

PUBLIC RIGHTS, SOCIAL EQUALITY, AND THE CONCEPTUAL ROOTS OF THE *PLESSY* CHALLENGE

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This Article argues that the test case that gave rise to the 1896 decision in Plessy v. Ferguson is best understood as part of a well-established, cosmopolitan tradition of anticaste activism in Louisiana rather than as a quixotic effort that contradicted nineteenth-century ideas of the boundaries of citizens' rights. By drawing a dividing line between civil and political rights, on the one hand, and social rights, on the other, the Supreme Court construed challenges to segregation as claims to a "social equality" that was beyond the scope of judicially cognizable rights. The Louisiana constitutional convention of 1867–68, however, had defined citizens' rights within a quite different typology, conferring a state constitutional guarantee to all citizens of the same "civil, political, and public rights," and providing the basis for successful litigation against forced separation on public transportation and in public accommodations. Understanding this "public rights" construct, and Louisiana's eleven-year experience under the 1868 state constitution, enables us to see Homer Plessy's challenge to Louisiana's Separate Car Law as emerging within a complex exchange of ideas and practices among activists who traced their ancestry to Africa, the United States,

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France, and Haiti. Far from being visionary or anachronistic, the Plessy challenge was solidly grounded in time and place. It drew upon both a dense social network of urban and rural supporters, and a creative line of vernacular political thought.

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The citizens of this State . . . shall enjoy the same civil, political, and public rights and privileges, and be subject to the same pains and penalties.

Louisiana Constitution of 1868¹

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 [the Separate Car Law] is an attempt to apply this rule to the establishment of legalized caste-distinction among citizens.

Brief of the plaintiff in error, filed April 6, 1893,
*Plessy v. Ferguson*²

INTRODUCTION

In 1892, the Louisiana Supreme Court ruled that when Homer Plessy refused to give up his seat in a whites-only, first-class train carriage he was displaying an “unreasonable insistence upon thrusting the company of one race upon the other, with no adequate motive.”³ In 1896, the U.S. Supreme Court agreed that the citizenship granted by the Fourteenth Amendment contained no grounds on which to assert a right to the “social equality” that they claimed Homer Plessy’s refusal of legally mandated segregation implied. Indeed, Justice Henry Billings Brown declared that “in the nature of things” the Amendment could not have been intended to “enforce” social equality.⁴ The

1. LA. CONST. tit. I, art. II (1868).

2. 163 U.S. 537 (1896).

3. *Ex parte Plessy*, 11 So. 948, 951 (La. 1892). The decision is also excerpted in *THE THIN DISGUISE: TURNING POINT IN NEGRO HISTORY* 71–74 (Otto H. Olsen ed., 1967).

4. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (“[I]n the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.”).

Court therefore ruled that the legislature of the State of Louisiana had not violated the U.S. Constitution when it passed a statute that obliged railroad companies to provide “equal but separate” railway cars and to have their agents assign passengers to one or another car based on race.⁵ Homer Plessy’s contrasting claim that the statute in question established “an insidious distinction and discrimination between citizens of the United States, based on race, which is obnoxious to the fundamental principles of national citizenship” thus failed.⁶

Precisely because the *Plessy* decision appears, in retrospect, to have been both repellent and consequential, it often seems to tempt constitutional analysts to shift a portion of the burden for its most repellent aspects onto what is imagined to be “the historical context.” In turning to the historical record to illuminate the *Plessy* case, legal scholars have characteristically asked a set of broad questions derived from the language of the decision: Did the drafters of the Fourteenth Amendment indeed mean to include “social equality,” or racial integration, as a component of citizenship? Was racial segregation perhaps already a well-established norm, rendering the decision a mere formality? And most importantly, could one have expected any other outcome from within a society so pervaded with racism of various kinds?

While deploring the decision in *Plessy*, analysts often come up with answers that hew rather closely to the framing proposed in the majority opinion. After examining the complexity of the debates and maneuvering surrounding the drafting of the Fourteenth Amendment, William Nelson concludes that the Reconstruction Congress had not resolved “the question whether the Fourteenth Amendment permits or prohibits segregation.”⁷ In Nelson’s view, the judges in *Plessy* should not be charged with racism for having chosen to interpret an indeterminate doctrine in a way that conformed to the pressures of the time.⁸ Michael Klarman argues that the decision in *Plessy* “simply mirrored the preferences of most white Americans” and that a contrary decision could hardly be expected unless a strong social movement had existed that could support a campaign against segregation.⁹ Owen Fiss views the outcome of the case as doctrinally “a foregone conclusion,” and characterizes Homer Plessy’s attorney as a visionary and a

5. *Id.* at 552. “Equal but separate” rather than “separate but equal” is the precise wording of the statute. Act of May 12, 1890, No. 111, 1890 La. Acts 152.

6. *Ex parte Plessy*, 11 So. at 949.

7. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 186–87 (1988).

8. *Id.*

9. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 22 (2004) [hereinafter KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS*]; see also Michael Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303.

legal Don Quixote whose “conception of citizenship” was “shaky.” Charles Lofgren views the decision as in keeping with “the spirit of the age.”¹⁰

In these formulations, “historical context” takes on an almost fatalistic explanatory value. Michael Klarman thus writes, “Justices in the *Plessy* era were too immersed in their historical context to spot the oppression that historical hindsight can readily see in racial practices at the turn of the twentieth century.”¹¹ This is, I will argue, an unnecessarily impoverished way of thinking about the relationship of law and historical inquiry. For one thing, the bog of determinism versus contingency is a famously deep one, generally better skirted than plunged into.¹² After a certain point, most things “have to” turn out more or less the way they turned out—but this hardly means that we are bound from the outset to accept the terms of the actual decision as defining the parameters of the possible in a given society. Moreover, invoking the larger “historical context” to argue that rights-denying court decisions were largely epiphenomenal seems oddly ahistorical: as those who fought over the legislation were well aware, law was an absolutely crucial component of formal segregation, and formal segregation was a linchpin of the conscious political project of white supremacy. This is why the *Plessy* challenge drew the energies of equal-rights activists for many years, even as they recognized the high probability of losing the case.¹³

The dialogue between historians and legal scholars is productive precisely because historical context is *not* simply a backdrop, a stage setting, or an external force pressing judicial events in one direction or another. A full historical context incorporates wide networks of social interaction and situates legal and other initiatives within shared and competing structures of discourse in order to illuminate the origins of a case as well as its meanings for different actors.¹⁴ Knowing that the 1890s were marked by pervasive racism, or that the Republican Party was becoming more conservative, or

10. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 354, 357, 362 (1993); CHARLES A. LOFGREN, *THE Plessy CASE: A LEGAL-HISTORICAL INTERPRETATION* 197 (1987).

11. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS*, *supra* note 9, at 58. For alternate perspectives, see Matthew D. Lassiter, *Does the Supreme Court Matter?—Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401 (2005), and Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256 (2005).

12. On the metaphor of the “Serbonian bog,” see JOHN MILTON, *PARADISE LOST* 46 (Merritt Y. Hughes ed., Bobbs-Merrill Educ. Publ’g. 1983) (1667). For law-related use of the metaphor, see *Landress v. Phoenix Mutual Life Insurance Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting), and JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 20–21 (2004).

13. For the contrary view, see KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS*, *supra* note 9, at 59, who argues that “[m]ost Jim Crow laws merely described white supremacy; they did not produce it.”

14. The term “mutually constitutive” is often invoked to denote this back-and-forth between law and other forms of action, in which the distinction between “law” and “society” is intentionally blurred. The elegant and now classic manifesto for one variant of this approach is Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). See also the discussion in the dossier on history and law in Numéro Spécial, *Histoire et Droit*, 57 ANNALES: HISTOIRE, SCIENCES SOCIALES 1425 (2002), especially Alain Boureau, *Droit naturel et abstraction judiciaire: Hypothèses sur la nature du droit médiéval*, 57 ANNALES: HISTOIRE, SCIENCES SOCIALES 1463 (2002).

that “public opinion” did not endorse “social equality” does not really tell us how the challenge was seen by Homer Plessy, his allies, and his enemies. Such generalities do not capture the dynamics of their activism and the historical constraints upon it. The New Orleans Citizens’ Committee for the Annulment of the Separate Car Law set out to *create* a context, drawing upon public practices, shared values, and social networks that now require considerable digging to reconstruct. Tracing these ideas and practices, one can see how a group of men and women built on their own understandings of the past and deployed vernacular as well as formal concepts of equality. Some among them may have been Quixotes, but more in the sense of citizens insisting on honorable conduct than in the sense of men and women tilting at windmills.¹⁵

In this Article I will argue that Homer Plessy’s supporters—and his opponents, though they were only later to acknowledge it—envisioned his legal challenge to a large extent as a claim to what the 1868 Louisiana Constitution had defined as *public rights*. That constitution, in force until 1879, had assured all of the state’s citizens access to the same “civil, political, and public rights and privileges.”¹⁶ For Plessy’s fellow activists in New Orleans, “public rights and privileges” were essential to the substance and symbolism of the equal dignity of citizens in the public sphere. Moreover, a claim of equal standing in public directly challenged the effort to impose white supremacy; it was not simply an expression of a preference for one rather than another mode of assorting individuals on a train.¹⁷ “Social equality,” by contrast, was a label their enemies had long attempted to pin on the proponents of equal public rights in order to associate public rights with private intimacy and thereby to trigger the host of fears connected with the image of black men in physical proximity to white women. To conflate the phrase “social equality” with an imagined taxonomy of civil, political, and social rights is to mistake an insult for an analytic exercise.¹⁸

The argument of this Article will proceed in three steps. First, I will explore the process by which the concept of “public rights” made its way into the 1868 Louisiana Constitution and the disparate historical traditions on which the delegates to Louisiana’s constitutional convention seem to have drawn. Second, I will trace the public rights jurisprudence that emerged in Louisiana in the early 1870s in response to a variety of cases brought by men and women of color. I will also describe some of the ways ordinary

15. I thank Roger Chartier for pointing out this alternate reading of the Quixote metaphor.

16. LA. CONST. tit. I, art. II (1868).

17. For an intriguing discussion of the interplay of public standing and social status in conservative thought in Britain after the French Revolution, see DON HERZOG, *POISONING THE MINDS OF THE LOWER ORDERS* 414–546 (1998). For an explication of the dignitary content of the *Plessy* case from the point of view of normative political philosophy, see Gerald J. Postema, *Introduction: The Sins of Segregation*, 16 L. & PHIL. 221 (1997). Postema argues that segregation’s core evil is the public denial of the fundamental good of “status or standing as a full and equal member of one’s society.” *Id.* at 241.

18. The language used in the Reconstruction-era struggle can be followed in the pages of the *New Orleans Tribune* and the *New Orleans Daily Crescent* during late 1867 and early 1868.

citizens of color in Louisiana acted on their claims to public standing after the defeat of Reconstruction, thereby keeping alive in practice an idea that was no longer part of the state's written law. Third, I will argue that in the course of the *Plessy* challenge the idea of equal public rights developed into a broad anticaste principle that sought to change the course of a rapidly narrowing Federal Fourteenth Amendment jurisprudence.

From this perspective, the Louisiana Separate Car Law was not a mere expression of deteriorating "race relations." It was part of a frontal attack by white supremacists on the belief that the citizenship recognized by the Fourteenth Amendment—if not the Amendment itself—prohibited the state from becoming complicit in public acts of disrespect. The anticaste principle expressed by *Plessy*'s supporters encompassed the earlier concept of equal public rights and constituted a reply to that attack. By fusing historical inquiry with doctrinal analysis across the three decades that linked the *Plessy* challenge to the 1868 Constitution, we can thus reframe the interpretation of the *Plessy* decision and situate it somewhat differently with respect to the Fourteenth Amendment.

I. WRITING PUBLIC RIGHTS INTO LAW

Louisiana's state constitutional convention of 1867–68 was a remarkable conclave. Its members were elected in the tense aftermath of a murderous 1866 vigilante attack on white and black Republicans in which the police appeared to be complicit. The behavior of local authorities in turn had helped to discredit President Andrew Johnson's conciliatory policy toward white Southerners and hastened the advent of congressional Reconstruction.¹⁹ Drawn from an electorate that included newly enfranchised male former slaves, the convention comprised nearly equal numbers of men categorized as white and those categorized as black or of color.²⁰ On the floor of the convention, agrarian reform and women's rights were debated alongside suffrage and the content of citizenship. In Louisiana's "constitutional moment," various delegates revealed a strong form of anticaste thinking that had its roots in the cosmopolitan world of free men and women of color in the Gulf Coast and the Caribbean and that was reinforced by the aspirations of former slaves in Louisiana to a place in the politics and public culture of the state.²¹

19. These events were discussed in the New Orleans *Tribune* in the months surrounding July of 1867, the first anniversary of the massacre at Mechanics' Hall.

20. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 62–67, 262–63 (1988). A close analysis of the composition of the delegates is presented in chapter six of TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA, 1862–1877, at 111–35 (1984).

21. Portions of the debate appear in OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONVENTION, FOR FRAMING A CONSTITUTION FOR THE STATE OF LOUISIANA (1867–68) [hereinafter OFFICIAL JOURNAL]. An overview of the legislature is provided in ROGER A. FISCHER, THE SEGREGATION STRUGGLE IN LOUISIANA, 1862–77, at 48–56 (1974).

The phrase “public rights” was introduced into debate in the early weeks of the convention. An initial draft of a proposed bill of rights, from a committee chaired by the former slaveholder Judge William H. Cooley, proposed a brief text guaranteeing all citizens the “same civil and political rights and privileges.” This much even conservative Republicans understood to be essential. A dissenting minority of the committee, including a schoolteacher of color from Ascension Parish named P. F. Valfroite, the shoemaker Charles Leroy, and the former slave James H. Ingraham, immediately counter-proposed a fuller text. In keeping with a longstanding radical Republican belief that the Declaration of Independence was the foundation upon which the U.S. Constitution should rest, the minority report argued that the state constitution should begin by declaring that “all men are born free and equal.”²² It should explicitly guarantee all citizens “the same public, civil, and political rights and privileges.”²³

The origins of the phrase *public rights* are difficult to pin down. At least three lines of thought came together to give meaning to the concept: longstanding conceptions of personal honor, French and Caribbean revolutionary ideas of equality, and nineteenth-century European liberal codifications of rights. Ideas of honor underlay the belief that forced separation on the basis of color constituted what would today be called a dignitary injury. Egalitarian currents from the age of revolution provided a basis for arguing that all citizens had a standing of equality incompatible with the imposition of such dignitary injuries. And formal European political theory could be invoked to argue that the state was obliged to guarantee what were alternatively characterized as “social rights” or “public rights.”

An honor-based right to respect in public places can be traced far back in the jurisprudence of *ancien régime* and colonial societies, though it was conferred only on certain members of such societies. In eighteenth-century Spanish America, for example, a white man aggrieved by what he saw as the insolent or importunate public behavior of a black slave could invoke not only his own personal honor but also a public right or interest that was offended when necessary hierarchies were thus publicly affronted.²⁴ Once colonies became republics, free and freed men could argue that self-dishonoring public

22. This concept of the Declaration was vividly expressed by both Charles Sumner and Frederick Douglass. See JOHN STAUFFER, *THE BLACK HEARTS OF MEN: RADICAL ABOLITIONISTS AND THE TRANSFORMATION OF RACE* 22–26 (2001). Some prewar state constitutions had done the same, though the import of the phrase “free and equal” had been diminished by the decision in *State v. Post*, 20 N.J.L. 368, 373–76, 378–86 (1845). For the successive draft wordings of the bill of rights, see OFFICIAL JOURNAL, *supra* note 21, at 84–109, 116–117.

23. OFFICIAL JOURNAL, *supra* note 21, at 96.

24. A case of this kind from colonial Peru is carefully analyzed in Tamara J. Walker, *Ladies and Gentlemen, Slaves, and Citizens: Dressing the Part in Lima, 1723–1854*, at 142–43 (2007) (unpublished Ph.D. dissertation, University of Michigan) (on file with author). For a discussion of honor, illegitimacy, and constructs of “the public,” see ANN TWINAM, *PUBLIC LIVES, PRIVATE SECRETS: GENDER, HONOR, SEXUALITY, AND ILLEGITIMACY IN COLONIAL SPANISH AMERICA* 25–37 (1999).

displays of deference should be a thing of the past.²⁵ But as long as slavery existed, states generally continued to require public deference on the part of those with apparent or known slave ancestry, in a mix of class and color subordination thought essential to the maintenance of slavery itself. Free people of color in antebellum Louisiana had been subjected to a particularly exigent set of such required acts of deference, and relief from these humiliations was very much on the minds of many of the members of the 1867–68 convention.²⁶

The fundamental idea of differential public standing had been challenged by the 1789 French Declaration of the Rights of Man and of the Citizen, which reflected a conscious assault on the allocation of rights and privileges according to birth, rank, and estate. The Declaration did not directly address the question of equal access to public accommodation or public transport, nor did it speak of color. But it reflected the dignitary dimension of public rights in declaring all citizens eligible for public office, and it located such rights within the essential nature of human beings:

Article 6. The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, are equally eligible for all public honors, positions, and employment [*toutes dignités, places et emplois publics*], according to their ability, and without any distinction other than their virtues and talents.²⁷

In late eighteenth-century France, the claim that all men had equal standing in civil society was a powerful statement about the respect that should be accorded to citizens, and a call for the state to protect basic liberties.²⁸ In practice, however, the legislators of Revolutionary France equivocated on the applicability of the Declaration of the Rights of Man to the colonies, first holding back on the extension of civil equality to free men of color, then conceding such equality and consenting to the abolition of slavery, then reimposing slavery during the reign of Napoleon Bonaparte.²⁹

25. On the transformations of these concepts in the nineteenth century, see HONOR, STATUS, AND LAW IN MODERN LATIN AMERICA (Sueann Caulfield et al. eds., 2005).

26. See CARYN COSSÉ BELL, REVOLUTION, ROMANTICISM AND THE AFRO-CREOLE PROTEST TRADITION IN LOUISIANA, 1718–1868, at 222–75 (1997).

27. For the text of the *Déclaration*, see LOUIS TRIPIER, LES CONSTITUTIONS FRANÇAISES 10 (1848). The term *dignité* evoked both merit and respect as well as honorableness. 1 DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE 1085 (Alain Rey et al. eds., 1998).

28. Within the *droits de l'homme* (rights of man) one finds the complementary concept of *libertés publiques* (public liberties). For a mid-nineteenth-century discussion, see 1 DENIS SERRIGNY, TRAITÉ DU DROIT PUBLIC DES FRANÇAIS, PRÉCÉDÉ D'UNE INTRODUCTION SUR LES FONDEMENTS DES SOCIÉTÉS POLITIQUES 287–88 (1846). See also JEAN-LUC AUBERT, INTRODUCTION AU DROIT ET THÈMES FONDAMENTAUX DU DROIT CIVIL § 56, at 47–48 (9th ed. 2002). The “rights of man” can be seen to include the right to “public liberties.” These do not translate directly as “public rights,” but could be so named in English.

29. See LAURENT DUBOIS, AVENGERS OF THE NEW WORLD: THE STORY OF THE HAITIAN REVOLUTION (2004); JOHN D. GARRIGUS, BEFORE HAITI: RACE AND CITIZENSHIP IN FRENCH SAINT-DOMINGUE (2006).

The most explicit assertion of the dignitary component of the claim to equal rights came not from Paris, but from the colonies themselves. At the end of the eighteenth century, free men of color Vincent Ogé and Julien Raimond from Saint-Domingue had allied with French abolitionists to advance the case for equal political rights for free men of color, and Raimond became highly influential in the French National Assembly. Free men of color had also carried their struggle to the battlefield, particularly in the western part of Saint-Domingue. At Mirebalais in 1791, for example, “citizens of color” signed a “Concordat” with white colonists that obliged the latter to recognize their “violated and misunderstood rights” and repudiated “the progress of a ridiculous form of prejudice.” These struggles overlapped and sometimes conflicted with the struggle against slavery itself that culminated in Haitian independence in 1804.³⁰

In France, the rise of the Empire under Napoleon Bonaparte and the subsequent restoration of monarchical rule eclipsed many of the egalitarian claims of the Declaration of the Rights of Man. By the time of the 1830 Revolution, however, some of the key ideas of the Declaration had been adjusted to fit France’s constitutional monarchy, and the first formal use of the precise phrase *public rights* seems to have come from a jurist writing in Paris in the 1830s. Pellegrino Rossi, an exiled Italian federalist, had been named by Minister François Guizot to a chair of constitutional law at the Collège de France in the 1820s. Rossi developed a detailed theory that divided the rights of people living in a state of law into three categories: private rights, public rights, and political rights.³¹ While *political* rights, in Rossi’s view, should be limited based on the different presumed capacities of certain groups (hence, for example, denied to women, children, and the insane), *public* rights should be open to all.³² He judged privileges for private persons in the public domain to be impermissible.³³

In 1846, the French jurist Denis Serrigny enumerated a set of “public rights” that were absolute and belonged to all citizens. These rights were constitutive of “social equality,” including “the absence of castes which place one portion of the members of the State into orders or classes from which they cannot exit.”³⁴ By 1848, with the revolution that brought the Second Republic, the previous reluctance to advocate full political equality gave way to a more egalitarian picture of rights, yielding a final abolition of slavery in the French colonies and an accompanying text that endorsed the

30. See DUBOIS, *supra* note 29, at 80–88, 119–20; LAURENT DUBOIS, A COLONY OF CITIZENS: REVOLUTION AND SLAVE EMANCIPATION IN THE FRENCH CARIBBEAN, 1787–1804 (2004); GARRIGUS, *supra* note 29. For a synthesis, see Laurent Dubois, *An Enslaved Enlightenment: Rethinking the Intellectual History of the French Atlantic*, 31 SOC. HIST. 1 (2006).

31. 1 P. ROSSI, COURS DE DROIT CONSTITUTIONNEL PROFESSÉ À LA FACULTÉ DE DROIT DE PARIS 9 (1866).

32. *Id.* at 11–12.

33. *Id.* This is one of many re-editions of a set of lectures dating originally to 1836. See PHILIPPE BRAUD, LA NOTION DE LIBERTÉ PUBLIQUE EN DROIT FRANÇAIS II, 9–10, 45 (1968). I thank Pasquale Pasquino for discussions of Rossi’s history.

34. 1 SERRIGNY, *supra* note 28, at 287–88.

dignity of all citizens. Minister François Arago declared that law in the colonies should henceforth make no distinctions that would violate the principle of “*égalité sociale*” [social equality].³⁵ In this context, the phrase “social equality” had both a formal legal meaning and a positive, anti-aristocratic resonance.

These European and colonial strands of public rights thinking were intellectually and socially available to the legislators of the 1867–68 Louisiana constitutional convention. Louisiana had lived under Spanish rule for the latter part of the eighteenth century, and everyone knew that how one was treated in public constituted a measure—indeed, it was often *the* measure—of one’s honor. The transfer of the colony to France and then to the United States brought a formal guarantee of the rights of U.S. citizenship, a guarantee quickly invoked by men of color who had served in the militia under Spain. President Jefferson’s refusal to honor this portion of the treaty did not diminish the militia members’ perception of themselves as honorable citizens.³⁶

Both the French Revolution and the ideology of the revolutionary *gens de couleur* of Saint-Domingue in the 1790s were thoroughly familiar to the immigrant free people of color in New Orleans and to their descendants—including convention delegate Edouard Tinchant, whose mother, a Saint-Domingue émigrée, had settled in New Orleans and later migrated to France.³⁷ The French revolution of 1848 was also part of the lived experience of European radicals like the New Orleans newspaper editor Jean-Charles Houzeau, a Belgian, and Edouard Tinchant, who had attended school in the French town of Pau during 1848.³⁸ Tinchant made the connection quite clear, explaining that his father had left antebellum Louisiana for France in order to raise his six sons “in a country where no infamous laws or stupid prejudices could prevent them from becoming MEN.”³⁹

In Reconstruction New Orleans, the claim to equal “public rights,” with its strong implication of equal access to public accommodations and public transport, brought the Louisiana legislators into bitterly disputed territory. Rossi, writing in France in the 1830s, had treated the terms “public rights”

35. See MAURICE AGULHON, 1848 OU L’APPRENTISSAGE DE LA RÉPUBLIQUE, 1848–1852 ch. 1 (1973). The 1848 abolition decree spoke of *dignité*. See D’UNE ABOLITION, L’AUTRE: ANTHOLOGIE RAISONNÉE DE TEXTES CONSACRÉS À LA SECONDE ABOLITION DE L’ESCLAVAGE DANS LES COLONIES FRANÇAISES 17–19 (Myriam Cottias ed., 1998). Arago’s instructions were *Portant instructions pour l’exécution du décret du 27 avril 1848, Circulaire Ministérielle No. 358 of May 7, 1848, Bulletin Officiel de la Martinique [Official Bulletin of Martinique], May 7, 1848, p. 594.*

36. See BELL, *supra* note 26, at 29–34; IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES 51–96 (2003); KIMBERLY S. HANGER, BOUNDED LIVES, BOUNDED PLACES: FREE BLACK SOCIETY IN COLONIAL NEW ORLEANS, 1769–1803 (1997).

37. Rebecca J. Scott, *Public Rights and Private Commerce: A Nineteenth-Century Atlantic Creole Itinerary*, 48 CURRENT ANTHROPOLOGY 237–49 (2007).

38. JEAN-CHARLES HOUZEAU, MY PASSAGE AT THE NEW ORLEANS TRIBUNE: A MEMOIR OF THE CIVIL WAR ERA (David C. Rankin ed., Gerard F. Denault trans., 1984).

39. Scott, *supra* note 37, at 241 (quoting a letter from Tinchant to General Máximo Gómez). For more on Tinchant, see Rebecca J. Scott & Jean M. Hébrard, *Les papiers de la liberté: Une mère africaine et ses enfants à l’époque de la révolution haïtienne*, GENÈSES, March 2007, at 18–25.

and “social rights” as interchangeable. But by the 1860s, the phrase “social rights” had become associated with a claim to “social equality”—an expression of positive aspiration in 1848 France, but generally employed as a term of opprobrium in the nineteenth-century United States.⁴⁰

As recent residents of a slave society, many of the delegates retained a keen understanding of the ways in which one’s treatment in public was decisive for one’s honor. By framing their claims to equal access to public transportation and public accommodation within the rubric of public rights rather than social rights, Louisiana activists of the 1860s could both assert their status as honorable citizens and try to avoid the charge that they were claiming “social equality” in matters of intimate or private life. Although any scheme that divides rights into fixed categories is to some extent artificially neat, a great deal was at stake in these distinctions.⁴¹ To use the phrase “public rights” was to emphasize those forms of equality manifested in the public sphere. This might amount to the same thing as what others called “social rights,” but it distanced the claim from the overtones of enforced intimacy and intrusion into private space that the term “social equality” had come to connote.⁴²

The language of public rights could appeal to bilingual Creole men of color, to English-speaking former slaves, and to white Republicans, giving a name to the dignitary dimension of public life that they knew quite well. Denials of access to public transportation in Union-occupied New Orleans in 1863, for example, had been much more than the perpetuation of “custom.” A man of color in Union uniform shoved off a streetcar knew the meaning of the gesture, whether the perpetrator was an ex-Confederate or a white Union soldier. Edouard Tinchant had been thus treated, and he later reasserted his affronted honor in a detailed letter to the editor of the New Orleans *Tribune*. In that letter Tinchant invoked his personal integrity, his military service, and a recent opinion on citizenship issued by U.S. Attorney General Edward Bates.⁴³

40. On the charge of “social equality” as a label to disqualify proposals to the Louisiana constitutional convention of 1867–68, see OFFICIAL JOURNAL, *supra* note 21, at 277. A small number of radical antislavery activists in the North did embrace the concept of social equality, along with an aspiration to friendship across the color line. See STAUFFER, *supra* note 22, at 8–44.

41. On the variability of schemes of rights, see RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 124–26, 127–76 (1999).

42. The battle over the phrase “social equality” emerged in many Reconstruction contexts, and was closely associated with thinking about gender and sexuality. See HANNAH ROSEN, *TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH* (forthcoming 2008); Barbara Y. Welke, *When All the Women Were White, and All the Blacks were Men: Gender, Class, Race, and the Road to Plessy, 1855–1914*, 13 L. & HIST. REV. 261, 261–316. A full analysis of the concept and label “social equality” is beyond the scope of this Article. As specialists in African American history have demonstrated, however, the negative connotations of “social equality” as a framing device led even quite radical thinkers to eschew the term. W.E.B. Du Bois makes this point most vividly in W.E.B. Du Bois, *On Being Crazy*, 26 CRISIS 55, 55 (1923).

43. Tinchant’s letter appeared in the French-language pages of the New Orleans *Tribune*, July 21, 1864. On the “protectable legal interest” in defense of one’s honor under French law, see

English-speaking conservatives, by contrast, professed to find the concept of public rights utterly incoherent. They argued that in the proposed language for the state constitution, “social equality is attempted to be enforced, and the right of citizens to control their own property is attempted to be taken from them for the benefit of the colored race.”⁴⁴ William H. Cooley, a judge and conservative Republican, furiously opposed the language and insisted that individuals could not be the carriers of such rights: “Because, I never heard the term ‘public rights’ mentioned as a private one, and because I cannot understand the idea of a private individual exercising public rights.”⁴⁵

In a sense, Judge Cooley’s bafflement was warranted. “Public rights” as individual rights were undoubtedly absent from the curriculum when he studied law, even in the famously mixed civil law–common law jurisdiction of Louisiana.⁴⁶ The words “public” and “rights” were indeed used together in the Anglo-American tradition, in particular by the English jurist Sir William Blackstone, for whom “public rights” referred to the broad interest of the public at large in being protected against criminal acts. But for Blackstone, *individual* rights of citizens or subjects varied depending on status and office.⁴⁷ The activists of Reconstruction Louisiana, by contrast, used the phrase “public rights” to invoke, on the basis of individual dignity, a whole range of rights including what we would now characterize as equal access to public accommodations and common carriers. Cooley, for his part, was opposed not only to the concept but also to the evident egalitarian purpose of the invocation of “public rights.” By renaming and denouncing this notion of public respect, calling it “social equality,” Cooley and his allies sought to deny that any judicially cognizable claim could be attached to it.

As even the irascible Judge Cooley would have known, however, at least some elements of the public rights concept did have a counterpart in Anglo-American common law, namely the “duty to serve” that a tradesman or corporation incurred when offering a service to the public.⁴⁸ Prior to 1865, some courts had viewed forced separation of passengers on common carriers on the basis of color as a violation of this common law duty; many

James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1279–1398 (2000).

44. OFFICIAL JOURNAL, *supra* note 21, at 290.

45. *Id.* at 117 (emphasis omitted); *see also id.* at 275–277.

46. On various complexities of this mixture, see VERNON VALENTINE PALMER, *THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION* (2005).

47. *See* 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* ch. 1 (Univ. of Chicago Press 1979) (1769); William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in *THE DEMOCRATIC EXPERIMENT* 85, 95 (Meg Jacobs et al. eds., 2003).

48. The classic formulation can be found in 3 BLACKSTONE, *supra* note 47, at 348: “if an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way” *See also* BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920*, at 323–75 (2001).

others had let it stand as a “reasonable regulation.”⁴⁹ The Union victory now opened the question back up, and Judge Cooley and his allies hoped that by invoking the rights of private property and the danger of “social equality” they could fend off legislation guaranteeing equal access.

After long wrangling over the language, the time for decision on the new state bill of rights arrived. On December 26, 1867, the twenty-fourth day of the convention, schoolteacher Edouard Tinchant moved to endorse attorney Simeon Belden’s proposal that article I should read, “all men are created free and equal.” The proposal passed, 57 to 11. Then Thomas H. Isabelle, a Union veteran and man of color, proposed to add the term “public” after the word “political” in the list of rights guaranteed in article II. His amendment passed by a vote of 59 to 16.⁵⁰ In their constitutional moment, the delegates showed conceptual flexibility and linguistic ingenuity. The overlap between Anglo-American common law and continental concepts of equality, including the language used by Pellegrino Rossi, meant that the phrase “public rights” was both intelligible and coherent to members of the Francophone-Anglophone coalition in the state convention. At a purely practical level, the new Louisiana Constitution aimed to wipe out the invidious distinctions based on color that had pervaded the Louisiana Civil Code and subsequent legislation; the bill of rights was one tool toward that end.⁵¹ At the same time, this bill of rights asserted a key portion of the “emancipationist” legacy of the Civil War and filled out the idea of equal rights as part of *state* citizenship, all the more important in light of the ambiguous and incomplete definition of the rights attached to national citizenship in the Fourteenth Amendment.⁵²

The 1868 constitution left undefined the full scope of the guarantee to all citizens of the same “public rights and privileges.” But article XIII of the bill of rights stated that all persons “shall enjoy equal rights and privileges upon any conveyance of a public character.”⁵³ It went on to specify that

all places of business, or of public resort, or for which a license is required by either State, parish or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage

49. For an erudite examination of this question, see Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996). For a sociological interpretation of the rise of racial segregation in rail travel, with attention to the construct of “social equality,” see Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 LAW & SOC. INQUIRY 377 (1999).

50. OFFICIAL JOURNAL, *supra* note 21, at 114–18; see also TUNNELL, *supra* note 21, at 117–19 (analyzing roll call votes on these questions). On Thomas Isabelle, see ERIC FONER, *FREEDOM’S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION* 115 (2d ed. 1996).

51. On the early Code Noir and the later Civil Code, see PALMER, *supra* note 46, at 23, 62–65, 71, 101–34.

52. For a careful tracing of the “emancipationist” thread in post-Civil War thought, see DAVID BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2001).

53. OFFICIAL JOURNAL, *supra* note 21, at 294.

of all persons, without distinction or discrimination on account of race or color.⁵⁴

In effect, the guarantee that all citizens would enjoy the same public rights had a double meaning. It invoked specific rights to equal treatment in public places and equal access to public services, and it implied that whatever other rights or privileges might subsequently be deemed “public” would apply equally to all citizens.⁵⁵ This formula had no precise equivalent in the constitutions of the other reconstructed states, though a few came close. Virginia’s 1868 bill of rights, for example, held that “all citizens in the State are hereby declared to possess equal civil and political rights and public privileges.”⁵⁶ Louisiana stood at the forefront in making public rights explicit, but the concept was not a Creole idiosyncrasy. Its core components would be reformulated in federal legislation, and the phrase itself would appear four years later in the Republican Party’s national platform.⁵⁷

II. LITIGATING IN DEFENSE OF EQUAL “PUBLIC RIGHTS”

By the time that the new Louisiana Constitution went into effect in 1868, the idea of equal public rights had become tightly linked to a broad and inclusive concept of United States citizenship. Like many radical Republicans in other states, Louisiana activists viewed the Fourteenth Amendment as recognition of a set of claims to citizenship that had always been legitimate, not simply as the conferring of citizenship on men and women of color at the moment of ratification.⁵⁸ The argument for an inclusive national citizenship had a long pedigree in Louisiana, dating back to the era of the Founders, when article III of the 1803 Louisiana Purchase Treaty guaranteed those who had been under French rule access to all the rights and privileges of citizens of the United States. President Jefferson had tried to ignore this promise and maneuvered adroitly to defeat the citizenship claims of the men of color serving in the militia, but the Treaty would none-

54. *Id.*

55. In 1872, for example, state delegates to the Republican convention struggled over the nomination of Aristide Mary, a man of color, for the office of governor. As Rodolphe Desdunes later emphasized, at stake here was not the politics of the particular nomination, but the *right* of such a man to be a candidate for public office. RODOLPHE L. DESDUNES, NOS HOMMES ET NOTRE HISTOIRE: NOTICES BIOGRAPHIQUES ACCOMPAGNÉES DE REFLEXIONS ET DE SOUVENIRS PERSONNELS 183–84 (1911) (“[J]e dirai que les partisans d’Aristide Mary ont revendiqué *le droit d’aspirer au poste de gouverneur*, mais qu’ils n’ont pas convoité le poste même.” [“I would say that the supporters of Aristide Mary were claiming *the right to aspire to the post of governor*, but that they did not seek the post itself.”]).

56. VA. CONST. art. I, § 20.

57. See KIRK H. PORTER & DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS, 1840–1956, at 47 (1956) (describing the 1872 platform); *id.* at 54 (describing the 1876 platform, which called on Congress and the executive branch to secure “to every American citizen complete liberty and exact equality in the exercise of all civil, political, and public rights”).

58. For a careful exploration of the competing interpretations of the Fourteenth Amendment as either a new citizenship, or the recognition of an unjustly denied prior citizenship, see Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1681 (2006).

theless be invoked in the rhetoric of men of color throughout the ensuing decades.⁵⁹

These claims had been reinforced by the wartime opinion of U.S. Attorney General Bates, who in 1862 issued a far-reaching ruling that people of color should be understood to be citizens of the United States.⁶⁰ Creole activists in New Orleans quickly seized upon this decision and published it on the front page of their newspaper, *l'Union*, to strengthen their claims to both public and political rights. The future delegate to the 1867–68 convention Edouard Tinchant publicly quoted the Bates ruling in 1864 in a vigorous defense of a deep set of citizenship rights that transcended not only the errors of the *Dred Scott* decision but also the hesitations of many federal officials and Union officers. Tinchant himself had been born in France, but he believed himself to have achieved the equivalent of “letters of naturalization” in the United States through his service in the Union army in defense of New Orleans against a potential Confederate attack.⁶¹ In the heady atmosphere of wartime Louisiana, the content of citizenship could be seen to be expanding, along with eligibility for it.

Once the 1868 Louisiana Constitution was drafted and ratified under the terms of congressional Reconstruction, the Louisiana Supreme Court made earlier precedents explicit by ruling that “[b]y the treaty whereby Louisiana was acquired, the free colored inhabitants of Louisiana were admitted to citizenship of the United States.”⁶² At stake in this 1872 case was the “private right” of an antebellum free man of color to hold land, not his “public rights.” But the ruling reflected the longstanding belief of free Creoles of color that they held a promise of citizenship rights from the very moment of

59. Article III of the Treaty of Cession reads:

The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and, in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.

Cession of Louisiana, U.S.-Fr., Apr. 30, 1803, 1803 U.S.T. 10, *reprinted in* REPORT OF THE SECRETARY OF STATE TO HIS EXCELLENCY W. W. HEARD, GOVERNOR OF THE STATE OF LOUISIANA 45–48 (1902). Its importance to subsequent generations of activists is discussed in BELL, *supra* note 26, at 29–40.

60. The decision by Bates arose from a dispute over the citizenship claims of ship captains who were men of color. To the Secretary of the Treasury, 10 Op. Att’y Gen. 382, 382–83 (1862).

61. See *Importante Décision*, L’UNION, Dec. 25, 1862, at A1; Edouard Tinchant, Letter to the Editor, LA TRIB., July 21, 1864, at 2 (“[N]é Français, nous avons gagné [le]s lettres de naturalisation américaine sur les [rem]parts de la Nouvelle Orléans, debout, l’arme [au] bras, au pied du drapeau des Etats-Unis pour [le]quel nous étions prêts a verser la dernière goutte de notre sang; quelle est donc la puissance [h]umaine qui peut nous nier notre titre de citoyen américain.” [B]orn French, I earned my naturalization papers on the ramparts of New Orleans, upright, with my weapon in my hand, at the foot of the flag of the United States, prepared to spill the last drop of my blood; what then is the human power that could deny my title to American citizenship?). The available microfilm edition is made from a torn copy; material in square brackets is inferred. I thank Diana Williams for alerting me to the existence of this letter.

62. Walsh v. Lallande, 25 La. Ann. 188, 189 (1873).

Louisiana's acquisition.⁶³ Present at the creation, as it were, people of color could claim a right to be seen as full members of civil society and the public sphere. The historical argument for national citizenship had been articulated by free people of color in the state long before the Fourteenth Amendment was drafted. Its ratification vindicated their sense of rights; it did not create it.⁶⁴

Louisiana's 1868 organic law, in turn, had given precise content to the longstanding ideals of equal citizenship. The attribution to all citizens of "the same civil, political and public rights and privileges" provided the basic framework, while article XIII spelled out the details of the right to equal treatment.⁶⁵ Thus, when Mrs. Josephine Decuir found herself denied access to the ladies' stateroom on the steamer *Governor Allen* in July of 1872, she had a basis on which to bring suit under the state constitution and subsequent state statutes.⁶⁶

Josephine Decuir's experience on the steamboat encapsulated the humiliation of "customary" racial segregation and exposed the fiction of consent on which it rested. John Cedilot, the steward on the *Governor Allen*, was by his own account a Frenchman raised in Louisiana. He viewed the separation of white and "colored" passengers to be a reasonable response to the preferences of white passengers. But when it fell to him to enforce the rules against Mrs. Decuir by denying her a ladies' cabin, the situation became awkward. His job was to provide passengers with supper and a berth on this overnight journey from New Orleans to Pointe Coupée. He struggled to persuade Mrs. Decuir to accept a berth in the windowless "colored bureau" or, failing that, in the "saloon" located below the "recess," a thoroughfare used by nursemaids and their charges. She refused. He offered to bring her supper in her chair. She refused. The otherwise deferential steward seems to have been no match for this well-dressed widow stubbornly defending her own dignity. Try as he might, he could not persuade her to consent to her own humiliation—even in return for a plate of fried oysters and warm rolls.⁶⁷

63. The Louisiana Supreme Court was ruling on the retrospective citizenship claim of Charles Lallande, who had lost claim to a piece of property in 1860 when a land office commissioner judged that as a "free negro" he had no right to hold property under the pre-emption laws of 1841. *See id.* at 188–89. The language of the case is, among other things, a nice technical rebuttal of Chief Justice Taney's argument in the *Dred Scott* decision that people of color had never held national citizenship in the era of the founders. *Id.* at 189–90.

64. *See* BELL, *supra* note 26, at 41–64. On the educational institutions that helped to nurture these claims of right, see Mary Niall Mitchell, "A Good and Delicious Country": *Free Children of Color and How They Learned to Imagine the Atlantic World in Nineteenth-Century Louisiana*, *HIST. EDUC. Q.*, Summer 2000, at 123.

65. LA. CONST. tit. I, arts. II, XIII (1868).

66. The testimony from this case at the state level is transcribed in Transcript of Record, *Hall v. Decuir*, 95 U.S. 485 (1877) (No. 294). The manuscript originals of the state case are in the Supreme Court of Louisiana Collection, Department of Archives and Manuscripts, Earl K. Long Library, University of New Orleans.

67. *Id.* at 51. On the question of women's particular claims to respect and respectability, see Welke, *supra* note 42.

Mrs. Decuir was on a journey to deal with legal matters in the case of her late husband's inheritance and thus happened to be accompanied by an attorney, who could later testify that the employees of the steamer had told him that their refusal of a stateroom was based on her perceived color. Mrs. Decuir's invocation of her class standing (her husband had been a planter, and her brother was now state treasurer), as well as her performance of feminine delicacy, give the case a quaint tone compared to the egalitarianism of twentieth-century sit-ins. But the underlying point was much the same: by refusing to accept forced segregation presented as custom, Mrs. Decuir framed her claim within article XIII of the Louisiana Constitution and state statutes protecting the right of *any* well-behaved female citizen to pay for and receive a stateroom in the ladies' cabin.⁶⁸

Under the Louisiana Constitution, Mrs. Decuir was in the right, and the state Supreme Court awarded her \$1,000 and court costs. Like the male plaintiffs in similar Louisiana cases involving admission to a coffee house and to a theater, she obtained redress under state law. The heirs of the owners of the steamboat, however, appealed the case to the U.S. Supreme Court. In a somewhat forced interpretation of the Commerce Clause, the Supreme Court ruled that even though her journey had been entirely within the State of Louisiana, the state constitution's prohibition of segregation on a steamboat constituted an undue interference with interstate commerce, thereby violating the Federal Constitution. The Court thus awarded victory to the captain's heirs and undermined the capacity of Louisiana to enforce its own antidiscrimination statutes.⁶⁹

Louisiana's 1868 constitutional framework provided a particularly explicit basis for legal challenges to forced segregation, but citizens of other states had framed their claims in similar language, drawing on both common law and state and federal statutes. In 1872, the national Republican Party had called for legislation to establish "complete liberty and exact equality in the enjoyment of all civil, political, and public rights" and sought to remind Congress and the courts that the "recent amendments to the national Constitution should be cordially sustained because they are right, not merely tolerated because they are laws."⁷⁰ During discussion of the proposed 1875 Federal Civil Rights Act, one man from Ohio wrote that "[s]ocial equality

68. Mrs. Decuir, who had lived twelve years in France, was a strong-minded woman. On an earlier journey, she had planted herself firmly in a rocking chair in the ladies' cabin. The distressed captain had a "note" conveyed to her telling her to leave. She responded by "summoning" the captain and trying to shame him into letting her remain. Transcript of Record, *Decuir*, 95 U.S. 485 (No. 294).

69. *Decuir*, 95 U.S. at 488–91, *rev'g*, *Decuir v. Benson*, 27 La. Ann. 1 (1875). For other challenges brought under the 1868 Constitution and the subsequent Civil Rights Act of 1869, see *Sauvinet v. Walker*, 27 La. Ann. 14 (1875) (upholding a district court grant of damages to the civil sheriff of the parish of Orleans, who had been refused service at a coffeehouse), and *Joseph v. Bidwell*, 28 La. Ann. 382 (1876) (upholding ruling granting damages to a man refused entrance to a theater). See also ROGER A. FISCHER, *THE SEGREGATION STRUGGLE IN LOUISIANA, 1862–77*, at 80–87 (1974).

70. FRANCIS H. SMITH, *PROCEEDINGS OF THE NATIONAL UNION REPUBLICAN CONVENTION HELD AT PHILADELPHIA, JUNE 5 AND 6, 1872*, at 51 (1872).

seems to be the bugbear at which American justice is frightened, and the colored man denied many public privileges accorded to other American citizens.”⁷¹ The 1875 Act is now remembered mainly for having been overturned by the Supreme Court in the 1883 *Civil Rights Cases*, but while it was in effect, it provided a lever with which men and women in states like Maryland could attack segregation on the railroads.⁷² The Republican Party platform in 1876 again called for “complete liberty and exact equality in the exercise of all civil, political and public rights.”⁷³

With the federal government’s retreat from Reconstruction in 1877, however, Louisiana’s self-avowed white supremacists took control of the state through the Democratic Party. In 1878–79, the new state legislature drafted and promulgated a constitution in which the phrase “civil, political, and public rights” no longer appeared. The principle of racial separation in the schools also made a discreet appearance through the funding of an all-black university.⁷⁴

In practice, the affronts to men and women of color in public spaces multiplied, and a statutory basis for appeals for damages or redress no longer existed. The struggle for public voice continued, however, both in the city and the countryside. Defending the Reconstruction-era conception of public rights after the defeat of Reconstruction itself was not merely the province of urban activists; it was a matter of importance to thousands of Louisianans of African descent, for whom the ability to travel freely and to gather in public were the bedrock for claims-making of various forms. Local activists like the blacksmith Pierre Carmouche in Donaldsonville and the schoolteacher Junius Bailey in Thibodaux turned their skills toward organizing for the Knights of Labor and drafting collective communications to the sugar planters’ organization. In late November of 1887, a huge strike swept through the sugar fields. The strike was crushed when the governor deployed the now all-white militia to force strikers out of their homes on the plantation, and vigilantes organized to confront the workers when they took refuge in the towns.⁷⁵

71. Patrick O. Gudridge, *Privileges and Permissions: The Civil Rights Act of 1875*, 8 *LAW & PHIL.* 83, 125 (1989).

72. On Maryland test cases under the federal Act, see Libby Benton, *Claims to Rights Under the Civil Rights Act of 1875* (Apr. 24, 2006) (unpublished manuscript, on file with author). On Tennessee, where common law claims were the preferred strategy, see Mack, *supra* note 49.

73. M.A. CLANCY, *PROCEEDINGS OF THE REPUBLICAN NATIONAL CONVENTION HELD AT CINCINNATI, OHIO JUNE 14, 15, AND 16, 1876*, at 56 (1876).

74. See LA. CONST. art. CCXXXI (1879). Rodolphe Desdunes was furious that the few remaining black legislators had accepted the offer of a separate university: “C’était la fin. L’homme de couleur avait accepté la subordination légale, c’est-à-dire l’idée d’être traité *conventionnellement* et non *constitutionnellement*.” [“It was the end. Men of color had accepted legal subordination, that is, the idea of being treated according to *custom* rather than according to the *constitution*.”] DESDUNES, *supra* note 55, at 181.

75. See REBECCA J. SCOTT, *DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY* 61–94 (2005); Rebecca J. Scott, “*Stubborn and Disposed to Stand their Ground*”: *Black Militia, Sugar Workers, and the Dynamics of Collective Action in the Louisiana Sugar Bowl, 1863–1887*, *SLAVERY & ABOLITION*, April 1999, at 103, 104.

The withdrawal of federal support for Louisiana's Republicans and for its citizens of color did not mean that they ceased entirely to be heard. Moreover, the courts' refusal to support their public rights did not prevent these citizens from acting in public as bearers of such rights. Indeed, such public displays of a claim to equality were precisely the target at which the Louisiana legislature aimed the 1890 Separate Car Law.⁷⁶

III. ORGANIZING THE *Plessy* CHALLENGE

In a post-slavery society in which large numbers of former slaves and their descendants did not possess the skills of reading and writing, it might seem difficult to nurture an oppositional movement centered on formal rights and legal claims-making. But through what Armando Petrucci has referred to as the "delegation of writing," the oral claims of many people of color of modest birth were routinely transformed into legal language by skilled members of the community.⁷⁷ The legal systems of both France and Spain had long attributed a central role in private law to the legal practitioner known as a *notaire* (*escribano* in Spanish), and the State of Louisiana had retained the public notary as an essential actor in the legal system. Charged with formalizing and recording consensual understandings, the notary conferred enforceability at law on a multitude of transactions. He was a key figure in the branch of private law designated "non-contentious," giving authenticity to texts and conferring "executory force" on their stipulations, without the necessity of court action. Notarial acts could also be drawn upon in court proceedings if the matter at hand moved into the realm of the "contentious."⁷⁸ Under Louisiana law, the notary, with his duty to serve all who sought him out, brought formal writing within the reach of ordinary people and was legally obliged to transcribe and retain for future reference the full text of most of the documents that he notarized.⁷⁹

In New Orleans, at the nexus between these everyday practices of writing and the larger campaign for public rights, was an intriguing individual: Louis A. Martinet, notary public. Martinet's mother was a Louisiana-born woman of color and his father was apparently a Belgian immigrant. After the Civil War, Martinet attended Straight University Law School, obtained admission to the bar, and, a decade later, acquired certification as a notary.⁸⁰

It was in the tense post-Reconstruction environment of 1888 that Louis Martinet opened his office as a notary public on Exchange Alley, in the

76. On the political context in which the legislation was passed, see KEITH WELDON MEDLEY, *WE AS FREEMEN: Plessy v. Ferguson* (2003).

77. See Armando Petrucci, *Escribir para otros*, in PETRUCCI, ALFABETISMO, ESCRITURA, SOCIEDAD 105–16 (1999).

78. See AUBERT, *supra* note 28, § 179, at 180–81 (discussing the notary as a public officer).

79. For the general regulations governing notaries and their records, see CIVIL CODE OF LOUISIANA: REVISION OF 1870 WITH AMENDMENTS TO 1947, arts. 2234, 2251–66 (Joseph Dainow ed., 1947).

80. For biographical information on Martinet, see MEDLEY, *supra* note 76, at 150–58.

commercial district of New Orleans. The pluralism and public character of the office of the notary gave it a particular importance. The ratification of the Thirteenth and Fourteenth Amendments to the U.S. Constitution had made it clear that former slaves, their descendants, and others of African ancestry would now unequivocally have juridical personality, becoming subjects of law, not the objects of property transactions. But by the 1880s, the restoration of white supremacy in Louisiana was well underway. If the juridical capacity of persons of color was in theory equal to that of other citizens, as a practical matter they often faced severe hostility in the courts. The notary's office, however, remained a place where some of the benefits of law could be invoked outside of the gaze of juries and the judiciary. Martinet's reach, moreover, extended from downtown New Orleans outward to the lively multiracial community of Faubourg Tremé, where his colleagues Homer Plessy, shoemaker, and Rodolphe Desdunes, schoolteacher and cigar-seller, lived.⁸¹

As Kathryn Burns has phrased it, the function of the notary was to pour meaning into the molds provided by law, precedent, and handbooks, producing texts to serve the needs of his clients.⁸² Among Louis Martinet's clients, these needs included the preparation of documents making property transactions official, establishing and cancelling mortgages and other loans, and providing for inheritance by will. The notary also formalized families' decisions on the care of an infirm relative and issued powers of attorney. As a result, the volumes of documents transcribed by Martinet reveal a web of interactions among people of differing degrees of literacy and prosperity, Catholic and Protestant, former slave and long-free. Although many of his clients were men and women who could have been categorized as "colored," Martinet rarely employed color terms of any kind, except when those coming before him explicitly chose to invoke African ancestry.⁸³

Martinet routinely documented the establishment of mutual aid societies, giving legal recognition to various forms of social solidarity.⁸⁴ On October 3, 1890, for example, three months after the Louisiana legislature passed the Separate Car Law, a group of eight women appeared before Martinet. They wished to incorporate legally as a mutual aid society under the name *La Dignité*, or *Dignity*. They committed themselves to providing medical assistance to their members and, when necessary, a funeral and burial, and they set procedures for the calling of meetings and the elections of

81. *See id.* at 33–34, 159 (discussing the residences of Plessy and Desdunes).

82. *See* Kathryn Burns, *Notaries, Truth, and Consequences*, *AM. HIST. REV.*, Apr. 2005, at 110.

83. These characterizations are based on a review of the indices and many of the acts recorded in Martinet's notarial records, which are in the New Orleans Notarial Archives Research Center ("NONARC"). For a detailed analysis, see Rebecca J. Scott, *Se Battre Pour Ses Droits: Écritures, Litiges et Discrimination Raciale en Louisiane (1888–1899)*, 53/54 *CAHIERS DU BRÉSIL CONTEMPORAIN* 182–209 (2003), and SCOTT, *supra* note 75, at 75, 88, 161, 172, 200.

84. Under Louisiana law, a notary recorded the formation of societies and transcribed their bylaws. Formal recognition came by depositing these texts with state officials. For examples, see the notations to 1 NOTARIAL ACTS OF LOUIS MARTINET (1890) in NONARC.

officers. Most striking is the provision that all of their subsequent documents were to be stamped using a copper emblem bearing the word “Dignité.” These women were explicitly asserting their dignified public presence, in life as in death.⁸⁵

These expressions of dignity and equal public standing in the office of Louis Martinet, public notary, provide us with an appropriate vantage point from which to view the *Plessy* challenge itself. In July of 1890 the Louisiana legislature passed Act No. 111, designated, “An act to promote the comfort of passengers on railway trains; requiring all railway companies carrying passengers on their trains, in this State, to provide equal but separate accommodations for the white and colored races.” It held that “the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs.” Entry into a coach other than the one assigned by the officer was a criminal offense, punishable by a fine of twenty-five dollars or not more than twenty days in the parish prison.⁸⁶

In response to this blow to equal public rights, Louis Martinet, Paul Bonseigneur, Rodolphe Desdunes, and others founded the Citizens’ Committee for the Annulment of Act No. 111, commonly known as the Separate Car Law, and expanded their newspaper the *Crusader* to raise money and publicize their campaign. Some of those joining with the Committee, including teachers, traders, and artisans, had come of age in the era of Louisiana’s radical 1868 constitution with its ringing claim of equal public rights. Others were younger, but recalled that constitution as a moment of principled triumph in the generation of their parents.⁸⁷

The networks and solidarities registered in Martinet’s notarial records would underlie and reinforce the Committee’s litigation. Many of these organizations and their counterparts in the countryside contributed to what was called “Mr. Desdunes’ stocking,” the fund to support the *Crusader* and the lawsuits. The schoolteacher Alice E. Hampton, who taught at the Donaldsonville Academy upriver in Ascension Parish, put in her fifty cents in July of 1895, along with dimes and quarters collected from dozens of young women, despite its being “so hot going to and coming from school

85. Act No. 6, Chartre “La Dignité” Société d’Assistance Mutuelle (Oct. 3, 1890), in 1 NOTARIAL ACTS OF LOUIS MARTINET (1890) in NONARC. Each of the women signed in her own hand. “Dignité” had been a key term in the lexicon of France’s 1848 republican revolution. One didactic text emphasized that “une République est l’état qui concilie le mieux les intérêts et la dignité de chacun avec les intérêts et la dignité de tout le monde.” [“A Republic is the state that best reconciles the interests and the dignity of each with the interests and dignity of all.”] CHARLES RENOUVIER, MANUEL RÉPUBLICAIN DE L’HOMME ET DU CITOYEN 93 (Garnier Frères ed., 1981) (1848).

86. Act of July 10, 1890, No. 111, 1890 La. Acts 152, 152–53, reprinted in Record of Case at 6–7, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 15,248).

87. See DESDUNES, *supra* note 55, at 165–67, on the “generation of 1860.” On support in the countryside, see SCOTT, *supra* note 75, at 90–91. See also Joseph Logsdon & Lawrence Powell, *Rodolphe Lucien Desdunes: Forgotten Organizer of the Plessy Protest*, in SUNBELT REVOLUTION: THE HISTORICAL PROGRESSION OF THE CIVIL RIGHTS STRUGGLE IN THE GULF SOUTH, 1866–2000, at 42, 56 (Samuel C. Hyde, Jr. ed., 2003); and the CRUSADER, June 1895 (on file with Archives, Xavier University of Louisiana Library, New Orleans, La., available in the *Crusader* clippings file in Special Collections).

every day” that she had found it hard to do her “whole duty.” Her neighbor Pierre Carmouche, the blacksmith and former Knights of Labor organizer, gathered funds from his colleagues in a mutual-aid society called the True Friends.⁸⁸

In claiming the right to equal treatment on public transportation, the organizers of the *Plessy* challenge were well aware of the power of “customary” forms of racism to continue to inhibit their public practices, with or without a Separate Car Law. But they were determined to try to prevent the central tenet of white supremacist ideology from being enforced by the law. Public rights, with their intimate connection to public standing, were a key component of honorable citizenship. If they fell, civil and political rights were at increased risk as well.

The story of the *Plessy* test case itself has been carefully told by several authors who have reconstructed the process by which first Daniel Desdunes, musician, and then Homer Plessy, shoemaker and Freemason, stepped forward to test the constitutionality of Louisiana’s Separate Car Law. Desdunes, who had purchased an interstate ticket, successfully invoked a recent ruling based on the Commerce Clause of the U.S. Constitution that barred Louisiana’s legislature from regulating carriers traveling between Louisiana and Alabama. For a moment the Committee of Citizens dared to exult, “Jim Crow is Dead!”; but the ruling in the Desdunes case did not address the broader claims of individual rights. By careful pre-arrangement, Homer Plessy had bought a ticket on the East Louisiana Railroad from New Orleans to Covington, Louisiana, and taken a seat in the “white” car, where he was confronted by the conductor and removed from the train. He had then been arrested, arraigned, and released on bond. The Committee vowed that they would “exhaust all remedies which the laws of our country allow to its citizens for a redress of grievances.”⁸⁹

Over the next four years, the case made its way through the courts on a writ of prohibition challenging the constitutionality of the Separate Car Law. When it reached the United States Supreme Court, Plessy was represented by J.C. Walker, a Louisiana attorney, and by Albion Tourgée, the eloquent novelist, Republican activist, Union veteran, and former judge.⁹⁰ Their briefs built on both the Thirteenth and the Fourteenth Amendments and made a variety of ingenious arguments about the indeterminacy of race and the

88. On these fundraising efforts, see the clippings from the *CRUSADER*, *supra* note 87, especially June 22, 1895, and July 12–20, 1895. See also *MEDLEY*, *supra* note 76, at 130–31.

89. *CRUSADER*, *supra* note 87, reprinted in *MEDLEY*, *supra* note 76, at 165; see also *LOFGREN*, *supra* note 10. Excerpts from newspaper reports are in *THE THIN DISGUISE*, *supra* note 3, and in the *CRUSADER*, *supra* note 87. The initial report of the detective who arrested Plessy, described him as “being a passenger of the colored race on a train of the East Louisiana Railroad Co.” Record of Case at 4, *Plessy*, 163 U.S. 537 (No. 15,248).

90. MARK ELLIOTT, *COLOR-BLIND JUSTICE: ALBION TOURGÉE AND THE QUEST FOR RACIAL EQUALITY FROM THE CIVIL WAR TO Plessy v. Ferguson* (2006).

“property” value of a reputation of whiteness.⁹¹ Blocked by the weight of precedent from simply claiming a right under the Fourteenth Amendment to freedom from discriminatory treatment, Plessy’s attorneys drew attention to the state’s action in forcing the railways to discriminate. Key to the whole structure of their claim, however, was the identification of the Separate Car Law with the concept of caste. In language that recalled the 1868 Louisiana Constitution’s guarantee of equal access to all enterprises holding a franchise or charter from the state, the brief for Plessy argued as follows:

It is not consistent with reason that the United States, having granted and bestowed *one equal citizenship* of the United States and prescribed *one equal citizenship in each state*, for all, will permit a State to compel a railway conductor to assert them arbitrarily according to his ideas of race, in the enjoyment of chartered privileges.⁹²

By 1896 it was no longer possible to invoke the 1868 Louisiana Constitution’s bill of rights, with its guarantee to all citizens of the same “civil, political, and public rights and privileges.” That text had been replaced by the state constitution of 1879, and the new Louisiana Supreme Court would not interpret the new constitution as granting any such public rights. The concepts and formulas of the 1868 Constitution nonetheless underlay the spirit of Plessy’s brief, echoed in references to “the enjoyment of chartered privileges.” The earlier terms were now re-molded to try to fit the language of the Thirteenth and Fourteenth Amendments, and the unifying concept was the impermissibility of caste: “The effect of a law distinguishing between citizens as to race, in the enjoyment of a public franchise is to legalize caste and restore, in part at least, the inequality of right which was an essential incident of slavery.”⁹³

By “caste,” the attorneys for Homer Plessy meant something quite different from the term as employed (for better or for worse) by twentieth-century historians and anthropologists. Early in the period of European colonial expansion, the word *casta* and its variants had been used to designate a pure or separate lineage (such as a “race” of horses or a variety of grapes). After the French Revolution, the word could be used—pejoratively—to designate a system of privileges based on birth and rank.⁹⁴ In this latter sense, the term *caste* was easily recognizable to jurists and activists in the United States in the late nineteenth century. To argue that the Separate Car Law

91. The argument that the actions of conductors under the law could imperil the property interest that a man or woman might have in the reputation of whiteness is analyzed in Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1746–50 (1993).

92. Brief for Plaintiff in Error, *Plessy*, 163 U.S. 537 (1896) (No. 210), 1869 WL 13992, at *11.

93. *Id.* at *14.

94. See 1 Dictionnaire Historique de la Langue Française, *supra* note 27, at 646. By a somewhat puzzling linguistic turn, the word also came to be applied in Spanish in the plural to *castas*, those who by virtue of mixed ancestry occupied specified roles in a hierarchy of human types in colonial society. I thank the Portuguese linguist Rita Marquilhas, of the University of Lisbon, for her assistance in tracking the term through various Spanish and Portuguese dictionaries from the eighteenth and nineteenth centuries.

imposed and enforced caste was to declare that law unworthy of a nation founded on the proposition that all men are created equal.

A majority of the justices on the U.S. Supreme Court chose to ignore virtually all of this reasoning and to accept instead the argument proffered by the attorneys for the State of Louisiana, who presented the law as a simple exercise of the state's legitimate police power. To them, Plessy's challenge was an illegitimate effort to gain legal backing in the pursuit of "social equality." The language of the majority decision thus incorporated a key tenet of white supremacist ideology—the sleight of hand through which *public rights* were re-characterized as importunate *social claims*. These, in turn, were associated with "social equality," with all the blurring of boundaries between public and private, the phantasms of "miscegenation," and the dangers of social transgression that phrase could evoke.⁹⁵ Persuading the Court to participate in the white supremacists' key rhetorical elision was perhaps the most consequential victory for the government of Louisiana in *Plessy*, both in the domain of discourse and in the domain of doctrine.⁹⁶

CONCLUSION

Once we define historical context to include vernacular concepts of rights, it becomes clear that reframing the *Plessy* challenge to emphasize its dignity dimension is not an anachronism, a mere artifact of our own post-*Brown v. Board of Education* consciousness.⁹⁷ When the bill of rights in the 1868 Louisiana Constitution granted state citizenship to residents regardless of race and assured all citizens of the "same civil, political, and public rights and privileges," the choice of language reflected decades of discussion among free persons of color in Louisiana, invigorated by the emancipationist energies of the Civil War.⁹⁸

By the time Homer Plessy took his seat in the first-class railway car in June of 1892, he and his colleagues had been exercising important public

95. One of the few white southern observers who denounced this sleight of hand was New Orleans resident George W. Cable, *The Silent South*, 30 CENTURY MAG. 647 (1885), reprinted in GEORGE W. CABLE, *THE NEGRO QUESTION: A SELECTION OF WRITINGS ON CIVIL RIGHTS IN THE SOUTH* 83, 92–96 (Arlin Turner ed., 1958).

96. Among works that follow the Court in treating *Plessy* as involving "social rights" are Klarman, *supra* note 9, at 325, which distinguishes civil rights from social rights in the case of school integration, and PLESSY V. FERGUSON: A BRIEF HISTORY WITH DOCUMENTS 13 (Brook Thomas ed., 1997). For convincing demonstrations that the triumvirate of civil, political, and social rights involves a continual shifting of boundaries, see PRIMUS, *supra* note 41, and Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884 (1987).

97. Klarman treats most critiques of the *Plessy* decision as falling into anachronism, because, he argues, "it may be fanciful to expect the Justices to have defended black civil rights when racial attitudes and practices were as abysmal as they were at the turn of the century." Klarman, *supra* note 9, at 305. In Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 27–28 (1996), Klarman uses the idea of "dominant racial norms" to similar effect: "The *Plessy* decision was, indeed, so fully congruent with the dominant racial norms of the period that it elicited little more than a collective yawn of indifference from a nation that would have expected precisely that result from its Supreme Court."

98. See LA. CONST. tit. I, art. II (1868).

rights in multiple spheres of daily life in New Orleans for decades, despite many informally enforced practices of segregation. By their own account, the organizers of the challenge to the Separate Car Law had staked their personal and political identities on a claim of equal public dignity that was incompatible with the legal recognition of caste-like distinctions. They designed the test case to highlight the ways in which the Separate Car Law affronted that dignity. In their view, the Separate Car Law was “intended to nullify the Fourteenth Amendment to the Federal Constitution, and to subordinate the dignity of the citizen to the malice and caprice of a few tyrant[s] and demagogues.”⁹⁹

Taking public rights seriously as a concept offers several kinds of insight into the *Plessy* appeal. First, it recognizes a construction of rights that was crucial to the plaintiff and powerfully unacceptable to the defendant. Second, it helps explain the persistence of the plaintiff. To claim public rights at law was, in effect, another way of exercising them in practice. Even as the odds against victory mounted, the members and supporters of the Citizens’ Committee continued their campaign to demonstrate that the dignity they asserted was indeed theirs to exercise, whatever the judicial outcome. Third, examining the *Plessy* challenge in this way encourages us to link the formal strategy of litigation with the vernacular practices of writing and legal reasoning in the larger community. Because these practices occurred in places like the local office of the notary public, they are below the radar of most jurisprudential analysis. But they were, in fact, part of the public legal culture in which public rights as a concept made sense.

By restoring the *Plessy* challenge to its precise context, we can go beyond its familiar portrayal as the effort of members of what is often misleadingly referred to as a “light-skinned elite.” The case in fact gives evidence of a cosmopolitan activist tradition with its own broad social base and conceptual roots in the city and the countryside of Louisiana. The Citizens’ Committee found allies among former union organizers upriver in Donaldsonville and among émigré Cuban revolutionary cigar workers in New Orleans. The money to support the campaign came in from schoolteachers in Ascension Parish as well as from artisans and philanthropists in the city. They knew what they were doing, even though they knew quite well that they might not win.¹⁰⁰

For the long years of the campaign, Rodolphe Desdunes and Louis Martinet explicated their thinking and exhorted their neighbors and supporters through their writings in the New Orleans *Crusader*. From further north, their attorney Albion Tourgée did the same on a national stage in the Chicago *Inter Ocean*. But even as they were seeking to secure public rights, the next wave of white supremacist legislation was coming up fast behind them. Across the 1890s, one after another southern state moved to deny to

99. MEDLEY, *supra* note 76, at 167 (quoting Rodolphe Desdunes in the *Crusader*).

100. For a discussion of the participation of Ramón Victor Pagés, a Cuban émigré, see LOUIS A. MARTINET, *THE VIOLATION OF A CONSTITUTIONAL RIGHT* 16 (1893), and SCOTT, *supra* note 75, at 76–77.

black men the political rights that had seemingly been secured by the Fourteenth and Fifteenth Amendments. Many southern states had already undertaken constitutional disfranchisement, and others were accomplishing the same goal through statute.¹⁰¹ By the time the Court issued its opinion in *Plessy*, the suggestion by the majority that “political equality” was indeed guaranteed under the Fourteenth Amendment rang very hollow.¹⁰²

Rodolphe Desdunes later reflected upon the failed *Plessy* challenge, and addressed those who asserted that it would be better to remain silent than to draw attention to the misfortunes and powerlessness of the population of color. He disagreed: “We believe that it is more noble and worthy to fight nonetheless, rather than to show oneself passive and resigned. Absolute submission augments the oppressor’s power and creates doubts about the sentiment of the oppressed.”¹⁰³ It has been the goal of this Article not only to reconstruct some of that “sentiment,” but also to trace the political philosophy and social network to which Desdunes was heir. The right to respectful treatment in the public sphere was at the core of that philosophy, and Louisiana’s constitutional concept of equal “public rights” provided a precedent and a jurisprudence that framed the enterprise. By bundling together “civil, political, and public rights,” those who wrote the Constitution of 1868 had been trying to assure both the long-free and the newly freed that they would be treated as equal citizens in the public culture of the post-slavery world. Private matters could, in their view, remain private, but freedom from public disrespect and exclusion as one boarded a train car or took a seat in a café was not a private matter. Honor, to use the ancient term, and dignity, to use the Republican one, depended on that respect.¹⁰⁴

By contrast, once the Supreme Court Justices accepted white supremacists’ claim that what was at stake was a presumption to “social equality,” the next step was the easy denial that the Fourteenth Amendment guaranteed such “social equality.” It is perhaps unsurprising that powerful and relatively

101. See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974); MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908* (2001).

102. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). Justice Brown’s phrasing (“[The Fourteenth Amendment] could not have been intended . . . to enforce social, as distinguished from political equality . . .”) implied a constitutional guarantee of political equality, a guarantee the Court would walk away from within the next few years, particularly in *Giles v. Harris*, 189 U.S. 475 (1902). See Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295 (2000).

103. DESDUNES, *supra* note 55, at 192 (“Nous croyons qu’il est plus noble et plus digne de lutter quand même, que de se montrer passif et résigné. La soumission absolue augmente la puissance de l’opresseur et fait douter du sentiment de l’opprimé.”).

104. Indeed, private matters could be seen as public to the extent that they conferred civil effects. On the floor of the convention, Edouard Tinchant proposed that all women, regardless of color, have the same right to sue for breach of promise (of marriage), and that all women be able to compel to marriage any man with whom they had lived for a year. Louisiana’s Creole activists did not shy away from the controversial question of interracial marriage, for in a setting in which women of color had often entered into long-term intimate relationships with men—relationships that had little or no civic protection—the right to marriage had a strong dignitary component. See OFFICIAL JOURNAL, *supra* note 21, at 192.

conservative white men of the 1890s took this path. But it *is* surprising that modern legal and historical scholars would adopt without careful scrutiny the “social equality” framing offered by the Democrats of late nineteenth-century Louisiana. For the equal public rights tradition had its own history, one that would have been immediately recognizable not only to Rodolphe Desdunes in Louisiana, but to his predecessors Edouard Tinchant from France and Julien Raimond from Haiti. By 1868, the idea of equal public rights made sense to the Massachusetts-born attorney Simeon Belden, and to the Louisiana-born former slave Thomas Isabelle. It underlay the successful claims of plaintiffs in antidiscrimination cases in Louisiana in the 1870s. And even into the 1880s, it was recognizable to some white men from Louisiana: George Washington Cable evoked the phrase when he wrote that “the day must come when the Negro must share and enjoy in common with the white race the whole scale of *public* rights and advantages provided under American government.”¹⁰⁵

Despite the revisions to the Louisiana Constitution, both the concept and the phrase lived on into the 1890s. Ramón Víctor Pagés, the head of the union of Spanish-speaking cigar workers in New Orleans, invoked “public rights” when he spoke to an 1893 mass meeting in support of the Citizens’ Committee.¹⁰⁶ And although Justice Harlan’s famous dissent in *Plessy* did not use the words “public rights,” his claim that the Constitution “neither knows nor tolerates classes among citizens” and thus “[t]here is no caste here” echoes the plaintiff’s brief in its underlying logic.¹⁰⁷

Ironically, the white supremacists would themselves later drop the veil and acknowledge that their own claims in the *Plessy* case had been disingenuous. As the Citizens’ Committee had known all along, the Louisiana legislature was explicitly concerned with refusing public respect to citizens of color. In his inaugural address in 1904, Governor Newton Blanchard acknowledged that the real goal of the white supremacist project was to deny to Louisiana’s citizens of color the very essence of public dignity and recognition: “No approach towards social equality or social recognition will ever be tolerated in Louisiana. Separate schools, separate churches, separate cars, separate places of entertainment will be enforced. Racial distinction and integrity must be preserved.”¹⁰⁸

There it was: no “social recognition.” Segregation was not merely an end in itself; it was a means to an end, that of denying social recognition to people of color. In perceiving the Separate Car Law as an act of intentional humiliation, as a public assertion of a fundamental inequality of standing among the state’s citizens, Homer Plessy and his allies were not, as Justice Brown had opined, showing a prickly hypersensitivity, envisioning disrespect where none was intended. They were accurately gauging the intent of

105. CABLE, *supra* note 95, at 9–10.

106. For a discussion regarding Pagés, see MARTINET, *supra* note 100, at 16.

107. *Plessy*, 163 U.S. at 559.

108. SIDNEY J. ROMERO, *MY FELLOW CITIZENS: THE INAUGURAL ADDRESSES OF LOUISIANA’S GOVERNORS 245–46* (1980).

those who now ruled them and accurately predicting the consequences of a loss of “public rights.” After their defeat in the Supreme Court, there was only one cold comfort for Plessy’s supporters, which was to have succeeded in using a branch of the federal government to expose the state’s violation of their rights. Like the ordinary men and women of Louisiana who formalized their claims at the office of the notary, they had used law and writing to register their assertion of public standing. The year before their defeat, Rodolphe Desdunes had reflected on the ironies they faced and charted the only remaining path of action: “‘It is well for a people to know their rights even if denied them,’ and we will add that it is proper and wise for people to exercise those rights as intelligently as possible, even if robbed of their benefits.”¹⁰⁹

109. DESDUNES, *in* CRUSADER, June 1895, *supra* note 87.