defending a limited number of depositions, and engaging in settlement negotiations. If the case proceeds to dispositive motions or trial, counsel has no obligation to continue to represent the client – counsel might simply apprise the client of the strengths and weaknesses of the case and end the engagement. If counsel wishes to continue with the case, and the client agrees, the scope of the representation can be extended.

In addition to expanding the pool of willing counsel, one of the key benefits of the program, explained Margaret Malloy, chief counsel to the Office of Pro Se Litigation, is that it allows judges to involve pro bono counsel early in a case. "This is important since cases may be won or lost at the discovery stage. It can be frustrating for an attorney to take on a case at the trial-ready stage and not have a full discovery record to work with," she explained. Engaging counsel at the discovery stage ensures a developed record and a crystallized set of issues when the case moves on to the dispositive phases.

Litigation Experience

The program is also a great way for volunteer counsel from firms of any size to get meaningful experience litigating a case in federal court. Volunteers have tended to be law firm associates, often supervised by one of the firm's partners. It is a valuable chance for associates to get both hands-on experience with discovery and to appear in court. "We really encourage our associates to run the cases themselves," said Sharon Katz, whose firm has taken on several cases through the program. She added, "The program also affords associates the relatively rare experience of appearing in federal court and we strongly encourage them to take advantage of those opportunities."

Heston – one half of the duo who represented Wallace – found the representation "extremely rewarding." Bresnahan and he got "great experience negotiating the scope of discovery and making strategic decisions" with Wallace. One of the "highlights of the experience was appearing before Judge Netburn for the settlement conference," he said. "And it meant a lot to get a great result for someone who needed our help. I would definitely recommend to other associates that they pick up a case."

Now in its third year, the program has made a meaningful dent in the court's pro se docket. To date, 22 different district or magistrate judges have issued orders requesting limited scope discovery counsel. The Office of Pro Se Litigation has placed 46 cases with volunteers. Nineteen of these have been resolved, most with favorable results for the pro se litigant.

The Office of Pro Se Litigation is hopeful that the program continues to grow and thrive. "We would love to hear from more attorneys who are interested in taking on these matters," said Malloy. Those interested in volunteering are encouraged to contact the Southern District's Office of Pro Se Litigation.

Editors' Note: The author, managing associate of Orrick's New York City office, is a member of the Federal Bar Council's Public Service Committee.

Legal History

Another *Awful* Decision by the U.S. Supreme Court

By C. Evan Stewart

In the last issue of the *Federal Bar Council Quarterly*, we explored the *worst* decision *ever* by the U.S. Supreme Court: *Dred Scott v. John F. A. Sandford*, 60 U.S. (19 How.) 393 (1856). Now, let's take a look at one almost as *bad*: *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Court expressly approved of racial segregation!

A Prelude to *Plessy*

Believing that the Thirteenth and Fourteenth Amendments had not gone far enough to ensure that African Americans would

be given all the rights and privileges accorded white people, Congress passed (and President Grant signed) the Civil Rights Act of 1875. That law guaranteed African Americans equal treatment in public accommodations and public transportation, as well as ensuring they were not denied the ability to serve on juries. A number of lawsuits thereafter dealt with the constitutionality of the statute. Ultimately, five of them were joined together before the United States Supreme Court, encaptioned the *Civil Rights Cases*, 109 U.S. 3 (1883) (four were criminal prosecutions against those who barred African Americans from hotels or theaters; the fifth was a suit by an African American barred from a railroad car).

By an eight-to-one majority, the Court struck down the first two prongs of the law as unconstitutional. The Court ruled that the federal government had the authority *only* to pass laws prohibiting discriminatory actions by states, *not* those by private citizens (e.g.. innkeepers, railroad conductors, theatre owners); put another way, excluding African Americans from privately owned facilities was not unconstitutional. Writing for the majority, Justice Joseph P. Bradley opined that the "state action" doctrine meant that the Fourteenth Amendment only barred states – not individuals – from infringing upon the equal protection and due process of citizens; in his words, if the federal government were allowed to "cover the whole domain of rights appertaining to life, liberty, and property," it would "establish a code of municipal law regulative of all private rights between man and man in society" – and that would be a constitutional bridge too far. As to the Thirteenth Amendment, while it did not have a "state action" limitation, that Amendment was self-executing – it nullified all state laws on slavery; but it went no further – i.e., it did not mean that distinctions and/or discriminations based upon race or color were inherently unlawful. Not only had free African Americans experienced discrimination prior to the Civil War, "it would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."

Justice John Marshall Harlan, the only Southerner on the Court and a former slaveholder, issued a stinging dissent to both prongs of the majority's opinion. With respect to the Thirteenth Amendment, he wrote that Congress intended to bar not just the institution of slavery but also "badges of servitude" (interestingly, he cited as authority *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), in which the Court upheld the federal government's – as opposed to the states' – power to enforce the Fugitive Slave Act). As for the Fourteenth Amendment, Harlan wrote that the Civil Rights Act of 1875 was clearly contemplated by that Amendment (the fifth section grants "express power in Congress … to enforce the constitutional provision…."); and the Amendment further created new affirmative rights for *all* U.S. citizens – rights to be free from "discrimination based on race or color, in respect of civil rights." As for the "state action" limitation found by the majority, Harlan was unpersuaded, since nearly every place of the discriminations at issue were public spaces, licensed by the state – hence "state action" was in fact not a legal barrier. As powerful as his words and his logic were, Harlan got only one vote – his own.

Based upon the *Civil Rights Cases*, across the South Jim Crow laws began to be enacted; these laws created a "separate but equal" world – separate schools, hospitals, cemeteries, restaurants, bathrooms, water fountains, etc. In 1890, the Louisiana legislature passed Act 111 (the Separate Car Act), mandating that there be "equal but separate accommodations for white and colored races" on railroads. That law set the stage for *Plessy v. Ferguson*.

A Planned Confrontation

In September 1891, a committee of local New Orleans citizens – the Comité des Citoyens ("Committee of Citizens") – wanted to challenge Act 111, and it contacted a northern lawyer named Albion Tourgée. Tourgée had worked for many years after the Civil War to help freed slaves achieve meaningful participation in the Ameri-

can way of life; he agreed to take on the challenge pro bono.

Tourgée wanted to have someone of mixed blood violate the law, so as to test what the classification "colored" actually meant as a matter of law. Homer Plessy, who was born a free man in 1862 and was an "octoroon" (seven-eighths of European descent (his family spoke French) and one-eighth of African descent), agreed to be put up for the test case.

On June 7, 1892, Plessy bought a first-class ticket on the East Louisiana Railroad and boarded a "whites only" railway car in New Orleans, heading on an intrastate journey to Covington, Louisiana. The railroad company, which did not like the law because of the extra expense of separate cars, was a complicit conspirator with the Committee. Indeed, the railroad knew all about Plessy's plans and cooperated with a detective hired by the Committee; after the conductor informed Plessy he would have to vacate the "whites-only" car, and he refused, the detective swooped in and arrested Plessy. Plessy was then taken off the train at Press and Royal streets in New Orleans and remanded over for trial.

Between Plessy's arrest and trial, the same judge who was to determine his fate – John H. Ferguson – presided over a similar case. There, Daniel F. Desdunes had been arrested for sitting in a "whites-only" car travelling between Louisiana and another state. Ferguson ruled that Act 111 was unconstitutional in its attempt to punish Desdunes because of the federal government's power to regulate interstate commerce. This ruling greatly encouraged the Committee. At Plessy's trial, however, Ferguson ruled that the federal government's power was *not* implicated (and thus the 13th and 14th Amendments had no sway); Plessy had been traveling on an intrastate train and thus, under the *Civil Rights Cases*, the conduct was private conduct which did not trigger constitutional protections. Plessy was convicted and sentenced to pay a $25 fine.

Plessy (and the Committee) immediately sought redress on appeal, but got an unsympathetic hearing at the Louisiana Supreme Court. That court not only rejected the challenge to Ferguson's ruling, it cited northern state laws pre-Civil War which expressly sanctioned segregated facilities (e.g., Massachusetts, Pennsylvania). Plessy (and the Committee) then went to the U.S. Supreme Court. On April 13, 1896, the case was argued before the Court; in addition to Tourgée, Plessy's case was argued by James Walker (a New Orleans attorney) and Samuel Phillips (as U.S. Solicitor General, he had argued – unsuccessfully – for the federal government in the *Civil Rights Cases*).

The Arguments of Plessy's Advocates

One broadside against Act 111 was that it violated Plessy's equal protection rights under the 14th Amendment. Tourgée argued that "Justice is pictured as blind and her daughter, the Law, ought at least to be color-blind." In furtherance of his "color-blind" point, Tourgée said that racial mixing had rendered the issue of who was "colored" problematic at best – especially given that the laws determining such status differed widely between the states. And in any event, how could such a judgment be placed in the hands of a railroad conductor?

He also argued that belonging to one race versus another was a form of property: "How much would it be worth to a young man entering upon the practice of law to be regarded as a white man rather than a colored one?" Dislodging Plessy from the "whites-only" car was depriving him – an "octoroon" – the public recognition/reputation of being a white man, and that deprivation was a taking without due process of law.

Phillips argued that there were constitutional gradations in the states' exercise of their police powers. Given that Washington, D.C., had segregated schools when Congress enacted the 13th and 14th Amendments, he conceded that states could enforce separate but equal schools – education was akin to institutions such as family and marriage (thus, he also was conceding that states could constitutionally bar interracial marriages). But the future of such institutions was not implicated by who sat where in railroad cars. Louisiana thus could not exercise its police power in such extenuated, non-essential settings.

Tourgée's most powerful argument was derived from Harlan's dissent in the *Civil Rights*

Cases. Congress's Reconstruction Amendments did more than merely end slavery. In particular, the 14th Amendment – "the magna carta of the American citizen's rights" – "create[d] a new citizenship of the United States embracing new rights, privileges and immunities, derivable in a new manner, controlled by new authority, having a new scope and extent, depending on national authority for its existence and looking to national power for its preservation." Under such *new* rights of citizenship, the treatment of Plessy was clearly a violation of equal protection and due process.

Less than five weeks after oral argument, on May 18, 1896, the Court handed down its decision.

Separate But Equal

By a seven-to-one vote (one Justice did not hear oral argument and did not participate in the decision), the Court held that Louisiana's "equal but separate" statute was constitutional. Six of the seven Justices were from Union-aligned states; the seventh was Edmund D. White, a Louisiana citizen who had been active in local white supremacy groups prior to being elevated to the Court. Justice Henry B. Brown (Michigan) wrote the majority opinion.

Brown addressed the 13th Amendment argument first, quickly dismissing it – for the reasons already stated by the Court in the *Civil Rights Cases* (as well as in the *Slaughter-House Cases*, 16 Wall. 36 (1873)). In addressing the 14th Amendment, Brown wrote that what Congress was seeking to enforce was "political equality," as opposed to "social equality" – Congress could not have "intended to abolish distinctions based on color, … or a commingling of the two races upon terms unsatisfactory to either."

To support this "political" versus "social" dichotomy of rights, Brown built upon Phillips' concession regarding segregated schools, citing a pre-Civil War case in Massachusetts. In *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850), Charles Sumner (a leading abolitionist lawyer; later U.S. Senator for Massachusetts) challenged Massachusetts' segregated public schools. Judge Lemuel Shaw (Herman Melville's father-in-law, and a recognized expert on the use of police power) rejected that challenge, finding that segregated schools did not violate Massachusetts' constitutional guarantees of equality before the law. Brown also used Phillips' concession on anti-miscegenation laws, contending that the states' police power in that context was "universally recognized." As for other aspects of life less central than marriage and schools, Brown cited the Court's prior ruling in the *Civil Rights Cases*, which dealt with hotels, theatres, and railroads.

He then turned to whether Act 111 was itself an appropriate use of Louisiana's police power. Citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (San Francisco's regulation of laundries upheld as protecting public health – even if it worked to discriminate against Chinese immigrants), Brown answered yes; he wrote that the Louisiana legislature was "at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and grand order."

As for Tourgée's property argument, Brown was unfazed – that argument failed on its face since Plessy's "octoroon" status meant he was indisputably "colored" as a matter of Louisiana law. That different states defined "colored" differently stood for nothing, since the issue was exclusively one for each state to decide (and was *not* a federal concern).

Then, in a vein similar to Chief Justice Taney's inability to restrain himself when delivering racist tripe thinly veiled in a legal band aid, Brown closed his decision by condemning the "underlying fallacy" of Plessy's entire legal complaint: "[T]he assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, *but solely because the colored race chooses to put that construction upon it."* (Emphasis added.)

Harlan's Historic Dissent

Harlan started his dissent off in a measured way, delineating (as he had in his *Civil Rights Cases* dissent) that railroads are undeniably "public highways" – public easements, the same as canals or turnpikes; and here, the State of Louisiana was regulating

"the use of a public highway by citizens of the United States solely upon the basis of race."

Then, again taking from (and building upon) his earlier dissent, Harlan opined that the 13th Amendment not only abolished slavery, it was also enacted to prevent "the imposition of any burdens or disabilities that constitute badges of slavery or servitude." And with the 14th Amendment adding new rights of citizenship to *all* Americans, together the two Amendments "if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship."

With that warm up, Harlan became very animated and agitated (rightly so): "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by the tribunal in the *Dred Scott* case." The 13th and 14th Amendments had eviscerated Chief Justice Taney's horrible decision, but the majority's ruling in *Plessy* had the effect of turning back the clock. And if Act 111 was to be judged fine and dandy, "why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of the Protestants and Roman Catholics?"

As for the majority's distinction between "political" equality and "social" equality, it was, in Harlan's view, "scarcely worthy of consideration." The purported distinction was merely a cunning device to defeat the "legitimate results" of the Civil War (and the constitutional amendments that followed). *All* citizens were entitled to "equality before the law," irrespective of whether "social equality [could] exist between the white and black races in this country."

The majority's decision was thus out-and-out wrong, Harlan wrote: "Our Constitution is color-blind [lifting Tourgée's words and argument], and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." The majority's decision (and rationale in support) were not only wrong, but they would "certainly arouse race hate" and "perpetrate a fueling of distrust between the races":

> [I]t is difficult to reconcile [the] boast [of freedom] with a state of the law which... puts the brand of servitude and degradation upon a large class of fellow-citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

As in the *Civil Rights Cases*, Harlan got only his vote for his historic dissent.

Postscripts

- Incredibly, the political response to *Plessy* was relatively benign after it was handed down. On May 19, 1896, for example, the *Union Advertiser*_(Rochester, New York) wrote an editorial entitled "State Sovereignty":

  > The Supreme Court of the United States yesterday made two important decisions in affirmance of State Sovereignty "within the powers not delegated to the United States by the constitution, nor prohibited by it to the States."
  >
  > The first declares constitutional the state law of Louisiana, involved in what is popularity knows as the "Jim Crow" case at the South, which requires railroad companies to provide separate coaches for whites and blacks. Of the nine Justices but one dissented – Harlan.
  >
  > The second declares constitutional the state law of Georgia which prohibits railroads from running freight cars in that state on Sunday.
  >
  > With the expediency of these the Court had nothing to do. The question was purely one of state power. Of course, in each case, the jurisdiction of the state is over railroads operated within its own territory alone.

- In fact, the public's reaction to the *Civil Rights Cases* was far more super-charged (on both sides). Perhaps the difference in reaction is best explained by the differences in time of the two rulings relative to the Civ-

il War, as well as the Northern states' increasing disinterest in the internal affairs of the "Reconstructed" Southern states.

- The majority's odious opinion had many awful consequences. One in particular that has never gotten a full airing in American History is the fact that when Woodrow Wilson (Virginia born) became president, he authorized re-segregation within the agencies and offices of the federal government. When challenged on this immediate and abrupt reversal of the federal government's prior policy of integration, Wilson personally rebuked the African American protestors: "segregation is not a humiliation but a benefit, and ought to be so regarded by you gentlemen." Wilson, of course, also screened at the White House D.W. Griffith's "Birth of a Nation," which was based upon Wilson's friend Thomas Dixon's book "The Clansman" (extoling the virtues of the Ku Klux Klan). After seeing the movie, Wilson is reported to have said, "It is like writing history with lightning, and my only regret is that it is all so terribly true."
- Harlan's famous dissent ("Our Constitution is color-blind") is justly so, and his prediction of the shame that the *Plessy* majority would attach to the Court by its horrible imprimatur of constitutionality upon "separate but equal" laws did come to pass.
- In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court ruled that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." But the Court did not actually expressly overturn *Plessy*, nor did it adopt Harlan's "color-blind" principle; instead, *Brown*'s holding is based upon the evidentiary record developed by the NAACP (and its lead advocate, Thurgood Marshall), which demonstrated that separate schools were *not* in fact equal. That we have still not gotten to Harlan's "color-blind" Constitution is evidenced by the Court's ongoing struggles with higher education's admissions policies. *See Fisher v. University of Texas*, 570 U.S. ___, 133 S.Ct. 2411 (2013) (Fisher I); 579 U.S.___ (June 23, 2016) (Fisher II).
- As depicted in the recent film "Free State of Jones" (IM Global, released June 24, 2016), Newton Knight's great-grandson, Davis Knight (an "octoroon"), was arrested and tried in 1948 in Mississippi for violating that state's anti-miscegenation laws – he had married a white woman in 1946. Sentenced to prison for five years, the Mississippi Supreme Court voided his conviction (on evidentiary grounds) in order to avoid a challenge to the laws' constitutionality before the U.S. Supreme Court.
- For those who want to read more about *Plessy v. Ferguson*, *see* Charles A. Lofgren's "The 'Plessy' Case: A Legal-Historical Interpretation" (Oxford Univ. Press 1987). *See also* T. Alexander Aleinikoff, "Re-Reading Justice Harlan's Dissent in *Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship," *Univ. of Illinois Law Review* 961 (1992); Brook Thomas, "Plessy v. Ferguson: A Brief History with Documents" (Bedford/St. Martin's 1997).

Regulatory Update

More Labor for Our Courts?

By Charles C. Platt

The Department of Labor recently adopted a new "fiduciary" rule that could have significant consequences for our federal courts. If the rule survives legal challenges, it will impose fidu-