Chapter 6
Plessy V. Crow

During the 1890s, the race question in America was as open as it had ever been. Old institutions had crumbled; new ones had yet to take their places. Prior to the Civil War, the institution of slavery had regulated relations between most African-Americans and the European-Americans with whom they came into contact. The large majority of blacks were slaves, which by definition made them subordinate to their masters, the over-whelming majority of whom were white. There were some anomalies in this system, including the few African-Americans who owned slaves and the greater number of African-Americans who were not slaves. But the anomalies weren't sufficient to cause the system to break down, and the equating of African-American with slaves afforded a fair approximation to reality.

The chief preoccupations of the slaveholders were two: to extract labor from the slaves and to prevent slave insurrections. Both of these required close contact between the two races. White overseers directed gangs of black plantation field hands; inside the plantation houses, slaves participated in the daily lives of their masters. On the more plentiful small farms, slaves and masters regularly rubbed shoulders, often literally. Slaveholders did their best to prevent the slaves from gathering on their own, out of white view. Whites feared that such gatherings would be the preludes to rebellion, as they in fact occasionally were.

In antebellum Southern cities, blacks and whites mingled constantly. New Orleans, for example, continually surprised visitors by the casualness with which the two races mixed in saloons, gaming halls, and brothels, not to mention in places of daytime business. Some visitors attributed New Orleans's racial openness to the Crescent City's French heritage, but similar conditions pertained in other Southern cities.
The fact of the matter was that segregation under a regime of slavery was both impractical and unnecessary. To separate the races would have made both the extraction of labor and the monitoring of the behavior of African-Americans inordinately difficult. Nor was separation necessary to remind blacks of their place in American society. Slavery made clear the relative status of the races.

Emancipation changed the situation dramatically. The end of slavery overturned the system of coerced labor; equally important, it undermined the status structure of the South. No longer could whites readily dictate what individual African-Americans must do on a daily basis: where they must live, with whom they could or could not associate. Further, the end of slavery and the ratification of the Reconstruction amendments [13th, 14th, and 15th amendments to the Constitution] created a psychological need in many whites for a new way of marking the distinction between the races. Under slavery there was never any doubt that whites were superior; under the newly amended Constitution there was serious doubt. In the eyes of the supreme law of the land, blacks were now the equals of whites. For whites—particularly for lower-class whites whose position on the social ladder was tenuous and uncertain—reaffirming white superiority became a pressing problem.

One possible answer to the problem was the Jim Crow system of racial segregation; but it wasn't the only conceivable answer. During the quarter century after Reconstruction, various persons and groups in the South proposed different models of race relations. George Washington Cable, author of the 1885 book, The Silent South, denied that one race had to be socially superior to the other. Speaking as a native of Louisiana, an officer of the Confederacy and, as he said, "a lover of my home, my city, and my State, as well as of my country," Cable declared that progress for the South required the advancement of both races, black as well as white. Cable rejected a
familiar argument of the "Redeemers"--the upper-class whites who regained power in the South after Reconstruction--that progress for blacks had to await the restoration of law and order and honest government. Enforced inequality for blacks, Cable asserted, by its very nature corrupted government. The South would never have honest and good government until it had government that represented all the groups residing there. It should live up to its hopes rather than down to its fears. The time had come for a new approach.

Lewis Blair made much the same argument in 1889 in a book entitled *The Prosperity of the South is Dependent upon the Elevation of the Negro*. Blair condemned measures that consigned blacks to inferior status, especially measures involving segregation. “The Negro must be allowed free access to all hotels and other places or public entertainment,” Blair wrote. “He must be allowed free admittance to all theaters and other places of public amusement; he must be allowed free entrance to all churches, and in all public and official receptions of the president, governor, mayor, etc.; he must not be excluded by a hostile caste sentiment.” To so exclude him would damage whites as well as blacks and retard the development of the South as a whole. “In his descent he drags us down with him,” Blair said.

The arguments of Cable and Blair for black equality didn't persuade many white people in the South; the notion of white superiority was too firmly entrenched. Other opponents of the Jim Crow system took this assumption of white superiority as their point of departure. So transparent, in fact, was white superiority to them that they saw no need to reinforce it by artificial programs like segregation. “The Negro race is under us; he is in our power,” said Governor Thomas Jones, the leading spokesman of Democratic conservatives in Alabama during the 1890s. “We are his custodians.” This being the case, whites should treat the Negro fairly and with consideration. “We should extend to him, as far as
possible, all the civil rights that will fit him to be a decent and self-respecting, law-abiding and intelligent citizen.” As caretakers of society, whites could do no less. Treating blacks decently was not just the requirement of *noblesse oblige*; it was in whites’ self-interest. Echoing Cable and Blair in this regard, Jones declared of blacks: “If we do not lift them up, they will drag us down.”

Obviously it was easier for white aristocrats to take such a position than it was for lower-class whites. The aristocrats didn’t need their status in society reinforced; their wealth and power sufficed. By contrast, lower-class whites often did feel the need for the kind of reinforcement segregation provided. Yet even among the lower classes there existed support for alternatives to a policy of separation. Tom Watson and the Populists argued for class solidarity across racial lines. In the Populist view, segregation and other forms of enforced inequality served chiefly to keep the rich in power and the poor in line. A Texas Populist put the case for white-black cooperation succinctly: “They are in the ditch just like we are.” Climbing out would require the efforts of both races working together.

For a while, Southern practice partially reflected these alternative views. Until the 1890s, visitors to the South noted a hodgepodge of policies existing side by side. Segregation typified some areas of life; racial mixing marked others. In 1885, an African-American journalist, T. McCants Stewart, left Boston to tour the South. He was prepared to detect the slightest evidence of discrimination against blacks. “I put a chip on my shoulder,” he wrote afterward, “and inwardly dared any man to knock it off.” Stewart did indeed discover evidence of discrimination, but he also observed a much greater degree of equality than he had anticipated. One day in Virginia he found himself seated in a railroad car that was becoming crowded. Late-arriving white passengers were forced to sit on their luggage. “I fairly foamed at
the mouth, imagining that the conductor would order me into a seat occupied by a colored lady so as to make room for a white passenger,” Stewart recounted. No such demand occurred. He continued his journey into South Carolina. From Columbia, he wrote, “I feel about as safe here as in Providence, Rhode Island. I can ride in first-class cars on the railroads and in the streets. I can go into saloons and get refreshments even as in New York. I can stop in and drink a glass of soda and be more politely waited upon than in some parts of New England.”

Another traveler in the South, Charles Dudley Warner, visited New Orleans for the International Exposition of 1885. Warner later recalled, “White and colored people mingled freely, talking and looking at what was of common interest.” On “Louisiana Day” at the fair, blacks were as well represented as whites. “The colored citizens took their full share of the parade and the honors. Their societies marched with the others, and the races mingled in the grounds in unconscious equality of privileges.”

But the mingling didn't last forever. Hopes for a future of racial equality gave way to fears of the same thing, and a system of legalized castes gradually emerged. During the late 1880s and especially the 1890s, several Southern states passed Jim Crow laws. In doing so, they looked to precedents established ironically, in the North. Slavery had largely vanished in the North a half century before it disappeared in the South, and although the North never had the large numbers of blacks the South had, Northern whites had to deal with some of the same issues of status Southern whites would encounter after the Civil War. Thus Northerners adopted many of the features of segregation that would later become the hallmark of Southern race relations. Northern blacks were required to use separate railway cars and stagecoaches and separate cabins on steamboats; they were forced into separate sections of theaters and churches; they were excluded from the best restaurants and hotels. They had to live in separate neighborhoods; they
had to send their children to separate schools, their sick to separate hospitals, their dead to separate cemeteries. The Northern system of segregation wasn't uniformly rigorous. Massachusetts was more tolerant than most Northern states; the Midwestern and Western states were less tolerant. Yet in the North as much as in the South it was completely respectable to consider whites superior to blacks. Northern attitudes toward race relations were summarized by no less a figure than Abraham Lincoln two years prior to his first election as president. Lincoln declared, “There is a physical difference between the black and white races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together, there must be the position of superior and inferior; and I as much as any other man am in favor of having the superior position assigned to the white race.”

II
The first Jim Crow laws passed in most Southern states pertained to transportation, particularly aboard trains. There were two reasons for singling out rail travel. First, it involved close contact among passengers, frequently including women, for many hours and often overnight. On this account, opponents of race mingling found integrated railcars particularly offensive. Second, trains almost always had more than one car, so that railroad companies could easily segregate passengers with little expense or lost rider-ship.

Florida led the way by mandating separation of the races on trains in 1887. Mississippi mimicked Florida in 1888, Texas in 1889. Louisiana passed a Jim Crow train law in 1890, followed by Alabama, Arkansas, Georgia, and Tennessee the next year, and Kentucky in 1892.
North Carolina, South Carolina, and Virginia held out for several years, not ordering the segregation of railroads until almost the beginning of the twentieth century.

The Carolinas and Virginia delayed as long as they did partly because they wanted to see whether the Jim Crow laws would withstand constitutional challenge. Since the Compromise of 1877—the arrangement whereby the South and the Democrats conceded the contested presidential election of 1876 to Rutherford Hayes and the Republicans in exchange for a tacit agreement by the Republicans to pull the last federal troops out of the South—African-Americans had watched the equality apparently guaranteed to them under the amended Constitution get chipped away, right by right. A Supreme Court decision in the Civil Rights Cases declared that the Constitution afforded no protection against discrimination by private individuals or private businesses. If the managers of hotels or restaurants or music halls or railroads decided on their own to restrict or bar black patrons, that was their own affair. Some did discriminate, but most, not wishing to lose business to competitors, awaited action by the state legislatures. The Jim Crow laws of the late 1880s and 1890s were just what they were waiting for.

To African-Americans, the shift from private Jim Crowism to public Jim Crowism was significant and ominous. The shift appeared to portend a large increase in the practice of discrimination; many more activities than heretofore would now be off limits to blacks. Additionally and far more important, the governmental sanctioning of segregation placed the seal of public approval on anti-black discrimination. The law had never been able to prevent private ugliness; probably most people doubted that it could or maybe even should. But democratic governments were not supposed to act in a deliberately discriminatory fashion toward any honest and peaceful segment of their populations.
Hoping to stem the tide of segregation, a group of African-Americans from Louisiana decided to challenge the constitutionality of the state’s Jim Crow railroad law. Their challenge was a continuation of an earlier fight to block passage of the law in the Louisiana legislature. The anti-discrimination forces succeeded in sidetracking efforts to disenfranchise blacks, but despite the presence of sixteen African-American lawmakers in the general assembly in Baton Rouge, and despite petitions from black citizens’ groups, they failed to stop the Jim Crow railroad law.

The preamble to the law stated its purpose as being “to promote the comfort of passengers on the railway trains.” It didn’t have to be spelled out which passengers’ comfort was being promoted. The next clause contained the essence of the measure: all railway companies offering passenger service to Louisiana were required “to provide equal but separate accommodations for the white and colored races, by providing separate coaches or compartments so as to secure separate accommodations.”

Following passage of the measure, the Louisiana African-American community considered its options. Some persons suggested a boycott of the railroads, but the *New Orleans Crusader*’s editor, L.A. Martinet, urged a response through the legal system. “We’ll make a case, a test case, and bring it before the Federal Courts,” Martinet wrote. With the *Crusader’s* encouragement, several of New Orleans’s most prominent African-Americans formed a “Citizens’ Committee to Test the Constitutionality of the Separate Car Law.”

The first order of committee business was raising money; the second was finding suitable circumstances for testing the law. The money flowed in at a modest pace while the committee looked for a good lawyer and a promising defendant. The lawyer was more easily found. Martinet wrote to Albion Winegar Tourgee, an Ohio native and a former Union officer who had
moved to North Carolina in 1865 to practice law and help the Radical Republicans reconstruct North Carolina; subsequently he served with some distinction on the North Carolina superior court. Beginning in the late 1870s, he published several novels based on what he had encountered and endured in the postwar South. Though his efforts with the pen never gained him a great deal of money or a lasting reputation as an author, they kept him in the public eye. “We know we have a friend in you,” the New Orleans committee wrote, adding, “We know your ability is beyond question.” When the committee asked Tourgee to serve as lead counsel in an effort to overturn the Louisiana Jim Crow law, he accepted.

Tourgee recommended that the committee choose for the person to test the law an individual, perhaps a woman, who was "nearly white." Presumably this would underline the arbitrariness of the ban. Martinet doubted that such a plan would work, since a very light-skinned African-American, especially a woman, probably would be allowed to pass for white. “It would be quite difficult to have a lady too nearly white refused admission to a 'white' car,” Martinet wrote Tourgee. “There are the strangest white people you ever saw here. Walking up and down our principal thoroughfare--Canal Street--you would be surprised to have persons pointed out to you, some as white and others as colored, and if you were not informed you would be sure to pick out the white for colored and the colored for white. Besides, people of tolerably fair complexion, even if unmistakably colored, enjoy here a large degree of immunity from the accursed prejudice. In this respect New Orleans differs greatly from the interior towns, in this state or Mississippi.”

Yet despite his reservations, Martinet was willing to go along with Tourgee's advice. “We will try to do the best we can.”
Members of the African-American citizens' committee then approached the railroads. Several of the companies opposed the law, partly because of the trouble of policing it, partly because of the risk of alienating blacks, who formed an important portion of their clientele, and partly because of the expense, albeit relatively small, of running extra cars in the cases where extra cars were needed. The first company Martinet and his associates contacted said it didn't enforce the law. It posted the requisite signs but instructed its personnel not to bother blacks who ignored them. Two other companies said they didn't like the law and hoped to see it overturned, yet they desired to talk with their lawyers before getting involved in what might be a costly court fight.

Eventually, Tourgee, Martinet, and the committee worked out a plan with a line that consented to cooperate. A black man, rather than a woman, would buy a train ticket and take a seat in a white car. A white passenger in the car, who would have volunteered for the task, would complain to the conductor. The conductor, also acting according to instructions, would tell the black man to move to the Jim Crow car. The black man would refuse. The white person would file a complaint.

All went as planned on February 24, 1892 when Daniel Desdunes, the twenty-one-year-old son of a founding member of the citizens' committee, boarded a train in New Orleans bound for Mobile, Alabama. Desdunes sat in the white car, was asked to move, refused, and was complained against. He was arrested, released on bond, and scheduled for trial in New Orleans district court.

Preparing for the trial, the two top lawyers for the defense, Tourgee and associate counsel James Walker, had a disagreement regarding the strategy they ought to pursue. Walker recommended attacking the Jim Crow law as a violation of the interstate commerce clause of the
Constitution. Tourgee granted that such an approach might succeed in voiding this particular statute, perhaps even an entire class of laws pertaining to transportation; but it wouldn't get to the heart of the matter, which was whether states could pass laws mandating segregation of blacks in any business whatever.

Tourgee and Walker were saved the trouble of resolving their difference by the Louisiana supreme court. In May 1892, the state's high court ruled in a separate case brought by the Pullman Company that the Louisiana Jim Crow law did in fact infringe the interstate commerce clause and therefore was void as it related to interstate passengers. Because Desdunes had purchased a ticket for a destination in Alabama, the case against him collapsed.

Some members of the New Orleans black community applauded the court's decision as a signal victory. Others, including Tourgee and most of the citizens' committee, remained unsatisfied. The Jim Crow law still applied to travel within Louisiana; more important, the principle of state-ordered segregation stood intact. Even James Walker agreed that the assault on the law must continue.

Accordingly a new test was arranged. Early in June, Homer Plessy bought a ticket from New Orleans to Covington, Louisiana on the East Louisiana Railroad. Although some of the details are unclear, the citizens' committee evidently had apprised the railroad company of its plan, as it had done in the previous test, for otherwise Plessy would probably not have been noticed. He had very light skin--he described himself as seven-eighths Caucasian and one-eighth African--and he customarily passed for white in New Orleans. Plessy took a seat in the white coach. A conductor asked him to move; he refused. A detective arrested him, and trial was scheduled.
When Plessy came to trial before the criminal court of the parish of New Orleans, Tourgee and Walker presented a plea specifying fourteen objections to the Jim Crow statute. The essence of the plea was that the statute established “an invidious distinction and discrimination between citizens of the United States based on race which is obnoxious to the fundamental principles of National Citizenship, perpetuates involuntary servitude as regards Citizens of the Colored Race under the merest pretense of promoting the comfort of passengers on railway trains, and in further respects abridges the privileges and immunities of Citizens of the United States and the rights secured by the 13th and 14th Amendments to the Federal Constitution.”

The trial judge praised the defense counsel on its “great research, learning and ability,” but indicated that he didn't think much of the defense's arguments. The court found the Jim Crow law constitutional and Plessy guilty.

The court’s decision elicited applause from leading organs of the white community in New Orleans. The editor of the Times-Democrat congratulated the court for upholding the separate-car law and reminded readers that the paper had supported passage of the Jim Crow law when it was before the legislature; indeed, the paper had urged more far-reaching segregationist measures. The paper hoped the recent court decision would cause the “silly negroes” who were fighting the law to cease and desist. “The sooner they drop their so-called 'crusade' against 'the Jim Crow car,' and stop wasting their money in combating so well-established a principle--the right to separate the races in cars and elsewhere--the better for them.”

But the “silly negroes” had no intention of calling off their fight. No sooner had the New Orleans court handed down its decision than Tourgee and Walker appealed to the Louisiana supreme court. The two attorneys weren't encouraged by the fact that the chief justice of the
court was former governor Francis Nichols, who in 1890 had signed the Jim Crow bill into law, but they pressed ahead. Their efforts were rewarded when the court accepted the case for review.

The Louisiana high court conducted its review with dispatch and soon delivered its judgment. After clearing away some procedural clutter, the court declared, “We thus reach the sole question involved in this case, which is, whether a statute requiring railroads to furnish separate, but equal, accommodations for the two races, and requiring domestic passengers to confine themselves to the accommodations provided for the race to which they belong, violates the 14th Amendment.” On this point the court cited precedents from other states. Not coincidentally, two of these precedents came from the North, the birthplace of Jim Crow. An 1849 case from Massachusetts upheld the principle of segregation in schools. The Massachusetts supreme court had answered objections by declaring, “It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law and cannot be changed by law.” The Massachusetts court went on to say that prejudice would be as likely to increase as to decrease, as the result of mixing schoolchildren.

The second case came from Pennsylvania. The supreme court there upheld a law quite similar to the Louisiana law, mandating separate accommodations in rail travel. The Pennsylvania court reasoned, “To assert separateness is not to declare inferiority in either. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix.” The Pennsylvania court continued, “Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away.”
The Louisiana court chose to be guided by these precedents. The court asserted that the challenged law applied with “perfect fairness and equality” between the races. In support of this point, the court noted that the charge against Plessy didn't specify whether he was black or white, merely that he insisted on sitting in a coach “to which by race he did not belong.” The court added, “Obviously, if the fact charged be proved, the penalty would be the same whether the accused were white or colored.” The court professed to be mystified that blacks were making such a fuss about placing themselves where they clearly weren't welcome. Moreover, the “unreasonable insistence upon thrusting the company of one race upon the other” would merely “foster and intensify repulsion between them, rather than to extinguish it.” The court denied Plessy's appeal.

The next step was the United States Supreme Court, which had been the objective of the New Orleans citizens' committee all along. It didn't take long for Tourgee and Walker to file the necessary papers, nor for the Supreme Court to consent to hear the appeal. But it did take a long time for the case actually to come before the federal high court. The delay owed partly to a backlog of cases on the court's docket and partly to a decision by Tourgee not to press for quick action. Tourgee examined the makeup of the court and wrote to Martinet, “Of the whole number of Justices, there is but one who is known to favor the view we must stand upon. One is inclined to be with us legally, but his political bias is strong the other way. There are two who may be brought over by the argument. There are five who are against us.” Tourgee declared that the Supreme Court had “always been the foe of liberty until forced to move on by public opinion.” He hoped public opinion would force the court to modify what evidently was its position in this case, but that might take some time. In any event, Tourgee believed, delay could only help the Plessy side. The moderate oppositionists might change their minds; they or some of the hard-
core four might retire or die and be replaced by more liberal successors. Tourgee deemed delay far preferable to defeat. “It is of the utmost consequence that we should not have a decision against us, as it is a matter of boast with the court that it has never reversed itself on a constitutional question.”

Though Tourgee wasn't quite accurate in this last claim, his basic point was right. The Supreme Court generally tried to adhere to the principle of *stare decisis*, meaning that it was guided by previous decisions. It would be better for the cause of equal rights to have no decision at all than to have one that favored segregation.

Tourgee recognized that popular opinion in the United States wasn't exactly overwhelming in its support for equal rights. If anything, the tide of opinion appeared to be moving in the opposite direction. Yet the situation wasn't hopeless. There were plenty of people in the country who supported equality between the races; they might be mobilized by an energetic campaign of education. “There are millions of the white people of the United States,” Tourgee told Martinet, “who believe in justice and equal right for the colored man, who desire for him all that they would wish and pray for were they in his conditions.”

III

As things turned out, efforts by Martinet and others to galvanize public opinion against segregation proved unavailing, and when the Supreme Court heard the Plessy case the atmosphere was, if anything, less conducive than earlier to equalitarian arguments. By this time, the case had become *Plessy v. Ferguson*. The second name was that of John Ferguson, the judge of the New Orleans criminal court that initially heard the case and whose decision Tourgee and Walker were appealing on Plessy's behalf.
In their brief, Tourgee and Walker described several deficiencies in the Louisiana Jim Crow law and the reasoning employed to uphold it. “The Statute,” they wrote, “imports a badge of servitude imposed by State law, and perpetuates the distinction of race and caste among citizens of the United States of both races, and observances of a servile character coincident with the institution of Slavery, heretofore exacted by the white race and compulsorily submitted to by the colored race.” In doing so the statute discriminated between white citizens and black citizens, abridging the rights, privileges, and immunities of the latter. In addition, the statute contained no provisions to guarantee that the separate accommodations it called for would be equal. Indeed, given human nature and the social and political conditions in the United States, it was impossible that the accommodations would be equal. “The court will take notice of a fact inseparable from human nature,” Tourgee wrote, “that when the law distinguishes between the civil rights or privileges of two classes, it always is and always must be to the detriment of the weaker class or race.”

Moreover, the statute failed to define “colored race” and “persons of color.” “There is no law of the United States, or of the State of Louisiana, defining the limits of race. By what rule then shall any tribunal be guided in determining racial character? It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice? Why not count everyone as white in whom is visible any trace of white blood?” Where would the court draw the line? “Will the court hold that a single drop of African blood is sufficient to color a whole ocean of Caucasian whiteness?” Tourgee asserted that in the absence of legal guidelines defining racial membership, decisions were left to employees of the railroads. These decisions would be made in an arbitrary and--on the evidence of the case at hand--unfair fashion.
Tourgee went on to say that in allowing the railroads--rather than the Courts--to decide who should ride in white-only cars, the statute deprived blacks of their property without due process of law. He contended that “in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action or of inheritance is property.” Tourgee asked: "How much would it be worth to a young man entering on the practice of law to be regarded as a white man rather than a colored one?” He noted that six sevenths of the population of the United States was white, that nineteen twentieths of the property in the country belonged to whites, that ninety-nine one-hundredths of the business opportunities were in the control of whites. Even assuming perfect harmony between the races, a black man embarking on a career was at a severe disadvantage compared to a white man. In light of the antagonism that often actually existed, the disadvantage was far greater. So great was the disadvantage, Tourgee suggested, that most white persons would prefer to die rather than live as blacks. “Under these conditions, is it possible to conclude that the reputation of being white is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?” The Jim Crow law, by allowing railroad employees to determine who was white and who was black, deprived blacks of this property without due process of law--a clear violation of the 14th Amendment.

The law was also unjust in that it exempted certain classes of people--for example, nurses attending children of the other race--from its provisions; it thereby compounded its racial unfairness with class inequities. If there existed a case of a white nurse attending the children of black parents, no one in Louisiana had ever seen it. What, then, was the effect of this provision? Simply to allow white parents to take blacks into the white coaches when the blacks were “in a menial relation” to the whites. This demonstrated that the framers of the statute didn't intend to
prevent whites and blacks from mingling, but only from doing so on a basis of equality. “In other words, the act is simply intended to promote the comfort and sense of exclusiveness and superiority of the white race. They do not object to the colored person in an inferior or menial capacity--as a servant or dependent, ministering to the comfort of the white race--but only when as a man and a citizen he seeks to claim equal right and privilege on a public highway with the white citizens of the state.”

The statute invaded the sanctity of marriage and the family by requiring individuals and offspring of mixed-race unions to travel in separate cars. “A man may be white and his wife colored; a wife may be white and her children colored. Has the State the right to compel the husband to ride in one car and the wife in another? ...Has a State the right to order the mother to ride in one car and her young daughter, because her cheek may have a darker tinge, to ride in another?”

Finally, the law forced railroads chartered as common carriers to violate the terms of their charters. Common carriers were required to accept the patronage of all customers on an equal basis. Distinguishing between whites and blacks inevitably led to favoring whites over blacks: blacks were thus treated unequally. Tourgee argued that the plain purpose and effect of the Jim Crow law was “to provide the white passenger with an exclusive first class coach without requiring him to pay an extra fare for it.”

The plaintiff's brief contained other objections, but the sum of them all was that states must not be allowed to draw distinctions between citizens on the basis of race. “If the State has a right to distinguish between citizens according to race in the enjoyment of public privilege, by compelling them to ride in separate coaches, what is to prevent the application of the same principle to other relations? Why may it not require all red-headed people to ride in a separate
car? Why not require all colored people to walk on one side of the street and the whites on the other? Why may it not require every white man's house to be painted white and every colored man's black?” Arguments that turned on the equality of the accommodations afforded the two races missed the point. “The question is not as to the equality of the privileges enjoyed, but the right of the State to label one citizen as white and another as colored in the common enjoyment of a public highway.” In a single sentence that encapsulated the argument for Plessy’s side, Tourgee declared, “Justice is pictured blind, and her daughter, the Law, ought at least to be color-blind.”

On the other side of the case, the attorney general of Louisiana, Milton Cunningham, and associate counsel Alexander Morse argued for Judge Ferguson. Cunningham and Morse made three points primarily. First, they said that the Louisiana separate-car law did not violate the rights of members of any race, since it did not legislate inequality. On the contrary, it mandated that facilities for the two races should be equal. Sorting individuals by race--as, for example, to reduce the “danger of friction from too intimate contact”--was a legitimate exercise of the state's police power.

Second, the claims of the Plessy side notwithstanding, the Louisiana law did not contradict the 14th Amendment guarantee of due process. The law did not exempt railway companies or their employees from liability for civil damages if they incorrectly assigned passengers; a person assigned to a wrong car could sue and presumably win. Nor did the law specify criminal penalties for the failure of a passenger to comply with a wrongful assignment. In no way, therefore, did the law transfer judicial authority from the courts to the railway companies.
Third, the argument of the Plessy side that determinations of race were difficult if not impossible was fatuous. People made such determinations daily with no great problem. Ferguson’s counsel cited several precedents that they said demonstrated that “every man must know the difference between a negro and a white man” and that “the exercise of judgment is not necessary to determine the question.” In those rare instances where it really was difficult to decide which race a person belonged to, individuals wrongly assigned could sue for damages. This fact alone would deter railway officials from capricious decisions.

Cunningham and Morse filled out their briefs with further contentions, but the crux of their argument was the opposite of that of Plessy's side. The state did have the right to distinguish between individuals on the basis of race so long as it did not do so for the purpose of legislating inequality. The Louisiana law did not legislate inequality; therefore the state's distinguishing between whites and blacks was constitutional.

IV
On May 18, 1896, the Supreme Court rendered its decision in the Plessy case. By a vote of 7-1, the court affirmed the decision of the Louisiana courts and found the separate-car law to be constitutional. Associate Justice Henry Billings Brown wrote the decision for the majority. One by one, Justice Brown dismissed the objections of the counsel for Plessy. Brown denied that the Louisiana law had anything to do with slavery. “It would be running the slavery argument into the ground,” he wrote, quoting the Court's decision in the Civil Rights Cases, “to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, of admit to his concert or theater, or deal with in other matters on intercourse or business.” Speaking in his own voice,
Brown added, “A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist as long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or to reestablish a state of involuntary servitude.”

Brown conceded that the purpose of the 14th Amendment was to enforce the “absolute equality” of the two races before the law, but he rejected the notion that it had been designed to abolish distinctions based on race. Neither had it been designed to enforce social equality, nor to impose a commingling of the races on terms unsatisfactory to either. For years courts had allowed school boards to distinguish between white and black children in assigning pupils to schools. The United States Congress had registered its concurrence with this practice by allowing the segregation of schools in the District of Columbia.

Brown rejected Tourgee's contention that the Jim Crow car law deprived African-Americans of property rights. The associate justice didn't deny that property issues were involved, but he accepted the arguments of the Louisiana side that a person wrongly assigned—and therefore wrongly deprived of the property in his reputation—could seek damages in the civil courts.

Brown likewise dismissed the argument that allowing states to pass Jim Crow car laws would lead to all manner of absurd and arbitrary segregationist measures. Inherent in the police power of the states was the stricture that this power be used in a reasonable manner, in good faith and for the public welfare rather than the annoyance or oppression of a particular class.

Brown didn't consider the problem of determining who was black and who white to be insuperable; neither did he consider it to be a matter for the Supreme Court to worry about. The states should establish their own guidelines. If these guidelines proved to be unsatisfactory, they
might become an issue in later cases. Plessy might have grounds for complaining that he was white rather than black, but he wasn't so arguing, and any such complaint had no bearing on the constitutionality of the law at hand.

The fundamental problem with the argument of the Plessy side, Brown explained, and the reason the court was rejecting Plessy's suit, had to do with the alleged implications of racial distinctions. Brown denied that mere distinction between the white and black races implied the subordination of the latter to the former. “We consider the underlying fallacy of the plaintiff's argument to consist in the 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.” Brown pointed out that during Reconstruction, when blacks and their allies had passed legislation most Louisiana whites didn't like, none of those whites for a moment had thought that such legislation meant the white race was inferior to the black race.

The plaintiff’s argument placed entirely too much importance on legislation as social engineering, Brown said. The argument assumed “that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by a forced commingling of the two races.” Brown rejected this proposition. Concluding his decision, Brown wrote: “Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”
Although Justice Brown spoke for the court, he didn't speak for all the justices. Associate Justice John Marshall Harlan vehemently disapproved of the court's decision and delivered a blistering rebuke to the majority. Where Brown had contended that the slavery issue was not germane to the Plessy case, Harlan declared that slavery was absolutely germane. The 13th Amendment, he said, “not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude.” To strengthen the 13th Amendment, Congress and the people of the states had approved the 14th Amendment; together, the two amendments “removed the race line from our governmental systems.” Quoting an earlier decision involving the scope of the 14th Amendment, Harlan explained that the Supreme Court had declared “that the law in the States shall be the same for the black as for the white; that all persons shall stand equal before the law of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.”

Harlan dismissed as disingenuous the argument by the attorneys for the Ferguson side that the Louisiana law did not discriminate, but treated blacks and whites equally. “Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.” Harlan continued, “The thing to accomplish was, under the guise of giving equal accommodation for white and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches.”

Harlan likewise dismissed the contention that the assignment of the two races to separate cars was merely an exercise of the state's police power and that the use of this power would be
confined to reasonable purposes. He thought the same logic that would allow a state to segregate passengers on railcars would allow states to segregate passengers on streetcars, to segregate visitors to legislative assembly halls, or to segregate voters convening to discuss political issues of the day. Further, there was no clear reason why segregation had to be restricted to racial classification. “Why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?”

Defenders of segregation said that such measures wouldn't be “reasonable.” Harlan thought reasonableness entirely too slippery a standard, for it got the courts into matters of policy and expediency as they related to legislation. “I do not understand that the courts have anything to do with the policy or expediency of legislation.” Harlan decried the “dangerous tendency in these latter days to enlarge the functions of the courts” until the courts encroached on the prerogatives of the legislature. “Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives.”

The white race considered itself dominant in America, Harlan went on; and so it was by any objective measure of social status, achievements, education, wealth, or power. But this was all the more reason for guaranteeing legal equality between blacks and whites. “In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man.”
Yet the decision of the court in the Plessy case tended in precisely the opposite direction. “The judgment this day rendered,” Harlan predicted, “will in time prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case”—the notorious 1857 case regarding slavery and black citizenship that did much to bring on the Civil War. “The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution.” The 60 million whites living in America were under no threat whatsoever from the 8 million blacks; if anything, the threat lay the other way. More to the point, the destinies of whites and blacks were indissolubly joined, and the interests of both groups dictated that the seeds of race hate not be planted under the sanction of law.