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The Plessy Case: A Legal-Historical Interpretation

David D. Meyer

THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION. By *Charles A. Lofgren.* New York: Oxford University Press. 1987. Pp. ix, 269. Cloth, $29.95.

To the beginning student of constitutional law, *Plessy v. Ferguson* juts out on the historical landscape as a significant, if ignominious, landmark. Torn from its late nineteenth-century context and jettisoned ahead into the twentieth-century casebook, the reasoning of its majority opinion inspires disbelief. Justice Henry Billings Brown, who wrote the opinion, surely must have been lying, blind, or deranged when he stated glibly that "the enforced separation of the two races [in no way] stamps the colored race with a badge of inferiority"[1] — or so it seems today. The passionate indignation of Justice John Marshall Harlan's now-famous dissent, in which he correctly prophesized that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case,*"[2] seems to underscore the controversial nature of the majority's assertions, and adds an element of drama appropriate for an historical watershed.

This dramatic view is one of the historical misconceptions that Professor Charles Lofgren[3] seeks to dispel in *The Plessy Case.* What is most remarkable about *Plessy,* Lofgren argues, is how *un*remarkable it was considered to be in its time. Both the case's result and its reasoning met with little controversy, and were hardly considered important by the legal community or newsworthy by the popular press.[4] The case was scarcely noted, Lofgren argues, because it fit so neatly with the firmly established assumptions of the day concerning the meaning of constitutional "equality" and with developing scientific theories that sought to validate widespread racist beliefs.

The Plessy Case provides what is surely the most complete narrative account to date of the litigation that began in 1892 with the

1. 163 U.S. 537, 551 (1896).

2. 163 U.S. at 559 (Harlan, J., dissenting).

3. Roy P. Crocker Professor of American Politics and History at Claremont McKenna College. Professor Lofgren is also a member of the Graduate Faculty in History at the Claremont Colleges, and is the author of "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM (1986).

4. Pp. 5, 196-98; *see also* Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine,* 28 AM. J. LEGAL HIST. 17, 17 (1984); Woodward, *The Case of the Louisiana Traveler,* in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 157, 169, 172-73 (J. Garraty rev. ed. 1987). Professor Otto Olsen, however, arrived at a somewhat different conclusion from that reached by either Lofgren or these surveys of the press coverage of *Plessy. See* THE THIN DISGUISE: PLESSY V. FERGUSON 25 (O. Olsen ed. 1967) ("[A] random survey of the northern white press reveals that the Plessy decision almost invariably attracted some attention, that it aroused significant opposition, and that it seldom won strong support.").

orchestrated arrest of Homer Plessy for riding in a "whites-only" railroad car and ended four years later with the disastrous opinion affirming the policy of "separate but equal." Yet Lofgren's account does more than recount the litigants' story. With this book, Lofgren enters a widening debate among historians over the origins of racial segregation following the Civil War and the significance of the *Plessy* decision in promoting segregationist efforts. In *The Plessy Case,* Lofgren has placed himself squarely among a growing number of historians who are challenging the dominant view of the Jim Crow era by emphasizing the early presence of *de facto* segregation in the post-war South and deemphasizing *Plessy*'s importance in propelling a new wave of *de jure* segregation in the Progressive era.

The orthodox historical account at which Lofgren takes aim has generally been attributed to the preeminent historian of the American South, C. Vann Woodward, who sketched his theory of the origins of twentieth-century segregation in his 1955 book, *The Strange Career of Jim Crow.*[5] What has become known simply as "the Woodward Thesis"[6] traces the racism and segregation prevalent in the twentieth century primarily to laws mandating segregation passed in the late 1880s and 1890s. By this view, the *Plessy* Court's affirmation of one of these laws — an 1890 Louisiana statute requiring "equal, but separate" railway cars — was a catalyst for a second wave of segregationist legislation at the turn of the century that significantly limited the rights of blacks.[7] *Plessy* "laid down the 'separate but equal' rule for the justifi-

5. Woodward's thesis has become the object of respectful attack by those who emphasize the significance of *de facto* segregation rather than legislated separation. *E.g.,* H. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH: 1865-1890, at 331-33 (1978); Hovenkamp, *Social Science and Segregation Before Brown,* 1985 DUKE L.J. 624, 625-26; *see also* Riegel, *supra* note 4, at 19 n.10 (summarizing the debate among historians over Woodward's thesis).

In later editions of his book, Woodward qualified somewhat his emphasis upon *de jure* segregation, conceding the prior existence of *de facto* segregation while still insisting that "law has a special importance in the history of segregation, more importance than some sociologists would allow." C. WOODWARD, THE STRANGE CAREER OF JIM CROW ix (2d rev. ed. 1966). Yet the debate continued to build over the next 20 years and by 1988 had spilled onto the pages of the *Journal of American History. See* Rabinowitz, *More Than the Woodward Thesis: Assessing* The Strange Career of Jim Crow, 75 J. AM. HIST. 842 (1988) and Woodward, Strange Career *Critics: Long May They Persevere,* 75 J. AM. HIST. 857 (1988). Twenty-three years after its original publication, Woodward was prepared to give some ground, but not much:

> I . . . agree with Rabinowitz that the debate has been 'fruitful' and hope to gain his admission that it has appreciably narrowed differences by concessions on both sides. At least I have come to agree that more segregation, both de facto and de jure, existed earlier in the nineteenth century than I had originally allowed. And, on the other hand, I fondly believe that most of my critics now concede that toward the end of the century an escalation in white fanaticism resulted in a rigidity and universality of the enforcement of discriminatory law that was a sufficient change to mark a new era in race relations.

Woodward, *supra,* at 862.

6. *See* H. RABINOWITZ, *supra* note 5, at 331; Rabinowitz, *supra* note 5, at 842.

7. C. WOODWARD, *supra* note 5; *see also* Woodward, *supra* note 4, at 173 (asserting that *Plessy* resulted in a "flood" of new "racial aggressions"). *But see* pp. 203-04 (describing and refuting this assertion).

cation of segregation,"[8] thereby slamming the door on the integrationist hopes and experiments of the Reconstruction era and signaling the start of a new era of aggressive *de jure* racism that lasted throughout the Progressive era. Based upon this view, the *Plessy* decision is often seen as an aggressive lunge against racial equality, in which the Court had to undergo contortions to launch the Jim Crow era. "To reach [its] conclusion," notes Richard Kluger, "the Court had to indulge in a willful reading of human nature and to abuse case law, common law, and common sense."[9]

Lofgren, however, offers a distinctly different view. *Plessy*'s reasoning, Lofgren asserts, required no invention at all; nor did the case have much influence over the subsequent development of *de jure* segregation.[10] "Specifically," he writes, "[Justice] Brown's conclusions did not rest on bad logic, bad social science, bad history, or bad constitutional law, as later alleged" (p. 197). In hindsight, of course, Brown's social science was most certainly bad, his history reprehensible regardless of its accuracy, and his view of the Constitution decidedly sterile. Yet, in his day, Brown's law merely captured "conventional wisdom" (p. 197). Lofgren's view is based upon more fundamental criticisms of the Woodward orthodoxy. He questions, for example, the degree to which Reconstruction politics were really aimed at integration (pp. 18-20), and stresses that widespread *de facto* segregation existed well before the post-*Plessy* legislative efforts of the 1890s (pp. 15-17, 116-47). *Plessy,* Lofgren concludes, was not a turning point in constitutional or political history and did little to change the course of the building racist momentum.

Lofgren's view casts the emergence of laws and private company policies requiring "separate but equal" accommodations in the late nineteenth century in a somewhat different light: because the new mandate in many cases compared favorably to the complete denial of accommodations to blacks, which many at the time supported, Lofgren argues that the sort of "separate but equal" laws upheld in *Plessy* can be seen as a modest step forward for civil rights.[11] While it is easy to overstate this point, because separate accommodations in the period were, in fact, rarely equal, Lofgren argues that the principle itself was not entirely reactionary.

Lofgren further seeks to show that the majority opinion in *Plessy,* so appalling to the modern mind, should not be seen as one in which fierce racism overcame constitutional mandates of equality in order to

8. C. WOODWARD, *supra* note 5, at 71.

9. R. KLUGER, SIMPLE JUSTICE 81 (1975).

10. Pp. 203-04 (Lofgren concludes that "the evidence calls for a 'not proved' verdict on a close relationship between the Supreme Court's 1896 handiwork and the passage of new [Jim Crow] legislation.").

11. Pp. 13-16, 27; *see also* H. RABINOWITZ, *supra* note 5, at 182-97; Hovenkamp, *supra* note 5, at 638; Rabinowitz, *supra* note 5, at 845-46; Riegel, *supra* note 4, at 25-37.

uphold segregation.[12] Rather, Lofgren argues, it should be seen as one in which well-meaning judges,[13] influenced by the dominant science of the day,[14] arrived at a result perfectly compatible with accepted contemporary judicial concepts of "equality" (pp. 197-98). From this perspective, Justice Brown's opinion begins to resemble, ironically, Chief Justice Warren's opinion in *Brown v. Board of Education,*[15] the case that drastically undercut (but refused to overrule explicitly) *Plessy* fifty-eight years later: both Justices relied upon the dominant social science data to decide what sort of "equality" the Constitution requires.[16] Once *Plessy* is viewed as the natural expression of its era, Lofgren asserts, its result can properly be seen not so much as dramatically striking a blow for segregation as declining Homer Plessy's invitation to strike a dramatic blow for integration.[17]

Lofgren's book is not intended as an apology for the *Plessy* Court's reasoning or result.[18] Rather, by putting the case in sharper historical

12. As Richard Kluger, for example, has portrayed it. *See* R. KLUGER, *supra* note 9, at 73-81.

13. Lofgren portrays Justice Henry Billings Brown, the author of the Court's majority opinion, as "[n]ot an inordinately ambitious man" whose "largely unexceptional" interpretations of the Constitution merely "reflected dominant trends of the times." Pp. 197-99. Another historian has described Brown as "one of the Court's dimmer lights," yet nonetheless "a steady, useful member, relatively free of ideological ballast." R. KLUGER, *supra* note 9, at 73-74; *see also* THE THIN DISGUISE, *supra* note 4, at 17-18.

14. It is worth noting in this regard that overt racism pervaded the North as well as the South, both before and after the Civil War. Free blacks in the antebellum North were systematically discriminated against in virtually every aspect of public and private life. "Most Northerners, to the extent they thought about it at all, rebelled at the idea of racial amalgamation or integration. Instead, they favored voluntary colonization, forced expulsion, or legal and social proscription." L. LITWACK, NORTH OF SLAVERY 64 (1961). Many northerners after the War accepted emancipation without enthusiasm, and entrenched racism, northern as well as southern, caused Reconstruction experiments to unravel "[f]rom the start." W. GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, at 366 (1979). This background of ingrained northern racism removes some of the irony in the observation that it was Justice Brown, of Massachusetts, who wrote for the Court in *Plessy,* leaving it to Harlan, a former Kentucky slaveholder, to write the lone dissent, an irony Professor Woodward has called "[t]he most fascinating paradox in American jurisprudence." Woodward, *supra* note 4, at 171.

15. 347 U.S. 483 (1954).

16. The similarity between *Brown* and *Plessy* was not, of course, merely coincidental. Chief Justice Warren invoked social science data in part to rebut the reasoning upon which *Plessy* was based. P. 205; 347 U.S. at 494 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding [that separate schools foster feelings of inferiority among black schoolchildren] is amply supported by modern authority.") (footnote omitted); R. KLUGER, *supra* note 9, at 705-06.

17. The lawyers arguing to strike down Louisiana's separate car law recognized the barriers they faced in established legal precedent and doctrine, and therefore adopted a strategy of urging the Court to look beyond mere case law in an appeal to broader notions of equal justice — what Lofgren labels a "call to statesmanship" that the Court declined. Pp. 168-69.

18. Lofgren notes at the outset:

> 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.

P. 4.

perspective, he hopes to correct what he sees as misperceptions in constitutional history. "[S]imply condemning the decision," he notes, "promotes an understanding neither of it nor of America in the late nineteenth century" (p. 4). Lofgren's book makes a valuable contribution to the developing debate over the origins of segregation and the impact of the *Plessy* case by adding important qualifications to some of the previous criticisms of Woodward's thesis. For example, Lofgren demonstrates convincingly that the emergence of "separate but equal" policies and laws in the late nineteenth century was not exclusively an effort to defeat integration, nor was it, as some critics have seemed to suggest, wholly a transitional step forward for blacks away from exclusion and toward eventual integration.[19] Instead, the truth falls somewhere in between. In particular, Lofgren argues that what has been widely labeled as "the first 'Jim Crow' law" — an 1881 Tennessee statute regulating conditions on railroad cars — was in fact a Republican reform measure aimed at outlawing free-wheeling discrimination by the state's rail carriers (p. 21). Lofgren argues that the law was motivated chiefly by a desire to curb the common practice of assigning all black passengers, including those who had paid first-class fare, to inferior "smoking cars." Lofgren finds it significant that the Tennessee law did not mandate segregation across the board, but simply required railroads to make available to black passengers purchasing first-class tickets separate accommodations equal to those offered white first-class passengers. Yet Lofgren also points out that many of the "separate but equal" laws that followed were clearly motivated by white hostility and were qualified by the requirement for "equal" accommodations only because that was thought necessary to avoid judicial invalidation (pp. 24-27).

This account is also useful because it ties together several of the separate and more focused documentary approaches found in earlier examinations of the late nineteenth century to explain *Plessy*. Lofgren begins by detailing three historical "environments" that he claims made the result in the case all but inevitable. He first documents the "constitutional environment" (pp. 61-92), in which expansive judicial deference was accorded to state regulations justified by the "police power" (pp. 83-88). Lofgren convincingly shows how the deferential tone adopted by Justice Brown in *Plessy* toward Louisiana's police power was not a strained resort to uphold the separate car statute, but was perfectly consistent with the posture applied by the Court toward all "due process" challenges to state laws, including by Justice Brown himself just two years earlier in *Lawton v. Steele*,[20] a case having noth-

19. Howard Rabinowitz leaves something of this impression in his account of the development of post-Civil War segregation. *See* H. RABINOWITZ, *supra* note 5, at ch. 6; *see also* Riegel, *supra* note 4, at 37.

20. 152 U.S. 133 (1894). In *Lawton*, Brown wrote for a 6-3 Court in upholding a New York ban on fishing nets that had been justified by a state interest in preventing over-fishing.

ing to do with race relations (pp. 87-88).

The "constitutional environment" was also one in which judges and lawyers almost universally distinguished between two types of "equality" in defining the requirements of the fourteenth amendment's equal protection clause. By this view, blacks were entitled to "political equality," which might include access to most public facilities and accommodations, but not "social equality," integrated access which was seen as possible only through consent (however unlikely) and not through the mandate of law.[21] *Plessy* clearly emphasized this distinction.[22] In addition, the standard interpretation of the Civil War amendments for many years before *Plessy* stressed the reciprocal nature of equal-protection burdens: so long as the law penalized whites and blacks alike for crossing the color line, there was an equality of treatment (pp. 65-66), and statutes would therefore be upheld so long as "reasonably" related to an arguable state interest in the public welfare or morals (p. 88).

By documenting what he calls the "transportation law environment" (pp. 116-47) of the pre-*Plessy* era, Lofgren also shows that the definition of "equality" adopted in Brown's opinion was hardly novel in 1896. Lofgren argues that the "separate but equal" rule, far from being invented by Justice Brown in *Plessy,* was a common law doctrine that had applied to public carriers at least since 1867 (pp. 117-18). This doctrine had become entrenched by the time the courts were called upon to say what the Civil War amendments required, and provided a ready foundation for defining the duties of "equality."[23]

Finally, Lofgren outlines the "intellectual environment" (pp. 93-115) of the years preceding *Plessy* to show how the rise of popular "scientific" theories about racial differences seemed to verify the "reasonableness" of mandated segregation. Throughout the mid-nineteenth century, many scientists purported to offer "scientific proof" about the inferior intelligence, health, and morality of blacks. Toward the end of the century, especially in the years immediately preceding *Plessy,* the intensity of public discussion of these theories increased rapidly as American intellectuals increasingly seized upon frequently misunderstood concepts of genetics, Darwinism, and anthropology as "evidence" bearing out their assumptions of Caucasian racial superior-

21. *See, e.g.,* W. GILLETTE, *supra* note 14, at 367 ("Republicans readily assured whites that the 'imaginary horrors of social equality' were merely Democratic propaganda, for . . . the [Republican] party wanted only 'equality before the law, nor more nor less.' "); Katz, *The Strange Birth and Unlikely History of Constitutional Equality,* 75 J. AM. HIST. 747, 754 (1988); Hovenkamp, *supra* note 5, at 642-51; Riegel, *supra* note 4, at 32-33. According to Professor Woodward, the distinction between "social" and "political" equality was conceded by many blacks as well. C. WOODWARD, *supra* note 5, at 28 ("Negro spokesmen constantly reiterated their disavowal of aspirations for what they called 'social equality,' and insisted that they were concerned only for 'public equality,' by which they apparently meant civil and political rights.").

22. 163 U.S. at 544.

23. *See* pp. 116-47.

ity.[24] Studies claimed to prove that blacks were more susceptible to illness and disease, and as popular awareness increased of the danger of contagion, it was feared that contacts with blacks promoted the spread of disease (p. 107). Elaborate "scientific" warnings were also offered about the danger of interracial marriage: while blacks were demonstrably inferior to whites, it was asserted, mixed-race offspring were inferior to both races. Blacks, the theory continued, would strive to mix with whites until the races were dissolved into a new, even more dangerously inferior mulatto race.[25]

These scientific warnings provided seemingly objective support for social policies aimed at separating the races and preserving racial identity. Even where prejudice was admitted as a possible motive for segregation, it, too, became enshrined in a "scientific" justification: racial hostility was the product of deeply ingrained, natural "racial instincts" that could not be altered by man-made law.[26] Thus, segregation was readily justified by a "reasonable" state interest in avoiding violent clashes by deferring to the "natural instincts" favoring separation. Justice Brown could therefore feel as confident that social science data supported his reasoning in *Plessy* as Chief Justice Warren could six decades later in finding that social science proved separate educational facilities to be "inherently unequal."[27]

Lofgren's thesis is not completely new.[28] Nor is his criticism of "the Woodward Thesis" conclusive. What divides Woodward from his critics, after all, is really more a disagreement over historical emphasis than historical fact. Woodward himself concedes the existence of *de facto* segregation prior to the legislative onslaught of the 1890s.[29] He also acknowledges, at least in passing, the influence of scientific

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24. Pp. 99-111; *see also* S. GOULD, THE MISMEASURE OF MAN (1981); Hovenkamp, *supra* note 5. Useful collections of primary source material documenting popular "scientific" theories of black inferiority and the existence of a natural "instinct" to racial antipathy can be found in THE DEVELOPMENT OF SEGREGATIONIST THOUGHT 29-62 (I. Newby ed. 1968) and 1 RACIAL THOUGHT IN AMERICA 441-97 (L. Ruchames ed. 1969).

25. Pp. 110, 115; *see also* Hovenkamp, *supra* note 5, at 656.

26. Pp. 97-99, 178-79. *Plessy* clearly reflected this view:

> [Plessy's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by the enforced commingling of the two races. . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties in the present situation.

163 U.S. at 551.

27. 347 U.S. at 495.

28. *See* Hovenkamp, *supra* note 5; Riegel, *supra* note 4. In addition, elements of Lofgren's thesis have been considered in some detail by other authors. *See, e.g.*, S. GOULD, *supra* note 24 (outlining history of scientific racism); H. RABINOWITZ, *supra* note 5 (arguing that "separate but equal" policies were typically adopted as an alternative to the exclusion of blacks rather than to integration).

29. C. WOODWARD, *supra* note 5, at 34, 102; Woodward, *supra* note 5, at 862.

racism in validating and entrenching preexisting customs of segregation,[30] and concedes that Justice Brown did little more in *Plessy* than give "voice to the dominant mood of the country"[31] at the time. But Woodward and his critics differ over the significance attached to the Jim Crow statutes, with Woodward arguing that they deprived blacks of freedoms they previously enjoyed,[32] and with critics like Lofgren arguing that they changed little in the already restricted daily lives of American blacks. "The Woodward Thesis" will likely remain the dominant explanation of the rise of Jim Crow in America for some time to come, yet Lofgren surely succeeds in arguing for some adjustments. Most strikingly, *The Plessy Case* presents persuasive documentation of a greater degree of segregation on transportation facilities (both southern and northern) in the pre-*Plessy* era than Woodward was prepared to concede.[33] The extent of that customary segregation, and the willingness with which lower courts generally enforced it, support Lofgren's argument that the enactment of segregationist codes may not have greatly altered the daily habit of southern life.

Moreover, Lofgren's is the most detailed historical examination to date of *Plessy v. Ferguson,* and includes a valuable narrative of the *Plessy* actors and their legal strategies. Historians have written extensively about *The Dred Scott Case,*[34] with which *Plessy* has been so often compared.[35] Yet surprisingly little has been written about *Plessy.*[36] Lofgren's thoroughgoing account of the *Plessy* litigants, their trial strategy, and the historical forces that shaped the Court's opinion is, therefore, a welcome contribution. It advances our understanding of the racism that dominated all of American society, including the

30. C. WOODWARD, *supra* note 5, at 103-04.

31. Woodward, *supra* note 4, at 173.

32. "[T]he Jim Crow statutes were effective means of tightening and freezing — in many cases instigating — segregation and discrimination." The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing.

C. WOODWARD, *supra* note 5, at 105 (quoting Gunnar Myrdal).

33. *Compare* pp. 9-17, 116-47, *with* C. WOODWARD, *supra* note 5, at 35-44.

34. *See, e.g.,* D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); V. HOPKINS, DRED SCOTT'S CASE (1951).

35. The comparisons began, of course, in the case itself, with Justice Harlan's dissent. *See supra* note 2 and accompanying text.

36. One of the few other serious examinations was contained in Professor Otto Olsen's 1967 book THE THIN DISGUISE, *supra* note 4. Olsen's analysis there, however, is confined to an introduction, with the remainder of the volume made up of edited primary source material from briefs, newspaper editorials, and correspondence among the *Plessy* attorneys. Olsen's introduction makes a start toward examining the context from which *Plessy* arose, but, at 28 pages, cannot begin to offer the documentary and argumentative detail that Lofgren provides.

Professor Woodward has also provided a brief historical account of the *Plessy* litigation in QUARRELS THAT HAVE SHAPED THE CONSTITUTION, *supra* note 4. But it, too, is constrained by its essay format and does not aspire to the in-depth analysis Lofgren undertakes.

legal community, during those years and helps to put the *Plessy* decision in its proper context.

— *David D. Meyer*