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Barry P. McDonald

A Reluctant Apology for *Plessy*: A Response to Akhil Amar

Barry P. McDonald*

I. INTRODUCTION

In this symposium dealing with nominees for the five worst Supreme Court decisions in that institution's history, I have been assigned the unenviable task of mounting a defense for one of the most notorious. In its 1896 decision in *Plessy v. Ferguson*,[1] the Court affirmed the concept of "separate but equal" and placed its blessing upon the legal foundations of the Jim Crow era which endured for much of the twentieth century (indeed, until the same institution saw the injustice of *Plessy* and reversed course in *Brown v. Board of Education*[2]). When I accepted this challenge, the only saving grace I could see was the opportunity to square off against Akhil Amar in a constitutional law conference. But after digging deeper into the decision and its legal and historical context, I was surprised to find myself agreeing with the conclusion of several noted historians that the constitutional case for the result reached in *Plessy* was arguably much stronger than the contrary result.

This essay will be my attempt to justify this unexpected conclusion. It will, in short, be a reluctant apology for the Court's ruling in *Plessy*, but not for the way that the opinion's author—Justice Henry Billings Brown—seemed to go out of his way to be needlessly offensive in arriving at that result. And because Professor Amar's eloquent critique of *Plessy* rests

* Professor of Law, Pepperdine University School of Law. This essay is a response to Akhil Reed Amar's Plessy v. Ferguson *and the Anti-Canon* presentation which was made as part of *Pepperdine Law Review*'s April 1, 2011 *Supreme Mistakes* symposium. This symposium explored candidates for the most maligned decisions in Supreme Court history. *See* Akhil Reed Amar, Plessy v. Ferguson *and the Anti-Canon*, 39 PEPP. L. REV. 75 (2011).

1. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
2. 347 U.S. 483 (1954).

largely on the same indictment of the decision made by most modern commentators—that the dissenting Justice Harlan was right in seeing the challenged law as an official attempt to degrade and subordinate the African-American race (a conclusion that seems undoubtedly correct), and that the majority wrongly sanctioned this effort—I will not address his comments in detail, but rather provide a general response to this charge.

II. HISTORICAL AND INSTITUTIONAL CONSTRAINTS

When one reads Justice Brown's opinion in *Plessy*, an ordinary person usually takes to it in much the same way as they take to Lady Tremaine, Cinderella's wicked stepmother. Like Lady Tremaine, Brown seems haughty, cold, and even cruel in telling black Americans to essentially "get over" any perceived slights to their humanity for being relegated to ride in separate railroad cars from whites.[3] Indeed, it is very difficult to find much of anything that is nice to say about the opinion.

Perhaps, however, with some substantial stretching, one could attempt to rehabilitate Justice Brown's opinion by arguing that he was being *fair-minded* in suggesting that a person with seven-eighths white blood and no discernible color (in other words, a virtual white man!) could still be cast into the black coach if Louisiana so wished;[4] or that he was being *helpful and understanding* in pointing out that the law was not depriving black people of any property interest in their reputation, because only people of the dominant white race had reputations worth protecting;[5] or that Brown was being *positively fatherly* in chiding black Americans for being too sensitive in claiming that the law marked them as inferior, when white people would never have felt that way had a black legislature put them in separate cars;[6] or that he was displaying *practical wisdom* with his observation that "[i]f one race be inferior to the other socially," there was nothing the law could do to make the superior race want to associate with them.[7] But it seems safe to assume that most would not be willing to stomach such a positive spin on these aspects of Brown's opinion.

However, notwithstanding the fact that Brown seemed to go out of his way to be needlessly offensive and divisive in the way he reasoned *Plessy*, the Court itself appeared to reach an understandable result when the case is placed in the legal and historical context of the late 1800s. For instance, in his comprehensive examination of the *Plessy* era, Michael Klarman, a noted historian of American civil rights laws, concludes that "the constitutional

3. *See Plessy*, 163 U.S. at 549.
4. *Id.* at 552.
5. *Id.* at 549.
6. *Id.* at 551.
7. *Id.* at 551–52.

case for sustaining railroad segregation statutes [in *Plessy*] was strong, probably much stronger than the opposing case."[8] Moreover, according to Charles Lofgren, a noted historian of the *Plessy* litigation itself, the result in that case was virtually inevitable.[9]

These experts reached their conclusions by situating *Plessy* in its proper historical context, and by recognizing that the institutional constraints under which the Court operates normally lead to decisions that reflect prevailing public opinion on socially-divisive matters—or at least do not push too far past it. There are two main reasons for this de facto restraint on any progressive inclinations members of the Court might harbor. First, individual Justices are part of the culture and society they live in, and more often than not, they share the values and worldviews of their contemporaries.[10] Second, the Court lacks the power of the purse or a police force to enforce its decisions, so even if Justices are inclined to push progressive positions, the Court must ultimately depend on the goodwill and acceptance of the public to abide by its decisions.[11] In short, when it comes to expanding protections for minority rights, the Court usually does so incrementally, as the law clearly supports, and as public opinion for the most part allows.

And in the late 1800s, neither the law nor dominant public opinion were anywhere near where they needed to be to produce a ruling against Louisiana's railroad segregation law.[12] After the Civil War ended in 1865, critical amendments to the Constitution were adopted in an attempt to secure the rights of recently freed African-Americans, and the Reconstruction Era saw the South occupied and governed by Northern armies in an attempt to enforce those rights.[13] But by the mid-1870s, the North's will to continue forcing Reconstruction on the South dissipated for a number of reasons, including a reluctance to continue imposing antidemocratic military rule on it, fear of the national government's increasing power, and a growing desire for national reconciliation.[14]

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8. Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 331.

9. CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION 197–98 (1987).

10. *See, e.g.*, MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 83–86 (2007).

11. *See id.* at 87–89; *see also generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

12. *See generally* KLARMAN, *supra* note 10, at 75–92.

13. *See id.* at 53–58.

14. *See id*. at 62.

The presidential election of 1876 led to a crisis when both the dominant Republican Party (which Lincoln had led) and the Democrats claimed to have carried three Southern states.[15] The Republicans, who controlled all of the state governments in the South, gave the electoral votes to their candidate, Rutherford B. Hayes, making him the winner.[16] Democrats protested and "threatened to march on Washington and reignite the Civil War" over the dispute, but they were more interested in regaining local power over the Southern state governments than securing the presidency.[17] This conflict was ultimately resolved with the Compromise of 1877, by which the party of Lincoln retained the White House at the cost of Northern troops being withdrawn from the South.[18]

As a result, the Southern states reverted to self-rule and began the process of repealing local civil rights legislation that had been passed under Northern domination.[19] The United States Supreme Court then added fuel to this fire with its 1883 ruling in the *Civil Rights Cases*,[20] reading the Thirteenth and Fourteenth Amendments in a narrow way to thwart federal Reconstruction Era protections for African-Americans.[21] In that case, the Court invalidated federal civil rights laws that protected blacks from being discriminated against by those doing business with the public, such as railway carriers.[22] And during this same period, race relations between whites and blacks in the country were deteriorating dramatically, especially in the South. This was primarily the result of the political empowerment of poorer white Southern farmers, who blamed African-Americans for a number of economic and other ills.[23] However, the period also witnessed a hardening of Northern attitudes against black Americans and an increasing willingness to leave Southern race relations alone to promote the reunification of the country.[24]

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15. *See id.* at 66.
16. *Id*.
17. *Id.*
18. *See id.* at 65–66.
19. *Id.* at 67.
20. 109 U.S. 3 (1883).
21. KLARMAN, *supra* note 10, at 68–70.
22. *See The Civil Rights Cases*, 109 U.S. at 25.
23. KLARMAN, *supra* note 10, at 80.
24. *Id*. at 80–82. Towards the end of the nineteenth century, Northern attitudes began to stiffen against African-Americans for a variety of reasons. For one, large numbers of blacks began migrating north after the Civil War, which led to heightened racial anxiety and discrimination in that region. Furthermore, the immigration of millions of Eastern Europeans to the region led to concerns about the dilution of the Anglo-Saxon race. Moreover, the assertion of American control over Hawaii, Puerto Rico, and the Philippines contributed to feelings of white superiority. Finally, the Republican Party's stance on racial equality began to shift towards the end of the century because it was able to maintain control of the national government without securing the Southern vote, thus eliminating an incentive to continue fighting for black suffrage. *See id.*

Southern states also undertook systematic and sometimes violent campaigns to deny African-Americans their right to vote and serve on juries, a campaign that was largely acquiesced in by Supreme Court decisions of the time.[25] Indeed, as horrific as it may seem, by 1895 (the year before *Plessy* was decided) an average of over 100 African-Americans were being lynched each year by white Southern mobs.[26]

In addition to these trends, the widespread practice in the South had long been to segregate whites from blacks in public facilities, including on railroads and in public schools.[27] Segregation laws did not cause that practice, but were mainly added as an afterthought to give it legitimacy.[28] Further, a belief in white supremacy was approaching its zenith in both the North and South, spurred on by scientists of the day, who taught that African-Americans as a class were biologically, intellectually, and morally inferior to whites.[29] In other words, white supremacy was generally viewed as an established fact of the day, a circumstance amply reflected in certain language that even the Great Dissenter, Justice Harlan, used in his famous *Plessy* dissent.[30]

In sum, in the late nineteenth century, the formal abolition of slavery by the Civil War had not significantly changed the substance of racial attitudes among white Southerners, and the attitude of white Northerners towards African-Americans had hardened considerably since that conflict.

III. EVALUATION OF *PLESSY* USING MODERN CONSTITUTIONAL METHODOLOGY

It was in this extremely tense racial environment that the Court was asked to invalidate a law, typical of the South in that period, which mandated separate but equal accommodations for black and white railway passengers. Given the tenor of those times, the sad truth is that it is amazing the South was not simply mandating separate accommodations with no requirement of equality. But historical conditions do not control constitutional decision-making, and our task is to evaluate the soundness of

25. *Id.* at 64–65, 75–76, 83–85.

26. *Id.* at 79–80.

27. *Id.* at 78; LOFGREN, *supra* note 9, at 17, 180–82; Plessy v. Ferguson, 163 U.S. 537, 551 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

28. *See* KLARMAN, *supra* note 10, at 89.

29. *Id.* at 79; LOFGREN, *supra* note 9, at 94.

30. *See, e.g.*, *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . .").

the Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment in the context of these conditions.[31] One way to evaluate that soundness is to apply modern methods of constitutional interpretation to see what result they would have produced had they been used in 1896 as tools of decision in that case.

If the Supreme Court were asking today whether the challenged Louisiana railway law violated the Equal Protection Clause, popular constitutional theory dictates that it should ideally consider what (at least) five major sources of constitutional interpretation have to say about that question.[32] Those sources consist of arguments drawn from the constitutional text itself, the original or historical understanding of the relevant provision, key structural principles underlying the Constitution such as federalism or separation of powers, precedent established by prior decisions of the Court, and contemporary societal values or needs (otherwise known as constitutional policy).[33] In order to apply these methods to *Plessy* to see if that Court should have done better, it must be determined what those sources of constitutional interpretation would have said at the time the case was decided.

As to the text of the Equal Protection Clause, that provision commands that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."[34] However, the idea of equality can be conceptualized in many different ways, and it is certainly not clear that requiring separate but *equal* accommodations for whites and blacks violated the plain language of this mandate.[35] This may explain why, in their brief to the Court, Plessy's lawyers relied primarily on the argument that the law violated the Privileges or Immunities Clause of the Fourteenth Amendment, rather than the Equal Protection Clause.[36] Unfortunately for them, the Court's earlier decision in

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31. Although the *Plessy* Court's analysis focused on whether the Louisiana law violated the Fourteenth Amendment in general, Homer Plessy's strongest argument was based on the Equal Protection Clause, since the Court had essentially gutted the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Hence, my analysis will focus on evaluating the strength of his equal protection argument at that time.

32. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244–46 (1987).

33. *See id.*

34. U.S. CONST. amend. XIV, § 1.

35. *Accord* KLARMAN, *supra* note 10, at 82; *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) ("The concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible of varying interpretations, for as Mr. Justice Holmes declared, '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'" (citation omitted)); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 896 (1998) ("'*Separate* but *equal*' is not obviously incompatible with '*equal protection* of the *laws*' . . . ." (emphasis added)).

36. *See* LOFGREN, *supra* note 9, at 152–62, 164–68 (citing Brief for Plaintiff in Error, submitted by Albion Tourgée & James C. Walker, Plessy v. Ferguson, 163 U.S. 537 (1896); Brief for Plaintiff in Error, submitted by S.F. Phillips & F.D. McKenny, Plessy v. Ferguson, 163 U.S. 537 (1896)).

the *Slaughter-House Cases*,[37] where that body essentially read the Privileges or Immunities Clause out of the Fourteenth Amendment, had made that argument virtually impossible to win.

Next, as a matter of original understanding, did the framers and ratifiers of the Fourteenth Amendment intend the Equal Protection Clause to outlaw segregated facilities? While the evidence is ultimately ambiguous, most historians conclude they probably did not.[38] For instance, Congress continued to authorize segregated public school systems in the District of Columbia after the passage of the Fourteenth Amendment, thus evincing an understanding that the Equal Protection Clause was not intended to abolish such arrangements.[39]

As to arguments from structural principles undergirding the Constitution, and particularly those of federalism, they would seem to have counseled in favor of according the Southern states a measure of deference in the exercise of their police powers to purportedly reduce racial friction in railway cars absent a clear constitutional command prohibiting this. And as noted earlier, the Equal Protection Clause did not contain such a clear prohibition when it came to separate but equal facilities.

As discussed earlier, with respect to relevant precedents in the law, the Court's key decisions that had previously interpreted the Thirteenth and Fourteenth Amendments—namely the *Slaughter-House Cases*[40] and the *Civil Rights Cases*[41]—were certainly not protective of minority rights. Moreover, lower court precedent of the day clearly supported racial segregation in public facilities. Applying common law, nineteenth century courts generally upheld racial segregation in facilities of common carriage

37. 83 U.S. (16 Wall.) 36 (1873).

38. *See, e.g.*, KLARMAN, *supra* note 10, at 53–54, 82.

39. *See* LOFGREN, *supra* note 9, at 180; *Plessy*, 163 U.S. at 551; *see also* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252–53 (1991) ("When Chief Justice Warren declared in *Brown* that evidence of the framers' views on school segregation was 'inconclusive,' he was being considerably less than candid. Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful; twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools. The failure of Senator Charles Sumner's repeated efforts in the early 1870s to secure congressional legislation prohibiting school segregation further undermines the notion that the Thirty-ninth Congress regarded that practice as constitutionally objectionable." (footnotes omitted)).

40. 83 U.S. (16 Wall.) 36 (1873).

41. 109 U.S. 3 (1883).

(such as the railroad cars in *Plessy*) as a reasonable measure that would reduce racial friction.[42]

But what about the fact, one might justifiably ask, that Southern legislatures were almost certainly passing these separate but equal laws not to reduce racial friction, but rather, as the dissenting Justice Harlan argued, to promote an agenda of white supremacy and degrade the African-American race? Should not the Court have seen through that? Perhaps it should have, but at that time the Court had a dominant tradition of rejecting direct inquiries into legislative motivation,[43] which generally remains the law today.[44] Moreover, back then the Court had not yet developed its modern heightened scrutiny approach for smoking out illicit legislative purpose.

Finally, why did the *Plessy* Court not apply more of a living constitutionalist approach—like the Court ultimately did in *Brown v. Board of Education*[45]—to reach the morally correct result that Harlan urged? The short answer is that American public opinion would not support official desegregation efforts in the South until after *Brown* was decided some sixty years later—and even then the South stiffly resisted *Brown* for more than a decade, until Northern public opinion had shifted in favor of its enforcement.[46] Moreover, the *Plessy* Court was legitimately concerned that striking down separate but equal in railway cars would ultimately lead to striking it down in public schools—something that certainly would have provoked a violent conflagration in the South of that era (just look at what happened after *Brown*, over sixty years later).[47]

In sum, even if modern methods of interpreting the Constitution had been applied by the *Plessy* Court, they almost certainly would have coalesced to produce the same result that the Court actually reached in that case. Under such circumstances, it is no wonder how legal historians of this period could conclude that the decision was virtually inevitable. As

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42. *See* KLARMAN, *supra* note 10, at 82; *see also* W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 215 (1867) ("[W]e are compelled to declare that, at the time of the alleged injury, there was that natural, legal and customary difference between the white and black races in this state which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, promote comfort, preserve the peace and maintain the rights both of carriers and passengers.").

43. *See, e.g.*, McCray v. United States, 195 U.S. 27, 56 (1904) ("The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."); *see also* Klarman, *supra* note 8, at 327.

44. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

45. 347 U.S. 483 (1954).

46. *See generally* KLARMAN, *supra* note 10, at 157–59, 164, 177–78.

47. *See* Klarman, *supra* note 8, at 399.

Klarman aptly observes, while the seven Justices of the Court[48] who voted to uphold separate but equal certainly were not heroes in the way it could be argued that Harlan was, neither does the record support the notion that they were the villains described by many modern commentators.[49] They were simply applying the prevailing law as they believed the existing social conditions dictated (although, in my view, Justice Brown can and should be convicted by the court of history for not writing the opinion in a more thoughtful and race-sensitive way). In the end, it is important to recognize that the *Plessy* decision was not so much a failure of the Court, as much as it was a failure of our people and institutions to live up to the most basic principle we long ago decreed we would abide by—that all men (and women) are truly created equal.

IV. CONCLUSION

Although we like to romanticize the Court as a valiant guardian of righteousness and justice, the truth is that it usually operates within the democratic commitments the People themselves have embodied in the Constitution. After all, even though a truism, a majority of five lawyers appointed to the Court is not charged with making our fundamental law, but rather with interpreting what the People have deemed it will be. And if the People themselves are not prepared, at any given time, to extend basic principles of justice embodied in the Constitution to social situations not clearly foreseen when adopted, then for good or ill, justice must await its vindication until the People are convinced of the truth of the matter. Although the Court can push and prod, and even on rare occasions throw down a marker like *Brown*, in the end, fundamental social change in a true democracy must be effected by the People, rather than judges claiming to be applying their law.

48. Justice David Brewer did not participate in the decision of the case due to the untimely death of his daughter on the day before *Plessy* was to be argued at the Court. *See* J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson*: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 315 (1991).

49. *See* Klarman, *supra* note 8, at 304–05.

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