IN THE SHADOW OF *PLESSY*

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INTRODUCTION

Some years ago Cass Sunstein wrote Lochner's *Legacy*,[1] a now classic essay on the significance and endurance of *Lochner v. New York*,[2] where the Court invalidated what was a basic wage and hours statute limiting the working hours for bakers because the law impermissibly infringed on the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment.[3] The assessment that this particular exercise of the police power amounted to an unconstitutional infringement of liberty rested in part on the Court's determination that the regulation did not fall within permissible categories of state authority. Holmes's famous admonition that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"[4] inaugurated a deluge of criticism on both substantive and institutional grounds.[5] Ultimately, *Lochner* was soundly repudiated as an example of misguided judicial activism, supplanted ultimately by the Court's far more deferential review of state exercise of the police

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[1] Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873 (1987).

[2] 198 U.S. 45 (1905).

[3] While allowing that state police power could legitimately impose limiting conditions on contracts, including contracts for labor, the Court ruled that the state had exceeded the scope of reasonable regulation because there was no reason to think that bakers as a class required paternalist protection, nor was the regulation required to safeguard public health. The Court intimated that the real impermissible motive was the legislature's desire "to regulate the hours of labor between the master and his employés (all being men, *sui juris*) in a private business." *Id.* at 64.

[4] *Id.* at 75. Holmes argued this: to hold that the state could limit contracts only where the police power was invoked to protect a weak class or secure public health was to constitutionalize a particular economic theory regarding the proper relationship between the state and its contracting citizens—in essence, a theory of non-intervention in the private domain absent special circumstances. In his view, however, a "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." *Id.* (Holmes, J., dissenting).

[5] *See, e.g.*, Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 464 (1916) (criticizing the Court for adopting and enforcing "18th century conceptions of the liberty of the individual and of the sacredness of private property").

power as well as the exercise of governmental power generally.[6] Over time, the received wisdom was that *Lochner* was a bad decision because the Court had usurped the inherent constraints on judicial power, and had launched an "illegitimate intrusion by the courts into a realm properly reserved to the political branches of government."[7]

Many have come to question the wisdom of *Lochner*, and in later years, even the wisdom of its critics. But the unique inquiry at the heart of Sunstein's essay was whether *Lochner* had really been repudiated. He argued it had not: despite being formally overruled, *Lochner* had reified a particular concept of neutrality that still maintained a grip on contemporary constitutional jurisprudence. As Sunstein put it, *Lochner* assumed:

> Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements. Whether there was a departure from the requirement of neutrality, in short, depended on whether the government had altered the common law distribution of entitlements. Market ordering under the common law was understood to be a part of nature rather than a legal construct, and it formed the baseline from which to measure the constitutionally critical lines that distinguished action from inaction and neutrality from impermissible partisanship.[8]

Sunstein argued if *Lochner* is thus understood, then it is not clear that it has been rejected because significant aspects of current law still rest on these assumptions.[9]

Notwithstanding critiques of this reading,[10] I still accept Sunstein's core insight.[11] Indeed, this Essay extends Sunstein's thesis in this re-

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[6] *See* W. Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937) (upholding a minimum wage law for women and rejecting a challenge grounded in liberty of contract because the Fourteenth Amendment does not protect an absolute freedom of contract or require the community "to provide what is in effect a subsidy for unconscionable employers").

[7] Sunstein, *supra* note 1, at 874.

[8] *Id.*

[9] Sunstein stated:

> Numerous decisions depend in whole or in part on common law baselines or understandings of inaction and neutrality that owe their origin to *Lochner*-like understandings. And if *Lochner* is understood in these terms, its heirs are not *Roe v. Wade*, and *Miranda v. Arizona*, but instead such decisions as *Washington v. Davis*, *Buckley v. Valeo*, *Regents of the University of California v. Bakke*, and various cases immunizing those who are thought not to be "state actors" from constitutional constraints.

Id. at 875 (citations omitted).

[10] *See, e.g.*, David E. Bernstein, Lochner's *Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) (arguing that Sunstein erroneously portrayed the *Lochner*-era Court as one that conceptualized the common law as the natural baseline from which to determine whether governmental regulation was a legitimate exercise of the police power).

[11] This is because, in my view, the central question is not whether *Lochner* led to a massive intrusion of the Supreme Court into state regulation—it did not. Nor is the issue whether the

spect: *Lochner*'s legacy is not the only legacy with which we live. We are still living in the shadow of a case that might be seen as *Lochner*'s antecedent—*Plessy v. Ferguson*.[12] *Plessy*'s endorsement of state-imposed racial caste, like *Dred Scott v. Sandford*'s[13] rejection of black citizenship, marks a long discredited racial logic far removed from current understandings of the law. In certain respects, that assessment is correct. But in telling and tragic ways, *Plessy* remains intact. Concepts of neutrality, federalism, and private ordering embraced in *Plessy* arguably still infuse key debates and framings of contemporary constitutional disputes.

Just as *Lochner* masked the inequities of the market as neutral, *Plessy* masked racial inequality as an accepted and neutral distribution of rights and entitlements. Hence, the structural inequality wrought by de jure segregation was ratified and legitimated as the equal distribution of rights and entitlements by race. Equal prohibition based on race amounted to equal treatment. *Lochner* deferred to the common law baseline of the markets; *Plessy* similarly deferred to the common law baseline of race and the notion of state sovereignty, despite the Fourteenth Amendment's assertion of the primacy of national citizenship and the mandate of equal protection.

Given the tenor of the times and the trend of prevailing precedent, it is plausible to argue, as some have, that *Plessy* was not a surprising or earth-shattering case.[14] But there is value in attending to *how* the Court arrived at *Plessy*, as that inquiry sheds insight on the mechanics of racial power, both historically and in the present. *Plessy* resolved that the Constitution protected a domain within which the state was free to impose rules of de jure segregation consistent with the command of equal protection. Segregation was thus permissible as a matter of state regulation that neither interfered with federal power over interstate commerce nor interfered with Fourteenth Amendment rights. This interpretation in effect further cemented the states' role in racial oppression by affirming that determinations

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Lochner-era Court ever allowed that the common law was not fixed, unchanging, and natural. The issue is whether the *Lochner* Court invalidated legislation as a matter of due process because it understood that unless legislation fell within specific domains of the police power such as public health and safety, it was constitutionally proscribed as a violation of neutrality as determined by a common law baseline. As I read it, Sunstein's insight concerns the relationship between government action, neutrality, and the status quo. The determination of what is a "subsidy" or violation of neutrality necessarily depends upon the determination of a baseline that is neither pre-political or self-evident. It is a choice.

[12] In 1896, the Supreme Court in *Plessy v. Ferguson* ruled that a Louisiana law mandating segregation of the races on railway cars was constitutionally valid. 163 U.S. 537 (1896).

[13] Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that "a negro of African descent" may not be a citizen of the United States).

[14] *See* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 5 (1987) (arguing that the case was not "especially controversial" and was largely "invisible").

of racial identity and the rights attendant to race were a function of state law that did not directly implicate constitutional concerns. From this vantage point, *Plessy* was not only situated within the narrow frame of equal protection as articulated by the post-Reconstruction Court; it was built within the edifice of federalism to insulate state discrimination from national intervention. Because segregation both cohered and conflicted with the needs of a national economy, the Court was necessarily engaged in the complex task of managing the shifting boundaries between state and national power. In affirming the authority of the state to impose de jure segregation within state borders, the Court played a critical role in consolidating state sovereignty over race and validating federalism as a constraint on national intervention to rectify inequality. In some critical ways, this presumption—that local law or interests are primary, even where the guarantee of equal protection is at stake—is still with us.

Plessy relied on the bifurcation of state and national power to authorize a reading of the Constitution that consigned to the states the all-critical question of allocating whiteness—a critical prerequisite of rights. At the same time, the Court was compelled to acknowledge the Fourteenth Amendment guarantees of national citizenship and equal protection. Yet, notwithstanding these constitutional commitments, the states were free to set inconsistent and highly contradictory rules regarding race in part because of notions of state sovereignty and investments in a particular understanding of federalism. *Plessy* re-authorized state control over matters of race and, in that sense, both hollowed out equal protection and federalized race. By saying that race was federalized, I mean to point to the fact that regulation of race and of the races was under the dual authority of both state and nation, and that notwithstanding the reordering of federal power under the Reconstruction Amendments and the grant of national citizenship, rights still derived first from state law. National power remained contingent and partial.

Current law functions within the shadow of *Plessy*, deploying analysis grounded in similar structural themes of neutrality, local control, and the limited character of federal power. The current Court's equality jurisprudence depends on distinctions between de jure and de facto segregation, prohibiting the former while naturalizing the latter: under current decisions, the first poses a constitutional problem while the latter does not. De facto segregation is simply the existing state of affairs produced by private choice, and unconnected to any past or ongoing discrimination.[15] In this regard, de facto seg-

[15] In *Oklahoma City v. Dowell*, for example, the Court held that federal court orders mandating school desegregation should end where the board has complied in good faith and "the vestiges of past discrimination have been eliminated to the extent practicable," even though end-

regation has become the neutral baseline and the normal state of affairs. This analysis is squarely within *Plessy*'s analytic frame that naturalized racial inequality is an artifact of local control, outside the realm of constitutional injury.

Presently, the Court's reading of equal protection further takes place within the same limited terrain of national power. It collapses the distinctions between race consciousness remediation and racial discrimination and assigns to both the same standard of review as though both were conceptually the same.[16] This too mirrors *Plessy*'s contention that because the racial exclusion of blacks from cars reserved for whites signified the same thing as the racial exclusion of whites from cars reserved for blacks, the exercise of the state police power was reasonable. Remedial legislation that attends to race is decidedly non-neutral and is subject to searching scrutiny while the enactment and enforcement of laws whose foreseeable consequence is the further entrenchment of racial inequality is insulated from meaningful review in part because to hold otherwise would entail judicial overreaching.[17]

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ing the school desegregation order would result in resegregation of the schools. 498 U.S. 237, 249–50 (1991). On this view, de facto segregation in the schools today is not connected to the history of school segregation. *But see id.* at 251 (Marshall, J., dissenting) (arguing that the Court's standard failed to consider "the threatened reemergence of one-race schools as a relevant 'vestige' of de jure segregation").

[16] *Compare, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (asserting that race conscious remediation even when authorized by federal enforcement powers is subject to strict scrutiny like de jure segregation), *with* Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that racial discrimination must be subject to strict scrutiny review). Of course, *Grutter v. Bollinger*, 539 U.S. 306 (2003), is the most recent statement by the Court applying strict scrutiny review: race conscious admissions policies at the University of Michigan Law School were found to be both narrowly tailored and justified by a compelling governmental interest. *But see* Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that the undergraduate race conscious admission policy did not meet strict scrutiny review because it was not narrowly tailored). This and other evidence would support the view that strict scrutiny is not "strict in theory and fatal in fact" as Gerald Gunther argued it was under the Warren Court. Gerald Gunther, *The Supreme Court 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Nevertheless, my point is that race conscious remediation is not the functional equivalent of racial discrimination such that the same standard of review should apply in the first instance. While recognizing that choosing a particular standard of review does not ineluctably lead to a certain outcome, I contend that the application of strict scrutiny to both state imposed racial inequality as well as programs designed to ameliorate the effects of racial inequality misdescribes social reality and is a serious conceptual error. *See Adarand*, 515 U.S. at 245 (Stevens, J., dissenting) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

[17] In *Adarand*, the Court held that the federal government's program to promote minority participation in federal contracting violates principles of consistency—that is that the rule is not neutral. 515 U.S. at 222. Strict scrutiny was therefore warranted. *Id.* On the other hand, in *Washington v. Davis*, the Court held that the administration of a test that produced racially disparate results for black police department applicants did not trigger strict scrutiny review in the absence of proof of discriminatory intent. 426 U.S. 229, 242 (1976). The Court reasoned that such a rule is required because of the Court's concern that requiring the state to justify the use

Although *Plessy* is generally considered a dead letter, the continuities between the racial reasoning of *Plessy* and current debates about race suggest a more complicated story. The particular formulation of separate but equal endorsed by *Plessy* has been discredited, but *Plessy*'s presumptions about race, neutrality, and the scope of state and national power arguably are with us still.

The argument proceeds as follows: Part I delineates the legal context from which *Plessy* emerged. By legal context I mean to imply more than the interface between segregation and equal protection. I also mean the multiplicity of ways in which racial segregation was enmeshed in complicated legal questions concerning the limits on state regulatory power, the scope of congressional power under the Reconstruction Amendments as well as in the common law of common carriers. Much of the literature on *Plessy* ignores or marginalizes this doctrinal history. As a result, our understanding of the case has been overdetermined by an equal protection framework. Broadening *Plessy*'s doctrinal history allows us to see how doctrines that are often treated as analytically distinct produced racial logics that coalesced in *Plessy* to form a solid jurisprudential foundation upon which the custom and practice of race segregation could comfortably rest. Part II exposes this foundation, revealing that *Plessy* helped to embed not only racial segregation but a variety of racial logics about racial identity, nationhood, and state sovereignty. Bound up in *Plessy* are notions about the separate spheres of both race and nation; blacks should not intrude on white sovereignty and the federal government should not intrude on state sovereignty. Part III argues that current equal protection jurisprudence continues to be situated within the jurisprudential architecture of *Plessy*.

I. THE LEGAL MATRIX OF SEGREGATION: COMMERCE, FEDERALISM, AND THE LAW OF COMMON CARRIERS

Plessy is an equal protection case, but it is also a decision that is grounded in federalism, the proper scope of congressional power, and the law of common carriers. Ultimately, the collective effect of interlocking rules from each of these domains was to render segregation a matter of local preference, immune from federal intervention. Determining whether state regulations proscribing or requiring segregation in transportation unlawfully intruded into the federal domain of interstate commerce was a persistent issue for both the Supreme Court and state courts. Beyond local boundaries, federal law legitimated interstate segregation by approving the regulatory author-

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of neutral practices that produced racially disparate impact would open up too many statutes and state practices to possible invalidation. *Id.* at 248.

ity of the railroads. Despite some considerable ambivalence about state imposed segregation, under the authority of the Interstate Commerce Commission, railroads later implemented segregation by regulation as a reasonable accommodation to culture and custom. National power again authorized local control. Like slavery that preceded it, the law accommodated and rationalized de jure segregation through the structure of federalism.

A. State Regulation and Commerce Power

De jure segregation was primarily enacted as a matter of state law. Yet, federal constitutional law was soon implicated as inconsistencies in local practice and custom gave rise to questions regarding whether state segregation statutes intruded on the congressional power to regulate interstate commerce. Both mandatory segregation and mandatory desegregation were tested in the courts under the Commerce Clause. The Supreme Court articulated a formal principle that state law could require interstate carriers to follow local rules only with regard to passengers traveling within the state: ostensibly, there could be no extraterritorial application of either a law imposing segregation or a law imposing desegregation. Notwithstanding the affirmation of neutral principle, the Supreme Court's application of it ensured that the state's capacity to enforce segregation was far more extensive than its ability to eliminate it.[18] In effect, state authority to regulate race was expansively read against a narrow notion of federal commerce power.

Consider two cases from the *Plessy*-era interpreting state law on the issue of access to public accommodations: *Hall v. De Cuir*[19] and *Louisville, New Orleans & Texas Railway Co. v. Mississippi.*[20] In *Hall* the plaintiff, Josephine DeCuir, a wealthy member of the "colored" Creole community, purchased first class passage on the steamship Governor Allen from New Orleans to her sugar plantation in Pointe Coupe Parish, Louisiana.[21] When she was denied access to the ladies' cabin, and forced to remain in a small cabin at the rear of the boat, she sued the Captain, John Benson, on the grounds that her mistreatment was

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[18] State court interpretations of state laws enacted in the wake of these decisions generally respected this principle and restricted the application of state laws imposing segregation to intrastate travel. *See* Joseph R. Palmore, *The Not-So-Strange Career of Interstate Jim Crow: Race, Transportation, and the Dormant Commerce Clause, 1878–1946*, 83 VA. L. REV. 1773, 1776 (1997). Nevertheless, the point here is that the Supreme Court's articulation of a standard did not foreclose its implementation on terms that ensured decidedly non-neutral results.

[19] 95 U.S. 485 (1877).

[20] 133 U.S. 587 (1890).

[21] *See* Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race and the Road to* Plessy *1855–1914*, 13 L. & HIST. REV. 261, 284–85 (1995).

both a constitutional violation and "an indignity to her personally," as a well-educated and well-traveled lady.[22] Consistent with the Louisiana Constitution,[23] state law required that public conveyances provide equal rights and privileges to all passengers regardless of race.[24] DeCuir recovered damages in the amount of $1,000.[25] The boat captain appealed the case charging that Louisiana's equal accommodations law was an unconstitutional interference with the federal power to regulate interstate commerce and an abridgement of his Fourteenth Amendment rights to liberty and property. Common carriers had the authority to issue rules and regulations, he argued, and given the customary practice of segregation on riverboats, the Governor Allen had a right to segregate its passengers.[26]

The Louisiana Supreme Court disagreed and affirmed the award of damages to DeCuir. The court held that Louisiana's equal accommodations law was not a regulation of interstate commerce but rather "was enacted solely to protect the newly enfranchised citizens of the United States, within the limits of Louisiana, from the effects of prejudice against them."[27] The law governing common carriers prohibited arbitrary discrimination between passengers. Moreover, even apart from the statute, the Fourteenth Amendment barred the railroad from treating DeCuir differently than a white passenger.[28]

Five years after the initial lawsuit, the Supreme Court reversed.[29] Even though DeCuir's ticket was for travel within the state, the Supreme Court deferred to the lower state court's determination that the law extended to those carriers engaged in interstate commerce. The Court relied on the fact that the steamboat was licensed by Congress, and that the route taken at times ran inside and outside the state of Louisiana.[30] Moreover the Court reasoned, "If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship."[31]

Of course, the same argument could apply to laws requiring race separation: inconsistent state laws could produce "great inconven-

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[22] DeCuir v. Benson, 27 La. Ann. 1 (La. 1875).

[23] LA. CONST. art. II (1868) ("All persons, without regard to race, color, or previous condition . . . shall enjoy the same civil, political, and public rights and privileges . . . .").

[24] LA. REV. STAT. LAW § 456 (1869) ("[C]ommon carriers . . . shall have the right to refuse to admit any person to their railroad cars . . .[*p*]*rovided*, [s]aid rules and regulations make no discrimination on account of race or color . . . .").

[25] *De Cuir*, 27 La. Ann. at 2.

[26] *See* LOFGREN, *supra* note 14, at 129.

[27] *DeCuir*, 27 La. Ann. at 3.

[28] *Id.* at 5–6.

[29] Hall v. De Cuir, 95 U.S. 485, 485 (1877).

[30] *Id.* at 486.

[31] *Id.* at 489.

ience and unnecessary hardship." The Court, however, asserted that only Congress could regulate commerce on navigable waters and that in light of congressional inaction, under common law, the captain of the Governor Allen was free to adopt reasonable rules and regulations governing passengers on his boat.[32] The Court admonished in its closing paragraphs, "If the public good requires such legislation, it must come from Congress and not from the States."[33]

In point of fact, such legislation had been adopted by Congress in the form of the 1875 Civil Rights Act that provided for equal access to all places of public accommodation and conveyances.[34] The Court however, assiduously ignored the implications of the legislation for the case. Instead, state court decisions upholding the separate but equal formula in public education were cited in a lengthy concurring opinion as supporting authority for the holding that separation of the races was customary and reasonable.[35]

Seemingly, *Hall* should have settled the question of the permitted scope of state regulation of public conveyances engaged in interstate commerce; insofar as such regulations impacted interstate commerce, they were invalid. Yet in *Louisville, New Orleans & Texas Railway Co. v. Mississippi* the Court upheld an indictment against an interstate railroad for failure to provide racially segregated accommodations as required by an 1888 Mississippi law.[36] Appealing from a conviction below, the company argued that given that the statute in *Hall* was held invalid under the Commerce Clause, the Mississippi statute mandating race segregation was similarly infirm. Surely, if a state could not prohibit race discrimination in a way that touched interstate commerce, neither could it compel it. Notwithstanding the clear implications of precedent, the Supreme Court dis-

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[32] *Id.* at 490.

[33] *Id.* at 490.

[34] *See infra* notes 56–59 and accompanying text (discussing the Court's ruling invalidating the Civil Rights Act). *See also* LOFGREN, *supra* note 14, at 132 (citing LOUIS POLLAK, EMANCIPATION AND LAW: A CENTURY OF PROGRESS IN 100 YEARS OF EMANCIPATION 166–67 (Robert Goldwin ed., 1964) (noting that *DeCuir* erroneously identified the situation as one of congressional inaction, and ignored Congress's adoption of the 1875 Civil Rights Act).

[35] Hall v. DeCuir, 95 U.S. at 504–05 (citing, *inter alia*, State v. McCann, 21 Ohio St. 198 (Ohio 1871) (upholding segregated schools in Ohio) and Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (Mass. 1853) (reaching a similar conclusion regarding schools in Boston)). Notably, the concurrence pointed to the fact of sex segregation in education as justification for the reasonableness of race segregation:

> The Supreme Court of the State [of Ohio] held that it worked no substantial inequality of school privileges between the children of the two classes in the locality of the parties; that equality of rights does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school. . . . Age and sex have always been marks of classification in public schools throughout the history of our country.

Id. at 504–05.

[36] 133 U.S. 587 (1890).

tinguished *Hall* on the grounds that, in that case, the state court had ruled that the statute applied to interstate carriers—a finding treated as conclusive by the Supreme Court on review. Similarly here, there was no violation of the Commerce Clause because the state court said the law did not affect interstate commerce. Thus, the state court's determination of the issue was conclusive.

Certainly one explanation of these two cases is that the Court was result driven: it simply was opposed to desegregation. Yet, regardless of biased motive or intent, it is worthwhile to consider the analytical structures deployed to achieve this outcome. State imposed desegregation presumptively was directed at interstate passengers and thus was unlawful. Race segregation was a matter of state prerogative presumably because its effects fell only on intrastate travel. Determinations of the interstate effects of state regulation were treated as questions for state courts and those assessments were treated as conclusive. On the other hand, desegregation could only be imposed by Congress. Of course, under the framework of the *Civil Rights Cases*, Congress was in turn constrained as state failure was a predicate to the valid exercise of the enforcement powers.[37] This restraint was then imposed at the same time that the states were given a domain within which they could freely discriminate. This was yet another reflection of the critical role of federalism in administering segregation.

B. The Scope of Congressional Power Under the Reconstruction Amendments

Not only was federal commerce power restricted from invading state authority over segregation, the enforcement powers granted to Congress under the Reconstruction Amendments were similarly constrained by a particular vision of what federalism required. Essentially, national power could only be invoked where there was clear evidence of state failure to protect constitutionally guaranteed rights. This understanding of the proper relationship between state and national power was worked out in part through the particulars of segregated transportation where competing values of economic liberalism and modernization, stable racial hierarchies, and the demand for equality were in play.

The facts on the ground changed in the wake of the war and Emancipation, but the judicial frame through which they were interpreted did not. The basic framework permitted segregation to emerge and flourish. For many whites, the end of slavery clearly trig-

[37] The Civil Rights Cases, 109 U.S. 3 (1883) (holding that under the Fourteenth Amendment "Congress's legislation must necessarily be corrective in its character, addressed to counteract and afford relief against state regulations or proceedings").

gered deep anxiety about the shifting legal and social status of blacks. Indeed, it could be said that "the value of white skin dropped when black skin ceased to signify slave status."[38] While historians dispute the question of why and when de jure segregation emerged,[39] they largely concur that the segregation of the social space was a crucial site of contention.[40]

The approach of some carriers was to "simply carve[] a space for black passengers from the already defined physical space."[41] Steamboats, as the most rigidly segregated public conveyances, reallocated space set aside for second class passengers or freight, creating the "colored cabin" or the "freedmen's bureau."[42] Some railroads assigned all blacks—women and men—to the smoking car, or a portion of the smoking car, the rough equivalent of second class accommodations.[43] In Virginia because blacks were assigned to second-class cars no matter what fare they paid, some blacks argued for the use of separate cars as a way of securing better accommodations.[44] As Booker T. Washington noted, "It is not the separation that we complain of, but the inequality of accommodations."[45] Other rail carriers solved the problem by offering second class fare—the only ticket the majority of

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[38] Eva Saks, *Representing Miscegenation Law*, 8 RARITAN REV. 39, 47 (1988). Saks points out that this was but one of five "assaults on white property": "First, Confederate money became worthless. Second, white southerners lost their property in slaves. . . . Third, land values dropped, both in absolute price and as valued relative to the growing industrial wealth of the North. Fourth, Lincoln and his successors intimated that major land distribution might be undertaken by the federal government." *Id.*

[39] *Compare* JOEL WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877, at 275 (1965) (arguing that "while slavery necessitated a constant physical intimacy," emancipation precipitated an immediate and revolutionary separation of the races so that "[w]ell before the end of Reconstruction, separation had crystallized into a comprehensive pattern which, in its essence, remained unaltered until the middle of the twentieth century"), *with* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974) (arguing that legalized segregation did not immediately emerge in the wake of the war but followed only after the struggle between elite Democrats and Populists was resolved by striking an agreement to exclude blacks).

[40] *See* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920, at 259 (2001) (noting the contestation between African Americans, railroads and Southern legislators, and Congress over regulation and segregation of public transit); WOODWARD, *supra* note 39, at 31–65 (describing the competing positions and forces involved in fighting and establishing de jure segregation); Howard N. Rabinowitz, *More than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. AM. HIST. 842, 849 (1988) (noting differing accounts of the reasons, but concurring that something significant in the 1890s fueled segregation).

[41] WELKE, *supra* note 40, at 259.

[42] *Id.*

[43] Welke, *supra* note 21, at 276.

[44] *See* LOFGREN, *supra* note 14, at 13 (noting that a black legislator actually introduced legislation calling for the creation of separate but equal facilities in order to secure improvements).

[45] *A Speech Delivered Before the Women's New England Club*, (Jan. 27, 1890), *in* 2 THE BOOKER T. WASHINGTON PAPERS, 27–28 (Louis Harlan ed., 2000).

blacks could afford.[46] Of course, this meant that black passengers rode in the company of white men; indeed, "these practices did not segregate all people of color from all whites; they segregated most people of color from white ladies."[47]

None of these arrangements offered accommodations to blacks in any way equal to those reserved for whites. The conditions were particularly problematic for black women and children who were forced to ride in dirty, smoke-filled cars, exposing them not only to symbolic or dignitary harm; under prevailing social norms, it put them at risk of sexual assault.[48] While the policy of racial separation was often justified on the grounds of protecting white women from black men's lust, subjecting black women to encounters with white men in smoking cars was treated as unproblematic in light of the longstanding practice of white male sexual violation of black women.[49]

Given the uncertain boundaries between race and gender as reflected in the spatial arrangements on rail carriers, it is unsurprising that enforcement was uneven and arbitrary with black women on occasion being allowed and then later denied access to ladies' cars on

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[46] Welke, *supra* note 21, at 275.

[47] *Id.* at 276.

[48] *Id.* at 261. Booker T. Washington's description of Alabama's rail system in 1885 is illustrative of the conditions:

> (a) that in most cases the smoking car and that in which colored people are put are the same; (b) when not put directly into the smoking car they are crammed into one end of a smoking car with a door between that is as much open as closed . . .; (c) on some of the roads the colored passengers are carried in one end of the baggage car, there being a partition between them and the baggage or express; (d) only a half coach is given to the colored people and this one is almost invariably an old one with low ceiling and it soon becomes crowded almost to suffocation and is misery to one knowing the effects of impure air. The seats in the coach given to colored people are always greatly inferior to those given the whites. The car is usually very filthy. There is no carpet as in the first class coach. White men are permitted in the car for colored people. Whenever a poorly dressed, slovenly white man boards the train he is shown into the colored half coach. When a white man gets drunk or wants to lounge around in an indecent position he finds his way into the colored department.

Letter from Booker T. Washington to the Editor of the Montgomery, Alabama Advertiser (Apr. 24, 1885), *in* 2 THE BOOKER T. WASHINGTON PAPERS, *supra* note 45, at 270–71, *cited in* LOFGREN, *supra* note 14, at 16.

[49] Welke contrasts two cases to illustrate the point. In 1894 Cornelia Wells, an unmarried black woman, was traveling alone in the colored compartment of a train when two drunken white men were ejected from the first class car and put into the smoking car. The men verbally and physically assaulted her, asserting that all "damn negroes were whores and would do it," exposing their private parts and ultimately physically forcing her down between the benches. When the conductor entered to collect tickets, the men left. Bailey filed suit but lost at trial and on appeal. On the other hand Pearl Morris, an unaccompanied white woman who was compelled to ride in a Pullman coach car with black men who did not speak to her, made no advances and by all accounts were sober and respectable, recovered $2000 in damages against the railroad for the injury of being compelled to be in the presence of black men. Welke, *supra* note 21, at 314–15.

the same line.[50] These inconsistent practices provided fertile ground for litigation.[51] In response, the railways denied that the facilities were inferior and endeavored to focus attention on the reasonableness of the rules rather than the capricious nature of their enforcement.[52] The adoption of the federal Civil Rights Act of 1875 initially gave a tremendous impetus to the demand for equality in access to public facilities and places of public accommodation, both through direct action and through the courts.[53] As originally proposed by Senator Charles Sumner, the bill not only proscribed racial discrimination in public accommodations, it also banned discrimination in public schools, jury selection, and churches. Sumner advocated for the bill from his death bed, and, two months after he passed away, the bill was enacted in the Senate essentially intact except for the provision relating to churches.[54] However, as Republican political will waned and white insurrectionist violence increased, the bill emerged from the Forty Third Congress in 1875 stripped of any reference to schools.[55] Court intrepretation further narrowed the reach of the statute even as to public accommodations: lower federal courts interpreted it to require only separate but equal accommodations for the races.[56] According to one district judge in the circuit court, this interpretation was the only reasonable one given the fact that

> [a]ny law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feelings and long established prejudices, and would be justly odious .... The civil rights bill neither imposes nor was intended to impose any such social obligation. [It] ... leaves social

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[50] *Id.* at 261.

[51] Indeed, the majority of cases challenging this form of segregation were brought by black women. *Id.* at 268. Among the litigants was Ida B. Wells, renowned journalist and leader of anti-lynching campaign. *Id.* at 270, 281. In New Orleans, a sufficient number of challenges were successful that white businesses became cautious about violating equal accommodations laws. *See* LOFGREN, *supra* note 14, at 20.

[52] WELKE, *supra* note 40, at 262.

[53] The Act provided: "[A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement ... and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Pub. L. No. 114, 18 Stat. 335 (1875). Woodward reports that in North Carolina for example, blacks in different parts of the State asserted their rights in hotels, theaters, railroads, and steamboats. WOODWARD, *supra* note 39, at 28.

[54] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 533 (1988).

[55] *Id.* at 556.

[56] *See* LOFGREN, *supra* note 14, at 135 (describing decisions of lower federal courts upholding racial segregation despite the Civil Rights Act).

rights and privileges to be regulated, as they have ever been, by the customs and usages of society.[57]

Ultimately, this separation of spheres into the political and the social was central to the Court's logic in the *Civil Rights Cases*,[58] which struck down the Civil Rights Act of 1875. Writing for a nearly unanimous court, Justice Bradley's opinion held that the black plaintiffs who were denied access to various public facilities complained of harms that were not the result of state action, but were rather the acts of private individuals. Hence, unless it could be established that the state had engaged in the proscribed conduct, Congress was without authority to enact the provision.[59] The Thirteenth Amendment was held to be similarly unavailing though it included no state action requirement and simply banned involuntary servitude.[60] While the Court conceded that the Amendment was directed at both the institution of slavery as well as its "badges and incidents,"[61] it concluded that "mere discriminations" by private individuals did not qualify as constitutional violations.[62]

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[57] Charge to the Grand Jury, The Civil Rights Act, 30 F. Cas. 999, 1000–01 (C.C.W.D.N.C. 1875) (No. 18,258). *Hall v. DeCuir*, 95 U.S. 485 (1877), was also deployed in undermining enforcement of the Civil Rights Act. In 1879, in the case of *Green v. City of Bridgeton*, 10 F. Cas. 1090 (E.D. Ga. 1879) (No. 5754), the plaintiff and her three-year-old nephew sought to travel on a steamboat from Darien, Georgia to Savannah. When she attempted to sit on the upper deck in the only section of the boat with accommodations appropriate for a woman with a baby, she was denied entry and ordered to the lower deck. She exited the boat at the next stop rather than sit where directed, or be forcibly thrown from the boat. Green then sued in federal district court for violation of the Civil Rights Act. The trial court looked to *Hall* for support for the claim that the common law of common carriers governed the case. *Hall* was read as permitting congressionally licensed carriers like the City of Bridgeton to adopt reasonable regulations such as those requiring separation of the races, for it "prevented contacts and collisions arising from natural and well known repugnancies, which are likely to breed disturbances . . . ." *Id.* at 1093 (quoting W. Chester Phila. R.R. Co. v. Miles, 55 Pa. 209 (Pa. 1867)). This outcome was also endorsed by *Bertonneau v. Board of Directors of City Schools of New Orleans*, 3 F. Cas. 294, 296 (C.C.D. La. 1878) (No. 1360a), which held that the segregation in the public schools did not violate the Fourteenth Amendment. According to the court, "[a]ny classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States." 3 F. Cas. at 296.

[58] 109 U.S. 3 (1883).

[59] *Id.* at 11–12.

[60] *Id.* at 23–24.

[61] *Id.* at 20.

[62] *Id.* at 25. In a passage remarkable for its ahistoricism, Bradley reasoned as follows:

> [A]n act [refusing service or access to blacks] has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State. . . . 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 guests he will entertain, or as to the people he will take into his coach or cab or car . . . . When a man has emerged from slavery, and by aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws . . . .

Id. at 24–25.

Prior to the *Civil Rights Cases*, *Strauder v. West Virginia*[63] had seemed to offer some hope that the Fourteenth Amendment was not a dead letter: in that case, the Court overturned a state law that barred blacks from jury service on the grounds that blacks had "the right to exemption from unfriendly legislation against them distinctively as colored—exemptions from discriminations, imposed by public authority, which imply legal inferiority in civil society, lessen the security of their rights, and are steps toward reducing them to the condition of a subject race."[64] Similarly, aspirations may have been raised by *Yick Wo v. Hopkins*, an 1886 decision that invalidated the administration of a local ordinance to effectively deny laundry licenses to all Chinese applicants while awarding them to whites.[65] Yet, neither *Strauder* nor *Yick Wo* was really grounded in a sense that the Court had a constitutional obligation to eliminate racial subordination as part of a new constitutional order in which equality was guaranteed as a national right. Rather, in both cases the Court acted to invalidate the imposition of a special burden on a particular class. Although the line between citizen and slave had been removed, the underlying delineations between state sovereignty and national power, between political and social rights, between subordinate and superior races, was not disrupted significantly by the Reconstruction Amendments and implementing legislation.

Pace v. Alabama[66] proved to be the more significant precursor to *Plessy*. Under Alabama law, adultery or fornication between a same-race couple was punishable by a maximum penalty of two years imprisonment or hard labor; if the same conduct was committed by a white person and "any negro, or the descendant of any negro to the third generation" the penalty was for two to seven years imprisonment or hard labor.[67] A unanimous Court held that while the purpose of the Fourteenth Amendment's Equal Protection Clause was

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Justice Harlan vigorously dissented in terms that foreshadowed his dissent in *Plessy*. Harlan noted that as the majority admitted, the Thirteenth Amendment did more than abolish the institution of slavery; it also empowered Congress to "remove certain burdens and disabilities, the necessary incidents of slavery," and "to secure to all citizens those fundamental rights which are the essence of civil freedom." *Id.* at 35 (Harlan, J., dissenting). Most significantly, Harlan argued that the majority's interpretation of the Fourteenth Amendment as entirely negative or prohibitory in character ignored the affirmative grant of citizenship in the first clause that made all persons born or naturalized in the United States citizens of the nation. *Id.* at 46. This grant was intended to secure certain essential rights, privileges, and immunities, including most significantly, "exemption from race discrimination in respect of any civil right belonging to citizens of the white race." *Id.* at 48.

[63] 100 U.S. 303 (1880).

[64] *Id.* at 308.

[65] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[66] 106 U.S. 583 (1883)

[67] *Id.*

"to prevent hostile and discriminating state legislation against any person or class of persons,"[68] the statute in question did not discriminate but rather imposed different punishments for different offenses, one committed by same race couples, while the other proscribed offenses that could be committed only by a couple of different races. In the latter case "[t]he punishment of each offending person, whether white or black, is the same."[69] *Plessy* then extended the logic of *The Civil Rights Cases* to cases where state action was clear. *The Civil Rights Cases* were not simply about demarcating the private-public distinction, but were also about the limits of national power vis-a-vis the state, which, despite the Fourteenth Amendment, had retained sovereign power. *Plessy* clarified that the limits imposed by dual federalism prevailed over the rights guaranteed by the Reconstruction Amendments. *The Civil Rights Cases* curtailed the capacity of Congress to act against what were asserted to be private actors. *Plessy* elaborated that even where the state imposed the restrictions, they were presumptively reasonable and imposed no constitutional injury. The two cases combined to foreclose any form of national intervention in state ordering of its racial affairs, except in the most narrow of cases.

C. The Law of Common Carriers

While the Court developed the framework for state exercise of authority over regulation of the races, the actual doctrine that legitimated racial separation as equal treatment developed in court cases involving common carriers in both state and federal courts three decades before *Plessy*.[70] Within the evolving and expanding regulatory frame of the common law of common carriers, courts at both state and federal levels held that carriers were required to conduct business in a "reasonable manner" and, with some exceptions for diseased or dangerous persons, were therefore required to provide equal service to all passengers who paid or offered to pay the requisite fare. At the same time, carriers had the right to establish reasonable rules and regulations, directed towards a range of goals including public safety, comfort, and community welfare. This authorized carriers to set different classes of fare and accommodations and even permitted the classification and separation of passengers within the same fare class as long as they received substantially equal accommodations. Under this logic of "equal but separate," even though the establishment of ladies' cars on railroads—the separate first class cars

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[68] *Id.* at 584.

[69] *Id.* at 585.

[70] This argument is fully developed in Lofgren's book. *See* LOFGREN, *supra* note 14, at 116–47.

for women and the men who accompanied them—was a clear example of unequal accommodations, it was accepted as natural and, hence, lawful.[71] Importantly, de jure segregation also arose as part of the emergent modern regulatory state.

In an effort to forestall the total abdication of national responsibility signaled in the *Civil Rights Cases*, James O'Hara, a black Republican legislator from North Carolina, introduced an amendment to prohibit racial discrimination in interstate travel in the bill pending in Congress to create the Interstate Commerce Commission ("ICC").[72] Although the amendment passed, Southern Democrats quickly offered their amendment to the amendment that qualified the requirement of equality: furnishing separate and equal accommodations would not be considered discrimination.[73] The proposal died in that congressional session, and the Interstate Commerce Act adopted in 1887 made no specific reference to racial discrimination other than section three, which barred railroads in interstate commerce from giving "unreasonable preference or advantage to" or imposing "unreasonable prejudice or disadvantage on" anyone.[74] In two complaints alleging violations of section three brought by black passengers who had been denied access to or ejected from first class ladies' cars, the ICC adopted an interpretation that paralleled the common law standard: racial segregation was not per se unreasonable and indeed would be permitted under the Act so long as the accommodations were substantially equal.[75]

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[71] As Welke noted, because the establishment of ladies' accommodations fit prevailing social norms, even when white men challenged their exclusion from ladies' cars, the courts rejected the claims and asserted nothing more than that extant social standards were evidence of the reasonableness of the regulations. WELKE, *supra* note 40, at 327.

[72] *Id.* at 343.

[73] The final amended provision as approved by the House was, as Lofgren states, a "farce." LOFGREN, *supra* note 14, at 141–42. In addition to requiring railroads to provide equal facilities and accommodations it contained the following provisos:

> But nothing in this act shall be construed to deny the railroads the right to provide separate accommodations for passengers as they may deem best for the public comfort or safety, or to relate to transportation relating to points wholly within the limits of one State; Provided, that no discrimination is made on account of race or color; and that furnishing separate accommodations, with equal facilities and equal comforts, at the same charges, shall not be considered a discrimination.

Id.

[74] WELKE, *supra* note 40, at 344.

[75] *See* LOFGREN, *supra* note 14, at 142–43. In part, the holdings in the cases were the product of what had become the common understanding—that separate but equal was a reasonable compromise on the question of equality. Moreover, some blacks did not challenge segregation. For example, Lofgren contends that in one case involving the violent ejection of William Councill from a car reserved for whites, Councill's lawyers admitted the railroad's right to classify by race and argued only that the accommodations were unequal. This reflected Councill's own political stance that "included a commitment to Negro self help within a segregationist framework." *Id.*

Thus, in establishing national control over interstate travel, federal administrative law affirmed that racial segregation was a proper regulatory standard. Simultaneously, the decisions provided a template for the states as to how they might reassert control over the status of blacks. Three months after the Interstate Commerce Act became law, Florida adopted the first separate coach law and in 1888 Mississippi followed suit.[76] The result was that while state separate coach laws incorporated the common law standard of separate but equal, segregation was now legally mandated rather than a matter of railroad policy.[77] This usurpation of corporate discretion was not welcomed by the railroads. While corporations were willing to decide as a matter of policy to segregate or exclude black passengers, the imposition of separate car laws "forced carriers to act as agents of the state" and compelled them to take on the cost of segregation.[78] For the railroads, segregation was a matter of customer preference the strength of which was to be weighed against the economic burden of accommodating it. Public carriers resisted the loss of autonomy imposed by state regulation and sought to retain some flexible market ordering. However, while railroads initially resisted state segregation laws, as the laws were legitimated (at least as to enforcement within state borders) they reassessed the value of white privilege to their customers, and gradually embraced the "local custom" of equal but separate accommodations.

In fact the custom of separate accommodations for ladies was the template used to justify race segregation. In one influential case,[79] Mary (Vera) Miles contested a regulation that required blacks to sit at one end of the cars. After she was ejected when she refused to comply with the regulation, Miles sued and was awarded damages. The railway appealed to the Pennsylvania Supreme Court on the grounds that if she had been assigned to a seat that was not inferior, she had no grounds to recover. The court ruled that while no one could be excluded from a public carrier on the basis of race, the railroad's policy of assigning blacks to different seats simply took account of racial differences and did not imply racial inferiority.[80] Like the separation between women and men, such separation was a reflection of the "natural, legal and customary difference between the black and white races."[81] Thus, "[b]lack was to white as male was to female."[82] This holding was issued notwithstanding the fact that in November 1867,

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[76] *See* WELKE, *supra* note 40, at 345.

[77] *Id.*

[78] *Id.*

[79] W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 210 (Pa. 1867).

[80] *Id.*

[81] *Id.*; *see also* WELKE, *supra* note 40, at 213.

[82] WELKE, *supra* note 40, at 328.

the same month of the decision, the Pennsylvania legislature had outlawed race discrimination on railroads in the state.[83] Thus, under a rule of formal non-discrimination, racial segregation in interstate travel was ratified as legitimate regulation by common carriers. The assertion of federal regulatory authority through the Commerce Clause was in part a mechanism for enforcing interstate segregation. In this sense, an interstate regulatory scheme was standardized and segregation was incorporated as part of a nation building project.

I have attempted to show that *Plessy*'s doctrinal lineage transcends equal protection. To the extent that segregation was made possible by and expressed through other doctrinal regimes, it is crucial to consider whether and to what extent those regimes laid the foundation for and became constitutive of *Plessy*. As will become clear, I do not mean to suggest that, for example, Commerce Clause jurisprudence appeared in *Plessy* as such. Instead, my point is that the racial logic underlying the Supreme Court's adjudication of Commerce Clause cases—the distinctions between the public and the private, the reasonableness of racial custom, the importance of state autonomy—has enormous currency in *Plessy*. A similar point can be made about the law of common carriers and the jurisprudence on the scope of congressional power under the Reconstruction Amendments. That is to say, *Plessy* is buttressed by the racial logics instantiated in both doctrinal areas. I will now specifically consider the work accomplished in *Plessy*.

II. WHAT *PLESSY* DID

This Part articulates precisely what the *Plessy* Court did—as a matter of formal law and racial logic. As a predicate to the discussion, I outline the broader social and political processes that made the case, and racial segregation more generally, common sense. Part I charts *Plessy*'s doctrinal genealogy, while this Part examines its social and political genealogy. While the discussion is decidedly summary, it helps to explain why *Plessy* "made sense" normatively, politically, and doctrinally.

A. Origins

The law contested in *Plessy* was enacted despite the fact that the Louisiana State Constitution of 1868 provided that all public conveyances and businesses "shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on ac-

[83] *See* LOFGREN, *supra* note 14, at 121.

count of race or color."[84] By 1890 Louisiana was clearly in line with the contemporary trend: between 1887 and 1892 nine states enacted laws requiring separation of the races on railways and public conveyances.[85] Of the nine statutes, five imposed criminal fines or imprisonment on non-compliant passengers.[86] Despite debates about the extent to which segregation exceeded law,[87] it is generally accepted that the period around 1890 marked a significant increase in the turn to legislatively mandated racial segregation.[88] The question is why?

In *The Strange Career of Jim Crow,* C. Vann Woodward argues that systemic de jure segregation was the end of a process of "reconciliation of estranged white classes and the reunion of the Solid South."[89] The end of slavery and the radical upheaval following the end of the Civil War produced a crisis around resolving the place of the negro.[90] Within this unsettled space, Woodward argued that competing ideologies among whites had not yet coalesced around de jure segregation. Democrats wavered on the issues while Populists on the other hand saw blacks as potential allies, as blacks and poor whites shared "the kinship of a common grievance and a common oppressor."[91] Ultimately, political fissures among whites were resolved by targeting blacks as the source of all political and economic ills.[92]

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[84] LA. CONST. art. XIII (1868).

[85] For a summary of the provisions of the laws of this period, see LOFGREN, *supra* note 14, at 18–23. For example, Florida's law regulated first class service only and required the sale of first class tickets to "respectable persons of color" and with the provision of separate accommodations equal to those for whites. *Id.* at 22. Tennessee, the first state to enact legislation mandating segregation on an equal but separate formula, required the railroads to provide separate cars or partitioned cars in which "all colored passengers who pay first class passenger rates of fare may have the privilege to enter and occupy, and such apartments shall be kept in good repair, and with the conveniences, and subject to the same rules governing other first class car[s]." *Id.* at 21. This notably did not require segregation but this was a distinction without real significance. What was ignored apparently was the requirement that the separate facilities be equal. *Id.*

[86] *Id.* at 22.

[87] According to one historian of the period, it is important to note that in context, segregation may have actually "marked an improvement in the status of blacks, rather than a setback" given that it often replaced not integration but racial exclusion. Rabinowitz, *supra* note 40, at 845–46.

[88] As Rabinowitz acknowledges:

> It is now clear that something highly significant happened in southern race relations during the 1890s. Though many segregation laws were already on the books, . . . [t]hose later laws, however, even when coming in new areas, did not create a new system of segregation. Rather, they added the force of additional laws to a system already widespread in practice.

Id. at 849.

[89] WOODWARD, *supra* note 39, at 82.

[90] *Id.* at 23 ("To the dominant whites it began to appear that the new order required a certain amount of compulsory separation of the races.").

[91] *Id.* at 61 (quoting Tom Watson, leader of the Populists).

[92] As Otto Olsen put it: "Once damned for the solidarity of his vote [for Republicans], the Negro was now damned by both sides [Democratic and Populist Party] for dividing it, and again

Both Populists and the Democratic Party gravitated to black disfranchisement as the solution to their differences and a way to make common cause: the elite wing of the Democratic Party sought to promote black disfranchisement as a way of currying favor with the Populist movement that had previously seen blacks as potential allies.[93] In many states, the Democratic Party led organized efforts to disfranchise black voters concurrent with the proliferation of segregation laws.[94] In fact, the franchise was broadened to extend voting rights to property-less white men at the same time that blacks were disfranchised, arguably shifting the property required for voting from land to whiteness.[95] This expansion of democratic rights for whites was accompanied by the contraction of black rights in a deepening cycle of oppression.[96] Nowhere was this more apparent than in the area of the franchise. By 1868, a million black voters were eligible to vote and in 1872, 700,000 voted in the presidential elections. Before 1867, there were no blacks in public office; by 1870, fifteen percent of all officeholders in the South were black. By the early 1900s these gains had been completely reversed.[97] In Louisiana for example, in 1896 there were 130,334 black voters. By 1904 there were 1,342.[98] While Louisiana had elected a black governor, and over 120 black legislators served in the state legislature through Reconstruction, the last black member left by 1900. There was not another black legislator in Louisiana until 1967.[99]

Black subordination thus was central to the process of democratization for poor whites. The consolidation of de jure segregation in the South constituted one of the material benefits of racial exclusion and subjugation that functioned to stifle class tensions among whites.

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became the scapegoat and victim of the unsolved problems of the South." OTTO H. OLSEN, *Introduction* to THE THIN DISGUISE: TURNING POINT IN NEGRO HISTORY 1, 22 (Otto H. Olsen ed., 1967).

[93] LOFGREN, *supra* note 14, at 24–25.

[94] *See id.* (noting that in all states that passed a separate car law except two, there "was concurrent—and in fact, generally more vigorous debate over black disfranchisement").

[95] Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 260 n.26 (1983) (stating that the disfranchisement of free black voters often occurred at the same time that property requirements were abolished for white voters).

[96] As Woodward reports, progressivism among whites was linked to racial exclusion. One Southern educator argued: "In fine, . . . disenfranchisement of the negroes has been concomitant with the growth of political and social solidarity among the whites." WOODWARD, *supra* note 39, at 92.

[97] *See* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 1–16 (1976) (reporting on the organized disfranchisement of the black vote in the South in the period following Reconstruction).

[98] WOODWARD, *supra* note 39, at 83–85. This pattern was common all over the southern states.

[99] *See* CHARLES VINCENT, BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION 220 (1976).

Even when the lower class whites did not collect increased pay as a consequence of white privilege, whiteness still yielded what W.E.B. DuBois called a "public and psychological wage."[100] These were relative benefits certainly, but crucial nonetheless.

Gender also figured into the complex matrix of race relations. That is, as Barbara Welke has argued, part of the answer to the question of why things changed in the 1890s lies in "[t]he unwavering goal of white Southerners to protect white womanhood, the embodiment of the idea of the South."[101] Historically, railroads and steamboats had separated passengers by sex and class, creating privileged facilities for women. When women of color sought "the privileges of their gender[and] challenged courts to justify a system that would require a woman of color paying first-class fare to accept [inferior] accommodations,"[102] the law of common carriers responded by permitting carriers to impose race segregation on the condition that they provided substantially equal accommodations—equal but separate to all passengers in the same fare. Reluctant to take on the additional expense imposed by such a requirement, many carriers began to allow "respectable" women of color to have access to first class ladies' accommodations. The eroding wall of separation "guarding Southern white woman's sacred place—and hence white supremacy"—produced the apprehension that legislative action was required to maintain the lines that were otherwise insufficiently safeguarded.[103]

Control of interracial intimacy, like control of access to public accommodations, was a key test of states' rights. For southern states in particular, the expansion of federal power through the Reconstruction Amendments opened up the possibility that interracial sex and interracial marriage might become lawful as a matter of federal law.[104] The result was that anti-miscegenation provisions were included in the post Civil War constitutions of six Southern states[105] and several states passed laws tightening the restrictions of and penalties for miscegenation in the wake of Reconstruction.[106]

Thus, the rationale for segregation was framed within a modernization project and rectification of the error of Reconstruction. Stabi-

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[100] W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 700 (1935) (David Levering Lewis ed., Simon & Schuster 1992). For a cogent and rigorous exposition of the DuBois thesis, see DAVID ROEDIGER, THE WAGES OF WHITENESS (1991).

[101] Welke, *supra* note 21, at 266.

[102] *Id.*

[103] *Id.* at 266–67.

[104] Saks notes that Reconstruction and the growth of national power "put state court judges of miscegenous bodies—white men charged with upholding state criminal law against federal constitutional challenges—on the defensive on many levels: sexual, economic, professional and political." Saks, *supra* note 38, at 44.

[105] *Id.*

[106] *Id.* at 48.

lizing the uncertain racial dynamics was cast as a key to stabilizing the labor market and reintegrating the South into the national economy.[107] This formed a counterweight to the railroad's quest for autonomy and efficiency. In a sense, both were competing discourses of progress. By the time that a law "to promote the comfort of passengers" that required the provision of "equal but separate accommodations for the white, and colored races" on railways in the state was introduced into the Louisiana legislature in May of 1890,[108] according to one daily newspaper in New Orleans, there was "an almost unanimous demand on the part of the white people of the State for the enactment of such a law."[109]

B. The Case and the Decision

Plessy developed as the culmination of a racial project that had enlisted federal constitutional law with regard to the scope of the congressional power, federalism, and the common law. Common carriers under common law had developed the framework of railway regulation that affirmed equal and separate as "reasonable" regulation, even if interstate travel congressional power did not extend to the direct regulation of race and racial subordination and the commerce power did not proscribe the intrastate exercise of state police power that enacted segregation.

Louisiana's "equal but separate accommodations" law had initially been challenged on the grounds that its application to interstate travel conflicted with federal authority over commerce. In February of 1892, Daniel Desdunes purchased a first class ticket to Mobile, Alabama on the Louisville and Nashville Railroad and took a seat in a car reserved for whites. When arrested and charged with a criminal offense under the enactment, Desdunes asserted that as a passenger in interstate travel, only Congress had the authority to regulate his travel.[110] Under the prevailing rules, Desdunes argued that either the law did not apply to interstate travel or, if it did, it was unconstitutional under the Commerce Clause. While Desdunes awaited a ruling in his case, on May 25 the Louisiana Supreme Court decided the case of *Louisiana ex rel. Abbott v. Hicks*.[111] In *Hicks*, a train conductor was prosecuted for admitting a black passenger traveling interstate into a car reserved for whites. The Louisiana court held that such regula-

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[107] *See* James Cobb, *Segregating the New South: The Origins and Legacy of* Plessy v. Ferguson, 12 GA. ST. U. L. REV. 1017, 1018 (1996) (arguing that racial separation emerged as a part of efforts to industrialize the South and reintegrate it with the national economy).

[108] *See* 1890 La. Acts 111, at 152–54.

[109] *See* Olsen, *supra* note 92, at 9 (citing NEW ORLEANS DAILY PICAYUNE, JULY 10, 1890).

[110] LOFGREN, *supra* note 14, at 34.

[111] 11 So. 74 (La. 1892).

tions were valid only as to travel within the state; its application to interstate passengers constituted a regulation of interstate commerce prohibited by the Constitution.[112] The ruling effectively determined the outcome in Desdunes's case and the charges were dismissed.

A new plaintiff was found to challenge the intrastate application of the law. On June 7, 1892, Homer Plessy purchased a first class ticket on the East Louisiana Railroad for passage from New Orleans to Covington, Louisiana. He entered the train and took the seat in a compartment reserved for whites. As previously arranged, the conductor of the train ordered Plessy to leave the car "under penalty of imprisonment" and to go to the section of the train reserved for "the colored race." When Plessy refused, a police officer was called, Plessy was forcibly ejected from the train and imprisoned in the New Orleans parish jail, where he was charged and, after posting $500 bond, was released.

Because the case presented only the question of intrastate travel, Plessy's lawyers could not specifically argue that segregation interfered with interstate commerce, but in their briefs they had pointed out that conflicting state standards could not be considered reasonable regulation, evoking an image of inconsistent state laws that could impede the flow of commerce. Plessy's lawyers appealed to the need for central authority—federal power—to control state legislative authority.

Similarly, determinations of race were fraught, as they were underwritten by inconsistent standards that were haphazardly applied. A common carrier could not be authorized to distinguish between citizens according to race, given the difficulty of making racial classifications. Indeed, Plessy challenged that the state had no power to confer to any person the authority "to determine [race] without testimony or to make the rights or privileges of any citizen of the United States dependent on the fact of race or its determination by such unauthorized person, to compel the citizen to accept such determination, or to make refusal to comply with same a penal offence."[113] Determinations of racial identity were complex questions of law and fact beyond the competence and authority of any railway employee. The observations of such employees were far from scientific, certain, or clear, and additionally embodied white domination.[114] As one of the

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[112] *Id.* at 76.

[113] Defendant's Plea to Information at 17, Louisiana v. Plessey, No. 19,117 (Crim. Dist. Ct. Orleans Parish, filed with petition Nov. 22, 1892), *pet. denied Ex Parte* Plessy, 11 So. 948 (La. 1892) (No. 11,134), *aff'd sub nom.* Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 15,248).

[114] They could not be given the pervasive nature of "racial mixing": "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. . . . [Because of the ban on slave marriages] in

briefs argued: "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?"[115]

The Act further deprived a citizen of a remedy for a wrong, since it provided that neither the railway company nor the conductor would be liable for damages arising from the placement or removal of passengers.[116] Because the state was without power to grant exclusive rights and privileges to one race that were denied to another, the Act established "an invidious distinction and discriminate[d] between citizens of the United States based on race" in violation of the Thirteenth and Fourteenth Amendments.[117]

The Louisiana Supreme Court held that the Act did not violate either Amendment.[118] Citing the *Civil Rights Cases*, the court concluded that the case did not implicate rights guaranteed by the Thirteenth Amendment, as segregation in public facilities was not a badge or incident of slavery.[119] The sole question was whether a statute requiring railways traveling intrastate to provide separate cars for the races and requiring passengers to confine themselves to those cars violated the Fourteenth Amendment.[120] The court conceded that *Louisville, New Orleans & Texas Railway v. Mississippi*[121] had not specifically resolved the matter, since that precedent governed only the question of whether passengers could be racially classified and excluded. Nevertheless, the court concluded that the question of restricting passengers to accommodations separated by race was not difficult in light of numerous decisions establishing the "principle that, in such matters, equality, and not identity or community, of accommodations is the extreme test of conformity to the requirements of the [F]ourteenth [A]mendment."[122]

Precedent from other jurisdictions and other eras was enlisted to support this principle. Citing *Roberts v. City of Boston*,[123] a pre-Civil War Massachusetts case upholding the legality of race segregation in public schools, the court argued that neither racially separate schools nor racially separate facilities violate the equal protection guarantee even

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a majority of cases, even an approximate determination . . . is an actual impossibility." Brief for Plaintiff in Error at 10, Plessy v. Ferguson, 163 U.S. 537 (1896), *available at* 1893 WL 10660.

[115] *Id.* at 11.

[116] 1890 La. Acts 111, at 152–54.

[117] Defendant's Plea at 18, Louisiana v. Plessey (No. 19,117).

[118] *Ex parte* Plessy, 11 So. 948 (La. 1892).

[119] *Id.* at 949.

[120] *Id.* at 950.

[121] 133 U.S. 587 (1890) (upholding an indictment against an interstate railroad for failure to provide racially segregated accommodations as required by an 1888 Mississippi law).

[122] *Ex parte Plessy*, 11 So. at 950.

[123] 59 Mass. (5 Cush.) 198 (1850).

if motivated by some animus, because law had no bearing on sentiment or the social structure of racial hierarchy. As *Roberts* stated: "This prejudice if it exists, is not created by law, and probably cannot be changed by law."[124] Thus, the regulation in *Plessy*, like that in *Roberts*, was a reasonable exercise of the police power in which a distinction was drawn on the basis of race. This distinction did not constitute unlawful discrimination. Indeed,

> [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.' Obviously, if the fact charged be proved, the penalty would be the same whether the accused were white or colored.[125]

This was the essence of equality.

In large part, the Supreme Court's opinion in *Plessy* endorsed the logic of the state court's decision. There was no conflict with the Thirteenth Amendment as a statute "which implie[d] merely a distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color" did not undermine legal equality or "reestablish a state of involuntary servitude."[126] As the Louisiana state court argued, the Fourteenth Amendment similarly posed no bar as the rule imposed equal penalties on the races, and regulated the state's domestic commerce—a domain outside of the reach of federal law.[127] The law was self-evidently reasonable given that a contrary finding would contradict precedent and critically establish a new precedent authorizing the removal of similar laws establishing separate schools. Like the Louisiana Supreme Court, the Court pointed to the ubiquitous practice of school segregation as evidence that these distinctions were non-discriminatory, unlike the exclusion of blacks from juries as in *Strauder v. West Virginia*.[128] The Court further cited *Roberts* as evidence that these practices and this interpretation were sound.[129] Against the reading of the *Civil Rights Cases* offered by Plessy's counsel, the Court asserted that its holding supported the validity of the law: the case established that the Fourteenth Amendment empowered Congress to act only where the state had acted to undermine or subvert "funda-

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[124] *Id.* at 209.

[125] *Ex parte Plessy*, 11 So. at 950.

[126] Plessy v. Ferguson, 163 U.S. 537, 543 (1896).

[127] *Id.*

[128] 100 U.S. 303 (1880) (overturning a state law that barred blacks from jury service).

[129] *Plessy*, 163 U.S. at 544–45 (citing Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850)).

mental rights specified in the amendment."[150] Such rights were not implicated in a law commanding the enforced separation of the races in intrastate travel.[151] The law was inherently neutral in its treatment of the races, imposing penalties on blacks and whites alike for violating its proscriptions.

The case then was simply a matter of whether Louisiana's judgment about its own local "established usages, customs and traditions" was to be supplanted by the Court.[152] Reasonableness was the touchstone and according to the *Plessy* majority, "there must necessarily be a large discretion on the part of the legislature."[153] The Court's reasoning respected and upheld segregation as a local prerogative immune from federal intervention. The sense of the majority opinion was that to do otherwise would offend local sovereignty and the basic ordering of federalism.

This same sensibility infused the Court's discussion of Plessy's claim that the train conductor's seating assignments by race amounted to an arbitrary and unauthorized deprivation of the property in whiteness that offended constitutional requirements of due process. The initial move was to avoid the issue altogether on the grounds that the issue of Plessy's race did not "properly arise on the record."[154] Because there was nothing to indicate that Plessy had been improperly classified, no claim for a lack of judicial process in reviewing an improper classification would lie. The record however

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[150] *Id.* at 546–47.

[151] "[W]e think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . . ." *Id.* at 548.

[152] *Id.* at 550.

[153] *Id.*

[154] *Id.* at 549. This assertion reprised Judge Ferguson's answer to the application for the writs:

> Respondent respectfully avers that nowhere in the information against the said Homer A. Plessy . . . is it alleged either that the said Homer A. Plessy was a white man or a colored man, or that he belonged to the white race or to the colored race; nor is it anywhere in the . . . . plea to the jurisdiction [filed by Plessy] either pleaded, averred, or admitted that the said Homer A. Plessy is a colored man or belongs to the colored race . . . . Respondent further avers that instead of pleading, averring, or admitting that [he] was of and did belong to the colored race, the said Homer A. Plessy, on the contrary, declined and refused, either by pleading or otherwise, to acknowledge and admit that he was in any sense or in any proportion a colored man.

Answer of Respondent at 23, *Ex Parte* Plessy, 11 So. 948 (La. 1892) (No. 11,134), *aff'd sub nom.* Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 15,248).

Ferguson argued that the affidavit made before the recorder attached to the petition for a writ of prohibition was not part of the proceedings in the court below. Therefore, Ferguson claimed, "Respondent respectfully represents that, so far as the proceedings in his court are concerned, he does not, cannot, and will not know until the trial of the said Homer A. Plessy . . . whether [he] was a white man or a colored man insisting upon going into and remaining in a compartment of a coach to which, by reason of his race or color, he did not belong." *Id.* at 24.

was replete with evidence concerning the question of Plessy's race both as a part of the state's case against Plessy and his defense against it. While the information filed against Plessy had failed to specify his race, it stated that the conductor had assigned Plessy to the coach used for the race to which he belonged, and that he unlawfully insisted on going into a coach to which by race he did not belong.[135] The affidavit of the arresting officer filed before the Recorder's Court and attached to the petition for the writs, asserted that Plessy was a passenger of "the colored race."[136] Moreover, Plessy's petition for writs of prohibition and certiorari had alleged that Plessy was "of mixed Caucasian and African descent in the proportion of seven-eighths Caucasian and one-eighth African blood."[137] In another document filed with the Court by Plessy's lawyers, he was described as an "octoroon."[138] Despite the Court's claim that the determination of Plessy's race was not properly raised by the record, in fact there was little doubt that the record contained facts pertaining to Plessy's racial identity albeit he did not identify himself as "white" or "colored" in the explicit terms of the statute. Further, the pleadings left no doubt that race and the authority to determine it were at the heart of his case.

While not ceding the point, the Court turned to the question of improper racial assignment assuming that it had been properly presented. The Court concluded that if Plessy were white, any injury to his reputation would be adequately compensated by an action for damages against the company, given that counsel for the state had conceded that the statute's liability exemption for conductors was unconstitutional.[139] Here the Court rested on the by now familiar assumption that state law determinations of this issue precluded any

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[135] *Id.*

[136] *Id.*

[137] Writs of Prohibition and Cert. at 1, *Ex Parte* Plessy (No. 11,134).

[138] The Assignment of Errors filed with the application for the writ further asserted that "[t]he statute impairs the right of passengers of the class to which relator belongs, to wit, octoroons, to be classed among white persons, although their color be not discernable in their complexion, and makes penal their refusal to abide by the decision of a railroad conductor in this respect." Assignment of Errors at 49, *Ex Parte* Plessy (No. 11,134).

[139] The Court stated:

> It is claimed by [Plessy] that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. 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.

Plessy, 163 U.S. at 549 (emphasis in original).

meaningful constitutional question for the Court to consider: Plessy's claim of misclassification raised no constitutional concern as race was a matter to be determined by the law of the state.[140] At the same time, however, the Court's decision lent support to the notion of race reputation as a property interest that required the protection of law through actions for damages. It did not specifically consider any particular rule of race definition, but it protected the boundaries of whiteness even as it denied the constitutional relevance of race determinations within a regime of enforced racial segregation.

Notwithstanding the conflict between jurisdictions that set the standard for whiteness as "a preponderance of [white] blood" as distinct from a rule requiring three fourths white "blood,"[141] the Court deferred to state law as the legitimate source of racial definitions, even as it declined to consider Plessy's racial status. The only qualification imposed by the Fourteenth Amendment was formal state neutrality: that the statute proposed the imposition of penalties for black and white alike and rested on the fiction of equal but separate accommodations was sufficient to meet the constitutional standard. At the same time the Court affirmed state power to maintain racial classifications that were arbitrary, conflicting, and grounded in the inherent asymmetry of white domination, the Court emphasized the neutral aspect of the law as evidence that race was irrelevant to the case. Disconnecting racial identities from subordination, past and present, allowed the Court to legally reconstruct white and black as formally equal racial categories, whose boundaries were properly determined by state law. In this regard, Plessy's constitutional claim rested upon and ultimately was swallowed by the deference to state sovereignty. Equal protection was hollowed out and race was federalized on terms consistent with the pre-Reconstruction constitutional structure. While situated within a larger national scheme, like slavery, segregation was a domestic institution, largely immune from federal intervention.[142] This vision of federalism was then critical to justifying and legitimating de jure segregation.

The legislation at issue in *Plessy* "represented not so much an initial resort to law, but a change in the place of segregation within the

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[140] *Id.*

[141] The Court stated: "It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States . . . . But these are questions to be determined under the laws of each State and are not properly put in issue in the case." *Id.* at 552 (citations omitted).

[142] *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (holding that the Constitution prohibited states from enacting laws that prevented the use of force in returning individuals into slavery as such legislation unlawfully inhibited or interfered with the right of slaveowners to the return of their property).

legal matrix."[143] That change placed law more squarely in the forefront of ratifying what had been common practice but now took on increased importance in disciplining the potential for black freedom, restoring racial and economic order, and reuniting the nation. *Plessy* arguably played an important role in consolidating the national identity as white in the post-Reconstruction period. The consignment of blacks to second class cars was the daily and public re-instantiation of their status as second class citizens who, while formally included in the nation, could not in any way stand for the nation.[144] In affirming the legitimacy of that status, *Plessy* inaugurated a new formalist account of race and equality that facilitated the continuation of racial subordination even within a revised constitutional framework. Notwithstanding the explicit enactment of constitutional authority to eliminate racial subjugation, and implicit restraints on state power imposed by the Commerce Clause, *Plessy*'s conception of power remains grounded in a commitment to federalism that translated into protection for state authority to impose and legitimate privately imposed racial inequality.

III. *PLESSY*'S CONTEMPORARY MEANING

Of course, rules of equal prohibition like those in *Plessy* are no longer seen as consistent with the constitutional mandate of the Fourteenth Amendment. The absurdity of *Plessy* and the basic reason de jure segregation has been repudiated is that, as Harlan argued, the Court ignored the obvious and conclusive evidence that segregation was the product of the intent to impose racial subordination. However, contemporary Supreme Court jurisprudence coheres comfortably with *Plessy*'s conceptions of neutrality and federalism. *Plessy*'s asymmetrical neutrality is most evident in the Court's justification for application of strict scrutiny review to rules implicating race. *Plessy*'s deference to state authority in limiting the scope and indeed the pos-

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[143] LOFGREN, *supra* note 14, at 201.

[144] As Toni Morrison has pointed out:

> It is no accident and no mistake that immigrant populations . . . understood their "Americaness" as an opposition to the resident black population.
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> . . . .
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> Deep within the word "American" is its association with race. To identify someone as South African is to say very little; we need the adjective "white" or "black" or "colored" to make our meaning clear. In this country, it is quite the reverse. American means white . . . .

TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 47 (1992). Indeed, it could be said that "*Plessy* was a landmark case not because it drastically altered the direction of legislation and juridical thought, but because it concluded the process of transfiguring dual constitutional citizenship into dual racial citizenship that had unfolded since the end of Reconstruction." Eric Sundquist, *Mark Twain and Homer Plessy*, 24 REPRESENTATIONS 102, 111 (1988).

sibility of any federal intervention is most evident in the recent cases involving the scope of Section 5 powers. In this respect, the logic of *Plessy* has not been fully repudiated.

In *Plessy*, the Court abandoned the conception of race as a natural hierarchy—what Neil Gotanda calls status race—and embraced formal race, in which race is seen as a "neutral, apolitical description[], reflecting merely 'skin color' or region of ancestral origin . . . unrelated to ability, disadvantage, or moral culpability."[145] Under *Plessy*'s logic, race became a formal identity category disconnected from history and from subordination, past and present. As Gotanda has argued, *Plessy*'s shift to a formalist account of race was a major contribution to sustaining racial hegemony.[146] Indeed, *Plessy* initiated an alternate construction of race that has proven highly durable and adaptable to changing conditions: the idea is that whatever race is (a matter of biology, a question of state law, a set of social customs), all racial identities are the same and all racial distinctions are prohibited whether for good or bad reasons. These are the principal justifications invoked today for the imposition of strict scrutiny to all forms of state invocation of race, even when deployed to remediate acknowledged state imposed racial injuries: white and black or, for that matter, all other non-white racial categories are symmetrically situated and thus the same equal protection analysis applies.[147]

My point is not that the material significance of race is precisely the same now as it was in 1896. Rather, my argument is that the Court's current conceptualization of neutrality mirrors that of the *Plessy* Court and produces a similar result: racial inequality is virtually irremediable under the Constitution. While the line has moved with regard to what counts as racial discrimination—rules of equal prohibition based on race now look plainly unconstitutional—the prevailing logic has reconstituted a conception of race which renders the

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[145] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 4 (1991).

[146] Gotanda points out:

> Formal-race and status-race offer two differing interpretations of Jim Crow segregation. Under the status-race approach, which assumes the subordinated status of blacks, racial segregation by custom or statute reflects a "common-sense" understanding of the "natural" racial hierarchy; in contrast, the formal-race, color-blind approach assumes "equal protection of the law" based on common "citizenship." Given these assumptions, racial segregation is simply a legislative differentiation that must be considered to have no social meaning.

Id. at 38.

[147] Since 1989, the Court has moved the doctrinal framework on race-conscious remediation from tentative approval and intermediate review in split opinions to a solid majority in favor of strict scrutiny of affirmative action programs. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding that a race-conscious licensing program adopted by the federal government was subject to intermediate review), *overruled by* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (holding that the proper standard of review for all race-conscious affirmative action programs is strict scrutiny).

asymmetrical allocation of power, access, and rights by race as constitutional and consistent with the equal protection guarantee. The *Plessy* Court relied on formal race—the idea that race has no social meaning or relevance—in deciding that the Louisiana statute requiring racial separation in public carriers was consistent with the Equal Protection Clause.[148] So, too, does the prevailing majority of the current Court rest its analysis upon the assertion that race is fundamentally irrelevant and signals nothing more than skin color.

Just as the *Plessy* Court's conception of equality was deeply intertwined with its particular view of federalism and state sovereignty, the current Court's rationales reveal these same interconnections. That such a relationship exists is perhaps unsurprising: as the Court stated in *San Antonio Independent School District v. Rodriguez*, "every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system."[149] What is striking is the similarity between current and past conceptions of federalism and the limits of national power.

Decisions have resuscitated *Plessy*'s interpretation of the Equal Protection Clause that assigned to the federal government a subordinate role relative to the states in protecting the right to be free from discrimination. In so doing, the Court has embraced a version of federalism and states' rights that echoes *Plessy*'s segregationist logic.

Notable evidence that the Court is in the grips of an era long past is *United States v. Morrison*, which struck down a section of the Violence Against Women Act that authorized civil actions against perpetrators of gender-motivated violence.[150] Here the Court rejected congressional authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment to enact the law because the measure violated principles of dual federalism and state sovereignty, both of

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[148] Thus, as I have argued, "the Supreme Court's insistence on the extension of strict scrutiny to all uses of race, even when deployed to remediate long-standing patterns of racial inequality, represents the repackaging of the formalist precepts about race implicit in the reasoning and holding of the Court's majority in *Plessy*." Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1766 (2001). Other scholars have similarly critiqued the racial formalism at the heart of *Shaw v. Reno*, 509 U.S. 630 (1993). In that case, the same majority that decided *Adarand* invalidated the creation of majority-minority congressional districts as a remedy for past voting rights violations because a "reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Id.* at 647. As a result, all efforts to remedy the egregious patterns of racial exclusion of minorities from political power are subjected to the same level of review as the underlying violations that gave rise to the remedy. Consequently, "*Shaw* fits squarely into a tradition of abstract, formalistic judicial actions, emblemized by the infamous [*Dred Scott*] and [*Plessy*] decisions, which did so much to buttress white supremacy." J. MORGAN KOUSSER, COLORBLIND INJUSTICE 7 (1999).

[149] 411 U.S. 1, 44 (1973).

[150] 529 U.S. 598, 627 (2000).

which limit the federal government's power to enforce antidiscrimination laws. Because the state's authority is primary, the Court held that Congress was powerless to act against individual, as distinct from state, actors.[151] The Court came to this conclusion despite a voluminous record establishing that states had systematically failed to protect or to vindicate the civil rights of women like the plaintiff, who had been victimized by sexual assault.[152] *Morrison*, remarkably, reached backward to the post-Reconstruction era, citing the *Civil Rights Cases* as precedent to support its reading of the Fourteenth Amendment partly on the grounds of "the insight attributable to Members of the Court at that time[, who each] had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment."[153] Presumably the fact of proximity in time to the framing of the Fourteenth Amendment afforded the post-Reconstruction Court greater interpretive authority, but this claim requires the complete disregard of the role of that earlier Supreme Court in ignoring the history of the Reconstruction Amendments. The genesis of the Fourteenth Amendment lies in the historic failure of the states to protect the rights of their citizens.[154] Indeed like the *Plessy*-era Court, the Court in *Morrison* turned a blind eye to history and contemporary reality, specifically here the abysmal record of state failure in enforcing equality.[155]

The *Morrison* Court's hostility to congressional action here is grounded in the asserted need to cabin federal legislative power lest it disrupt the balance between state and national authority. More specifically, *Morrison*'s logic is rooted in the proposition that the Constitution did not confer on Congress the power to encroach upon the authority and rights of the states; thus, federal efforts to enforce anti-

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[151] *See id.* at 621–26.

[152] *See id.* at 628–36 (Souter, J., dissenting).

[153] *Id.* at 622.

[154] *See* Sarah Louise House, Note, Alden v. Maine*: Protecting the States at the Expense of the People*, 62 LA. L. REV. 275, 289 (2001) (arguing that the Civil War Amendments were passed to address the South's failure to protect the rights of newly emancipated black people and that in so doing, Congress intended to change the relationship between the states and national power with regard to rights).

[155] As Robin West argues:

> [T]he Equal Protection Clause and the Fourteenth Amendment within which it appears, read as forbidding the states to neglect to protect their citizens, envision[] a thoroughly *political*, not legal, response to such failures: the clause empowers Congress, not the Court, to address those failures through federal legislation. The response envisioned by the Fourteenth Amendment itself, to states' failure to protect their citizens against violence, in other words, is passage of legislation such as an anti-lynching law, a law restricting hate groups, or the Violence Against Women Act. In all cases, the envisioned federal legislation responds to the failure of states to protect citizens against the adverse affects of unchecked private violence.

Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1, 5–6 (1999) (emphasis in original) (citations omitted).

discrimination law cannot infringe on state sovereignty. The underlying vision of the proper relationship between state and national power animating the majority's view is the nineteenth century vision of federalism under which the state's imposition of de jure segregation as well as its determinations of racial identities were domestic regulations immune from federal intervention.[156]

Decisions limiting the power of Congress to enact laws implicating equality concerns have been predicated on the view that only valid exercises of Congress's Section 5 powers can abrogate the state's sovereign immunity guaranteed by the Eleventh Amendment.[157] Here, too, state sovereignty is jealously guarded against the national government's attempt to enforce anti-discrimination norms and laws against the state. It is state prerogatives that are given primacy, not the need to vindicate the constitutional rights of the state's citizens.

CONCLUSION

Given the massive social change that has occurred since *Brown v. Board of Education*[158] more than fifty years ago, it may seem implausible to assert that we are still living within the framework of a case that *Brown* ostensibly repudiated. And of course, in profoundly important ways that world has changed since *Plessy*. Even conservative scholar Robert Bork noted that *Plessy* could no longer be sustained because the background circumstances changed.[159] Justice Harlan's assertion in 1896 that "[e]veryone knows that the statute had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons,"[160] exposed that even then the underlying circumstances were a far cry from the formal equality proclaimed by the majority. What has been more resistant to change however is the notion that the principal danger to liberty lies in a robust vision of equality that might somehow supplant state autonomy and the values

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[156] Robert Post and Reva Siegel assert:

> [T]here is nevertheless something telling in *Morrison*'s recourse to these decisions of the first Reconstruction. . . . [The cases relied upon by *Morrison*] present an account of our federal system in which there are large stretches of state municipal law free from federal interference.
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> This was the understanding of federalism that pervasively shaped the Court's interpretation of the Constitution in the decades after the Civil War.

Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 483 (2000).

[157] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[158] 347 U.S. 483 (1954) (holding that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, violates the Equal Protection Clause of the Fourteenth Amendment).

[159] ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 74–76, 81–82 (1990).

[160] Plessy v. Ferguson, 163 U.S. 537, 557 (1896).

of federalism. *Plessy*'s underlying default to state sovereignty reiterated a pattern that continues to cast a long shadow over today's understandings of the relationship between state and national authority in the critical realm of equality. As we move fully into the twenty-first century, we would do well to move out of the shadow and into the light.