

him, perhaps no less than letting him slip, has the potential of fulfilling Antony's prophesy.

THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION. By Charles A. Lofgren.¹ New York, N.Y.: Oxford University Press. 1987. Pp. vi, 269. \$29.95.

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Plessy v. Ferguson remains a bone in the throat of American constitutional law, thirty-five years after its supposed demise in *Brown v. Board of Education*. This new book by Professor Charles A. Lofgren helps us to understand why. The continuing problem with *Plessy* results from the intellectual weakness of *Brown*. By failing to mount a frontal and decisive attack on *Plessy*, Chief Justice Warren's opinion in *Brown* left open the door to the mischievous ambiguity in equal protection analysis which continues to plague us.³ While we know that Jim Crow was judicially dismantled on the authority of *Brown*, that case did not cleanly overrule *Plessy*, but held that "in the field of public education the doctrine of 'separate but equal' has no place."⁴ And as Professor Lofgren remarks: "As of mid-1986, *Shepard's Citations*, the standard 'finding aid' used by lawyers to trace subsequent judicial treatment of decisions, listed no case as having overruled *Plessy*." As early as 1955 Edmund Cahn, a wholehearted supporter of the outcome in *Brown*, regretted that the decision appeared grounded in the shifting sands of social science, and that it failed to end discrimination on the basis of a clear, constitutional principle.⁵

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3. When if ever are race-conscious remedies licit? *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), answered the question in the affirmative as regards racial assignment of pupils to schools to achieve that degree of racial balance the Justices held required as the remedy for a district's having maintained a dual school system in the past. In other contexts doctrine governing "affirmative action" is vaguely contoured and the Court deeply divided. See *United States v. Paradise*, 107 S. Ct. 1053 (1987); *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Local 28 Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019 (1986); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). And if *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442 (1987) (a Title VII decision holding that a marginally less qualified female may be promoted over a male in the absence of a history of past purposeful discrimination) has implications for racial affirmative action, the confusion becomes coruscant.

4. 347 U.S. 483, 495 (1954).

5. See Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

Ironically, *Brown* was decided the way it was because so many of the participants were convinced that as a matter of traditional constitutional interpretation *Plessy* was unassailable.⁶ They recognized that the generation that framed and ratified the fourteenth amendment had countenanced separation of the races in public facilities, including schools, and had not thought that the equal protection clause forbade the states from engaging in this kind of racial discrimination. Furthermore, they concluded that this "original intention" had been worked into the fabric of American law over the course of half a century, and there was no way within the ground rules of conventional constitutional argument and conceptions of the judicial role that *Plessy* could be attacked. The only way to get the desired result was to stress essentially nonconstitutional arguments, to engage in what we would call today a "noninterpretive" construction of the Constitution.

This view of *Brown*, which sees the opinion as necessarily noninterpretive, still commands respect. Those law professors who disparage interpretivism (or "originalism," as it is sometimes called) often observe that its inadequacy is conclusively demonstrated by its inability to justify the result in *Brown*.⁷

What Lofgren helps us to see is that the legal architects of the mid-1950s (and the constitutional theorists of the late-1980s) got it wrong—wrong in a way that will breed increasing strife until the error is corrected. For what was called for in Linda Brown's suit was not a flight from history, not a turning away from the framers of the fourteenth amendment. What was needed was an opinion that, while acknowledging that it was announcing new law which went beyond the consensus of 1866-1868, made it clear that the new rule ("no discrimination on grounds of race") had very respectable

6. Professor Alfred H. Kelly, who was an NAACP consultant in connection with *Brown*, was later quoted to the effect that he was faced with "the deadly opposition between my professional integrity . . . and my wishes and hopes with respect to a contemporary question of values, of ideals, of policy, of partisanship, and of political objectives. . . . The problem we faced was . . . the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the Court that we had something of a historical case. . . . It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts, and above all interpreting facts in a way to do what [Thurgood] Marshall said we had to do—'get by those boys down there.'" *Quoted in W. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 510 (1973). In fact, an historical argument was, finally, included in the plaintiff's brief, but it was neither very seriously offered, nor stressed by lead counsel. It was apparently ignored by the Court. That was too bad. The Justices could not have adopted Kelly's argument (it was, after all, wrong) but they might have built on it.

7. The *locus classicus* of this argument is M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 66-70 (1982), but it has become commonplace. See Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *YALE L.J.* 1006, 1049 (1987).

historical antecedents. What was needed was an explanation that, in the light of five decades of experience with “separate but equal,” the new rule was necessary in order to validate the primary purposes of the amendment. Walter Berns has recently reminded us that, far from contributing to the legitimacy of the outcome or protecting the Court against the inevitable charge that it was usurping the legislative role, “nothing in the Court’s opinion could persuade [critics] that the decision was rooted in, or issued from, the Constitution.”⁸ A clear constitutional statement could have fared no worse in the short run, and would have served much better in the end.

It is always easy to second guess busy men, who were about great works, in a political and intellectual climate different from our own. But in hindsight one may surely be permitted to wonder why it was that those involved in the *Brown* drama were so intimidated by *Plessy* as precedent even while wishing it away with every fiber of their beings.⁹ After all, there had been a famous dissent in *Plessy*—Justice John Marshall Harlan had attacked state-mandated racial discrimination in terms that rarely have been surpassed for eloquence. Harlan wrote:

In respect of civil rights, common to all citizens, 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.

“Our Constitution is color-blind,” Harlan continued. And he concluded prophetically:

State enactments, regulating the enjoyment of civil rights, upon the basis of race, . . . under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

By the 1950s, there were adequate models in American constitutional practice for relying on famous dissents to undermine rules of law which critics believed mistaken. One thinks of the eventual

8. Berns, *Government by Lawyers and Judges*, 83 COMMENTARY 17, 20 (1987).

9. See R. KLUGER, *SIMPLE JUSTICE* 543-81 (1975). The NAACP lawyers did, in fact, call for *Plessy* to be overruled, and had done so as early as *Sweatt v. Painter*, 339 U.S. 629 (1950). Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 4 (1979). But they did not attack hard on the point, and the attempt to put forward a principled alternative to *Plessy* was halfhearted. See R. BERGER, *GOVERNMENT BY JUDICIARY* 117-33 (1977). In any case the Justices apparently despaired of finding traditional arguments against *Plessy*. This question of the vigor of the attack on *Plessy* has surfaced again in an exchange between Randall Kennedy and Philip Elman, prompted by the publication in the Harvard Law Review of Elman’s memoir of his role in *Brown*. Elman, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987); Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987); Elman, *Response*, 100 HARV. L. REV. 1949 (1987). Elman has by far the better of this argument.

triumph of "clear and present danger" over "bad tendency,"¹⁰ and of the eventual vindication¹¹ of Justice Holmes's dissent in *Lochner v. New York*.¹² Couldn't Harlan's *Plessy* dissent have served as a base for a frontal intellectual assault on that case and its progeny?

The answer is that however moved opponents of segregation may have been by the rhetoric of Harlan's dissent, they thought its reasoning (which, as Lofgren points out, drew heavily on Albion Tourgée's brief for Homer Plessy) was bad. Besides, Harlan did not have the towering reputation of Holmes or Brandeis. He had taken a number of constitutional positions which by the 1950s had come to be regarded as indefensible¹³—indeed, Harlan was the one "eccentric exception" to which Justice Frankfurter referred in his attack on Justice Black's argument for the historical incorporation of the Bill of Rights into the due process clause in *Adamson v. California*. But did Harlan's *Plessy* effort really deserve its poor reputation?

Harlan was certainly wrong about how the generation which framed and ratified the fourteenth amendment defined "civil rights." In order to get hold of this, it is necessary to grasp the distinction, which was as natural to that generation as the air it breathed, between civil rights, political rights, and social rights and duties. Hear, for instance, Justice Field, dissenting in *Ex parte Virginia*, arguing that section one of the fourteenth amendment left "political rights, or such [rights] as arise from the form of government and its administration, as they stood previous to its adoption." The fourteenth amendment, Field wrote, "has no more reference to them [political rights, such as voting] than it has to social rights and duties, which do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals."¹⁴ Just as voting, a "political right," was not within the compass of section one, so most of the framers and ratifiers considered state-enforced racial separation to fall into the sphere of "social rights and duties," not civil rights. The paradigmatic civil rights were enumerated in the Civil Rights Act of 1866: owning property, entering into legally enforceable contracts, having access to the courts to sue, and so on. On this, Raoul Berger is certainly correct.¹⁵

10. *Herndon v. Lowry*, 301 U.S. 242 (1937).

11. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

12. 198 U.S. 45, 74 (1905).

13. Most prominently, Harlan maintained that the fourteenth amendment nationalized the Bill of Rights, and that inns and similar places of public accommodation were sufficiently "public sector" in character as to be covered by the fourteenth amendment. *Civil Rights Cases*, 109 U.S. 3, 26-62 (1883).

14. *Ex parte Virginia*, 100 U.S. 339, 367-68 (1879).

15. R. BERGER, *GOVERNMENT BY JUDICIARY* 119-21 (1977).

Granting all this, several things can be said for Harlan. First, he had the framers' general approach right. With respect to what they conceived to be civil rights, the supporters of the fourteenth amendment were clear about what was intended. It was that black men and white men should stand on an equal footing. What was intended, in other words, was that the law be color blind with respect to its subjects.

Second, while most of those who focused on section one during the framing debate and ratification probably thought it left the states free to classify by race, not everyone did. Others, as Lofgren notes, formed "a general impression . . . that negroes would . . . be admitted on the same terms and conditions as white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc."

Third, Harlan was able to use (and very adroitly) an earlier interpretation of section one, namely Justice William Strong's opinion for the Court in *Strauder v. West Virginia*. Strong, in 1880, appears to have understood clearly what the framers of the fourteenth amendment had not perceived: that political and social discriminations based on race would inevitably undercut any guarantees of equality. Thus Harlan, quoting Strong:

The words of the [fourteenth] amendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Fourth, Harlan's dissent embodies that clear constitutional basis for decision that was tragically missing in *Brown*. Harlan was wrong about the specific intentions of the generation which framed the fourteenth amendment. But it surely could have been argued that by the mid-twentieth century it was painfully apparent that enforced racial separation fatally undercut those civil rights which the framers *had* sought to protect. To have written such an opinion in *Brown* would certainly have been to announce "new law for a new day," but it would not have been "noninterpretive" review. Harlan's "color-blind Constitution" yields a neutral principle of constitutional law, and one which is rooted in a value the Constitution denominates as special.

This is the heart of the matter. As Lofgren puts it, the opinion in *Brown* "did not reject reliance on racial 'facts,' a central if not entirely explicit feature of Justice Brown's reasoning in *Plessy*." More important, the Court did not "wholeheartedly embrace Justice Harlan's color-blind Constitution." In fact,

Chief Justice Warren used an argument structurally similar to the one that Justice Brown had used in upholding Louisiana's conclusion that separation promoted the public's welfare. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, Warren held, the trial court's factual finding [in *Brown*] was amply supported by modern authority, a statement he [Warren] then documented through his soon-controversial Footnote Eleven, which cited seven studies by social scientists. In 1896, it is true, the Court had deferred to legislative judgment about "facts" of race, while in 1954 it deferred to a lower court's judgment, but in each instance conclusions about such "facts" entered into the reasoning. The Chief Justice himself saw his social science authorities as important because they rebutted Justice Brown's social science.

Let us be clear. The principle of no-discrimination (Justice Harlan's "color-blind Constitution") has three advantages over the social engineering approach adopted by Warren. First, an historical argument can be made in support of it—not quite the one Harlan himself made, but a plausible one. More important, no-discrimination (no governmental use of race as a category for classifying people) is a neutral legal principle; that is, it is the kind of basis of decision which provides guidance for the future and which gives the quality of law (and thus legitimacy) to the Court's decisions. Most important, a decision on the basis of a no-discrimination principle would have removed the equal protection clause from the shifting tides of fashionable opinion about which government policies will or will not lead to better race relations.

THE AUTHORITATIVE AND THE AUTHORITARIAN.

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Beginning with a poem, ending with a poem, and covering such topics as "MIND," "NATURE," "AUTHENTICITY," "TIME," and "FAITH," Professor Joseph Vining wishes to lay bare the "lawyer's dilemma" and its resulting "pain." The dilemma, the reader quickly discovers, does not concern insider trading, and the pain is not from reaching one's quota of billable hours. His book identifies the lawyer's dilemma with the fundamental choices of life and death, hope and despair. Its approach is more evocative than analytic, its form more rumination than argument, and its diction more metaphoric than literal. It thus defies and mocks attempts

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