Plessy as "Passing": Judicial Responses to Ambiguously Raced Bodies in *Plessy v. Ferguson*

Mark Golub

The Supreme Court's decision in *Plessy v. Ferguson* (1896) is infamous for its doctrine of "separate but equal," which gave constitutional legitimacy to Jim Crow segregation laws. What is less-known about the case is that the appellant Homer Plessy was, by all appearances, a white man. In the language of the Court, his "one-eighth African blood" was "not discernible in him." This article analyzes *Plessy* as a story of racial "passing." The existence of growing interracial populations in the nineteenth century created difficulties for legislation designed to enforce the separation of the races. Courts were increasingly called upon to determine the racial identity of particular individuals. Seen as a judicial response to racial ambiguity, *Plessy* demonstrates the law's role not only in the treatment of racial groups, but also in the construction and maintenance of racial categories.

In June 1892, Homer A. Plessy purchased a one-way ticket aboard the East Louisiana Railway, departing New Orleans and bound for Covington, Louisiana. What happened next is well-known: Plessy was arrested for violating the Louisiana Separate Car Act, his case was argued before the U. S. Supreme Court, and his conviction was upheld in *Plessy v. Ferguson* (1896) under the doctrine of "separate but equal."[1] The *Plessy* case is infamous for extending constitutional sanction to Jim Crow segregation laws. Every student of American history will know these facts, just as

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[1] Louisiana's Separate Car Act was signed into law in 1890, requiring "equal, but separate" accommodations on all passenger railways, and mandating that "no person or persons, shall be permitted to occupy seats in coaches, other than the ones, assigned, to them on account of the race they belong to" (General Assembly of the State of Louisiana, Acts 1890, No. 111, cited in Lofgren 1987:29).

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every study of race and American law will cite *Plessy* as a low point for the Court, second only to *Dred Scott v. Sandford* (1857). In short, *Plessy* is a familiar symbol of American racial apartheid.[2]

What many people do not know is that Homer Plessy was by all appearances a white man. In the language of the Court, Plessy's "one-eighth African blood" was "not discernible in him" (163 U.S. 537, 538). Born of seven great-grandparents of European descent (an "octoroon," in nineteenth-century racial parlance), Plessy was no darker than the trial court judge in his case (Medley 2003:162). If Plessy had not declared that he was a colored man when asked by the conductor, he almost certainly would not have been arrested (Medley 2003:142). In other words, Plessy could pass for white, which is one reason he was chosen to bring the test case, which had been arranged by prominent leaders from New Orleans' Creole community as part of a planned challenge to the constitutionality of the act.[3]

Curiously, while several commentators have noted Plessy's light skin, the discrepancy between his racial appearance and his official racial classification has yet to be explored as a question of theoretical interest or central concern.[4] Rather, *Plessy* is routinely framed as a case concerning the proper interpretation of the Fourteenth Amendment's Equal Protection Clause and the judiciary's historical complicity with legislative mistreatments of racial minorities. Certainly the case is about these things, but *Plessy* also raises important and more difficult theoretical issues that standard accounts leave out. In contrast, this article takes Homer Plessy's racial ambiguity as absolutely central to understanding the case, as well as the Court's larger role in structuring the politics of race in America.

My reading of *Plessy* situates the issue of racial ambiguity within a comprehensive legal strategy to challenge segregation. Plessy's ability to pass for white (and his publicly staged refusal to do so) called attention to the social and legal processes of racial sorting through which purportedly natural and discrete racial groups are produced and maintained. Reading *Plessy* as a case fundamentally about racial passing reveals the Court's deep anxiety regarding mixed-race individuals and the specter of interracial sexuality that

[2] Several books have been devoted to the *Plessy* case. Lofgren (1987) remains the definitive legal history of the case. Two excellent volumes (Olsen 1967; Thomas 1997) collect relevant historical documents. Recent narrative histories of the case include Medley (2003) and Fireside (2004).

[3] The case had also been coordinated with the railroad company, which bore the added costs of maintaining and servicing additional coaches (Lofgren 1987:41).

[4] Plessy's appearance is often introduced as a point of irony that remains incidental to understanding the case (Olsen 1967:12; Kluger 1975:73; Lofgren 1987:54–6; Thomas 1997:3–4; Medley 2003:146, 162; Fireside 2004:12–3). A notable exception is Elliott (2001). See also Kennedy (2003:323) (Plessy's choreographed announcement that he was "a colored man" demonstrates that he was not trying to pass for white).

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ambiguously raced bodies necessarily signify. Within the Court's racial narrative, passing simultaneously constitutes a violation of white supremacist norms of sexual behavior and a challenge to the assumption of natural racial differences upon which the institutions of segregation depended.

The article is divided into three parts. "*Plessy* and Passing: Racial Ambiguity as Legal Strategy" explains the central role of passing in Plessy's legal strategy. Relying on evidence from the organizational efforts of the Citizens' Committee to Test the Constitutionality of the Separate Car Law (*Comité de Citoyens*) as well as the personal correspondences and legal briefs submitted on Plessy's behalf by lead attorney Albion Tourgée, I reject the criticism that passing sought only to extend the benefits of whiteness to light-skinned blacks, offering instead an interpretation of passing in *Plessy* as a radical critique of the legal institutions of white supremacy.

"Judicial Responses to Indeterminately Raced Bodies" examines Justice Henry Billings Brown's majority opinion as a response to the racially destabilizing potential of Plessy's ambiguous racial status. Justice Brown was compelled to respond to this challenge in his acknowledgement of each state's right to set the legal definitions of racial group membership. A close examination of the state court cases that he cited as precedent for such an authority vividly illustrates the discrepancy between lived experiences of race, in all their infinite complexity, and the legal requirement for clear rules defining racial identity. In each of the cases cited by Justice Brown, the criteria for racial determination are multiple and contradictory, relying as much on social performances of racial roles as on the supposedly objective factors that Justice Brown suggested.[5] The cases also demonstrate, in their attempts to convert racial ambiguity into orderly legal categories, how passing might call into question not only the racial identity of a particular individual, but also the criteria by which racial determinations are made.

"Blindness as Disguise: Revisiting Harlan's Dissent" considers the implications of this analysis for contemporary issues of race-conscious legislation and challenges the common assertion that the Fourteenth Amendment prohibits racial classifications for purposes of affirmative action and the like. My focus on racial ambiguity complicates the simple opposition between race-conscious legislation and Justice John Marshall Harlan's dissenting claim that "our Constitution is color-blind" (136 U.S. 537, 559). Thinking about color blindness in the context of *Plessy* as "passing" draws our attention to those social structures that make racial identity meaningful, and helps clarify why there is no contradiction between

[5] These findings are consistent with broader studies of nineteenth-century trials of racial determination (Pascoe 2000:185; A. Gross 1998:111–2, 118–23).

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Justice Harlan's principle of color blindness and various color-conscious remedies for entrenched racial subordination.

Plessy and Passing: Racial Ambiguity as Legal Strategy

Modern commentary on *Plessy* is nearly uniform in its condemnation of the case. Kull notes that *Plessy* is "routinely vilified" (1992:13) and directs the reader to Lofgren's "pastiche" of scorn—an assemblage of judgments that condemn *Plessy* for "reduc[ing] the Fourteenth Amendment to little more than a pious goodwill resolution," thus delivering "the ultimate blow to the Civil War Amendments and the equality of Negroes"; for being "inconsistent" and "irrational," and even "slipping into absurdity" (Lofgren 1987:3–4). Of *Plessy*'s central argument, legal historian Kluger writes, "It would be onerous work to find a more unsupported and insupportable sentence in the annals of American jurisprudence" (1975:74). And while some legal scholars have preferred understatement—McCloskey is contented to describe the opinion as "dubious" (1994:141) and Ely calls it "a mistake" (1980:163)—others identify *Plessy* as "the final and most devastating judicial step in the legitimization of racism under state law" and "one of the most catastrophic racial decisions ever rendered" (Higginbotham 1996:117).

Justice Brown's majority opinion in *Plessy* has been criticized for its faulty logic and its misleading citation of precedent, and even more for its reliance upon racial "science" and its constitutional endorsement of white supremacy. Nonetheless, re-examining this landmark case from the perspective of racial indeterminacy is warranted because it suggests new and valuable insights regarding the law's constitutive powers of racialization and production of racial subjectivity.

Most scholars of race and law agree that there is no scientific justification for regarding human populations as belonging to distinct racial groups. The non-existence of biological race found early support from physical anthropologists (Montagu 1965) and, more recently, in the field of human genetics (Graves 2001). In a strictly biological sense, it may be true that "there are no races" (Appiah 1992:45). Yet we cannot ignore that race remains a central fact of American social, economic, and political organization. Attempts to reconcile the social significance of race with its biological insignificance have generated a rapidly expanding literature on the social construction of race too vast to account for here. Sometimes placed under scare quotes, "race" has been variously characterized: it is a product of linguistic performance or "trope" (Gates 1986), a social-political process of "racial formation" (Omi & Winant 1994), a

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purely ideological creation designed to mediate or channel class conflict (Fields 1982), a contested ideological terrain of Gramscian hegemony (S. Hall 1996), a transnational cultural formation (Gilroy 1993) that may be irredeemable for egalitarian political commitments (Gilroy 2000), and a central organizing principle of the modern state (Goldberg 2002).

Understood as social construction, racial identities are results of complex social-historical processes rather than fixed sources of meaning. And if race "functions as a verb before signifying as a noun" (powell 1997), legal discourse plays an important role in the articulation of racial meaning and definition of racial categories. The role of law in producing racial "common sense" (Haney López 2003: Ch. 5) is a subject of central concern to writers within the tradition of Critical Race Theory (CRT).[6] In his seminal study of the racial prerequisite cases in immigration law, Haney López demonstrates both how the law's ability to constrain reproductive choices "creates differences in physical appearance" (1996:14) and how court decisions literally define the legal boundaries of whiteness.[7] Because the law also helps create the racial subjects on which it acts, race cannot be assumed as a prelegal phenomenon. In its strongest formulation, Haney López argues that "law constructs race" (1996:19).

In focusing on issues of racial indeterminacy in *Plessy*, my research draws from and extends a powerful literature on the legal construction of race. The legitimacy of Plessy's removal from the "white car" turned in large part on a prior resolution of his racial status, thus linking the Court's consideration of the constitutionality of segregation to the state's power to impose racial categories. However, where others have stressed the law's successful imposition of racial order, my analysis of *Plessy* also calls attention to the *in*stability of racial categories and to the often partial nature of legal racial constructions. From the unruly complexity of human physical variation, legal discourse forges what purport to be clear and stable racial lines. This aspect of legal power is most evident when it confronts human bodies not easily categorized within established classificatory schemes. Ambiguously raced bodies threaten to disrupt ordinary assumptions of naturally distinct races and thus are met by the law as a kind of problem to be contained. Where Plessy's legal defense consciously deployed racial ambiguity to destabilize racial categories, Justice Brown's majority opinion may be under-

[6] Delgado and Stefancic list anti-essentialism as one of the defining tenets of CRT (2001:6–8). CRT scholarship is particularly strong in identifying the various senses in which courts use the concept of race (Gotanda [1995] especially, but see generally the edited volumes by Delgado [1995] and Crenshaw et al. [1995]).

[7] For a discussion of racial determination cases in nineteenth-century trial courts, see Pascoe (2000) and A. Gross (1998). On racial classification in the administration of contemporary affirmative action programs, see Ford (1994).

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stood as just such an exercise in containment, responding to the disruptions that mixed race and passing create.

The Creole Context: Racial Hybridity in New Orleans

Virtually every stage of the legal process in *Plessy* was marked by issues of mixed race and passing, from the activism of social movement organizations that brought the case to the legal briefs submitted in Plessy's defense, oral arguments before the Supreme Court, and majority and dissenting opinions of Justices Brown and Harlan. To appreciate the complexity of issues of racial classification in the case, one must consider the location and context of the legal dispute, in New Orleans, a city thoroughly marked by its strong Creole tradition.

As a French colony, both demographic and cultural factors contributed to high rates of interracial sexual contact (Spear 1999:37). The origins and subsequent development of slavery in antebellum Louisiana provided conditions for a greater hybridity of peoples and cultures than elsewhere in North America (G. Hall 1992:29–32; Berlin 1974:77). French and Spanish law in Louisiana encouraged the growth of sizeable free Negro and mulatto communities in possession of legal, social, and economic rights denied in the British colonies (Sterkx 1972:26–34; Fiehrer 1979:14–8). In the early 1800s, interracial sexual relationships were neither uncommon nor entirely socially condemned in New Orleans, which was known for its "quadroon balls"—popular dances in which admission was limited to white men and free mulatto women (Fischer 1974:16–8). By the middle of the nineteenth century, the institution of *plaçage* allowed affluent white men to maintain socially acknowledged long-term extramarital relationships with women of color (Martin 2000; Fischer 1974:15). The combination of socially recognized interracial relationships with the greater freedoms and economic opportunities that mixed-race people could enjoy fostered New Orleans' thriving community of free people of color (*gens de couleur libre*).

The New Orleans Creole community has been described as "a third race of people neither white nor black and neither slave nor completely free" (Martin 2000:57). It would be more precise to say that racial identities in mid-nineteenth-century Louisiana were governed by norms and rules of classification that were themselves in a period of transition. Throughout the eighteenth and early nineteenth centuries, Louisiana's racial hierarchy had followed the three-tiered pattern of the Spanish and French empires rather than the American two-tiered model (Hirsch & Logsdon 1992:189). Creoles were distinguished by language, culture, and ethnicity rather than color, whereas the American pattern insisted upon racial dichotomy. The "Americanization" of New Orleans after Reconstruction

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represents a conflict between these two systems of racial classification, which came to a head over the question of segregation: "The imposition of Jim Crow at the dawn of the twentieth century symbolized the ascendance of the new order and accelerated the submergence of ethnicity—both black and white—as a stark racial dualism held uncontested sway" (Hirsch & Logsdon 1992:190). From the perspective of Creole New Orleans, Jim Crow segregation laws sought to create the very racial groups that they purported simply to keep apart.

The Separate Car Act of 1890, challenged by Plessy in 1892, was deeply resented by the Negro and Creole citizens of New Orleans alike, but it especially threatened members of the Creole community, who had more to lose from segregation than did their black counterparts. The different reactions to segregation were in large part due to the distinct class positions of the two communities. For affluent Creoles in positions of prominence, Americanization threatened to destroy their culture and community. For many less-affluent Negroes, however, the changes primarily affected class and color privileges which they themselves had never enjoyed.

As Welke (1995) has shown, racial segregation laws in the post-Emancipation South involved a complex interplay of class, race, and gender. The laws found precedent in the longstanding practice of providing separate rail accommodations for affluent white women. The "ladies' car" was typically more comfortable, cleaner, and safer than the "smoker" (or gentlemen's car) and was reserved for women traveling alone or accompanied by a gentleman. On rail lines that offered second- or third-class rates, the ladies' car "was always a first-class car" (Welke 1995:269–70). Consequently, gender and not race provided the basis for most legal challenges to segregated train travel before *Plessy*:

> The division of accommodations by class and gender meant that women of color who could afford first-class fare would seek the privileges of their gender. In doing so, they challenged courts to justify a system that would require a woman of color paying first-class fare to accept accommodations no similarly situated white woman would be required to accept. (Welke 1995:266)

The women of color who brought such suits sought to leverage their class status against the disability of color, demanding access to the privileges afforded Southern "ladies."

By contrast, the Separate Car Act of 1890 segregated explicitly by race, denying first-class accommodations even to nonwhite women and men who could afford to pay the higher fare.[8] This class component may further have divided Creole and Negro re-

[8] Plessy had in fact paid the higher fare and was careful to dress in a suit and hat, "the proper attire of gentlemen traveling first class" (Fireside 2004:1).

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actions to the law. For the most part, black Protestant leaders had responded to racial discrimination "by forming their own all-black institutions where they could find solace and support," and the reluctance of most black Creoles to accept the racial binary of Americanization "struck some black Americans as a denial of racial pride or solidarity" (Logsdon & Bell 1992:201). The conflict reached its peak when the black former Republican governor P. B. S. Pinchback agreed to support the Redeemer Constitution of 1879 in exchange for the creation of a black college, Southern University (Logsdon & Bell 1992:251–2). Rejecting this accommodationist strategy, New Orleans Creoles took the lead in organizing resistance to the Separate Car Act.

The gens de couleur libre of New Orleans were fiercely proud of their heritage, to which some attributed their more outspoken resistance to segregation. This was certainly the view of Rodolphe Desdunes, founder of the weekly civil rights publication *The Crusader*, who denounced the accommodationist position of Negro leadership by pointing to "Latins" such as himself and Aristide Mary, who "molded their lives . . . on those French radicals of the Revolution" (Fireside 2004:108). Desdunes and the *Crusader*'s editor Louis Martinet were responsible for the creation of the American Citizens' Equal Rights Association (ACERA), dedicated to forging a coalition of black leaders throughout the South. ACERA had limited its activities to drafting resolutions condemning the new segregation law, yet the organization collapsed in 1891 because black Protestant leadership found ACERA's program too controversial (Fireside 2004:109), leading Martinet and Mary to form a new group that would actively challenge the law in court.

Their organization was the Citizens' Committee to Test the Constitutionality of the Separate Car Law (Comité des Citoyens), and its members were chiefly from the Creole professional class, many of whom were so light-skinned that "they could have easily disappeared into white society" (Medley 2003:126).[9] The Comité des Citoyens provided the organizational structure and resources to bring a test case, generated public interest, and raised funds for legal expenses, arranging for Albion Tourgée (the self-proclaimed "carpetbagger" lawyer, novelist, and outspoken advocate of Negro equality) to handle the defense.[10]

[9] On the development of the Comité de Citoyens, see Olsen (1967:10–2), Medley (2003:117–27, 135–7); Fireside (2004:107–10).

[10] Olsen's (1965) excellent biography details Tourgée's political life. But Tourgée is also remembered for his popular works of fiction (T. Gross 1963). His novel, *A Royal Gentleman* ([1874] 1967), is structured around an incident of racial passing that receives noticeably sympathetic treatment, in contrast to the familiar "tragic mulatto" genre (Andrews 2000:310; Kinney 1985:119–25).

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Plessy was selected for the job in part because he was a friend of Desdunes, but Tourgée was also explicit in his preference for a light-complexioned defendant (Elliott 2001:306–7). Plessy's complexion was so light, in fact, that a story in *The Crusader* described his appearance as "white as the average white Southerner" (*The Crusader,* June 1892; cited in Medley 2003:146). The choice may have been a tactical decision, meant to appeal to the racist preferences of the judges (Olsen 1967:11), but it also served as ironic commentary on the arbitrary nature of racial classifications. Given the strained relations between black and Creole leaders in New Orleans, it is not surprising that the Comité des Citoyens' conscious choice of a light-skinned litigant met with considerable criticism. In a letter to Tourgée, Martinet relayed concerns from some members of the New Orleans black community that the Comité des Citoyens was representing only the interests of "those who were nearly white, or wanted to pass for white" (Martinet to Tourgée, 7 December 1891, The Tourgée Papers; cited in Olsen 1967:12).[11] This criticism characterizes passing in *Plessy* as an attempt by mulattos to retain the privileges that their light skin had previously afforded. In contrast, my reading locates Plessy's ability to pass as a central element in the legal challenge to segregation and suggests how passing might provide a more radical critique of white supremacy.

Plessy, Passing, and Property: Appropriation or Critique?

Building on the insights of Bell (1988), Harris (1993) has famously theorized the material advantages of whiteness as a form of property right. The argument for "whiteness as property" emerges directly from the *Plessy* case. Observing that Plessy's legal argument "was predicated on more than the Equal Protection Clause of the Fourteenth Amendment" (Harris 1993:1747), Harris describes his additional claim to have been deprived of property without due process of law: "Because phenotypically Plessy appeared to be white, barring him from the railway car reserved for whites severely impaired or deprived him of the reputation of being regarded as white . . . [and] the public and private benefits of white status" (Harris 1993:1747). Plessy's claim to injury was thus predicated upon his ability to pass for white.

The argument proved persuasive to the Court in its basic premise, and Justice Brown's opinion explicitly endorsed the view that one could hold a property right in one's reputation as a white person. However, Brown denied that Plessy had been injured

[11] The Tourgée Papers, Chatauqua County Historical Museum, New York (per Olsen 1967). Martinet, however, dismissed the assertion as "a lot of nonsense." See Elliott (2001:307, note 48).

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because he was not in fact white—and therefore could neither possess nor be deprived of such property:

> It is claimed by the plaintiff in error 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, . . . 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. (163 U.S. 537, 549, emphasis in original)

Harris traces this argument to a brief submitted by Tourgée, in which Tourgée asked, "[h]ow much it would be *worth* to a young man entering upon a practice of law, to be regarded as a *white* man rather than a colored one?"—and answered that "*the reputation of being white* . . . is the most valuable sort of property, being the master-key that unlocks the golden door of opportunity" (Olsen 1967:83; emphasis in original).[12] Harris finds Tourgée's argument significant, like Justice Brown's appropriation of it, because it clearly demonstrates the material advantages that attach to being regarded as a white person in America. Moreover, these benefits extend beyond the age of segregation, thus demonstrating "the Court's chronic refusal to dismantle the structure of white supremacy" (Harris 1993:1750), which Harris views as an unstated premise of the Court's current equal protection jurisprudence. Understanding whiteness as property allows us to see how the *Plessy* doctrine of "separate but equal" has been rejected while the *Plessy* principle of property rights in whiteness has not.

Viewing whiteness as property also grounds a critique of passing, since it is precisely the privileges of whiteness that lead people to pass. The material benefit of passing *is* the property value in being regarded as white:

> Like passing, affirmative action undermines the property interest in whiteness. Unlike passing, which seeks the shelter of an assumed whiteness as a means of extending protection at the margins of racial boundaries, affirmative action de-privileges whiteness and seeks to remove the legal protections of the existing hierarchy spawned by race oppression. What passing attempts to circumvent, affirmative action moves to challenge. (Harris 1993:1779)

[12] Brief for Homer A. Plessy by Albion Tourgée, *File Copies of Briefs* 1895, VIII October Term, 1895; reprinted in Olsen (1967:80–103). Cited below as "Tourgée Brief."

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On this view, passing merely extends white privilege to a broader class of recipients and therefore cannot challenge the legitimacy of white supremacy as an ordering principle of American society. Thus Harris criticizes Tourgée's request for a light-skinned plaintiff, which she describes as coming "over vigorous opposition from organized black leadership" who feared that "such a strategy, even if successful would mitigate conditions only for those blacks who appeared to be white" (Harris 1993:1747, note 179).

In her critique of *Plessy*, Harris is precisely right to identify the Court's protection of a property right in whiteness. However, her characterization of passing fails to appreciate Tourgée's subversive use of racial indeterminacy to critique the institution of segregation. Tourgée's argument that whiteness is property was less concerned with the fact of white privilege (which he viewed as obvious) than with the legal mechanisms through which an individual's race was established. If the process of racial classification was arbitrary, and assuming whiteness to be property, then segregation violated the Fourteenth Amendment's prohibition against denying property without due process of law. The Louisiana law was unconstitutional, Tourgée argued, because it required train conductors or other railway employees to make unqualified on-the-spot determinations of a passenger's race without benefit of formal standards, criteria, or procedures to govern the process (Tourgée Brief 1895:83–5). The very concept of whiteness, he argued, could not be understood independent of the institutional mechanisms through which races were defined. Moreover, it may not be possible to determine an individual's race in any non-arbitrary fashion:

> The Court will take notice of the fact that, in all parts of the country, race-intermixture has proceeded to such an extent that there are great numbers of citizens in whom the preponderance of blood of one race or another, is impossible of ascertainment, except by careful scrutiny of pedigree. As slavery did not permit the marriage of the slave, in a majority of cases even an approximate determination of the preponderance is an actual impossibility, with the most careful and deliberate weighing of evidence, much less by the casual scrutiny of a busy conductor. (Tourgée Brief 1895:84)

Tourgée's argument deploys the figure of passing to call out the inherent instability of those racial categories upon which segregation depended. By shifting the focus from the legal treatment of African Americans as a class to the legal process of racial classification, Tourgée hoped to render the racial categories demanded by segregation both practically and conceptually incoherent.

Awareness of the racially destabilizing potential in passing is evident in a letter to Tourgée from Martinet, discussing the choice

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of a light-skinned plaintiff for the case. Martinet wrote, "[p]eople of tolerably fair complexion, even if unmistakably colored, enjoy here a large degree of immunity from the accursed prejudice" and therefore might not be arrested (Martinet to Tourgée, 5 October 1891, The Tourgée Papers; reprinted in Olsen 1967:56). Aside from the obvious complication (that the arrest was necessary to pursue a test case), Martinet's letter to Tourgée is usually quoted to attest to the higher social status of light-skinned over darker-skinned blacks (Harris 1993:1747, note 179; Lofgren 1987:31; Elliott 2001:307). But while Martinet was alerting Tourgée to the practical problem of finding a suitable test case, he also connected that concern to the notable difficulty in distinguishing whites from blacks in New Orleans. Examined in its entirety, the passage takes on a rather different implication:

> It would be quite difficult to have a lady *too* nearly white refused admission to a "white" car. There are the strangest white people you ever saw here. Walking up and down our principal thoroughfare - Canal Street - you would [be] surprised to have persons pointed out to you, some as white & others as colored, and if you were not informed you would be sure to pick out the white for colored and the colored for white. Besides, people of tolerably fair complexion, even if unmistakably colored, enjoy here a large degree of immunity from the accursed prejudice. (Martinet to Tourgée, 5 October 1891, The Tourgée Papers; reprinted in Olsen 1967:56–7; emphasis in original)

In this passage, Martinet identifies two senses in which race and mixed race find themselves conceptually at odds. The first lines of the passage describe a community in which the color line (or at least the precise boundaries of the color line) was thoroughly confounded. In the lived experience of race in nineteenth-century New Orleans, one could not necessarily know from appearances an individual's racial identity. While this did not in itself invalidate racial classifications, it did force Martinet to distinguish these passers from another group who remained "unmistakably colored" despite their "tolerably fair complexions." Unlike members of the second group, whose racial identity was "unmistakable," those in the first set remained "colored" *despite their white appearance*. Their coloredness derived, then, from some source other than appearance—some source other than color.

There is at least a possibility of slippage here, between the problem of correctly categorizing a particular ambiguously raced individual and the broader difficulty of maintaining under such conditions the coherence of clearly distinct racial categories such as state-mandated segregation both required and sought to impose. This is precisely the strategy that Tourgée pursued in his argu-

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ments before the Supreme Court. It was not an attempt to expand the roster of white privilege but rather to undermine the stability of racial classifications and so to challenge the legitimacy of racial segregation itself.

Racial Sorting in the Tourgée Brief

Tourgée's brief to the Supreme Court began with a seemingly simple question: "Has the State the power under the provisions of the Constitution of the United States, to make a distinction based on color in the enjoyment of chartered privileges within the state?" (Tourgée Brief 1895:80). It is tempting to read this question as concerned primarily with the scope of Fourteenth Amendment protections for racial minorities. But more precisely, the question concerned the legality of state-mandated racial assignments, as Tourgée made clear: "The gist of our case . . . is the unconstitutionality of the assortment; not the question of equal accommodation" (Tourgée Brief 1895:97). Tourgée refused to let the question of equal treatment of races come untethered from the logically prior question of how it is determined to what race an individual belongs.

The activity of racial classification is prior to any question of equal treatment because racial classification defines the terms of comparison, which later may be judged permissible or not. That is, before discussing the acceptable treatment of blacks, one needs to determine who is black. Tourgée put the question to the Court:

> Has [the State] the power to require the officers of a railroad to assort its citizens by race, before permitting them to enjoy privileges dependent on public charter?
> Is the officer of a railroad competent to decide the question of race?
> Is it a question that *can* be determined in the absence of statutory definition and without evidence? (Tourgée Brief 1895: 80–1; emphasis in original)

The question that emerged from Martinet's description of "passing" on Canal Street (what does it mean to be "colored" if it is not a question of color?) was thus placed before the Supreme Court in the form of Plessy's own ambiguous racial identity. But where Martinet's description initiated a question of what race *is*, Tourgée's questioning demanded an account of how race is *determined*, who makes the determination, and by what criteria it is to be made:

> Has the State the power under the Constitution to authorize any officer of a railroad to put a passenger off the train and refuse to carry him *because* he happens to differ with the officer as to the race to which he properly belongs? (Tourgée Brief 1895:81, emphasis in original)

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Before considering the meaning of equal treatment, Tourgée would have us ask what it is that is (or is not) being treated equally. Before considering whether Plessy was white, Tourgée asked by what authority a train conductor made such a determination. On what basis would one know if the conductor was "correct" in his determination?

Questions such as these expose the process by which bodies are raced, and the seeds of skepticism about the process of racial classification come to infect the resulting racial categories. The emphasis on the activity of racial determination in Tourgée's sentence (marked in italics to emphasize the disagreement over classification rather than the legality of removing a passenger from the train) unsettles the status of "properly belonging to one's race" at the sentence's conclusion.

Tourgée continued, but with the question of racial belonging now placed under scare quotes: "Has the State the power under the Constitution, to declare a man guilty of misdemeanor and subject to fine and imprisonment, *because* he may differ with the officer of a railroad as to 'the race to which he belongs?'" (Tourgée Brief 1895:81, emphasis in original). The questioning has a certain trajectory, undermining confidence not only in the assessment of Plessy's race, but in the stability of "races" more generally:

> Is not the question of race, scientifically considered, very often impossible of determination?
> Is not the question of race, legally considered, one impossible to be determined, in the absence of statutory definition? (Tourgée Brief 1895:81)

Where the determination of Plessy's race by a train conductor on the East Louisiana Railroad line was too arbitrary to constitute "due process of law," Tourgée's argument also suggested that *no* method of racial classification could be sufficiently non-arbitrary as to make segregation constitutionally valid.

Tourgée's argument against racial classification trades heavily upon the practical and logical difficulties of maintaining the boundaries of race in view of a history of race-intermixture throughout the country. But the critical force of his claim derived not only from the inherent instability of racial categories, but also from his recognition that racial classifications were exercises in power designed to keep blacks a subordinated class. His deconstruction of racial categories was closely tied to a critique of white supremacy, evident in the remarkable thought experiment with which he concluded his brief, and which bears quoting at length:

> Suppose a member of this Court, nay, suppose every member of it, by some mysterious dispensation of providence should wake tomorrow with black skin and curly hair—the two obvious and

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> controlling indications of race—and in traveling where the "Jim Crow Car" abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result, the indignation, the protests, the assertion of pure Caucasian ancestry. But the conductor, the autocrat of Caste, armed with the power of the State conferred by this statute, would listen neither to denial or protest . . .
> What humiliation, what rage would then fill the judicial mind! How would the resources of language not be taxed in objurgation! Why would this sentiment prevail in your minds? Simply because you would then feel and know that such assortment of the citizens on the line of race was a discrimination intended to humiliate and degrade the former subject and dependent class–an attempt to perpetuate the caste distinctions on which slavery rested–a statute in the words of the Court "tending to reduce the colored people of the country to the condition of a subject race." (Tourgée Brief 1895:102–3)[13]

In imagining the Justices of the Supreme Court thus transformed in appearance, Tourgée posed a hypothetical that oddly inverted Plessy's situation. Like Plessy (a white black man), the Justices (as black white men) would be ordered into the Jim Crow car. Playing on the obvious absurdity of the scene, the hypothetical was meant to suggest that Plessy's racial classification was every bit as arbitrary as that of the (phenotypically) black judges. What decides the question of which race each will be? Tourgée's hypothetical demonstrated the power of law to impose racial subjectivity: it is not simply a matter of properly matching the race of each person to the appropriate train car. Rather, an individual's race may be a *product* of being assigned to a white or a colored car. In this regard Tourgée anticipated Du Bois' quip that the definition of a black man is "a person who must ride Jim Crow in Georgia" (Du Bois 1968:153).

The assignment of racial identity in Tourgée's example was arbitrary not only because it lacked criteria for racial determination, but also because it served to perpetuate white supremacy. The two elements joined in Tourgée's description of the conductor as an "autocrat of Caste" and so exposed the true purpose of Jim Crow: to "humiliate and degrade" nonwhites, to reduce colored people to "the condition of a subject race."

The centrality of Plessy's white appearance to the legal case against segregation lies in the possibility of denaturalizing racial categories, revealing the force of law required to maintain race. Reading *Plessy* as a case critically concerned with racial ambiguity

[13] Quoting *Strauder v. West Virginia* (1880): [the Fourteenth Amendment guarantees] "the right to exemption . . . from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race" (100 U.S. 303).

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recovers Tourgée's interrogation of this aspect of the law's operation, drawing our conception of race up from the body and onto the power exercised by the state's assignation of racial categories. From this perspective, the Court may be seen to have participated in the creation and maintenance of the very racial categories on whose behalf the law claimed to act. In the following section, I demonstrate how Tourgée's strategy registered in the Court's opinion, in which Justice Brown sought to contain the disruptive effects of passing.

Judicial Responses to Indeterminately Raced Bodies

Unlike the infamous *Dred Scott* decision, which simply denied that blacks could be citizens—having been no part of "the people of the United States" at the time of the founding and regarded as possessing "no rights that the white man was bound to respect" (*Dred Scott v. Sandford* 1857, 60 U.S. 393)—Justice Brown in *Plessy* accepted the premise that the "object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law" (163 U.S. 537, 544). The task of his argument, therefore, was to show how "absolute equality" could be reconciled with a policy of state-mandated racial segregation. To this end, Brown adopted two strategies to limit the scope of the Civil War amendments and justify the constitutionality of Jim Crow. First, he distinguished political equality, as guaranteed by the Fourteenth Amendment, from a social equality, which he characterized both as beyond the scope of constitutional protection and incompatible with biologically based natural differences between the races. Second, he advanced a formalistic theory of symmetrical equality holding that segregation applied equally to all races because whites were separated from blacks just as blacks were separated from whites.[14]

Significantly, both of Justice Brown's arguments are implicitly linked to questions of mixed race. The theory of symmetrical equality developed as a legal justification for anti-miscegenation laws, adopted by the Court in *Pace v. Alabama* (1883). As visible evidence of previous miscegenation, passing is closely related to the theme of mixed race. To the extent that race-thinking presupposes discrete or pure racial kinds, race requires the denial of mixed race (Moran 2001:42–60; Zack 1995:301; Root 1992:233).[15] Where scientific theories of race attempted to define away the racially

[14] The phrase *symmetrical equality* is taken from Bank (1995), who traces the argument from its origins in anti-miscegenation cases to its eventual application in civil rights cases.

[15] On the history of state regulation of interracial intimacy, see Kennedy (2003), Moran (2001), and Sollors (2000).

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destabilizing implications of mixed-race people, anti-miscegenation laws sought to legislate against such disruptions. In this regard, Justice Brown's majority opinion can be seen as an exercise in containment, reacting against the destabilizing potential of passing in Tourgée's defense.

Justice Brown's first argument, contrasting political equality to social equality, sought to distinguish *Plessy* from *Strauder v. West Virginia* (1880), in which the Court held that the exclusion of blacks from juries violated the Fourteenth Amendment's guarantee of equal access to the judicial process. While protecting certain political rights surrounding access to the courts, *Strauder* also made clear that social rights received no such protection under the Fourteenth Amendment.[16] These categories of rights were common to nineteenth-century jurisprudence. Political rights referred specifically to the realm of voting and office-holding, whereas civil rights guaranteed access to the courts, protection of property rights, and enforcement of contracts, and prohibited the imposition of greater punishments for criminal offenses simply on the basis of race (Tushnet 1987). Social rights, in contrast, referred to interracial association and social contact, typified by interracial marriage and sexual intimacy.

It is difficult to overstate the significance of white anxiety about interracial sexuality to post-Emancipation southern culture (Kinney 1985; Welke 1995:266). White demands for segregated travel were largely driven by sexualized fears that "white women and black men might otherwise find themselves seated next to one another" (Litwack 1980:265–7). Moreover, white Americans in the late nineteenth century routinely associated social equality with compulsory interracial intimacy, to the point even of thinking that "the state's power to bar interracial marriage was somehow equal to its power to force people into such unions" (Przybyszewski 1999:83, 113). The white "obsession with miscegenation" thus made it nearly impossible to "clarify the difference between 'social equality' and 'public equality'" (Litwack 1980:265–7).

In casting Plessy's argument against segregation as a demand for social equality, Justice Brown exploited white fears of miscegenation while figuring the challenge to mandatory segregation laws as a radical restructuring of deeply personal preferences that far exceeded the scope of the Fourteenth Amendment and the power of the Court:

> [The Fourteenth Amendment was intended to] enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions

[16] "Social rights . . . do not rest upon any positive law, though they are more potential in controlling the intercourse of individuals" (*Strauder v. West Virginia* 1880, 100 U.S. 303).

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> based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. (163 U.S. 537, 544).

Justice Brown's argument granted to the social institution of law all the force of nature. The legal enforcement of segregation was said to follow naturally from biological differences ("color" and "race") that exist simply "in the nature of things." The language of natural difference, sutured to social arrangements based upon those differences, served to insulate segregation from legal remedy by locating the source of inequality outside the sphere of legitimate government action.

Suggesting the inevitability of racial separation, Justice Brown described race differences as "a distinction which is found 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" (163 U.S. 537, 543). The move was a rhetorical victory regardless of whether one believes in natural racial differences. By figuring racial segregation as a consequence of biology, the argument portrayed anti-segregationists as demanding the impossible from the limited tools of limited government: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences" (163 U.S. 537, 551). But Plessy was not arguing that the Constitution obliged the state to force private businesses to integrate. He claimed only that the Fourteenth Amendment prevented states from *requiring* racial segregation. Indeed, Louisiana's legislative effort to prevent interracial contact was itself an example of "social engineering" in that it attempted to impose social patterns that might fade absent the coercion of law. Justice Brown's opinion depicted segregation laws as preserving rather than imposing racial separation, just as nineteenth-century scientific racism theorized distinct and pure racial types even in the face of an increasingly large mulatto population.

Justice Brown's second argument—based on symmetrical equality—attempted to reconcile segregation with the Fourteenth Amendment's requirement of "absolute equality before the law." Racial segregation placed no additional burdens on Negroes, Justice Brown argued, because the law applied equally to both races and provided identical punishments for whites and nonwhites who violated it. Justice Brown's argument thus severed the connection between the law's formal neutrality and segregation's unmistakable purpose: "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other" (163 U.S. 537, 544). On this view, racial distinctions need not be abolished but would be treated just like any other legal category, and

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their constitutional permissibility would therefore be determined by the "reasonableness" of the exercise of state power.[17] The reasonability of racial segregation, moreover, Justice Brown inferred from two judicially sanctioned uses of racial distinctions: segregated schools and prohibitions against interracial marriage and sexual contact (163 U.S. 537, 544–5).

The basic structure of the argument can be traced to the unlikely source of Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court, in the school segregation case of *Roberts v. City of Boston* (1850). Shaw's opinion upheld the constitutionality of Boston's segregated schools on the grounds that the principle of equality before the law did not imply that all should receive "the same treatment," but rather that all are entitled to equal regard and "paternal consideration" (cited in Kull 1992:49). Just as "equal protection" did not compel the identical treatment of parents and children or women and men, neither did it condemn the separation of students based on differences of age or educational need—or race. Racial distinctions would be prohibited when placed in the service of prejudice and domination, but allowed when, as deemed in this case, "the good of both classes of schools will be promoted, by maintaining the separate primary schools for colored and for white children" (cited in Kull 1992:51).

Justice Brown's reliance on *Roberts*, while establishing the structure of his argument, also posed two obvious problems. First, *Roberts* had been decided before the ratification of the Fourteenth Amendment and so did not address any protections that the Equal Protection Clause might afford. Second, it would be difficult to show how the Louisiana Separate Car Act worked to "the good of both classes" of citizens. To address both problems, Justice Brown introduced the issue of miscegenation.

The Court had embraced the idea of symmetrical equality just over a decade before *Plessy*, in *Pace v. Alabama* (1883). In *Pace*, Justice Stephen J. Field insisted that laws prohibiting interracial adultery or fornication were racially neutral because "the punishment of each offending person, whether white or black, is the same" (106 U.S. 583, 585). Although Justice Brown did not cite *Pace*, the reference may be implied both from the structure of the argument and from his assertion that anti-miscegenation laws "have been universally recognized as within the police power of the State" (163 U.S. 537, 545).[18] Moreover, the Court in *Pace* had not

[17] On the significance of the "reasonability standard" in Justice Brown's opinion, see Kull (1992:116–8).

[18] Moran (2001:80–1) makes a similar connection between *Pace* and *Plessy.* On the role of anti-miscegenation laws in the post-Emancipation "hardening of racial boundaries," see Bardaglio (1999) [noting that such decisions run counter to the trend of courts deferring to the authority of contract in domestic relations and labor law].

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felt constrained by Shaw's principle that racial distinctions must work for the benefit of both races, arguing instead that prohibitions against interracial sexual contact served the community's interest and general welfare. In similar fashion, Justice Brown's opinion in *Plessy* asserted that segregated railway travel carried with it no implication of inferiority for either race. Ignoring the plain meaning of segregation, Justice Brown could thus blame the victims of Jim Crow for their recognition of the injury they sustained:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. (163 U.S. 537, 551)

The literal truth of Justice Brown's claim, that nothing in the statute on its face treated blacks differently than whites, is only intelligible to the extent that it abstracts the law outside of its social context and obvious legislative purpose. It requires one to believe that segregation statutes were intended to keep whites out of "colored cars" rather than to announce with the authority of the state that blacks are degraded, inferior, and unfit for association with whites.

This interpretation was, of course, directly contradicted by the actual practices of segregation. The inferior conditions of the Jim Crow cars (Elliott 2001:306), the historical roots of segregation in the regulation of antebellum free blacks (Berlin 1974; Litwack 1971), and the lack of enforcement of the law against whites—who would move up to the "smoking car" to indulge in alcohol and tobacco (Lofgren 1987:10–1), all testify to the true purpose and function of segregation as "an instrument in the maintenance of white supremacy" (Olsen 1967:4). Justice Brown's suggestion that the degrading social meaning of racial segregation existed "solely because the colored race chooses to put that construction upon it" thus works a kind of double injury: it constitutionalizes the physical segregation of racial minorities while simultaneously disqualifying minority interpretations of their own lived experiences. Justice Brown's argument is disingenuous in its winking disavowal of segregation's degrading intent, but also in its presumption that words can mean whatever one chooses them to mean (or mean nothing at all). What disappears in Justice Brown's fantastical linguistic account is just what ought to be at the center of the analysis: the fact of white supremacy.

While Justice Brown refused to acknowledge the social meaning of segregation laws, his argument nonetheless depends upon the presumption of highly meaningful racial differences presumed

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to be grounded in nature. Throughout his opinion, Justice Brown repeatedly invested the visible distinctions of skin color with the normative authority of a "natural" social order. Racial differences, he claimed, must inevitably exist "so long as white men are distinguished from the other race by color" (136 U.S. 537, 543), just as social equality cannot "in the nature of things" be accomplished through intervention by the state (136 U.S. 537, 544). Differences of color and race were natural facts for Justice Brown, and he presented the social relationships organized around race as natural outgrowths of biology and therefore immune to judicial intervention. Nonetheless, and despite Justice Brown's stated assumption of fixed, discrete biological races, a careful reading of his opinion reveals the remarkable extent to which he was unable to fully contain the racially disruptive implications that mixed-race subjects posed for systems of racial classification designed to identify and preserve racial purity.

In marked contrast to the language of natural difference, Justice Brown's response to Plessy's racial ambiguity forced him explicitly to acknowledge the social-legal processes by which seemingly natural racial categories are constructed, clarified, justified, and maintained. In administering segregation laws, courts were necessarily called upon to assign races to those individuals whose actual bodies confounded the logical clarity of legal definition, as well as to issue criteria by which the boundaries of racial categories could be justified and refined.

Justice Brown's explicit recognition of the legal construction of race appears in the text of his opinion, responding to the issue of racial classification raised in the Tourgée Brief. Despite his earlier claim that race flows naturally from color, Justice Brown noted that the state's authority to segregate based on race would necessitate a legal determination of the boundaries of racial categories:

> The power to assign a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. (163 U.S. 537, 549)

While the logic of the majority decision relies upon natural differences between the races, in *Plessy,* the Court nonetheless recognizes that those boundaries require state definition and regulation. Rather than finding distinct groups in the world, and then regulating their conduct, the Court now appears to describe a scheme of categorization that depends upon legal construction even while acting in the name of those "natural" differences. And because not all states defined racial identity according to the same criteria, the Court's reliance upon "natural differences" ran into the

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embarrassing fact that someone who is naturally white in Virginia could be naturally black in North Carolina, or any state with a more narrow legal construction of whiteness.

Justice Brown was not unaware of this contradiction. The sheer range of racial definitions was problematic for him in two senses. First, because the diversity of definitions makes the question of *what* one is dependent upon the question of *where* one is. The less consistency with which racial identities are judged, the less natural those judgments will seem. Second, because the diverse standards of racial determination call attention to the legal apparatus by which racial identities are assigned. The seeming naturalness of racial categories is bound to be unsettled by the extensive involvement of legal institutions in defining and enforcing racial classifications.

Justice Brown's solution to this problem was to pass it along to the states to deal with, citing state court rulings that employed various formulae of racial determination:

> 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, some holding that any visible admixture of black blood stamps the person as belonging to the colored race (State v. Chaver, 5 Jones [N.C.] 1, p. 11); others that it depends upon the preponderance of blood (Gray v. State, 4 Ohio 354; Monroe v. Collins, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three-fourths. (People v. Dean, 4 Michigan 406; Jones v. Commonwealth, 80 Virginia 538). But these are questions to be determined under the laws of each State, and are not properly put in issue in this case. (163 U.S. 537, 552)

The passage is remarkable for a number of reasons. Because it is edited out of most legal casebooks that reproduce the opinion, it may be unfamiliar even to those who have carefully read the case.[19] Moreover, it demonstrates an attention to law's constitutive power to impose racial identity that sits uncomfortably with the rest of the opinion. The apparent ease with which Justice Brown dismissed the problem as a matter for state legislatures to decide may be of less significance than the fact that he felt compelled to address the problem at all.

[19] Neither of the two sections I discuss are included in Bell (1980), Emerson (1967), Stone et al. (1996), or Sullivan and Gunther (2004). Nor are they included in the third edition of Brest and Levinson 1992, although they have been added to the 4th edition of that text (Brest et al. 2000) along with a brief section on the legal construction of race, "What is 'Race' for the Purpose of the Equal Protection Clause?" The absence of these important passages speaks to an accepted standard interpretation of the case as concerned with the treatment of pre-existing racial groups rather than processes of racial formation.

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The specific rationales that Justice Brown pointed to in lower-court rulings are also of interest. Each of the decisions was claimed to make blood-quantum the criterion of racial determination, whether it be "any visible admixture of black blood" or a "preponderance of blood" or a "proportion of three-fourths" standard. The "visible admixture" standard, however, while claiming the supposed objectivity of blood nevertheless remains a visual standard based on appearance (surface) rather than blood (depth). An assumed connection between surface and depth—which functions here as a rule of racial definition—is implicit in ordinary conceptions of race. Morphological differences that are taken to constitute distinct racial kinds take their authority from an assumed connection to racial essences thought to reside below the skin, either in blood or, more recently, in the genes. Those physical features that serve as racial markers do so because they are taken as external signs of an internal racial truth.

Justice Brown's response to ambiguously raced bodies may thus be understood as an attempt to shore up the solidity of internal racial essences by insulating them from the admittedly variable external criteria that a state could choose as its legal definition. The inherent messiness of racial categorization was in this way dismissed as belonging to the bureaucratic realm of proper administration or the legislative realm of adopting appropriate criteria of racial definition. In either case, states were left with the authority to define race by statute, while the contradiction between state recognition of natural difference and the state's construction of those differences was dismissed as being "not properly put in issue in this case."

Justice Brown's attempt to shift the problem to the state level was meant to resolve the difficulty of racial ambiguity. But even a cursory reading of the cases that he cited as precedent reveals the inadequacy of this solution. In each of the five cited cases, the court either ruled to dismiss charges or remanded for a new trial because the state had failed to meet its burden of proving the race of the defendant. And in none of the cases did the court "resolve" the problem in the easy manner that Justice Brown implied. On the contrary, the cases cited in *Plessy*, while meant to show that the questions posed by racial ambiguity were "questions to be determined under the laws of each State," in fact demonstrated just what Tourgée hoped to show: that Jim Crow laws not only constituted unequal treatment of racial minorities, but that they also presumed the state's authority to impose racial status without justification of the criteria by which such determinations can be made.

In the first case, *State v. Chavers* (1857), which Justice Brown cited as establishing a "preponderance of blood" standard, the Supreme Court of North Carolina set aside the conviction of

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William Chavers under a statute that prohibited "free Negroes" from carrying shotguns. Chavers, who was indicted as a "free person of color," argued "there was no evidence of his being a Negro" (*State v. Chavers* 1857, 50 NC 25 at 27). The court examined statutory and common language usage of the words *white* and *Negro* in order to reach its conclusion that "free Negro" and "free person of color" were distinct legal categories, thus raising the possibility that Chavers, as a free person of color, was not subject to the prohibition against free Negroes carrying shotguns.

In response to Chavers's ambiguous racial status, the court sought various kinds of evidence that might finally determine to what race he truly belonged. The legal standard adopted by the court, as Justice Brown observed, was that of "visible admixture of black blood." However, the evidence used at trial to make the actual determination hardly conformed to the standard that Justice Brown described. One source of evidence issued from an invitation by Chavers's counsel for "the jury to inspect him and judge for themselves" (*State v. Chavers* 1857, 50 NC 25). But rather than settling the issue, this visual evidence seems to have been taken as a proxy for lineage, thus requiring the introduction of evidence relating to the respective races of the defendant's parents. The determination of lineage, however, only led back to questions of morphology, and the racial appearance of the defendant's father was introduced via testimony of a witness who "proved that the defendant's father was a man of dark color and had kinky hair; that he was a shade darker than the defendant himself, and his hair was about as much kinked" (*State v. Chavers* 1857, 50 NC 25).

While these highly subjective judgments cycled through conflations of appearance and lineage (the former taken as proof of the latter, the latter determined only by recourse to the former), the court also allowed as proof of visible admixture evidence even more squarely linked to behavior than appearance. Chavers had apparently traveled to his trial aboard a steamboat that charged white passengers a fare of one dollar but carried Negroes for half price. At trial, a Mr. Green testified that Chavers had paid only the fifty-cent fare. This was taken as proof of his race by "his own declaration" (*State v. Chavers* 1857, 50 NC 25 at 26). Presumably it is as important that Chavers was accepted by the steamboat operator as not white as it is that he claimed to be so. But here we find a standard of racial identification that is almost entirely performative. Public display and reception of racial identity is given equal evidentiary weight as that of morphology or lineage. Chavers could well have been passing for colored in order to avoid paying the higher fare on the steamboat, but either formulation (white passing for black or black passing for white) is to large extent arbitrary, as Chavers was evidently neither black nor white, but rather indeter-

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minate within a classificatory scheme whose purpose was to impose and maintain "pure" racial categories.

In *Gray v. State* (1831), which Justice Brown cited as establishing a preponderance of blood standard, the Supreme Court of Ohio set aside the conviction of Polly Gray, who had been found guilty of robbery largely on the basis of testimony by a Negro witness. Under Ohio law, Negroes were deemed incompetent to testify against whites. Gray claimed to be white, thus rendering the testimony invalid. In response to Gray's objection at trial, "the prisoner appeared, upon inspection, and of such opinion was the court, to be of a shade of color between the mulatto and white" (*Gray v. State* 1831, 4 Ohio 353). Upon review, the court reversed the trial court's judgment, finding that statutory and ordinary language usage recognized only three racial categories (white, Negro, and mulatto), none of which adequately described the defendant.

Far from resolving the problem of racial ambiguity, the Ohio court expressed reservations that such resolution could ever be supplied: "We are unable to set out any other plain and obvious line or mark between the different races. Color alone is sufficient. We believe a man, of a race nearer white than a mulatto . . . should partake in the privileges of whites" (*Gray v. State* 1831, 4 Ohio 353, 355). The rationale for the decision makes clear the court's discomfort at the position in which it was placed, issuing "partly from the difficulty of defining and of ascertaining the degree of duskiness which renders a person liable to such disabilities" (*Gray v. State* 1831, 355). Despite the admittedly arbitrary nature of the rule, and to Polly Gray's great relief, the witness's "degree of duskiness" constituted something just short of white, and so the testimony was disallowed.

Justice Brown also cited two cases involving voting rights, in which ambiguously raced men sought to vote in states that limited the franchise to white males. In both cases the men sought relief from disenfranchisement on the grounds that they were, in fact, legally white. In *Monroe v. Collins* (1867), the Supreme Court of Ohio struck down two supplements to the 1841 Act to Preserve the Purity of Elections. Under the terms of the supplements, election officials were required to challenge the votes of anyone with "a visible admixture of African blood" (17 Ohio St. 665), and were at the same time made not liable for damages for rejecting the votes of such persons. George Collins sought a ballot but was rejected by James Monroe, an election judge in Greene County, upon failing to provide "proof" of his racial qualification to vote. As specified by the terms of the supplemental act, proof of whiteness consisted in an elaborate procedure in which the potential voter was asked a series of questions, including questions of lineage: "4. Had your parents, or either of them, a visible and distinct admixture of

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African blood?" (17 Ohio St. 665, 679) and questions of association: "5. In the community in which you live are you classified and recognized as a white or colored person, and do you associate with white or colored persons?" (17 Ohio St. 665, 679). If the vote was not rejected after the initial questioning, the election official was instructed to demand the oaths of "two credible witnesses" testifying that they knew the person challenging, and that they knew the parents of the challenger not to "have a distinct and visible admixture of African blood" (17 Ohio St. 665, 679). The Act explicitly rejected evidence "founded merely upon appearance, unless the facts are fully stated as to the parentage of the person challenged" (17 Ohio St. 665, 680). The challenger was then required to take the following oath: "You do solemnly swear (or affirm) that, to the best of your knowledge and belief, you are a white male citizen of the United States, and know the fact to be so from a knowledge of both your parents and your pedigree" (17 Ohio St. 665, 681).

Collins refused to take the oath, and so was ruled ineligible to vote. His stated reason for refusing the oath was that his racial classification was indeterminate and so the terms of the questioning precluded an honest response. In an answer that perfectly illustrates Tourgée's strategy, Collins declared, "I know of no established and well defined classification of persons as to color and shades of color, and am, therefore, unable to say how I am classified. I associate with persons white and persons black, when agreeable to all parties" (17 Ohio St. 668). The question "do you associate with white or colored persons?" refused the possibility of interracial association, making a truthful answer unintelligible.

Justice Brown was not entirely wrong in citing *Collins* for its "preponderance of blood" standard. The Court did utilize such a standard in striking down as unconstitutional the Purity of Elections Act. But the facts of the case demonstrate the absurdities that the court encountered when setting out to define racial categories with any degree of precision. The sheer variety of sources of evidence (lineage, appearance, association, affirmation, belief) did little to establish racial differences as natural facts that seamlessly translate into rules of social organization. Nor could Justice Brown find much support in the court's conclusion that the Act imposed an undue burden upon "white citizens of less than half African blood" (17 Ohio St. 688).

The other voting rights case that Justice Brown cited, *People v. Dean* (1866), was similarly ambiguous in its adoption of a criterion by which to define whiteness. In this case, the Supreme Court of Michigan was asked to consider the conviction of William Dean on charges of "illegal voting" (*People v. Dean* 1866, 14 Mich. 406 at 413), and took the opportunity to "settle the position of persons of

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mixed blood under the [Michigan] constitution" (*People v. Dean* 1866, 413). As Justice Brown suggested in *Plessy*, the Michigan court did settle upon a standard of requiring at least three-fourths white ancestry: "persons are white within the meaning of our constitution, in whom white blood so far preponderates that they have one-fourth of African blood" (*People v. Dean* 1866, 14 Mich. 406, 424). But the rationale for the decision was less supportive of Justice Brown's goal. The court did not find a natural distinction to guide its decision but seemed instead to accept the responsibility of imposing a uniform, but admittedly arbitrary, standard of racial determination:

> Rules of suffrage must be presumed uniform as far as possible. It must be admitted, therefore, that we are compelled to discover some mode of classification, and that persons of precisely the same blood must be treated alike, although they may differ in their complexions. There are white men as dark as mulattoes, and there are pure blooded albino Africans as white as the whitest Saxons. This classification is no doubt a difficult task, and there is room for much disagreement in it, but no rule can be applied without some inconvenience; but that will not justify us, I think, in refusing to assume the duty .... (*People v. Dean* [1866], 14 Mich. 406, 422)

The court did not so much resolve ambiguity as it imposed an admittedly arbitrary rule of racial definition. The resulting racial categories were at least partly the products of those laws that innate racial differences were supposed to justify.

Moreover, the "one-quarter black blood" standard was offered as an alternative to considerations of color that admittedly failed to do the work that scientific racism required of them. Yet despite having severed the connection between race and color, the court's rationale for the "one-fourth" standard was based precisely upon the significance of appearance: "[w]hile quadroons are in most cases easily distinguished as not white, persons having less than one-fourth African blood are often enough white in appearance to render any further classifying difficult" (*People v. Dean* 1866, 14 Mich. 406, 424). The reasoning of *People v. Dean* is thus quite inconsistent with Justice Brown's interpretation of it. Racial ambiguity motivated the court's imposition of the "one-fourth" standard but did not resolve it.

The final case that Brown cited, *Jones v. Commonwealth* (1885), encounters similar difficulties. In this case, Isaac Jones was sentenced to two years and nine months in the state penitentiary for "felonious marriage with Martha Gray, a white woman" (*Jones v. Commonwealth* 1885, 80 Va. 538). As a legal defense, Gray alleged that she had some black blood while Jones claimed to have some

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white blood, thus legitimizing the marriage. The court applied a "one-quarter black blood" rule, as the Michigan court did in *People v. Dean* (1866), ordering a new trial at which the state would have to show evidence of "the quantum of negro blood in his veins" (*Jones v. Commonwealth* 1885, 80 Va. 538, 540). However, the difficulty of establishing the races of the defendants can be seen in the kinds of evidence that were accepted by the court. As evidence that Gray had some "negro blood in her veins," the court observed "that her mother had given birth to negro children before her birth; that she herself was a bastard, and was accustomed to associate and attend church with negroes; and the colored pastor of the church testified that there were colored persons attending his church whiter than the said Martha" (*Jones v. Commonwealth* 1885, 80 Va. 538, 542). However clear the "one-fourth" standard may seem on paper, the lived experience of race is anything but clear, and remains highly resistant to the kind of tidy classification that Justice Brown assumed in his citation of the case.

In each of the cases that Justice Brown cited as evidence that the problem of racial ambiguity can be easily resolved by state law, a closer reading suggests just the opposite to be true. In none of the cases was a petitioner's contestation of racial classification simply dismissed. In three of the cases, convictions were overturned or remanded for a new trial (*Chavers*, *Gray*, and *Jones*), and in one case a state law was ruled unconstitutional (*Monroe v. Collins*). In none of the cases was a blood-quantum rule sufficient to settle an individual's racial status, which ultimately comes to depend on the contingent factors of social performance, presentation, and reception.[20] Justice Brown's attempt to rein in the racially destabilizing implications of passing in Tourgée's argument cannot in the end be considered a success. Rather than "resolving" racial ambiguity through legal fiat, the cases demonstrate the extent to which racial categories are produced and maintained through the constitutive power of the law.

Blindness as Disguise: Revisiting Harlan's Dissent

Thus far, the central claim of this article has been that standard accounts of the *Plessy* case fail to recognize the significance of Homer Plessy's white appearance and therefore misunderstand the role of racial passing as a challenge to both the practical application

[20] In her comprehensive survey, A. Gross reports that "the most striking aspect of 'race' in the nineteenth-century racial determination trials was not so much the biologization emphasized by earlier writers, but its performative and legal aspects. Proving one's whiteness meant performing white womanhood or manhood. [T]he evidence that mattered most was evidence about the way people acted out their true nature" (1998:156).

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of segregation laws and the ontological assumptions upon which they depended. But state-mandated racial segregation no longer exists in the United States even while racial hierarchy and inequality persist. What implications for contemporary issues of race and law does my interpretation of *Plessy* suggest?

Re-examining *Plessy* in the context of nineteenth-century concerns over passing and racial ambiguity sheds new light on Justice Brown's opinion and the role of law in processes of racial construction and classification. But my approach also raises questions about current practices of racial classification for such purportedly benign purposes as affirmative action. *Plessy* is of special significance to these debates because it is Justice Harlan's dissenting opinion that introduced the now famous phrase "Our Constitution is color-blind" (163 U.S. 537, 559). Criticisms of race-conscious legislation typically invoke this principle of color blindness, frequently quoting Justice Harlan's words. However, reading the dissent in the context of Plessy's ambiguous racial status complicates the binary opposition between "color-blind" and "color-conscious." In this section I argue that Justice Harlan's conception of color blindness both allows and requires judicial attention to the social and political forces through which race is made meaningful and consequently is not incompatible with racial classifications that seek to undermine the material conditions of racial stratification.

Harlan's dissent is remembered primarily for the phrase "Our Constitution is color-blind," which is uniformly regarded as providing unique insight into the proper construction of the Fourteenth Amendment. In *Brown v. Board of Education* (1954), the Court implicitly embraced Justice Harlan's dissent by reversing *Plessy* and declaring that "separate but equal has no place" (*Brown v. Board of Education* 1954, 347 U.S. 483). And while Justice Harlan's precise language "has never been adopted by the Court as the proper meaning of the Equal Protection Clause" (*Regents of the University of California v. Bakke* 1978, 438 U.S. 265, 355, Brennan, concurring in part), the Court has moved increasingly toward a "color-blind" approach.[21]

As Aleinikoff observes, "Justice Harlan's dissent in *Plessy v. Ferguson* has become an important cultural text in late twentieth century America. The opinion is seen as righteous and prophetic, announcing the proper understanding of the Equal Protection Clause of the Fourteenth Amendment years ahead of its time" (1992:961). However, because the principle of color blindness

[21] The Court has often reiterated a strong presumption against racial classifications of any kind, which can be justified only if narrowly tailored to achieve a compelling state interest: *Fullilove v. Klutznick* (1980), *Wygant v. Jackson Board of Education* (1986), *City of Richmond v. J.A. Croson Co.* (1989), *Adarand Constructors, Inc. v. Pena* (1995), and *Gratz v. Bollinger* and *Grutter v. Bollinger* (2003).

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would seem to cut as much against race-conscious remedies—such as affirmative action—as it does against segregation, Critical Race Theorists argue that color-blind constitutionalism serves to undermine the gains of the civil rights movement and protect rather than restrict the scope of white privilege.[22] In locating Justice Harlan's dissent as the original source of "color-blind constitutionalism" (Freeman 1995:45, note 3; Gotanda 1995:263), Harlan's words are taken by critics and advocates of "color blindness" alike to announce a general prohibition against the state's use of racial classifications irrespective of purpose. Because the phrase continues to have such purchase in contemporary discussions of equal rights, it is important that it be properly understood within the context of the *Plessy* case. That context, I suggest, includes the ubiquitous presence of white fears regarding miscegenation and interracial intimacy posed implicitly by Justice Brown's deployment of the *Pace* argument for symmetrical equality and explicitly by Plessy's legal representation.

The crucial passage of Justice Harlan's dissent reads as follows:

> 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, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. (163 U.S. 537, 559)

To be sure, there are textual resources in Justice Harlan's dissent that seem to support an interpretation for the principle of mandatory racial nonrecognition, and not only in the metaphor of color blindness itself. There is also Justice Harlan's own formulation of something very close to the nonrecognition rule: "[T]he Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights" (163 U.S. 537, 554). And Justice Harlan explicitly denied "that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved" (163 U.S. 537, 555). Defenders of a color-blind constitution maintain that this is the plain meaning of Justice

[22] The critique of color blindness is a defining element of CRT (Delgado 1995:xvi; Delgado & Stefancic 2001:6). Particularly powerful formulations of the critique include Harris (1993), Crenshaw et al. (1995), Freeman (1995), Gotanda (1995), Guinier and Torres (2002), and Peller (1995).

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Harlan's dissent and a faithful rendering of the Fourteenth Amendment.

However, this interpretation is misleading. There are several reasons to doubt that Justice Harlan thought the Fourteenth Amendment barred states from ever considering race, not all of which are flattering to the Justice. First, Justice Harlan's dissent was filled with the language of racial pride (for Anglo-Saxons) and animus (against the Chinese), not easily reconciled with the ideal of color blindness.[23] Those who are inclined to find here a strict prohibition against racial recognition are less likely to cite the lines preceding the famous phrase, which openly celebrate the supposed superiority of the white race. Further complicating matters, Justice Harlan's commitment to racial egalitarianism was actually premised on his racial paternalism. As Przybyszewski has convincingly shown, Justice Harlan thought that "whites expressed their racial identity best by extending civil rights to others regardless of race" and so "declared the Constitution color-blind in the name of his racial heritage" (1999:99). In this way, Justice Harlan could embrace the principle of color blindness and yet opine that "Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper" (163 U.S. 537, 554). If "pride of race" is compatible with color blindness, that is because the defining feature of the doctrine is not self-imposed ignorance of race, but rather the exercise of restraint by the dominant (white) class in regard to civil rights.

The distinction between Justice Harlan's personal race pride and his understanding of the proper role of the state regarding racial minorities serves to both recognize and privatize racialist assumptions by containing them within the sphere of social rather than civil rights. But this distinction provides another reason to doubt the familiar interpretation of Justice Harlan's color blindness as a strict bar against racial classifications by the state, irrespective of purpose. Had that been his intention, the principle should have led him to view all racial distinctions as illegitimate, including laws that prohibited interracial marriage and sexual contact. Yet Justice Harlan joined with the majority of the Court in upholding precisely such a law in *Pace v. Alabama* (1883). Consequently, his argument in *Plessy* had to explain why the Fourteenth Amendment

[23] For example, Justice Harlan wrote, "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese Race. But by the statute in question, a Chinaman can ride in the same passenger with white citizens of the United States . . ." (163 U.S. 561). For a detailed account of Harlan's anti-Chinese racism, see Chin (1996).

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prohibited states from barring interracial travel on railway cars yet permitted states to outlaw interracial contact of a sexual nature.

Identifying the right to travel (and the equal use of public accommodations) as a civil rather than social right accomplished this task. The distinction allowed Justice Harlan to present interracial sexual contact—the quintessential example of "social equality"—as categorically distinct from civil rights and therefore unprotected by the Constitution. In this sense, there is nothing in Justice Harlan's dissent that contradicts Justice Brown's assertion that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races on terms unsatisfactory to either" (163 U.S. 537, 544). Rather than defending social equality, Justice Harlan simply shifted the use of public accommodations in travel from a social to a civil right. His argument therefore did not commit him to the doctrine of color blindness in regard to interracial intimacy.

Given Justice Harlan's acquiescence to the holding in *Pace*, it is even more noteworthy that his *Plessy* dissent contradicted the symmetrical equality rationale in *Pace*. Justice Brown deployed such an argument in defense of "separate but equal," claiming that segregation laws applied equally to whites and blacks and therefore implied no "badge of inferiority" (163 U.S. 537, 551). Justice Harlan's objection to this point was not that the law required classification by race. His dissent turned instead on a consideration of whether the law's purpose was to perpetuate the subordination of a racial group: "There is no caste here. Our Constitution is colorblind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law" (163 U.S. 537, 559). Rather than acting as a formalistic rule of racial nonrecognition, this "anticaste principle" (Sunstein 1994) focused squarely on the law's effect as an instrument of racial subordination. In this regard, Justice Harlan's analysis followed *Strauder v. West Virginia* (1880) rather than *Pace,* by condemning legislation restricting "the enjoyment of rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race" (*Strauder v. West Virginia* 1880, 100 U.S. 303). In rejecting Justice Brown's assertion of formally equal treatment under segregation, Justice Harlan was objecting not to racial classification but to racial domination.

As a critique of symmetrical equality, Justice Harlan's dissent located the error of *Plessy* less in its assumption of natural differences between the races than in the willful ignorance through which Justice Brown maintained that segregation laws applied equally to members of both races. The trope of "blindness" that is the centerpiece of Justice Harlan's dissent suggests an intentional

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withholding of knowledge of the racial identity of those on whom the law operated. But Justice Harlan's understanding of this concept explicitly contradicted Justice Brown's blindness to the real purpose and effect of segregation. To refute the formally correct claim that the Separate Car Act was "applicable alike to white and colored citizens," Justice Harlan insisted upon the ordinary meaning of segregation as precisely the kind of knowledge to which judges must not be blind: "*Everyone knows* that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons" (163 U.S. 537, 557; emphasis added). Where color blindness suggested an act of intentional nonrecognition, Justice Harlan's appeal to common knowledge implied just the opposite: a demand for knowledge of social meaning and a refusal to be misled. Justice Brown's argument was disingenuous because it used formal legal rules to distort the plain meaning of Jim Crow. It willfully blinded itself to important "social facts" (Hirsch 1992), foremost among them the fact of white supremacy and the use of Jim Crow as an instrument of domination.

The formalism of Justice Brown's argument was not unusual within the norms of nineteenth-century legal thought, which tended to treat law as an abstraction, independent of social context (Wiecek 1998:151; Friedman 1997:54–5). However, when viewed as the target of Justice Harlan's dissent, Justice Brown's willingness to disregard the social implications of legislative uses of racial distinctions becomes highly significant. In rejecting "the thin disguise of 'equal' accommodations" (163 U.S. 537, 562), Justice Harlan was criticizing the willful ignorance of Justice Brown's symmetrical equality argument. The phrase was not, as is often suggested, primarily a critique of racial distinctions per se. Thus, the Constitution "neither knows *nor tolerates* classes among citizens" (163 U.S. 537, 559; emphasis added). But if not tolerating classes (such as racial caste) requires the law to take notice of the practices that keep those classes subordinated, then Justice Harlan's dissent must mean something other than a straightforward rule of racial nonrecognition.

Justice Harlan's dissent is not only compatible with more expansive conceptions of justice; it actually requires judges to discern the legislative purposes and social meanings of specific uses of racial distinctions—precisely what today's color-blind constitutionalism seeks to prevent.[24] Thus he answered the claim of symmetrical

[24] Color-blind constitutionalism presumes the inability of courts to distinguish state-mandated segregation from race-conscious remedies such as affirmative action: "[a]bsent searching judicial inquiry, there is simply no way of determining what classifications are

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equality by insisting that "All will admit . . . the real meaning of such legislation" (163 U.S. 537, 560). Rejecting the disingenuous claim to equality in separate accommodations, he declared, "[t]he thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one" (163 U.S. 537, 562). And so it is Justice Harlan's insistence upon knowledge, rather than self-imposed blindness, that reveals the injury in what might otherwise pass as a neutral rule. When properly understood as a critique of symmetrical equality, Justice Harlan's dissent can be seen as altogether inconsistent with the color-blind approach as it is currently conceived. Contemporary assaults on affirmative action that invoke Justice Harlan's dissent thus distort the meaning of his now famous phrase. To the extent that Justice Brown's position required courts to ignore the social significance of specific racial classifications, the Court's contemporary color blindness more closely resembles the majority in *Plessy* than Justice Harlan's dissent. It is the false neutrality of Justice Brown's willful ignorance (and not just the unequal accommodations) that constituted "the thin disguise."

Conclusion

The *Plessy* doctrine of "separate but equal" no longer carries the force of precedent. Still, the case remains relevant today, not only as an artifact of past racism but also for what it reveals about contemporary understandings of racial identity and legal rights. That Justice Harlan's dissent in the case introduced the constitutional language of color blindness—a concept that remains at the center of contemporary legal struggles concerning race and racism—further secures *Plessy*'s relevance. A proper understanding of the *Plessy* decision is not, therefore, merely a matter of historical curiosity.

In this article I have argued against standard interpretations of the case that take up the discussion only after encountering racial difference, thereby ignoring the constitutive power of law to define, construct, regulate, and maintain racial categories. Focusing on Homer Plessy's mixed-race heritage and the indeterminacy of his racial classification reveals the Court's active and conscious participation in the construction of race and the imposition of racial order. The *Plessy* case is important not only because it informs our construction of the Fourteenth Amendment and the treatment of

'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics" (*City of Richmond v. J.A. Croson Co.* 1989, 488 U.S. 469). Similarly, Justice Thomas's dissent in *Grutter v. Bollinger* (2003) condemns the "benighted notion that one can tell when racial discrimination benefits (rather than hurts) minority groups" (539 U.S. 24) and concludes by quoting Justice Harlan's "Our Constitution is color-blind" dissent (539 U.S. 24 at 31).

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racial minorities, but also for what it reveals about judicial responses to ambiguously raced bodies and the role of law in generating the orderly racial categories on whose behalf the law of segregation proceeded.

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