

Undoing Plessy

Undoing Plessy:
Charles Hamilton Houston, Race, Labor,
and the Law, 1895-1950

By

Gordon Andrews

**CAMBRIDGE
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P U B L I S H I N G

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*For Mindy, Ian, and Mia,
Because Love and Family Matter*

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Gordon Andrews
2014

INTRODUCTION

Undoing Plessy: Charles Hamilton Houston, Race, Labor and the Law, 1895-1950 explores the manner in which African Americans countered racialized impediments, attacking their legal underpinnings during the first half of the twentieth century. Specifically, this work explores the professional life of Charles Hamilton Houston, and how it informs our understanding of change in the pre-Brown era. A broad range of forces, from individuals, organizations, and institutions, to government in its various forms (local, state, and federal), complicated any strategy to reformulate the parameters of equality. Houston's life is replete with examples illustrating the gains made by African Americans who sought to exercise their own collective agency, contesting the imposed boundaries that limited their lives. The second purpose of this work is to explain a paradox associated with Houston's life; given his historic successes in effecting change in the pre-Brown era, why does he remain a relative unknown to the public?

Born in 1895 in Washington D.C., Charles Hamilton Houston died in 1950 and is probably best remembered as the civil rights attorney who laid the groundwork for the *Brown v. Board* decision of 1954. His life was dedicated to the emancipation of oppressed people, thus he was inspired early-on to choose the law as a tool to become, in his words, a "social engineer." Throughout a career that spanned more than a quarter century, he earned a Supreme Court record of 10-1. Between 1925 and 1950 Houston served as Vice Dean of the Howard Law School, collaborated with attorneys in the Scottsboro case, headed the legal wing of the NAACP, and represented African American railroaders in an effort to integrate white unions.

Notably, as special counsel to the NAACP, he taught and hired Thurgood Marshall, and was special council to, and later a member of, the Fair Employment Practices Commission, while simultaneously working tirelessly in private practice to improve the lives of African Americans. Houston's life provides a unique lens through which one may more accurately view the threads of race, labor, and the law as they are woven throughout American society. Houston understood the difficulties facing black workers in America, and by marshaling his considerable skills as an

attorney and leader, was able to construct a strategy that fought for full integration by changing the laws of the United States at the highest level.

This book will also argue that major inroads into the dismantling of *Plessy* were made after the incorporation doctrine was implemented through the Supreme Court's 1925 decision in *Gitlow v. New York*. The Gitlow decision rejuvenated the 14th Amendment's original intent, rescuing it from the reactionary and corporatist interpretation that relegated African Americans and laborers to the predations of individual, local, state, and federal caprice. By examining Houston's life in this context we can best understand the impact of his pragmatic approach to undoing *Plessy*. With unparalleled success, Houston developed a three-pronged strategy from 1925-1950 that focused on the courts, the workplace, and politics, securing the expansion of labor rights and civil rights for African Americans.

The labor movement in the United States has long presented historians with stultifying hurdles in their attempts to navigate the complexities and nuanced relationships that exist(ed) within working class America, particularly as they relate to the issues of race, ethnicity, and gender. Robert Zieger has identified three main areas of historiographical inquiry; these are classified as "wages of whiteness," "black agency," and "public policy" schools.¹ Some argue that there has always been an inherent value in maintaining the "whiteness" that was cultivated by working whites. Whiteness studies offer a nuanced explanation of the way in which workers early in American history nurtured a republican notion of work and community that excluded blacks. These studies have also documented how workers exerted their own historical agency, necessarily juxtaposed against African Americans who would always be the "other," in order to preserve their status regarding wages, community, and governance.²

However, whiteness studies heavily discount evidence that appeared self-evident to Houston and others, including notions of black inferiority perpetrated by elites. It was embodied in slavery, as well as through laws precluding whites from teaching slaves to read, anti-miscegenation laws, black codes, use of the courts to impose de jure segregation, and so on, throughout American history. These examples defy the singularly developed working class notions of whiteness. Buttressing Houston's observations regarding elite efforts to quash an organic coalescence of interracial forces were potent occurrences on the national stage, including the Homestead Strike, Coxey's Army, and the Battle at Blair Mountain, each discussed in parts one and two of this book. These examples demonstrate the lengths to which those in power would go to keep

segregation alive, maintaining race as a wedge to divide workers and society.

Undoing Plessy: Charles Hamilton Houston, Race, Labor, and the Law, 1895-1950 falls clearly within the school of black agency, as its explanatory power more accurately addresses Houston's life and his approach to solving inequality. The narrative of Houston's career commonly places him within the legalistic tradition, trying cases that move in a teleological fashion toward the groundbreaking case of *Brown v. Board* (1954), ultimately argued by Thurgood Marshall. Instead I argue that Houston formulated an approach to eradicating inequality that critically included the use of the law, politics, and the workplace, as part of a triangulated approach. Understanding that a purely legalistic approach would invariably fall short of eliminating the rampant inequality that plagued African Americans, Houston knowledgeably negotiated all three avenues.

In asserting the primacy of black agency, *Undoing Plessy* also confronts the public policy school which asserts, in part, that blacks actually experienced greater freedom during the *Lochner* Era, when freedom of contract was celebrated as a virtue nullifying workplace reforms.³ Kenneth Mack deftly addresses the inadequacies of the public policy argument in his article *Rethinking Civil Rights Lawyering and Politics in the Era Before "Brown."* Mack fittingly explains that freedom of contract was well understood by those living at the time, and historians today, as a not-so-subtle means by which to exclude African Americans from equal access to jobs and fair wages.

The public policy school also argues that labor laws enacted to protect workers were responsible for discrimination against blacks. They argue that laws allowed unions to become inefficient labor cartels, excluding blacks from employment, while disregarding the notion that racism existed in both unions and ownership. Instead it is argued that "while employers usually paid for discrimination, union members usually benefitted from it."⁴ This ignores the fact that labor never benefits from being divided, and that corporations have long played on any divisions, race being the most obvious focus. This argument too is countered by understanding that the very laws public policy adherents identified as harmful, were used by Houston to gain greater freedom for African Americans, not less.

By placing Houston's life and career within the historiography of the long Civil Rights Movement, this work explains how it is that someone of Houston's stature and influence in American history could be relatively unknown to the broader public. The lack of public understanding and awareness is best explained by the popularity of the short civil rights

movement and its wide dissemination by teachers in K-12, and at the collegiate level who rarely, if ever, touch on Houston's work. Instead, the narrative usually begins with Thurgood Marshall and *Brown v. Board of Education* (1954), moves through the Montgomery Bus Boycott, and the rise of Dr. Martin Luther King, is taken in dramatic fashion through the 1963 march on Washington, and finally to its resolution with the 1965 Civil Rights Act.

This chronology, while not comprehensive, demonstrates how someone like Charles Houston becomes excluded from the established narrative. Rather he appears in a sentence here, or footnote there, with every now and then a few pages dedicated to his contributions. The success of the short civil rights movement obscures the contributions of many of its founders. By placing the movement within what Jacquelyn Dowd Hall has identified as the "long civil rights movement" we gain a richer understanding of the struggle for equality.⁵ This is not a new argument, but by reexamining Houston's life there is new insight, and the value of a more historically expansive narrative of the civil rights movement. Consideration of the long civil rights movement also allows us to contemplate why the 1890's, long viewed as the "nadir" of civil rights, can also be viewed as a foundational period in the civil rights narrative. Houston's life gives us entrée into the national conversations surrounding *Plessy*, and also the biracial efforts toward freedom in the workplace and broader society, as well as the impact of turn-of-the-century imperialism, and the First World War. As the aspirations of African Americans were left frustrated after the war, the twenties and thirties let us view fundamental changes in the courts, politics, and the workplace, expanding civil rights and the rising expectations of Americans. The Depression, New Deal reforms, and World War II serve as catalysts as we witness the mature Houston maneuvering to undo *Plessy*, developing a strategy that triangulated the law, the workplace, and politics. Only through the long view do we reach the full understanding of black agency as it was exerted in local, state, national, and global arenas to inform the long civil rights movement.

There are three book-length works that address Charles Hamilton Houston's life's work, each of which falls under the legalistic interpretation of the pre-Brown era. Legalism attributes progress made in the pre-Brown era to African American lawyers, most notably Houston, who used the courts as the sole avenue toward achieving equality for African-Americans in the United States. *In Any Fight Some Fall*, authored in 1975 by Geraldine R. Segal, provides a small, but insightful first glance into Houston's life, cataloging his accomplishments in one hundred pages.

Though thin, it provides many useful interviews and illuminates Houston's life from his childhood to his days as an accomplished lawyer who used the courts to end de jure segregation.⁶

Genna Rae McNeil's 1983 treatment of Houston, entitled *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, is the most thorough biographical representation of the man, framing his life in the pre-Brown era as a continuous struggle to reverse de jure segregation, laying the groundwork that ultimately led to *Brown v. Board* in 1954. *Root and Branch: Charles Hamilton Houston, Thurgood Marshall, and the Struggle to End Segregation*, written by Rawn James Jr., was released in 2010, and examines the relationship between Charles Houston and Thurgood Marshall as they worked tirelessly together to extricate African Americans from a segregated America. After Houston's death in 1950, Thurgood Marshall, who had been hand-selected by Houston to replace him in the NAACP, carried the fight forward with a cadre of lawyers, almost all of whom were trained by Houston, to the celebrated challenge of *Brown v. Board* (1954).⁷ All three works offer revealing insights into Houston's life, however, they also tend to frame the pre-Brown era as an inevitable march through the courts, with *Brown*, or a case like it, ending de jure segregation.

Instead, this work will frame Charles Houston as a legal pragmatist, whose intellectual legacy places him between the accommodationist, self-help approach of Booker T. Washington, and W.E.B. Du Bois, to whom accommodation was anathema, and who ultimately left the country in frustration after decades attempting to achieve equality for African Americans. By exercising his vision, Houston was able to perceptively and presciently take maximum advantage of a system that too often marshaled its forces to thwart the constitutional rights of African Americans. By rejecting the legalistic approach regularly attributed to Houston, this book asserts that Houston's successes were linked to his understanding of the nature of race, labor, and the law in America. *Undoing Plessy: Charles Hamilton Houston, Race, Labor, and the Law, 1895-1950* is divided into three parts – "The World of Plessy and Houston," "Confronting Plessy," and "Undoing Plessy" – providing historical context to Houston's life's work.

Part one, *The World of Plessy and Houston*, uses the 1890s as a point of embarkation, allowing for an exploration of the intellectual, legal, and social currents that framed the condition of race at the turn of the twentieth century. Among the most notable of these were the death of Frederick Douglass in 1895, and the expanding influence of Booker T. Washington, as witnessed by his era-defining speech in Atlanta the same year. The

following year, the U.S. Supreme Court announced its decision in *Plessy v. Ferguson*, codifying segregation. Together the two chapters seek to explain the confluence of forces between 1890 and 1900 that framed the struggles workers in the twentieth century encountered, while also establishing the historical roots of Houston's family.

Part two, *Confronting Plessy*, traces Houston's life from his undergraduate career at Amherst College, to his military career as a member of the first African American officer corps in World War I, and, following the War, his decision to attend Harvard. Houston's decision to enter the legal profession can be directly traced to his own encounters with racism during WWI. Part II also explores the role of labor during the First World War, at home and abroad, as the United States government found itself one of the largest employers of African Americans after 1900. Additionally, *Confronting Plessy* addresses how World War I and the trans-Atlantic nature of the war influenced labor and race in the U.S., both before and immediately after the war.

Part three, *Undoing Plessy*, examines the critically important incorporation of the 14th Amendment through Houston's personal, legal, and political battles to improve the lives of working African Americans. A critical free speech case in 1925, *Gitlow v. New York*, compelled the Supreme Court to use the long dormant Fourteenth Amendment to incorporate the Bill of Rights into the states. The ruling unshackled promised protections in the amendment (allowing other amendments to be incorporated over time), establishing the nexus of race, labor, and the state.

After 1925, Houston fought for equal rights using the Constitution as his guide, navigating the Depression, opportunities presented by New Deal legislation, and the administrations of F.D.R. and Harry Truman. From 1925 to 1950 he would stake his career in redefining freedom for African Americans by altering the existing structure to accommodate the American Creed. In 1929 he declared that "a lawyer is either a social engineer, or he's a parasite on society."⁸ Clarifying his words, Houston was specific in his instructions to future lawyers, the most salient of which for this study are: "to recognize that the written constitution and inertia against its amendment give lawyers room for social experimentation and therefore, 'to use...the law as an instrument available to [the] minority unable to adopt direct action to achieve its place in the community and nation; to engage in a carefully planned [program] to secure decisions, rulings and public opinion on...broad principle[s] while arousing and strengthening the local will to struggle.'"⁹

These obligations are indicative of the strategy Houston employed throughout his life, and reflect the myriad historical themes that impact people's daily lives as they proceed through the political, economic, social, and cultural landscapes. In the first half of the twentieth century, African Americans used various strategies to confront inequality, employing methods developed by race advancement organizations, as well as the efforts launched by untold individuals, and occasionally the state. Houston's foresight and legal acumen were decisive in attacking inequality. How best to assault an apartheid system that influenced every facet of U.S. society is the major issue this project seeks to address. Houston's role within this struggle for freedom will effectively illustrate the interplay between individual agency and the state.

Houston's seeming ubiquity within the formal and informal power elites, both black and white, citizens and leaders, clarifies his commitment across racial and class lines. His life's work brought him into contact, and at times conflict, with many of the country's most recognizable voices over how best to advance the interests of African Americans. This is perhaps best illustrated by considering the historically well documented tensions between Booker T. Washington and W.E.B. Du Bois, or between Du Bois and Marcus Garvey. Houston, however, negotiated a path staked between that of Washington and Du Bois, convinced that if true change were to take place within the country, it would have to be accomplished through multiple fronts inside the system.

Examining Houston's life from a labor perspective sheds significant light on the larger economic issues surrounding civil rights in the United States. Franklin Delano Roosevelt in 1944 pronounced that 'a second Bill of Rights... an economic bill of rights' was needed to guarantee all persons jobs, health care, housing, and more in an effort to outline the centrality of work and security in obtaining freedom.'¹⁰ More recently, the historian Zaragosa Vargas elaborated on that notion, insisting that "workers rights are civil rights."¹¹ Better than most, Charles Houston understood that the right to work was inherently necessary to achieve real, not just perceived freedom. To that end, situating Houston's life within the contested cultural and political realities of his time enlarges our understanding of what it meant to work and be free in America during the first half of the twentieth century.

Additionally, the nature of the problem examined here relates to the way in which African American workers, within and across racial and class lines, were able to make demonstrable gains during these decades. In particular, these gains will be revealed in areas significant to workers that include the workplace, access to unions, housing, and equality before the

law at the local, state, and federal levels. To understand Charles Houston's contributions on behalf of those who labored in the black community, and more broadly in American society, his life will be contextualized within the long Civil Rights Movement. Houston's life was intimately connected with many profound efforts to liberate those who were oppressed in the first half of the twentieth century. Examining his strategies and accomplishments helps us to further understand change in the pre-Brown Era, and offers compelling insights into dilemmas currently facing those in the workplace. There is a satisfying symmetry in Houston's life in that railroads serve as bookends. He was born in 1895, as *Plessy v. Ferguson* (1896) waited to legitimate separate but equal, and he died while fighting to end racial exclusion in the railroad unions. It is to that era, the Houston family, and the state of Louisiana, that this work now turns in order to understand how *Plessy* was established.

Notes

¹ Robert Zieger, "The Historiography of Race and Labor," OAH Regional Meeting July 9, 2004, 1-10.

² David Roediger, *The Wages of Whiteness: Race, and the Making of the American Working Class* (New York: Verso, 2007), 13-15, newly revised, was the first in a series of influential works in "whiteness" studies that have since been taken up by a number of scholars and advanced to include the areas of culture, immigration, progressive reforms. For example, read Michael Frye Jacobson's *Whiteness of A Different Color: European Immigrants and the Alchemy of Race*, Gary Gerstle's *American Crucible: Race And the Nation In the Twentieth Century*, or Noel Ignatiev's *How the Irish Became White* for excellent examples of "Whiteness" studies.

³ see, David E. Bernstein's *Only One Place of Redress: African Americans, Labor Regulations, & The Courts From Reconstruction To the New Deal* (Durham: Duke University Press 2001), and Kenneth W. Mack's, *Rethinking Civil Rights Lawyering and Politics in the Era Before "Brown,"* *The Yale Law Journal*, Vol. 115, No. 2 (Nov., 2005), 256-354, <http://www.jstor.org/stable/25047607>

⁴ Paul D. Moreno's *Black Americans and Organized Labor: A New History* (Baton Rouge: Louisiana State University Press, 2006), 5.

⁵ Critical to understanding the long civil rights movement are the works of Jacquelyn Dowd Hall, Glenda Elizabeth Gilmore, and Robert Korstad. In particular Jacquelyn Dowd Hall's "The Long Civil Rights Movement and the Political Uses of the Past," *The Journal of American History*, Vol. 91, No. 4 (Mar., 2005), 1233-1263, Glenda Gilmore's, *Defying Dixie: The Radical Roots of Civil Rights, 1919-1950*, and Robert Korstad's, *Civil Rights Unionism: Tobacco workers and the Struggle for Democracy in the Mid-Twentieth-Century South*. Not only has their work been seminal in the framing of the long civil rights movement, but they

also speak directly to issues addressed in this book regarding labor, the law, and politics. For a new discursive approach, read Minrose Gwin's, *Remembering Medgar Evers, Writing the Long Civil Rights Movement*.

⁶ Geraldine R. Segal, *In Any Fight Some Fall* (Rockville, Maryland: Mercury Press, 1975).

⁷ Rawn James Jr., *Root and Branch: Charles Hamilton Houston, Thurgood Marshall, and the Struggle to End Segregation* (New York: Bloomsbury Press, 2010).

⁸ Genna Rae, McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (University of Pennsylvania Press, Philadelphia, 1983), 84.

⁹ *Ibid.*, 217.

¹⁰ David Kennedy, *Freedom From Fear: The American People in Depression and War, 1929-1945* (New York: Oxford University Press, 1999), 784-785.

¹¹ See, Zaragosa Vargas, *Labor Rights Are Civil Rights: Mexican American Workers in Twentieth Century America* (Princeton, N.J. : Princeton University Press, 2005)

PART ONE:
ESTABLISHING PLESSY

CHAPTER ONE

CONFLICT AND PROGRESS IN THE NADIR

It was not uncommon for African Americans born in the late nineteenth and early twentieth centuries to have family members who had been slaves. Those who had endured bondage linked their families to a long history of struggle and liberation. Houston's grandparents on his father's side were born into slavery, each achieving freedom through dramatically different means. Thomas Jefferson Hunn was born in Missouri to an institution and an owner equally cruel. Hunn knew that his freedom and that of his family would ultimately hinge on his ability to read, which would unlock a greater range of personal and economic freedom in the future. His illiterate master loathed any slave's efforts to educate himself, and when he discovered that Hunn possessed books, he burned them.¹ After suffering one too many beatings by his owner, Hunn resolved to escape regardless of the consequences. It was after a "brutal horsewhipping" upon his third attempt that he would successfully flee, despite an injury to his ankle which left him permanently hobbled.² On a moonless night with a slight breeze that he hoped would conceal his movements, Hunn made his move to reach Illinois, safely beyond the clutches of slavery. During his escape and subsequent settlement, he planned for the liberation of his family which included his wife and all five children.³

There T.J. (as Thomas was called) changed his name from Hunn to Houston in order to conceal his identity as he prepared to free the others. His moral and philosophical commitment to justice led him to join the Underground Railroad and also work to become a Baptist minister. While traveling back and forth from Missouri to Illinois for the Underground Railroad, he continued to work at his ministry as well as at supplemental jobs to earn a living.⁴ As if leading the enslaved to freedom were not enough, during the Civil War Thomas attached himself to Ulysses S. Grant's regiment, ultimately serving as Aide de Camp through the campaign to Richmond, and as an honorary pallbearer, returning Abraham Lincoln's body to Springfield, Illinois.⁵

It is easy to see how Charles Hamilton Houston's grandmother, Katherine Kirkpatrick, was captivated by a man like Thomas Jefferson Houston. She, too, was born to enslaved parents in Kentucky, and would eventually find freedom through escape. Katherine was not beaten by her original owner, however she suffered an equally wrenching experience, as she was torn from her mother and father at the age of seven to accompany her master's son. Slavery's decimating impact on family structure is well documented, and the Kirkpatrick's experience unfortunately mirrored that of too many other slave families. When her original owner decided to follow his son to Paducah, Kentucky, he brought Katherine's mother, reuniting mother and daughter, but left her father behind, forcing the separation of husband and wife.

Determining the number of times this cycle was repeated is a statistical impossibility, and can never account for the unspeakable sorrow that must have accompanied these devastating separations. It likely accounts, however, for the ferocity with which both Katherine and Thomas would later guard their family. The two met while Thomas Houston was preaching, and they developed a relationship that led to their marriage on April 29th, 1866. They made a life together, and as their family grew they were faced with questions familiar to many families concerning educational and economic opportunities dependent upon relocation. They moved frequently in a search for better schools, and as the children grew older and more independent, in 1890 they moved to Washington, D.C. where he worked as a cabinet maker and Baptist minister.⁶

It was there that their oldest son, William LePre Houston, would settle, marry, and raise his family. He had been a schoolteacher and a principal in Paducah, Kentucky, and was encouraged by a friend to try his hand at the law. D.C. seemed to present myriad opportunities for employment, particularly within the government, and William Houston secured such a job. While teaching in Paducah he had also met Mary Hamilton, a fellow teacher whose intelligence and beauty caught his eye. Her grandmother had been a slave whose freedom was purchased by Jesse Hamilton, but the unrest caused by the Dred Scott decision precipitated their move to Ohio. William and Mary began to see each other, and their relationship developed into a robust partnership.⁷

William Houston moved to D.C. in 1890 and secured a civil service job in the War Department. He did not relish his time away from Mary and found himself missing her deeply. Unable to wait any longer, he wrote her a letter proposing marriage, and she agreed. The two were wed in the summer of 1891, in the District of Columbia, where he had been attending Howard University law classes in a quest to provide a better life for the

family he would soon be starting.⁸ Over time he began to practice law, and Mary took a job as a hairdresser because it paid more than teaching. On September 3rd, 1895, their first and only child, Charles Hamilton Houston, was born at the family home in Washington D.C.⁹ Mary was determined that her son would have all of the advantages possible, and both parents worked diligently toward that end, providing a nurturing and protected home for their son.

The harsh realities of segregation did not impact Charles Hamilton Houston in those early years; that would come later. As the Houstons prepared to make their life in Washington D.C. with their new-born son, they were part of a larger national debate among African Americans who were interested in reversing efforts to implement *de jure* segregation. Those efforts crystallized in Louisiana, culminating in a Supreme Court decision that would take more than a half-century to repair. To fully appreciate the road taken to undo segregation, we must first visit New Orleans, with its rich racial history. There we may begin to understand the legal context in which African Americans labored, and fought for their full measure of human rights in the United States.

Nineteenth-Century Louisiana

Louisiana, with its complex political history, reaches back to the entangled colonial aspirations of Europe's powers dating back to the sixteenth century. With its remarkable geography, including gulf ports, a legendary river system, steamy bayous, and the almost mystical moss-draped Cyprus trees, Louisiana's soul is the city of New Orleans. Those who settled in the area were lured by the possibilities of vast riches, some rumored and some real, propelled by the mercantile impulse that guided colonial policies of the time. Louisiana served as a crossroads for a broad swath of humanity which settled in its unique city, built below sea level at the end of the Mississippi approximately one hundred miles from the Gulf of Mexico. It included Native Americans, Africans, free and enslaved, Haitians, Spaniards, French, Creole, British, and the kaleidoscope of combinations made possible by time, proximity, and human inclination. As it emerged from the strains of Reconstruction, the city of New Orleans provided the distinctive setting and circumstances that would unhinge any remaining egalitarian impulses. With the rise to power of the Democratic "Redeemers," the mundane act of traveling from one city to another would thrust Homer Plessy headlong into a transformative Supreme Court case, legitimizing *de jure* segregation for the next sixty years.

The facts surrounding the arrest of Homer Plessy are fairly well known, and have often been retold. On June 7, 1892 Homer Plessy, who was 1/8 black, purchased a first class train ticket to travel from New Orleans to Covington, approximately thirty miles outside the city limits. When he attempted to be seated in the first class car he was confronted by the conductor, who instructed him to move to the colored car, which he refused to do.¹⁰ He was then promptly arrested, leading to appeals on both sides as the case moved its way to the Supreme Court of the United States. These simple facts overlook, as historian Blair Kelley has pointed out, “the broader social circumstances from which Plessy emerged,” which are too often ignored.¹¹

Against the background of the post-Reconstruction amendments undoing slavery, providing for equal protection, and granting black male suffrage (among other rights), African Americans faced a concerted effort on the part of whites to render those gains null and void. Those efforts crystallized in the Supreme Court decision *Plessy v. Ferguson*, which would earn for the 1890’s the deserved attribution by Rayford W. Logan as the nadir of race relations.¹² However, race based segregation in the United States did not just materialize as an anachronistic ethos plaguing the circumstance of race in America for nearly sixty years. In fact it emerged in the vibrant contestations and debates among workers, intellectuals, and the political classes of all races. Indeed the challenges sought to define the very essence of what an industrial democracy in the United States would become. Understanding how *Plessy* emerged and its reception by the public at large in 1896 begins with an exploration of the socio-cultural, political and legal milieu of New Orleans at the end of the nineteenth century.

Louisiana in the 1890’s would prove to be fertile ground for the continuation of the debate over race and its place in society among those who still held out hope for the promises of reconstruction, as well as those who were actively striving to circumvent those promises through legal or extralegal means. The city of New Orleans presented a unique circumstance given its history, geography, and politics, which combined to inform the debate on race as it related to the matter of segregation and public accommodations. Jim Crow cars first appeared in Florida in 1887, and the practice spread as those in the white power structure boldly moved to undermine the gains that had been attained during Reconstruction.¹³ Moreover, the extent to which Jim Crow laws would inhibit the freedoms of black citizens, North and South, was furthered by fading empathy for the ideals of Reconstruction and the rise of the “redeemers.”¹⁴ Interestingly, what would begin as a localized, biracial effort to confront

segregation, ended with the sanctioning of the democratically repugnant notion of “separate but equal” by the nation’s highest court. The immediate question for Louisianans in the 1890’s, both black and white, was what, if anything, could they do about it?

Under Reconstruction, Louisiana was able to pass laws fully respecting its heterogeneity, however it was also susceptible to the growing reactionary forces that ultimately dashed the hopes of radical Republicans. For example, within a year of the ratification of the Fourteenth Amendment in 1868, the legislature passed a law that forbade segregation based on race.¹⁵ The “Equal Accommodation Act” stated in part that “common carriers...make no accommodations on account of color”¹⁶ Endorsed earlier by Article 13 of Louisiana’s Constitution, it declared that,

‘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.’¹⁷

Those passengers in fact represented a heterogeneity fully expressed in their rich mix of Spanish, French, African, European and Haitian ancestries. Segregation did not make sense to many Creoles, due to the dynamics of race that existed, “especially since it classified many white-skinned people as ‘Negro.’”¹⁸ That is why, when the Separate Car Law (Act No. III) passed in 1890, it was met with immediate disdain and revealed not only resentments within the greater black/white divide, but also the divisions of race, ethnicity and class that existed within the city of New Orleans. For instance, Afro-Creoles advocated for total integration in society and its institutions, while blacks cultivated independent black churches and schools. This tension would eventually lead to a fracturing among people of color within New Orleans, as “an elite group of Creoles of Color came together,” remonstrating for a legitimate challenge to the law.¹⁹

The challenge proved true the old adage that politics does make for strange bedfellows, as the white ownership of the East Louisiana Railroad sided with the newly-formed Citizens Committee for the Annulment of Act No. III, led by Afro-Creole legislator Aristide Marie, with a strategy to use the courts and the 14th Amendment to take the law down.²⁰ The law stipulated that there would be two first class cars, and the railroads would be responsible for determining which passengers were white and which black. The owners sided with the Citizens Committee out of economic

self-interest, but nonetheless added significantly to the partnership as they challenged the law. For the railroad's part, the law opened them up unnecessarily to increased costs (two cars instead of one) and a liability to lawsuits due to the potential to misidentify passengers.²¹ As one observer noted, "if you were not informed you would be sure to pick out the white for colored and the colored for white."²²

It was also plain, as Akhil Amar has written, that the law's "whole point was to privilege whites and degrade blacks, in direct defiance of the 14th Amendment's promise of equal citizenship."²³ But citizenship itself was not such a clear cut proposition to many in power during the nineteenth century. In the antebellum period citizenship largely emanated from the state in which one was born and resided – a Kentuckian, Virginian, or Louisianan, etc. Then there were those immigrants who were naturalized and granted citizenship by the federal government, which also included those in the federal territories.²⁴

Debates over race and identity were nothing new to Louisiana. It must be remembered that it was the Louisiana Purchase, at the beginning of the nineteenth century, that first raised the issue of citizenship not directly addressed by the Constitution. The question surrounded the issue of designation for those persons in the lands purchased. Would they become instant citizens? While there were provisions in the Constitution for naturalization, and for territories to be admitted to the union, there was no such consideration for the status of residents of land that was bought. Would the Spanish, French, Indian, Blacks, both free and enslaved, become immediate citizens?

Congress manufactured an answer that satisfied all by ignoring the reality, and simply turned Louisiana into a territory under federal authority. As territories applied for statehood, those individuals defined as citizens by the fledgling state would, true to antebellum custom, be granted citizenship emanating from the state. So, while the nineteenth century began with the nation embroiled in a citizenship crisis that enveloped Louisiana, coming to an acceptable racial end only through an act of legislative fiat, so too, did the century end. This time, however, the crisis would be promulgated by another branch of government, the Supreme Court of the United States.

The decision to challenge the Separate Car Act was far from unanimous, and was hotly contested both within the community of color and without. These "broader social circumstances from which *Plessy* emerged have been less well probed" and deserve an airing in order to appropriately frame the questions of the day. Should, for example, a case be brought to directly challenge the "equal but separate" portion of the act,

as it was then known, or should a more accommodating posture be assumed in light of the then-current case law and cultural, political and economic dispositions of those in Louisiana and the United States as a whole?²⁵ Finally, if a case were brought, should it be a concerted effort on the part of the offended communities or should it be left to individuals to bring action to the courts?

The Courts Prior To Plessy

As the era of Reconstruction ended, the Supreme Court of the United States found itself in the midst of a nation adapting to massive changes. As Samuel P. Hays notes in his book, *The Response to Industrialism: 1885-1914*, aggrieved parties in the U.S. regularly used the courts to address wrongs, rather than the legislative and executive institutions of the state and federal governments.²⁶ This would change as the nation moved away from “judge-made” law to “statute law,” and as the modern American state transformed at the end of the nineteenth century and into the twentieth. For African Americans though, the courts would remain a platform from which to redress the issue of rights that had been abridged. While the majority turned to local, state, and federal governments to legislate new laws, those avenues were largely closed to blacks, leaving the courts as the only viable source for justice, such as it was.

A few of the early, formative cases that called the Supreme Court’s attention to the Fourteenth Amendment are noteworthy for the reason that they demonstrate the interpretive approach of the court. It was not inclined to read broadly the intent of the Reconstruction Congresses that authored the amendment; instead it would rely on a very narrow reading, at times standing the Fourteenth Amendment on its head. There was a question among the jurists concerning whether the Fourteenth Amendment “was limited to state actions against freedmen (like the black codes) or if it was meant to apply to individuals who acted with the covert consent of former Confederate state leaders as well as to the states themselves.”²⁷

In the *Slaughterhouse Cases* (1873), the justices were faced with a state-granted monopoly that permitted a single company to claim all the meat-packing business in New Orleans. Louisiana awarded the twenty-five year contract, citing the state’s responsibility to protect the health of its citizens. Butchers felt this was an unlawful deprivation of their right to work, depriving them of their livelihoods, and they sued under the 14th Amendment’s protections.²⁸ The court ruled in the narrowest fashion, declaring that the intent of the amendment was to protect ex-slaves, which these men were clearly not. Additionally, and more disturbingly, the court

recognized both state citizenship and national citizenship, while the 14th Amendment only protected those rights attributed to national citizenship.²⁹ In a 5-4 decision, the justices ruled that the butchers had no claim of harm as national citizens, and the state of Louisiana was within its rights to protect its people in this fashion.

Another alarming case, *Munn v. Illinois* (1877), resulted in a decision allowing Illinois to regulate private property for public use, and in *Santa Clara v. Southern Pacific* (1886) personhood was granted to corporations. *Munn v. Illinois* legitimated the state's ability to set maximum charges for the storage of grain in warehouses. The act did not constitute a violation of plaintiff's life, liberty, or property without due process, because according to the justices, the state has a right to exercise its police powers, and the property of the elevator owners constituted a public interest and could therefore be regulated as such.³⁰ Furthermore, in a still confounding decision, the justices in *Santa Clara County v. Southern Pacific* (1886) decided a case that originally turned on whether Santa Clara, California could count the fences alongside the railroad tracks as assets, and therefore taxable. Southern Pacific countered that they were entitled to deduct the cost of the mortgage just as any person in California was.³¹ The Supreme Court decided in Southern Pacific's favor, granting that its 14th Amendment rights had in fact been violated. It is ironic that the Supreme Court of the United States saw fit to grant personhood to a corporation, thereby protecting it from state action, but actual persons could not expect the same consideration. These decisions severely weakened, if not altogether extinguished, the original intent of the 14th Amendment.

Two other cases that dealt directly with civil rights and would have a bearing on future action against the state of Louisiana were *Hall v. DeCuir* (1878), and the *Civil Rights Cases* (1883). The *Hall* case dismantled the Equal Accommodations Act of 1869, which forbade the segregation of passengers on carriers within Louisiana. Enforcement of the law was restricted to travel within that state, and the court ruled that a passenger entering the state might still be forced to ride in an integrated car. It also federalized the doctrine of "reasonableness" regarding the notion of separate but equal, allowing states to legally rationalize the legitimacy of segregating whites and blacks.³² Also devastating was the Supreme Court's overturning of the 1875 Civil Rights Act for "exceeding Congress's enforcement authority under the 13th and 14th Amendments."³³ Congress, it adjudged, had no right to interfere with private acts, declaring that if a restaurateur wanted to segregate diners in his establishment, that was his private right. The amendments only protected against state action, and were therefore not applicable. Taken together, these cases stirred the

vigorous debate over separate facilities, equal rights, whether social rights were the same as civil rights, and how best to proceed with untangling the frayed threads of logic.

Political and Social Considerations

There was a very real dispute between those in the Creole community, who favored a direct engagement in the courts, and those in the African American community, who were willing to accommodate social segregation if civil rights were protected.³⁴ This disagreement would play out in the fracturing of the American Citizens' Equal Rights Association (ACERA), which was founded by Creoles of color in 1891 to address the increasing number of segregation laws.³⁵ Afro-Creoles and African Americans argued over this issue, with Afro-Creoles asserting the need for total institutional integration, while African Americans were inclined to nurture their own black schools and churches separately.³⁶ After the split, an influential group of Creoles of color, led by Aristide Marie, a long-time agitator for equality, emerged and sought a fitting case with which to challenge Jim Crow.³⁷

While Aristide Marie and his group waited for just the right case, the political winds were shifting unfavorably. Two unpropitious outcomes regarding the passage of bills written in the spirit of the Reconstruction congresses were harbingers of future legislative dispositions concerning race. The Blair Bill, authored by Senator Henry Blair of New Hampshire, provided federal monies (starting with \$15, 000,000.00) for education, to be disbursed to the states in an attempt to shore up the woefully half-hearted efforts of many southern states to fund their schools with a modicum of equality. "Segregation of the races was permitted, but no inequality in the benefits derived from the bill."³⁸ Additionally, the Lodge Bill (Force Bill), offered by Henry Cabot Lodge in the House of Representatives, was designed to protect Blacks who wanted to exercise their right to vote in federal elections, free from intimidation. These bills were viewed by many in the south as a direct threat to state sovereignty, but they were equally viewed as a threat to the Democratic Party's dominance in the region.³⁹

Both bills were defeated over the course of long debate that exposed the range of intellectual currents competing for influence. Some, like J.L.M. Curry of Alabama, thought the education bill's defeat had more to do with southern "race-prejudice...and fear that the education of the negroes would make them less easily manipulated in elections had more influence in the adverse action than constitutional scruples."⁴⁰ With the