HOMER PLESSY'S FORGOTTEN PLEA FOR INCLUSION: SEEING COLOR, ERASING COLOR-LINES

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I. INTRODUCTION

Plessy v. Ferguson[1] has become a landmark, a negative precedent in the history of Equal Protection doctrine, defined and reversed by *Brown v. Board of Education*.[2] Despite the attention given to the Supreme Court's opinions in that case, Homer Plessy's claim and his plea are largely forgotten, however, which is unfortunate, because he speaks to our time with surprising urgency. In the 1890s, when his suit was in preparation, the backlash against Reconstruction was 30 years old, and on the crest of success. Today, we are 30 years into the backlash against the civil rights jurisprudence of the Warren Court, against what historians call the "Second Reconstruction."[3] The insurgency of Homer Plessy's day created the Jim Crow regime, drawing a color-line around the formerly enslaved. Today, the New Jim Crow[4] is

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1 163 U.S. 537 (1896).

2 347 U.S. 483 (1954).

3 *See, e.g.*, Richard Thompson Ford, *Rethinking Rights After the Second Reconstruction*, 123 YALE L.J. 2942 (2014).

4 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163 (2010).

accomplished through mass incarceration and mass deportation; the color-line is a wall, and the imprisoned are invisible. We say "Black lives matter" and "Brown lives matter" to bring that reality into view.

The question that Plessy's lawyers tried to bring before the Court, a question for today, as well as past centuries, can be more easily stated in modern language. Homer Plessy was a man of mixed race,[5] living in a diverse community among people whose identities encompassed a range of colors and nationalities. In an age of racial diversity, he argued not for equality merely, but for inclusion. "Diversity and inclusion" is a motto for today,[6] but changes in thought and language make it difficult for us to see that it could have been the motto of Homer Plessy's movement as well. He insisted on an inclusive citizenship for persons of all races: a society that was not blind to color, but that rejected legally imposed color-lines of exclusion. Considering the need once again to fight for both diversity and inclusion, it is worth recalling both Homer Plessy's argument and the language in which it was framed. Plessy's famous suit, as we know, challenged the segregation of public accommodations. A Louisiana state law authorized railroad conductors to assign their passengers to one of two cars, white or "colored," according to their own judgment as to the race of the passenger.[7] The State claimed that this was a reasonable police measure to separate the supposed races, so long as the accommodations for the two races were equal.[8] Homer Plessy's argument was that there were not two races in New Orleans but many—indeed a spectrum of individual, racial variations—and that the law conferred on railroad conductors the discretion to create a single class of "colored" people by drawing an arbitrary line to imprison them. In modern language we would say that the state law delegated legislative authority to private persons to create a legally imposed color-line, that the conductor's decisions were necessarily arbitrary, and that the classification scheme the conductor was authorized to impose was based on animus and lacked any rational basis. None of those arguments were yet available, however, and Homer Plessy was reduced to arguing—forcefully and correctly, but without success—that he was deprived of the fundamental privilege of citizenship, the right to belong. This is a right again claimed by all those who labor under the burden of past and present discrimination, the right of inclusion.

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5 *Plessy*, 163 U.S. at 541–42.

6 Paulette Brown, then President-elect of the Am. Bar Assoc., Keynote Address at the Mid-Atlantic People of Color (MAPOC) Legal Scholarship Conference at West Virginia University College of Law: Diversity and Inclusion (Jan. 30, 2015).

7 *See* Act of July 10, 1890, 1890 La. Acts 152 (quoted in part in *Ex parte* Plessy, 11 So. 948, 948–49 (La. 1892), *aff'd sub nom*. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

8 The Louisiana Supreme Court had agreed with the State and held that the law was constitutional. *See Ex parte* Plessy, 11 So. at 951.

Homer Plessy fought the imposition by law of a color-line that would exclude him from the civil society of which he was a citizen and full member. Today, the color-line is no longer imposed by law, but it is a daily reality for persons of color. The Homer Plessy of today therefore must ask for "affirmative action"—for inclusion as a person of color in schools, for instance, that were segregated for so long—for "reparations," if you like, for the persistence of the color-lines that were drawn long ago.

Part II of this Article provides a brief tour of Reconstruction New Orleans, the white insurgency that recaptured state and local government, and the "citizens" movement that fought the new Jim Crow laws.

In Part III, this Article unpacks and explains for the first time in the modern legal literature the litigation strategy that framed the question in Homer Plessy's case, whether the Fourteenth Amendment's guarantee of *state citizenship* forbade the exclusion of an individual from a public accommodation on account of legally imposed "color." Louisiana courts accepted the case as Plessy's lawyers and an accommodating railroad company contrived it, and so laid the premise for an appeal to the Supreme Court of the United States.

In Part IV, this Article explores the then-novel argument made to the Supreme Court of the United States that an arbitrary color-line imposed by law deprived Homer Plessy of his rights without Due Process of Law. This Article points out that in today's language, we would say that the color-line was based on animus. Homer Plessy's lawyers offered the aphorism, that as justice was said to be blind, the Constitution ought to be "color-blind." This argument was offered in the vain hope of persuading the Justices to accept Homer Plessy's race as an individual characteristic that he was free to define, and not impose upon him an arbitrary category of color.

In Part V, this Article focuses on the failure of all the Justices to grasp the argument; even famously dissenting John Marshall Harlan treated Plessy as a colored man trying to cross a color-line, and ignored the plea that no state had the authority under the Constitution to draw such a line.

Part VI recounts the aftermath of the case, and the revival of Homer Plessy's argument in opinions of the Supreme Court invalidating exclusions from the public sphere based on sexual orientation. The Court fails to see that the same argument has force with regard to race-conscious admissions policies in higher education, where race consciousness is needed to erase the arbitrary color-lines imposed so long ago. Homer Plessy asks us to understand race as an individual characteristic, a spectrum in which there is no basis except animus for a color-line, and consequently no reason to treat unequally situated classes of people as if they were equal and rivals.

II. BACKGROUND OF *PLESSY V. FERGUSON*

Plessy and his attorneys are the subjects of an extensive literature, which we need not recapitulate here. The suit itself and the numerous

commentaries upon it are described in several articles and book-length studies.[9] A summary of the surrounding circumstances will be sufficient for our purposes. The suit was brought by a citizens' group in New Orleans who objected to Louisiana's Separate Car Law, which required separate accommodations for "white" and "colored" passengers.[10] Homer Plessy's lawyers constructed an elaborate litigation strategy in order to put their novel arguments before the Supreme Court: they contrived to have him charged with a crime, and then to have the statute under which he was charged reviewed by the Supreme Courts of Louisiana and the United States on stipulated facts. The stipulated facts that they contrived allowed them to pose questions of Homer Plessy's race and citizenship, questions which the Louisiana court understood well enough but the Justices of the Supreme Court of the United States, whose opinions we study, failed to understand or address.

Here at the outset, before unpacking that litigation strategy, we must attend to a change of language over the past century. A "person of color" was not any non-white person. A "person of color" in today's language was an African-American; "color" was a polite euphemism, remembered now mainly in the names of a few organizations with long histories, such as the National Association for the Advancement of Colored People, and the National Association of Colored Women's Clubs.[11] The Louisiana statute was not a general enactment concerning race, but a form of discrimination aimed at African-Americans, those formerly enslaved or subject to enslavement. Those

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[9] *See, e.g.*, HARVEY FIRESIDE, SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM (2004); WILLIAMJAMES HULL HOFFER, *PLESSY V. FERGUSON*: RACE AND INEQUALITY IN JIM CROW AMERICA (2012); CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987); KEITH WELDON MEDLEY, WE AS FREEMEN: *PLESSY V. FERGUSON* (2012); OTTO H. OLSEN, THE THIN DISGUISE: TURNING POINT IN NEGRO HISTORY—*PLESSY V. FERGUSON*—A DOCUMENTARY PRESENTATION (1864–1896) (1967); Cheryl I. Harris, *The Story of* Plessy v. Ferguson*: The Death and Resurrection of Racial Formalism*, *in* CONSTITUTIONAL LAW STORIES 187 (Michael C. Dorf ed., 2d ed. 2009); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303 (1999).

[10] Act of July 10, 1890, 1890 La. Acts 152; *Ex parte* Plessy, 11 So. 948 (La. 1892), *aff'd sub nom*. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[11] In polyglot, multi-racial New Orleans, "*gens de couleur libre*," free persons of color, were distinguished from "*negros*," blacks presumed to have been slaves or the children of slaves. KENNETH R. ASLAKSON, MAKING RACE IN THE COURTROOM: THE LEGAL CONSTRUCTION OF THREE RACES IN EARLY NEW ORLEANS 2 (2014). Homer Plessy lived as a person of color in the Tremé, then as now a multi-racial community. *See* MEDLEY, *supra* note 9, at 21–22. One of the many ironies of this case is that an earlier civil rights movement gained legal recognition for free persons of color like Plessy, to distinguish them from enslaved blacks. *See generally* ASLAKSON, *supra.* Both classes of persons descended from African ancestors were subsumed in the "colored" category for purposes of the Separate Car Law. *Id.* at 186–90. The term "Afro-American" had been proposed for the national civil rights organization that challenged the law, but the New Orleans committee preferred the term "colored." Letter from Louis A. Martinet to Albion W. Tourgée (Oct. 5, 1891), *reprinted in* OLSEN, *supra* note 9, at 55, 57.

who objected to the statute pointed out that it did not apply to immigrants. In the Louisiana House of Representatives, Representative C.F. Brown said, "[W]e are asking for equal rights before the laws of the land which every other nationality enjoys . . . ."[12]

The leading figure in the campaign against the Separate Car Law was an attorney, Louis A. Martinet, editor of the New Orleans *Daily Crusader*.[13] Martinet had served in the Reconstruction legislature[14] and had joined in founding the American Citizens' Equal Rights Association, a national organization that included attorney and author Albion W. Tourgée, among other prominent figures.[15] Tourgée was a veteran of the Union Army who had served as a judge in North Carolina's Reconstruction government, but had been forced to flee when Reconstruction collapsed.[16]

The group's name—Citizens' Equal Rights—encapsulated their view of Reconstruction. They believed the Reconstruction Amendments expressed an ideal of universal citizenship which was to be the basis of equality of all before the law. A New Orleans chapter was quickly formed and filed a memorial (probably drafted by Tourgée) in the Louisiana legislature opposing the Separate Car Act.[17] The local citizens' committee announced their opposition to any law requiring segregation of the colored race: "Citizenship is national and has no color."[18] When Albion Tourgée described the new organization in his newspaper column, he said its purpose was to determine "whether justice is still color-blind or National citizenship worth a rag for the defense of right."[19]

When we review the arguments made on behalf of African-Americans, we should recall that their civil rights movement began with a struggle for citizenship. Chief Justice Taney's abusive opinion in *Dred Scott v. Sandford*[20]

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[12] C.F. Brown, Representative, Address to Louisiana House of Representatives (June 4, 1890), *reprinted in* OLSEN, *supra* note 9, at 50–51.

[13] MEDLEY, *supra* note 9, at 103–10.

[14] ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 142 (1993).

[15] LOFGREN, *supra* note 9, at 28–32.

[16] For his biography, see OTTO H. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE (1965); see also Michael Kent Curtis, *Albion Tourgée: Remembering Plessy's Lawyer on the 100th Anniversary of* Plessy v. Ferguson, 13 CONST. COMMENT. 187 (1996).

[17] MEDLEY, *supra* note 9, at 14.

[18] Memorial, Official Journal of the House of Representatives of Louisiana (1890), *reprinted in* OLSEN, *supra* note 9, at 47–50.

[19] *"A Bystander's Notes,"* CHI. DAILY INTER-OCEAN, Oct. 17, 1891, *reprinted in* MARK ELLIOTT, JUSTICE DEFERRED: ALBION TOURGÉE AND THE FIGHT FOR CIVIL RIGHTS 12 (2008), http://web.uncg.edu/hrs/documents/JusticeDeferred.pdf.

[20] 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

was among the precipitating events of the Civil War. Taney, relying on the text and meaning of the original Constitution, had denied that African-Americans were or could be citizens of the United States, however they were treated in the laws of the several states.[21] "White" and "citizen of the United States" indeed had been roughly synonymous terms before the Civil War; Dred Scott's suit had challenged that practical reality, and Chief Justice Taney had anchored it in the text of the Constitution. In the language of the Constitution of 1787, "[T]he terms 'citizen' and even 'the people' of the United States . . . referred to members of the *polis* or political community, those who could vote and hold office, all of whom were adult white men."[22]

As Professor James W. Fox has pointed out, the Reconstruction Amendments were meant, among other things, to heal this flaw in the original Constitution and to extend full national citizenship to the former slaves. This meant granting to blacks inclusion in civil society and the rights of white citizens.[23] The Civil Rights Act of 1866 made this explicit:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is *enjoyed by white citizens* . . . .[24]

This central purpose was then repeated in the opening sentences of the Fourteenth Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."[25]

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[21] *Id.* at 407.

[22] Pauline Maier, *Nationhood and Citizenship: What Difference Did the American Revolution Make?*, *in* DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD 45, 55 (Gary Jeffrey Jacobson & Susan Dunn eds., 1996) (emphasis added). *But see* Randall Kennedy, *Dred Scott and African American Citizenship*, *in* DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD, *supra*, at 101, 101–02 (pre-Civil War Constitution's applications to birth-right citizenship was complex and based on state and territorial rules, but naturalization was limited to whites). As a broad generalization Maier's summary is correct, if in need of qualifications.

[23] James Fox, *Fourteenth Amendment Citizenship and the Reconstruction-Era Black Public Sphere*, 42 AKRON L. REV. 1245, 1246 (2009). The *Plessy* case is a good example of the manner in which, as Fox explains, the black civil rights movement sought to make citizenship mean full membership in civil society. *See id*. at 1248.

[24] Now codified at 42 U.S.C. § 1981(a) (2014) (emphasis added).

[25] U.S. CONST. amend. XIV, § 1; Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 246–50 (2011)

The phrase "privileges or immunities of citizens" echoes Article IV of the original Constitution, which assures equality before the law for "Citizens in the several States." Scholars generally agree that the civil rights movement closely associated the status of "citizenship" with the entitlement to legal equality.[26] This indeed was the basis of the argument for legal equality made on behalf of the formerly enslaved. Homer Plessy's suit was an extension of this movement. The Jim Crow laws were designed to meet the demand for formal, legal equality while authorizing and compelling private actors to discriminate. Plessy sought not merely equal treatment, but inclusion in civil society, inclusion in the community of citizens of the several states.

The national Citizens' Equal Rights Association allied itself with a local "citizens" committee in New Orleans, *le Comité des Citoyens* (the Citizens' Committee), formed to challenge the constitutionality of the Separate Car Law.[27] The difficulty that the citizens' committee faced, however, was the counter-argument being made by insurgent whites, that separation of the races did not violate the principle of equality. The new suit would try to establish the principle that citizenship meant not only equality, but inclusion.

The New Orleans Citizens' Committee invited Albion Tourgée to be their counsel, and he agreed, waiving the fee that was offered. Martinet then retained local counsel, James C. Walker, to appear in court in New Orleans. Walker was the preeminent criminal defense lawyer in New Orleans. Tourgée and Martinet devised the overall strategy for the suit, and Walker controlled tactics and procedure in Louisiana courts. When they reached the Supreme Court of the United States, Tourgée took the lead and recruited a friend, Samuel F. Phillips, former Solicitor General of the United States, to share the briefing and oral argument.[28]

They were dealing with the continuing insurgency against Reconstruction. Senator Charles Sumner, chairman of the Senate Foreign Relations Committee and leader of the radical Republicans in the Senate, had expressed the central purpose of the Reconstruction Amendments: a new social compact enshrined in constitutional law, the unitary nationality of the United States, a modern nation founded on citizenship rather than ancestry.[29] His

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(presenting how Representative Bingham and other Abolitionists' arguments show original, anti-slavery meaning of citizenship and due process clauses).

[26] *See, e.g.*, Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493 (2013) and sources cited therein.

[27] MEDLEY, *supra* note 9, at 14.

[28] LOFGREN, *supra* note 9, at 30, 148; MEDLEY, *supra* note 9, at 136–37; C. Vann Woodward, *The Case of the Louisiana Traveler*, U. OF MINN. http://www.soc.umn.edu/~samaha/cases/van%20woodward,%20plessy.htm (last visited Mar. 31, 2016).

[29] CHARLES SUMNER, *Are We a Nation?*, *in* 16 CHARLES SUMNER: HIS COMPLETE WORKS 3 (George Frisbie Hoar ed., 1900); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 374–85 (2005).

stump speech on behalf of the Fourteenth Amendment was published and widely disseminated under the title, "Are We a Nation?"[30]

Sweeping federal civil rights legislation had been adopted to ensure implementation of the Reconstruction Amendments, measures that were to be enforced by federal troops if necessary. This effort at nation-building, however, was opposed by a violent insurgency. As late as 1875, President Grant was obliged to send General Sheridan to Louisiana to restore order. Sheridan reported that more than 2,000 blacks had been murdered by insurgents, crimes that had gone unpunished.[31] Lynching for the most part was carried out by the "invisible empire," the Ku Klux Klan. The "Colfax Massacre," the last battle of the Civil War, as it has been called, was fought in Mississippi in that same year.[32] Congress had wearied of the effort of nation-building, and the continuing warfare it required. In 1877, the last federal troops were withdrawn from the South.

The Supreme Court reflected the general weariness, after 15 years of rebellion and counter-insurgency. In the *Slaughter-House Cases*,[33] in what might have been an effort by the Court to reach a grand bargain, a Reconstruction measure was approved at the cost of emptying the content from a central provision of the Fourteenth Amendment. The Court declined to accept the argument that the central purpose of the Fourteenth Amendment was to confer on the former slaves the rights of citizens, all the "privileges and immunities" afforded to citizens of the several states.[34] National citizenship was said to be what it had always been, a status that carried few significant privileges or immunities.[35]

In *United States v. Cruikshank*,[36] another case from Louisiana, the Court struck down the Ku Klux Klan Act,[37] holding that the federal government had no authority to punish ordinary crimes. Then, in *The Civil Rights Cases*,[38] the Supreme Court struck down as unconstitutional those portions of the Civil Rights Act of 1875 that forbade race discrimination in inns, public

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30 SUMNER, *supra* note 29, at 3.

31 NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 11 (2006).

32 *Id.* at 15–20. The network of Klan organizations, led by officers and soldiers of the Confederate army, is described in WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA (1987).

33 83 U.S. 36 (1872).

34 U.S. CONST. art. IV, § 2.

35 *Slaughter-House Cases*, 83 U.S. at 78–81.

36 92 U.S. 542 (1875).

37 Section six of the Enforcement Act of May 30, 1870, provided that it was a felony for two or more individuals to gather or go "in disguise upon the public highway, or upon the premises of another, with intent to . . . injure, oppress, threaten, or intimidate any citizen with intent to prevent . . . his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution . . . ." 16 Stat. 140 (1870); *Cruikshank*, 92 U.S. at 547.

38 109 U.S. 3, 25–26 (1883).

conveyances, and other places of public accommodation. The federal government, as the Court repeatedly held, had no authority to punish the private acts of violence and discrimination that were principal tools of the insurgency. The states were solely responsible for guaranteeing the rights of their citizens, in places of public accommodation, except for those few and inconsequential rights of national citizenship—such as the right to petition Congress—that were to be protected by the national government.[39]

Capitalizing on these victories, the insurgents—now entrenched in minority white governments throughout the South—adopted legislation that authorized and even required private discrimination against blacks in public accommodations, indeed in every sphere of life. Among these measures were statutes requiring separate accommodations for colored passengers in railroad cars. The railroad-car bills were only one element in a system of Jim Crow laws that were used to recreate the subordinate caste in which African-Americans had once been enslaved: insurgent, white governments were defining and mobilizing racial prejudice and authorizing private actors to carry out the violent repression of African-Americans. We have no adequate legal language for this reign of terror, which somewhat resembles the anti-Jewish pogroms that were just then being carried out in Russian Poland.[40] This was the situation in which the Citizens' Committee in New Orleans planned to challenge Louisiana's Separate Car Law.

III. LITIGATION IN LOUISIANA

The *Plessy* suit addressed the separation of races required by the Separate Car Law,[41] in the hope of attacking the premise of racial segregation itself. This meant addressing the wickedly ingenious method of authorizing private acts of discrimination, which the Supreme Court previously held could not be addressed as such by federal law.[42] Perhaps the Court could be persuaded that the legal schemes which authorized private acts of racial discrimination and violence were unconstitutional, even if the private acts themselves could not be reached by federal law.

The Separate Car Law required railroads operating wholly within Louisiana to provide "equal but separate accommodations for the white, and colored races[.]"[43] Railroads were to provide separate cars, or place a partition

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39 *Cruikshank*, 92 U.S. at 552–53. The white murderers in this case might have been subject to federal prosecution if their colored victims had gathered for the purpose of petitioning Congress.

40 The pogroms were waves of racial violence authorized by the government but not carried out by government agents. *See* POGROMS: ANTI-JEWISH VIOLENCE IN MODERN RUSSIAN HISTORY (John D. Klier & Shlomo Lambroza eds., Cambridge Univ. Press ed. 2004).

41 1890 La. Acts 152 (quoted in Plessy v. Ferguson, 163 U.S. 537, 540–41 (1896)).

42 *The Civil Rights Case*s, 109 U.S. at 25–26.

43 *See Plessy*, 163 U.S. at 540 (quoting Act of July 10, 1890, 1890 La. Acts 152).

in a single car. Conductors were required to assign passengers to the proper accommodation, and failure of a passenger to follow the direction of the conductor was a misdemeanor: "[A]ny passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison . . . ."[44]

This was the heart of the Separate Car Law: railroad employees, clothed with the authority of the state, would segregate the railroad's colored passengers. All would have to fit into one of only two categories, "white" or "colored"—which was to say, "colored" and everyone else. The population would be divided between those who had been eligible for enslavement before the Civil War, and those who had not. Free white citizens were authorized and even required to constrain the formerly enslaved within the pale of segregation: federal courts would not concern themselves with these private acts of discrimination, nor would they lift the veil of supposed neutrality that masked the state's law. Doctrine would obscure reality.

The novel litigation strategy and arguments of counsel marshalled by Homer Plessy's lawyers to oppose this ingenious law have not been adequately explained in the extensive, modern literature. The Jim Crow laws were said to afford equal treatment of two racial groups, kept separate for their mutual benefit; this equality of treatment was said to satisfy constitutional demands for a universal citizenship, with equal legal rights for all citizens. Plessy's attorneys sought to get behind this play of words, and challenged the power of a state to label persons by race and to separate them according to label, authorizing and facilitating private acts of oppression. In order to make their point, the Citizens' Committee sought a plaintiff whose appearance was ambiguous.[45]

Homer Plessy, a young resident of New Orleans, was asked to play the part. The situation and character of the plaintiff would be stipulated for the purpose of testing the statute, because there was to be no trial. The attorneys famously decided to describe their plaintiff as an "octoroon," a person with a single black great-grandparent, and hence of one-eighth "colored" blood, in the language of that time.[46] According to Keith Medley's careful review of birth and census records, however, both of Homer Plessy's parents were known as people of color.[47] Homer Plessy's father had a black grandparent, but his mother also was recorded as a "mulatto" in census records. The extended

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[44] *Id.* at 541.

[45] Louis A. Martinet to Albion W. Tourgée, Oct. 5, 1891, *reprinted in* OLSEN, *supra* note 9, at 55, 56–57.

[46] *Plessy*, 163 U.S. at 538 ("[P]etitioner was a citizen of the United States and a resident of the state of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood . . . the mixture of colored blood was not discernible in him . . . .").

[47] MEDLEY, *supra* note 9, at 21.

Plessy family at the time of Homer's birth, according to Medley,[48] was French-speaking and Roman Catholic, part of a large community of free persons of color. Homer Plessy, a 30-year-old shoemaker, lived with his wife as a person of color among the professionals and artisans of all races in the Faubourg Tremé:[49] a person of color, with two parents of mixed ancestry and an unknown number of more remote African ancestors. The underlying point was correct, however—Homer Plessy, in the ordinary speech and practice of his time and place was neither white nor black.

New Orleans was a diverse community of French, English, and Spanish descent, of Native Americans, of Cajuns—descendants of French Acadians—of recent immigrants from southern Europe, and the distinct social class of "blacks," former slaves.[50] The Separate Car Law ignored all this complex reality, and required railroads to establish a line between "white" and "colored." By claiming for purposes of the suit that their plaintiff was an "octoroon," the attorneys managing the case tried to point out the arbitrary character of the racial divide. Homer Plessy's lawyers were able to ask the Justices of the Supreme Court of the United States why a man with one black great-grandparent could not claim the rights of a white citizen? They were able to ask, furthermore, why is not a man with but a single *white* great-grandparent considered white?[51]

At this distance in time and place, one easily mistakes the argument for an undignified claim that a light-skinned black had the right to pass for white, and indeed the suit has been criticized on that ground.[52] That is a misunderstanding of the thought and language of the day. As we have seen, the rights of a "white" citizen were the standard to be met, the criterion of citizenship. The Civil Rights Act of 1866, and the first section of the Fourteenth Amendment, established a sort of most-favored-nation standard of rights—every citizen was entitled to the rights of a "white" citizen—that is still found in federal civil rights law, in language carried forward from the Civil Rights Act of 1866.[53] Simply labeling a person "colored" was to assign him to a presumptively inferior caste.

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48 *Id*.

49 *Id*. at 21–22.

50 Free persons of mixed African and European descent were *gens de couleur*, persons of color, a legal category that survived from the years of French rule. ASLAKSON, *supra* note 11, at 2.

51 *See infra* note 83 and accompanying text.

52 *See* Harris, *supra* note 9, at 219–20, and sources cited therein.

53 42 U.S.C. § 1981(a) (2014):

> Statement of equal rights: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Having found a suitably light-skinned volunteer, Homer Plessy, to serve as plaintiff, the Citizens' Committee sought the cooperation of an inter-city railway company. The Separate Car Law authorized a railroad conductor to eject a colored passenger who tried to board a whites-only car, and in practice a conductor was likely either to ignore the presence of a light-skinned African-American in a car reserved for whites, or simply to eject him. This would have made a direct challenge to validity of the law difficult. To test the fundamental constitutionality of the law, it was necessary to have the railroad *assign* their plaintiff to the colored-only car, for him to refuse the assignment, and to be charged with a criminal offense under the new law. The validity of the law, on its face, could then be challenged.

This strategy grew out of experience with the federal Jurisdiction and Removal Act of 1875,[54] which allowed federal courts to take jurisdiction of state criminal prosecutions before trial. The statute allowed removal of criminal prosecutions from state courts to federal circuit courts when a federal constitutional defense was raised and was an important mechanism for enforcing the Reconstruction Amendments, which gave the federal courts supervisory authority over the reconstituted state governments.[55]

There would have been no objection to a law that required railroad companies to provide separate but equal accommodations for "white" and "colored" passengers, so long as the choice of cars was left to the passengers. The suit on behalf of Homer Plessy was carefully constructed to identify an underlying evil, the legal construction and imposition of race. By challenging the power of the state to clothe a railroad conductor with the authority to draw a compulsory color-line, they challenged the strategy of the Jim Crow laws to authorize and even to require private acts of discrimination against those trapped within a circle from which whites could remove themselves.

To test the law on this basis, a good deal of cooperation among the parties was needed. The railroad would have to order Plessy to the colored-only carriage, rather than simply eject him, and would have to summon a policeman. A policeman, in turn, would have to be available and would have to make the appropriate charge. Several railroads were approached, and eventually the East Louisiana Railroad agreed to cooperate.[56] An accommodating policeman was more difficult to find. In order to ensure that the record was properly constructed, the Citizens' Committee simply hired a private detective, Christopher C. Cain, to make the arrest.

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[54] *See* Jurisdiction and Removal Act of 1875, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2014)); Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449 (1884).

[55] *See* 28 U.S.C. § 1331. *See generally* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333 (1969).

[56] Letter from Louis A. Martinet to Albion W. Tourgée (Oct. 5, 1891), *reprinted in* OLSEN, *supra* note 9, at 55–57.

With all the parties in place, Homer Plessy purchased a first-class ticket and boarded the first class, whites-only car of the East Louisiana Railroad.[57] According to the affidavit filed later by Cain, the conductor questioned Plessy, who identified himself as a colored man.[58]

We may pause here to consider what proved to be a flaw in this carefully orchestrated prelude to suit. The argument the attorneys sought to make, at least as we see it in retrospect, was that "race," while real enough, was a social construct known as "reputation." Reputation was a form of property, and damage to reputation was a recognized harm under state law. Since Homer Plessy was not visibly a member of a particular race, he was free to choose—to construct a reputation that he preferred. Boarding the whites-only car was a claim to a reputation as a white man, and he was entitled to make that claim.[59] If a reputation was a property right, it followed that the railroad conductor could not deprive him of his reputation without affording him due process of law. A hearing and the taking of evidence on a railroad car plainly was not possible, and as the racial categories of white and colored were in any case arbitrary, the Separate Car Law on its face allowed a railroad conductor to deprive Homer Plessy of his reputation, his property, without due process of law.[60] Arguing that Homer Plessy had been deprived of the liberty and property of a white citizen risked obscuring the underlying fundamental point, that the law created and imposed two arbitrary racial categories, and allowed the state to create the impression that Homer Plessy was a colored man trying to pass as white.[61]

Today, we have a legal vocabulary better suited to express the argument they sought to make: the statute on its face created a statutory classification based solely on racial hostility or "animus" and, accordingly, was arbitrary and denied both due process and the equal protection of the law.[62] Our modern language had not yet been devised, however, and Homer Plessy's suit was necessarily cast in the narrow mold of procedural due process of law as it was then understood.

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[57] It appears that the railroad had made no change in its usual cars, but had added a car labeled "For Colored Only" so that Plessy could argue that he had simply boarded the first-class car.

[58] MEDLEY, *supra* note 9, at 139–42.

[59] *Cf.* ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO 503, 660 (2008) (explaining that Thomas Jefferson's household exemplified arbitrary racial categories).

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

[61] This indeed seems to be what the Justices of the Supreme Court of the United States took to be the case. *See id.* (noting that Plessy was not deprived of property since "a colored man . . . [was] not lawfully entitled to the reputation of being a white man").

[62] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that class legislation that affixes stigma without rational basis is deprivation of liberty and violates the Due Process Clause); Romer v. Evans, 517 U.S. 620, 634 (1996) (holding that class legislation based on "animosity" violates the Equal Protection Clause of the Fourteenth Amendment).

Some of the difficulties inherent in the arguments made on Plessy's behalf are shown by Cain's affidavit, which we must assume was drafted by the attorneys managing the case. According to the affidavit, Homer Plessy identified himself as a man of "color," and his statement gave the conductor a premise for expelling him. After Plessy's admission, it would be confusing to assert that "color" was an arbitrary construct imposed by the conductor or that Plessy was deprived of liberty or property by being labeled in that way.[63]

According to Cain's affidavit, in any case, when Homer Plessy said that he was a man of color, the conductor ordered him to leave the whites-only car. Plessy refused to leave the car he had chosen, Cain was summoned, arrested Plessy and brought him to the police court, where reporters were waiting.[64]

Local counsel James Walker apparently tried to deal with the question of Plessy's self-identified race by excluding it from the formal record.[65] The case was to be decided without any taking of evidence, in a court that would be asked to determine the constitutionality of the state law on its face. The record would contain only a formal charge and the response of the accused. Walker's plan evidently was to create a record in which *equality* of treatment of the colored race would not be the issue. The claim would be that two races had been arbitrarily defined and forcibly separated by a color-line, depriving a citizen of his liberty to cross that line, and of the value inherent in standing outside it.

A full year passed before an information was filed, charging Homer Plessy with a misdemeanor. Walker obtained the delay while he sought the cooperation of the New Orleans District Attorney, and he was able to influence both the timing and the wording of the information that the District Attorney had prepared, which set out the criminal charge and would be essential to the construction of the record. Although Cain's affidavit showed that Plessy was ordered to leave the whites-only car, the information filed by the district attorney after a year's delay only charged Plessy with the offense of refusing to ride in a car to which he was assigned.[66] The formal record only showed that Plessy had declined to have a race assigned to him.[67]

The year-long delay may also have been engineered by Walker to ensure that the case was heard by newly appointed Judge John Ferguson, a

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[63] It is not at all clear why this declaration was included in the affidavit, and James Walker did not include it in the formal record, but it may have been meant to shield the conductor and Cain himself from liability.

[64] *See* MEDLEY, *supra* note 9, at 142–46.

[65] *See* LOFGREN, *supra* note 9, at 54.

[66] The hand-written information is reproduced in *id.* at 164.

[67] As the Supreme Court acknowledged, gratuitously adding that Plessy had a great-grandfather of African descent, implying that whether he was "colored" within the meaning of the Louisiana law was a question of fact to be decided at trial. Plessy v. Ferguson, 163 U.S. 537, 538, 552 (1896).

Democrat but a New Englander. Once the charge was brought, Walker moved to dismiss on the ground that the Separate Car Law was unconstitutional. Ferguson promptly denied the motion, and granted an immediate continuance while the Citizens' Committee sought intervention of the federal circuit court.[68]

Tourgée and his colleagues had planned to have the prosecution of Homer Plessy removed to federal court. At some point after Judge Ferguson's ruling, however, the Citizens' Committee altered their strategy. They decided not to seek removal of the case to federal circuit court, but instead to seek review of the law in the Louisiana courts, with an eventual appeal to the Supreme Court of the United States if necessary. The suit hinged on threshold questions of state law concerning the nature and effect of the Separate Car Law, and so it may have seemed better to have the statute interpreted authoritatively by the state's supreme court. No appeal was provided from judgments of the New Orleans police court, but a rarely used common-law writ of prohibition was available. Once Judge Ferguson ruled that the statute was constitutional, Plessy's lawyers applied for a writ of prohibition, and the Supreme Court of Louisiana obligingly held a hearing to determine if Judge Ferguson's initial ruling should be reversed.[69] Homer Plessy's claim that the Separate Car Law was unconstitutional would be reviewed before trial, as planned, but in the Supreme Court of Louisiana rather than federal circuit court.

The case was briefed and argued before the Supreme Court of Louisiana, by Martinet and Walker, and Judge Ferguson's ruling was defended by one Lionel Adams. The court, as expected, upheld the Separate Car Law on December 19, 1892. Justice Charles E. Fenner wrote the opinion.[70] He summarized the arguments made on behalf of Homer Plessy:

> The whole *gravamen* of relator's plea is contained in the fourteenth ground [of his plea], which is as follows: "That 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."[71]

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68 *See* MEDLEY, *supra* note 9, at 139–68.

69 *Ex Parte* Plessy, 11 So. 948 (La. 1892), *aff'd sub nom*. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

70 *Id.* at 948–51.

71 *Id*. at 949.

This passage summarized Plessy's claims in important respects, but Justice Fenner quickly reduced it to a claim that two races, white and black, were not being treated alike. He casually dismissed the argument that the Thirteenth and Fourteenth Amendments created a unitary state and national citizenship. Fenner clearly understood Homer Plessy's insistence that, as a citizen of Louisiana, he was entitled to full membership in civil society. Citing decisions from other states, however, Fenner concluded that equal treatment of the separated races was all that the Constitution required. The precedents "all accord in the general principle that, in such matters, equality, and not identity or community, of accommodations, is the extreme test of conformity to the requirements of the fourteenth amendment."[72]

Once the question was stated in this way, the answer followed quickly. The Separate Car Law required equal accommodations for each race, and members of each race were equally prohibited from entering cars reserved for the other.[73] There had been no abrogation of the right of citizens to legal equality, if equality was understood as equal treatment of forcibly separated races.[74] The court was not entirely blind to the reality of the statute, however:

> Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations.[75]

In other words, any difficulties or injuries were caused, not by the desire of whites to withdraw themselves, but from the insistence of blacks on entering the white community.

Having established to his own satisfaction that Homer Plessy had not been harmed in any legally cognizable way, except by his own insistence on entering a car reserved for whites, Justice Fenner could easily dismiss the premise of the carefully constructed case. "[Plessy] claims that the statute vests the officers of the company with a judicial power to determine the race to which the passenger belongs[.]" This was not correct, Fenner held. The employees of the railroad were not charged with making judicial decisions, but only with carrying out a ministerial duty—the duty of assigning passengers correctly according to their race: "The discretion vested in the officer to decide primarily the coach to which each passenger, by race, belongs, is only that

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72 *Id*. at 949–51.

73 *Id.* at 949–50.

74 Justice Potter Stewart observed in a different context, upholding a Georgia law against an equal-protection challenge, "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).

75 *Ex parte* Plessy, 11 So. at 951.

necessary discretion attending every imposition of a duty, to determine whether the occasion exists which calls for its exercise."[76]

The railroad, in short, was made a sort of administrative agency of the state, acting through its conductors, who had only ministerial duties. According to Fenner, race was an objective characteristic to which the conductor's attention was directed; he had only to determine whether a passenger *in fact* belonged on one side or the other of the color-line. Homer Plessy's lawyers had failed to persuade the court that the conductor's decision, enforced by law, was part of a process that defined—and in effect created—Plessy's racial identity on arbitrary grounds.

IV. *PLESSY V. FERGUSON* IN THE SUPREME COURT

Attorneys for Homer Plessy thereupon applied to the Supreme Court of the United States for a writ of error, and the Court scheduled oral argument for April 13, 1896. Homer Plessy's attorneys filed briefs, and the argument was shared by Albion Tourgée and Samuel Phillips, the former Solicitor General of the United States.[77] Briefs filed by Tourgée, Phillips, and Walker, on behalf of Homer Plessy, were argumentative and at least by modern standards not as artful as they might have been. Few precedents were cited, as there were few precedents to cite; in the handful of instances in which the Supreme Court had reviewed civil rights claims under the Reconstruction Amendments, the only helpful precedent was *Strauder v. West Virginia*.[78] In that case, a black man was indicted for murder by a grand jury on which only white men were permitted to sit. Strauder claimed that he was denied rights equal to those of a white citizen, and the Supreme Court agreed, having had no difficulty in seeing that all state citizens were entitled to the same due process of law in a capital proceeding.[79]

The precedent was a little awkward to apply, as the opinion seemed to support equality of treatment rather than a unitary citizenship. A white citizen of West Virginia was assured a jury with members of his own race, but a colored citizen was denied the chance to have a jury in which colored men were permitted to sit. It would have been self-defeating to argue that Homer Plessy was entitled to a car in which colored passengers were allowed; the Separate Car Law was designed to answer just that argument. Homer Plessy's attorneys tried to show that allowing a railroad employee to apply the "colored" label to Plessy was an injury in itself, by constraining him within a color-line. He was equally injured whether he was in fact white or colored. This was not an argument for equal protection, but for due process of law. As we have already

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76 *Id*.

77 HOFFER, *supra* note 9, at 81, 105.

78 100 U.S. 303 (1879).

79 *Id*. at 304, 309.

seen, Tourgée and Phillips argued that the railroad, clothed with legal authority, had deprived Homer Plessy of liberty and property without due process of law: the liberty to sit in the whites-only, first-class car and a property interest in his reputation. By choosing the whites-only car, Plessy had chosen to be outside the color-line, in the first-class compartment.[80]

Having staked out his position, Tourgée then framed the question that he and his colleagues had struggled so long to present to the Court—one that exposed the core of the new Jim Crow regime. The State of Louisiana required railroads to label a class of persons "colored," drawing a line around that class, in order to authorize private and official bigotry toward those within the line.[81]

Tourgée pointed out that there were no legal standards for making distinctions based on race, and that any legal standard would be arbitrary. There was no objective basis for drawing a color-line, and the avowed purpose of drawing such a line was a sham. The State's claim, that it had adopted the law requiring separation of the races in order to keep the peace, was a pretense. The purpose and effect of the statute was to *create* a subordinated caste defined by prejudice.[82]

> [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.
>
> 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 . . . by the casual scrutiny of a busy conductor.
>
> But 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?
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> There is no law of the United States, or of the State of Louisiana defining the limits of race-who are white and who

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[80] Brief for Plaintiff in Error, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1896 WL 13990, at *6–18 (arguing that deprivation of the liberty to travel poses a federal question); Brief for Plaintiff in Error, Plessy v. Ferguson, 163 U.S. 537 (1896), 1893 WL 10660, at *29–30, *38–39, *46 [hereinafter 1893 Brief for Plaintiff in Error] (discussing a property interest in reputation).

[81] 1893 Brief for Plaintiff in Error, *supra* note 80, at *36.

[82] *Id.* at *4, *11.

> are "colored?" By what rule then shall any tribunal be guided in determining racial character? 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? *Why not count every one as white in whom is visible any trace of white blood*? There is but one reason to wit, the domination of the white race. Slavery not only introduced the rule of caste but prescribed its conditions, in the interests of that institution. The trace of color raised the presumption of bondage and was a bar to citizenship. The law in question is an attempt to apply this rule to the establishment of legalized caste-distinction *among citizens*.
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> . . . .
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> . . . The question is not as to the *equality* of the privileges enjoyed but *the right of the State to label one citizen as white and another as colored* in the common enjoyment of a public highway as this court has often decided a railway to be.[83]

This argument was an expansion of the aphorism that the Constitution ought to be color-blind. That is to say, government ought not to impose a color-line, or use the power of the state to impose a colored label. The power of the state to acknowledge and deal with the reality of racial identity, whether self-chosen or imposed by private prejudices, was never in question in this case. No one imagined that the Constitution was color-blind in that sense. The question that Tourgée and his colleagues sought to pose was clearly enough stated: whether the state had power to draw a color-line in an arbitrary administrative procedure.

V. OPINION OF THE COURT

As the Louisiana court had recognized, the heart of the legal argument was the claim that both the Thirteenth and Fourteenth Amendments forbade the state from segregating its citizens and thereby creating a subordinated caste. The Thirteenth Amendment prohibited labelling those who had been eligible for enslavement—the label "colored" was a badge of servitude[84]—and the

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[83] *Id*. at *10–11, *29 (emphases in final two sentences are in the original, others are added).

[84] The Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting). Harlan was elaborating on the unsuccessful argument made by Phillips, then Solicitor General. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 585–89 (2012). Phillips and Harlan repeated this point in *Plessy*. Plessy v. Ferguson, 163 U.S. 537, 555, 562 (1896) (Harlan, J., dissenting).

Fourteenth prohibited the denial of liberty or property without due process of law.[85]

This forceful argument, toward which the carefully constructed litigation strategy had been aimed, was somewhat vitiated as evidenced by Homer Plessy's admission that he lived as a person of color, which helped the Court to treat his race as a fact. Harlan, in his dissent, also treated the color-line as one based in actual differences of color; he insisted only that there was no proper basis for *separating* the supposed races.[86]

The plaintiff's arguments were further obscured by the device Louisiana had employed, requiring acts of discrimination to be carried out by private railroad conductors.[87] In the earlier cases invalidating federal statutes, many of the same Justices whom Plessy's attorneys now faced had decided that the Fourteenth Amendment did not prohibit private acts of racial discrimination, and did not even forbid lynching. These were matters for the state to deal with as it wished, without federal supervision.[88] It seemed to follow that state law might authorize or even require a railroad operating wholly within a state to segregate its cars, since private acts of discrimination were wholly within the state's jurisdiction. Justice Henry Billings Brown, writing for himself and six other members of the Court, devoted much of his opinion to reiterating the holdings of those earlier cases, from the *Slaughter-House Cases* down.[89] These private acts did not recreate the legal regime of slavery. Quoting an earlier opinion of the Court, Justice Brown summarized the case law this way:

> "It would be running the slavery question into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."[90]

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85 Although *Plessy* is taught as an Equal Protection case, the opinion of the Court rests principally on Due Process arguments. *See* LOFGREN, *supra* note 9, at 153–55. The Due Process argument was framed in procedural terms—the Louisiana railroad conductor arbitrarily deprived Homer Plessy of liberty and property without a fair proceeding—an argument the Court failed to address because of its insistence that an actual color-line between two races could be drawn in some non-arbitrary manner by state law. Today, of course, we would cast Plessy's claim in Equal Protection or procedural Due Process—that the statute lacked a rational basis. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

86 *Plessy*, 163 U.S. at 560–62 (Harlan, J., dissenting) (reasoning that a Separate Car Law will "create and perpetuate a feeling of distrust between these races").

87 *Id.* at 538.

88 *See, e.g.*, *The Civil Rights Cases*, 109 U.S. 3; United States v. Harris, 106 U.S. 629 (1883).

89 *Plessy*, 163 U.S. at 542–52 (majority opinion).

90 *Id.* at 543 (quoting *The Civil Rights Cases*, 109 U.S. at 24–25).

Brown, as if to add a flourish, noted smugly that segregation of public schools had been upheld in Massachusetts, against the plea of Charles Sumner, the great advocate of unitary citizenship.[91]

The balance of Brown's long opinion was devoted to the question whether the Louisiana statute was outside the scope of the state's police power, and hence a violation of *substantive* due process. Did the state have power to regulate relations between the races? Brown simply ignored the point that Plessy's racial identity had been imposed by the railroad conductor on arbitrary grounds, although this was the point at which the suit and the arguments were aimed:

> A statute which implies merely a legal distinction between the white and colored races—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—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.
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> . . . .
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> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color[.][92]

With this central point avoided, Brown went on to consider whether the state had the power to regulate relations between the supposed races.[93] Ignoring the point that the color-line was arbitrary, and was created by railroad conductors without benefit of legal standards, Brown ponderously considered whether a measure to separate the two supposed races on the grounds of keeping the peace between them was within the police power of the state. The Supreme Court of Louisiana said the Separate Car Law was intended to keep the peace between two races, and Brown accepted this rationale:

> In determining the question of reasonableness, [the State] is 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. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable[.][94]

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91 *Id.* at 544.

92 *Id.* at 543–44.

93 *Id.* at 543.

94 *Id.* at 550–51.

The mismatch of argument and decision is one of the most curious aspects of the case. Neither Justice Brown nor any of the other Justices, it seems, could see the point being made about race and the color-line, perhaps because racial images were so deeply embedded in their thought.[95] The Supreme Court of the day was a modest institution, and the Justices were not particularly distinguished.[96] They were a close-knit group, drawn from the class of moderate Republicans and "national" Democrats. Justice David Brewer was Justice Stephen Field's nephew; New England Justices Brown and Jackson had recommended each other for their seats. Justice William Douglass White, a Democrat from Louisiana, was the only Southerner. The Justices met in the old Senate Chamber, abandoned by the Senate when the Capitol was enlarged. Their conferences were held in a basement room in the Capitol that also served as their meager library. A brass spittoon stood beside each chair at the long table at which they conferred. They had no chambers, or law clerks; they wrote their opinions out by hand. It is not surprising that they relied very heavily on the Louisiana Supreme Court opinion and the state's brief, or that they shared a point of view that kept them from seeing the novel arguments made by Plessy's lawyers.[97] They reflected in their microcosm the reconciliation of the Northern governing class and the Southern insurgents, a reconciliation which was accomplished at the cost of the formerly enslaved.[98]

Justice Brown, who wrote the opinion for the Court, is said later to have regretted the decision in *Plessy*, because he had come to doubt the rightness of the decision in the underlying *The Civil Rights Cases*.[99] Because railroads were "clothed with a public interest," governments could regulate the fares they charged.[100] It seemed to follow that Congress might have regulated intrastate railroads as public accommodations, with regard to race, under

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[95] The difficulty is evident in the opening sentence of Justice Brown's autobiography, written some years afterward: "I was born of a New England Puritan family in which there had been no admixture of alien blood for two hundred and fifty years." HENRY BILLINGS BROWN, MEMOIR OF HENRY BILLINGS BROWN: LATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 1 (Charles A. Kent ed., 1915), http://supremecourthistory.org/assets/schs_publications-henrybillingsbrown.pdf.

[96] The remainder of this paragraph is based on characterizations found in the letters of Justice Holmes, who joined the Court in 1902, replacing Horace Gray. *See* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 241–92 (1989).

[97] *Id.*

[98] *See* Klarman, *supra* note 9, at 307, 320.

[99] Joel Goldfarb, *Henry Billings Brown*, *in* 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789–1969: THEIR LIVES AND MAJOR OPINIONS 762, 772–73 (Leon Friedman & Fred L. Israel eds., 1997).

[100] *See* Munn v. Illinois, 94 U.S. 113, 133 (1876) (discussing property rights as rights of "citizens").

authority conferred by the Fourteenth Amendment.[101] These doubts were formed long afterward, however.

Only Justice John Marshall Harlan dissented. His dissenting opinion has become a celebrated precedent. In it, he reiterated important parts of the argument that Plessy was making, especially the point that the "colored" label was a badge of servitude. Harlan accepted the premise that Homer Plessy was in fact a man of color, however, sidestepping the principal point, and muddling the due-process argument. He saw that legal rights of *citizens* were at issue, but unfortunately chose to dramatize the argument by noting that persons born in China, who were not then eligible for citizenship, were permitted to ride in the whites-only car while colored persons, who were citizens, were barred.[102] Harlan freely affirmed his belief in the superiority of his own white race.[103] He agreed with Homer Plessy's assertion that the Constitution should be "color-blind," but seems to have understood this to mean only that the Thirteenth and Fourteenth Amendments forbade enforcing by law what he imagined to be the natural hierarchy of two races, white and colored.

VI. AFTERMATH

The decision in *Plessy v. Ferguson*, which did not so much reject as it ignored Homer Plessy's plea for inclusion in civil society, authorized the backlash against Reconstruction and gave permission to the states of the former Confederacy to follow Louisiana's lead; legal segregation of places of public accommodation soon was universal in the South. Private discrimination and violence had already been insulated from federal sanction, and now the systematic segregation of work and of the structures of civil society, enforced by lynch law, were likewise authorized by state governments. No citation is needed for the horrors that followed.

Homer Plessy's argument was not forgotten, however. W.E.B. Du Bois, writing seven years after the decision in *Plessy*, famously identified the underlying evil: "The problem of the twentieth century is . . . the color-line."[104] The Civil War and the struggles of Reconstruction had compelled white America to face the captive nation in its midst. Du Bois did not deny the existence of a black nation within a white nation, he decried the barrier that

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[101] Goldfarb, *supra* note 99, at 772–73. Federal civil rights statutes today generally are based on a similar Commerce Clause rationale.

[102] Plessy v. Ferguson, 163 U.S. 537, 561–62 (1896) (Harlan, J., dissenting). *See generally* United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898) (Fuller, C.J., and Harlan, J., dissenting) (person of Chinese ancestry should not be entitled to birthright citizenship); Lem Moon Sing v. United States, 158 U.S. 538 (1895) (resident of San Francisco, born in China, remains an alien); Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

[103] *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

[104] W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 3 (Brent Hayes Edwards ed., Oxford Univ. Press 2007) (1903).

divided them, and the subordination that separated the black nation from the simply American.[105]

Homer Plessy's argument in 1896 for a single citizenship in a multi-racial society, the argument that Du Bois would soon make so eloquently, was not accepted by a court until a generation later, in *Buchanan v. Warley*.[106] That suit was brought by the National Association for the Advancement of Colored People ("NAACP"), whose name then and now embodies the difficulty and the paradox embedded in their cause. W.E.B. Du Bois was one of the founders of the NAACP; the manager of the suit and architect of the renewed *Plessy* argument was Moorfield Storey, the first president of the NAACP, who had been Senator Charles Sumner's secretary.[107]

The *Buchanan* suit was another test case, carefully contrived. Louisville, Kentucky, had adopted an ordinance requiring racial segregation in housing. The ordinance was challenged in a test case brought by the heirs of Homer Plessy's citizenship movement, the NAACP. As in Plessy's suit, local counsel was obtained and a prominent citizen agreed to serve as the "colored man" in the suit. He signed a contract to buy property on a white-majority block, with the express intention of residing there. This supposed buyer then breached his contract. He claimed that he could not purchase the property as he had agreed to do; citing the ordinance, he claimed he would be forbidden to live in his own house. The suit was designed to test the ordinance; the supposed seller of the property went into state court to compel specific performance of the contract, claiming that the ordinance was unconstitutional and therefore had no force. If the ordinance were allowed to stand he would lose the value of the sale, deprived of property without due process of law.[108]

The Louisville ordinance resembled the Separate Car Law and was similarly justified as a measure to protect health and safety by separating the supposed races.[109] The races were treated equally: colored persons could purchase property in colored neighborhoods, just as white persons could live in white neighborhoods. Now, however, the Supreme Court did not think the question was one of equality, but of the rights of an individual citizen protected by the Thirteenth and Fourteenth Amendments. The Court acknowledged the argument made by the plaintiff:

> [T]he colored race, having been freed from slavery by the Thirteenth Amendment, was raised to the dignity of citizenship and equality of civil rights by the Fourteenth Amendment, and the states were prohibited from abridging the privileges and

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105 *Id*. at 184–85.

106 245 U.S. 60 (1917).

107 *NAACP: A Century in the Fight for Freedom*, LIBR. CONG., https://www.loc.gov/exhibits/naacp/founding-and-early-years.html (last visited Mar. 31, 2016).

108 *Buchanan*, 245 U.S. at 69–73.

109 *Id.* at 73–76.

> immunities of such citizens, or depriving any person of life, liberty, or property without due process of law.[110]

The state's argument, that the purpose of the ordinance was to prevent race mixing and to keep the peace, the Court dismissed as insufficient:

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.[111]

The *Buchanan* Court allowed the decision in *Plessy* to stand, and the bulk of legal segregation with it, but the Court did stop the progress of Jim Crow laws toward a complete apartheid regime.[112] The *Buchanan* opinion furthermore served as a precedent for *Bolling v. Sharpe*,[113] the companion to *Brown v. Board of Education*,[114] striking down Washington, D.C.'s school segregation law as a violation of the due process of law guaranteed by the Fifth Amendment:

> Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.[115]

Plessy's argument was revived yet again in the congressional debate over Title II of the Civil Rights Act of 1964, forbidding discrimination in places of public accommodation.[116] Sponsors of the bill repeated Homer Plessy's argument that exclusion from places of public accommodation was a badge of servitude forbidden by the Thirteenth Amendment.[117] That argument

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110 *Id.* at 76.

111 *Id*. at 82.

112 A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 765–69.

113 347 U.S. 497 (1954).

114 347 U.S. 483 (1954).

115 *Bolling*, 347 U.S. at 500 (citing *Buchanan* among other precedents).

116 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243–46 (codified as amended at 42 U.S.C. §§ 2000a–1 to –6 (2014)).

117 Linda C. McClain, *Involuntary Servitude, Public Accommodations Laws, and the Legacy of* Heart of Atlanta Motel, Inc. v. United States, 71 MD. L. REV. 83, 83–84 (2011).

was not addressed by the Supreme Court when it reviewed the statute,[118] but neither has it been rejected, and scholars have continued efforts to return to the original understanding of the Thirteenth Amendment as seen by its authors and proponents.[119]

There are also continuing efforts to revive the original understanding of the Fourteenth Amendment, as Plessy's lawyers portrayed it,[120] in defense of "affirmative action." Indeed, in the first cases addressing affirmative action in government contracts[121] and enforcement of the Voting Rights Act,[122] the Supreme Court did acknowledge the reality of race as an individual characteristic that government could acknowledge, so long as no one was treated solely as a member of a racial category—so long as no hard and fast color-line was imposed by law.[123] Justice Sandra Day O'Connor's opinions in those early affirmative-action and voting-rights cases seemed to acknowledge Homer Plessy's plea for diversity and inclusion; but a long-running dispute over the University of Texas's race-conscious admissions policies has raised the possibility that the color-line remains with us, drawn once again for the benefit of those who claim a white identity.[124]

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[118] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (holding that the Commerce Clause confers sufficient authority; distinguishing *The Civil Rights Cases*; reasoning that the Thirteenth Amendment argument need not be addressed).

[119] The literature of Reconstruction is vast. For some recent discussions of the broader meaning of the Thirteenth Amendment for which Plessy argued, see Brief of *Amici Curiae* Thirteenth Amendment Scholars in Support of Plaintiff-Appellee and Affirmance, United States v. Hatch, 722 F.3d 1193 (10th Cir. 2013) (No. 12-2040), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174499; ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY (1983); ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY (2004); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001); Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992); Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993); Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459 (2012); Barnett, *supra* note 25; Fox, *supra* note 23; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002).

[120] *See, e.g.*, Barnett, *supra* note 25, at 246–50; Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187 (2005) (concluding that the framers intended the Fourteenth Amendment to give Congress power to protect civil rights); Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 FORDHAM L. REV. 153 (2004) (noting that the Supreme Court recognized federal power to protect property rights of slave owners more than the civil rights of freed slaves).

[121] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[122] Shaw v. Reno, 509 U.S. 630 (1993).

[123] That at least was the language of O'Connor's opinion for the Court in *Adarand Constructors*.

[124] Fisher v. Univ. of Tex. at Austin (*Fisher II*), 758 F.3d 633, 637 (2014), *cert. granted*, 135 S. Ct. 2888 (2015) (mem.).

In the long-running litigation over the University of Texas's admissions policies, the Supreme Court has granted standing to a "Caucasian" student—presumably meaning that the student was neither black nor Hispanic—to challenge the University's consideration of race in admissions.[125] The University of Texas considers race and ethnicity[126] in a manner that the Court approved in *Grutter v. Bollinger*,[127] in which O'Connor's reasoning prevailed: in *Grutter* the University of Michigan Law School was permitted to use race as one factor in the consideration of a student's application.[128] The University of Texas used precisely the method approved in *Grutter*, which it referred to as "holistic": all aspects of a student's self-declared identity and circumstances were considered in the admissions process.[129]

The University of Texas's "holistic" method, although identical to that approved in *Grutter*, was nevertheless challenged and the challenge was heard by the Supreme Court.[130] Justice Kennedy's opinion noted that the University of Texas's consideration of race was essentially that approved in *Grutter*, but nevertheless it was remanded to the lower courts. Kennedy summarized the previous case law by saying that the University might consider race as a factor in its admissions process, in the interest of obtaining diversity in the student body, but that a plaintiff claiming to be injured by race-conscious policies was "entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve [that] compelling governmental interest."[131] The suit was remanded so that the University's procedure could be subjected to strict scrutiny, to determine if it was "precisely" or "narrowly" tailored to accomplish the goal of diversity, as the Michigan policy presumably had been.[132]

The burden borne by plaintiff Abigail Fisher because of her "Caucasian"[133] identity was not specified, however, and is difficult to identify. On remand, the Fifth Circuit opinion pointed out that Fisher did not meet the

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125 Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411, 2415 (2013).

126 "Hispanic" or "Latino" is not considered a "racial" category for the purposes of federal civil rights law. Office of Mgmt. & Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997); Howard Hogan et al., *Projecting Diversity: The Methods, Results, Assumptions and Limitations of the U.S. Census Bureau's Population Projections*, 117 W. VA. L. REV. 1047, 1048–49 (2015). Abigail Fisher seems to be claiming that she is the victim of race prejudice, although non-Hispanic white students are over represented among students admitted under the race-conscious admissions policies. *See Fisher II*, 758 F.3d at 639–40.

127 539 U.S. 306 (2003).

128 *Id.* at 333–44.

129 *Fisher II*, 758 F.3d at 637.

130 *Fisher I*, 133 S. Ct. at 2411.

131 *Id.* at 2417 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)).

132 *Id*. at 2420.

133 *Id.* at 2415.

usual requirement for standing;[134] it appears she would not have been admitted even if she were able to claim that she was a disadvantaged person of color. The "burden" borne by the white plaintiff—the injury claimed to result from the University's race-conscious admissions policy which gave the plaintiff standing—apparently amounted to no more than her distress that non-Caucasian students were given some assistance in the admissions process that were not afforded to Caucasians.

The Supreme Court nevertheless required a determination that the University's race-conscious policy was narrowly tailored.[135] The Fifth Circuit, in an opinion by Judge Patrick E. Higginbotham, accordingly concluded that whatever burden was imposed on Abigail Fisher, the University of Texas admissions procedure was narrowly tailored to achieve diversity in the student body without drawing an impermissible color-line.[136]

There was no zero-sum conflict of races in this case; each applicant was considered on his or her characteristics, and accommodations were made only where they were presumed to be needed because of past discrimination. As Judge Patrick E. Higginbotham carefully explained, more clearly perhaps than the University itself had done, the "holistic" consideration of the race of each applicant did not constitute a color-line—it was only what it sought to be, a consideration of each student on his or her merits. "The numbers support UT Austin's argument that its holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals[.]"[137] "Diversity is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes."[138]

The plaintiff, in short, was demanding an inverted color-line, asserting that affirmative action discriminated against whites; but this was not the case in her application. So far as the Fifth Circuit Court of Appeals was concerned, the state's university had answered the demand for both diversity and inclusion, without drawing a color-line that excluded any individual because of her race.

The difficulty in this case was that a white plaintiff was permitted to demand that the University's policy be justified according to the strictest standard, although there was no evidence that she had been injured. The Justices who had ordered the remand of the case seemed to assume that the non-Caucasian applicants for admission had benefitted at the expense of the whites. This, however, was just the silent assumption of the *Plessy* Court, that white and colored were equally situated, rival communities.

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134 *Fisher II*, 758 F.3d at 639–40.

135 *Fisher I*, 133 S. Ct. at 2414.

136 *Fisher II*, 758 F.3d at 654.

137 *Id.* at 654.

138 *Id*. at 643.

VII. CONCLUSION: HOMER PLESSY SPEAKS TO US STILL

Changes in language and in law make it difficult for us to now recover arguments made on behalf of Homer Plessy, who was charged with violating an invalid law. Plessy denied that he was merely seeking equal treatment of an unequally situated race. He objected to a color-line—a barrier based on the demand of whites to separate themselves from the objects of their prejudice—those whom they deemed "colored." Albion Tourgée's aphorism was offered on Homer Plessy's behalf: an applicant for justice ought to be heard without regard to his or her color—but the Justices to whom he made this plea went out of their way to point out that Homer Plessy was a man of color, and to treat his suit as a demand for better treatment of his race. Perhaps he ought to have won his case even on that ground, as Harlan argued, but sadly and tragically the Justices of the Supreme Court refused to understand him and consequently denied him the dignity to which every person is entitled—to appear in public in his own character, without a badge of servitude imposed by law.

Today, after a century of living in a country divided by a color-line, Homer Plessy's aphorism, the plea for a color-blind Constitution, can easily be misunderstood. The color-line imposed by Louisiana law is now so much a part of our thought and language that even the jurisprudence of Equal Protection takes it for granted. White plaintiffs can claim a right to equal treatment with persons who have suffered race discrimination, on the theory that there are two races engaged in a contest for limited benefits, and that accommodations offered to those who have suffered discrimination somehow deprives those who have not.

We need a new language, rooted in modern Due Process jurisprudence, rather than the formulas of equal treatment and Equal Protection. The Fourteenth Amendment, as Homer Plessy told us, forbids drawing a line defined by animus toward a group of persons, because it denies the protection of law that a state must afford to each of its citizens. Legislation drawing such lines is unconstitutional because it violates a core principle of substantive due process—that legislation must have a rational basis. As in Homer Plessy's case, a state's failure to include a person on equal terms in a place of public accommodation is an injury to his liberty, and to his personal dignity; remedying that injury does no particularized harm to any other individual.

Remedial acts correcting the effects of past discrimination do not draw color-lines, they only help to erase them, and thus to remove barriers to diversity and inclusion. The right to enter into and move freely in civil society as a distinct individual is surely a liberty interest recognized repeatedly by the Supreme Court, as Homer Plessy once vainly argued; a right that belongs to both white and colored persons. We are a nation of immigrants now, and it will no longer do to say that citizens alone have the right to belong equally to civil society. The Fifth and Fourteenth Amendments extend their protection to all

"persons" and Homer Plessy's claim of personal dignity[139] equally expresses the ideal of personhood embedded in the Due Process and Equal Protection Clauses. This liberty interest is not a doctrine of color-blindness in the modern sense, but rather a doctrine of racial consciousness, of diversity and inclusion. Race is real, a color-line is not.

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[139] Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) ("[L]iberties [protected by the Due Process Clause] extend to certain personal choices central to individual dignity and autonomy.").