Who Gets to Say Who's Who? *Plessy*'s Insidious Legacy

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Plessy v. Ferguson*'s legacy reaches far beyond Jim Crow's "separate but equal" doctrine to perpetuate state control of personal identity. The 1896 U.S. Supreme Court decision upheld white supremacy's slave law power to say who's who, epitomized in state power to declare some human beings not persons but mere property. It sanctioned government power to identify and categorize individuals and to direct their actions and interactions based on such identities and categories. In perpetuating unchecked state determination of individual identities,* Plessy *persists in its insidious denial of basic human rights and fundamental freedoms. To reestablish birthright personal autonomy over identity free of state subordination requires reforming U.S. law to recognize and accept the individuality of human diversity. Such a process requires abolishing state authority to arbitrarily assign personal identity by decree and recognize the basic personal autonomy of individuals to define, redefine, and express their individual identities.*

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Control over identity lay at the heart of *Plessy v. Ferguson*.[1] Yet the case has usually gone unrecognized as contesting state power over personal identity. From the case's beginning in June 1892, the popular narrative has long settled it as the Supreme Court of the United States' black-and-white sanction of Jim Crow segregation (on the initiation and development of the case, see Davis 2012, 1–15). Its recognized legacy has been narrowed to the "separate but equal" doctrine. For although the decision treated only intrastate rail transportation, it became the touchstone of Jim Crow segregation. It became most associated with state-mandated racial segregation in public schools, especially after the 1954 *Brown v. Board of Education* ruling that "in the field of public education the doctrine of 'separate but equal' has no place."[2] That narrative, like the Court's 7–1 decision on May 18, 1896, has neglected the core of Homer A. Plessy's challenge to the state of Louisiana's asserting authority in its 1890 Separate Car Act to

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

2. *Brown v. Board of Education of Topeka*, 397 U.S. 483, 495 (1954).

say who he was and deny him the personal autonomy of self-identification, giving rise to an insidious legacy (for more on the Court's neglect, see Davis 2004).

The Court's rationale in its *Plessy* decision reached far beyond a black-and-white racial binary to stealthily encompass a full range of legal relations attached to personal identity (Davis 2002, 61–76). In rejecting Plessy's appeal that Louisiana law unconstitutionally and unconscionably declared him to be someone he was not, or at least someone he said he was not, the Court implicitly affirmed state authority to say not only who Plessy was but also who is who for all persons within the state's jurisdiction. The decision breached the boundary between personal autonomy and state authority. It afforded few legal protections for any individual right of personal self-determined identity and confirmed state power to assign personal identity in classes with consequences of inclusion and exclusion. That legacy has continued to traverse a complex landscape connecting individual identities, social norms, and state power, for the decision quashed any claim of right to determine or express individual self-identity in the face of categorical state decrees.

The most intimate and essential life activities remain captive to *Plessy*'s legacy. From sex and marriage to adoption, gender recognition, employment, and voting, persistent discrimination turns in various degrees on state authority to define, categorize, and deny or abridge freedom of personal identity. The battle for individual self-determination against state invasion of such intimate aspects has been long and hard-fought in courts of law and in courts of public opinion (Kennedy 2004).

Personal identity looms large in almost every aspect of human life in the twenty-first century. Simultaneously taken for granted and highly contested, identity serves as a currency in negotiating both social acceptance and self-acceptance. It is a mainstay in civic life and in legal and social relations. It purchases positions in the ongoing processes of everyday living and also within the past and future connections of community and lineage. It is a private and public matter, a matter of fact and a matter of fascination. It captures not only the ego's attention but also commercial marketplaces enriched by popular yearnings for self-determination, self-discovery, and self-identification.

Who gets to say who's who matters. In recent years the question has flared, for example, over who can use what public toilets. Indeed, state authority over personal identity has continued to implicate self-definition and self-expression in relations with government, in social settings, in interconnections with others, and in personality formation and manifestation, including gender presentation and sexual orientation. It has been, and promises to continue to be, no trivial matter in its inheritance from the 1896 *Plessy* decision.

So how did this legacy arise? Examining afresh the origins of Plessy's case, the arguments for Plessy, and the Court's rationale in disposing of the case, reveals the harm beyond "separate but equal" that the *Plessy* decision handed down and that remains for U.S. law to address. The policy analysis that follows aims to define, describe, and evaluate the substance and structure of the problematic legacy the Court bequeathed in confirming the state of Louisiana's authority to arbitrarily assign personal identity and to delegate to others power to discriminate on the basis of the state's determination, regardless of any individual's self-identification.

This article aims to expose the roots and reach of the Court's upholding state power to say who's who. It treats the Court's *Plessy* decision and the decision's legacy as implicating more than race in denying individual autonomy to determine personal identity, given that the ruling sanctioned state imposition of embedded social prejudices and practices to deny Plessy, and by extension all others, any right of self-identity without state determination. The article views the Court's allowing the state to subjugate personal autonomy as permitting the state to extend the effects of slave law that determined not only civil privileges and immunities but more fundamentally legal personality.

Further discussion opens by retracing the case's roots in the growth of prescriptive legislation in the former slave states after the Civil War to preserve the civic and social distances and distinctions white supremacy imposed on blacks and whites before the Thir-

teenth Amendment in 1865 nullified the laws of slavery. It exposes parts of the attitudes, thinking, and legal process that created the doctrine of "separate but equal" as an anchor for Jim Crow segregation, particularly as it arose in railway transportation. Parting with traditional views of the Court's response to Plessy's appeal, the article focuses on the arguments for Plessy, not the state, to control his personal identity and on the Court's willful blindness to that challenge. Also, it treats the injurious implications of the Court's allowing the state to continue to control personal identity as it had in the laws of slavery. The article further treats the need to dismantle state control and so quash the continuing insidious reach of the *Plessy* decision into the complex of personal identity that rests on basic human rights to autonomy.

ARRIVING AT THE TOUCHSTONE FOR JIM CROW

The *Plessy* ruling sanctioned state action requiring physical separation of persons by race. Specifically, it upheld Louisiana's 1890 statute formally titled "An Act to promote the comfort of passengers on railway trains."[3] Also known as the Louisiana Railway Accommodations Act, but popularly referred to as the Separate Car Act, the legislation 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, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations."[4] The ruling immediately attached only to intrastate railroads, as the Louisiana act pointedly exempted "street railroads."[5] Yet in time the ruling came to cover public transportation generally. Indeed, it became the legal touchstone for the twentieth-century U.S. system of apartheid known as Jim Crow segregation (Davis 2012, 143–56).

The ruling came as a confirmation not a commencement. When the Court handed down its decision on May 18, 1896, eight states already had separate car acts in place.[6] The first legislation had appeared in 1865–1866, before the Fourteenth Amendment in 1868 with its due process guarantees of life, liberty, property, and equal protection of the laws. The first legislation after the amendment came in April 1881, when Tennessee mandated separate cars by race.[7]

In aim and affect, the Tennessee statute stood in contradistinction to later separate car acts, such as the 1890 Louisiana law, as it arose as a remedy for blacks rather than as a restriction (Stephenson 1909, 181–82; Mack 1999, 377).[8] The statute's title—"An act to prevent discrimination by railroad companies"—signaled its distinction. Its preamble announced its aim to correct a blatant and common fraud and to provide for blacks to get what they paid for on railroads. "It is the practice of railroad companies located and operated in the State of Tennessee to charge and collect from colored passengers traveling over their roads first-class passage fare, and compel said passengers to occupy second-class cars," the legislature found. To counteract that discrimination and extortion, the law required that "all railroad companies

3. 1890 La. Acts 152 (1890).

4. 1890 La. Acts, sec. 1.

5. 1890 La. Acts, sec. 3.

6. The eight states, and the year each adopted a separate car act for the races, were Tennessee (1881), Florida (1887), Mississippi (1888), Texas (1889), Louisiana (1890), Alabama (1891), Arkansas (1891), and Georgia (1891).

7. "An act to prevent discrimination by railroad companies among passengers who are charged and paying first-class passage, and fixing penalty for the violation of same." 1881 Tenn. Pub. Acts ch. 155 (April 7, 1881).

8. This article uses the terms *black, colored, Negro,* and *nonwhite* as synonyms, accepting the white supremacist dichotomy that prevailed at the time of the *Plessy* case. The prevalent and persistent colorism of then and now, along with the developing understanding of race as a social construct, of course, distinguishes among the categories. Homer Plessy certainly was not *black* and would have objected to being termed so, as much as he refused also to simply call himself *white*, rejecting binary racial categories and, indeed, racial categorization. His case argued for a self-designated, self-determined identity.

located and operated in this State shall furnish separate cars, or portions of cars cut off by partition walls, in which all colored passengers who pay first-class passenger rates may have the privilege to enter and occupy."[9]

Tennessee further required that the separate cars or the separate spaces within cars that the statute and contemporaries termed "apartments" for colored persons "shall be kept in good repair, and with the same conveniences, and subject to the same rules governing other first-class cars." The "separate but equal" formula was enunciated clearly—"separate cars, or portions of cars cut off by partition walls" plus "the same conveniences, and subject to the same rules governing other first-class cars."[10]

The act thus furnished blacks a right to ride and get what they paid for on railroads in Tennessee. Also, it allowed them to sue any railroad that refused to deliver accommodations as the law required for their paid passage. Gaining such accommodations, however, came at a price: in exchange for escaping being extorted or excluded, blacks suffered being physically separated from whites by law (Rabinowitz 1976, 325–50).

The 1881 statute advanced Tennessee from the position it had adopted in 1875 to empower unfettered racial discrimination. Halting the Reconstruction progress of colored persons' civil rights, the legislature dominated by white conservative Redeemers abrogated the common-law rule allowing persons to sue for damages if excluded from service at public accommodations (Davis 2016, 125). The 1875 act abolished liability for common carriers and facilities, such as railroads, hoteliers, innkeepers, restaurateurs, and public amusements, if they discriminated in providing services. The law permitted owners and operators of such businesses absolute discretion "to control the access & admittance or exclusion of persons." In short, owners and operators could exclude anyone for any reason, and the person excluded had no recourse at law. To the contrary, recourse lay on the other side because the act made any person who protested being excluded from public accommodations liable for civil damages of $500 and a criminal fine of not less than $100.[11]

SEPARATE CARS WERE NOT UNUSUAL

Although an advance from Tennessee's 1875 position, the 1881 separate car approach was not original. Separate cars emerged as a common practice after the Civil War to accommodate class and gender. And they were not fixed by race or region. The expanding mode of passenger transportation that postbellum railroads provided created increasingly accessible public spaces that had the potential for unaccustomed close contact for persons across the social spectrum (Welke 2000, 267–68; Mack 1999, 381–82). In fact, expanding postbellum railroads created highly contested spaces, and fierce competition for control and definition surfaced on almost every facet of the business. Typical of U.S. development, evolving law stood in the midst of the contention. Legislatures strove to alter common law to meet current circumstances as railroads themselves sought to fashion suitable company rules, leaving the courts to judge what was reasonable under the law (Welke 2001, 3–4; Minter 1995, 995).

As many saw it, decorum demanded separate spaces to maintain, or at least protect, distinctions in social status. Thus first-class cars and ladies cars cordoned off persons of means and the "fairer sex" deemed "ladies" from the hoi polloi relegated to cars that allowed smoking and often vulgar or obscene language (Welke 2000, 267–68; Mack 1999, 381–82). Further, in speaking of separate cars, it is well to note that in regard to race such cars existed before the Civil War and originated outside the South. The phrase "Jim Crow" was first attached to arrangements for seating and service in Massachusetts in 1841, during agitation over railroad cars set aside there for blacks (Davis 2012, 144; Ruchames 1956, 61–75).

9. 1881 Tenn. Pub. Acts ch. 155.

10. 1881 Tenn. Pub. Acts ch. 155.

11. "An act to define the rights, duties, and liabilities of inn keepers, common carriers and proprietors." 1875 Tenn. Pub. Acts ch. 130 (March 24, 1875). For traditional common-law liabilities related to travel services, see Sandoval-Strausz 2005, 53–94.

SEPARATION REPLACED EXCLUSION

Tennessee did not start the shift from exclusion to segregation. That began in the wake of the Thirteenth Amendment, submitted to the states in February 1865 and ratified that December. Outlawing slavery ended legal distinctions that excluded blacks not in service from access to all manner of public places and provisions. Before the Civil War, enslaved persons accompanied their holders to serve them in many places they had no access to on their own. Blacks had little or no independent access to public transportation in most slave states, and no access to public institutions such as hospitals, poor houses, and orphanages (Rabinowitz 1974, 327–54).

Separation by exclusion had been a fact with slavery. In the wake of the Thirteenth Amendment, three ex-Confederate states scurried to maintain the fact of separation on railroads by enacting exclusion by law. Mississippi rushed in November 1865 to ban blacks from railroad cars set apart for whites, providing for penalties of fine and imprisonment.[12] Florida's legislature in December 1865 banned blacks from "intruding" in any public vehicle set apart for whites. Further, revealing its aim to extend racial rules that prevailed during slavery, the Florida law provided for punishing by pillorying or whipping.[13]

The Florida and Mississippi acts were part of the notorious 1865–1866 Black Codes in the former slave states designed to limit blacks' post-abolition personal rights (Stephenson 1909, 181–82). The federal Civil Rights Act of April 1866 outlawed many of those provisions.[14] Texas in November 1866 suggested part of the approach Tennessee would adopt in 1881 when it mandated that railroads in the state "attach to each passenger train run by said company one car for the special accommodation of Freedmen."[15] The effect eliminated exclusion by providing blacks a place to ride.

Eliminating exclusion became a necessary change in postbellum public policy, but separation came with it to preserve the caste division of the color line. Rather than admit blacks to existing facilities that served whites, separate public facilities sprang up across the South in 1866 and 1867. Nashville and New Orleans, for example, provided separate streetcars for blacks. Before the war, blacks were simply excluded. Similarly, Nashville opened separate schools for blacks in 1867, for the first time admitting them to its public schools. No discussion of equal accommodations accompanied such separate facilities (Rabinowitz 1976, 326–28; Rabinowitz 1974, 327–54).

"SEPARATE BUT EQUAL" TO SATISFY EQUAL PROTECTION

Tennessee's 1881 separate car act also exhibited a shift in law occasioned by the U.S. Supreme Court's 1880 decision in *Strauder v. West Virginia*, holding that state laws excluding blacks from public services violated the Fourteenth Amendment's Equal Protection Clause.[16] And more than exclusion was on the table in 1881. The federal Civil Rights Act of 1875 had provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."[17]

Outlawing exclusion proved too much for whites who insisted on being separate. They demanded the right to discriminate or at least not

12. 1865 Miss. Laws 231, 232 (November 21, 1865).

13. 1865 Fla. Laws 25 (December 1865).

14. "An Act to protect all Persons in the United States in their Civil Rights and liberties, and furnish the Means of their Vindication." 14 Stat. 27 (April 9, 1866).

15. "An act requiring railroad companies to provide convenient accommodations for Freedmen." 1866 Tex. Gen. Laws 97 (November 6, 1866).

16. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

17. "An act to protect all citizens in their civil and legal rights." 18 Stat. 335, sec. 1 (March 1, 1875)

to be legally liable for discriminating. The Supreme Court obliged in its 1883 decision in the *Civil Rights Cases*. With Justice John Marshall Harlan alone dissenting, the Court quashed the 1875 Civil Rights Act holding that federal prohibitions could not reach private racial discrimination.[18] That decision allowed railroads—such as the Memphis & Charleston Railroad, which had been a party in the 1883 case—to discriminate as they pleased, in the absence of state regulation (Horan 1972). Perhaps foreseeing the demise of federal antidiscrimination protections for nonwhites, Tennessee had enacted regulations to provide "colored passengers . . . the same conveniences, and subject to the same rules" in railroad transportation in the state.[19]

Beginning with Florida in 1887, other southern states joined Tennessee with separate car acts. Their focus fell, however, on separating colored and white passengers. Access was no longer the focus, as it had been in the 1881 Tennessee statute. Separation was the exclusive mandate. Equal accommodations got little more than lip service. The duplicative cost of maintaining dual accommodations doomed equality; indeed, the cost factor would prove telling for all segregated facilities, from transportation to education. Railroads and other public service providers balked at duplicative cost as southern state laws turned former matters of custom and practice into binding constraints that carried civil and criminal penalties (Osborn 2002, 395; Roback 1986, 894). Supply and demand in that political economy time and again left blacks with less than whites.

The growing wave of separate car acts stirred fundamental objections to the underlying matter of the state's asserting and delegating authority over personal identity—arbitrarily deciding who individuals were and where they belonged. Enter Louisiana with its exceptional history of multiple colonial regimes and demographic intermixture. Its incomparable Francophone community of colored Creoles had much to say in opposition to the state's escalating racial decrees. To challenge the 1890 Separate Car Act, they organized the Comité de Citoyens, which chose Homer A. Plessy to make their case against what they viewed as the state's arrogation of their right to self-identity (Davis 2012, 157–74).

PLESSY'S ARGUMENTS FOR IDENTITY

In simplest terms, the legal case constructed to represent Homer Plessy boiled down to who got to say who he was. That was the focus when the Comité de Citoyens recruited Plessy and hired his local lawyer James C. Walker and his primary appellate advocate Albion W. Tourgée to challenge the constitutionality of the state's nonwhite-white binary assignment of race and, in fact, the concept of race itself. In his brief on Plessy's behalf, Tourgée asked the U.S. Supreme Court rhetorically, "Is not the question of race, scientifically considered, very often impossible to determination?" (Davis 2012, 195). With that and other interrogatories posed against the state, Tourgée disputed Louisiana's authority to determine not simply Plessy's race but his personal identity (Davis 2012, 157–74; 2004, 1–41; Kurland and Gunther 1975, 13:33–57).

Tourgée argued that Louisiana's 1890 separate car act not only arrogated authority to determine personal identity but also overreached in asserting authority to delegate that power to private persons, in that it directed railway officials "to assign each passenger to the coach or compartment used for the race to which the passenger belongs."[20] That authorized officials to say who was who and where the law allowed

18. *Civil Rights Cases*, 109 U.S. 3 (1883).

19. 1881 Tenn. Pub. Acts ch. 155. Notice the decision in *Munn v. Illinois*, 94 U.S. 113 (1876), allowing state regulation of grain elevators and, by extension, railroads on a public use theory. This position was overturned in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), which held that under the Constitution's Commerce Clause, Article I, Sec. 8, cl. 3, states lacked authority to regulate interstate railroads. The Court had adopted a similar position earlier in *Hall v. DeCuir*, 95 U.S. 485 (1877), treating riverboat transportation, in invalidating an 1868 Louisiana statute prohibiting racial discrimination on all common carriers, whether interstate or intrastate, operating in the state.

20. 1890 La. Acts 152, sec. 2.

their passage. Usually such decisions fell on conductors, as they were the immediate operating officers on trains. They were responsible for making sure all was in good order, from the equipment to the passengers; and that responsibility entailed assuring that all on the train complied with applicable laws, rules, and regulations (Gibbard 2017, 53–56).

Having the state delegate an assignment added another bother to the trainmen's tasks. For the most part, however, sorting passengers in the state-mandated nonwhite-white binary posed no problem. No questions arose with most passengers: their self-identification matched their publicly perceived identity—that is, their appearance. Their choice of coach or compartment fit their appearance and so tended to satisfy all concerned, leaving neither the conductor nor anyone else to say anything in regard to who they said they were in complying with the law. No burdens arose for or with such passengers.

Yet passengers' coach or compartment selection necessarily concerned conductors and other railway officials because the law made them liable for allowing any passenger to use "a coach or compartment which by race he does not belong." For such a violation, company officers and directors were liable for a misdemeanor and a fine of not less than $100 nor more than $500. Conductors were liable for a fine of not less than $25 nor more than $50.[21]

Liability lay further because the law recognized that railroad officials might misidentify a passenger by race. "Any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs" faced a fine of $25 or imprisonment for not more than twenty days. A like punishment faced any passenger who insisted on using "a coach or compartment which by race he does not belong." That was the penalty Homer Plessy faced.[22]

So identifying passengers by race was no trivial matter. But how was such identification to be made? Were there creditable indicia or instructions? Was the identification wholly subjective, based on the perception of a conductor or other railroad official? Were there objective facts or principles to guide such identification? Tourgée pounded such questions in pressing Plessy's case to the Supreme Court. "Is the officer of a railroad competent to decide the question of race?" he demanded. "What evidence" were railroad officials supposed to use in "the absence of statutory definition," Tourgée pressed further, emphasizing that Louisiana then had no law defining or describing racial character (Davis 2012, 195; Kurland and Gunther 1975, 13:33–57).

Tourgée's arguments for Plessy outlined points later developed as the foundation for critical race theory (Jones 2006, 1–26; Crenshaw et al. 1996, xi–xxxii). Recognizing white privilege, Tourgée defined identity as property and denial of identity as a deprivation of that property and of liberty, in that such a denial reduced personal autonomy, independence, and integrity. It followed then that state action involved in such deprivation denied or abridged the constitutional equality implicit in the freedom the Thirteenth Amendment established when it prohibited slavery and explicit in the Fourteenth Amendment's protections of personal rights, including those of life, liberty, property, and equal protection of the laws, Tourgée maintained (Davis 2004, 29–41; Kurland and Gunther 1975, 13:33–57).

Tourgée's arguments in Plessy's case reached beyond race to touch the nexus of state power over the complex of personal identity. So much in regard to an individual centered on identity, Tourgée pointed out. Life, or at least quality of life, depended largely on identity, he noted. Was the state to have unlimited control over so crucial a lever of life? Were there no substantive restraints to state action? Did not the absence of such restraints return the law of slavery by allowing unfettered state control of persons? What interests, if any, permitted the state "to assort its citizens" in categories such as "colored" or "white" that lacked any standards-based measures? Tourgée's questions for the Court were many (Davis 2012, 195–198; Kurland and Gunther 1975, 13:33–57).

21. 1890 La. Acts 152, sec. 3.

22. 1890 La. Acts 152, sec. 2.

PLESSY CHALLENGED THE BINARY

The challenge Plessy posed was not about deciding a place along a color line. It was more fundamental. It was about who had the power to draw lines and, ultimately, decide his personal identity: Plessy or the state? Did Louisiana have authority to say who Plessy was or to empower others to say who he was, regardless of who Plessy said he was? Did the state have authority to decide his choices of identity, to tell him he had to say he was one or another in a binary? Did Plessy have no right to determine his own choices of personal identity?

Throughout his arrest, arraignment, and appeals, Plessy rejected Louisiana's binary determination, refusing to identify himself as colored or white. He persisted in his pleadings to the Supreme Court. When obliged there to identify himself in relation to the challenged act, he stated simply he was "seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him."[23] He was not claiming to be white. He rejected that box. Nor was he claiming to be colored. He rejected that box too. He asserted autonomy, claiming self-identification as a right beyond state encroachment. And he did so not simply for himself but for the community of persons describing themselves as "*gens de couleur*," Francophone Creole people of color, whom he represented (Davis 2012, 1–3).

Plessy's challenge embodied personal agency in self-identity. He purposely refused to identify himself according to the nonwhite-white binary Louisiana's Separate Car Act decreed. His reported violation of the act arose only through collusion. The East Louisiana Railroad conductor who confronted Plessy and the City of New Orleans police detective who arrested him for violating the act did so only by prior arrangement, for nothing distinguished Plessy on either side of the binary. He had been pointed out to officials for the purpose of challenging the law decreeing that someone other than himself got to say who he was (Davis 2012, 1–3, 157).

Plessy's case contested the state's interest in imposing on his person a binary racial identity, and it flatly refuted the state's authority to criminalize him for refusing to conform to the state's binary mandate. It disputed state authority to usurp autonomy to self-identify and to authorize private persons to do so. It was one thing for the state to say who Plessy was; it was by far another for the state to authorize others, such as train conductors, to say who he was. And what was the basis of their decision to be—appearance, ancestry, the white supremacist one-drop rule adopted during slavery? The rule and laws based on it were dismissive, carrying the taint of hypodescent that relegated children to their nonwhite ancestors' assigned lower status, with no recognition of their white ancestry (Davis 1991, 4–6).

Louisiana's separate car act, and those of its southern sister states with their binary racial schemes, erased from legal recognition mixed elements of identity Plessy and his fellow *gens de couleur* held as essential to their identity as individuals and as members of a community (Davis 2012, 165–70; Dunbar-Nelson 2009). Such laws were denials of Plessy and his people's culture and ancestry, desecrating the identity that was their heritage. That was what Plessy's challenge to the statute represented. It was not about him. It was not about one but about many; it was about individuality and lineage, about the here and now, about forebears and progeny. The challenge was to be free of the dictates and coercion in the state's usurping Plessy and his people's autonomy to recognize themselves and say who they were for themselves.

THE MAJORITY'S SHORT SHRIFT

Despite the pleadings for Plessy, the U.S. Supreme Court hardly recognized identity as an issue for it to consider in the case. The 7–1 Court majority showed no interest in any complexity on the subject the pleadings introduced. Rather, they viewed personal identity as simple and straightforward. If contestable, identity was in the majority's mind a matter of legal definition not personal expression. Chief Justice Roger B. Taney seemingly settled the point in his 1846 pronouncement in *United States v. Rogers*, holding personal identity immutable in

23. *Plessy*, 163 U.S. at 541.

terms of race and more.[24] No person had freedom to declare who they were outside of the law's sanction, Taney had ruled (Berger 2004, 1960–65, 2008–17).

The majority effectively dismissed the arguments for Plessy about state power and personal identity and scarcely considered the Louisiana Separate Car Act's connections to slavery and the prohibitions of the Thirteenth Amendment. It gave only slightly more consideration to his Fourteenth Amendment arguments that insisted on U.S. constitutional protection for him to determine and express his own identity as rights guaranteed by his U.S. citizenship and by his personal rights to "life, liberty, or property" and "equal protection of the laws."

The arguments for Plessy maintained that the Fourteenth Amendment prohibited the state from abridging or depriving him of his self-determined identity. Further, the arguments maintained that a single, unwavering standard circumscribed the state's reach to Plessy's personal identity. As Tourgée argued to the Court and as Justice Harlan agreed in his dissent, the only significant identity the state had constitutional authority to recognize in regard to the exercise of rights was Plessy's citizenship (Davis 2012, 195–98).

Going beyond the Constitution, the arguments for Plessy rested on fundamental human rights to self-definition of personal identity. The arguments asserted autonomy but rested on no atomistic or simplistic vision. Nor were they any nihilistic denial of state interests. The arguments for Plessy were narrowly focused. They attacked only restrictions the nonwhite-white binary imposed. They skirted the broad state power to recognize, regulate, or enumerate persons within the state's jurisdiction. The exercise of such power reached back to antiquity, after all. The ancient Babylonians, Chinese, Egyptians, Greeks, Romans, and others classified and documented populations for such purposes as food inventorying, taxing, and registering males eligible for military service (Whitby 2020, 23–54; Alterman 1969). The census authorized in the Constitution and inaugurated in 1790 developed an increasingly extensive statistical system with equally extensive controversies attached to being essentially a political undertaking (Skerry 2000, 43–79). But Plessy's challenge was not about general data-gathering—about age, ownership, or residence, for example. Rather, the arguments for Plessy challenged the Court to grasp the importance of reaching beyond convention or the status quo to protect personal autonomy and freedom. They pushed the Court to see the white supremacist binary for what it was, arbitrary and oppressive.

The justices in Plessy's case took no cognizance of any human rights norms, as typical of U.S. courts historically (Bayefsky and Fitzpatrick 1992, 2–5). The U.S. rule of law offered no alternatives: in a challenge to a statute, such as Louisiana's Separate Car Act, a court was obliged to presume the act constitutional. As the challenging party, Plessy bore the burden of proving the act constitutionally unreasonable (Nachbar 2016, 1627–690). Thus the weight of the case rested on the state's side, and in the majority's view the arguments for Plessy wholly failed to budge that weight. The majority saw nothing procedurally or substantively wrong with the Louisiana legislation.

Not even a hint of substantive due process protections against state interference with fundamental rights appeared anywhere in the *Plessy* majority's consideration, as would famously appear less than ten years later in the Court's 5–4 decision in *Lochner v. New York* (1905).[25] The individual economic liberty to contract that the majority found in *Lochner* to deny state authority to restrict the working hours of bakers found no parallel in the individual freedom of personal identity for which Plessy argued. In *Lochner*, the majority found that the Fourteenth Amendment guarantee of liberty protected the self-determination of bakery owners and workers (Bernstein 2011, 1–7). In *Plessy*, the Court's 7–1 majority found no Fourteenth Amendment protection for self-determination of personal identity.

The *Plessy* Court understandably took no judicial notice of the psychological or interpersonal aspects of personal identity the case sug-

24. *United States v. Rogers*, 45 U.S. 567 (1846).

25. *Lochner v. New York*, 198 U.S. 45 (1905).

gested. At best, such aspects were novel in legal consideration long after the 1890s. Boston attorney Samuel D. Warren and future U.S. Supreme Court Justice Louis D. Brandeis's 1890 *Harvard Law Review* article "The Right to Privacy" had broached some aspects of U.S. law's need to provide protections and remedies for the intangible character of human personality, including identity. In phrasing Tourgée might well have uttered before the Court in 1896, Warren and Brandeis opened their article declaring, "That the individual shall have full protection in person and in property is a principle as old as the common law," as they proceeded to call for "a recognition of man's spiritual nature, of his feelings" and noted that "the term 'property' has grown to comprise every form of possession—tangible, as well as intangible" (Warren and Brandeis 1890, 193–94; Kurland and Gunther 1975, 13:33–57; Davis 2012, 194–98). Protecting Plessy's self-determination of his identity as integral to his person and property was, in fact, the fundamental legal principle of his case. In dismissing that argument, the Court's *Plessy* decision bequeathed a legacy of U.S. law's indifference and injustice based on personal identity (Davis 2004, 1–41).

SCRUTINIZING THE STATE POLICE POWER

For the *Plessy* Court, the fundamental legal principle in the case was whether Louisiana's Separate Car Act conformed to the U.S. constitutional concept called the state police power doctrine. Extending as an element of state sovereignty and acknowledged in the Tenth Amendment,[26] the doctrine recognized state authority to legislate for its inhabitants' health, safety, welfare, and morals. The influential nineteenth-century jurist Lemuel Shaw, chief justice of the Massachusetts Supreme Judicial Court (1830–1860), in 1851 articulated the framework of the power in responding to the question "What are the just powers of the legislature to limit, control, or regulate?"[27] U.S. Supreme Court Justice Joseph McKenna in 1911 in writing for a unanimous Court upheld state power to legislate for "health, safety, morals, or general welfare," declaring simply that "the police power is but another name for the power of government."[28]

In the *Plessy* majority's eyes, Louisiana's mandating separation of nonwhites and whites on railroads in the state easily passed its constitutional test. The purpose announced in the act's title, "to promote the comfort of passengers," sat solidly within the police power definition and was "a reasonable regulation" that fell within the state legislature's "large discretion," to which the Court gave explicit deference. The majority discerned no element of "annoyance or oppression" in the application of the act, nor did they see it as aimed at "a particular class." They deemed the legislation "enacted in good faith for the promotion of the public good." It was not arbitrary or unjust discrimination in their view, because the statute had done no more than codify "the established usages, customs and traditions of the people," Justice Henry Billings Brown wrote.[29]

The *Plessy* majority took notice of "natural affinities" and the "voluntary consent of individuals" in endorsing the view New York State's highest court in 1883 expressed on racial discrimination and separation, saying that laws were best when they did not "conflict with the general sentiment of the community."[30] When a state "has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social

26. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. Amend. X (1791).

27. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 65 (1851).

28. *Mutual Loan Co. v. Martell*, 22 U.S. 225, 233 (1911) (upholding against Fourteenth Amendment due process and equal protection challenges a Massachusetts statute restricting assignment of wages, holding the state legislation was not "arbitrary and unreasonable").

29. *Plessy*, 163 U.S. at 550.

30. *Plessy*, 163 U.S. at 551, quoting with approval, *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883).

advantages with which it is endowed," the New York Court of Appeals had ruled in upholding racially separate public schools in Brooklyn.[31]

Using a theory called "equal application," which captured much of the Court's equal protection jurisprudence until the 1950s and 1960s, the *Plessy* majority held that the Louisiana statute was not racially discriminatory in that it treated nonwhites and whites alike (Green 2009, 219–310; Williams 2007, 1207–214). The statute excluded no one from rail travel when it mandated "equal but separate accommodations for the white and colored races."[32] Neither race nor identity were a bar, which appeared the majority's only concern. They turned a blind eye to the exclusion that in fact occurred in coaches and compartments, viewing the segregation there as applicable alike to all and thus impartial or at least as not legally objectionable.

Not only did the majority see nothing wrong with Louisiana's separate car act, it also explicitly took judicial notice of the existence of "social prejudices" and accepted that nonwhites stood as the object of such prejudices. More than merely consenting to the operation of such prejudices, the majority denied law's reach to, or possible remedy for, the resulting discrimination, explicitly rejecting what it described as the proposition that "social prejudices may be overcome by legislation."[33]

More pointedly, the majority rejected any claim that prejudice arising from notions of white supremacy related to appearance in the form of race, color, or previous condition of bondage could be "justly regarded as imposing any badge of slavery or servitude."[34] Justice Brown sealed the majority's position by quoting approvingly Justice Joseph P. Bradley's dismissive declaration in the 1883 *Civil Rights Cases* that "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make."[35]

DISMISSING PERSONAL AUTONOMY OVER IDENTITY

Asserting the limits of the law to redress or remedy racial discrimination, the Court majority also boldly asserted the power of law to identify persons by race. The last paragraph of Justice Brown's majority opinion offered curt notice of the arguments for Plessy's claim of personal autonomy in challenging state power over personal identity in general and racial identity in particular. Brown conceded that identity "may undoubtedly become a question of importance." But not for the Court or, at least, not in Plessy's case. The majority refused to countenance in any way the concept of race as insubstantial. They accepted race as a reality and with it the white supremacist binary. If there were a question as to whether Plessy "belongs to the white or colored race," in the majority's view that was for the laws of Louisiana to determine, as such questions were "to be determined under the laws of each State," the Court concluded.[36]

Even Justice Harlan in his powerful, prescient dissent hardly touched state control of identity. He disparaged Louisiana's nonwhite-white binary only to the degree that his own intolerance of Chinese allowed no place for them (Chin 1996, 151–82). He decried the Louisiana statute for providing "a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race" were denied that right.[37] Such

31. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883).

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

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

34. *Plessy*, 163 U.S. at 542.

35. *Plessy*, 163 U.S. at 543, quoting with approval *Civil Rights Cases*, 109 U.S. at 24.

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

37. *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting). On Justice Harlan's intolerance toward the Chinese, further note his concurring in Chief Justice Melville Fuller's dissent in *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898), that "the children of Chinese born in this country do not, ipso facto, become citizens of the United States."

an outcome belied reasonableness in Harlan's view as the statute purported to provide noncitizens privileges and rights denied to citizens. And there he took his stand: Louisiana's separate car act failed because it was unreasonable and thus unconstitutional, as he illustrated with a litany of examples.[38]

Justice Harlan bottomed his argument on citizenship. His view was that "the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States." No state had any authority under the Constitution "to regulate civil rights, common to all citizens, upon the basis of race," Harlan famously declared (Scott 2010, 324–27).[39]

Adult male citizenship was the sole identity that concerned Justice Harlan. To him it was what mattered most in Plessy's case. Louisiana had violated rights attached to citizenship in violation of the Reconstruction Amendments that "established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and," Harlan maintained, "placed our free institutions upon the broad and sure foundation of the equality of all men before the law."[40]

A REASONABLE DISMISSAL?

Justice Harlan demanded stricter scrutiny of Plessy's case, but the Court majority saw no need. The state police power question was all the majority saw the need to consider, and that required only a simple twofold test, as their reasonableness inquiry earlier demonstrated. First, did the act touch and concern the health, safety, welfare, or morals of the state's inhabitants? That, after all, was the definition of the state police power. The Louisiana legislature anticipated and aimed to answer that question in titling the statute one "to promote the comfort of passengers." Second was whether the act conformed to the doctrine of reasonableness. As courts commonly explained the doctrine, it posited that the legislation needed "in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, the general welfare."[41] The test was clearly circular in repeating its terms without identifying any fixed limits or guide for judgment.

Writing for the *Plessy* majority, Justice Brown added a bit more definiteness to the standard for constitutional unreasonableness in stating that "every exercise of the police power must . . . extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[42] His use of the word *class* reflected an acceptance of the nonwhite-white binary at the core of Plessy's challenge. That acceptance was the basis for allowing an equal application doctrine to satisfy the Fourteenth Amendment's Equal Protection Clause. At least on that point, it settled the constitutionality of a law, such as a separate car act, that imposed the same regulations and restraints on both nonwhites and whites.

The reasonableness standard provided none of the scrutiny for which Plessy pleaded. In using it, the Court majority granted the Louisiana legislature broad discretion, accepting without question its "good faith" in enacting its Separate Car Act. The majority raised no questions about its actual application or the results it achieved. Nor did they inquire into the state's interests or objectives in decreeing a nonwhite-white binary. The standard allowed the majority to ratify what Justice Brown described as "the established usages, customs and tradi-

38. *Plessy*, 163 U.S. at 552–64.

39. *Plessy*, 163 U.S. at 563.

40. *Plessy*, 163 U.S. at 563.

41. *Ex parte R. F. Quarg*, 149 Cal. 79, 81 (1906), holding invalid a state statute criminalizing ticket scalping—"sale [of] any ticket or tickets to any theater or other public place of amusement at a price in excess of that charged originally by the management of such theater or public place of amusement"—because "the legislation in question is an unwarrantable interference with the inherent and constitutional rights of individuals" (80, 83).

42. *Plessy*, 163 U.S. at 550.

tions of the people."[43] Doing so effectively stripped away public protections for minority persons or positions that challenged the majority. Moreover, in refusing to recognize any fundamental right in Plessy's pleas for personal autonomy over his identity, the Court's *Plessy* decision bequeathed a legacy of indifference and injustice arising from arbitrary and oppressive governmental labeling of individuals.

CONSEQUENCES OF DISMISSAL

The *Plessy* decision settled U.S. law into a position where the state had unchallenged control of personal identity, leaving individuals without self-definition or self-determination in regard to their identities. Further, it denied legal recognition of particular personal identities and of diverse personal identities, and left all persons on an unequal footing in regard to identity. It elevated state authority over personal self-possession and extended slave law's unbalanced disregard for the person, lineage, and connections in self-selected communities (Marshall 2014, 4–22). It simply sanctioned state determinism.

The decision left a legacy of physical appearance discrimination, not only by the state but also by private persons cloaked with state authority. It left the state to decide who was who and to delegate that power to others, making personal identity turn on observers' subjective perceptions. Others got to say who a person was and what a person was permitted to have or do on the basis of how the person appeared to them. The decision thus sanctioned what has come to be termed *lookism*—one of the most pervasive but denied prejudices (Safire 2000, 25; Tietje and Cresap 2005, 31; Mahajan 2007, 163; Rhode 2014).

The arguments for Plessy contended for his identity to be self-determined and taken in its entirety, encompassing his self-realized lived experience in a distinct community with a fully recognized ancestry. His identity was not nonwhite or colored; it was not white; it did not fit into the state-decreed binary, the arguments insisted (Davis 2012, 157–74). The Court's dismissal of Plessy's arguments for personal autonomy over self-identification left a legacy of practices denying personal autonomy in regard to sexual identity, sexual intercourse, and sexual orientation (Hellum 2018, chap. 1). It left the state to dictate who's who and who could do what on the basis of the state's definition of who the state decreed they were.

The *Plessy* Court's decision arose from its refusal to scrutinize its thinking about biology and blood, about its assumptions of the thing it thought of as race and the state's control of bodies marked by race. Considerations of personal identity connected to privacy were clearly nowhere in the Court's thinking, just as privacy as a right was then nascent, at best, in the law's development (Richardson 2017, chap. 2, app. 11). Everywhere in the decision, Warren and Brandeis's admonitions went wanting on the "necessity from time to time to define anew the exact nature and extent of such protection" of person and property as accorded with individual integrity (Warren and Brandeis 1890, 193).

Infamous practices of Jim Crow segregation followed from the Court's decision, as the companion articles in this *RSF* journal issue detail. As the most often focused-on extension of *Plessy*, the decision's continued reach into public schooling at all levels has remained prominent in its legacy. Douglas Reed (2021, this issue) shows "the influence of colorblind logics in public education." Also the data analysis of Dania Francis and William Darity (2021, this issue) shows how the legacy of racialized tracking perpetuates segregation within schools. Such demonstrations reflect on the standing of the 1954 *Brown* decision to outlaw *Plessy*'s reach to public education. Yet, as Timothy Diette and coauthors (2021, this issue) establish, much remains to be understood about what the *Brown*-initiated school desegregation really did and did not do. But the *Plessy* decision reached far beyond schoolrooms. In revisiting *Plessy*'s legacy, Leland Ware (2021, this issue) exposes the decision as a foundation for a federally facilitated system of residential segregation and exclusion. Jason Reece (2021, this issue) adds a perspective on *Plessy*'s impact on contemporary policies controlling real estate. All of these continuing lived experiences reflect *Plessy*'s enduring legacy of discrimination on the basis of

43. *Plessy*, 163 U.S. at 550.

racial identity. Such experiences persist, as Paru Shah and Robert Smith (2021, this issue) illustrate in their Wisconsin case study of contemporary voter identification campaigns.

Over the years, piecemeal attacks on the *Plessy* decision have failed to reach the Court's core rationale about the right of personal identity. Instead, attacks have largely targeted time, place, and manner of discrimination based on state-determined identity. Consider landmarks in countering state authority to deny or restrict personal rights based on racial identity, Court decisions such as *Morgan v. Virginia* (1946), *Brown v. Board of Education* (1954), *Boynton v. Virginia* (1960), *McLaughlan v. Florida* (1964), and *Loving v. Virginia* (1967). *Morgan* and *Boynton* outlawed racial segregation on interstate common carriers and accommodations.[44] *Brown* limited itself to pronouncing "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[45] *McLaughlan* and *Loving* each treated sexual intimacy, *McLaughlan* in the context of cohabitation and *Loving* in marriage.[46] In both cases the Court pronounced racial classification suspect—but no more. State power to classify remained unchecked. The decisions were, of course, of immense importance. The *Loving* decision concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[47] That finally dismissed the misguided equal application doctrine (Williams 2007, 1208–12).

None of the landmarks reached the core of state authority to classify or identify persons. Statutory responses to *Plessy*'s legacy of Jim Crow and its remnants, such as the historic Civil Rights Act of 1964, have tended to codify socially designated markers and failed to reach fundamental issues of identity (Heitzeg 2015, 54–79).[48] Recognition has focused largely on characteristics presumed immutable—such as race, color, sex, and national origin. Religion has stood most prominently among the basic categories as belonging to personal identity by individual choice. Such antidiscrimination measures aimed to reach segregation's broad expanse in public and private practice but at most merely tangentially touched state power to classify personal identity. The so-called race-neutral movement in U.S. law has left unchallenged the legitimacy of the *Plessy* decision's legacy of state-imposed and state-sanctioned invasions of the right to personal identity (Kuznicki 2009, 417–64).

A WAY FORWARD

The failure in U.S. law to reach the issues of personal identity broached in *Plessy* stands out starkly when compared with European progress to protect the right of personal identity. Increasingly robust applications of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since 1953, when the 1950 agreement went into force, have illustrated how protections for individual identities attach to and operate in the context of human rights to which the arguments for Plessy pointed.[49] Particularly Articles 8 and 14, treating privacy and discrimination, respectively, have provided for authentic recognition of self, which the legacy of *Plessy* has obstructed in the United States.

The European Court of Human Rights' (ECHR) recognition of and protection for the right of choice to enable and empower personal identity runs in opposition to the state determination the *Plessy* decision sanctioned for personal identity in the United States, particularly for individuals and communities deemed nonwhite or counter-conventional. Admittedly,

44. *Morgan v. Virginia*, 328 U.S. 373 (1946); *Boynton v. Virginia*, 364 U.S. 454 (1960).

45. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

46. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

47. *Loving v. Virginia*, 388 U.S. at 11–12.

48. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).

49. Convention for the Protection of Human Rights and Fundamental Freedoms. Details of Treaty No. 005 (Rome, April 11, 1950; March 9, 1953), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (accessed September 10, 2020).

majority community and cultural norms have presented challenges for the ECHR, just as Christian, heterosexual, male-dominated white supremacy has in the United States. Yet the ECHR has pushed back, not always successfully, against criminalizing anyone for appearance or for "looking" a particular way (Marshall 2014, 214–15).[50]

The *Plessy* Court's refusal to check state authority over personal identity bequeathed a legacy that has continued to extend persistent and intractable inequalities throughout the U.S. economy and society. Such state control reaches back to slavery, when states exercised authority not merely to control but also to obliterate personal identity, refusing by law to identify a class of human beings as persons and insisting instead on identifying them as mere property, denying them all self-determination and self-identification. That authority affirmed the doctrine of white supremacy to decree and direct identity as a matter of ancestry, appearance, or any other basis the state decided. The Court's preserving that authority has allowed arbitrary governmental decisions to intrude on personal self-determination in complex and nuanced ways with messy and uneven results.

Confronting *Plessy*'s legacy of legally sanctioned discriminations that reduce or render personal identity in favor of state-defined categories and classes demands a reassessment in U.S. law of the concept of personal identity and the attached value of individual autonomy. What compelling state interest required Louisiana to tell Homer Plessy who he was and to deny him any right to say who he was? The fictive binary of race is only one facet of the clash between state dictation and self-determination of personal identity.

Wholesale reassessment of governmental categorizing has long been necessary (Caplan and Torpey 2001). Multiplying category options to disguise the persistence of racial demarcation has failed to address articulation of the governmental interests that compel such use of specific categories for personal identity. Since the first census, in 1790, the political and popular contention over categorization within the federal statistical system has underscored both increasing diversity in the U.S. population and movements to assert personal autonomy over individual identity.

The Russell Sage Foundation's 2002 collection *The New Race Question: How the Census Counts Multiracial Individuals* documented and illustrated the complex of tensions attached to governmental categorizations (Perlmann and Waters 2002). Moreover, what governmental purposes does checking what boxes serve? (Prewitt 2013; Linehan 2000, 43–72; Dyson 2004, 387–420). What, for instance, is the governmental interest in defining and directing categories that create sex-segregated spaces? Scrutinizing the agenda underlying structuring and sustaining categories for personal identity has long been overdue, as anticlassification and antisubordination proponents have maintained (Balkin and Siegel 2002, 1–17; Siegel 2004, 1470–547; Epstein 2017, 433–72).

The arguments for Plessy exposed the fiction of race as an inherent and immutable reality and state imposition of personal identity in a racial binary as a violation of fundamental rights. The progress of time since 1896 has increasingly eroded essentialist concepts of im-

50. European Court of Human Rights, *SAS v. France*, 60 EHRR 11 (2015), prominently illustrated for many the failure of Convention protections, as the ECHR upheld France's Law no. 2010-1192 of October 11, 2010, that banned "wearing clothing designed to conceal one's face in public places," against the challenge of a twenty-three-year-old female French national who described herself as "a devout Muslim" and argued that her wearing a full face veil (niqab) was within her Convention Articles 8 and 9 rights, and further, that the ban violated her Convention rights to private life, freedom of religion, freedom of expression, and her right not to be discriminated against. The court majority found that the law "has an objective and reasonable justification" and could be regarded as "necessary in a democratic society," and further, that it "can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'" (at 58–59). Reasoning that "less restrictive measures" were available, the dissent argued that the French measure "cannot readily be reconciled with the Convention's restrictive catalog of grounds for interference with basic human rights . . . [and] has therefore been a violation of Articles 8 and 9 of the Convention" (at 66–67).

mutable characteristics (Rainier 2012, 1–13; Ortiz 1993, 1833–58). What about a person in today's world or tomorrow's is essential or immutable? Consider traditional markers beyond the construct of race or the concept of gender: what facial or other features of appearance or anatomy are unchangeable with evolving technology, science, and social acceptance?

U.S. law needs to come to grips with more than changing technology, however; it needs to reflect both the complexity of identity formation and presentation and the realities of the intersectionalities of overlapping identities and the discriminations they may engender. Throughout the momentous civil rights movement of the 1940s through the 1960s too little attention attached to state control of personal identity. Presumptive links between anatomy, appearance, and identity were often simply unchallenged in law or were rarely remarked upon. Like the majority and dissent in *Plessy*, courts and lawmakers have too often routinely accepted racial and other personal identification as given or immutable, accepting state designated identifiers such as race as fact rather than as social construct. And not race alone. Gender and sexual identity have also fallen in a similar binary and fixed regime.

State authority to identify and categorize individuals and to direct their actions and interactions on the basis of such identities and categories has marked *Plessy*'s most insidious legacy. That in no way discounts the horrors and injustice the "separate but equal" doctrine produced and prolonged as they have continued to manifest themselves with reemergent vigor approaching the third decade of the twenty-first century. *Plessy*'s legacy in regard to identity has further been insidious in that its harms have persisted in characteristically "flying under the radar," as the saying goes.

Too seldom have recollections of *Plessy* included recognition of its implications for personal agency and autonomy over identity. Struggles over racial identity led the way in challenging for the right of self-definition, but at the forefront of the struggle in the twenty-first century has been the right to define gender identity. The arguments of biology and birth long used in pseudo-definitions of race have stood squarely in opposition to the right to define gender identity. The International Bill of Gender Rights adopted in 1993 directly displays the issues in declaring that "Individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned at birth sex, or initial gender role" (Feinberg 1996, app.; Alston 1999, 329).

To reestablish a birthright of personal autonomy over identity free of state subordination requires reforming U.S. law to recognize and accept the individuality of human diversity. Such a process requires abolishing state authority to arbitrarily assign personal identity by decree. Progress toward such a result may well begin with reassessing governmental identification categories. The radical feminist legal scholar Catharine A. MacKinnon pointed toward a positive direction decades ago in pushing to transform legal thinking about sexual harassment of working women. In classifying identity, MacKinnon wrote, framers and judges of U.S. law need to weigh "whether the policy or practice integrally contributes to the maintenance of an underclass or a deprived position" (1979, 117).

REFERENCES

Alston, Andrew. 1999. "Transgender Rights as Legal Rights." *Canterbury Law Review* 7:329–42.

Alterman, Hyman. 1969. *Counting People: The Census in History*. New York: Harcourt.

Balkin, Jack M., and Reva B. Siegel. 2002. "The American Civil Rights Tradition: Anticlassification or Antisubordination." *Issues in Legal Scholarship* 1(1): 1–17.

Bayefsky, Anne, and Joan Fitzpatrick. 1992. "International Human Rights Law in United States Courts: A Comparative Perspective." *Michigan Journal of International Law* 14(1): 1–89.

Berger, Bethany R. 2004. "Power Over This Unfortunate Race: Race, Politics and Indian Law in *United States v. Rogers*." *William and Mary Law Review* 45(5): 1957–2052.

Bernstein, David E. 2011. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*. Chicago: University of Chicago Press.

Caplan, Jane, and John Torpey. 2001. *Documenting Individual Identity: The Development of State Practices in the Modern World*. Princeton: Princeton University Press.

Chin, Gabriel J. 1996. "The Plessy Myth: Justice Harlan and the Chinese Cases." *Iowa Law Review* 82(1): 151–82.

Crenshaw, Kimberlé, Neil Gotanda, Gary Peller, and Kendall Thomas. 1996. *Critical Race Theory: The Key Writings That Formed the Movement*. New York: The New Press.

Davis, F. James. 1991. *Who Is Black: One Nation's Definition*. University Park: Pennsylvania State University Press.

Davis, Thomas J. 2002. "Race, Identity and the Law*: Plessy v. Ferguson* (1896)." In *Race on Trial: Law and Justice in American History*, edited by Annette Gordon-Reed. New York: Oxford University Press.

———. 2004. "More than Segregation, Racial Identity: The Neglected Question in *Plessy v. Ferguson*." *Washington and Lee Race and Ethnic Ancestry Law Journal* 10(1): 1–41.

———. 2012. *Plessy v. Ferguson*. Santa Barbara, Calif.: ABC-CLIO.

———. 2016. *History of African Americans*. Santa Barbara, Calif.: ABC-CLIO.

Diette, Timothy M., Darrick Hamilton, Arthur H. Goldsmith, and William A. Darity Jr. 2021. "Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 166–86. DOI: 10.7758/RSF.2021.7.1.10.

Dunbar-Nelson, Alice Moore. 2009. "People of Color in Louisiana." In *Creole: The History and Legacy of Louisiana's Free People of Color*, edited by Sybil Kein. Baton Rouge: Louisiana State University Press.

Dyson, Maurice R. 2004. "Multiracial Identity, Monoracial Authenticity & Racial Privacy: Toward an Adequate Theory of Multiracial Resistance." *Michigan Journal of Race & Law* 9(2): 387–420.

Epstein, Daniel C. 2017. "Black and White and Gray All Over: How Anticlassification Theory Can Endorse Race-Based Affirmative Action Policies." *University of Pennsylvania Journal of Constitutional Law* 20(2): 433–72.

Feinberg, Leslie. 1996. *Transgender Warriors: Making History from Joan of Arc to Dennis Rodman*. Boston, Mass.: Beacon Press.

Francis, Dania V., and William A. Darity Jr. 2021. "Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 187–202. DOI: 10.7758/RSF.2021.7.1.11.

Gibbard, Frank. 2017. "Defamed on a Train: Conductors Behaving Badly." *Colorado Lawyer* 46(6): 53–56.

Green, Christopher R. 2009. "The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application." *George Mason University Civil Rights Law Journal* 19(2): 219–310.

Heitzeg, Nancy A. 2015. "On the Occasion of the 50th Anniversary of the Civil Rights Act of 1964: Persistent White Supremacy, Relentless Anti-Blackness, and the Limits of the Law." *Hamline Journal of Public Law & Policy* 36(1): 54–79.

Hellum, Anne. 2018. *Human Rights, Sexual Orientation, and Gender Identity*. New York: Routledge.

Horan, Michael J. 1972. "Political Economy and Social Life as Influences on Judicial Policymaking: The *Civil Rights Cases* of 1883." *American Journal Legal History* 16(1): 71–86.

Jones, Bernie D. 2006. "When Critical Race Theory Meets Legal History." *Rutgers Race & the Law Review* 8(1): 1–26.

Kennedy, Randall L. 2004. *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*. New York: Vintage Books.

Kurland, Philip B., and Gerald Gunther. 1975. *Landmark Briefs and Arguments of the Supreme Court of the United States*. Washington, D.C.: University Publications of America.

Kuznicki, Jason. 2009. "Never Neutral State: American Race Relations and Government Power." *Cato Journal* 29(3): 417–54.

Linehan, Patrick F. 2000. "Thinking Outside the Box: The Multiracial Category and Its Implications for Race Identity Development." *Howard Law Journal* 44(1): 43–72.

Mack, Kenneth W. 1999. "Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905." *Law & Social Inquiry* 24(2): 377–410.

MacKinnon, Catharine A. 1979. *Sexual Harassment of Working Women: A Case of Sex Discrimination*. New Haven, Conn.: Yale University Press.

Mahajan, Ritu. 2007. "The Naked Truth: Appearance Discrimination, Employment, and the Law." *Asian American Law Journal* 14(6): 165–203.

Marshall, Jill. 2014. *Human Rights Law and Personal Identity*. London: Routledge.

Minter, Patricia Hagler. 1995. "The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth Century South." *Chicago-Kent Law Review* 70(3) 993–1009.

Nachbar, Thomas B. 2016. "The Rationality of Rational Basis Review." *Virginia Law Review* 102(7): 1627–90.

Ortiz, David R. 1993. "Creating Controversy: Essentialism and Constructivism in the Politics of Gay Identity." *Virginia Law Review* 79(7): 1833–58.

Osborn, William S. 2002. "Curtains for Jim Crow: Law, Race, and the Texas Railroads." *Southwestern Historical Quarterly* 105(3): 393–427.

Perlmann, Joel, and Mary C. Waters. 2002. *The New Race Question: How the Census Counts Multiracial Individuals*. New York: Russell Sage Foundation.

Prewitt, Kenneth. 2013. *What Is Your Race? The Census and Our Flawed Efforts to Classify Americans*. Princeton N.J.: Princeton University Press.

Rabinowitz, Howard N. 1974. "From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865–1890." *Social Service Review* 48(3): 327–54.

———. 1976. "From Exclusion to Segregation: Southern Race Relations, 1865–1890." *Journal of American History* 63(2): 325–50.

Rainier, Elias. 2012. "Identity, Law, and Essentialism: What's Love Got to Do with Same-Sex Marriage." *The Crit: A Critical Studies Journal* 6(1): 1–13.

Reece, Jason. 2021. "Confronting the Legacy of 'Separate but Equal': Can the History of Race, Real Estate, and Discrimination Engage and Inform Contemporary Policy?" *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 110–33. DOI: 10.7758/RSF.2021.7.1.07.

Reed, Douglas S. 2021. "Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 148–65. DOI: 10.7758/RSF.2021.7.1.09.

Rhode, Deborah L. 2014. "Hooters Hires Based on Looks. So Do Many Companies. And There's No Law Against It." *New Republic*, August 30. Accessed September 10, 2020. https://newrepublic.com/article/118683/why-we-need-law-protect-against-appearance-discrimination.

Richardson, Megan. 2017. *The Right to Privacy: Origins and Influence of a Nineteen Century Idea*. New York: Cambridge University Press.

Roback, Jennifer. 1986. "The Political Economy of Segregation: The Case of Segregated Streetcars." *Journal of Economic History* 46(4): 893–917.

Ruchames, Louis. 1956. "Jim Crow Railroads in Massachusetts." *American Quarterly* 8(1): 61–75.

Safire, William. 2000. "The Way We Live Now: 8–27–00: On Language: Lookism." *New York Times Magazine*, August 27.

Sandoval-Strausz, Andrew K. 2005. "Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America." *Law and History Review* 23(1): 53–94.

Scott, Grinsell. 2010. "The Prejudice of Caste: The Misreading of Justice Harlan and the Ascendancy of Anticlassification." *Michigan Journal of Race & Law* 15(2): 317–68.

Shah, Paru, and Robert S. Smith. 2021. "Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 134–46. DOI: 10.7758/RSF.2021.7.1.08.

Siegel, Reva B. 2004. "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*." *Harvard Law Review* 117(5): 1470–547.

Skerry, Peter. 2000. *Counting on the Census? Race, Group Identity, and the Evasion of Politics*. Washington, D.C.: Brookings Institution Press.

Stephenson, Gilbert Thomas. 1909. "The Separation of the Races in Public Conveyances." *American Political Science Review* 3(2): 180–204.

Tietje, Louis, and Steven Cresap. 2005. "Is Lookism Unjust? The History and Ethics of Aesthetics and Public Policy Implications." *Journal of Libertarian Studies* 19(2): 31–50.

Ware, Leland. 2021. "*Plessy*'s Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 92–109. DOI: 10.7758/RSF.2021.7.1.06.

Warren, Samuel D., and Louis D. Brandeis. 1890. "The Right to Privacy." *Harvard Law Review* 4(5): 193–200.

Welke, Barbara Y. 2000. "Beyond *Plessy*: Space, Status, and Race in the Era of Jim Crow." *Utah Law Review* 2000(2): 267–300.

———. 2001. *Recasting American Liberty: Gender, Race, Law and the Railroad Revolution, 1865–1920*. New York: Cambridge University Press.

Whitby, Andrew. 2020. *The Sum of the People: How the Census Has Shaped Nations*. New York: Basic Books.

Williams, Jeffrey A. 2007. "The Equal Application Defense." *University of Pennsylvania Journal of Constitutional Law* 9(5): 1207–32.