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Michal R. Belknap, Reviewer

BOOK REVIEW

THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION. By Charles A. Lofgren. Oxford University Press, 1987. Pp. ix-269.

Reviewed by Michal R. Belknap

"[W]e cannot say," the Supreme Court declared in 1896 in *Plessy v. Ferguson*, "that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable"[1] These words are likely to strike most Americans today as absurd. We tend to share the view expressed by the first Justice John Marshall Harlan in his classic dissent in *Plessy*[2] that legally mandated or endorsed racial segregation is unreasonable as a matter of law.[3] Yet, as Charles A. Lofgren demonstrates in his impressive new monograph, *The Plessy Case: A Legal-Historical Interpretation*, what seems almost self-evident in the 1980s flew in the face of orthodoxy in the 1890s. To American judges, lawyers and laymen nine decades ago, separation of the races seemed eminently reasonable, and therefore legally proper. That is why, according to Lofgren, the Court found it so easy to reconcile segregation with the egalitarian demands of the fourteenth amendment.

The device the Court used to accomplish this reconciliation was the doctrine of separate-but-equal.[4] At issue in the *Plessy* case was the constitutionality of a Louisiana statute that required railroads in the state to provide "equal but separate accommodations" for white and black passengers.[5] Speaking through Justice Henry Billings Brown, the Court held that this law violated neither the thirteenth nor the fourteenth amendment. According to Brown, "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or to es-

1. 163 U.S. 537, 550, (1896).

2. *Id.* at 560. *See generally* A. BARTH, PROPHETS WITH HONOR 22-53 (1974).

3. This is Lofgren's summary of Harlan's position. *See* C. LOFGREN, THE PLESSY CASE 199 (1987).

4. As Professor Benno C. Schmidt has pointed out, while the statute which the Supreme Court upheld required "equal and separate" accommodations, the Court did not actually say equality was necessary to make separation constitutional. *See* Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 469 (1982). See also G. STONE, L. DEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 454 (1986).

5. Separate Car Law, ch. 111, 1890 La. Acts 152.

tablish a state of involuntary servitude."[6] Of course, the fourteenth amendment did prohibit states from denying to any person within their jurisdictions the equal protection of the laws, and Brown acknowledged that "the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law . . ." But, as he saw it, "in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social as distinct from political, equality or a commingling of the two races upon terms unsatisfactory to either."[7] "Although the separate but equal doctrine in *Plessy* applied to accommodations on public conveyances, it was used to uphold widespread segregation in public schools and other state institutions and statutory requirements of segregation in privately-owned businesses."[8] *Plessy v. Ferguson* made "separate but equal unambiguously a part of the law of the Constitution."[9]

That is why the case is infamous today. Technically, *Plessy* has never been overruled.[10] Yet, the separate-but-equal principle for which it stands is completely at odds with modern conceptions of equal protection. The Supreme Court now views racial discrimination with tremendous suspicion, subjecting measures which classify on the basis of race to strict judicial scrutiny.[11] The mere fact that a law of this type treats whites and blacks in the same way will not save it from being declared unconstitutional. In *Loving v. Virginia*,[12] the Supreme Court struck down a Virginia miscegenation statute[13] that subjected both whites and blacks who married persons of the other race to exactly the same penalties. The Court "reject[ed] the notion that mere 'equal application' of a statute

6. 163 U.S. at 541.

7. *Id.* at 544.

8. M. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 568-69 (3rd ed. 1986).

9. C. LOFGREN, supra note 3, at 201.

10. In Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954), the Supreme Court distinguished *Plessy* on the basis that in the field of public education, separate could never be equal. Nor did the Court explicitly overrule the 1896 decision in Gayle v. Browder, 352 U.S. 903 (1956). There, it invalidated a Montgomery, Alabama bus segregation ordinance by simply filing a brief *per curiam* opinion which rested the holding on *Brown*. "As of mid-1986 SHEPHERD'S CITATIONS listed no cases as having overruled *Plessy*." C. LOFGREN, *supra* note 3, at 204.

11. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-6, at 1452 (2d ed. 1988). Not since 1945 has the Supreme Court upheld a race-based classification that burdened a racial minority. NOWAK, ROTUNDA & YOUNG, *supra* note 8, at 556. John Hart Ely points out that the rational basis test used to evaluate most classifications challenged as alleged violations of the equal protection clause cannot adequately handle racial segregation because "apartheid generally is a *rational*, if misused, means of avoiding racial strife . . ." Hence, "something stronger must be invoked to accomplish the purpose of the fourteenth amendment." J. ELY, DEMOCRACY AND DISTRUST 31 (1981).

12. 388 U.S. 1 (1967).

13. Va. Code §§ 20-58, 20-59 (1960 Rpl. Vol.)

containing racial classifications" is enough to satisfy the demands of the fourteenth amendment.[14] Even if such a law served a rational purpose, it was suspect simply because it discriminated on the basis of race. "The clear and central purpose of the fourteenth amendment," the Court insisted, "was to eliminate all state sources of invidious racial discrimination."[15] While not quite saying that statutory classifications based on racial differences could never be anything but invidious and arbitrary, the Court at least implied as much.[16] Even though the statute at issue in *Loving* treated blacks and whites equally, its very existence served to stigmatize and demean members of the minority race.[17]

The vice of the Virginia miscegenation law was that it deprived black people of what Ronald Dworkin calls "*treatment as an equal.*"[18] That is to say, it denied them the right "to be treated with the same respect and concern as anyone else."[19] Segregation laws have the same effect. They reflect and reinforce stereotyped prejudices. Because such statutes deny members of the minority their fundamental human right to be treated as equals, even when they require that both races be provided with identical accommodations, they nevertheless deny the minority the equal protection of the laws.[20]

This modern view of racial separation as inherently inconsistent with equality is quite realistic. It rests on the realization that historically the reason for segregating the races has been to promote white supremacy.[21] As historian George M. Fredrickson points out, "[f]orced racial separation, or *de jure* segregation, has constituted the most striking institutional expression of white supremacy in both the United States and South Africa."[22] In the latter coun-

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14. *Loving*, 388 U.S. at 8.
15. *Id.* at 10.
16. *See id.* at 11-12.
17. *See* L. TRIBE, *supra* note 11, § 16-15, at 1474-75.
18. R. DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1978).
19. *Id.*
20. *See* L. TRIBE, *supra* note 11, § 16-15, at 1474-76.
21.

> As generally understood, white supremacy refers to the attitudes, ideologies and policies associated with the rise of blatant forms of white or European dominance over 'nonwhite' populations. In other words, it involves making invidious distinctions of a socially crucial kind that are based primarily, if not exclusively, on physical characteristics and ancestry. In its fully developed form, white supremacy means color bars, and restriction of meaningful citizenship rights to a privileged group, characterized by its light pigmentation.

G. FREDRICKSON, WHITE SUPREMACY xi (1981).

22. *Id.* at 239. Fredrickson argues, however, that, "[d]espite some resemblances in practice and a good deal of similarity in ideology and spirit, the institutional foundations and socio-economic implications of the pattern of social discrimination and political exclusion that is usually summed up by the term 'Jim Crow' differed substantially from those of

try, its purpose is glaringly apparent. South Africa has explicitly rejected the separate-but-equal principle. In 1939, 1943, and 1950 courts in that country ruled that segregation in public places was valid only if the facilities for nonwhites could be considered equal to those provided for Europeans, but the South African Parliament in effect reversed those decisions by passing the Reservation of Separate Amenities Act in 1953. That law not only required segregation in all public facilities but explicitly authorized inferior amenities for non-whites.[23] It gave legal sanction to a system of "petty apartheid" that reflected "a more fundamental pattern of legally entrenched [white] political and economic privilege."[24]

Despite their somewhat different appearances, South African apartheid and the system of segregation that existed in the southern United States until the 1960s had similar purposes. During the days of slavery the South developed a "caste principle" which "certified that all whites were members of an exclusive and privileged community by virtue of their racial origins. . . ."[25] After the Civil War, blacks became free, but not even the thirteenth, fourteenth, and fifteenth amendments could make them equal to members of what had always been the master race. By the end of the nineteenth century, whites were successfully employing disfranchisement, lynching, and segregation to keep blacks "in their place." During the decades after 1889, three waves of segregation laws solidified the southern color line. The first two (enacted between 1889 and 1893 and between 1897 and 1907 respectively) governed public accommodations, especially common carriers, such as trains, boats and streetcars. The third wave (1913-1915) required separate facilities in factories (particularly separate toilets) and set up schemes designed to achieve block-by-block segregation of urban housing. A few of these laws, adopted by conservative whites in upper states of the upper South, such as Virginia, were designed to protect blacks from abuse by lower class whites. In the deep South, however, the racist Radicals who secured enactment of segregation statutes did so for the purpose of preserving white dominance by destroying black self-esteem.[26]

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native segregation and apartheid." *Id.* at 241. The principal difference to which he points is the spacial aspect of apartheid: South African policy confines blacks to certain limited geographical areas while reserving most of the country for whites. *Id.* at 241-49. Another distinction was the fact that Southern segregation was something imposed on a black minority by a white majority, whereas in South Africa a white minority imposed apartheid on a black majority. *Id.* at 250.

23. *Id.* at 248.

24. *Id.*

25. *Id.* at 107.

26. J. WILLIAMSON, THE CRUCIBLE OF RACE 253-55 (1984). Williamson notes that segregation laws did not produce any great change in physical arrangements within the

Under the Jim Crow system[27] mandated by these laws, "almost all forms of social separateness took on an invidious character and became, as many were indeed intended to be, patent symbols of racial inferiority."[28] Under the *Plessy* decision the separate facilities to which the law confined blacks were supposed to be the same as those made available to whites, but in fact this was seldom true. "Radicals wanted black people to have clearly inferior accommodations and to know that they were inferior. Like arbitrary disenfranchisement, arbitrary relegation to always inferior facilities was a sign of where the power actually lay, and where it was likely to lie in the future."[29] So firmly established did white supremacy become that when Homer Plessy's lawyers attacked the constitutionality of the Louisiana separate car law, one of the arguments they made against it was that the statute violated the fourteenth amendment's due process clause because it deprived the light skinned petitioner of his reputation for being white, something so valuable that he had a property interest in it.[30]

By the time the Supreme Court decided *Loving v. Virginia*, the idea that law could be used to confine blacks to a subordinate social position had become anathema. To Justices in 1967 it seemed obvious that measures "designed to maintain White Supremacy" could not be constitutional.[31] In 1896, however, only Justice Harlan saw any inconsistency between segregation and the equal protection guarantee of the fourteenth amendment.[32] He may well have seen something which even those who framed that constitutional provision did not grasp, for according to one authority, when Congress passed the fourteenth amendment in 1866, "the meaning of racial impartiality . . . generally permitted separate but equal facilities."[33] Lofgren does not go quite that far. He does conclude, however, that with respect to whether the meaning of equality excluded all racial classifications when the equal protec-

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South because blacks had not been using the facilities to which they applied in large numbers before their adoption. *Id.* at 253. But requiring separation of the races by law did represent something sufficiently novel that a new term had to be developed to describe it. Not until around 1913-1914 did the word "segregation" come to be widely used to describe racial separation. *Id.* at 254.

27. The term "Jim Crow" appeared as early as 1832 in the title of a minstrel show's song and dance routine. By 1841 it was being used in Massachusetts to identify separate railway cars for blacks. C. LOFGREN, *supra* note 3, at 7.

28. G. FREDRICKSON, *supra* note 21, at 273.

29. J. WILLIAMSON, *supra* note 26, at 254.

30. C. LOFGREN, *supra* note 3, at 55.

31. *Loving*, 388 U.S. at 11.

32. See Plessy v. Ferguson, 163 U.S. at 554-56, 561-62.

33. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 928 (1986).

tion clause was adopted, the evidence points in both directions.[34]

No such ambiguity existing in 1896 when *Plessy v. Ferguson* was decided, he argues. However unreasonable and even irrational segregation may seem today, at the turn of the century it was widely regarded as a reasonable means of safeguarding the public welfare. When placed within its historical context, *Plessy* appears to be a routine expression of commonplace ideas and legal principles, that were accepted by almost everyone. "But therein lies much of its significance," Lofgren observes. For, "[a] decision which is largely commonplace may offer a strategically placed window onto what contemporaries regard as conventional; or to change the figure, it may serve nicely as a kind of prism through which to refract and analyze some of the tenets of a period."[35]

That is the way Lofgren uses *Plessy* in his book. He feels the separate-but-equal case has not been well understood, and his stated purpose is to rectify that situation by enhancing his readers' understanding of the constitutional and legal contexts within which *Plessy* was decided, as well as of the racism that helped to shape American law at the turn of the century. While doing this, Lofgren also tries to suggest "a modest recasting" of a major historiographical controversy over the relative importance of *de facto* and *de jure* segregation in the South during the last one-third of the nineteenth century.[36]

In order to achieve his stated objectives, Lofgren has exhaustively researched both the *Plessy* litigation itself and the environment in which it took place. The sources on which this book is based include not only printed judicial opinions, but also unpublished court records, manuscript correspondence, and contemporary newspapers. In order to understand the attorney's strategy, Lofgren (an historian not trained as a lawyer) studied nineteenth century pleading and procedure. He also read numerous early treatises on railroad law. Besides investigating the legal context of the *Plessy* case, Lofgren has probed the intellectual environment in which it arose, steeping himself in nineteenth century popular and scientific thought concerning race.

His presentation is as comprehensive as his research. The result is an account that is extremely enlightening, although occasionally more detailed than some readers might prefer. To enhance understanding, Lofgren outlines, and sometimes even entirely reorganizes, the often poorly structured and convoluted briefs and judicial opinions in *Plessy*. He guides readers with equal care through his

34. C. LOFGREN, *supra* note 3, at 65.
35. *Id.* at 5.
36. *Id.*

own writing, providing them with a sort of road map at the very beginning of his presentation by explaining that:

> To provide background, especially for readers who are not versed in the pertinent aspects of what C. Vann Woodward has called "the strange career of Jim Crow," I begin by reviewing transportation segregation in practice and law in the postbellum South. . . Next I trace the internal development of a judicial test of Louisiana's separate car law . . . and delineate the legal issues emerging at the state level . . . Attention then shifts to three 'environmental' elements shaping the approaches that courts and counsel took to *Plessy*: the body of law and doctrine by the early-to-mid 1890s had developed around the Thirteenth and Fourteenth Amendments . . . current attitudes toward and theorizing about race distinctions . . . and non-constitutional case law and related developments concerning transportation segregation . . . Finally, I return to *Plessy*, analyzing its presentation before the Supreme Court, . . . deciphering the responses of the Court and Justice Harlan . . . and inquiring into the case's broader significance . . .[37]

The result is a book that makes a significant contribution to the literature of American constitutional history. Lofgren has written what is clearly the best available study of *Plessy v. Ferguson.* His analysis of the case and of the legal and social environment that produced it goes far beyond what other scholars have done.[38] Consequently, his conclusions are more persuasive than theirs. For example, Lofgren demolishes the contentions of Benno C. Schmidt, advanced in one of his highly acclaimed articles on the Supreme Court and race during the Progressive Era, that *Plessy* represents a "surprise on the level of doctrine" and that, "[t]his bedrock opinion, establishing the 'separate but equal' principle rejected equality as a condition to the constitutionality of Jim Crow."[39] His long and carefully researched analysis of "[t]he Transportation Law Environment" within which *Plessy v. Ferguson* was decided demonstrates that Schmidt is wrong on both counts; the decision was unsurprising from a doctrinal point of view and by 1896 substantial equality of facilities was a well-established requirement for judicial acceptance of racial segregation by a common carrier.[40]

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37. *Id.* at 6.

38. *See, e.g.,* Woodward, *The Case of the Louisiana Traveler,* in QUARRELS THAT HAVE SHAPED THE CONSTITUTION. (J. Garraty ed. 1987); Oberst, *The Strange Case of Plessy v. Ferguson,* 15 ARIZ. L. REV. 389 (1973); *Plessy v. Ferguson Reexamined,* 7 J. OF AM. STUD. (1973); L. MILLER, THE PETITIONERS 165-73 (1966).

39. Schmidt, *supra* note 4, at 468.

40. *See* C. LOFGREN, *supra* note 3, at 116-17. For a discussion of Lofgren's demonstration that there was nothing surprising about the *Plessy* decision because separate-but-equal was by 1896 already a well-established principle in transportation law, *see infra*

The *Plessy* case also makes a significant contribution to a long-running debate among Southern historians about the origins of segregation.[41] In an extremely influential book entitled *The Strange Career of Jim Crow*,[42] the first edition of which appeared the year after the Supreme Court's 1954 ruling in *Brown v. Board of Education*, C. Vann Woodward sought to refute those defenders of segregation who accused the Court of demanding destruction of social arrangements that had always existed in the South.[43] Woodward argued that in fact segregation had not developed until the 1890s. His evidence was the statutes requiring separate accommodations for blacks and whites that Southern states began to enact about that time.[44] Critics of Woodward, such as Joel Williamson[45] and Howard N. Rabinowitz[46] demonstrated that long before the widespread adoption of these Jim Crow laws, separation of the races was already the norm in the South. As Lofgren points out, however, what both they and Woodward's defenders "have taken for granted . . . is that segregation *by law* did come *mainly* in the late 1880s and beyond."[47]

This is a proposition which Lofgren disputes. He believes that those who talk in terms of a dichotomy between *de facto* segregation (i.e., segregation by custom and practice) and *de jure* segregation (i.e., segregation by law) wrongly characterize the legal spectrum. He agrees with Woodward's critics that "in the states of the former Confederacy, from the end of the [Civil] War into the late 1880s and early 1890s, segregation or discrimination existed almost everywhere to an identifiable degree; and in perhaps half the states these practices flourished to the extent that their absence was the exception."[48] He also concurs in their contention that "these practices developed largely outside the framework of legislative regulations."[49] Lofgren demonstrates that more than custom supported pre-1890 segregation. In common law litigation state and federal courts developed a body of case law on which

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notes 51-82 and accompanying text.

41. For a summary of this debate down to 1971 see C. WOODWARD, AMERICAN COUNTERPOINT 234-60.

42. C. WOODWARD, THE STRANGE CAREER OF JIM CROW xv-xvi (3RD ED. 1974).

43. *See id.* at 97-109. As Lofgren points out, C. LOFGREN, *supra* note 3 at 8, in later editions of his book, Woodward modified his position to accommodate his critics, conceding that the South was really not an open society on the racial front prior to the 1890s. *See* C. WOODWARD, STRANGE CAREER, *supra* note 42, at ix-x.

44. *See* J. WILLIAMSON, AFTER SLAVERY 274-75, 298 (1965).

45. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865-1890*, 63 J. OF AM. HIST. 325 (1976).

46. C. LOFGREN, *supra* note 3, at 9.

47. *Id.* at 17.

48. *Id.* at 17.

49. *Id.* at 116-47.

rail and boat companies that wished to separate the races could rely for support when they were sued by those who viewed themselves as victims of such practices. Thus, according to Lofgren, what earlier scholars characterized as *de facto* segregation was really partially *de jure*.

Besides offering this novel insight, Lofgren also shows that Woodward's explanation for the enactment of Jim Crow laws after 1890 requires some modification.[50] It is, however, Lofgren's effective elucidation of the broad context within which *Plessy* arose that is his most important contribution. By thoroughly analyzing the legal environment, while also relating late nineteenth century law to late nineteenth century social thought, he establishes that, repugnant as *Plessy v. Ferguson* may be to Americans today, in its own time it was an obvious, proper, and indeed, almost routine decision. This was because the statute whose constitutionality Homer Plessy challenged involved an exercise of a state's police power. In Lofgren's words, the "insuperable barrier" faced by Plessy and his attorneys "was the alleged status of the separate car law as a police measure, well within the state legislature's acknowledged institutional authority to protect the health, welfare, and morals of the state's citizens."[51]

This barrier proved insurmountable because during the last quarter of the nineteenth century the Supreme Court was extremely supportive of the police power. Legal historian Robert J. Kaczorowski has shown that in 1873, when the Court decided the *Slaughter-House Cases*,[52] it was far more concerned about protecting this aspect of state authority than about safeguarding the civil rights of black Americans.[53] According to Lofgren, this was

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50. Woodward attributes their enactment to scapegoating by white farmers, frustrated by the failure of the Populist political challenge to rule of the South by conservative Bourbons. *See* C. WOODWARD, *supra* note 42, at 74-102. The problem with this thesis, as Lofgren points out, is that the enactment of segregation statutes began during the years 1887-1892, well before the Populist political revolt collapsed in the wake of the defeat of William Jennings Bryan in the 1896 presidential campaign, and consequently well before the poor white farmers who supported Populism yet had any reason to feel frustrated or to need a scapegoat for failure. *See* C. LOFGREN, *supra* note 3, at 23-24. Lofgren's own explanation for the fact that whites chose to legislate segregation when they did emphasizes "increasing black unwillingness to defer to whites." *Id.* at 25. By 1890, "A new generation, raised outside the confines of slavery and the web of antebellum restrictions on free blacks, was coming of age," he points out. "Negro newspapers perceived growing black assertiveness in the face of indignities inflicted by whites; and among the white population, stories of 'uppity' Negroes increased during the 1880s." *Id.*

51. C. LOFGREN, *supra* note 3, at 48.

52. 84 U.S. (16 Wall.) 36 (1873).

53. R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION 149, 154-55 (1985). According to Kaczorowski, the police power was viewed as particularly important at this time because it was considered necessary to control growing concentrations of monopolistic power in business. *See id.* at 161.

still the Court's attitude in 1896. What Lawrence Tribe characterizes as the "Lochner era"[54] did not begin until after *Plessy*. Not until 1897 did the Supreme Court clearly overturn a legislatively enacted police measure, and from 1887 through 1900 over 90% of its fourteenth amendment decisions went in favor of the state.[55] Thus, "During the period Plessy's case was making its way through the courts, the United States Supreme Court proved reluctant to overturn state police legislation on fourteenth amendment grounds."[56] Although state judges were somewhat less tolerant of such laws, they too upheld them most of the time. "Only a minority of non-racial cases in state courts seriously qualified the police power, while at the federal level the Supreme Court's *occasional* endorsement of what has come to be called 'substantive due process' still lay almost entirely in the future."[57] "Judicial deference to legislative judgment remained the rule."[58]

"A court would closely examine a legislative judgment only in the absence of a commonly acknowledged or easily perceived connection between (a) the law in question along with whatever classifications it embodied, and (b) the public welfare."[59] In other words, so long as a statute allegedly based on the police power was "reasonable," it would be sustained (against either a due process challenge or an equal protection one). The "reasonableness" of a statute depended on whether it had a legitimate police power objective and whether the means that it employed were arguably calculated to obtain that objective. These were empirical questions.[60] To determine what the answers to them would have been if the statute in question were Louisiana's separate car law, Lofgren believes, one must examine "those elements in the popular and particularly scientific thought of the late nineteenth century that arguably supported the state's position in *Plessy*."[61]

Lofgren skillfully elucidates those elements. The conclusion that flows from his analysis is that, "Although embodying no unified, internally consistent doctrine, popular and scientific opinion provided broad grounds for concluding that racial separation was

54. *See* L. TRIBE, *supra* note 11, § 8-2 at 567-68. According to Tribe, this era, during which the Supreme Court used the device of substantive due process to invalidate much state and federal legislation, began around 1897 and ended in 1937. *Id.*

55. C. LOFGREN, *supra* note 3, at 80.

56. *Id.* at 88.

57. *Id.* at 92. According to Lofgren, the state courts, "generally limited their censorship to a fairly narrow range of measures, consisting mainly of employment, regulations affecting male workers. . . ." *Id.* at 89.

58. *Id.* at 89.

59. *Id.* at 92.

60. *Id.* at 93-94.

61. *Id.* at 94.

'reasonable' in the sense of arguably conducive to maintenance of public health, welfare and morals."[62] According to Lofgren, a loose syllogism

> summarizes racist thought of the period and thus the case for reasonableness: (1)Blacks are significantly different from whites. (2) These differences result in black inferiority, especially in moral and mental characteristics. (3) Change in these respects will occur very slowly if at all. (4) Given inbred racial differences, race mixing is deleterious to both whites and blacks, and at best produces a hybrid inferior to the former. (5) Race antipathy is inevitable, especially if blacks intrude themselves on the superior group. (6) Therefore, an integrated society is impossible in a practical sense.[63]

Likewise, segregation was obviously reasonable. Transportation law offered further evidence of its reasonableness. Perhaps Lofgren's most important contribution is his demonstration that the separate but equal principle governed relations between common carriers and their passengers long before the Supreme Court decided *Plessy v. Ferguson.* As an element of transportation law, this "doctrine did not originate in the separate car legislation that southern states began to adopt in the late 1880s, but instead emerged through a series of state and federal judicial cases dating from the 1860s into the early 1890s."[64] As Lofgren explains, "[M]ost of these cases involved ordinary common law [tort and contract] suits against transportation companies and their agents."[65] Under the common law of common carriers, passengers paying the same fare could be classified and separated on reasonable grounds, so long as they received substantially equal accommodations. This principle received endorsement in the nearly universal acceptance of separate "ladies cars" for women and their male escorts.[66] To Pennsylvania's Judge Daniel Agnew, such segregated cars implied "no loss of equal right on the part of the excluded sex."[67] Nor did racial segregation. In the much cited 1867 case of *West Chester and Philadelphia Railroad Company v. Miles*,[68] Judge Agnew asserted that with race as with sex, "to assert separateness is not to declare inferiority in either."[69] A railroad company had an obligation to make reasonable regulations to preserve order in its cars and to prevent "contacts and collisions

62. *Id.* at 115.
63. *Id.*
64. *Id.* at 116.
65. *Id.* at 111.
66. *Id.* at 117.
67. 55 Pa. 209, 211 (1867).
68. 55 Pa. 209 (1867).
69. *Id.* at 213.

arising from natural or well-known customary repugnances, which are likely to breed disturbances by promiscuous seating."[70] As he saw it, "[t]he natural separation of the races is an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature."[71] Hence, race was "a reasonable ground of separation."[72]

Agnew's *Miles* opinion was the first regularly reported judicial assertion of the separate-but-equal doctrine in the field of transportation.[73] Between 1867 and 1890 a number of other state and federal appellate decisions endorsed the principle.[74] These rulings included the United States Supreme Court's 1878 ruling in *Hall v. DeCuir*,[75] which "federalized the interpretation of the reasonableness doctrine the Pennsylvania Supreme Court had advanced in *Miles* a decade earlier, and in a very real sense constitutionalized it as well."[76] *Hall* struck down a state law *forbidding* common carriers to discriminate on the basis of race, and its constitutional basis was the commerce clause rather than the fourteenth amendment. Like the other judicial endorsements of separate-but-equal seating on trains and boats, however, it was evident that racial segregation was considered reasonable.[77] "The grip that this version of reasonableness (and of equality) had on jurists was underscored in the systematizing efforts of treatise writers and commentators. . . ."[78] When Justice Brown decided *Plessy* he cited common law common carrier cases. They were not authority with respect to the constitutional question at issue in the case, but they supported his conclusion that Louisiana's separate car law was reasonable, and hence a holding that it involved a permissible ex-

70. *Id.* at 212.

71. *Id.* at 213.

72. *Id.*

73. C. LOFGREN, *supra* note 3, at 120. The first judicial articulation of the separate-but-equal concept in a racial case was Roberts v. City of Boston, 5 Cushing 198 (Mass. 1849), which involved school segregation. *See generally*, L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 109-17 (1957).

74. According to Lofren, there were something less than twenty-five decisions during the twenty-five-year period which "endorsed separate but equal in transportation where not compelled by statute." C. LOFGREN, *supra* note 3 at 145.

75. 95 U.S. 485 (1878). In this case the Supreme Court invalidated a Louisiana equal accommodations act which mandated that rules and regulations of common carriers make no discrimination on account of race or color. The Court held this law invalid because it regulated an aspect of interstate commerce that Congress had intended to remain unregulated. According to the Court, congressional inaction with respect to the matter was evidence of a desire on the part of Congress to allow racial discrimination on common carriers to continue to be governed by the applicable common law rules. *See* C. LOFGREN, *supra* note 3, at 128-31.

76. *Id.* at 128.

77. *Id.*

78. *Id.* at 146.

ercise of the state's police power.[79]

As far as Brown and other members of the majority were concerned, "[t]he *arguable* reality of racial traits and differences empowered legislatures to take them into account."[80] There was enough evidence that segregation could promote the public welfare to give the Louisiana Legislature's determination that it would have this effect some basis in reason. "Part of the evidence came from the common law acceptability of racial separation. Part of it came from common and expert opinion."[81]

Plessy, in other words, embodied the conventional legal, scientific, and popular wisdom of the late 1890s. For this reason, the press paid little attention to the decision.[82] By placing it in context, Lofgren reduces considerably the importance of that now-infamous ruling. At the same time, however, he greatly enhances our understanding of *Plessy*, as well as our appreciation of how deeply and diversely racism infected American law.

These are significant achievements, and they make *The Plessy Case* an important book. That is not to say it is a perfect one. Lofgren's discussion of whether *de jure* segregation existed in the South prior to the enactment of separate car laws lacks legal precision,[83] and his organization and writing style are sometimes reminiscent of a lawyer's brief. Also, a distressing number of typographical errors seem to have slipped by the proofreaders at Oxford University Press.

These are, however, small flaws in an otherwise excellent book. It is one which lawyers and law students ought to read, for they can learn from it the valuable lesson that legal rules are products of particular historical circumstances and that they cannot really be understood unless they are examined within the context that produced them. Merely because our ancestors used words familiar to us does not mean they thought the way we do. "A century ago, Americans also professed a strong belief in equal rights before the law." But, as Lawrence Friedman has pointed out, "social norms — and the law — defined equality quite differently from the current definition."[84] In 1896, separating people on the basis of race

79. *Id.* at 190.
80. *Id.*
81. *Id.* at 190-91.
82. *Id.* at 196.
83. Lofgren treats racial classifications imposed by private parties as a form of *de jure* segregation because courts affirmed their right to impose them when those private parties were sued by the victims of the alleged discrimination. As Tribe notes, the characterization of discrimination as *de jure* is usually reserved for those situations in which *governmental* classifications deprive someone of equality. *See* L. TRIBE, *supra* note 11, § 16-1, at 1438-39.
84. L. FRIEDMAN, TOTAL JUSTICE 110 (1985).

was widely regarded as a reasonable means of promoting the public interest. Since then, "the doctrine that what is 'immutable' should be legally irrelevant has been raised to a constitutional principle and redefined in ways that make blazingly apparent the injustice of the older view."[85] Yet, merely because we recognize its unfairness does not mean this is self-evident. Charles Lofgren has produced an arresting demonstration that what one generation regards as obviously true, another may consider complete nonsense. He shows us that "reasonableness" itself is a relative and time-bound concept. That is something no lawyer or law student should forget. It is reason enough to read *The Plessy Case.*

85. *Id.*