Supreme Court added, "the African admixture not being perceptible."[310] So, what was Plessy—and by extension his confreres in the *Comité*? To repeat the question from the brief: "Are they white or colored?"[311] Moreover, who was to decide?

Spotlighting Plessy to leave no shadow on their point, Walker and Tourgée, asked what their client's crime was. "The crime . . . for which he became liable to imprisonment so far as the court can ascertain," they argued, "was that a person of seven-eighths Caucasian blood insisted in sitting peacefully and quietly in a car the state of Louisiana had commanded the company set aside exclusively for the white race."[312] Focusing attention fully then on the identity issue, they continued, "Where on earth should he have gone? Will the court hold that a single drop of African blood is sufficient to color a whole ocean of Caucasian whiteness?"[313]

"There is no law of the United States, or of the State of Louisiana defining the limits of race—who are white and who are 'colored'? By what rule then shall any tribunal be guided in determining racial character,"[314] Walker and Tourgée asked in their rhetorical style. "It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice?"[315] they asked.

Hypodescent extended the law of slavery, Walker and Tourgée argued. They again asked rhetorically, "Why not count every one as white in whom is visible any trace of white blood?"[316] "There is but one reason to wit, the domination of the white race,"[317] they explained. "Slavery not only introduced the rule of caste but prescribed its conditions, in the interests of

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308 *Id.*
309 *Id.*
310 *Id.*
311 *Id.* at 37.
312 *Id.* at 57–58.
313 *Id.* at 58.
314 *Id.* at 37.
315 *Id.*
316 *Id.*
317 *Id.*

that institution. The trace of color raised the presumption of bondage,"[318] they noted. "The law in question is an attempt to apply this rule to the establishment of legalized caste-distinction *among citizens*,"[319] they insisted. As such, it was both "a badge of servitude"[320]—an "essential concomitant of slavery,"[321] that the Thirteenth Amendment[322] outlawed—and a violation of the Fourteenth Amendment command that

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[323]

Walker and Tourgée made plain that their argument's focus fell against the state's authority to impose racial identity. They opposed the state assigning, categorizing, classifying, or grouping persons on the basis of race, which they insisted was indistinct. "The gist of our case is the unconstitutionality of the assortment; *not* the question of equal accommodation," they declared.[324] To be sure, they offered what they conceded were tried-and-failed equal accommodation arguments,[325] but they turned those with their new twist of identity that animated the *Comité* and the Creoles of color, whom they represented. "The question is not as to the *equality* of the privileges enjoyed," Walker and Tourgée emphasized for their client, "but *the right of the State to label one citizen as white and another as colored*."[326]

Who was to say what Plessy's race was, so determining his identity and deciding on that basis what rights and privileges he was to have? Attacking the criminal penalty Louisiana's Separate Car Act of 1890[327] imposed, Walker and Tourgée argued further that "[t]he crime assigned depends not on the quality of the act, but on *the color of the skin*."[328] The criminal liability arose from nothing touching or concerning "equal but

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318 *Id.*

319 *Id.*

320 *Id.* at 30.

321 *Id.* at 37.

322 U.S. CONST. amend. XIII, § 1.

323 *Id.*

324 LANDMARK BRIEFS, *supra* note 32, at 56.

325 *Id.* See the assignment of errors, *id.* at 30–31. See also the focus on the equality of accommodations argument in the Phillips brief, *id.* at 3–26.

326 *Id.*

327 1890 La. Acts 152.

328 LANDMARK BRIEFS, *supra* note 32, at 57.

separate,"[329] the attorney argued, quoting the statute.[330] "The question of equality of accommodation cannot arise on the trial of a presentment under this statute,"[331] they explained. "Equal or not equal,"[332] that was not the question. The information charging Plessy "asserted that he did not belong to the *same race as the coach*"[333] in which he chose to ride, the attorneys noted. "It does not appear to what race he belonged,"[334] they emphasized.

There, the argument came full circle. The crime for which Plessy stood charged turned on his identity. More precisely, it turned on determination of his identity. Walker and Tourgée suggested, but never directly stated, the proposition that Plessy or any other citizen or person had a constitutional right to self-identification. Their argument only denied "*the right of the State to label one citizen as white and another as colored.*"[335] Race was indeterminate and indistinct—at least in Louisiana, they insisted. "There is no law of the United States, or of the State of Louisiana defining the limits of race—who are white and who are 'colored,'"[336] Plessy's counsel impressed on the Court.

The conclusion Plessy's counsel sought was that the Separate Car Act of 1890,[337] "Act 111 of the Legislature of 1890, of the State of Louisiana is null and void,"[338] and was "a violation of the fundamental principles of all free government,"[339] more particularly of the Thirteenth and Fourteenth Amendments.

VII. CONCLUSION: THE STATE AND RACIAL IDENTITY IN PLESSY

Walker and Tourgée's arguments elaborated two distinct theories against Louisiana's "statutory assortment of the people of a state on the line of race."[340] Both theories turned on state action—"statutory assortment"[341]—on the basis of racial identity. "The gist of our case is the unconstitutionality of the assortment," they argued.[342] Their two theories were discrimination and indeterminacy.

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329 1890 La. Acts 152.

330 *See* LANDMARK BRIEFS, *supra* note 32, at 57 (stating that "the criminal liability of the individual is not affected by the inequality of accommodations").

331 *Id.*

332 *Id.*

333 *Id.* (emphasis in original).

334 *Id.*

335 *Id.* at 56.

336 *Id.* at 38.

337 1890 La. Acts 152.

338 LANDMARK BRIEFS, *supra* note 32, at 58.

339 *Id.* at 63.

340 *Id.* at 33.

341 *Id.*

342 *Id.* at 56.

The first challenged that "assortment of the citizens on the line of race was a discrimination intended to humiliate and degrade the former subject and dependent class—an attempt to perpetuate the caste distinctions on which slavery rested."[343] The Thirteenth and Fourteenth Amendment made such discrimination unconstitutional, Walker and Tourgée argued. In deciding *Plessy v. Ferguson*,[344] the U.S. Supreme Court voted seven to one to reject the discrimination theories, which in time became the headline of the case and what it stood for in constitutional law.[345]

The second theory posited that race was in fact indeterminate as a matter of science and law. "Is not the question of race, scientifically considered, very often impossible of determination?"[346] Walker and Tourgée asked in their rhetorical style. "Is not the question of race, legally considered, one impossible to be determined, in the absence of statutory definition?"[347] they added. The necessary element of indeterminacy in racial identity failed to make headway, however, with the Court in 1896 and in the line of cases that followed.[348]

Indeed, the indeterminacy theory along with the identity basis of the discrimination theory virtually vanished beneath discussion of the *Plessy* case as a failed sortie against segregation. Focus on the legal construction of racial separation eclipsed attention on the legal construction of race. Yet the legal construction of race stood as the core of plaintiff in error Plessy's arguments.

The *Comité des Citoyens* worked with Walker and Tourgée for more than three years in developing the *Plessy* case to challenge the legal construction race as a category of fact. They opposed a law of dichotomous division that delineated unmistakable types on supposed racial bases. Rather, they argued for a view of humanity as a "mixed community,"[349] as an open continuum, not two clumps of closed categories. They offered the person of Plessy (as they had first offered Daniel F. Desdunes)[350] as physical, tangible evidence for inspection on the issue of whether race was a clear matter of fact in a set of fixed, mutually exclusive categories. In their view Plessy embodied the reality of "admixture not being perceptible."[351]

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343 *Id.* at 63.

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

345 *See* LOFGREN, *supra* note 4, at 3–6, 196–208 (introducing the themes of *Plessy* and discussing its import for the future).

346 LANDMARK BRIEFS, *supra* note 32, at 33.

347 *Id.*

348 *See* LOFGREN, *supra* note 4, at 3–6, 196–208 (discussing the influence of the *Plessy* decision).

349 LANDMARK BRIEFS, *supra* note 32, at 35.

350 *See* LOFGREN, *supra* note 4, at 33.

351 LANDMARK BRIEFS, *supra* note 32, at 30.

The racial identity arguments in the *Plessy* case were perhaps difficult for most minds at the time to grasp. They challenged popular attitudes and dominant understandings of the day (and later).[352] And perhaps the arguments were not advocated directly enough. Walker and Tourgée approached their central argument mostly by tangents. They offered scant, if any, constitutional basis to support their theory that racial identity was indeterminate. Their discrimination argument reached clearly back to the Thirteenth and Fourteenth Amendments. But to where did their indeterminacy argument reach? They argued essentially for a rule of reason. Their rhetorical questions on race and color all tended to the same point: look at the reality of appearance. They spotlighted Creoles of color, persons of "mixed community."[353] Plessy was their prime example. He stood as a citizen "of mixed Caucasian and African blood, in the proportion of one-eighth African and seven-eighths Caucasian, the African admixture not being perceptible."[354] What was the identity of persons such as Plessy? Walker and Tourgée asked in their rhetorical style, "Are they white or colored?"[355] At most, their argument supplied ambivalent answers.

Walker and Tourgée's indeterminacy theory—and perhaps the thinking of their real clients in interest, the *Comité* and the Creoles of color they represented—was itself uncertain. It rejected the racial dichotomy of black and white. It focused, however, on the opposition (or non-opposition) of the binary subclasses. At least tacitly it accepted the reality of the black and white subclasses. It posited that the black and white subclasses were not always exclusive and that they were not all-inclusive. The Walker-Tourgée theory insisted that black and white were not the only subclasses and that there was at least another category or a range of categories mixing black and white, even unto a degree that made "the African admixture not . . . perceptible."[356]

Such a theory lay exposed to risk along multiple lines of alternative explanation. It argued a point of law and a matter of fact. It insisted that the binary black/white system Louisiana imposed in its 1890 Separate Car Act[357] could not as a matter of law reasonably apply to racially mixed persons such a Plessy who appeared white. Why? Because the act made no category for persons such as Plessy, Walker and Tourgée suggested. But such an

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[352] *See, e.g.*, Frederick Ludwig Hoffman, *Race Traits and Tendencies of the American Negro, in* 11 PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 1 (Macmillan 1896) (discussing attitudes and understandings of racial identity of the day). *See also* Hoffman, *supra* note 184.

[353] LANDMARK BRIEFS, *supra* note 32, at 35.

[354] *Id.* at 30.

[355] *Id.* at 37.

[356] *Id.* at 30.

[357] 1890 La. Acts 152.

approach abandoned whether Plessy was within a statutory category to become a question of fact—at least as the law recognized it.

Two immediately apparent replies were available to rebut Walker and Tourgée's argument. One reply allowed Plessy to win the battle in court but lose the war at home, as it allowed the Louisiana legislature to redeem the statute by amending it or by otherwise explicitly providing for persons of "mixed community"[358] within the separation scheme—assuming such persons were found not to be within an existing statutory category. Perhaps most easy was the reply that Louisiana's "statutory assortment of the people of a state on the line of race"[359] was not unreasonable as a matter of law.

U.S. Supreme Court Justice Henry Billings Brown seized the easy reply and with it easily passed over Walker and Tourgée's underlying arguments about racial identity. Writing the majority opinion, Justice Brown found that the Louisiana Separate Car Act was a "reasonable regulation" within the state legislature's discretion. "In determining the question of reasonableness," Justice Brown declared, the state was "at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." He cast the Act then as clearly within the state's police power, as the Louisiana high court had ruled.[360]

Justice Brown paused over the identity arguments only long enough to establish the legal authority of an option Walker and Tourgée posed. He accepted that Plessy's race could be in dispute but not that Plessy's race could be indeterminable by law. He found "a legal distinction between the white and colored races"[361] wholly reasonable, as reflecting the reality of "a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color."[362] If Plessy had been misidentified by race or color, he could sue in state court in Justice Brown's opinion, for it was for the appropriate state court to decide the question whether Plessy "is not lawfully entitled to the reputation of being a white man."[363] Thus, Justice Brown replied directly to Walker and Tourgée's argument that *Plessy* represented "the case of a man who believed he had a right to the privilege and advantage of being esteemed a white man, asserting that right against the action . . . intent on putting upon him the indignity of belonging to the colored race."[364]

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358 LANDMARK BRIEFS, *supra* note 32, at 35.
359 *Id.* at 33.
360 Plessy v. Ferguson, 163 U.S. 537, 543 (1896).
361 *Id.*
362 *Id.*
363 *Id.* at 549.
364 LANDMARK BRIEFS, *supra* note 32, at 50–51.

In Justice Brown's view, the state had the capacity to decide racial identity. Indeed, he noted that different states chose different measures. And apparently he saw nothing denying the state such capacity either to decide racial identity or to adopt different measures to assign racial identity. In arguing to deny state capacity, Walker and Tourgée had supplied nothing in regard to source of authority or in regard to process. They had argued about outcome, about the disparate impact of "statutory assortment"[365] schemes.

Justice Brown brushed aside the discrimination arguments. His opinion for the Court declared that "we are unable to see how this statute deprives [Plessy] of, or in any way affects his right."[366] Justice Brown and his brothers in the majority saw no "annoyance or oppression"[367] of persons of African descent in Louisiana's Separate Car Act.[368] Justice Brown wrote that "the underlying fallacy of [Plessy's] argument . . . [was] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so," the Justice declared, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[369]

Justice John Marshall Harlan vigorously dissented from the majority's reasoning and result in *Plessy*.[370] Rejecting the Court's "conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race,"[371] he embraced Walker and Tourgée's discrimination arguments. Yet Justice Harlan no less declined the racial indeterminacy arguments. He, like the majority, accepted racial definition and the reality of a black race and a white race. He accepted more also but not along the line that Plessy's counsel offered. Articulating the falsity of the majority's "two races"[372] view, Harlan exposed his own ugly racism in writing of another race—the Chinese—as "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."[373]

Yet closer scrutiny showed the majority itself appearing to recognize more than white and colored. In brushing aside Plessy's Thirteenth Amendment argument, the Court referred to the Constitution outlawing "the

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365 *Id.* at 33.

366 Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

367 *Id.* at 550.

368 1890 La. Acts 152.

369 *Plessy*, 163 U.S. at 551.

370 *Id.* at 552–64 (Harlan, J., dissenting).

371 *Id.* at 559 (Harlan, J., dissenting).

372 *Id.* at 548.

373 *Id.* at 561 (Harlan, J., dissenting). *See* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. R. 151 (1996) (discussing Justice Harlan's views on the Chinese and U.S. law). *See also* TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN (1995).

Chinese coolie trade"[374] and "Mexican peonage."[375] It further used the Chinese for a contrasting point to Justice Harlan's view. Noting that the Chinese had been objects of discrimination and other ill-treatment, the Court used them to illustrate the protections of U.S. law.[376] The Court trumpeted its holding in *Yick Wo v. Hopkins*,[377] in which it struck down a San Francisco municipal ordinance purporting to regulate laundries.[378] The ordinance proved to be unconstitutional, in the Court's words, because "[i]t was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race."[379] In contrast to Justice Harlan's use of the Chinese to illustrate unreasonable elements of law, the majority used the Chinese to illustrate reasonableness. Explaining *Yick Wo* further, the Court emphasized its view "that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."[380]

Neither the *Plessy* majority nor the dissent appeared to grasp any idea of questioning not merely whether government had authority to recognize race as a legal category for a specified purpose but whether government could in fact recognize race. Racial indeterminacy appeared beyond the reach of reason in that day. What it was that government recognized as race when using it as a legal category did not appear as an issue among the Court's brethren. Both Justice Brown for the majority and Justice Harlan in dissent appeared to accept race as a clear category, as a set of "distinctions based upon physical differences."[381] Whether two, three, four or more existed, race existed in fact in the common view of Justice Brown, Justice Harlan, and their fellow Justices of the U.S. Supreme Court. They accepted race as a determinable, conclusive biological classification that stood as an un-crossable divide.[382] And in doing so they left tragically to later generations of Americans the problem of sorting out the source of identity in law.

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374 Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

375 *Id.*

376 *Id.*

377 Yick Wo v. Hopkins, 118 U.S. 356 (1886).

378 *Id.* at 374.

379 *Plessy*, 163 U.S. at 550.

380 *Id.* (noting that while *Yick Wo* treated a municipal ordinance, the rule against "arbitrary and unjust discrimination" applied also to acts of a state legislature exercising the police power).

381 *Id.* at 551.

382 *Id. See* HALE, *supra* note 181 (discussing the social construction of U.S. segregation); IAN F. HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (discussing the construction of race); DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991) (same).