THE PLESSY CASE

A LEGAL-HISTORICAL INTERPRETATION

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INTRODUCTION

"The *Plessy* Prison"

I

On Monday, May 18, 1896, the United States Supreme Court handed down its decision in *Plessy v. Ferguson*. At issue was the constitutionality of a Louisiana law, passed in 1890, which mandated "equal but separate accommodations for the white and colored races" on all passenger railways within the state. In an opinion by Justice Henry Billings Brown, a native of Massachusetts, a majority of seven justices upheld the enactment as a reasonable "police" measure. Using a less-than-direct argument, the Court could not say there was no basis for accepting the state legislature's conclusion that the law would promote the comfort of the people and preserve "public peace and good order." But the lone dissenter, Justice John Marshall Harlan of Kentucky, a former slaveholder, saw the inner truth. "The thin disguise of 'equal accomodations,'" he declared, "will not mislead anyone, nor atone for the wrong this day done." The Court's judgment would, "in time, prove to be quite as pernicious as the decision . . . in the *Dred Scott case*."[1]

In castigating the majority's position, Harlan had future company. By mid-twentieth century, a plethora of maledictions—here sampled in the form of a pastiche—centered on "the notorious Supreme Court case of *Plessy v. Ferguson*," which "reduced the Fourteenth Amendment to little more than a pious goodwill resolution" and indeed gave the "ultimate blow to the Civil War Amendments and the equality of Negroes." "It is permissible to doubt

whether the . . . Court has ever exposed the fundamentally racialist assumptions behind its reasoning with quite such incontinence, and it is also permissible to hope that it has never [elsewhere] committed itself through such inferior reasoning." In uttering "the climactic Supreme Court pronouncement on segregated institutions" through "one of the most irrational opinions ever announced," Justice Brown in places "slipped into absurdity" and "smuggled Social Darwinism" into the Constitution.[2]

Marking "the Court's acceptance of an overtly racist social policy," Brown's "disastrous excursion into legal philosophy" sentenced blacks for more than fifty years to "the *Plessy* prison." More broadly, it inaugurated a half-century's hiatus in moral leadership in America, announced "the federal birth of the separate but [un]equal doctrine," and itself produced a "catastrophic backlash" against blacks of "almost unbelievable" proportions. It was, in short, "the national decision against equality."[3]

In its specific features, moreover, Brown's majority opinion constituted "a compound of bad logic, bad history, bad sociology, and bad constitutional law." By claiming that "[l]egislation is powerless to eradicate racial instincts," Brown had penned "one of those phrases that live in constitutional history largely because of their inaccuracy."[4] But it was at least clear that the Court had upheld Mr. Plessy's conviction, after dismissing the equal protection arguments that formed the core of his position.[5] Other parts of his case, however, had raised Thirteenth Amendment and due process arguments, the latter involving the claim that the separate car law deprived the light-toned Plessy of property in the form of reputation as a white man. On those fronts, it may have been Plessy's own counsel who had been ill-advised in their approach. Perhaps, too, they were mistaken in allowing the case—an arranged affair—to develop in such a hostile environment.[6]

But at least *Plessy* came down only "over the ringing protest of John Harlan." The Kentuckian delivered "a dissenting opinion of extraordinary force"—"the greatest of his many dissents, and . . . one of the most majestic utterances in American law." Its "most striking aspect . . . [was] the attitudes of racial toleration and the fears of racial antagonism that it expressed . . . ." Because Harlan "recognized the bankruptcy of the Court's reasoning," it was for good reason that a "coming vindication" awaited him—albeit posthumously.[7]

II

It should need no belaboring: Harlan's indignation was the morally correct response in a republic founded on the truth "that all men are created equal." To say that is to affirm that by taking *Plessy* seriously, I hardly intend to resurrect it for the benefit of the late twentieth century, although now and again people are charged with the attempt.[8] Without more, however, simply condemning the decision promotes an understanding neither of it nor of America in the late nineteenth century.

The Plessy case has not been well understood. At the level of "fact," for example, Homer A. Plessy was not appealing a conviction. Nearly as demonstrable, "equal protection" did not constitute the core of the argument made on his behalf. And the connection between his case and the legal ensconcement of "equal-but-separate" (to use the sequence of terms that was more common in the late nineteenth century) turns out to be problematic.

In addition, we confront an initially puzzling phenomenon: the nation's press met the decision mainly with apathy. Why? And why did *Plessy* remain nearly invisible for a long time after 1896? It is true that the early black historian Carter G. Woodson correctly identified it in 1921 as one of the cases that, over a period of fifty years, had substantially qualified the Negro's citizenship. But in 1922, Charles Warren's pioneering history of the Supreme Court neglected it, and his 1926 revision listed it only in a footnote, along with twenty-four other cases "involving rights of Negroes" in the late nineteenth and early twentieth century. Among textbooks, so often the barometer of what recently has passed for scholarly wisdom, Carl Brent Swisher's generally solid survey of constitutional history, published in 1943, failed to mention the case. And as late as 1948, Henry Steele Commager, a historian of assuredly liberal credentials, omitted *Plessy* from his widely consulted *Documents of American History*, first published in 1934.[9]

These omissions suggest several things, not least being the long-term acquiescence of many white Americans in the Compromise of 1877. They also hint that within its historical period, *Plessy* perhaps was *not* especially controversial. But therein lies much of its significance. A decision which is largely commonplace may offer a strategically placed window onto what contemporaries regarded as conventional; or, to change the figure, it may serve nicely as a kind of prism through which to refract and analyze some of the tenets of a period.

Through examining several themes suggested by *Plessy v. Ferguson*, this book has a double thrust. It contributes, I hope, to our understanding of the constitutional-legal context of southern race relations and American racism from the end of the Civil War to the turn of the century; and in doing so it suggests a modest recasting of the controversy over *de facto* versus *de jure* segregation, about which historians have spilled more than a little ink. The book also explores and dissects the case itself within what may be called the legal-racial matrix of the 1890s, with an eye toward explaining why it turned out as it did.

More schematically, the presentation proceeds as follows. To provide background, especially for readers who are not versed in pertinent aspects of what C. Vann Woodward has called "the strange career of Jim Crow," I begin by reviewing transportation segregation in practice and law in the postbellum South (Chapter One). Next, I trace the initial development of a judicial test of Louisiana's separate car law (Chapter Two) and delineate the legal issues emerging at the state level (Chapter Three). Attention then shifts

to three "environmental" elements shaping the approaches that courts and counsel took to *Plessy*: the body of law and doctrine that by the early- to mid-1890s had developed around the Thirteenth and Fourteenth Amendments (Chapter Four); current attitudes toward and theorizing about race distinctions (Chapter Five); and non-constitutional case law and related developments concerning transportation segregation (Chapter Six). Finally, I return to *Plessy*, analyzing its presentation before the Supreme Court (Chapter Seven), deciphering the responses of the Court and Justice Harlan (Chapter Eight), and inquiring into the case's broader significance (Chapter Nine).

Two terms (and variations on them) appear frequently in the following pages—"racism" and "the South." Most of us have at least a feel for their meaning, but more specificity may be in order. Covering a multitude of sins, "racism" can refer to prejudice (an attitude), discrimination (an action), theorizing about racial differences that stresses an inferior/superior relationship (a "scientific" doctrine), and a broad system of law and custom embodying each of the preceding elements (a social order).[10] The Plessy case implicated each element and especially the last. Context will establish which emphasis I intend. In using "the South," "southerners," and the like, I generally mean the former slave-holding states and their inhabitants. Additional precision seems unnecessary in a study that does not rest on or aim for sharp quantitative distinctions. Where necessary, I again rely on context to qualify or extend the meaning.

CHAPTER ONE

De Facto to *De Jure*: Transportation Segregation in the South From the Civil War to the 1890s

I

Historians face at least one special temptation: the pursuit of the ever-receding beginning. The Plessy case increases the urge, for racial separation in the South did not suddenly spring forth fully developed in the late nineteenth century, but rested instead on attitudes and practices running deep into the American past. Even the term "Jim Crow," commonly applied to separate facilities for blacks in the century following the Civil War, dated to the antebellum period. Appearing as early as 1832 in the title of a minstrel show's song-and-dance routine, by 1841 it identified a separate railway car for Negroes in Massachusetts. More importantly, the complex of beliefs that led many white Americans to see blacks as inferior yet threatening beings, perhaps not quite human, predated the founding of the Republic and may even have preceded slavery in England's North American colonies.[1]

But rather than probe the issue of distant beginnings, which continues to attract able scholars, we may take the existence of widespread racial prejudice as a historical "given" at the close of the Civil War, for it assuredly was. A Confederate who returned to New Orleans in 1865, only to find "niggers with arms in hand, doing guard duty," manifested simply an extreme form of the sentiment when he wrote in a personal letter how he hoped "the day will come when we have the upper hand of those black scondrels [*sic*] and we will have no mercy for them[;] we will kill them like

Homer Plessy's trial. On January 11, 1897, over four and a half years after his arrest for attempting to board a white car on the East Louisiana Railway, Plessy entered a plea of "guilty" in Criminal District Court and paid a twenty-five-dollar fine. The case by then had cost $2762 of the $2982 that the Citizens' Committee had raised to support its challenge to Jim Crow. The Committee distributed $160 of the remainder to Louisiana charities and used the final sixty dollars to inscribe "a flattering testimonial" to Tourgée, as the old carpetbagger publicly described it.[34]

Of the main characters in the case, James Walker died in July 1898, his role sufficiently obscured that obituaries praised him for his successful fight on behalf of Jim Crow. Albion Tourgée died in France in 1905, having received a consular appointment from President William McKinley the year after *Plessy* came down. Louis Martinet continued on in New Orleans as a lawyer and physician, dying in 1917. Homer Plessy, who lived to 1925, was largely lost to history.[35]

The *Plessy* case turns out finally as a story about losers, albeit dedicated losers. Quite at odds with the initial hopes of the Citizens' Committee, the federal Supreme Court's action ratified classification by race. The outcome came not from startling recent shifts in doctrine, nor from the Court's setting off boldly in a new direction in the case itself. Rather, it turned, almost inexorably, on incremental change. Acceptable law and passable social science—by the lights of the day—together denied the self-evident truth of the Declaration of Independence, a point the Committee underscored in its final report. "As the purpose of the Dred Scott decision was to secure and perpetuate slavery," Tourgée reflected after receiving the report, "so the effect of this decision is to establish that most degrading and inhuman form of oppression—legalized caste, based on race and color."

Yet the case is more than a tale of losers. Besides having their years in court, Martinet and his associates had their arguments displayed on the record—indeed, memorialized in Justice Harlan's dissent—to instruct later generations. "In defending the cause of liberty," declared the Citizens' Committee, "we met with defeat, but not with ignominy."[36] *Plessy v. Ferguson* made a difference, then, not so much for what it did, as for what it symbolized, negatively and positively, and for the sobering and nagging questions about citizenship in a scientific age that it posed—and poses—to anyone paying attention.

NOTES

INTRODUCTION "The *Plessy* Prison"

1. *Plessy v. Ferguson*, 163 U.S. 537, 550–51, 562, 559 (1896). The irony of Brown and Harlan's positions, when viewed in light of the origins of the two men, is suggested in C. Vann Woodward, "The National Decision Against Equality," in Woodward, *American Counterpoint: Slavery and Racism in the North/South Dialogue* (1971; New York, 1983), 229.

2. In order of quoted phrases: Herbert Storing, "The School of Slavery: A Reconsideration of Booker T. Washington," in *100 Years of Emancipation*, Robert A. Goldwin, ed. (Chicago, 1964), 66; Loren Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York, 1966), 169; Justice Thurgood Marshall, dissenting and concurring in *Regents of the University of California v. Bakke*, 438 U.S. 265, 392 (1978); J. R. Pole, *The Pursuit of Equality in American History* (Berkeley, 1978), 197; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass., 1977), 453–54; Ralph T. Jans, "Negro Civil Rights and the Supreme Court, 1865–1949" (Ph.D. diss., Univ. of Chicago, 1951), 199; Benno C. Schmidt, Jr., "Principle and Prejudice: The Supreme Court and Race in the Progressive Era; Part I: The Heyday of Jim Crow," 82 *Colum. Law Rev.* (1982), 467; Miller, *Petitioners*, 170.

3. Keller, *Affairs of State*, 453; Loren P. Beth, *The Development of the American Constitution, 1877–1917* (New York, 1971), 197; Roy Wilkins, "Emancipation and Militant Leadership," in Goldwin, ed., *100 Years*, 26; Judge A. Leon Higginbotham, Book Review of Derrick A. Bell, *Race, Racism, and American Law*, in 122 *Univ. of Pa. Law Rev.* (1974), 1053–65 (Higginbotham's brackets); Woodward, "National Decision Against Equality," 212.

4. Robert J. Harris, *The Quest for Equality: The Constitution, Congress, and the Supreme Court* (Baton Rouge, 1960), 101; Beth, *Development of the American Constitution*, 197. Harris's remark about bad logic, etc., has been a favorite for subsequent quotation; see, for example, Otto H. Olsen, "Introduction," in *The Thin Disguise . . .* Plessy v. Ferguson*: A Documentary Presentation*, Olsen, ed. (New York, 1967), 17; Paul Oberst, "The Strange Career of *Plessy v. Ferguson*," 15 *Ariz. Law Rev.* (1973), 390; David W. Bishop, "*Plessy v. Ferguson*: A Reinterpretation," 62 *J of Negro Hist.* (1977), 125.

5. For assertions that *Plessy* involved a conviction, see, for example, Sidney Kaplan, "Albion W. Tourgee: Attorney for the Segregated," 49 *J. of Negro Hist.* (1964), 129; Oberst, "Strange Career," 393. The claim that equal protection was the core issue has been widely stated or implied, as, for example, in Charles W. Collins, *The Fourteenth Amendment and the States* (1912; New York, 1974), 55; Leonard W. Levy, "'Separate But Equal': The History of a Noxious Doctrine," *The New Leader*, 2 Feb. 1953, at 8; Jack Greenberg, *Cases and Materials on Judicial Process and Social Change: Constitutional Litigation* (St. Paul, Minn., 1977), 20; Richard A. Maidment, "*Plessy v. Ferguson* Reexamined," 7 *J. of Amer. Studies* (1973), 125.

6. See, for example, Maidment, "*Plessy v. Ferguson* Reexamined," 126 (suggesting the Thirteenth Amendment argument was ill-advised); Woodward, "National Decision Against Equality," 224 (implicitly questioning the due process/reputation argument); Greenberg, *Judicial Process*, 585–86 (questioning the case's timing).

7. Paul Oberst, "The Supreme Court and States Rights," 48 *Ky. Law J.* (1959), 78; Paul G. Kauper, "Segregation in Public Education: The Decline of *Plessy v. Ferguson*," 52 *Mich. Law Rev.* (1954), 1137; Schmidt, "Principle and Prejudice," 467; G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York, 1976), 143; *Univ. of California v. Bakke*, 438 U.S. at 392 (Marshall, concurring and dissenting); Richard F. Watt and Richard M. Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 *Ill. Law Rev.* (1949), 13.

8. See, for example, *Los Angeles Times*, 4 Feb. 1980, pt. I, at 3, describing the reaction to Professor Derrick Bell of Harvard Law School, formerly an attorney with the NAACP Legal Defense and Education Fund, when he testified against the efficacy of racial balancing as a means to equal educational opportunity.

9. See Chapter Nine, *infra* (on press reaction); Carter G. Woodson, "Fifty Years of Negro Citizenship as Qualified by the United States Supreme Court," 6 *J. of Negro Hist.* (1921), 26–29; Charles Warren, 3 *The Supreme Court in United States History* (Boston, 1922); 2 *ibid.* (rev. ed., Boston, 1926), 621 n. 1; Carl Brent Swisher, *American Constitutional Development* (Boston, 1943) (Swisher's second edition [1954] mentioned *Plessy* briefly, at 1047); 2 *Documents of American History*, Henry Steele Commager, ed. (4th ed., New York, 1948). Later editions of Commager's *Documents* included *Plessy* as Document Number 343, in place of the Democratic Party Platform of 1896. (I am grateful to Professor Arthur Bestor for calling Commager's omission to my attention.) See also Higginbotham, Book Review, 122 *Univ. of Pa. Law Rev.* (1974), 1054–56, 1064, on the omission of *Plessy* from law school casebooks.

10. This analysis of the term is suggested by several authors; see, for example, Don E. Fehrenbacher, "Only His Stepchildren: Lincoln and the Negro," 20 *Civil War Hist.* (1974), 299–300, and Fehrenbacher's accompanying citations.

CHAPTER ONE *De Facto* to *De Jure*: Transportation Segregation in the South from the Civil War to the 1890s

1. *Century Dictionary and Cyclopedia* (New York, 1902), 4, 3233; Hugh M. Smythe, "The Concept 'Jim Crow,'" 27 *Social Forces* (1948), 45. On early Anglo-American racial stereotypes and their relation to the origins of slavery, see, for example, Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812* (Chapel Hill, 1968), 3–98; George M. Fredrickson, *White Supremacy: A Comparative Study in American and South African Slavery* (New York, 1981), 54–85.

2. Emile E. Delseriez to Marguerite Williams, 6 May, 20 June 1865, in John W. Blassingame, *Black New Orleans, 1860–1880* (Chicago, 1973), 174; *Journal of the Senate of the State of Delaware* (1866), 33, quoted in Harold B. Hancock, "Reconstruction in Delaware," *Radicalism, Racism, and Party Realignment: The Border States During Reconstruction*, Richard O. Curry, ed. (Baltimore, 1969), 197; George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (New York, 1971), esp. 165–97; Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835–1875* (New York, 1982), 327–34. (Chapter Five, *infra*, offers a fuller account of American racist thought in the late nineteenth century.)

3. C. Vann Woodward, *The Strange Career of Jim Crow* (1955; 3rd rev. ed., New York, 1974), esp. 31–109; Woodward, "The Strange Career of a Historical Controversy," in Woodward, *American Counterpoint: Slavery and Racism in the North/South Dialogue* (1971; New York, 1983), 234–60; Howard N. Rabinowitz, "From Exclusion to Segregation: Southern Race Relations, 1865–1890," 63 *J. of Amer. Hist.* (1976), 330. To describe Woodward's focus and argument, two of his former students have suggested an apt analogy tothree common statistical concepts: the mode, the mean, and the variance. The first measures dominant tendency; the second, average circumstance; and the third, degree of divergence. They argue, convincingly I think, that Woodward's primary focus is the last of these, or, as Woodward himself has put it, the "crosscurrents and uncertainties" and the "forgotten alternatives." See J. Morgan Kousser and James M. McPherson, "Introduction," in *Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward*, Kousser and McPherson, eds. (New York, 1982), xxvi–xxvii.

4. James Bryce, "Thoughts on the Negro Problem," 153 *North Amer. Rev.* (1891), 644; [J. B. Harrison,] "Studies in the South—Part IX," 50 *Atlantic Mon.* (1882), 626–27; David Macrae, *The Americans at Home* (Edinburgh, 1870), 2, 219, quoted in Howard N. Rabinowitz, *Race Relations in the Urban South, 1865–1890* (New York, 1978), 183.

5. See, for example, Charles Wynes, *Race Relations in Virginia, 1870–1902* (Charlottesville, 1961), 76; Frenise A. Logan, *The Negro in North Carolina, 1876–1894* (Chapel Hill, 1964), 176–83; Henry Dethloff and Robert C. Jones, "Race Relations in Louisiana, 1877–1898," 9 *La. Hist.* (1968), 311–14; Lawrence D. Rice, *The Negro in Texas, 1874–1900* (Baton Rouge, 1971), 144–48.

6. Rabinowitz, *Race Relations*, 183–84, 192–94; Chapter Six, *infra*.

7. Rabinowitz, *Race Relations*, 191; *The Sue*, 22 Fed. Rep. 843, 846–47 (1885); transcript of testimony in *DeCuir v. Benson*, Case No. 7800, 8th District

CHAPTER NINE

Speaking to the Future

I

Albion Tourgée arrived home tired from the oral argument in *Plessy* and likely awaited news of the outcome with little hope and some anxiety. When the decision came down, he must have been pleased with Justice Harlan's dissent. Just as surely, Harlan must have welcomed the support he received elsewhere. Among editors outside the South who judged the judges, hostility to the decision overshadowed approval by perhaps three to one. The Negro press and some religious publications more emphatically condemned it. "The spirit of Roger B. Taney seems to be the presiding genius of that tribunal," declared the Chicago *Inter Ocean*, picking up one of Harlan's themes. "Take all these cases together," the paper said of *Plessy* and earlier pro-segregation decisions, "and they complete the denial [of] the fourteenth amendment." Even Booker T. Washington complained mildly in print. Using the reductio ad absurdum argument that Harlan had borrowed from Tourgée, he asked, "[W]hy cannot the courts go further and decide that all men with bald heads must ride in one car and all with red hair still in another? Nature is responsible for all these conditions."[1]

But such reaction was atypical. Although hostility to the Court's decision predominated among newspapers offering an opinion, the most common press response was simply routine notice of the case, or no mention at all.[2] The *New York Times*'s coverage is revealing. The paper included the decision in its regular Tuesday column on railway news, on page three,

sandwiched between reports of another Supreme Court railway decision, which overturned an Illinois law ordering minor re-routing of interstate passenger trains, and a request by the receivers of the Baltimore and Ohio for authority to issue new improvement bonds. By contrast, three of the fifty-three decisions decided or otherwise disposed of by the Court on May 18 received coverage on the front page of the *Times*. In one, the Court held that a sugar plantation owner had not violated the federal contract labor law by bringing in a German chemist under contract; and in the second, it disallowed a challenge to a portion of an heiress's multi-million-dollar inheritance. The third case found the Court refusing to hear an appeal to vacate the lower-court injunction that playwright Augustin Daly had obtained against two other playwrights who, he claimed, had plagiarized the "railroad scene" from his own play *Under the Gaslight*. "In other words," quipped the *Times*, "not even a 'railroad scene' can be railroaded into the legal purview of the Supreme Court of the United States."[3]

Of course, it was more than the gripping content of other decisions that railroaded *Plessy* out of prominent view. As regards the judiciary itself, the Populist revolt had lent drama to different issues, so that to the extent the Supreme Court attracted public attention, focus centered on its handling of railway taxation and rate regulation, the Sherman Anti-Trust Act, the income tax, and labor injunctions. Also, the rush of current events must have been distracting. During the week preceding the separate car decision, the Spanish commander in Cuba, Captain-General Valeriano Weyler, had threatened to execute several Americans taken prisoner off the filibustering ship *Competitor*. When his home government interposed a moderating hand, Weyler announced he regretted that he had not simply ordered the men shot. Meanwhile, reports circulated of a new American filibustering expedition. At home, William McKinley had emerged as the clear front-runner for the Republican presidential nomination; but among proponents of the gold standard, speculation focused on whether McKinley's silence on the money question indicated that he harbored hidden silver sympathies. And in Texas and the Midwest, tornadoes ("cyclones" in the parlance of the day) had killed an estimated 200 or more people.[4]

The indifference greeting *Plessy* had a still more fundamental source. Benno Schmidt has labéled the majority opinion "an untroubled endorsement of racial separation"—and it was. It embodied conventional wisdom. There seems little reason to doubt Justice Brown's accuracy when he later recalled that in reaching its decision, the Court experienced "little difficulty." In point of clarity, Brown's opinion (which, it needs remembering, was the Court's opinion) was atrocious, and its obscurities have often hidden from later readers its commonplace strengths within the 1890s. Specifically, Brown's conclusions did not rest on bad logic, bad social science, bad history, or bad constitutional law, as later alleged. Once his incidental lapses and nods are rectified, his logic turns out to be passable—at least by judicial

standards. The vision of social reality that he posited did not lack substantial support in contemporary expert opinion; nor was his history jarringly inaccurate. Not least, these elements along with recent trends in American law, some having nothing to do with race, made his constitutional law largely unexceptional. In truth, an early student of the Fourteenth Amendment offered an assessment less tinged with anachronism. "The opinion enunciates sound principles of political science," wrote Charles Collins in 1912, "and is justified by the logic of history and of fact."[5]

The decision was so routine that within two years Brown himself did not find it noteworthy. In 1898, when he spoke for the Court in *Holden v. Hardy*, which upheld Utah's eight-hour law for miners against a Fourteenth Amendment challenge, Brown not only stressed the legitimacy of reasonable state police regulations, but included a crucial passage about legislative deference that closely paralleled language in *Plessy*. In the course of his exposition, he broadly reviewed prior judicial applications of the Amendment, including all the major race-related decisions under it—save one. He omitted any mention of *Plessy*, despite its having clearer relevance to the case at hand than did the race-related decisions that he discussed.[6]

Yet there was another side to the case. Against the conventional doctrine that served as a bastion for the separate car law, Homer Plessy's counsel had launched a radical attack; and Justice Harlan wrote it into *United States Reports*. The lawyers and to some extent Harlan additionally developed more standard claims resting especially on the Fourteenth Amendment's due process and equal protection clauses.

Bowing to legal orthodoxy, Plessy's attorneys squarely confronted the due process issue, raising the question of reputation as property. It may be protested that this claim responded only to the interests of a small and perhaps elitist group of "blacks"—those who could pass for white. Yet it was a practical, lawyer-like claim with a base in decisions holding that to call a white man a Negro was actionable.[7] If accepted, it would have "impossibly complicate[d] the enforcement of segregation," as Tourgée's biographer notes.[8] Counsel also advanced equal protection arguments, the key assertion being a technical claim that the separate car law denied a right of legal action that was available to others. But the Louisiana Supreme Court had already obviated each of these conventional attacks by construing the law as not immunizing railways against suits for wrong assignments. Further blunting the conventional arguments against the law, counsel for the state conceded that the provision in question was unconstitutional. Because misassigned blacks could now get their day in court, they suffered neither deprivation of due process nor denial of equal protection. A privileges-or-immunities argument proved no more conclusive.

Harlan addressed the conventional Fourteenth Amendment arguments less directly, for good reason. As Tourgée had come close to admitting on brief, the case law ran against them. Yet Harlan did not avoid the issues entirely. By stressing the public character of the facilities that Louisiana sought to regulate, he underscored that the separate car law violated the prohibitive clauses of the Amendment. By joining Plessy's counsel (at least implicitly) in denying the reasonableness of the law, he in effect concurred that it lacked an element which under conventional doctrine was essential to the validity of any police regulation.

In the final analysis, Harlan's central contention was his declaration that the "Constitution is color-blind." For this, the due process and equal protection clauses were secondary (although not irrelevant). His view rested primarily and broadly on the Thirteenth Amendment and the national citizenship clause of the Fourteenth. Plessy's attorneys had read these provisions in light of the Declaration of Independence, and Harlan gave them the same interpretation, but without explicit mention of the Declaration. Both for Harlan and for Plessy's counsel, that is, legally mandated or endorsed separation was ultimately unreasonable *as a matter of law*—period. Although the attorneys arguably compromised the point and Harlan left it implicit, the "facts" of science made no difference to the claim. Nor was history particularly crucial, though Harlan surely accepted the version of Reconstruction that Albion Tourgée had proposed.[9] Instead, the position relied on a simple and complex truth that cut through more than two decades of judicial accretions. At its core, Homer Plessy's case before the Court, which Harlan accepted, affirmed that American constitutional law necessarily embodies the principles of republican government, categorically rejecting recognition of race.

II

Brown probably would not have objected to the observation that he and the majority for which he spoke only reflected dominant trends of the times. When, writing from retirement in 1912, he took on the task of surveying the many dissents of Justice Harlan (who had died a year and a half earlier), he declared: "He, who would put himself abreast of the current thought of any particular epoch in the history of this country[,] cannot do better than to familiarize himself with the opinions of its great judges . . . ." Not an inordinately ambitious man, Brown perhaps would have disclaimed for himself the label of "great judge"; but the hypothetical reader might still have looked at Brown's opinions. For the Court's work in its generality, Brown averred, while not always "altogether unbiased," disclosed "the same division of sentiment among the judges as among the people whom they are presumed to instruct."

By contrast, Brown intimated that Harlan was a "great judge," or at least a great dissenter; and so, by implication, Brown admitted that the Kentuckian in his civil rights dissents likewise conveyed a broader strand of contemporary thought. Brown evidently doubted, however, that much

would result. Harlan's dissents, he predicted, "will probably share the general fate and will not result in many changes in the law . . . ." Good lawyer that he was, Brown covered himself by allowing that a few of the dissents "will doubtless become the basis for future legislation, and perhaps for a reversal by the Court itself"—but he gave no hint that Harlan's *Plessy* opinion would share this happy fate.[10]

The issue Brown thereby raised leads to the question of *Plessy*'s impact. What results flowed from the majority and minority positions? In a word, what difference did the case make?

Plessy planted the doctrine of separate-but-equal more firmly than before in American law and particularly in the Constitution. It is true that Brown's opinion gave no explicit attention to the requirement of equality itself, a silence which has led one commentator to deny that the case really had anything to do with the equality portion of the doctrine. By this analysis, the case embedded a still more pernicious principle into constitutional law: that separation without reference to equality met the test of the Reconstruction Amendments.[11] Had Brown actually endorsed this view, he would only have set the Court in line with the trend of practice. But the separate car law linked separation to equality; Louisiana had defended the act partly on that ground; the state courts had noted the requirement of equality; and the sources of transportation segregation in non-constitutional case law, on which Brown partly relied, required that equal facilities accompany separation. In this context, whatever shortcomings *Plessy* manifested, a failure to require the separate-but-equal variety of equality cannot be counted among them.

One cannot confidently maintain, though, that without *Plessy* separate-but-equal would have lacked legal legitimacy. For one thing, within a few years other cases would probably have given the Supreme Court the opportunity to reach the same result. Four years later, for example, Kentucky's separate car law came up for review. After accepting the Kentucky Supreme Court's construction of the law as applying only to intrastate commerce, the federal Supreme Court, on an eight-to-one vote, summarily upheld it against a Fourteenth Amendment challenge on the authority of *Plessy*. Justice Brown spoke for the Court and Justice Harlan dissented without opinion.[12] Absent the 1896 decision, a fuller discussion of the Fourteenth Amendment issues would probably have been forthcoming. But a different result? This seems unlikely, for the same reason that a different result in *Plessy* itself is difficult to imagine within the context of the period.

A more compelling reason for discounting (but not dismissing) *Plessy*'s importance in establishing separate-but equal is that *prior* to 1896 courts had already accepted the doctrine as part of the common law of common carriers. They had declined to give private parties legal remedies against separation properly established by company regulation, despite the quasi-public status of common carriers. From the standpoint of the individual passenger, that is,

separation was already legally mandatory if a carrier elected to decree it and a state equal accommodations law did not forbid it. In 1878, in *Hall v. DeCuir*, the Supreme Court itself construed congressional inaction regarding separation on common carriers as an endorsement of the permissibility of separate-but-equal within the common law governing them. This federalized the doctrine.

As a result, the first wave of *legislated* transportation segregation, enacted between 1887 and 1892, represented not so much an initial resort to law, but a change in the place of segregation within the legal matrix. This is not to say that the switch to statutory law made no difference. Persons who attempted to gain access to accommodations assigned to the other race no longer faced only denial of service without legal remedy. They were additionally liable to criminal prosecution. Not least, the legislation deprived transportation companies of any choice regarding segregation, which meant that remaining variations disappeared from southern practice. But the legal difference is easily overstated. The arguments that previously upheld company-imposed separation within the common law of common carriers now meshed nicely with the jurisprudence that courts had developed as they grappled with a plethora of non-racial police regulations challenged under the Fourteenth Amendment. Having already accepted one variety of equal-but-separate, courts confronted only the task of adaptation in order to validate the new version.

The United States Supreme Court's decision in *Plessy* nonetheless removed all doubt: separate-but-equal was unambiguously a part of the law of the Constitution. The Court, Albion Tourgée wrote, had "virtually nullified the fourteenth amendment . . . and emasculated the thirteenth." The blow was only partial, however. The justices had not gone so far as to hold explicitly that the Constitution recognized two categories of citizenship, one for whites and the other for non-whites, analogous to the stance it soon would take toward the inhabitants of the new territories acquired in the imperialist binge at the end of the decade. Rather, whatever the realities of the hardening color line in America, the formula associated with *Plessy* could be invoked against the worst deprivations. Thus, in *McCabe v. Atchison, Topeka, and Santa Fe* (1914), the Supreme Court indicated that in properly developed cases it would indeed hold intrastate railways to the standard of equality of service.[13]

Because of this "promising" side to *Plessy*, if it may be so labeled, the 1896 decision proved eventually to be a useful tool in the attack on racial segregation. *McCabe* signaled the beginning of the "journey *from* jim crow." Blacks, both individually and especially through the National Association for the Advancement of Colored People, used legal action to complicate and make more costly the enforcement of separation, by holding common carriers to the standard of real equality in facilities. Similarly, *Plessy* proved serviceable in the NAACP's fight against segregated schooling. In 1938, in the first school

case in which the Court directly endorsed application of separate-but-equal to education, the doctrine served to strike down Missouri's arrangement to send blacks out-of-state for legal education. Both these trends came to fruition in the 1950s, when *Brown v. Board of Education* (1954) invalidated legally mandated segregation in education and *Gayle v. Browder* (1956) extended the *Brown* ruling to cover intrastate transportation.[14]

But prior to the success of the campaign against Jim Crow—aptly described by Catherine Barnes as "black initiative and federal response"—segregation laws and ordinances proliferated in the South. From hospitals before birth to cemeteries after death, separate-but-equal set the legal status of blacks. Fifty-four years after *Plessy*, one commentator found laws and decisions extending the doctrine "to every type of transportation, education, and amusement; to public housing, restaurants, hotels, libraries, public parks and recreational facilities, fraternal associations, marriage, employment, and public welfare institutions. It ha[d] pursued the negro even into prisons, wash houses in coal mines, telephone booths, and the armed forces." The separation extended as well to inanimate objects, as in Florida where school textbooks which had been used by one race were to be stored separately from those used by the other race. As for the detail of the codes, South Carolina provided an example in its 1917 circus regulation:

> Tent shows are to maintain separate entrances for different races. Any circus or other such traveling show exhibiting under canvas or out of doors for gain shall maintain two main entrances to such exhibition, and one shall be for white people and the other entrance shall be for colored people, and such main entrances shall be plainly marked "For White People," and the other entrance shall be marked "For Colored People," and all white persons attending such show or traveling exhibition other than those connected with the said show shall pass in and out of the entrance provided for white persons, and all colored persons attending such show or traveling exhibition shall pass in and out of the entrance provided for colored persons.

Violators could be fined not more than $500.[15]

Of all the legislated separation, the "jim crowing" of transportation, which had been the immediate issue in *Plessy*, probably proved the most galling. At the beginning of the new century, in the course of discussing the democratizing influence of relatively classless railway travel, Walter Weyl remarked how "[t]he exclusion of negroes from the compartments for whites in many Southern railways is a striking exception . . . ." The point was not lost on blacks, as Ray Stannard Baker and Gunnar Myrdal found in 1908 and 1944, respectively, when they probed Negro attitudes toward the color line. It was partly that the equality half of the separate-but-equal formula was frequently ignored, and partly that drivers and railway conductors often spoke and behaved abusively. Especially, though, transportation segregation had, as W. E. B. DuBois put it, "a publicly insulting character" which rubbed its way into the grain of daily life.[16]

After 1896, *Plessy* provided judicial authority for this degradation. It is frequently asserted or implied, however, that the decision did more—that it triggered both the second wave of separate car legislation, between 1898 and 1907, and the extension of compulsory segregation into other areas.[17] Did it, or does this view of the case's impact involve the historical fallacy of *post hoc ergo propter hoc*?

It had not taken a *Plessy*-type decision to trigger the first wave of legislation, in the years around 1890, when disfranchisement campaigns and accompanying anti-black political rhetoric had contributed to the segregation movement, along with white perceptions of distressingly uppity behavior by a new generation of Negroes. Similar elements undoubtedly helped to prompt the new separate car measures. In South Carolina, the first of the states contributing to the new wave of legislation, *Plessy* may in some sense have been the "decision which unlocked the door of the Jim Crow railroad car with a constitutional key," but the state's separate car law, passed in 1898, was part of a broader racist movement in politics spearheaded by the demagogic Ben Tillman. Significantly, too, separate car bills had been introduced regularly since the early 1890s; but after *Plessy* came down, the legislation still failed to pass. It was only in the second legislative session following the decision that a measure became law, as racial tension heated in the face of labor competition and as white fears arose that a new generation of blacks was replacing the compliant "fore de War variety of Negro."[18]

Elsewhere, as well, the evidence of *Plessy*'s direct role is slight. In Virginia, increased "nigger baiting" in state politics provided more of the major impetus for the legislation of 1900. It is also noteworthy that legislative activity promoting segregation in Virginia peaked in the 1920s and 1930s, a period not only well removed in time from 1896 but coinciding with more black assertiveness. North Carolina's first Jim Crow railway measure (1899) was enacted in the midst of the drive within the state to disfranchise blacks, and Maryland's law (1904) emerged as a by-product of an unsuccessful disfranchisement campaign. Oklahoma's contribution to transportation segregation (1907) was part of an anti-black movement accompanying the scramble for office following statehood. For the region as a whole, not only did racist agitation flourish but race separation fitted conveniently with Progressive-era ideals of social efficiency and progress.[19]

To be sure, by removing whatever doubts remained about the constitutional acceptability of segregation under the separate-but-equal formula, *Plessy* permitted the new legislation. But even as a permissive factor the case hardly stood alone. End-of-the-century imperialism, which led to colonial rule over non-white people abroad, helped free the white South from whatever restraints national opinion had imposed. Within the South itself,

the decline in some places of older conservative elements within the Democratic Party, combined with the conservatives' adoption of race-baiting tactics, removed another restraint.[20]

There were, then, additional causal elements. Some served to encourage or incite further official segregation; others were permissive in their effects. Overall, one may argue about their importance in relation to each other. As regards an evaluation of *Plessy*, however, their meaning is clear enough. Although the decision may aptly serve as a symbol for legally mandatory segregation, the evidence calls for a "not proved" verdict on a close relationship between the Supreme Court's 1896 handiwork and the passage of new legislation.

III

In 1912, Henry Billings Brown largely conceded that John Marshall Harlan had been correct in identifying the intention behind Louisiana's separate car legislation as the degradation of blacks. By the middle of the twentieth century, Harlan seemed a prophet of the blossoming civil rights revolution, with the overturn of state-mandated school segregation in *Brown v. Board of Education* completing his constitutional vindication. Noting Harlan's vision of a color-blind Constitution, the *New York Times* editorialized after the *Brown* decision in May 1954 that "the words he used in lonely dissent . . . have become in effect . . . a part of the law of the land. . . . [T]here was not one word in Chief Justice [Earl] Warren's opinion that was inconsistent with the earlier views of Justice Harlan."[21]

History is seldom so neat and often more cunning. A case may be made that it was Justice Brown and the *Plessy* majority who stood vindicated by the last decades of the twentieth century. At a formal level, Chief Justice Warren failed to announce in 1954 that *Brown* had overruled the 1896 decision. Court watchers noted the omission. If not in *Brown*, some said, then the 1896 decision was overruled two years later in *Gayle v. Browder*, which invalidated city-ordered segregation of buses in Montgomery, Alabama. But again the Court did not explicitly reject *Plessy*, filing only a short *per curiam* opinion that rested on *Brown*. As of mid-1986, *Shepard's Citations*, the standard "finding aid" used by lawyers to trace subsequent judicial treatment of decisions, listed no case as having overruled *Plessy*. By then, though, some judges took a different view, commenting almost in passing that the 1954 decision had overturned the earlier ruling.[22]

More important, courts did not reject reliance on racial "facts," a central if not entirely explicit feature of Justice Brown's reasoning in *Plessy*. Nor did judges wholeheartedly embrace Justice Harlan's color-blind Constitution. The *Brown* case itself hinted that the spirit of *Plessy* survived in these regards. In upholding the finding of the federal trial court in Kansas that state-mandated segregation harmed school children, Chief Justice

Warren used an argument structurally similar to the one Justice Brown had used in upholding Louisiana's conclusion that separation promoted the public's welfare. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," Warren held, the trial court's factual finding was "amply supported by modern authority," a statement he then documented through his soon-controversial Footnote Eleven, which cited seven studies by social scientists.[23] In 1896, it is true, the Court had deferred to legislative judgment about the "facts" of race, while in 1954 it deferred to a lower court's judgment, but in each instance conclusions about such "facts" entered into the reasoning. For Warren, a later critic observed, *Plessy*'s deficiency was "not that it asked the wrong questions but that it gave the wrong answers." The Chief Justice himself saw his social science authorities as important because they rebutted Justice Brown's social science.[24]

In *Brown*, Warren focused on the Fourteenth Amendment's equal protection clause. Once he found that legally segregated schooling violated the clause, he had no need to address the issue of due process violations. But in *Bolling v. Sharpe*, the school desegregation case from the District of Columbia that the Court decided along with *Brown*, Warren necessarily reached the due process issue. (Because the Fourteenth Amendment's prohibitive clauses do not apply to the federal government, *Bolling* turned on the due process clause of the Fifth Amendment.) Here, too, Warren declined to reject *Plessy*'s major premise. Rather than flatly holding segregation unreasonable as a matter of law—that is, as inconsistent with the true color-blind character of the amended Constitution, as Harlan had urged in 1896—the Chief Justice in effect admitted that some classifications based on race might be legitimate. Only then did he conclude that "[s]egregation in public education is not reasonably related to any proper governmental objective" and thus violated the due process rights of black school children in the District of Columbia.[25]

Yet *Brown* and its progeny invalidated legislated segregation in a variety of settings and in that sense undeniably struck at the system which *Plessy* had allowed. And if the reasoning in the 1954 opinions showed similarities to the reasoning of 1896, Warren at least did not overtly deny the correctness of Justice Harlan's dissent. In this regard, an argument can be made that if it was legitimate after *Brown* for the Court to rely solely on the 1954 decision as its authority for striking down segregation in non-educational areas, then *Brown* must have turned on the unconstitutionality of *all* racial classification by state agencies.[26] But within a quarter-century, a rather different conclusion was possible.

By the 1970s, attention shifted to affirmative action programs involving preferential or "benign" quotas for members of racial minorities. Their advocates had to show that *Brown* did not mean that *all* racial classifications were per se unconstitutional. In the *Bakke* case (1977), the Supreme Court

finally faced the issue. It overturned an admissions program of the medical school of the University of California at Davis that set aside sixteen places in each entering class for minority applicants. The Court also held that admissions officers could take account of the racial identity of applicants as one of several non-academic characteristics that might contribute desirable qualities to the overall educational environment. Justice Lewis F. Powell announced the Court's judgment and filed an opinion which gained considerable attention because Powell provided the deciding vote in shaping the Court's two-pronged judgment. He had no good reply to the charge that in some cases such an admissions scheme would in fact use race as the crucial determinant. A court, he could only say, must not presume that university officials would operate the program "as a cover for the functional equivalent of a quota system."[27]

Justice John Paul Stevens, joined by three other members of the Court, strongly objected to any use of race (and thus voted with Powell to overturn the program at the University of California-Davis and to order Allen Bakke's admission). Because Stevens focused on the arrangement at Davis as a statutory violation of the Civil Rights Act of 1964, he avoided extensive constitutional analysis. But lurking only slightly beneath the surface of his opinion was the charge that the Court had rejected Justice Harlan's color-blind Constitution.[28]

What gave real substance to the charge was not Stevens's passing comments, but rather the position taken by the four justices who joined Powell in agreeing that the medical school might still take *some* account of race. These four, who would have preferred to go further and forthrightly accept the university's quota system, spoke out against letting "color blindness become myopia which masks the reality that many [of those] 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." Regarding a "color-blind" interpretation of the equal protection clause, they stressed that the Court had "expressly rejected this proposition on a number of occasions."[29]

One of the four, Justice Thurgood Marshall, bore in deeper in a separate opinion. From his review of the events surrounding the adoption of the Fourteenth Amendment, he found it "inconceivable that the . . . Amendment was intended to prohibit all race-conscious relief measures." Reminding his brethren "that the principle that 'the Constitution. is color-blind' appeared only in the opinion of the lone dissenter [in *Plessy*]," he left the clear implication that the Constitution should not now be regarded as color-blind. As if to underscore the chasm between his analysis and the one advanced in the 1890s by Albion Tourgée and Justice Harlan, Marshall portrayed the Declaration of Independence itself as the founding statement of a racist nation. Against this backdrop, racial classification was a requisite to remedying social ills.[30]

The debate over the relation of affirmative action to *Plessy* did not stop

with the Court. In the course of defending preferential treatment of minorities, one scholar went so far as to label Harlan's view "color-blind racism" and cautioned, "The courage of Harlan's dissent should not blind us to the moral and historical limitations of his argument." It was a position calculated to ensure white supremacy under the façade of equal protection. Another academician argued that Harlan's slogan about a color-blind Constitution really meant the Constitution was highly sensitive to color. From the other side, a critic of affirmative action charged that the very reasoning used to support supposedly benign racial classifications can be used to support the outcome in *Plessy*, and that Justice Brown's 1896 opinion indeed anticipated the reasoning on behalf of such classifications. After all, Brown had written that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, *and not for the annoyance or oppression* of a particular class." Preferential racial classifications were "*Plessy v. Ferguson* all over again, in new and modish dress."[31]

By the mid-1980s, "counting by race" had received further judicial approval.[32] A resulting problem recalled the *Plessy* era when, one day, Booker T. Washington observed a man riding in a colored coach. The passenger, as Washington subsequently related the story, "was well known in his community as a Negro, but . . . was so white that even an expert would have [had] hard work to classify him as a black man," and so the train's conductor was in a quandary. "If the man was a Negro, the conductor did not want to send him into the white people's coach," Washington surmised; "at the same time, if he was a white man, the conductor did not want to insult him by asking him if he was a Negro." Presumably without being obvious, the train official looked over the passenger's "hair, eyes, nose, and hands, but still seemed puzzled." There remained the feet, which next came under attentive glance. (The man evidently was barefoot.) Observing the process, Washington said to himself: "That will settle it." The man's feet identified him as black, and the conductor left him in his seat. In late 1985, several New York City policemen sought to have their racial classifications changed from white to black or Hispanic, their apparent goal, according to a police official, being qualification for promotion to sergeant under a racial quota. But the nation had progressed beyond the foot test. Proof of race and ethnicity now had to meet federal guidelines.[33]

IV

In September 1896, four months after the Citizens' Committee to Test the Constitutionality of the Separate Car Law lost its case, Louisiana Attorney General Cunningham dutifully requested the Clerk of the United States Supreme Court to forward the Court's formal order affirming the state decision in *Ex parte Plessy*. The Clerk complied, and nothing now blocked

Homer Plessy's trial. On January 11, 1897, over four and a half years after his arrest for attempting to board a white car on the East Louisiana Railway, Plessy entered a plea of "guilty" in Criminal District Court and paid a twenty-five-dollar fine. The case by then had cost $2762 of the $2982 that the Citizens' Committee had raised to support its challenge to Jim Crow. The Committee distributed $160 of the remainder to Louisiana charities and used the final sixty dollars to inscribe "a flattering testimonial" to Tourgée, as the old carpetbagger publicly described it.[34]

Of the main characters in the case, James Walker died in July 1898, his role sufficiently obscured that obituaries praised him for his successful fight on behalf of Jim Crow. Albion Tourgée died in France in 1905, having received a consular appointment from President William McKinley the year after *Plessy* came down. Louis Martinet continued on in New Orleans as a lawyer and physician, dying in 1917. Homer Plessy, who lived to 1925, was largely lost to history.[35]

The *Plessy* case turns out finally as a story about losers, albeit dedicated losers. Quite at odds with the initial hopes of the Citizens' Committee, the federal Supreme Court's action ratified classification by race. The outcome came not from startling recent shifts in doctrine, nor from the Court's setting off boldly in a new direction in the case itself. Rather, it turned, almost inexorably, on incremental change. Acceptable law and passable social science—by the lights of the day—together denied the self-evident truth of the Declaration of Independence, a point the Committee underscored in its final report. "As the purpose of the Dred Scott decision was to secure and perpetuate slavery," Tourgée reflected after receiving the report, "so the effect of this decision is to establish that most degrading and inhuman form of oppression—legalized caste, based on race and color."

Yet the case is more than a tale of losers. Besides having their years in court, Martinet and his associates had their arguments displayed on the record—indeed, memorialized in Justice Harlan's dissent—to instruct later generations. "In defending the cause of liberty," declared the Citizens' Committee, "we met with defeat, but not with ignominy."[36] *Plessy v. Ferguson* made a difference, then, not so much for what it did, as for what it symbolized, negatively and positively, and for the sobering and nagging questions about citizenship in a scientific age that it posed—and poses—to anyone paying attention.

NOTES

INTRODUCTION "The *Plessy* Prison"

1. *Plessy v. Ferguson*, 163 U.S. 537, 550–51, 562, 559 (1896). The irony of Brown and Harlan's positions, when viewed in light of the origins of the two men, is suggested in C. Vann Woodward, "The National Decision Against Equality," in Woodward, *American Counterpoint: Slavery and Racism in the North/South Dialogue* (1971; New York, 1983), 229.

2. In order of quoted phrases: Herbert Storing, "The School of Slavery: A Reconsideration of Booker T. Washington," in *100 Years of Emancipation*, Robert A. Goldwin, ed. (Chicago, 1964), 66; Loren Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York, 1966), 169; Justice Thurgood Marshall, dissenting and concurring in *Regents of the University of California v. Bakke*, 438 U.S. 265, 392 (1978); J. R. Pole, *The Pursuit of Equality in American History* (Berkeley, 1978), 197; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge, Mass., 1977), 453–54; Ralph T. Jans, "Negro Civil Rights and the Supreme Court, 1865–1949" (Ph.D. diss., Univ. of Chicago, 1951), 199; Benno C. Schmidt, Jr., "Principle and Prejudice: The Supreme Court and Race in the Progressive Era; Part I: The Heyday of Jim Crow," 82 *Colum. Law Rev.* (1982), 467; Miller, *Petitioners*, 170.

3. Keller, *Affairs of State*, 453; Loren P. Beth, *The Development of the American Constitution, 1877–1917* (New York, 1971), 197; Roy Wilkins, "Emancipation and Militant Leadership," in Goldwin, ed., *100 Years*, 26; Judge A. Leon Higginbotham, Book Review of Derrick A. Bell, *Race, Racism, and American Law*, in 122 *Univ. of Pa. Law Rev.* (1974), 1053–65 (Higginbotham's brackets); Woodward, "National Decision Against Equality," 212.

construction. See *Workman v. Board of Education of Detroit*, 18 Mich. 399, 408–14 (1869); Kousser, *Dead End*, 10, 18–19.

15. *King v. Gallagher*, 93 N.Y. at 454–55.

16. *Plessy*, 163 U.S. at 545.

17. *Ibid.*, 548 (emphasis added). One source of difficulty in following Brown's exposition is his paragraphing. Here, for example, a distracting paragraph break falls between his brief discussion of the cases and the conclusion he drew from the cases.

18. Bernstein, "Case Law in *Plessy v. Ferguson*," 196.

19. *People v. King*, 110 N.Y. 418, 423–24, 426–27 (1888), in part quoting from *Commonwealth v. Alger*, 7 Cushing 53, 85 (Mass., 1851).

20. See Chapter Six, *supra*. Brown also omitted to mention that many northern states had abrogated the common law of common carriers in this respect through passage of equal accommodations legislation, also discussed in Chapter Six. Besides *West Chester v. Miles* and *People v. King*, Brown cited *Day v. Owen*, 5 Mich. 520 (1858) (which clearly was inapposite, owing to its endorsement of separate-and-*un*equal); *Chicago and North Western Railway Company v. Williams*, 55 Ill. 185 (1870); *The Sue*, 22 Fed. 843 (D.Md. 1885); *Logwood and Wife v. Memphis and Cincinnati Railroad Company*, 23 Fed. 318 (C.C.W.D.Tenn., 1885); *Chesapeake, Ohio, and Southwestern Railroad Company v. Wells*, 85 Tenn. 613 (1887), *Memphis and Charleston Railway Company v. Benson*, 85 Tenn. 627 (1887); *Heard v. Georgia Railroad Company*, 1 Inters. Comm. Rep. 719 (1888); *Heard v. Georgia Railroad Company*, 2 Inters. Comm. Rep. 508 (1889); *McGuinn v. Forbes*, 37 Fed. 639 (D.Md., 1889). Brown's lapse in referring to constitutionality is all the more surprising in view of his eventual unambiguous statement that the core question in *Plessy* was the reasonableness of the separate car law.

21. *Plessy*, 163, U.S. at 550–51.

22. *Ibid.*, 545. See *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Gibson v. Mississippi*, 162 U.S. 565 (1896).

23. *Plessy*, 163 U.S. at 545–46

24. *Ibid.*, 546.

25. *Ibid.*, 546–47, quoting the *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

26. See *Louisville, New Orleans and Texas Railway Company v. Mississippi*, 133 U.S. 587 (1890), as discussed in Chapter Two.

27. *Plessy*, 163 U.S. at 547–48 (emphasis added), partly quoting *Louisville, New Orleans and Texas Railway Company v. Mississippi*, 133 U.S. at 591.

28. *Plessy*, 163 U.S. at 548.

29. *Ibid.*, 548–49

30. *Ibid.*, 549.

31. *Ibid.*, 549–50; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

32. See *Daggett v. Hudson*, 43 Ohio 548, 563–65 (1885). The other voting cases Brown cited were *Capen v. Foster*, 12 Pickering 485 (Mass., 1832); *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875) (both upholding registration laws as reasonable means of implementing the right to vote); and *Monroe v. Collins*, 17 Ohio 665 (1868) (overturning legislation that unreasonably burdened racially mixed voters who met the state's definition of who was white). The two irrelevant cases—*Orman v. Riley*, 15 Calif. 48 (1860), and *Hulseman v. Rems*, 41 Pa. 396 (1861)—involved the counting of soldier's votes.

33. *Louisville and Nashville Railroad Company v. Kentucky*, 161 U.S. 677, 696–701 (1896). See *ibid.*, 700, for a listing and description of the other commerce cases that Brown included by reference in *Plessy* at 550.

34. *Plessy*, 163 U.S. at 552.

35. *Ibid.*, 553.

36. *Ibid.*, 553–55. For confirmation of Harlan's description of nineteenth-century railways as quasi-public agencies by virtue of their eminent domain powers, see Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government, 1789–1910," 33 *J. of Econ. Hist.* (1973), 232–51.

37. *Plessy*, 163 U.S. at 555–56, in part quoting from *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896). Harlan, who had written the Court's opinion in *Gibson*, failed to add in *Plessy* that the black defendant in *Gibson* nonetheless had his murder conviction and death sentence upheld.

38. *Plessy*, 163 U.S. at 556–58, in part quoting William Blackstone, 1 *Commentaries on the Laws of England* (1765–69; facsimile reprint ed., Chicago, 1979), 130.

39. *Plessy*, 163 U.S. at 558–59; Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* (2nd ed., with additional notes by John Norton Pomeroy, New York, 1874), 324–27.

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

41. *Ibid.*, 559–60.

42. *Ibid.*, 559–63.

43. *Ibid.*, 563.

44. Tourgée-Walker U.S. Brief, 36; Phillips Brief, 18, 22; *Plessy*, 163 U.S. at 563–64. For the guarantee clause, see U.S. Constitution, Art. IV, sec. 4; and for its salience during the early Reconstruction period, as well as the ongoing refusal of the judiciary to enforce it, see William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca, N.Y.), 129, 171–209, 233–39, 292.

CHAPTER NINE Speaking to the Future

1. Emma Tourgée's diary, entry for 16 April 1896, in Tourgée Papers; Otto H. Olsen, "Introduction," in *The Thin Disguise . . .* Plessy v. Ferguson: *A Documentary Presentation*, Olsen, ed. (New York, 1967), 25–27, 30 n. 4; Chicago *Inter Ocean*, 20 May 1896, quoted in James M. McPherson, *The Abolitionist Legacy from Reconstruction to the NAACP* (Princeton, 1975), 300; Washington, "Who Is Permanently Hurt?" 16 *Our Day* (June 1896), 311, in 4 *The Booker T. Washington Papers*, Louis R. Harlan, ed. (Urbana, Ill, 1972–84), 186.

2. See Rayford W. Logan, *The Betrayal of the Negro from Rutherford B. Hayes to Woodrow Wilson* (New York, 1965), 211–12; Olsen, *Thin Disguise*, 25–26. Both Logan and Olsen made careful surveys of press and periodical reaction, and while their arguments differ in emphasis regarding national response to *Plessy*, their figures indicate the preponderance of indifference.

3. *New York Times*, 19 May 1896 at 1, 3. The cases mentioned in the text are *Illinois Central Railroad Company v. Illinois ex rel. Butler*, 163 U.S. 142 (1896); *United States v. Laws*, 163 U.S. 258 (1896); *Cornell v. Green*, 163 U.S. 75 (1896); and *Webster v. Daly*, 163 U.S. 155 (1896).

4. Alan F. Westin, "The Supreme Court and the Populist Movement," 15 *J. of Politics* (1953), 3–41; John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920* (Westport, Conn., 1978), 51–79; *New York Times*, 11–18 May 1896, *passim*.

5. Benno C. Schmidt, Jr., "Principle and Prejudice: The Supreme Court and Race in the Progressive Era; Part I: The Heyday of Jim Crow," 82 *Colum. Law Rev.* (1982), 466; Henry Billings Brown, "The Dissenting Opinions of Mr. Justice Harlan," 46 *Amer. Law Rev.* (1912), 337–38; Robert J. Harris, *The Quest for Equality: The Constitution, Congress, and the Supreme Court* (Baton Rouge, 1960), 101; Charles W. Collins, *The Fourteenth Amendment and the States* (1912; reprint ed., New York, 1974), 72.

6. *Holden v. Hardy*, 169 U.S. 366 (1898); for the language paralleling *Plessy*'s, see 398; for the discussion of race-related cases, see 383–84.

7. See Gilbert T. Stephenson, *Race Distinctions in American Law* (New York, 1910), 26–27. For example: "Under the social habits, customs, and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a Negro is calculated to inflict injury and damage." *Spotarno v. Fourichon*, 40 La. Ann. 423 (1888), quoted in *ibid.*, 27.

8. Otto H. Olsen, *Carpetbagger's Crusade: The Life of Albion Winegar Tourgée* (Baltimore, 1965), 329.

9. It may be significant that at the end of the Civil War and just afterward, Harlan campaigned in Kentucky *against* the Thirteenth and Fourteenth Amendments on grounds that they were revolutionary and pro-Negro. After he subsequently endorsed the Amendments, he found no reason to change his understanding of their meaning. See Alan F. Westin, "John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner," 66 *Yale Law J.* (1957), 653–54 and *passim*.

10. Brown, "Dissenting Opinions of . . . Harlan," 321, 352, 335–38.

11. Schmidt, "Principle and Prejudice," 468. Schmidt argues that *Plessy* classified railway seating as within the realm of social relations and hence outside the ambit of the Fourteenth Amendment's requirement of equality. But Brown's meaning, I believe, was that *if* accommodations were equal, *then* any feelings of inequality were the result not of the law but of what he called "social prejudices." In the nature of things, he contended, constitutional amendments could not have been intended to change such feelings, for the feelings were impervious to legal alteration.

12. *Chesapeake and Ohio Railway Company v. Kentucky*, 179 U.S. 388 (1900).

13. Tourgée, "A Bystander's Notes," Chicago *Inter Ocean*, 26 May 1897, in Tourgée Papers; *Downes v. Bidwell*, 182 U.S. 244 (1901); *McCabe v. Atchison, Topeka, and Santa Fe Railway Company*, 235 U.S. 151 (1914).

14. See Catherine A. Barnes, *Journey from Jim Crow: The Desegregation of Southern Transit* (New York, 1983), 21–131 and esp. 35–51; Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York, 1976), *passim*; *Brown v. Board of Education*, 347 U.S. 483 (1954); *Gayle v. Browder*, 352 U.S. 903 (1956). In the transportation area, the Interstate Commerce Commission also played a crucial role by striking down both the application of state laws to interstate transit and company regulations mandating separation on interstate routes; see Barnes, *Journey from Jim Crow*, *passim*. On the issue of when the Court explicitly extended *Plessy* to segregated schooling, compare Paul G. Kauper, "Segregation in Public Education: The Decline of *Plessy v. Ferguson*," 52 *Mich. Law Rev.* (1954), 1145, with Harris, *Quest for Equality*, 102–3, 130–31.

15. Note, "The Fall of an Unconstitutional Fiction—The 'Separate but Equal' Doctrine," 30 *Neb. Law Rev.* (1950), 72–73; Laws of Florida, 1939, excerpted in *State Laws on Race and Color . . .*, Pauli Murray, comp. (n.p., 1950), 82; Laws of South Carolina, 1917, quoted in Charles S. Johnson, *Backgrounds to Patterns of Negro Segregation* (1943; reprint ed., New York, 1970), 171. For the full array of laws in effect as of 1950, see Murray's compilation.

16. Walter E. Weyl, *The Passenger Traffic of Railways* [Publications of the University of Pennsylvania in Political Economy and Public Law, No. 16] (Philadelphia, 1901), 27–28 and 28 n.1; Barnes, *Journey from Jim Crow*, 18, partly quoting from Ray Stannard Baker, *Following the Color Line: American Negro Citizenship in the Progressive Era* (1908; reprint ed., New York, 1964), 31, Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944; reprint ed., New York, 1962), 635, and W. E. B. DuBois, "Race Relations in the United States," 9 *Phylon* (1948), 243.

17. For example, John Hope Franklin, *Racial Equality in America* (Chicago, 1976), 65; Germaine A. Reed, "Race Legislation in Louisiana, 1864–1920," 6 *La. Hist.* (1965), 392.

18. W. Ernest Douglas, "Retreat from Conservatism: The Old Lady of Broad Street [the Charleston *News and Courier*] Embraces Jim Crow," *Proc. of the South Carolina Hist. Assoc.*, 1958, at 5; Albert N. Sanders, "Jim Crow Comes to South Carolina," *ibid.*, 1966; at 36–39; Linda M. Matthews, "Keeping Down Jim Crow: The Railroads and the Separate Coach Bills in South Carolina," 73 *So. Atlantic Q.* (1974), 121–28.

19. Charles E. Wynes, "The Evolution of Jim Crow Laws in Twentieth Century Virginia," 28 *Phylon* (1967), 416–21; Margaret Law Callcott, *The Negro in Maryland Politics, 1870–1912* (Baltimore, 1969), 133–34; J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven, 1974), 188–95, 231–36, 250–64; Joel Williamson, *The Crucible of Race: Black-White Relations in the American South Since Reconstruction* (New York, 1984), 243–44; Dewey W. Grantham, "The Contours of Southern Progressivism," 86 *Amer. Hist. Rev.* (1981), 1037–50.

20. C. Vann Woodward, *The Strange Career of Jim Crow* (3rd rev. ed., New York, 1974), 72–82.

21. Brown, "Dissenting Opinions of . . . Harlan," 338; *Brown v. Board of Education*, 347 U.S. 483 (1954); *New York Times*, 23 May 1954, sec. 4, at E10. Specifically, Justice Brown wrote: "He [Harlan] assumed what is probably the fact, that the statute 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 or assigned to white persons." Regarding the *Civil Rights Cases*, Brown similarly confessed, "there is still a lingering doubt whether the spirit of the [Reconstruction] amendments was not sacrificed to the letter . . . ." Brown, "Dissenting Opinions of . . . Harlan," 338, 336.

22. On the Court's failure to overrule *Plessy*, see, for example, Kauper, "Segregation in Public Education," 1151–56; Harris, *Quest for Equality*, 148–50.

For the *Gayle* suggestion, see, for example, Barton J. Bernstein, "*Plessy v. Ferguson*: Conservative Sociological Jurisprudence," 48 *J. of Negro Hist.* (1963), 196 n. 2; Albert P. Blaustein and Clarence C. Ferguson, Jr., *Desegregation and the Law: The Meaning and Effect of the School Segregation Cases* (2nd ed. rev., New York, 1962), 208–9, 282. In *Gayle v. Browder*, 352 U.S. 903 (1956), the Court cited two other cases besides *Brown*, but these were themselves *per curiam* decisions relying on *Brown*. Using *Shepard's Citations* to resolve the issue is suggested by Paul Oberst, "The Strange Career of *Plessy v. Ferguson*," 15 *Ariz. Law Rev.* (1973), 415 (which also offers other insights into the mini-debate about the overruling of *Plessy*). For judicial comments that *Brown* overruled *Plessy*, see, for example, *Browder v. Gayle*, 142 F. Supp. 707, 715–17 (M.D. Ala., 1956); *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973), quoted in *Milliken v. Bradley*, 418 U.S. 717, 767 (1974) (Justices White, Douglas, Brennan, and Marshall, dissenting); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 152 n. 6 (1981) (Justice Stevens, concurring).

23. See *Brown v. Board of Education*, 347 U.S. at 494–95 and n. 11.

24. Ralph A. Rossum, "*Plessy, Brown*, and the Reverse Discrimination Cases," 28 *Amer. Behavioral Scientist* (1985), 792; Kluger, *Simple Justice*, 705–6. Readers familiar with the controversy over *Brown* will recognize that I credit (or charge) the Supreme Court with giving less direct weight to social science testimony than do some of the critics of Warren's opinion. Neither the opinion (when read closely) nor Kluger's careful account indicates that the Court itself rested its conclusions on *independent* evaluation of the empirical evidence—nor, of course, had Justice Brown done so in *Plessy*.

25. *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954). Warren indicated his constitutional test in this fashion: "Classifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Ibid.*, 499. As authority he cited the Japanese Relocation Cases from World War II, which upheld racial classification on the grounds that after close examination the Court could not say that the classification was not reasonably related to the conduct of the war—which was essentially an adaptation of the *Plessy* test, albeit with some tightening.

26. See, for example, Blaustein and Ferguson, *Desegregation and the Law*, 156, 198–209.

27. *Regents of the University of California v. Bakke*, 438 U.S. 265, 318–19 (1978) (Justice Powell, separate opinion). Justice Blackmun in particular charged that by allowing race as a factor but rejecting preferential quotas, Powell had elaborated a distinction without a difference. *Ibid.*, 406 (Justice Blackmun, concurring and dissenting). See generally J. Harvie Wilkinson III, *From* Brown *to* Bakke*: The Supreme Court and School Integration, 1954–1978* (New York, 1979), 301–6.

28. *Bakke*, 438 U.S. at 415–19 and 417 n. 19 (Justice Stevens, joined by Justices Burger, Stewart, and Rehnquist, dissenting and concurring).

29. *Ibid.*, 326–27, 355–56 (Justices Brennan, White, Marshall, and Blackmun, dissenting and concurring).

30. *Ibid.*, esp. 388–89, 392–93, 397–98, 401–2 (Justice Marshall, dissenting and concurring).

31. John C. Livingston, *Fair Game? Inequality and Affirmative Action* (San Francisco, 1979), 85–88; Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977), 225 and *passim*; William Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," 46 *Univ. of Chic. Law Rev.* (1979), 792–803, partly quoting from *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (Van Alstyne's emphasis).

32. For example, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir., 1983), cert. denied, 104 S.Ct. 703 (1984). For critiques, see, for example, Terry Eastland and William J. Bennett, *Counting by Race: Equality from the Founding Fathers to* Bakke *and* Weber (New York, 1979); Edward J. Erler, "Sowing the Wind: Judicial Oligarchy and the Legacy of *Brown v. Board of Education*," 8 *Harv. J. of Law and Public Policy* (1985), 399–426.

33. Booker T. Washington, *Up from Slavery* (New York, 1901), reprinted in 1 *Booker T. Washington Papers*, 267; *New York Times*, 6 Dec. 1985 at 17.

34. Cunningham to James H. McKenney, 24 Sept. 1896, in Clerk's File, Plessy; Mandate, dated 18 May 1896, and Notice of Remand, dated 28 Sept. 1896, in *Plessy v. Ferguson*, No. 210, October Term, 1895, filed and entered with the clerk of the Louisiana Supreme Court, 2 Nov. 1896, in Plessy La. Case File; Notation of Disposition, on Information, *State v. Plessy*, No. 19,117, Section A, Criminal District Court, Parish of Orleans, in photocopied case file, Nels R. Douglas materials, The Amistad Research Center, New Orleans; Citizens' Committee, *Report of Proceedings for the Annulment of Act 111 of 1890* (New Orleans, [1897]), 6–8; Tourgée, "Bystander's Notes," Chicago *Inter Ocean*, 26 May 1897, in Tourgée Papers. The minute clerk's notation on the Information indicates that Plessy changed his plea from "not guilty" to "guilty." Since he had apparently never pleaded "not guilty," the plea to the jurisdiction having been his initial plea, I am following the statement in the final report of the Citizens' Committee that he "entered" the plea of "guilty." (*Report of Proceedings*, 6.) Neither the final report nor Tourgée's column describes the form of the Committee's testimonial to Tourgée or its contents.

35. Otto H. Olsen, "Reflections on the *Plessy v. Ferguson* Decision of 1896," in *Louisiana's Legal Heritage*, Edward F. Haas, ed. (Pensacola, 1983), 182–83; New Orleans *Daily Picayune*, 9 July 1898 at 7; Olsen, *Carpetbagger's Crusade*, 337–49. The date of Plessy's death is from his tombstone in St. Louis Cemetery No. 1, New Orleans which lists his age at death as sixty-three. (I am indebted to Lester Sullivan of The Amistad Research Center for this information.)

36. Citizens' Committee, *Report of Proceedings*, 7; Tourgée, "Bystander's Notes," 26 May 1897.