THE STRANGE CAREER OF PLESSY v. FERGUSON

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In 1955 Vann Woodward, in his book *The Strange Career of Jim Crow*,[1] challenged the conventional history of the times with his demonstration that racial segregation, far from being a long standing and inevitable American folkway, came gradually on the scene in the late nineteenth century and attained its most absurd developments only in the twentieth century. Indeed, it was only after the decision of the United States Supreme Court in *Plessy v. Ferguson*,[2] upholding an 1890 railroad segregation statute and validating state-imposed segregation as equality, that rigid segregation-in-fact began to run rampant. Then, with increasing frequency, it began to be transmitted by legislation into an elaborate, but unsystematic and often conflicting, body of Jim Crow laws. Segregation statutes "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking . . . to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries."[3] It seems today that *Plessy* was indeed one of the pivotal decisions of the Supreme Court.[4]

There was a time in the 1960's when segregation did seem to be vanishing, but the intractable problems of segregated housing and the "bussing issue" of today serve to warn us that there are miles to go

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1. *See generally* V. WOODWARD, THE STRANGE CAREER OF JIM CROW (1955) [hereinafter cited as V. WOODWARD].

2. 163 U.S. 537 (1896).

3. V. WOODWARD, *supra* note 1, at 8.

4. It is important to note that the pernicious effects of *Plessy* were not always recognized. Charles Warren, in his HISTORY OF THE SUPREME COURT OF THE UNITED STATES, vol. 2, 690-728 (1926), does not even mention *Plessy* in chapter 37, "Chief Justices Fuller and White 1888-1918," although several quite forgettable cases decided at the October 1895 term are discussed. Indeed, there is not one index reference either to "segregation" or *Plessy* in WARREN!

before the nation, like the Constitution, is "color blind." That the malign effects of this unfortunate decision are still with us today is reason enough to consider its strange career.

The plain fact is that *Plessy v. Ferguson* cannot withstand searching constitutional scrutiny. The decision has been characterized by Harris as a "compound of bad logic, bad history, bad sociology, and bad constitutional law."[5] It was also, he suggests, bad psychology and bad jurisprudence.[6] Before subjecting *Plessy* to demanding analysis, it is important to provide an historical perspective outlining conditions of segregation before 1896, explaining how *Plessy* originated, and more technically, how it reached the Supreme Court of the United States. Then a full-scale analysis of the Court's handling of the thirteenth and fourteenth amendment contentions can be undertaken which exposes the psychological and sociological infirmities in the Court's reasoning. Finally, the historical aftermath of *Plessy* must be evaluated: what was *Plessy*'s impact on our society, was it effectively overruled and what is its historical significance?

Plessy v. Ferguson IN HISTORICAL PERSPECTIVE

Segregation Before Plessy

It is commonly and erroneously believed that racial segregation has always been the southern way of life, except for a decade of Reconstruction following the Civil War, when the South was under the aegis of federal troops and Northern carpetbaggers. This misconception arises because slavery is confused with segregation, and the franchise with integration. Four eras might be identified: The era of slavery was ended in 1865 with emancipation. After a brief postwar period of Restoration under Lincoln and Johnson, the Radical Reconstruction was established. Reconstruction was in turn terminated a decade later with the Compromise of 1877, and the "Redemption" instituted a long period of discrimination, suppression and disenfranchisement at the hands of dominant whites.[7] It was only during the last of these four eras that segregation became the rule and was converted into statutory law.

In the midst of these shifting times in the last quarter of the nineteenth century, segregation had its own separate development. As W.E.B. Du Bois pointed out, a rigid segregation code could not exist under slavery.[8] Black domestics lived in daily intimacy with whites,

5. R. HARRIS, THE QUEST FOR EQUALITY 101 (1960) [hereinafter cited as R. HARRIS].
6. *Id.* at 130-58.
7. V. WOODWARD, *supra* note 1, at 6, 7.
8. W.E.B. DU BOIS, THE SOULS OF BLACK FOLKS 183 (1903).

lived in the same houses, shared the same food, went to the same church and conversed constantly with each other.[9]

During the decade of Reconstruction, oddly enough, there was new voluntary segregation in several areas. Black Protestants established their own churches, most of the newly established public schools were segregated in fact and segregation in the military services continued.[10] But with the end of Reconstruction in 1877 there was no great rush by the Redeemers to extend segregation. Vann Woodward cites many travelers' reports of the freedom with which blacks and whites mingled in railroad cars, steamboats and railroad stations in the late seventies and in the eighties.[11] While there was "conflict and violence, brutality and exploitation . . . it was not yet an accepted corollary that the subordinates had to be totally segregated and needlessly humiliated by a thousand daily reminders of their subordination."[12]

The era of Redemption was a strange period when the interests of the conservatives, the radical populists and the liberals led many of them—each for a different reason—to oppose extension of racial segregation. The conservatives believed in white supremacy, but did not believe that blacks should be disenfranchised, degraded or segregated. "An excessive squeamishness or fussiness about contact with Negroes was commonly identified as a lower-class white attitude, while the opposite attitude was as popularly associated with 'the quality'."[13] The blacks and conservatives sought a mutual alliance against the "crackers."[14] The Populists, on the other hand, sought to approach the Negro on the ground of mutual economic interests in opposition to the conservative establishment. In the 1890's Tom Watson of Georgia was promising that the Populists would "wipe out the color line and put every man on his citizenship irrespective of color."[15]

With both the conservatives and radicals seeking to enlist the support of the black, not to segregate him, how did the Jim Crow regime begin? Vann Woodward attributes it to the coincidence of the abandonment of the Negro by Northern liberals after 1877, a series of Su-

9. *Id.* *But see* L. FRIEDMAN, THE WHITE SAVAGE 33 (1970) (distinguishing between house servants and field hands, and, after emancipation, between "servile" and "defiant").
10. V. WOODWARD, *supra* note 1, at 15.
11. *Id.* at 25, 26.
12. *Id.*
13. *Id.* at 31.
14. *Id.* at 32, 33.
15. *Id.* at 45. This attitude was not uniform throughout Populist ranks, however. In South Carolina, the Negro played almost no role in the movement, and when Benjamin Tillman, the leader of the Populists, was elected Governor in 1890, he excaimed that his was a "triumph of Democracy and white supremacy over mongrelism and anarchy." E. FRAZIER, THE NEGRO IN THE UNITED STATES 152 (rev. ed. 1967) [hereinafter cited as E. FRAZIER].

preme Court cases narrowly construing the fourteenth amendment, turn-of-the-century American imperialism and, finally, a sudden crumbling of internal Southern resistance to the racial extremists. The radicals and conservatives, locked in a struggle for supremacy, both turned against the black as a scapegoat and abandoned their policy of racial moderation.[16] Segregation laws were enacted, not because of "any spontaneous public demand, but because of the clamor of demagogues who endeavored to outdo each other in running for office against the Negro as a fictitious opponent."[17] The first priority was to disenfranchise the Negro and then to "keep him in his place" with newly designed discrimination laws. The first of these laws were directed at segregation on railroads, and one of the first states to adopt such legislation was Louisiana.[18]

The Origins of Plessy

By all accounts Louisiana, and especially New Orleans with its Spanish and French background, had a society which permitted the freest intermingling of the races anywhere in the South and in which many Negroes had acquired wealth and dignity.[19] It is not surprising that when a bill to require segregation on railroad cars was introduced in the Louisiana legislature in 1890 there was vigorous opposition to its passage.[20]

A Memorial addressed to the Louisiana House of Representatives by "The American Citizens Equal Rights Association of Louisiana Against Class Legislation," and signed by 17 prominent New Orleans Negroes, attacked the bill as unjust, discriminatory and a denial of equality.[21] It was characterized as a gratuitous indignity and legal degradation. The bill's opponents argued that "under such circumstances the promotion of good will among inhabitants of the same State

16. V. WOODWARD, *supra* note 1, at 65.
17. R. HARRIS, *supra* note 5, at 97.
18. Woodward, *The Birth of Jim Crow*, AM. HERITAGE, vol. 15, at 52, April 1964: "The first genuine Jim Crow law requiring railroads to carry Negroes in separate cars or behind partitions was adopted by Florida in 1887. Mississippi followed this example in 1888; Texas in 1889; Louisiana in 1890."
19. O. OLSEN, CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 309 (1965). Dethloff and Jones, *Race Relations in Louisiana, 1877-98*, 9 LA. HIST. 301, 322 (1968): "Clearly, segregation in Louisiana did not exist before 1898 as a permanent and thorough system of race relations." The same authors say: "A marked exception to the generally depressed condition of Louisiana Negroes was the status of the descendants of the New Orleans 'Free People of Color'. These Negroes had accumulated substantial propertied interests by 1860, and their wealth, social standing, and education set them apart from most rural Negroes." *Id.* at 306. *See also* H. STERKX, THE FREE NEGRO IN ANTE-BELLUM LOUISIANA, 200-84 (1972).
20. O. OLSEN, THE THIN DISGUISE: *Plessy v. Ferguson*, 10, 47 (1967).
21. OFFICIAL JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 1890, pp. 127-28, *cited in* O. OLSEN, *supra* note 20, at 47-50.

would be almost impossible."[22] The bill was originally defeated in the Senate on July 8, 1890, but due to political treachery it was passed later that same month.[23]

Subsequently, New Orleans Negroes formed the "Citizens Committee to Test the Constitutionality of the Separate Car Law" and collected funds to make a test case. They had the encouragement of Albion W. Tourgee, an upstate New York lawyer, who was one of the founders of the biracial Citizens Equal Rights League in 1890.[24] Judge Tourgee offered to direct the attack without fee and was named "leading counsel . . . [with] control from beginning to end."[25] James C. Walker, a white New Orleans criminal lawyer, was retained as local counsel.

Tourgee from the outset insisted that the plaintiff in the test suit be a "nearly white" Negro, perhaps in order that the issue of denial of "property rights" might be introduced.[26] The chosen plaintiff was Homer Adolph Plessy, who was "seven-eighths" white and, as the petition states, "the mixture of colored blood was not discernible in him." On June 7, 1892, Homer Plessy boarded a passenger train in New Orleans with a first class ticket to an intrastate destination. He seated himself in a coach reserved for whites and refused to move to the car reserved for Negroes, as the conductor commanded, apparently pursuant to previous arrangement with the railroad.[27] He was arrested, imprisoned in the county jail and released on $500 bond. Plessy was tried before Judge John H. Ferguson in the Criminal District Court of the New Orleans Parish in November 1892 and convicted, over objections of his attorney that the Louisiana statute of 1890 violated the Federal Constitution.

On appeal to the Supreme Court of Louisiana,[28] it was contended that the statute violated both the thirteenth and fourteenth amendments. The court denied the thirteenth amendment claim that the statute "perpetuates involuntary servitude" with a brief reference to the

22. O. OLSEN, *supra* note 20, at 48.

23. *Id.* at 10. The original defeat of the bill was due in part to an agreement of 18 Negro members of the legislature to help override the governor's veto of the state lottery bill. After passage of the lottery bill, the segregation bill was reconsidered and passed 2 days after its original defeat. *But see* Letter from Louis A. Martinet to Albion W. Tourgée, July 4, 1892, *cited in* O. OLSEN, *supra* note 20, at 63. He blames the defeat on Republican "miscreants" in the legislature "chasing the Lottery's gold."

24. O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 307, 310.

25. Letter from Louis A. Martinet to Albion W. Tourgée, Oct. 5, 1891, *cited in* O. OLSEN, *supra* note 20, at 56.

26. O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 327; O. OLSEN, *supra* note 20, at 12.

27. O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 327, 328. "The railroads, though dreading public opinion, professed distaste for the costly segregation law and proved surprisingly co-operative." *Id.* at 327.

28. *Ex parte* Plessy, 45 La. Ann. 80, 11 So. 948 (1892).

decision of the United States Supreme Court in the *Civil Rights Cases.*[29] In denying any violation of the fourteenth amendment, the opinion of the Louisiana court by Justice Charles E. Fenner relied principally on the opinion of Massachusetts Chief Justice Shaw in *Roberts v. City of Boston,*[30] and the decision of the Supreme Court of Pennsylvania in *Westchester and Philadelphia R.R. v. Miles*[31] for the principle that "separate but equal" treatment of the races was constitutionally permissible. The latter case involved intrastate commerce, and the Louisiana court said that to deny the state's right to require "separate, though equal" accommodations on intrastate, as opposed to interstate, cars would necessarily entail the nullity of all state segregation laws whatever. The court also disposed of any questions of discrimination against Negroes by the bland observation that

> [t]he statute applies to the two races with such perfect fairness and equality that the record brought up for our inspection does not disclose whether the person prosecuted is a white or a colored man. The charge is simply that he did 'then and there, unlawfully, insist on going into a coach to which, by race, he did not belong.'[32]

Plessy in the Supreme Court

A writ of error was filed in the United States Supreme Court on January 5, 1893, but in a letter of October 31, 1893, Tourgee advised the Equal Rights Committee that, far from pressing for an early hearing, he would encourage delay. He reasoned that

> [o]f the whole number of Justices there is but one who is known to favor the view we must stand upon. . . . There are five who are against us. Of these one may be reached, I think, if he 'hears from the country' soon enough. The others will probably stay where they are until Gabriel blows his horn.[33]

Tourgee counseled the Committee "to bend every possible energy to secure the discusson of the principle in such a way as to reach and awaken public sentiment. . . . [I]f we can get the ear of the Country, and argue the matter fully *before the people first,* we may incline the wavering to fall on our side when the matter comes up."[34] In the

29. 109 U.S. 3 (1883). The Supreme Court held that the thirteenth amendment applied only to systems of labor. Harlan, dissenting, contended that it applied to "badges of servitude." *Id.* at 35.

30. 59 Mass. (5 Cush.) 198 (1850).

31. 55 Pa. 209 (1867).

32. 45 La. Ann. 80, 87, 11 So. 948, 951 (1892).

33. Letter from Albion W. Tourgée to Louis A. Martinet, Oct. 31, 1893, *cited* O. OLSEN, *supra* note 20, at 78. Tourgée thought that "[i]t is of the utmost consequence that we should not have a decision *against* us as it is a matter of boast with the court that it has *never reversed itself* on a *constitutional* question." *Id.* (emphasis added).

meantime the decision in the Supreme Court was somehow delayed for over 3 years.

The Tourgee brief, not filed until April 6, 1896, was a *tour de force* attacking the constitutionality of the Louisiana statute under both the thirteenth and fourteenth amendments.[35] The argument was organized into some 23 enumerated subsections. Some of these contentions were met with concessions by the Louisiana Attorney General, others were later rejected in the majority opinion, while still others surface almost verbatim in the dissenting opinion of Mr. Justice Harlan.[36] Additional briefs were filed by James C. Walker, trial counsel, who "concentrated upon establishing the impossibility of defining a Negro,"[37] and by F. D. McKenney and Samuel F. Phillips, "emphasizing certain unique technical points."[38] Oral argument was held on April 13, 1896. Olsen reports that neither Tourgee nor Walker appeared,

34. *Id.* at 79. Unfortunately delay was not on the side of Plessy. See O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 328: "Meanwhile, the very reverse of what Tourgée had hoped for had occurred. The climate had become ever more unfavorable, and was especially highlighted by Booker T. Washington's famous Atlanta Compromise speech of 1895, widely interpreted as a sign of Negro acceptance of an inferior status."

35. Woodward, *The Birth of Jim Crow*, *supra* note 18, at 103, quoting a letter from Justice Robert H. Jackson. Portions of the Tourgée brief appear in O. OLSEN, *supra* note 20, at 80-103; and in CIVIL RIGHTS AND THE AMERICAN NEGRO 298-304 (A. Blaustein & R. Zangrando eds. 1968) [hereinafter cited as CIVIL RIGHTS AND THE AMERICAN NEGRO].

36. It has been asserted that Harlan encouraged Tourgée to litigate the case. See O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 310.

37. Tourgée's brief also included this argument:

> The Court will take notice of the fact that, in all parts of the country, race intermixture has proceeded to such an extent that there are great numbers of citizens in whom the preponderance of the blood of one race or another is impossible of ascertainment, except by careful scrutiny of the pedigree. As slavery did not permit the marriage of the slave, in a majority of cases even an approximate determination of this preponderance is an actual impossibility, with the most careful and deliberate weighing of evidence, much less by the casual scrutiny of a busy conductor.

CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 35, at 301.

The problem of defining race arose in many jurisdictions both before and after *Plessy*. In Ohio race originally was determined by a preponderance of blood, Lane v. Baker, 12 Ohio 237 (1843), although the courts later ruled that children with five-eighths white bood but with distinctly Negroid physical characteristics were ineligible to attend a white school. Van Camp v. Board of Educ., 9 Ohio St. 406 (1859). Florida and South Carolina established a similar absolute division between blacks and whites. There, any person with one-eighth Negro bood was a Negro. FLA. COMP. GEN. LAWS ANN. § 5858 (Skillman, 1927); Tucker v. Blease, 97 S.C. 303, 81 S.E. 668 (1914). North Carolina and Georgia originally followed the same rule. GA. CODE ANN. § 2177 (Michie, 1926); N.C. CODE ANN. § 5384 (Michie, 1931); *see* Johnson v. Board of Educ., 166 N.C. 468, 82 S.E. 832 (1914). In Virginia, on the other hand, a man was "white" if he had less than one-quarter Negro blood, Eubank v. Boughton, 98 Va. 499, 36 S.E. 529 (1900), although this requirement later was stiffened, making only one with less than one-sixteenth Negro blood a "white" man. See Note, 17 VA. L. REG. 692 (1911). Most states, however, avoided the problem of mathematics, and merely held that *any* trace of Negro blood made a man "colored." *See, e.g.*, ALA. CODE ANN. § 2 (Michie, 1928); GA. CODE ANN. §§ 2177, 2177(13) (Michie, Supp. 1928); OKLA. CONST. art. XIII, § 3; OKLA. COMP. STAT. § 10, 568 (1921); TENN. CODE § 25 (Will. Shan. & Marsh 1932); TEX. ANN. REV. CIV. STAT. Art. 2900 (Vernon, 1925); VA. CODE ANN. § 67 (Michie, 1930).

38. O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 328. Olsen says that Phillips, a member of a prominent North Carolina family, was a friend of Tourgée's from Carpetbagger days. O. OLSEN, *supra* note 20, at 16.

and that the only argument for Plessy was made by Phillips.[39]

The decision of the Supreme Court in *Plessy v. Ferguson* came down on May 18, 1896, nearly 4 years after Plessy's arrest and more than 3 years after the writ of error was first filed in the Supreme Court. Mr. Justice Brown, writing for the Court, upheld the validity of the Louisiana statute, with Mr. Justice Harlan alone dissenting.[40]

ANALYSIS OF *Plessy*

The issue facing the Supreme Court in *Plessy* was whether the Louisiana statute providing for equal but separate railway accommodations for the white and colored races contravened the thirteenth and fourteenth amendments to the Constitution. The Court treated these questions separately, dismissing the thirteenth amendment attack in three paragraphs and focusing on the fourteenth amendment claims. Instead of squarely meeting the question whether the fourteenth amendment permits statutory classifications on the basis of race for any purpose, the Court began its exposition with an inquiry into whether state laws permitting separation of the races are within the state police power. Relying on a strange assortment of precedents, the Court concluded that the fourteenth amendment does not restrict the state's power to enact legislation separating the races. The Court then turned its attention to whether the Louisiana statute deprived Plessy of property without due process of law in refusing to permit him to sit in a carriage reserved for whites only. Finding no due process violation, the Court relied on specious psychological and sociological premises in an effort to refute Plessy's charge that the statute was an unreasonable exercise of the police power, fraught with potential abuse. Justice Harlan's dissent graphically pointed out the pernicious results of the Court's decision: "What can more certainly arouse race hate, what can 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?"[41] Reaching out to grasp the original intent of Congress in passing the fourteenth amendment, Harlan explained: "Our Constitution is color-blind, and neither knows nor tolerates classes among citi-

39. Tourgée's fortunes were at a low ebb in the spring of 1896, and Walker was ill, but Olsen suggests that pessimism may also have been involved. O. Olsen, Carpetbagger's Crusade, *supra* note 19, at 328 (1965); *cf.* OLSEN, *supra* note 20, at 16, where he says the argument was "finally . . . commenced on April 13, 1896, by Tourgée . . . . This final argument was delivered and actually written by Phillips . . . who [had been] Solicitor General."

40. 163 U.S. 537 (1896).

41. *Id.* at 560.

zens."[42] An evaluation of the Court's treatment of each of these issues reveals that Harlan's condemnation of the majority's reasoning has withstood the test of time.

The Thirteenth Amendment Argument

The majority opinion made short shrift of appellant's claim that the statute violated the thirteenth amendment because it imposed a badge of slavery or servitude. The Court relied on the *Slaughter-House Cases*[43] for the proposition that the thirteenth amendment merely abolished slavery and did not affect the provisions of the Black Codes even if the Codes by imposing discriminations and disabilities short of slavery made freedom of little value. As in the *Slaughter-House Cases*, the Court in *Plessy* inferred that the thirteenth amendment was thus limited in scope by the later adoption of the fourteenth amendment which "was devised to meet this exigency."[44] In addition, the *Civil Rights Cases*[45] were cited for the proposition that the acts of discrimination by individuals in those cases were not "badges of slavery." Without noting that the segregation in the *Plessy* case was imposed by state statute, the Court quoted Mr. Justice Bradley's impatient sally in the earlier case: "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 . . . as to the people he will take into his coach or cab or car . . . ."[46] Then, in an attempt to extend the above rule to a case where such discrimination was imposed by state statute rather than a private person, the Court added a dubious proposition of its own: "A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."[47] Unfortunately, this statement would be proven untrue in its actual operation in American society for decades to come. It has credibility only if "legal equality" is taken to mean that kind of de jure equality which has no regard for the facts of life. Under this separate but equal formula, the Negro was to be placed and kept by law on a scale half way between servitude and freedom for generations, contrary to the intent of the proponents of the post Civil War amendments.[48]

In his dissenting opinion Mr. Justice Harlan insisted once more, as

42. *Id.* at 559.
43. 83 U.S. (16 Wall.) 36 (1873).
44. 163 U.S. 537, 542 (1896).
45. 109 U.S. 3 (1883).
46. 163 U.S. at 543, *quoting* The Civil Rights Cases, 109 U.S. 3, 24 (1883).
47. 163 U.S. at 543.
48. Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U.L.Q. 421, 478 (1972).

he had in the *Civil Rights Cases,* that segregation is a badge of slavery, despite the narrow interpretation of the majority in that case. He also raised again his view of the meaning of "the privileges and immunities of citizens of the United States," which had been narrowed so sharply by the Court in the *Slaughter-House Cases.* To Harlan, the railroad was a public highway operated for public use, and under the Constitution open to the enjoyment of citizens of the United States without distinctions based on race. The Louisiana statute, he thought, was "inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States."[49] In addition, Harlan reiterated his belief that the thirteenth amendment "not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country."[50] His conclusion in regard to segregation in transportation was unqualified: "The arbitrary separation of citizens, on the basis or 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. It cannot be justified upon any legal grounds."[51]

The Fourteenth Amendment Contentions

Turning to the fourteenth amendment, the majority conceded that the object of that amendment was to enforce absolute or "political" equality of the two races "before the law." But the Court then advanced two sweeping propositions in the realm of social psychology which it said were "in the nature of things." First, it said that the fourteenth amendment could not have been intended to abolish all distinctions between the races or to enforce social equality in the form of a "commingling" of the two races. Second, the Court flatly added that laws requiring segregation of the two races do not necessarily imply inferiority of either.[52] Having stated its propositions, the Court turned to the case law. It concluded that segregation by law had been generally recognized as within the competency of the states under their police power.

1. *Precedents in the Majority Opinion*

The use of precedents by the Court to substantiate its decision

49. 163 U.S. 537 at 555 (1896).
50. *Id.* at 555.
51. *Id.* at 562.
52. *Id.* at 544.

was most unusual. The first resort of the opinion was to school segregation cases. *Roberts v. City of Boston*,[53] decided in 1850, was the principal case relied upon. There the Supreme Judicial Court of Massachusetts, in an opinion by Chief Justice Shaw, had sustained the establishment of separate schools for Negro children, despite the provision of the Massachusetts constitution that "all men are born free and equal."[54] Charles Sumner had advanced the view for the plaintiffs that this provision stood for "the principle . . . that all men, without distinction of color or race, are equal before the law."[55] Shaw responded that this merely meant that "the rights of all . . . are equally entitled to the paternal consideration and protection of the law,"[56] but that separate schools might be established for children of different ages, sexes and colors, or for the poor and neglected.[57] Shaw's opinion, though later to have a great effect in constitutional history, was overruled by statute in Massachusetts a mere 6 years after it was written.[58]

The majority opinion in *Plessy* also relied on seven other school cases and an act of Congress requiring segregated schools in the District of Columbia. Discussing these, Barton Bernstein comments:

> For authority that segregation of the races had been 'recognized as within the competency of the state legislature in the exercise of its police power,' the court cited seven cases clearly distinguishable in material facts from *Plessy*. Only six of these cases upheld this doctrine and each considered school segregation. One depended on an antebellum Ohio case and three others relied on a fourth, *Roberts v. City of Boston*, the original source of the 'separate but equal' position. . . .
>
> On the basis of this weak persuasive authority from distinguishable cases in inferior courts, the Supreme Court concluded that the states could segregate the races.[59]

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53. 59 Mass. (5 Cush.) 198 (1850).

54. MASS. CONST., pt. 1, art. I.

55. Charles Sumner's oral argument in Roberts v. City of Boston, *cited in* CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 35, at 113.

56. 59 Mass. (5 Cush.) at 206.

57. *Id.* at 208. Leonard Levy has observed that these contradictory propositions are more succinctly expressed by the pigs in G. ORWELL, ANIMAL FARM 112 (1946): "All animals are equal but some animals are more equal than others." L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 114-15 (1957).

58. At the time *Roberts* was decided only the primary schools of Boston were segregated and that was by regulation of the Boston School Board. The decision was immediately attacked by the abolitionists, and 6 years later a statute was passed prohibiting any distinctions "on account of the race, color or religious opinions" of an applicant for admission to the public schools of Massachusetts. MASS. ACTS AND RESOLVES, 1855, c. 256, Sec. 1.

59. Bernstein, *Case Law in Plessy v. Ferguson*, 47 J. NEGRO HIST. 192, 193-94 (1962); *cf.* L. MILLER, THE PETITIONERS 212 (1966), where he notes the "bootstrap lifting" operation of the courts in using school segregation cases to justify segregation on public carriers, and in turn using the latter opinions to justify school segregation.

After passing reference to a miscegenation case,[60] and cases requiring equality in political rights,[61] the Court did turn its attention to railroad precedents. *Railroad Co. v. Brown*[62] was cited for the proposition that where particular laws or charters prohibited the railroad from excluding any person "from the cars on account of color," the enactment was not satisfied by the provision of equal, but separate, cars. What the Court did not point out was that in *Brown* the railroad had argued that it had always provided accommodations to Negroes and had never excluded them "from the cars." The *Brown* Court rejected this construction, observing that it was "an ingenious attempt to evade the obvious meaning" of Congress, and held that the provision was addressed not to the right to ride, but to discrimination. "Congress, in the belief that this discrimination was unjust, acted. It told this company . . . that this discrimination must cease, and the colored and the white race, in the use of cars, be placed on an equality."[63] Apparently, it did not occur to the *Plessy* Court that the fourteenth amendment "equal protection" clause, like the phrase "excluded from the cars," could likewise be interpreted to bar any discrimination among passengers on the ground of color, and was not limited to the guarantee of a "right to ride."

After discussing *Hall v. DeCuir*[64] and the *Civil Rights Cases*,[65] two wholly distinguishable cases, the *Plessy* Court finally came to *Louisville, N.O. & Tex. Ry. v. Mississippi*,[66] a case which the Court said was "[m]uch nearer, and, indeed almost directly in point."[67] That case involved the validity of a Mississippi statute requiring that all

60. State v. Gibson, 36 Ind. 389 (1871).

61. *E.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879) (negroes cannot be systematically excluded from jury duty); *Ex parte* Virginia, 100 U.S. 339 (1879) (members of race of person on trial cannot be systematically excluded from jury).

62. 84 U.S. (17 Wall.) 445 (1873). This case and its background are discussed in Frank & Munro, *supra* note 48, at 454-56.

63. *Id.* at 452-53. See the "substitute" opinion for the School Segregation Cases in Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-30 (1959). Citing *Railroad Co. v. Brown*, Professor Pollak wrote: "The 'separate but equal' doctrine announced in Plessy v. Ferguson was the product of sophistication. At an earlier day it was apparent to this Court that mere separation by reason of race was discriminatory." *Id.* at 29.

64. 95 U.S. 485 (1877). This case had held that the anti-segregation law of Louisiana did not apply to a steamboat in interstate commerce.

65. 109 U.S. 3 (1883). There the Civil Rights Act of 1875 was held unconstitutional as applied to individual acts of discrimination, since "state action" was not involved. In *Plessy*, of course, the segregation was a result of an act of the legislature. In the *Civil Rights Cases, id.* at 11, the Supreme Court said:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States . . . or which denies to any of them the equal protection of the laws.

66. 133 U.S. 587 (1890).

67. 163 U.S. at 547.

railroads provide equal, but separate, accommodations for the white and Negro races. The railroad was indicted for failing to provide the separate accommodations and was fined. The statute was interpreted by the Supreme Court of Mississippi as applying solely to commerce within the state and the conviction was sustained. On appeal by the railroad, the United States Supreme Court, pointing out that no question of interstate commerce was involved, said that it could consider only whether the state has the power to require railroads operating intrastate to maintain separate accommodations for the two races. The Court held that such a regulation affected only commerce within the state and therefore did not infringe upon the powers given to Congress by the commerce clause.[68]

All of this was duly reported by Mr. Justice Brown. What he did not note was that the point at issue in the *Louisville* case was the commerce clause, not segregation enforced by law under the fourteenth amendment. In holding that intrastate accommodations could be regulated by the state, the opinion of Justice Brewer had passed over the segregation point with the observation that it was not clear on the record whether use of the dual accommodations was to be a matter of choice or compulsion for the passengers. For this reason, it is fair to say that the Supreme Court's decision in *Louisville, N.O. & Tex. Ry. v. Mississippi* was not "almost directly in point" with the issue in *Plessy*: does the fourteenth amendment permit a state to punish a person for seating himself in a railroad car set aside for passengers of a race to which he did not belong?

Finally, the court cited 11 cases arising under "similar statutes" as upholding the constitutionality of separation of the two races. All were from inferior federal courts or from state courts. Of these cases Bernstein wrote: "Not one case supports this contention. Indeed, only one case even involved the constitutionality of a state statute, and that law required the same accommodations for the races.[69] Perhaps Harlan's view of the labored, often inaccurate, and sometimes distorted uses of precedent in the majority opinion is even more in point. For him they were irrelevant to the issue:

> I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time

68. 133 U.S. at 591.
69. Bernstein, *supra* note 59, at 195-96.

> when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which 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 placed our free institutions upon the broad and sure foundation of the equality of all men before the law.[70]

2. *Segregation as a Denial of Due Process*

Turning from precedent to principle, the opinion of Justice Brown then addresssed an issue of procedural due process. It is on this point that the effort of Tourgee to have a "nearly white" plaintiff for his test case was most relevant. Tourgee's brief began with his peculiar argument that "in any mixed community, the reputation of belonging to the dominant race . . . is property."[71] He stressed that the reputation of being white was a property of great pecuniary value, "the master-key that unlocks the golden door of opportunity."[72] From this premise, Tourgee argued that the provision of the act authorizing the railroad officials "to assign a person to a car set aside for a particular race" deprives the passenger of his property without due process of law. This argument has been characterized as an "unconscious paradox,"[73] and one writer erroneously suggested that Plessy might have been more interested in proving himself white than in defeating the discrimination against blacks.[74] Olsen suggests that Tourgee's purpose was twofold: to appeal to a property-conscious Court, and to establish Plessy's rights as a "nearly white" man, in the expectation that this would not only complicate enforcement of segregation, but would convince the Court that "since the holder of the smallest bit of property was entitled to the same right as the largest, one drop of white blood would suffice."[75]

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70. 163 U.S. at 563.
71. Brief for Homer A. Plessy by Albion W. Tourgée, File copies of briefs 1895, VIII (Oct. Term 1895) *as set out in* O. OLSEN, *supra* note 20, at 83.
72. *Id.*
73. V. WOODWARD, *The Birth of Jim Crow*, *supra* note 18, at 101.
74. Oberst, *The Supreme Court and States Rights*, 48 KY. L.J. 63, 77 (1959).
75. O. OLSEN, CARPETBAGGER'S CRUSADE, *supra* note 19, at 329-30. In Part IV of his brief Tourgée does make such an argument:

> There is no law of the United States, or of the State of Louisiana defining the limits of race—who are white and who are 'colored'? By what rule then shall any tribunal be guided in determining racial character? It may be said that all those should be classed as colored in whom appears a visible admixture of colored blood. By what law? With what justice? Why not count every one as white in whom is visible any trace of white blood? There is

The brief dealt at length with the arbitrary nature of the right of the railroad official to assign a person to a specific car. The statute bestowed on the "officers" of passenger trains the power and duty to assign each passenger to the coach used for the race to which such passenger belonged, with power to refuse to carry any non-compliant passenger. Moreover, it immunized the officers and the railway from any damage suits arising out of refusal to carry the passenger. The procedural due process shortcomings of such a proposal are perhaps made clearer when the interest of *Plessy* is alternatively characterized as a "property" interest and dramatized by consideration of the possible financial impact on the individual incorrectly classified. The Court solved its procedural due process dilemma by deciding that a suit for damages would provide an ample opportunity for review of the railroad's decision and vindication of the property rights injured by the error, if any, and that whether a person was to be stamped as colored or white was a matter of state law. The Court indicated that the conductor who assigned passengers according to race acted at his peril. Consequently, the provisions of the Louisiana statute which purported to exempt the official and the railroad from damages for an erroneous assignment were declared in dictum to be unconstitutional, as the state's attorney had conceded. Summarizing, the Court observed:

> If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.[76]

Although this neat hypothetical case may have logically solved the Court's procedural due process problem, it raises some question of the Court's sensitivity to the equal protection problem, since it inadvertently suggests a great deal about the inequality of the "separate but equal" formula and about the realities of equality before the law, as opposed to logical symmetries.

3. *The "Nature of Things": Segregation and Psychology*

Precedents and procedure disposed of, Mr. Justice Brown turned

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but one reason to wit, the domination of the white race. . . . The trace of color raised the presumption of bondage and was a bar to citizenship. . . .

Brief for Homer A. Plessy by Albion W. Tourgée, File Copies of Briefs 1895, VIII (Oct. Term 1895) *as set out in* O. OLSEN, *supra* note 20, at 84-85. *See also id.* at 94, where Tourgée argues that this illustrates the fact that the law is based solely on race or caste.

76. 163 U.S. at 549.

back to the "nature of things." He had announced at the outset that laws requiring separation of the two races "in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . . ."[77] Expanding on this position, he found that "the underlying fallacy" of plaintiff's argument consisted "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 because the colored race chooses to put that construction upon it."[78] His "proof" of the proposition was simple: if the colored race had passed a racial segregation law when it had a legislative majority, whites would not have assumed they were inferior.

This was too much for Mr. Justice Harlan. He thundered:

> 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 travellers. 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.[79]

The proposition that any implication of inferiority arising from segregation by law was not any part of the intent of the segregator but was merely a psychological quirk in the minds of the segregated does seem to raise questions of candor, rather than capacity.[80] Certainly many of those who enacted segregation laws were imbued with strong feelings of white superiority. They were determined to maintain the supremacy of the whites politically, economically and socially; segregation by law and ordinance was only one of the last resorts of the dominant whites in securing and maintaining a status of semi-servitude for the black population.[81]

As Friedman puts it, the "Negro problem" in the South following Reconstruction was more properly a white problem: "If a servile pattern of Negro behavior was to be restored—if anarchy was to be resisted—new techniques of racial control were required."[82] Various

77. *Id.* at 544. *See* text accompanying note 52 *supra.*
78. 163 U.S. at 551.
79. *Id.* at 557.
80. *Cf.* R. HARRIS, *supra* note 5, at 100, where he speaks of the "dubious psychology in attributing inferiority exclusively to a state of mind . . . ."
81. *See* E. FRAZIER, *supra* note 15, at 156-58.
82. L. FRIEDMAN, THE WHITE SAVAGE 121-25 (1970).

theories were espoused to maintain white control—total exclusion, integrated subservience and differential segregation—but the impossibility of the first and the practical difficulties of the latter in urban society ultimately drove the racists to indiscriminate segregation by law.[83]

The black citizens of New Orleans who protested the enactment of the Louisiana statute had no doubts as to its intent and consequence.[84] Neither did the Negro representatives in the Louisiana legislature, who protested bitterly as they voted against the Jim Crow bill.[85] And neither did Tourgee, as he argued that the Louisiana statute was intended to assert the inferiority of the Negro:

> The title of an Act does not make it a 'police provision' and a discrimination intended to humiliate or degrade one race in order to promote the pride of ascendancy in another, is not made a

83. *Id.* at 121 *et seq.* Nolen suggests that the carefully constructed theories of Negro inferiority with which the South defended its "peculiar institution" before the Civil War were merely carried over and transmuted into a defense of a social order in which the whites would dominate the semifree Negroes after Emancipation. He believes that an important aspect of the movement to racial segregation was worry over "amalgamation:"

> To prevent amalgamation of the races, to make possible thoroughgoing discrimination, and to keep individuals of the dominant and subordinate groups from forming ties of friendship, Southern whites kept strict watch over racial contacts and regulated them with elaborate ritual. Although the Creator, they argued, had implanted in each race an instinct of aversion toward other races, fallen men often refused to heed the promptings of this instinct. It was necessary, they claimed, to segregate the races, for if mongrelization of the South did not result in the extinction of the population, it would bring cultural disaster.

C. NOLEN, THE NEGRO'S IMAGE IN THE SOUTH 199 (1967).

84. We say that it is unjust, unchristian, to inflict upon any portion of the people the *gratuitous* indignities which take their motive and their bitterness from the dictates of an unreasonable prejudice. . . .

> Besides, we believe that the colored people will be greatly disturbed when they see that in addition to their many other grievances is to be enacted that *legal degradation* (emphasis added) which is to make of them passive objects of a system as unjustifiable as it would be unmerited.
>
> Under such circumstances the promotion of good will among inhabitants of the same State would be almost impossible.

Protest of the American Citizens' Equal Rights Association of Louisiana Against Class Legislation, OFFICIAL JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 127-28 (1890) *cited in* O. OLSEN, *supra* note 20, at 48.

85. *See, e.g.*, the speeches of Representatives C.F. Brown and Victor Rochon, *id.* at 50-52:

> Mr. Speaker, you have thousands of colored men in this State, who have labored hard, accumulated property, raised up a family of children, educated them, and they share equally the duties and responsibility in maintaining the government of this State. And now you propose to discriminate and humiliate this class of your citizens . . . the passage of the act by a Democratic legislature will be an evident fact of the ill-feeling of the whites of Louisiana against our colored brothers.
>
> Can there be, Mr. Speaker, any legislation spread upon the statutes of Louisiana, that will cast the odium of pariahism upon the colored people of this State more than this bill? I conceive of none in my imagination, and its passage will compare most favorably with any law having for its effect the oppression of our people.
>
> The protection of our rights, the dearest ambition of our lives, and gratitude, the noblest sentiment of the human heart, prompts us to ask for no more oppression or degradation at your hands.

> 'police regulation' by insisting that the one will not be entirely happy unless the other is shut out of their presence. Haman was troubled with the same sort of unhappiness because he saw Mordecai the Jew sitting at the King's gate. He wanted a 'police regulation' to prevent his being contaminated by the sight. He did not set out the real cause of his zeal for the public welfare: neither does this statute. He wanted to 'down' the Jew: this act is intended to 'keep the negro in his place.' The exemption of nurses shows that the real evil lies not in the color of the skin but in the relation the colored person sustains to the white. If he is a dependent it may be endured; if he is not, his presence is insufferable. Instead of being intended to promote the *general* comfort and moral well-being, this act is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class. Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.[86]

The Court rejected Tourgee's psychological insight, however. American justice was not yet prepared to confront the full reality of racism.

4. *The "Nature of Things": Segregation and Sociology*

The majority opinion found additional support for state-imposed segregation in several dubious ventures into social theory. First, the Court said that a legislature in its discretion might reasonably require segregation by law "with a view to the . . . preservation of the public peace and good order."[87] Mr. Justice Brown did not elaborate upon this thought, but Harlan, in dissent, attacked the argument with considerable force. Not only would the decision upholding such statutes stimulate aggressions against the admitted rights of Negroes, but it would create reciprocal feelings of distrust. Harlan wrote:

> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. 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? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.
>
> The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments,

86. Brief for Homer A. Plessy by Albion W. Tourgée, File Copies of Briefs 1895, VIII (Oct. Term 1895), *as set out in* O. OLSEN, *supra* note 20, at 89-90.
87. 163 U.S. at 550.

> National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights upon the basis or race, and cunningly devised to defeat legitimate results of the war, under the pretence 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.[88]

Similar thoughts had been voiced years earlier by the Equal Rights Association when the Jim Crow law was pending before the Louisiana legislature. It was argued that the bills to provide separate cars would license "the evilly-disposed" to "insult, humiliate and otherwise maltreat inoffensive persons, and especially women and children . . . . [T]he promotion of good will among inhabitants of the same State would be almost impossible." The Association called upon the legislature to heed its protest "[i]n the name of God and the Constitution . . . in the name of justice, reason and equity, and *in the name of peace* . . . ."[89]

At this point Mr. Justice Brown turned to a discussion of the first caveat which he had mentioned earlier in the opinion: that the fourteenth amendment granted civil and political equality, but not "social equality."[90] While a public railroad car is hardly a private social club, Mr. Justice Brown apparently concluded that any "commingling" necessarily amounted to social equality, and any constitutional prohibition of segregation by law in railway transportation was "enforced commingling." He observed that "in the nature of things" the amendment could not have intended that. Just what is the "nature of things" was not discussed. Apparently the Court was postulating that social prejudices cannot be overcome by legislation; that legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences; indeed, that "if one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."[91] Therefore, despite any intent of Congress or the Constitution, efforts to do away with segregation—and force "social" equality by law—apparently were considered by Mr. Justice Brown to be so fruitless as to be beyond judicial consideration.

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88. *Id.* at 560.
89. Protest of the American Citizens' Equal Rights Association of Louisiana Against Class Legislation, OFFICIAL JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF LOUISIANA, 127-28 (1890), *cited in* O. OLSEN, *supra* note 20, at 48-49 (emphasis added).
90. *See* text and note 52 *supra*.
91. 163 U.S. at 552.

Mr. Justice Harlan considered the suggestion that "social equality" did not exist between the white and black races in this country to be wholly beside the point. To him travel in a passenger coach no more involved social equality than using the streets or approaching the ballot box.

Even more dubious was the proposition in the majority opinion that "social prejudices" cannot be overcome by legislation. Indeed, there is mounting evidence to the contrary. "The fact is," says Harris, "that laws do change customs and traditions even to the extent of uprooting them. Law and its penal sanctions have indeed changed the most stubborn of customs with respect to the legal status of Negroes."[92] Unfortunately, of course, it took the Congress of the United States some 75 years after *Plessy* to rediscover this fact and act upon it.

Mr. Justice Brown was merely espousing a jurisprudence and social theory of his day. It is part of the strange career of *Plessy* that the case was decided at a moment when southern political factions were all turning against the Negro in the struggle for power, and at the same time discrimination and segregation were becoming tolerable elsewhere in a United States which was beguiled by the theories of Social Darwinism. Mr. Justice Brown's observation that "legislation is powerless to eradicate racial instincts" sounds very much like William Graham Sumner's "stateways cannot change folkways."[93]

The Original Meaning of the Fourteenth Amendment; the Intent of Congress

What is the meaning of "equal protection?" Does the legislature deny equal protection when it provides for segregation by law? Equal protection does not forbid reasonable classification. Does the fourteenth amendment allow classification into black and white for the purposes of rail transportation or for any other purpose? Or is race and color not merely suspect, but a forbidden classification so that the trait "color" may never be used to classify persons?[94]

Harlan in dissent was clear on that point. Over and over he reiterated in various ways his conclusion that no legislature could have regard to race or classify on the basis of color. "Our Constitution is color-blind,"[95] he said. The consequences of this position are clear. If color is a forbidden trait in classification, obviously the state is for-

92. R. HARRIS, *supra* note 5, at 101.
93. *See* WOODWARD, *supra* note 1, at 88-90; Bernstein, *Plessy v. Ferguson: Conservative Sociological Jurisprudence*, 48 J. NEGRO HIST. 196, 201 (1963).
94. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 353-56 (1949).
95. 163 U.S. at 559; *cf.* the language in Tourgée's brief at text accompanying note 86 *supra*.

bidden to *segregate* according to color as surely as it is forbidden to deny rights or to treat persons unequally on the basis of color. "In respect of civil rights . . . the Constitution of the United States does not, I think, permit any public authority to *know* the race of those entitled to be protected in the enjoyment of such rights."[96] The civil war amendments, he believed, "removed the race line from our governmental systems."[97] Finally he concluded: "There is no caste here. Our Constitution is color-blind, and neither knows or tolerates classes among citizens. . . . The law regards man as man, and takes no account of . . . his color when his civil rights as guaranteed by the supreme law of the land are involved."[98]

Tourgee's brief made the same point in striking language:

> The act in question in our case, proceeds upon the hypothesis that the State has the right to authorize and require the officers of a railway to assort the citizens who engage passage on its lines, according to race, *and to punish the citizen if he refuses to submit to such assortment.*
>
> The gist of our case is the constitutionality of the assortment; *not* the question of equal accommodation; that much, the decisions of the court give without a doubt. We insist that the State has no right to compel us to ride in a car 'set apart' for a particular race, whether it is as good as another or not . . . . The question is not as to the *equality* of the privileges enjoyed, but the right of the state to label one citizen as white and another as colored in the common enjoyment of a public highway as this court has often decided a railway to be.[99]

The majority opinion clearly indicated that the classification into white and colored for the purpose of assigning segregated cars was a *reasonable* regulation and within the discretion of the state legislature. According to Justice Brown, laws are valid "if enacted in good faith for the promotion of the public good," or "with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[100] But was this in accord with the understanding of the 39th Congress which proposed the fourteenth amendment and its equal protection clause? What was the understanding of the state legislatures which adopted it? The opinion of the majority is barren of any speculation on that subject, perhaps because they regarded the Constitution as powerless to do anything about "social

96. *Id.* at 554 (emphasis added).
97. *Id.* at 555.
98. *Id.* at 559.
99. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 35, at 302-03.
100. 163 U.S. at 550.

equality" anyhow. The opinion of Mr. Justice Harlan reaches for the intent of Congress and the legislatures, but resorts to quotations explaining the meaning of the amendments in earlier opinions of the Court.[101]

Subsequent history showed Harlan's view of the intent behind the fourteenth amendment to be the more accurate. Although the Court did not, of course, have the benefit of later studies, it is strange indeed that the Justices, having lived through the Civil War and the passage of the thirteenth and fourteenth amendments, did not scrutinize the intent behind the very provision under consideration. Since the materials on which such studies are based were available and almost contemporaneous, the Court certainly should have considered them.

Interest in the intent of the 39th Congress in proposing the fourteenth amendment was eventually raised to a high point in 1953 by the action of the Supreme Court in ordering additional argument on this issue in connection with the Segregation Cases. The response of counsel was prodigious, and many books and articles followed.[102] Although the Court found the history "inconclusive," perhaps a more complete "legislative history" has been written on this amendment than on any other. Frank and Munro, who were first concerned with this question as *amici* in *Sweatt v. Painter*,[103] recently reviewed the question and the materials since 1950 in an article entitled "The Original Understanding of Equal Protection of the Laws."[104] Their conclusion summarizes what they believe "equal protection" meant in the Reconstruction decade in regard to the segregation issue:

> [T]here should be no segregation of individuals on the basis of race or color as to the right to own or use land; there should be no segregation of individuals on the basis of race or color in the use of utilities, such as transportation or hotels; with reservations, for here there is substantial divergence, there should be no segregation in the schools. It was generally understood that Congress could legislate to secure these ends, without regard to whether the particular objective was frustrated by state action or by state inaction. On the other hand, the clause was meant to have no bearing on . . . segregation of a purely private sort in situations

101. *See* Strauder v. West Virginia, 100 U.S. 303 (1879); *Ex parte* Virginia, 100 U.S. 339 (1879).

102. "The briefs and appendices are book-size and shelf-length." Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 6 (1955). See the bibliography at the beginning of the article by Frank & Munro, *supra* note 48, at 421.

103. 339 U.S. 629 (1950).

104. Frank & Munro, *supra* note 48, at 421. The introductory footnote states that this article updates an earlier article by the same authors, bearing the same title, in 50 COLUM. L. REV. 131 (1950).

> fairly independent of the law, as in churches, cemeteries, or private clubs.[105]

Bickel published another view in "The Original Understanding and the Segregation Decision in 1955.[106] He concluded that the fourteenth amendment was a compromise to be viewed in both the immediate and long-range purposes of Congress. In its immediate effect, "section 1 of the fourteenth amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation."[107] For its long-range effect, the Framers agreed on "language capable of growth" and

> . . . the question of giving greater protection than was extended by the Civil Rights Act was deferred, was left open, to be decided another day under a constitutional provision with more scope than the unserviceable thirteenth amendment. . . .[108]

A third view was presented by Harris, who after reviewing the same materials concluded:

> With respect to whether the equal protection clause of its own force condemned antimiscegenation laws and segregation laws and customs, the evidence is inconclusive. That Congress sought to condemn by law some form of segregation in 1875 is a partial argument that it did not. However, the answer to this argument is that judicial remedies alone were regarded as inadequate to prevent discrimination. More important is the failure of Congress to condemn segregation in the schools of District of Columbia and the neglect of many of the states which ratified the amendment to establish mixed schools. It is quite possible that the amendment of its own force condemned segregation only when it worked a discrimination because of race, which, as a matter of fact, it always has done.[109]

In any event, the failure of the *Plessy* Court to consider the intended meaning of the fourteenth amendment emerges as a major shortcoming.

Plessy: THE AFTERMATH

Social Impact

For a decision of the Court purporting to respond to the folkways,

105. Frank & Munro, *supra* note 48, at 477-78.
106. Bickel, *supra* note 102. Bickel was Mr. Justice Frankfurter's law clerk during the October 1952 term, when *Brown v. Board of Education* was first argued.
107. *Id.* at 58.
108. *Id.* at 63. Bickel points out that any long-range hopes the Radicals had of striking down segregation must have rested in Congress, not the Court. *Id.* at 64.
109. R. HARRIS, *supra* note 5, at 55-56.

Plessy was greeted with a surprising lack of popular enthusiasm in the press. Woodward says:

> [T]he country as a whole received the news of [the Court's] momentous decision upholding the 'separate but equal' doctrine in relative silence and apparent indifference. Thirteen years earlier the Civil Rights Cases had precipitated pages of news reports, hundreds of editorials, indignant rallies, congressional bills, a Senate report, and much general debate. In striking contrast, the *Plessy* decision was accorded only short, inconspicuous news reports and virtually no editorial comment outside the Negro press.[110]

Olsen reported a more negative reaction:

> Although this decision did not arouse the furor provoked thirteen years earlier by the Civil Rights Cases, neither was it endorsed with marked enthusiasm outside of the white South, and not even always there. The Negro press was unanimous in its denunciation, and a random survey of the northern white press reveals that the *Plessy* decision almost invariably attracted some attention, that it aroused significant opposition, and that it seldom won strong support. Only three out of forty-three newspapers surveyed ignored the decision altogether, while twelve displayed some hostility toward the decision and four, two of which were south of the Mason Dixon line, approved it. Due notice was frequently given to Harlan's telling dissent, and out of nine New York City publications, only one, the *Journal*, positively endorsed the majority opinion while four (*Tribune, Recorder, Independent*, and *Mail & Express*) favored the views of Harlan.[111]

On the other hand, although the platforms of the Populist and Democratic parties in the presidential campaign of 1896 each contained an anti-Supreme Court plank criticizing the decisions of the Court in three 1895 cases—involving income tax, the sugar monopoly and the Pullman strike—they made no mention of the recently decided *Plessy* case.[112]

Whatever the immediate popular response, the long range results of *Plessy* were certainly devastating to the freedom of a sizeable number of Americans. As Vann Woodward wrote:

> The racial aggressions [Harlan] foresaw came in a flood after the decision of 1896. Even Harlan indicated by his opinion of 1899 in *Cummings v. Board of Education* that he saw nothing unconstitutional in segregated public schools. Virginia was the last state in the South to adopt the separate-car law, and she re-

110. Woodward, *The Birth of Jim Crow*, *supra* note 18, at 103.
111. O. OLSEN, *supra* note 20, at 25.
112. *Id.* at 21-22.

> sisted it only until 1900. Up to that year this was the only law of the type adopted by a majority of the southern states. But on January 12, 1900, the editor of the Richmond *Times* was in full accord with the new spirit when he asserted: 'It is necessary that this principle be applied in every relation of Southern life. God Almighty drew the color line and it cannot be obliterated. The negro must stay on his side of the line and the white man must stay on his side, and the sooner both races recognize this fact and accept it, the better it will be for both.'
>
> With a thoroughness approaching the incredible, the color line *was* drawn and the Jim Crow principle was applied even in those areas that Tourgee and Harlan had suggested a few years before as absurd extremes. In sustaining all these new laws, courts universally and confidently cited *Plessy v. Ferguson* as their authority.[113]

It was this dynamic character of the new movement toward de jure segregation that was most remarkable. Like a snowball rolling downhill it gathered mass and momentum. Says Vann Woodward: "The Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society. *They were constantly pushing the Negro farther down.*"[114]

It is all too easy to forget the excesses of segregation in the first half of the twentieth century. Laws, ordinances and regulations were passed in incredible volume and detail. And where law did not supply the rule, custom took over. It is difficult for old men to recall or young men to believe. Those who lived in the North did not experience its greatest rigors; for many of those who lived in the South, black and white, it was part of life, unnoticed and unremarked as the air one breathed. Trains, waiting rooms, ticket windows, street cars, entrances and exits in theatres, hotels, toilets and water fountains, industrial employment, hospitals, sports, telephone booths, barber shops and beauty shops, taxis, airport facilities, elevators, beaches, parks, soda fountains, bars, circuses, and even courtroom Bibles for swearing

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113. Woodward, *The Birth of Jim Crow*, *supra* note 18, at 103; *see* Chasteen, *Bibliographic Essay: The Legal Validity of Jim Crow*, 56 J. NEGRO HIST. 284, 293 (1971):

> That the Plessy decision established the Jim Crow system as custom is a conclusion that evidence in the literature cited refutes. However, it does appear historically true that the system as a legal fact was an after effect of the Court's ruling. The stamp of legality placed upon the 'separate but equal' doctrine gave vent to the desires of Southern racist elements. From this point on, according to Stephenson, they were to crystalize custom into law.

114. V. WOODWARD, *supra* note 1, at 93 (emphasis added). Woodward quotes Edward Gardner Murphy as saying "These new antipathies . . . are assertive and combative . . . frankly and ruthlessly destructive . . . . Its spirit is that of an all absorbing autocracy of race, an animus of aggrandizement. . . ." *Id.* at 94.

witnesses, all were segregated at some time in some places.[115]

Several points made by Woodward deserve special emphasis here. The enactment of laws, ordinances and rules requiring racial segregation continued through the twenties and thirties, and into the forties. A Jim Crow ordinance on taxis, segregating and marking cabs by race and driver, was passed in Atlanta in 1940; the Virginia legislature enacted a statute requiring separate waiting rooms and other facilities for airports in 1944.[116] The enforcement of the Jim Crow laws was effectively in the hands of the street-car conductor, the bus driver, the theatre usher and the hoodlum on the playground, giving free rein and might of law to individual aggression. The Jim Crow laws applied to all Negroes and made no distinction among classes within the Negro race, as did the post-Reconstruction segregation of the Redeemers and other southern conservatives.

Plessy Overruled?

There is no time here to dwell on the social forces which assisted in bringing about the end of legal segregation. Our principal concern is with the end of legal segregation by the Supreme Court. It has been said[117] that *Missouri ex rel. Gaines v. Canada*,[118] by its insistence on *equal* education, spelled the doom of segregated education. In that case the Supreme Court required Missouri to afford equal legal educational opportunity *within* the state of Missouri. Others see the beginning of the end in *Sweatt v. Painter*,[119] with Chief Justice Vinson's dictum that even if equal physical facilities were provided for Heman Sweatt, he would not be given an equal education if he were excluded from the prestigious University of Texas Law School and an opportunity to associate with the white future leaders of the bar of Texas.

When *Brown v. Board of Education*[120] came down, holding that segregated primary education was unequal, there was a strong attack made on the case because of its reliance upon "foreign sociology" rather than law. The brief opinion of the Court did indeed invoke the psychological effect of segregation upon school children. Legal criticism blossomed especially after Wechsler's suggestion that the opinion was not founded on "neutral principles," although he acknowledged that an appropriate legal principle might have been found if the

115. *See* V. WOODWARD, *supra* note 1, at 82-87, 104; L. MILLER, *supra* note 59, at 205.
116. V. WOODWARD, *supra* note 1, at 103-04.
117. R. HARRIS, *supra* note 5, at 103.
118. 305 U.S. 337 (1938).
119. 339 U.S. 629 (1950); *see* L. MILLER, *supra* note 59, at 340; Oberst, *supra* note 74, at 80.
120. Brown v. Board of Educ., 347 U.S. 483 (1954).

Court struck down segregation as a violation of the "right of association."[121]

Other writers supported the *Brown* ruling. Edmond Cahn wrote that segregation was a form of exile—a most ancient form of punishment—and a punishment of the innocent surely denying equal protection.[122] Pollak, writing an "opinion of the Court" in answer to Wechsler, grounded the *Brown* decision on the unconstitutionality of a statute placing blacks at a disadvantage, and concluded that such legislation was contrary to the intent of the fourteenth amendment.[123] Charles Black considered such a statute unconstitutional simply because of its intent to disadvantage Negroes and to relegate them in fact to a position of inferiority.[124]

However sound the holding in *Brown*, and however content one is with the opinion, Mr. Justice Warren said only that the separate but equal doctrine "has no place in the field of public education." *Plessy* was not expressly overruled. Acknowledging this, many writers have speculated whether *Plessy* has been overruled. Blaustein and Zangrando[125] say it was overruled in *Gayle v. Browder*.[126] Loren Miller insists that it was not overruled until 1962 in *Bailey v. Patterson*[127] when it was "choked to death on buttermilk."[128] Indeed, no less an authority than Shepard's *Citator* apparently believes that *Plessy v. Ferguson* has never been directly overruled.[129]

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121. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

122. Cahn, *Jurisprudence*, 1954 ANNUAL SURVEY OF AMERICAN LAW 809, 817-18 (1955).

123. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-30 (1959).

124. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429-30 (1960).

125. CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 35, at 295.

126. 352 U.S. 903 (1956). This case merely affirmed without opinion the decision of a three-judge district court holding the Alabama bus segregation statutes and ordinances void, Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956). In the latter opinion the court said: "[W]e think that Plessy v. Ferguson had been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation . . . ." *Id.* at 717. *See also* L. MILLER, *supra* note 59, at 371-72.

127. 369 U.S. 31 (1962).

128. L. MILLER, *supra* note 59, at 373.

129. The citator has hundreds of entries on *Plessy*, but none is marked with the simple "O" for "overruled." *Cf.* L. MILLER, *supra* note 59, at 373:

> The student of the law will look in vain for the words in which important cases are ordinarily overruled: *'Plessy v. Ferguson is overruled.'* He will not find them. Nor will he find anywhere a Supreme Court opinion refuting the grievous errors contained in Justice Brown's opinion for the Court in that case or a repudiation of the evil that it wrought in the almost sixty years that it guided state and federal courts and inspired racial discrimination in every aspect of American life. Perhaps no justice on the Court wanted to speak of the rope in the house of the hanged, or perhaps all considered it impolitic to do so. Some future historian may unravel the question, as he threads through the decisions and gains access to unpublished material.
>
> The failure of the Court to write an opinion directly overruling the

Mr. Justice Douglas, furthermore, in several In Chambers opinions, has found some life in the old case. He has noted that it "has not yet been overruled on its mandate that separate facilities be equal,"[130] and in a dissenting opinion he said:

> There is, moreover, an ancient American doctrine that as, if, and when public facilities are separate for the races, they must be equal. *Plessy v. Ferguson* held that a State could maintain separate facilities for different races providing the facilities were equal. . . . But there *can* be *de facto* segregation without the State's being implicated in the creation of the dual system and it is in such situations that *Plessy*'s mandate that separate facilities be equal has continuing force.[131]

He contends, therefore, that where the state is not implicated in the actual creation of a de jure dual system, but is maintaining a school system which is segregated de facto, the *Plessy v. Ferguson* equality principle mandates an order that the inferior facilities be shared by the whites and the superior facilities be shared by the minority groups.[132] This road to integration in a school system segregated de facto might lead to a program of school building and upgrading in the black areas which would match the efforts in some southern states on the eve of *Brown* in the early fifties![133]

It is an interesting point but *Plessy* may not be the best authority for it. One wonders in retrospect whether the Court was very deeply concerned with *equality* of physical facilities in *Plessy v. Ferguson.* The Louisiana statute did indeed mandate "equal, but separate accommodations," but the Court's emphasis was more on separateness than on equality.[134]

Plessy case also foreclosed its opportunity to pay deserved tribute to the first and great John Marshall Harlan and his accurate prediction in 1896 that 'the judgment this day rendered [*Plessy v. Ferguson*] will, in time prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case, . . .'

130. Gomperts v. Chase, 404 U.S. 1237, 1240 (1971).

131. Spencer v. Kugler, 404 U.S. 1027, 1030-31 (1972).

132. *See also* F. LEVY, NORTHERN SCHOOLS AND CIVIL RIGHTS 70-130 (1971).

133. "The decisions in the *Gaines, Sweatt,* and *McLaurin* cases stimulated frenzied spending campaigns and gigantic efforts in the states with segregated education in order to equalize the educational opportunities of white and Negro pupils." R. HARRIS, *supra* note 5, at 139.

134. "[T]o provide equal but separate accommodations for the white and colored races, by providing separate coaches or compartments so as to secure separate accommodations . . . ." LA. LAWS 1890, Act 111, Preamble, *cited in* O. OLSEN, *supra* note 20, at 54.

The opinion of the Court in *Plessy* nowhere deals with the question of whether the facilities involved were in fact equal or even necessarily had to be equal to empower a valid assignment of a passenger. The Court noted that questions could arise of the proper test of race, and that misassignment might result in liability of the carrier. It said these questions did not properly arise on the record, and concluded that "the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race." 163 U.S. at 549.

Mr. Justice Douglas' insistence on equal facilities is a good point, however, and one that was made repeatedly by the Court in that period during which it gave relief to petitioners on the ground of gross inequality of facilities, avoiding the necessity of confronting the segregation principle.[135] Vigorously applied to those disparities of facilities, expenditures, staff and program which all too often exist in public education today, the "equal" portion of the *Plessy* formula and cases that followed it can serve some immediate purpose. In the long run, however, the Court, and the nation, must squarely face up to the difficult problems of housing segregation and its handmaiden, the neighborhood school, which have not yielded so gracefully to equal protection as did abolition of segregation in transportation, public accommodations and even in employment opportunity.

CONCLUSION

Plessy was a catastrophe. Ill-conceived, ill-supported and rife with gratuitous psychological and social theory, the decision did great damage to the concept of freedom in America. The concern today is whether we are again about to settle for separate but equal facilities. There was a time a hundred years ago when many Americans were not, but then came the 1890's. There are some interesting parallels today. In 1895 Booker T. Washington was willing to settle for a distinctive role for blacks;[136] today, to some, black identity and black separatism have become the most important values. Theories of racial differences being advanced by William Graham Sumner in his theories of folkways seem to find an echo in Jensenism.[137] Some of the north-

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Tourgée's brief in *Plessy* did touch upon the question of inequality of facilities. He noted that although the act required equal accommodations, there was no assurance that accommodations would be equal in fact. Under the terms of the statute, criminal liability was not affected by unequal facilities. Thus, Tourgée argued, a man who refused to leave a clean car and go into a filthy one at the order of the conductor woud be guilty of a misdemeanor. The Court ignored this question, as it did the question of the standards for the determination of race. The Court may have been justified in doing this, however, since Tourgée's brief had stated: "The gist of our case is the unconstitutionality of the assortment; not the question of equal accommodation; that much, the decisions of the court give without a doubt." Brief for Homer A. Plessy by Albion W. Tourgée, File Copies of Briefs 1895, VIII (Oct. Term 1895), *as set out in* O. OLSEN, *supra* note 20, at 97. Another brief filed in favor of Homer Plessy made the same argument.

135. *E.g.*, Brown v. Board of Educ., 397 U.S. 483 (1954); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); *see* R. HARRIS, *supra* note 5, at 130-38; L. MILLER, *supra* note 59, at 333-46.

136. Washington's famous Atlanta Compromise speech of 1895 is reprinted in WASHINGTON, UP FROM SLAVERY 218-25 (1909) and in CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 35, at 289-93. For an interesting evaluation of Washington, see L. LOMAX, THE NEGRO REVOLT 32-36 (1962).

137. Arthur Jensen, psychologist at the University of California (Berkeley), in a leading article published in 1969, questioned the suitability of white middle class education for poor and black children, and suggested that on the basis of IQ tests black children were genetically inferior in intelligence. He was assailed as a racist by those

ern white ethnic groups have taken a position which parallels the abandonment of the Negro by the northern Republican politicians after 1877 and by southern Populists in the 1890's. Similarities might be suggested between the Hayes Compromise of 1877 and Nixon's 1972 "Southern Strategy." Above all there is a great yearning for peace.

At times one wonders if the nation is ready to settle for "separate but equal" facilities all over again, at least in housing and in neighborhood schools. Young voters can scarcely remember the climate of the 1960's that produced the Freedom Rides and the March, the federal and state public accommodations Acts, open housing and equal employment opportunity laws, all intended to put the nation on the road to equality, not to segregation. So was the Civil Rights Act of 1875, intended to end segregation, however, and it was succeeded in Congress by the long night of 1875 to 1957—with the early help of the Supreme Court.

Plessy v. Ferguson is dead, but the acquiescence in the inevitability of segregated society which was at the roots of that case seems to be with us again. Let us hope that the Court, the Congress, and President and the Nation will do better this time around. People, said Santayana, who do not know their history are doomed to repeat it. We cannot afford another round of "separate but equal."

who believed the inferior scores were due to environmental factors. Jensen's article has recently been republished in his book GENETICS AND EDUCATION. In it he denies he is a racist and says he favors desegregation of schools, but proposes special curricula and methods for poor and black children in those schools.