The Law and Significance of *Plessy*

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In this article, the author explores the legal history that precluded and followed the case of Plessy v. Ferguson*, setting up the historical context and significance of the case. Here, powell shows the embeddedness of structural racism in the American legal system and the slow work done to untangle racism from the law.*

Keywords: legal history, structural racism, segregation

It is helpful to social science researchers unfamiliar with legal scholarship to understand how a U.S. Supreme Court decision can shape public policies more than a century later.[1] The decision in *Plessy v. Ferguson* looms large in our nation's historical memory, but it is both more significant than we generally appreciate and less so.[2] Ostensibly about little more than the separation of railway passengers by race as required by a state ordinance, the decision cemented rather than inaugurated many changes in public policy across the South as White-dominated governments sought new ways to institutionalize racial stratification after 1863. Nonetheless, it has become an arch symbol of jurists going awry and a talisman of racial oppression. Indeed, in his now-famous and lone dissenting opinion, Justice John Marshall Harlan wrote 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," with *Dred Scott* being another touchstone of judicial malfeasance.[3]

Yet, for all its symbolic importance, the

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1. This article provides a layman's introduction to the legal and historical essays in this volume and provides details about the reasoning behind and consequences of the *Plessy* decision.

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3. *Plessy*, 163 U.S. at 559. In *Dred Scott*, the Supreme Court held that the Constitution did not intend to extend citizenship privileges to African Americans, whether they were born free or in slavery or in a free or slave state.

Plessy decision does not implicate the type or form of segregation we live with today, nor is it even directly connected to it. Racial residential segregation across the United States was relatively low and generally nowhere more than moderate, in the late nineteenth and early twentieth centuries. Not until the interwar and postwar periods nearly a half century later did racial residential segregation become an accomplished fact in the United States (see Massey and Denton 1993, 47). Contrary to the significance accorded to the *Plessy* Court for sanctioning racial segregation in public facilities, residential segregation was not primarily an outgrowth of Jim Crow.

Indeed, it was northern cities, not southern ones, that segregated most rapidly from 1920 to 1940. Thus, by 1940, urbanized areas of most northern cities had high levels of Black residential racial segregation, and southern cities lagged behind. Moreover, although *Plessy* was decided in 1896, racial residential segregation in the United States, at least as measured by the dissimilarity index, peaked somtime between 1950 and 1970, depending on the region of the country measured (Massey and Denton 1993, 47).

Because segregation was already accomplished by social mores and in public spaces, municipal or state ordinances mandating racial residential segregation were not only generally unnecessary but also would not have served the regions' labor arrangements, in which domestic workers and agricultural workers needed close access to their employers (Sander, Kucheva, and Zasloff 2018, 24–25). Because segregation was in effect in restaurants, theaters, schools, and recreational facilities, residential segregation to maintain racial hierarchy and inequality was not needed.

An interaction is implicit between mores—what are thought of as informal practices—and more formal norms and standards such as those implemented by law and policy. As Richard Rothstein points out, it can often be difficult to distinguish between de facto and de jure forms of segregation or discrimination: "for example, if it becomes a community norm for whites to flee a neighborhood where African Americans were settling, this norm can be as powerful as if it were written into law" (2017, xv).[4]

Segregation, however, was never just about separating people by race physically; it was primarily about preserving White supremacy and opportunity. In the Jim Crow South, residential segregation was not needed to maintain either. Segregation can be thought of as a form of opportunity hoarding (Rury and Saatcioglu 2015). The denial of transportation opportunities at the end of the nineteenth century and the more explicit subjugation of Black spatial geographic segregation was neither necessary nor practical. Thus the expression of segregation evolves—and will continue to evolve—as circumstances change. It is one of many ways to maintain the racial status quo. With the increase in public and private transportation, the need for workers to live close to work became less important and thus supported spatial segregation.

Plessy is not only not the root of the segregation so pervasive today, it is also not the root of Jim Crow segregation. Far from inaugurating a new regime of Jim Crow, *Plessy* is better viewed as the impetus for backsliding on the commitments embodied in the Reconstruction amendments to the Constitution. Indeed, it was preceded by decisions like the *Civil Rights Cases*, which struck down the Civil Rights Act of 1875 as reaching beyond the domain of state action into private activity, *United States v. Cruikshank*, in which the Supreme Court gutted the Force Acts of the early 1870s and overturned convictions of White men associated with the Klu Klux Klan who massacred freedmen in Louisi-

In that decision, the Court also struck down the 1820 Missouri Compromise. In this way, the decision intensified debates about the extension of slavery in the western territories that was a contributory cause of the Civil War. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

4. Rothstein argues that the racial residential segregation we live with today is de jure, not de facto, and that therefore a powerful federal response is constitutionally required to remediate it.

ana, and the *Slaughter-House Cases*, which constricted the meaning of federal citizenship and eviscerated the Privileges and Immunities Clause of the Fourteenth Amendment (see Black 1999).[5] *Plessy* was the crystallization of a long process by which a reactionary and increasingly conservative Supreme Court drained those amendments of their full meaning and import, a pullback from Lincoln's call for "a new birth of freedom."

Nonetheless, the *Plessy* decision reverberated across the nation and became both a symbol of oppression for a burgeoning civil rights movement and the ultimate target of Thurgood Marshall and Charles Hamilton Houston's grand, multidecade legal strategy to attack Jim Crow. The culmination of this strategy was the unanimous Supreme Court opinion in *Brown v. Board of Education*, which declared unconstitutional the segregation of educational facilities and, by extension, the segregation of public spaces.[6] Although the Court in *Brown* did not explicitly overturn *Plessy*, it did ultimately reject the doctrine of "separate but equal" announced in *Plessy*.[7]

THE DOCTRINE OF "SEPARATE BUT EQUAL"

The Equal Protection Clause of the Fourteenth Amendment simply requires that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Unfortunately, it does not clearly explain what is meant by this.[8] The Louisiana state ordinance challenged in *Plessy* required that "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white and colored races." Stringent penalties for violation applied to both passengers and employees of the railway, in the form of a $25 fine or imprisonment in lieu thereof.[9] The act created a single exception for "nurses attending children of the other race." It did not, however, create similar exceptions for White passengers traveling with or attending to "children of the other race" nor "colored attendants traveling with adults," even where a White passenger's "condition of health requires the constant, personal assistance of such servant."[10] The concept of equality both as a constitutional provision and social norm is anything but intuitive. Although the ordinance explicitly required that all such accommodations be "equal," the Court accepted the fiction that separate could be equal, in part, by parsing the scope of equality ever so narrowly. As the Court explained, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely

5. *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Slaughter-House Cases*, 83 U.S. 16 (1873), at 36. Charles Black (1999) argues that *Slaughter-House* decision was the worst Supreme Court opinion in American jurisprudence.

6. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

7. The decision in *Brown* could have easily gone the other way. "But probably the most important single factor in the victory over school segregation was the presence of Earl Warren as Chief Justice. President Dwight Eisenhower named Warren to the Court to replace Chief Justice Fred Vinson, who had generally favored separate-but-equal laws. . . . Warren used his influence among Court members to consolidate a unanimous decision to outlaw *Plessy*" (Marable 1999, 85).

8. As one constitutional scholar observed, "Although the equal protection clause assumedly means what it says—that is, we ought not interpret it inconsistently with its words—it does not very clearly say what it means. Three things are clear: First, the clause imposes some kind of duty having to do with equality. Second, that which must be equalized is denominated as protection. Third, the bearer of the equalization duty is the state" (Roosevelt 2008).

9. Louisiana Railway Accommodations Act (1890), http://railroads.unl.edu/documents/view_document.php?id=rail.gen.0060 (accessed September 2, 2020).

10. *Plessy*, 163 U.S. at 553.

because the colored race chooses to put that construction upon it."[11]

From the post-Reconstruction era until the early twentieth century, the prevailing meaning or interpretation of the Equal Protection Clause was that it prohibited legislation that was "stigmatizing" or "intended to oppress" (Roosevelt 2008, 1202). Although dominant for the first century of interpretation, this interpretation no longer prevails. Yet both the Court in *Plessy* and the Court in *Brown* adopted this position that stigma and dominance was important in the interpretation of the Equal Protection Clause. As one scholar explains, "Where *Plessy* and *Brown* differ . . . is their application of that test to particular facts. If you think Louisiana's segregation of railroad cars is stigmatic, *Plessy* says, that's your problem—it's only because you choose to place that construction on it" (1203). In short, both *Plessy* and *Brown* adopted the same construction of the equal protection clause; the difference was in their application of that standard to the facts.

Brown, backed by then-groundbreaking psychological evidence like the "doll tests," asserts that "to separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community."[12] In *Brown*, it is not the student's construction of the policy of segregation that fails her, but the system of segregation—the psychological impact of racial stratification itself—that produces the stigma. What is clear is that the Civil War amendments were meant to go beyond the formal equality the Court adopted beginning with *Plessy* and completed in a number of cases in the late twentieth century.

The key premise which underlies the *Plessy* Court's ability to ignore the obvious is an incredible exercise in hairsplitting. The Court distinguished between three types of equality: legal, political, and social. It then suggested, distorting the meaning and intent of the Civil War amendments, that the Equal Protection Clause of the Fourteenth Amendment was intended to extend only to political and legal equality, not to social equality. Indeed, they expressed flinty skepticism that legislation could ever reverse engineer social prejudice: "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. 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."[13]

Of course, the law at issue would prohibit such associations in public spaces, undermining the Court's underlying premise here. Only by distinguishing social equality from political and legal equality could the Court plausibly argue that laws mandating the segregation of races could not violate the Equal Protection Clause, and, insidiously, might serve it, as later defenders of *Plessy*, such as Herbert Wechsler, argued to undermine the Court's legitimacy following the *Brown* decision.

In his enormously influential article "Toward Neutral Principles of Constitutional Law," Wechsler (1959) argues that the chief flaw in the *Brown* decision was that the Court lacked a "neutral" basis. Although obscure today, Wechsler's argument carried tremendous weight in the 1950s and 1960s as the debate over the justification for *Brown* continued into the legislative debates over civil rights legislation and into the progeny of *Brown*, that is, subsequent desegregation cases (Snyder 2000). Wechsler argues that the First Amendment "associational" rights of Whites to avoid associating with Blacks could not be squared with the associational rights of Blacks to integrate with Whites (Wechsler 1959).[14] He argues that be-

11. *Plessy*, 163 U.S. at 551.

12. *Brown*, 347 U.S. at 494.

13. *Plessy*, 163 U.S. at 551.

14. Though the First Amendment does not state associational rights explicitly, the Supreme Court held in *NAACP v. Alabama* that the freedom of association is protected by the First Amendment because it is encompassed in the freedom of speech. *NAACP v. Ala. Ex rel. Patterson*, 357 U.S. 449, 461 (1958).

cause no basis for this determination was "neutral," the decision in *Brown* was effectively illegitimate (Snyder 2000).

The flaw in Wechsler's argument was his assumption that amendments requiring equality were indeed neutral, when logically and in practice any command of equality is hardly neutral when instituted to rectify state-imposed White supremacy, segregation, and domination. Even the *Slaughter-House* Court understood that "the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery."[15] Although the Equal Protection Clause was framed in universalistic terms (applying to everyone), its purposes were hardly neutral, in that they clearly aimed at protecting freed slaves and their descendants.

The doctrine of "separate but equal" is a blatant fiction. But an alternative to a direct, facial attack on that doctrine, as was led by Marshall and Houston, was to press for enforcement of that doctrine by its own terms, so that it was true in fact, and not a legal fiction: a demand that school districts, municipalities, and other state instrumentalities equalize their investments in separate Jim Crow facilities, and that dilapidated buildings and aging books be replaced and modernized (Tushnet 2012).

The NAACP (National Association for the Advancement of Colored People) lawyers who led the strategy to attack *Plessy* refused to accept this alternative. In fact, as they traveled through the South, they told parents and community members that they would take on their cause and press their case if and only if they were willing to attack the doctrine directly rather than demand its enforcement (Tushnet 2012). Although skepticism prevailed in many quarters (for many Black parents saw little reason to demand integration, and saw it simply as a way to equal provision), the architects of the strategy to overturn *Brown* understood, and as the Court in *Brown* ultimately observed, that separate could never be equal. The notion of "separate but equal" itself was the fiction, not just its lack of enforcement.[16] The Court in *Brown* assumed that material conditions were equal. It found the separation itself violated the Fourteenth Amendment.

This becomes even clearer if one of the central purposes of segregation under *Plessy* was not just opportunity hoarding, but also maintaining caste oppression and stigma. Indeed, in *Brown*, the Court explicitly said that "there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[17] It therefore refused to rest its conclusion that the doctrine of "separate but equal" was unconstitutional as applied, but that it was facially so because segregation itself was harmful. Under *Plessy* and its progeny, segregated conditions were separate and unequal, not just materially but symbolically as well. Unfortunately, today, we have lost sight of this truth.

Toward the end of his life, the great legal scholar Derrick Bell became disenchanted with the progress made since *Brown*, and reluctantly concluded like others before him that many Black children might have been better off had *Plessy* been enforced, rather than the doctrine of "separate but equal" overturned (Trei 2004). His pessimism was unwarranted. Longitudinal research on the effects of "desegregation" on Black students is unequivocal: they have better outcomes across the board, and few to no harmful effects on similarly integrated White students. Indeed, most of the White students who integrated report being grateful for their experience (Johnson 2011).

Despite this, many Black people have been and continue to be ambivalent about the practice and goal of integration. This is complicated by the confusion of desegregation and integration, terms which have never been fully

15. *Slaughter-House Cases*, 83 U.S. at 2.

16. *Brown*, 347 U.S. at 483.

17. *Brown*, 347 U.S. at 486–96.

defined or clearly understood. As Elizabeth Anderson and others note, true integration has remained largely elusive in America despite *Brown I* (Anderson 2010). Part of the problem was *Brown II*, which commanded "all deliberate speed." Full-on integration of schools only occurred for a brief period from the late 1960s, commencing with *Green v. County School Bd.* (1968), to the early 1970s, when the Supreme Court began to pull back the throttle. By the time the Supreme Court decided *Milliken v. Bradley* in 1974, intradistrict integration was no longer possible in many districts because of White flight.[18] Moreover, the practice of integration left much to be desired, given that what was practiced constituted assimilation rather than transformation (Adams 2006). A more robust approach would have been for the Court to enforce meaningful integration rather than desegregation.

Society today is in many ways more segregated than at the times of *Plessy* and *Brown*, and certainly more than a generation ago. However, the types and forms of segregation have changed over the years. Maria Krysan and Kyle Crowder describe the persistence of racial residential segregation as also a product of constrained market choice. When searching for new housing, potential homeowners and renters start with areas they know well or that their social networks recommend. Whether on the basis of familiarity or selection bias, they overwhelmingly choose to live in communities that reflect their homogeneous network (Krysan and Crowder 2017). This sentiment is furthered in this volume by Shai Stern's article, "'Separate, Therefore Equal': American Spatial Segregation from Jim Crow to Kiryas Joel," which identifies minority religious communities that choose to perpetuate voluntary self-segregation to preserve their culture and religious identity. Although the causes of continued segregation vary, at least one is that today, in addition to Whites, many minority groups are choosing, whether consciously or unconsciously, to segregate themselves.

However, the choice of self-segregation is not permitted or possible for all. The deep history of redlining and public policy has disproportionately determined housing outcomes for African Americans. This issue of *RSF* expands on types of segregation, reasons segregation persists, and segregation that continues to harm Blacks and other non-Whites, even in the presence of tangible equality of resources or the absence of segregation by law. In the spirit of *Plessy*, this issue recognizes and takes seriously the symbolic and intangible inequality that segregation perpetuates as much as its material effects, as well as the role that intangible forces, such as social networks, play in sustaining and exacerbating material inequality.

The Public-Private Penumbra

Modern readers may puzzle at how a state ordinance interfering so baldly into the affairs of private companies could be upheld, especially when the Civil Rights Act of 1875 was held unconstitutional for requiring the opposite of so-called public facilities. Jim Crow and the doctrine of "separate but equal," however, extend deep into the heart of public life—to businesses, institutions, and facilities owned and operated by private actors but held out to the public, including restaurants, lunch counters, theaters, and, yes, railway cars. It also extends (or extended) to the instrumentalities of the state, including public schools, public transportation, swimming pools, parks, and drinking fountains.

Not until the attack on Jim Crow was well under way did the public-private distinction acquire so much significance, both as a sword to attack laws designed to extend and protect civil rights, and as a shield to defend Jim Crow traditions from federal encroachment. It is little wonder then that much of the opposition to the Fair Housing Act of 1968 was grounded in concerns that it went beyond state action and regulated private economic activity, such as the right of a homeowner to refuse to sell their house to a person on the basis of their race. This is why the authors of the Fair Housing Act based their authority in the Commerce Clause, which explicitly permits the regulation of pri-

18. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968); *Milliken v. Bradley*, 418 U.S. 717 (1974).

vate activity, rather than just the Fourteenth Amendment.[19]

This question of state action and the public-private distinction became even more pressing in the dilemma over racially restrictive covenants—covenants that bound homeowners in mass tract developments from selling their homes to anyone that might integrate a development or community. In the landmark case of *Shelley v. Kraemer* (1948), the Supreme Court again split hairs ever so finely, arguing that racially restrictive covenants were actually unenforceable under the Equal Protection Clause of the Fourteenth Amendment, not because the covenants were illegal but because to use the courts was a public act.[20] The dissent noted that such logic would destroy the public-private distinction. Another example is *Jones v. Alfred H. Mayer Co.*, in which the Supreme Court found that a federal statute intending to bar all private and public racial discrimination was a valid exercise of power to enforce the Thirteenth Amendment.[21] Thus the doctrine of public and private in the law is very much bound up with racial inclusion and exclusion.

Much of the fighting between conservative and liberal jurists over the last 150 years has revolved around citizenship or the distinction between public and private under the Fourteenth Amendment, as well as what constitutes "badges and incidents" of slavery under the Thirteenth (Ware 1989). The turmoil in this area of law has led to remarkable scholarship, including a notable essay by the famous jurist Judge Henry Friendly (1968), which sought to delineate the precise line between public and private action. Unsettled by the ambiguities and potential for litigation upon a "liberating or even obliterating view of what constitutes state action," Judge Friendly explored fact patterns in which state action and private activity seemed interlaced, or perhaps deeply coordinated. "No pat formula," he concluded, "will solve our problems."

The question of the line between public and private activity has never been resolved, and in fact the sharp distinction has been rejected by some leading jurists. As former Supreme Court Justice Anthony Kennedy wrote in 2007, "The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices."[22]

Indeed, Justice Kennedy is right from a historical vantage point, but the enduring persistence of racial residential segregation—the segregation of private space—even as our public spaces have never been more integrated—merely underscores the problem. In *Brown*, the Court said that the "Segregation of white and colored children in public schools has a detrimental effect upon the colored children."[23] But what it said next is not fully appreciated: "The impact is *greater* when it has the sanction of the law."[24] The implication is that segregation is still harmful to African Americans, even when

19. The Fair Housing Act (Title VIIII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 et seq., was based on the Commerce Clause, but, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that, although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. *United States v. Guest*, 383 U.S. 745, 761, 774 (1966) (concurring opinions); *Griffin v. Breckenridge*, 403 U.S. 88 (1971). id. 951 Clause 3. "The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

20. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

21. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

22. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701 (2007), Justice Kennedy Concurrence: III B.

23. *Brown*, 347 U.S. at 494, n.10.

24. *Brown*, 347 U.S. at 494.

it does not have the sanction of law. African Americans were never really meant to benefit from the "separate but equal" doctrine, rather, the goal was to benefit Whites and teach African Americans "their place" as an inferior race. And yet our jurisprudence of late shields so-called de facto segregation from a mandatory constitutional remedy (Green 1999). In this way, the public-private distinction continues to operate in a way that frustrates any current as well as future attempts to fully extirpate the legacy of *Plessy*.

The First Justice Harlan

Homer Plessy, the petitioner before the Supreme Court in 1896, argued that the Louisiana ordinance not only violated the Fourteenth Amendment's Equal Protection Clause, Privileges and Immunities Clause, and Due Process Clause, but also the Thirteenth Amendment's prohibition of "badges and incidences" of slavery. As we have seen, the Court dismissed these arguments on grounds that those amendments did not require "social equality," and that the ordinance was a "reasonable regulation" of railway carriers.

In his dissent in *Plessy*, Justice Harlan disagreed with the Court to a truly remarkable breadth and extent. His understanding of the Reconstruction amendments was more progressive and expansive than perhaps any current member of the Supreme Court. To appreciate just how radical his understanding of those amendments was, we must dig into his dissent in *Plessy* and other cases.

Harlan's dissent in *Plessy* is perhaps most famous for the phrase "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[25] This quote has been broadly deployed, much like a similar quote from Martin Luther King Jr., to suggest a kind of colorblindness, and the attendant notion that the truest path to racial equality is to ignore race (M. King 1963, 1964). Unfortunately, this interpretation ignores the true meaning of Harlan's dissent, and on multiple levels (Berry 1996; M. King 1963, 1964).

To begin, Harlan would not only have held that the Louisiana statute at issue violated the Equal Protection Clause, but also violated the Thirteenth Amendment, and remarkably, but rarely acknowledged, the "guarantee" clause (Article IV, Section 4) of the Constitution (by which the Constitution requires that every state have a "Republican Form of Government"). In other words, he found that the separation of race systematically violated the Constitution in multiple respects.

Unlike his colleagues, Harlan saw the Reconstruction amendments in their whole, and as part of the larger fabric of the Constitution. Rather than seeing the amendments as simply constraining state action, he saw those amendments as an affirmative "font" of authority for Congress to enact legislation designed to achieve the ultimate purpose of those amendments (Liu 2006). First and foremost, Harlan believed that the Citizenship Clause of the Fourteenth Amendment, which was intended to bring freed slaves and their descendants fully into the political community, clothed Congress with the power to take affirmative steps to secure that right, including regulating pernicious laws such as those enacted by Louisiana. The Civil War amendments were unusual in giving Congress explicit rights of enforcement.

Justice Harlan viewed the Reconstruction amendments as infusing the entire Constitution with new meaning and purpose. They redefined the "we" in "we the people" expansively and inclusively. In particular, Justice Harlan understood the Thirteenth Amendment as doing more than prohibiting slavery, emphasizing that it "decreed universal civil freedom in this country" via the enforcements powers of Section 2, which granted Congress the authority to legislate against the "imposition of any burdens or disabilities that constitute badges of slavery or servitude." Harlan further explained that the Thirteenth Amendment, "having been found inadequate to the protection of the rights of those who had been in slavery," was intended to be read and enforced in conjunction with the Fourteenth Amendment, adding greatly to the "dignity and glory of American citizenship, and to the security of personal liberty." Harlan further asserted that "these two amendments, *if enforced according to their true intent and mean-*

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

ing, will protect *all* the civil rights that pertain to freedom and citizenship" (emphasis added).[26] Against this backdrop, Harlan held that "the arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution," and could not "be justified upon any legal grounds."[27]

Seeing through the fiction surrounding the doctrine of "separate but equal," Harlan wrote that "the thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone"[28] and further, that the concept of "separate but equal" could hardly be understood as the true intent behind the statute in question:

> Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.[29]

Although his dissent in *Plessy* is more famous, his dissent in the *Civil Rights Cases* is more revealing. There, he presented the full scope of his views on the Reconstruction amendments. He explained that the power to enforce those provisions through affirmative legislation must be coterminous with the previous power to protect slavery. As he put it, "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." If Justice Harlan's views prevailed, the Thirteenth Amendment, the Citizenship Clause, and the Privileges and Immunities Clause would be vital and active parts of the Constitution, not the narrow and moribund script they are today.

Interestingly, Justice Harlan's personal views on race may well have been far more constricted than his otherwise expansive interpretation of the Reconstruction amendments. In his dissent, he admitted that "the white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time."[30] In this regard, Justice Harlan was also a slave owner, defended the institution, and manumitted his slaves only when the Thirteenth Amendment compelled him to do so (Gordon 1993).

Speculation on Harlan's views abound. Could it be that Harlan's expansive interpretation of the Constitution was possible, at least in part, because of a high degree of confidence in the ability of White supremacy to live on in society indefinitely? Could Harlan have been signaling to Whites that they need not worry about changes in law because society would continue to recognize and support their supremacy? Whether his statements were merely an observation of reality circa 1896, or a confession of personal belief in White supremacy, we may never know. What is clear is that such observations may be regarded as racist today despite his progressive and inclusive jurisprudential vision.

This perplexing and paradoxical contrast between Justice Harlan's personal beliefs and public jurisprudence perhaps highlights a distinction between personal prejudice and structural inclusion to which we should pay greater heed. Too often, we assume that personal prejudice and exclusionary policy preferences are conjoined. The case of Justice Harlan reminds

26. *Plessy*, 163 U.S. at 555.

27. *Plessy*, 163 U.S., dissent at 562.

28. *Plessy*, 163 U.S., dissent at 562.

29. *Plessy*, 163 U.S. at 557.

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

us that they may not be, a lesson that matters greatly as NIMBY suburbanites express support for the Black Lives Matter movement while opposing school integration or affordable housing (Joffe-Walt et al. 2020).

Finally, Harlan's dissent is remarkable in that it has proven to be a chillingly accurate harbinger for much of what has come in the 125 years since *Plessy* was decided. For example, new and enduring patterns of race-based hatred and violence, pervasive implicit biases against Blacks, the continued maintenance of White supremacy, and patterns of judicial interference and overreach:

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge.[31]
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> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?[32]
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> State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.[33]
>
> There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution.[34]

Although the doctrine of "separate but equal" has been overturned, Justice Harlan's sweeping vision for the Reconstruction amendments lies dormant in our jurisprudence, waiting to arise again.

Whiteness and Gradients of Color

One of the ironies of *Plessy v. Ferguson* is that Homer Plessy was phenotypically White and, in fact, sought better conditions than his Black fellow citizens. Part of what Homer Plessy argued for was a due process ground, that he was being denied the property interest in his Whiteness (Harris 1993). Although the Court declined to consider whether Plessy met any statutory definition of Whiteness, and deferred to state law on this issue, the Court signaled that an incorrect classification could provide grounds for a suit and corresponding damages.

There is a vigorous debate among legal scholars about whether *Plessy* was primarily about race, citizenship, or Whiteness. Much of this debate arises from Harlan's prominent role in the case as a dissenter. Not only was Justice Harlan a wealthy slave owner, but he had a half-brother who was Black (G. King 2011). The Harlan dissent famously stated, "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . . . The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law

31. *Plessy*, 163 U.S. at 560.

32. *Plessy*, 163 U.S. at 560.

33. *Plessy*, 163 U.S. at 560–61.

34. *Plessy*, 163 U.S. at 558.

established by the Constitution. It cannot be justified upon any legal grounds."[35]

The Harlan dissent also explicitly raised the issue of citizenship and the counting of persons who are neither White nor Black:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.[36]

The race line affirmed by the Supreme Court held that "one drop" of Black blood rendered a person non-White. In this way, Whiteness was not only a racial classification, but also an explicit property interest that conferred benefits denied to non-Whites. Anti-miscegenation laws reinforced property interests tied to Whiteness and were often designed to punish and regulate those who threatened the exclusivity of Whiteness by crossing racial boundaries. Not only did anti-miscegenation laws function as protective measures for Whiteness and its associated property interests, they helped expose the public and private nature of racial boundaries and identities, and became integral in the creation of Whiteness itself. This, too, is a legacy of *Plessy*. When immigration debates presume fitness based on race, *Plessy* extends its shadow.

Ultimately, the expression of state-sponsored intolerance and racial hierarchy cannot be reduced to a single case or law. The space for interpretation means that who decides matters, and it is the justices sitting on the Supreme Court who matter. If Justice Harlan's views prevailed, our jurisprudence would look quite different today. Still, *Plessy* rightfully stands as one of the continuing stains on the history of our country in its ambivalence and unwillingness to address White dominance with many lessons for our current and continuing racial travails.

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

36. *Plessy*, 163 U.S. at 561.

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