



# *The Louisiana Supreme Court and Civil Rights: A Fickle Courtship*

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*A young swallow had built her nest under the eaves of a Court of Justice. Before her young ones could fly, a serpent gliding out of his hole ate them all up. When the poor bird returned to her nest and found it empty, she began a pitiable wailing. A neighbor suggested, by way of comfort, that she was not the first bird who had lost her young. “True,” she replied, “but it is not only my little ones that I mourn but that I should have been wronged in that very place where the injured fly for justice.*

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—Aesop, Fables



It is impossible to fully synthesize a comprehensive treatment of civil rights issues rendered by the Louisiana Supreme Court within the space limitations of this article, and a consistent thematic approach is difficult. One constant, nevertheless, seems to emerge; specifically, the Louisiana Supreme Court has not embraced its institutional policy-making function to advance the salutary purposes of civil rights issues. Several cases in representative categories illustrate this thesis.

## Slave Period

The Louisiana Supreme Court's examination of civil rights must begin by examining the institution that made the recognition of those rights essential: slavery. The high Court struggled to find the appropriate place for slaves within the legal system. Consequently, these individuals occupied a position somewhere between property and person. This dichotomy continually confused the Court, as the justices could neither deny a slave's humanity nor grant them full civil personhood.<sup>1</sup>

This confusion manifests itself in a case from 1850, in which the defendant landowner was convicted of manslaughter for killing a slave.<sup>2</sup> He appealed and argued that the only crime for which he could be convicted was that of willful and malicious murder because the crime of manslaughter did not apply to slaves. The Court upheld the conviction, holding that "slaves are regarded both as persons and property," and the law is intended to give "the most ample protection, both to the person of the slave, and to the property of the citizen."<sup>3</sup> Several decisions throughout the 1800s present a contrast to the recognition of the personhood of a slave. Notably, slaves could be, and often were, the object of redhibitory actions to rescind a contract. If the Court found a slave was defective and that the slave's defect, whether it was mental or physical, existed at the time of the sale or shortly thereafter, the buyer could get the sale rescinded.<sup>4</sup>

Until 1857, when emancipation became illegal in Louisiana, it was common for slave owners, upon death, to free their slaves. The Court defined this practice as "a donation of [a slave's] value to her."<sup>5</sup> A slave became, therefore, someone who

could inherit, and also the property she was inheriting. This duality became further complicated when the slave owner died with forced heirs because if the slave was worth more than the disposable portion of the deceased owner's estate, then she could not be freed and had to be included in the estate's assets for distribution.<sup>6</sup>

In *Vail v. Bird*, Vail died and, through his will, emancipated his female slave, Jane, and bequeathed to her two promissory notes for \$100 each.<sup>7</sup> Vail's heirs attacked the legacy on several grounds, including that Jane was Vail's concubine and, as such, Vail could not donate to Jane an immovable or movables over one-tenth of the value of Vail's estate. Further, since the disposition to Jane of her freedom was a disposition of immovable property, it was prohibited.

The Court determined that Jane was immovable property and that she was Vail's concubine, despite the Court's admission that a slave is subject to the power of her master and thus could not consent to a concubinage relationship. According to the Court, the law of concubinage applied to all persons, regardless of color or status. Since Jane was immovable property, Vail could not have donated her freedom to her. The inherent illogical nature of the Court's reasoning illustrates the difficulty in defining a slave's legal status, especially in the context of other state laws.

The Court's willingness to bend the law to accommodate this unusual system was often irrational. For instance, after the Legislature made emancipation illegal in 1857, the Court declared that the act applied retroactively. Therefore, after 1857, if a slave owner emancipated his slave through testament executed before 1857, the slave would be denied his freedom. In one case, the deceased, Hyde, emancipated his slave mistress

and her eight children through his will.<sup>8</sup> He also left all nine of them as his universal legatees. His legal heirs attacked the will, claiming that the slaves could not be emancipated because of the Act of 1857, even though it had been legal for Hyde to emancipate his slaves when he died. The Court held that the slaves' rights to emancipation were conditioned upon certain regulations and laws regarding manumission and, since the Act of 1857 made emancipation illegal, Hyde's slaves had no legal standing in Court on any matter.

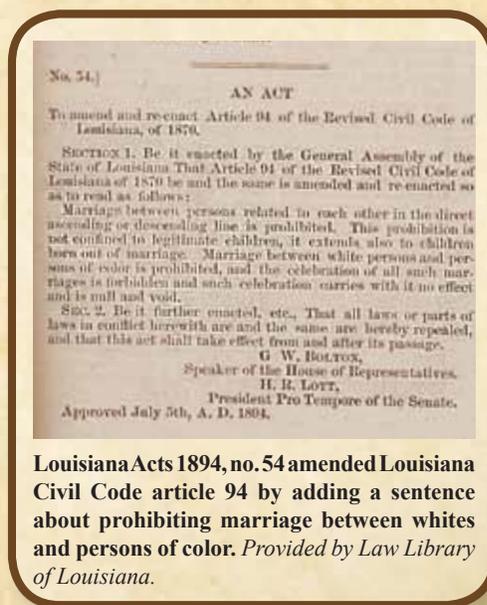
The slave's status under the law dumbfounded the Court for as long as the institution existed. Once slavery was abolished, however, that confusion did not dissipate; it merely transferred to the difficulty of defining the civil rights that freed blacks were afforded.

## Early Civil Rights

Slaves gained freedom when the Civil War ended in 1865; however, it was clear that all free men were not created equal. The Reconstruction era immediately followed the Civil War and saw southern legislatures passing *code noirs*, or "black codes," that severely restricted and controlled the rights of freed blacks.<sup>9</sup> Soon after this period, however, the South entered the Radical Reconstruction era,

during which blacks gained a stronger political presence by winning elections in southern legislatures. This political momentum waned a decade later when white supremacy groups reacted by attempting to strip blacks of any political capital they had gained. The Louisiana Supreme Court was not immune to this political tug-of-war.

Anti-miscegenation laws were enacted in the early 20th century. Before these laws



Louisiana Acts 1894, no. 54 amended Louisiana Civil Code article 94 by adding a sentence about prohibiting marriage between whites and persons of color. Provided by Law Library of Louisiana.

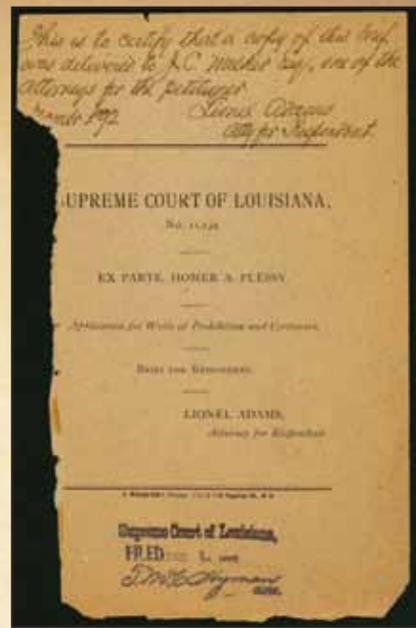
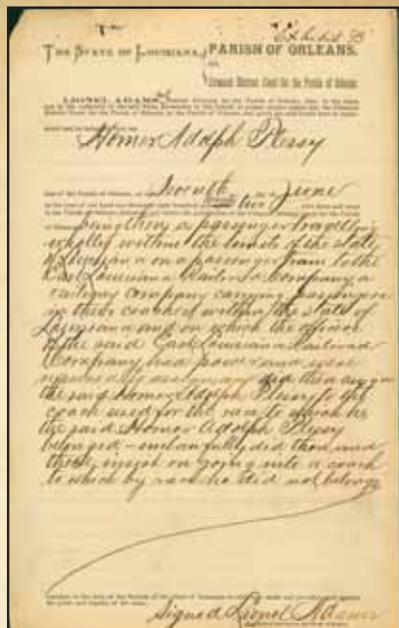


came into effect, freed blacks and whites could legally marry because blacks were afforded the same rights by default. In 1874, the Court decided a case in which Cornelia Hart, a black woman, married a white man 18 months before his death.<sup>10</sup> The two had lived together for several years and had children together. Mr. Hart's relatives challenged the children's rights to inherit from Mr. Hart by claiming that the marriage was absolutely null because Cornelia was black. The Court upheld the marriage because Cornelia was a free woman and she was conferred with all of the privileges and civil rights as anyone else under federal law and, therefore, had the right to enter into the contract of marriage.

Seventy years later, the Court decided a case under the newly enacted anti-miscegenation laws. These laws cropped up after the Radical Reconstruction era when white supremacist groups sought to curb the rights of black citizens. For instance, the Court considered a case involving Tony Rice, a white man, and Azelia Barthelmy, a black woman, who were married and lived together for more than 20 years.<sup>11</sup> Barthelmy recorded a declaration in the mortgage records stating that the home they shared was a family home. Rice and Barthelmy separated but did not legally divorce, and Rice sold the home that he had purchased during the marriage. The new owner attempted to evict Barthelmy and eventually sued to effectuate the eviction when Barthelmy refused to leave. Barthelmy claimed she was Rice's wife and that he could not sell the property without her consent.

The Court held that Rice and Barthelmy were not legally married and the house was Rice's alone. At that time, Civil Code Article 94 stated that marriages between whites and blacks were absolutely null. Therefore, the marital community never existed and no legal effects flowed from the marriage. Barthelmy was ordered to leave the property.

The laws of "separate but equal" also were a post-Reconstruction era concept. In 1876, the Court sided with a black man who was refused entry into a public theater in New Orleans.<sup>12</sup> The Court held that the plaintiff "was rudely denied admission to the theatre solely on account



Depicted are documents from the record in *Ex Parte Plessy*. Courtesy of Historical Archives of the Supreme Court of Louisiana, Earl K. Long Library, University of New Orleans.

of his being a colored man," which was unconstitutional.<sup>13</sup> Contrast this with the famous case of *Ex parte Plessy*, in which the Court held that separate but equal accommodations were not only legal, but necessary.<sup>14</sup> In that case, a black man was denied entrance onto a railroad car reserved for whites only. The Court declared that separate but equal accommodations were "in the interest of public order, peace, and comfort" and did not impair the rights of either race.<sup>15</sup> The Court effectively ushered in the Jim Crow era and officially sanctioned legally-imposed segregation, which endured until a unanimous United States Supreme Court overturned this principle in *Brown v. Board of Education*, 74 S.Ct. 686, 347 U.S. 483 (1954).

*State v. Goldfinch* was one of the first Louisiana Supreme Court cases to deal with the modern civil rights movement.<sup>16</sup> The consequence of the retaliation following Radical Reconstruction was the need to create laws to specifically combat racial discrimination. The 14th Amendment served as the starting point to those laws. In *Goldfinch*, the defendants entered a restaurant and took seats at the counter reserved for "whites only," instead of the counter reserved for "colored persons."<sup>17</sup> The defendants were refused service, the manager was called, the counter was

closed, and the defendants were asked to leave. They refused to leave and were arrested and charged with criminal mischief.

The defendants asserted that the statute was unconstitutional in its application; that is, the statute was only enforced against blacks and those acting in concert with them. The Court held, however, that because the statute allowed the proprietor of the business the sole discretion to allow someone to remain in the business, there was no state action to violate the 14th Amendment.<sup>18</sup>

## Contemporary Civil Rights

Racial discrimination continues to require the Court's attention; however, other areas of civil rights also have emerged in the battle for equality. One such area is gender discrimination. In *Albright v. Southern Trace*,<sup>19</sup> female members of a country club sued the owners of the club for refusing them access to the dining room, which was reserved for men only. The plaintiffs alleged a violation of Louisiana Constitution Article 1, Section 12, which provides that in access to public areas, accommodations and facilities, every person shall be free from discrimination based on sex. Since discrimination was obvious, the case hinged on whether the country club was a public



facility subject to the constraints of the Constitution. On that issue, the Court held that the country club was a public facility because there was no selectiveness in the addition of new members; bulk mailings were sent out to solicit members; and no membership requirements existed, other than paying dues.

After the progress made for women's rights, the Court again regressed by essentially eliminating affirmative action under state law. In *Louisiana Association of General Contractors, Inc. v. State of Louisiana*,<sup>20</sup> the Association of General Contractors brought suit challenging the constitutionality of the Louisiana Minority and Women's Business Enterprise Act. The Act required that a certain percentage of funds spent on public works be designated solely for participation by certified minority and women's business enterprises. In order to meet the percentage, a certain number of public works contracts were set aside for bidding only by minority and women's businesses.

The Court held that the Act violated the equal protection clause of the Louisiana Constitution, which the Court interpreted as providing greater protection than the equal protection clause of the federal Constitution. The wording of Louisiana's clause, according to the Court, is clear and unambiguous and "on its face absolutely prohibits any state law which discriminates on the basis of race."<sup>21</sup> The Court interpreted this to mean that the law must be applied regardless of race and with no scrutiny at all. Breaking from United States Supreme Court precedent, the Louisiana Supreme Court determined that it was irrelevant whether a racially discriminatory law was designed to remedy past discrimination. A compelling state interest, e.g. diversity and increased participation by minority-owned businesses, was irrelevant to the inquiry. This decision was in stark contrast to *Regents of University of California v. Bakke*<sup>22</sup> and *Grutter v. Bollinger*,<sup>23</sup> in both of which the Court held that the use of race in school admissions should be subject to strict scrutiny; that is, the policy should be upheld if it is narrowly tailored to serve a compelling governmental interest. While the Louisiana Supreme Court claimed it was interpreting the Louisiana Constitu-

tion to provide greater protection than the 14th Amendment, the Court actually limited its application.

## Conclusion

Whether the Louisiana Supreme Court's history in the civil rights landscape has been a response to public opinion or shaped by legislative enactments is yet to be answered. This article is simply a condensation of the opinions heretofore issued by the Louisiana Supreme Court.<sup>24</sup>

*The author gratefully acknowledges the assistance of law clerk Emily Ross in the preparation of this article.*

## FOOTNOTES

1. See, *Gomez v. Bonneval*, 6 Mart. (o.s.) 656 (La. 1819) (describing slaves as "mere passive beings who are disposed of according to the will of the different state legislatures"). The Court attempted to clarify the slave's status compared to that of a free man. "A free man of color is capable of contracting. He can acquire by inheritance and transmit property by will. He is a competent witness in all civil suits. If he commits an offence against the laws, he is to be tried with the same formalities, and by the same tribunal, as the white man." *State v. Harrison, a Slave*, 11 La. Ann. 722, 724 (La. 1856). A slave, on the other hand, "is the object of contracts, not a legal party to contracts. He may be sold or mortgaged, but he cannot sell or mortgage. He can neither inherit, nor make a will, because he can possess nothing as owner. He is inadmissible as a witness in any civil suit whatever. And if accused of a crime, he is tried by a special tribunal, to which the safeguards of the common law are unknown." *Id.*

2. *State v. Seaborne*, 8 Rob. (LA) 518 (La. 1843).

3. *Id.* at 521. The Court did not always recognize a slave's humanity. One such blind spot was the law applicable to caretakers who were cruel to their slaves. The legal system was often unable to adequately adjudicate cases concerning cruelty to slaves for several reasons. Slaves were unable to testify against whites, which meant a case for cruelty often could not be heard in court at all, unless other witnesses stepped forward. Further, even if criminal charges were brought, juries were composed of the caretaker's peers, which meant a jury was unlikely to hand down a guilty verdict. Judith Kelleher Schafer, "Details Are of a Most Revolting Character: Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana," in *Slavery and the Law* 240 (Paul Finkelman, ed., 2002).

4. *Buhler v. McHatton*, 9 La. Ann. 192 (La. 1854).

5. *Prudence v. Bermodi*, 1 La. 234, 241 (La. 1830).

6. *Id.*

7. 6 La. Ann. 223 (La. 1851).

8. *Price v. Ray*, 14 La. Ann. 697 (La. 1858).

9. Reconstruction officially began under

President Andrew Johnson and was an attempt to restore the political environment of the South. Johnson's policies, however, reflected racist sentiments and a fervent belief in states' rights that resulted in the tight restriction of African-American rights. Northern voters were unhappy with Johnson's policies, leading Congress to initiate Radical Reconstruction, under which blacks enjoyed increasing political power in various areas of government. Wall, Bennett, H., Ed. *Louisiana: A History*. Wheeling, IL: Harlan Davidson, 2008. (5th ed.)

10. *Hart v. Hoss*, 26 La. Ann. 90 (La. 1874).

11. *Ryan v. Barthelmy*, 32 So.2d 467 (La. 1947).

12. *Joseph v. Bidwell*, 28 La. Ann. 382 (La. 1876).

13. *Id.* at 1.

14. 18 L.R.A. 639 (La. 1892).

15. *Id.* at 951.

16. 132 So.2d 860 (La. 1961).

17. *Id.* at 861.

18. This decision was overturned by the United States Supreme Court in *Lombard v. State of La.*, 373 U.S. 267 (1963). The Supreme Court held that, although no specific ordinance existed prohibiting the desegregation of dining establishments, Louisiana had achieved the same result through official commands. The restaurant manager asked the petitioners to leave in accordance with directives from city officials. The Court held that this amounted to state action and was unconstitutional. *Id.*

19. 03-3413 (La. 7/6/04), 879 So.2d 121.

20. 95-2105 (La. 3/8/96), 669 So.2d 1185.

21. *Id.* at 1196.

22. 98 S.Ct. 2733, 438 U.S. 265 (1978).

23. 123 S.Ct. 2325, 539 U.S. 306 (2003).

24. For further reading on this subject, refer to: Judith Kelleher Schafer, "Details Are of a Most Revolting Character: Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana," in *Slavery and the Law* 240 (Paul Finkelman, ed., 2002); Judith Kelleher Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (1994); *An Uncommon Experience: Law and Judicial Institutions in Louisiana* in *The Louisiana Purchase Bicentennial Series in Louisiana History Volume XIII* (Judith Kelleher Schafer and Warren M. Billings, eds., 1997).

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