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THE CONSTITUTION, THE SUPREME COURT, AND RACIAL POLITICS

Nelson Lund[†]

INTRODUCTION

The institution of slavery indubitably generated the most serious and intractable political problems that the United States has faced. It is much less obvious which American institution has provided the most effective leadership in coping with slavery's legacy. At least among lawyers, there would be considerable sentiment for awarding this honor to the federal courts. Certainly those courts have frequently and vigorously acted as though they were vying for the prize.

A special role for the federal judiciary would hardly be out of place. Slavery was always inconsistent with the most fundamental principles of the American regime, but it persisted because of interest-group politics. After the Constitution was amended to grant full citizenship and equal legal rights to the liberated slaves and their descendants, a similar form of interest-group politics was bound to resist the full realization of this formal grant. As the governmental institution most insulated from such political pressure, the federal judiciary might naturally have become the most scrupulous guardian of the rights provided by the Constitution and especially by the Reconstruction Amendments.

For all the glorification, and self-glorification, that has accompanied judicial activity in dealing with issues of racial discrimination,¹ I believe that the United States Supreme

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1. For a thoughtful discussion of this phenomenon, written by a respected federal judge, see Patrick E. Higginbotham, *Conceptual Rigor: A Cabin for the Rhetoric of*

Court's performance has been fairly dismal. It could have pursued its proper function by faithfully protecting the rights that the Constitution secured for all Americans, a task that at some times would have required little more than simple courage and at other times would have required wrestling with genuinely difficult interpretive problems. Time after time, however, the Justices have either found the job of applying the Constitution too inglorious or treated the task of investigating the meaning of the Constitution as too burdensome. Setting itself up instead as a kind of great shepherd of the people, the Court has repeatedly undertaken to impose its members' personal political judgments about how the country should handle the difficult social problems that have arisen from slavery and its aftermath. This adventurism might be defensible, at least in retrospect, if the Justices' political judgments had generally proved superior to the judgments embodied in the Constitution and laws. But I do not believe that the evidence will support such a defense.

At least in comparison with the Court, Congress has compiled a record that is not so very terrible. Congress can easily be criticized—though perhaps a little too easily in some cases, given how cheap the wisdom of hindsight is—for having been too slow, too prone to compromise, and too irresolute. Nevertheless, it is difficult to identify any major federal statutes that significantly retarded progress toward the equality of rights that the Constitution promises. And Congress must also get credit for a number of very significant statutes, beginning with those enacted during Reconstruction, that implemented the Constitution's goals, and in some cases, went well beyond what our constitutive document can fairly be read to require. The Supreme Court, however, has perversely interpreted some of these statutes so as actually to undermine the legal equality that Congress sought to establish.

Many of the Court's errors are now mainly of academic interest, either because they are without continuing direct effects or because they are, as a practical matter, beyond correction. But some of the mistakes plague us still. Where they can be corrected, the Court should do so, and it should do so in an appropriately judicial manner. This last suggestion, of course,

Heroism, 59 TEX. L. REV. 1329 (1981) (reviewing JACK BASS, UNLIKELY HEROES (1981)).

rests on the controversial assumption that there is a meaningful distinction between the judicial function of interpreting and applying the laws and the legislature's political function of choosing what policies the law should adopt. Even if it is true that the judicial function cannot be entirely purged of political judgment in every circumstance, I believe that the Supreme Court's racial discrimination jurisprudence has been politicized far more often and far more thoroughly than necessity would dictate. If anything, the Court frequently has seemed intent on purging its own function of anything *except* political judgment. It is not too late to begin resisting that inclination.

In this short Article, I will not try to defend the many broad generalizations that I have just made. Instead, I will discuss the Supreme Court's three most famous constitutional decisions on racial discrimination. Before taking up the case that is the subject of this symposium, *Plessy v. Ferguson*,² I will briefly discuss its most famous predecessor, *Dred Scott v. Sandford*,³ and its most famous successor, *Brown v. Board of Education*.⁴ In these famous and typical cases, the Justices impatiently and arrogantly presumed to exercise their own political judgment in the guise of constitutional "interpretation." This kind of politicized judging was not necessary. Nor was it somehow redeemed by subsequent events, for the actual effects of the decisions ranged from horrible to insignificant.

Much has changed since *Plessy*, and even since *Brown v. Board of Education*. Our society has changed, our statutory law has changed, and political leanings on the Supreme Court have changed. But one thing has been fairly constant: the Justices' aversion to consulting the Constitution in cases involving racial discrimination. This Article concludes with a recent example that illustrates how persistent the temptation to engage in political judging has remained.

2. 163 U.S. 537 (1896).

3. 60 U.S. (19 How.) 393 (1857).

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

THREE TRAVESTIES OF CONSTITUTIONAL ANALYSIS

A. Dred Scott v. Sandford

As an act of judicial politics, Chief Justice Taney's opinion in *Dred Scott*⁵ probably has no living defenders. The opinion's callous attitude toward the horror of slavery must provoke a visceral disgust in any civilized modern reader. If one tried to imagine how this attitude could have been justified, one would have to suppose that it might have somehow contributed to the preservation of the Union. But of course it did not. Whatever role Taney's opinion played in provoking the War Between the States, it certainly did nothing to forestall that conflagration.

If Taney's rhetoric now seems utterly indefensible, however, it is still fair to ask whether the decision itself was not required by the law. Some modern commentators, indeed, have argued that because Taney correctly interpreted the original intent of the Constitution, *Dred Scott* proves that judges must be authorized and in fact obliged to ignore the written Constitution when it conflicts with a higher or deeper ideal.⁶ Judges, in other words, should substitute their own political and moral judgments for those embodied in the Constitution, at least on very important questions. And if we are to criticize those judgments, it should be on moral or political grounds rather than on grounds of usurpation.⁷

5. 60 U.S. (19 How.) 393 (1857).

6. This view has been most relentlessly expounded by political scientist Harry V. Jaffa. Perhaps the most concise statement of his position came when he denounced Robert Bork's insistence on the primacy of constitutional text and structure in constitutional interpretation: "[I]t was precisely attention to 'constitutional text and structure' divorced from the 'abstractions of moral philosophy' that led Taney to his conclusions in *Dred Scott*." HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 31 (1994). For a perceptive critique of Professor Jaffa's position, see Charles J. Cooper, *Harry Jaffa's Bad Originalism*, 1994 PUB. INT. L. REV. 189.

7. See, e.g., JAFFA, *supra* note 6, at 67-68 (rejecting the view that the issue in *Dred Scott* was whether Congress had the authority to prohibit slavery in the territories, and claiming instead that "whether slavery was right or wrong was the only important question in *Dred Scott*"); *id.* at 70 ("The judgment in *Dred Scott* declaring the Missouri law of 1820 unconstitutional was, however, perfectly reasonable once one conceded that the question of the Negro's personality was purely a matter of positive law."); *id.* at 104 ("Taney's opinion in *Dred Scott* was wrong for one paramount reason. He did not see that the Constitution, grounded in the principles of the Declaration of Independence, reflected a standard of justice other than positive law."); *id.* at 299 ("In short, it was not Taney who read the right to slave ownership into the Constitution; it is Judge Bork who has read it out of the Constitution.").

Whatever might be said in favor of liberating judges from the obligation to apply the law when it conflicts with their own moral or political intuitions, *Dred Scott* is evidence for exactly the opposite conclusion. The decision in that case was based on a demonstrably false "interpretation" of the Constitution. Chief Justice Taney, moreover, was fully aware of this fact, for the demonstration was provided with devastating clarity and excruciating detail in Justice Curtis's dissent.

Recall the case. Scott's master took him from Missouri through Illinois to the Upper Louisiana Territory (where slavery had been outlawed by the Missouri Compromise) and then back to Missouri.⁸ Scott was then sold to a citizen of New York who tried to take possession of his purchase in Missouri.⁹ Scott sued for his freedom in federal court, invoking diversity jurisdiction.¹⁰ The Supreme Court concluded that Scott was not entitled to sue because Congress had exceeded its constitutional authority when it outlawed slavery in the Upper Louisiana Territory, and because a black person in any event could not be a citizen of the United States under the Constitution.¹¹

Taney's opinion for the Court deployed a remarkably modern doctrine to invalidate the Missouri Compromise: substantive due process.¹² In defending Congress's authority to outlaw slavery in the territories, Scott had invoked the Constitution's express grant to Congress of power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹³ Taney interpreted this provision, however, to apply only to the territory owned by the United States when the Constitution was adopted. With respect to territory acquired later, he claimed, Congress's power to govern was merely implicit. Such implicit authority, said Taney, was trumped by the right of property in slaves, a right "distinctly and expressly affirmed in the Constitution"¹⁴ and protected by

8. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 431 (1857).

9. *Id.*

10. *Id.* at 400.

11. *Id.* at 452-53.

12. The link between Taney's innovation in *Dred Scott* and later cases like *Lochner v. New York*, 198 U.S. 45 (1905), and *Roe v. Wade*, 410 U.S. 113 (1973), has been frequently noted. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 31-32 (1990).

13. U.S. CONST. art. IV, § 3.

14. *Dred Scott*, 60 U.S. (19 How.) at 451.

the Fifth Amendment's Due Process Clause against abridgements like that found in the Missouri Compromise.

Taney's far-fetched construction of the Property Clause need not detain us here, for his argument has two other fatal defects. First, a right of property in slaves was not "distinctly and expressly affirmed" in the Constitution, which contained only the most oblique references to the peculiar institution. Indeed, the constitutional provision that came closest to implying a kind of property right in slaves also implied, if anything, that Congress actually had the power to outlaw slavery in the territories. The so-called Fugitive Slave Clause provided that when those bound to service under the laws of one state escaped into another *state*, they were not to be discharged from service but rather delivered back upon the claim of the party to whom the service was due.¹⁵ On its face, therefore, this provision applied only to those slaves escaping to a state, not to a territory, thus implying that congressional authority over the territories was left undiminished.

Second, Taney's conversion of the Due Process Clause into a substantive guarantee, like so many similar conversions that have followed, was based on mere assertion: a statute that deprived a citizen of his property merely because he brought that property into a territory "could hardly be dignified with the name of due process of law."¹⁶ This assumes, at a minimum, that there was a right to own slaves whose source was outside the positive laws of the slave states. But that insupportable assumption was not even shared by the slave states themselves, all of which acknowledged the ancient requirements of due

15. The Clause provided in full that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." U.S. CONST. art. IV, § 2, cl. 3. Well before *Dred Scott*, the Supreme Court had perversely concluded that state legislation implementing this rule, which had been designed to ensure that free blacks were not dragooned into slavery, was unconstitutional. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). One reason given for this bizarre conclusion was that any state regulation delaying a slave owner from exercising dominion over his property amounted to a temporary discharge from slavery, and thus violated a right protected by the federal Constitution. *Id.* at 612-13. Such nonsense did not bear legally on the issue in *Dred Scott*, but it did serve as a precedent for a judicial policy of expanding the limited safeguards that the Constitution itself extended to the institution of slavery.

16. *Dred Scott*, 60 U.S. (19 How.) at 450.

process and some of which had enacted laws treating slaves newly brought within their borders exactly as the Missouri Compromise purported to treat Dred Scott.¹⁷

As unforgivable as it was to invalidate the Missouri Compromise on the basis of arguments like these, Taney managed to exceed even this effrontery by offering an alternative ground for dismissing Scott's case. Even if Scott had been set free by federal law when he was taken into the Upper Louisiana Territory, he could not sue in federal court. And why not? Because the mere fact of his ancestry disqualified him from becoming a citizen of the United States. And why was that? Taney's wordy explanation boiled down to this: Congress was given the power to establish uniform rules of naturalization in order to prevent one state from introducing into the political community created by the Constitution the sort of people originally excluded from it, for such people could then migrate to other states and enjoy the constitutionally guaranteed privileges and immunities of citizenship.¹⁸ And this certainly meant blacks, according to Taney, because they had not been citizens of any state or considered eligible for the rights and privileges of citizenship at the time the Constitution was adopted.¹⁹

Whatever its other weaknesses, Taney's argument founders on a question of fact. He conceded that every class of persons recognized as citizens by the states when the Constitution was adopted automatically became citizens of the new political body.²⁰ His argument that Dred Scott could not be a citizen of the United States thus depended on his claim that free blacks had not been citizens of the states when the Constitution was adopted. But Justice Curtis demonstrated that this was factually incorrect.²¹ And Taney offered no refutation of Curtis's demonstration. Thus, not only was Taney's argument crucially dependent on an untrue proposition, but Taney had to know the proposition was untrue. His is thus the jurisprudence of the bald-faced lie.

Perhaps the most famous passage in Taney's opinion is this:

17. *See id.* at 626-27 (Curtis, J., dissenting).

18. *Id.* at 405-06.

19. *Id.* at 407.

20. *Id.* at 406.

21. *Id.* at 572-75 (Curtis, J., dissenting).

They [of African descent] had for more than a century before [the Founding] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.²²

This exaggeration of the facts, or the Court's strong desire to read the implications of this exaggeration into the Constitution, was the real basis for Taney's supposedly legal reasoning. We would all be better off if the fame that has attached to this passage were bestowed instead on Justice Curtis's far more accurate analysis:

Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who *for the time being* have power to declare what the Constitution is, according to their own views of what it ought to mean.²³

The specific constitutional amendments adopted in *Dred Scott* lasted only "for the time being," just as Justice Curtis suggested they would. The judicial itch to substitute political judgment for interpretive judgment, however, has not proved so transitory.

B. *Brown v. Board of Education*

The Supreme Court's most revered case on racial discrimination may well have been rightly decided as a legal matter. You would never know it, however, from reading Chief Justice Warren's opinion. Without any analysis of the

22. *Id.* at 407.

23. *Id.* at 620-21 (emphasis added).

Constitution's text, the Court dismissed the legislative history of the Fourteenth Amendment as "inconclusive" and declared separate educational facilities for blacks and whites "inherently unequal."²⁴ This conclusion was based entirely on a psychological judgment: at least in the context of public schools, "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²⁵

As Andrew Kull has arrestingly and insightfully suggested, this looks like a straightforward application of the legal rule adopted in the infamous *Plessy v. Ferguson*.²⁶

Racial classifications, announced Justice Brown [in *Plessy*], are like every other sort of classification, and those racial classifications will be constitutional that a majority of the Supreme Court considers to be "reasonable." That rule of constitutional law, and no other, will explain every Supreme Court decision in the area of racial discrimination from 1896 to the present.²⁷

Professor Kull's conclusion gets particularly strong support from the fact that the Court followed *Brown* with a series of *per curiam* decisions declaring many forms of segregation unconstitutional, while refusing to strike down laws dealing with the sensitive subject of miscegenation, *and all without any explanation whatsoever*.²⁸ Because the rationale on which *Brown* was ostensibly based applied only to primary and secondary education, the real basis unifying that decision with its immediate progeny therefore must have been something that the Justices were unable or unwilling to articulate. Political intuitions about what is "reasonable" at the moment fit this description better than any other plausible explanation for the Justices' behavior.

That does not necessarily mean that *Brown* was wrongly decided, or that it could not have been given a sound legal

24. *Brown v. Board of Educ.*, 347 U.S. 483, 489, 495 (1954).

25. *Id.* at 494.

26. 163 U.S. 537 (1896).

27. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 118 (1992). "[I]n its broad holding as opposed to its particular application, *Plessy* has never been overruled, even by implication." *Id.* at 113.

28. *See id.* at 159-61.

justification. If the decision in *Brown* was correct, however, it must be for reasons like those recently advanced by Michael W. McConnell, who has demonstrated that a substantial majority of the political leaders who supported the Fourteenth Amendment believed that segregated schools were unconstitutional.²⁹ That belief is consistent with the constitutional text, though by no means compelled by it. Public education can plausibly be regarded as a civil right protected by the Privileges or Immunities Clause (especially now that all jurisdictions provide free public education for their citizens), and state-enforced segregation can plausibly be regarded as an abridgement of that right. Had the Court offered an argument along the lines of Professor McConnell's, *Brown* would have been a perfectly ordinary and respectable act of constitutional interpretation. The Court might have had to wait until someone offered the argument McConnell makes, but it is hard to believe—in light of the extraordinary industry and resourcefulness that the modern civil rights bar has displayed—that it would have had to wait forty years.

The Supreme Court, however, was not willing to wait for a good argument, and perhaps it was not even capable of telling the civil rights bar what kind of argument was needed. It is now conventional wisdom that the Court's impatience was justified by the pressing need to get the schools desegregated. That defense of the Court's behavior, however, collapses under the fact that *Brown* did almost nothing to desegregate the schools.³⁰ Ten years of "all deliberate speed" produced virtually no results, and it was only after *Congress* stepped in with the Civil Rights Act of 1964 that desegregation actually occurred.³¹ So much for the

29. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

30. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

31. Perhaps the most ingenious effort to attribute responsibility for desegregation to *Brown* is made by Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994). Professor Klarman argues that *Brown* contributed to the inflammation of Southern segregationist sentiment, which enabled civil rights leaders to provoke violent responses to peaceful demonstrations, which in turn aroused Northern sentiment in favor of a federal legislative response. Even assuming that Klarman has correctly assigned *Brown* a significant role in the chain of events that led eventually to the statutes that were enacted by Congress in the mid-1960s, the Justices could hardly have planned all this. If they had, doing them justice would require a new Machiavelli.

urgency that is supposed to have justified ignoring the Constitution.

Though *Brown* did not desegregate the schools, it managed to fix the Justices' moral and political intuitions in a lofty status somewhere above the Constitution itself. On the same day that *Brown* was decided, for example, the Court declared unconstitutional a federal law providing for segregated schools in the District of Columbia: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be *unthinkable* that the same Constitution would impose a lesser duty on the Federal Government."³² The word "unthinkable" in this sentence can have no other meaning than "intolerable." By assuming that the Constitution could only mean what the Justices could tolerate, the Court thus united itself in spirit with the *Dred Scott* majority and, as we shall see, with the *Plessy* Court as well.

The elevation of the Justices' intuitions has carried the Court into some political acts that have not been quite as well received as the desegregation of the District of Columbia schools. The abortion decisions are the most conspicuous of these acts, and the Court has now taken to wrapping itself in the mantle of *Brown* as a shield against criticisms of those decisions. For example, in *Planned Parenthood of South Eastern Pennsylvania v. Casey*,³³ the Court explained:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe [v. Wade]* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown [v. Board of Education]* and *Roe*

. . . .

32. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (emphasis added).

33. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, (1992).

. . . Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.³⁴

For understandable reasons, the *Casey* Court neglected to discuss *Dred Scott*. Just as understandably, Justice Scalia's impassioned dissent gave *Dred Scott* a prominent place.³⁵ Whatever one thinks about abortion and how the law should regard it, no one who has read both the Constitution and the Court's abortion decisions can honestly believe that the former implies the latter. As the quoted passage indicates, however, a majority of the Justices consider that little detail irrelevant.

What we are urged to concern ourselves with now is the importance of protecting the Supreme Court's legitimacy as the great resolver of national controversies. As the Court recognized in the last sentence quoted above, however, it is easy to see why the Justices would be concerned with preserving this role for themselves, and much less easy to see why the rest of us should have the same interest they do. But maybe that is the point of the citation to *Brown*. The chilling, though unstated, message of this passage seems to be: "If we were to reconsider *Roe v. Wade*, we might also be obliged to reconsider *Brown v. Board of Education*. And you wouldn't like that very much, now would you?" Thus, the Court's claim on the rhetoric and honors of the political leader may be leading it increasingly to adopt some rather less elevated arts of the politician as well.³⁶

34. *Id.* at 866-68.

35. *Id.* at 984-85, 998, 1001-1002.

36. It is probably no coincidence that the holding in *Casey* closely mirrored public sentiment as expressed in the latest opinion polls. See William Schneider, *A Legal Victory or Political Setback?*, 24 NAT'L J. 1666 (July 11, 1992).

In the latest poll by CNN-USA Today-Gallup Organization Inc., taken just after the Court announced its decision in the Pennsylvania case, a third of Americans said they felt that abortion should be "legal

As Professor McConnell has now shown, the holding in *Brown* seems to stand up pretty well in light of the Constitution.³⁷ But it is hard to imagine that McConnell's work could be of any real interest to the Supreme Court. The Court's indifference to the Constitution, and the Justices' concomitant obsession with writing their own political beliefs into constitutional law, is nothing new and it is nowhere better exemplified than in the case to which this symposium is dedicated, *Plessy v. Ferguson*.

C. *Plessy v. Ferguson*

After its disastrous decision in *Dred Scott*, and the extraordinarily careful and elaborate attention that Congress gave to adjustments in the Constitution and laws after the ensuing civil war, the Supreme Court might have been expected to begin emulating Justice Curtis by taking up the pursuit of legal rather than political analysis. But this did not occur.

*Plessy v. Ferguson*³⁸ has come down to us as the most notorious example of the Court's refusal to enforce the promise of the Reconstruction Amendments, in large part because of Justice Harlan's dissent. The majority's approach to the case was certainly misguided, and its decision may well have been wrong. But Harlan's dissent does not deserve the adoration that it now receives. His political or moral judgment certainly looks superior to that of his colleagues, but his legal analysis was little better. In that respect, the opinion he wrote is fundamentally different from Curtis's dissent in *Dred Scott*.

Plessy raised a real issue. The challenged statute required railroads operating in Louisiana to furnish "equal but separate accommodations" for white and black passengers and provided for legal penalties against railroad officials or passengers who breached the required separation.³⁹ Because Louisiana's statute made it equally illegal for a black passenger to travel in a "white" compartment or for a white to travel in a "black" compartment, it

under any circumstances." Only an eighth of the respondents thought abortion should be "illegal in all circumstances." Almost half said abortion should be "legal only under certain circumstances." Strong majorities of 71-81 per cent endorsed each of the restrictions the Court upheld (counseling, a 24-hour waiting period and parental consent for minors).

Id.

37. See McConnell, *supra* note 29.

38. 163 U.S. 537 (1896).

39. *Id.* at 540-42.

treated the members of both races the same in a formal sense. It is not immediately obvious whether this formal equality should have saved the statute from invalidation under the federal Constitution.⁴⁰

If the Louisiana statute was unconstitutional, it must have been because it abridged Plessy's privileges or immunities as a citizen of the United States or because it denied him the equal protection of the laws. In order to determine whether the right to associate with those of a different race while traveling on a train was covered by the Privileges or Immunities Clause, one would have to find out what rights were referred to by those who framed and ratified this constitutional provision. Similarly, one would have to discover just what the Equal Protection Clause was meant to require the states to protect people from. If taken seriously, these are difficult questions.⁴¹ The *Plessy* Court, however, did not even take the questions seriously enough to ask them.

The Court's analysis began with the following proposition:

The object of the [fourteenth] amendment was undoubtedly 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 based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁴²

This statement might be treated as little more than a recognition of the fact that the equality demanded by the Fourteenth Amendment must have *some* limits. It certainly could not make everyone's skin color the same. Nor could it have produced social equality in the sense of equalizing acquisitions and accomplishments. And it is impossible to imagine that anyone

40. Cf. *Pace v. Alabama*, 106 U.S. 583 (1883), in which the Court upheld a statute that applied different penalties for intra- and inter-racial adultery on the ground that the offense of miscegenation "cannot be committed without involving the persons of both races in the same punishment." The Court concluded that "[w]hatever discrimination is made in the punishment prescribed in the two sections [of the law] is directed against the offence designated and not against the person of any particular color or race." *Id.* at 585. *Pace*, of course, has now been overruled. See *Loving v. Virginia*, 388 U.S. 1 (1967).

41. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

42. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

intended the Constitution to require people unwillingly to extend dinner invitations or marriage proposals to members of another race.⁴³

From the proposition that the Fourteenth Amendment does not demand every imaginable sort of racial equality, Justice Brown leaped to the far different conclusion that the Fourteenth Amendment permits any regulation that is "reasonable."⁴⁴ Logic does not authorize the leap, and Brown produced no evidence from the text or legislative history of the Constitution that could support his conclusion. What he offered were citations to state cases upholding laws forbidding miscegenation and upholding segregated schools and public conveyances.⁴⁵ To the extent that these cases arose under state laws, they are obviously quite irrelevant to the construction of a federal measure limiting state power. And to the extent that some of the decisions may have entailed a construction of the Fourteenth Amendment, they could not be owed any deference except what they earned through the persuasiveness of their reasoning.⁴⁶ But Brown pointed to no reasoning at all.⁴⁷

Brown also cited a federal law providing segregated schools for the District of Columbia.⁴⁸ Because the Fourteenth Amendment does not restrict Congress, however, this statute does not imply anything at all about the meaning of that provision of the

43. *Id.* Giving Justice Brown the benefit of the doubt, I am assuming that he did not mean to exempt from the scope of the Fourteenth Amendment any commingling of the races to which a majority of either race objected. That would mean, for example, that a majority of whites could insist on segregated juries, contrary to *Strauder v. West Virginia*, 100 U.S. 303 (1879), which Brown recognized as binding precedent. *See id.* at 545.

44. *Id.* at 550 ("[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.").

45. *Id.* at 544-45, 548.

46. Brown also cited *Louisville, New Orleans & Texas Ry. v. Mississippi*, 133 U.S. 587 (1890), which he deemed "almost directly in point." *Id.* at 547. While that case involved a statute closely resembling the one at issue in *Plessy*, the Court had determined only that the statute did not violate the Commerce Clause. The Fourteenth Amendment had not been construed or even mentioned. So the case was only "in point" in a way that completely missed the point.

47. *Id.* Apart from bare citations to cases, Brown offered only a quotation making the familiar point that the idea of equality before the law cannot mean that the law must treat everyone exactly the same in all ways. *See id.* at 544 (quoting from Chief Justice Shaw's well-known opinion in *Roberts v. City of Boston*, 5 Cush. (Mass.) 198 (1850)).

48. *Id.* at 545.

Constitution. Much more revealing is that Congress had attempted with the Civil Rights Act of 1875 to exercise its enforcement authority under the Fourteenth Amendment by outlawing segregated public accommodations like railway cars. Rather than discuss this much more relevant fact, Justice Brown instead discussed the irrelevant Supreme Court case invalidating the 1875 statute because it purported to reach private conduct as well as state action.⁴⁹

Although Brown never explained why the Fourteenth Amendment should be interpreted to permit every "reasonable" regulation, he gave a very clear explanation of why he thought segregated public accommodations should be considered reasonable:

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. . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in *accentuating the difficulties of the present situation*. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.⁵⁰

This passage begins with a lie and ends with something even worse. Saying that the degrading implications of "enforced separation" were simply the result of misinterpretation by blacks was obviously untrue. The lie was needed, however, to help blur the distinction between "social equality" and "legal equality." If Plessy had been suing to force unwilling whites to sit next to him on a train, Justice Brown's comments about racial instincts and

49. See *id.* at 546-47 (discussing the *Civil Rights Cases*, 109 U.S. 3 (1883)). Neither the presence of state action *vel non* nor the reach of Congress's authority under section 5 of the Fourteenth Amendment was at issue in *Plessy. Id.*

50. *Id.* at 551-52 (emphasis added).

physical differences might have had some bearing on the case (though they would not necessarily have been correct or dispositive). But *Plessy* was challenging a law that *forbade* the voluntary commingling of the races. If that entails a demand for “social equality,” then the distinction between social and legal equality is nothing but the distinction between good and bad policy as determined by the state legislatures and their judicial superintendents. And if the Constitution made a different judgment, it seems, that judgment was simply quixotic.

Brown’s conclusion therefore amounts to the following: the Constitution cannot require an end to legal restrictions on people’s freedom if a state legislature and a majority of Supreme Court Justices believe that doing so would “result in accentuating the difficulties of the present situation.” The *Plessy* Court not only gave effect to its political judgment about the advisability of forced segregation, but it treated the Constitution as powerless to override that judgment. This is lawlessness that goes a step beyond *Dred Scott*, for even Taney did not go so far as to suggest that the Constitution could not overrule the Court’s judgment about what was good for the country.⁵¹

Unlike the majority, Justice Harlan had no interest in lying about what the Louisiana legislature had done.⁵² And he saw the majority’s position as a judicial nullification of the Constitution:

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

51. Some of Justice Brown’s intellectual descendants have embraced this conclusion. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 238-39 (1993) (arguing that the Supreme Court could invalidate some constitutional amendments adopted pursuant to Article V on the ground of inconsistency with “[t]he successful practice of [the Constitution’s] ideas and principles over two centuries”).

52. In at least three separate places, Harlan clearly implied that the majority was lying when it denied that the Louisiana statute was meant to degrade blacks. *Plessy*, 163 U.S. at 557 (rejecting the majority’s assertion and stating: “No one would be so wanting in candor as to assert the contrary”); *id.* at 560 (describing the “real meaning” of the statute as something that “all will admit”); *id.* at 562 (stating that “[t]he thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead anyone”).

. . . State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.⁵³

As this passage shows, Harlan's diagnosis of the majority's defiant disregard of the Constitution was rooted in a disagreement with the majority's political judgment. The majority thought that segregation would help keep the peace, while Harlan thought that it would promote continued racial conflict. Most people today would undoubtedly agree that Harlan was right and the majority wrong.⁵⁴ But that should not have been the issue in the case. As a legal opinion, Harlan's discussion of the case should be judged on its legal analysis.

Sadly, Harlan gave the Constitution almost as little attention as Justice Brown gave it. Although he *praised* all three of the Reconstruction Amendments, Harlan never tied the language of any of them to the issue in the case and in fact never even specified which clause of which amendment he thought was violated by the Louisiana statute. Instead, he just summed them all up in his notion of a "color-blind" Constitution:

[I]n 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. . . . The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.⁵⁵

At some level of generality, all of this is correct or at least defensible. But it does not tell us *which* civil rights are

53. *Id.* at 560-61.

54. Professor Maltz's interesting contribution to this symposium shows how important it is to avoid extrapolating from Harlan's *Plessy* dissent to the conclusion that Harlan's moral or political judgment about racial matters generally would have provided a sound basis for constitutional law. See Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan's View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973 (1996).

55. *Plessy*, 163 U.S. at 559.

guaranteed by the Constitution or whether the right to associate with the members of other races on railroad trains is among those civil rights. Rather than analyze the Constitution to answer that question, however, Harlan merely asserted that the Louisiana statute was “hostile to both the spirit and letter of the Constitution of the United States.”⁵⁶ Maybe he got the spirit right, but he never identified the letter that incorporated that spirit. And that failure prevented him from offering an intelligibly legal reason for invalidating the Louisiana statute.⁵⁷

The sloppiness of Harlan’s spirit-based approach is illustrated by his repeated suggestions that the color-blind “spirit” he identified included identical prohibitions on both the federal and state governments.⁵⁸ Unless Harlan could argue that *Plessy*, and challenges to federal statutes mandating segregation, should be decided under an extraordinarily expansive interpretation of the Thirteenth Amendment, his suggested identification of the constraints on the state and federal governments was plainly untenable. Apart from the fact that Harlan did not specifically invoke the Thirteenth Amendment, relying on it here would have rendered the Fourteenth Amendment redundant, and made its elaborate distinctions (among privileges or immunities, due process, and equal protection) a laughable waste of time and attention.

This, unfortunately, is the common thread that unites both opinions in *Plessy*. Brown and Harlan alike refused to confront the constitutional text and thus spared themselves the interpretive difficulties that would have ensued had they done so. That refusal, repeated in many cases before and after *Plessy*, has now become almost a point of principle in our legal culture. When it comes to racial discrimination, everyone knows

56. *Id.* at 563.

57. *Cf.* Letter from Justice Oliver W. Holmes to Sir Frederick Pollock (Apr. 5, 1919), in 2 HOLMES-POLLOCK LETTERS 7, 8 (Mark DeWolfe Howe ed., 1941) (characterizing Harlan’s mind as “a powerful vise the jaws of which couldn’t be got nearer than two inches to each other”).

58. *See Plessy*, 163 U.S. at 554 (stating that the Constitution does not permit “any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights”); *id.* at 556 (quoting *Gibson v. Mississippi*, 162 U.S. 565 (1896), for the proposition that the Constitution forbids “‘discrimination by the General Government or the States against any citizen because of his race’”); *id.* at 563 (claiming that the “recent amendments” to the Constitution “obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law”).

intuitively what the Constitution must mean. And it always seems to mean exactly the same thing: whatever the "interpreter" thinks is good policy.

CONCLUSION: THE SPIRIT OF JOHN MARSHALL HARLAN

Justice Harlan's color-blind constitutional rhetoric has had an enduring appeal to those dissatisfied with the Supreme Court's ad hoc racial policy judgments. Perhaps the most striking recent example of this appeal came in *Adarand Constructors, Inc. v. Peña*.⁵⁹ Concurring in the Court's decision to apply strict scrutiny to federal affirmative action schemes, Justice Scalia offered a manifestly conscious evocation of the Harlan formulation quoted above: "In the eyes of government, we are just one race here. It is American."⁶⁰ To the extent that Harlan and Scalia actually state a principle,⁶¹ rather than a mere political judgment, judges will look more judicial when applying that principle than they have when behaving in the fashion of Justice Brown. But that does not resolve the nagging question whether Harlan's color-blind Constitution is the real Constitution. If it is not, then the Harlans and Scalias may not be quite so different from the Taney and Browns as they first appear. While they may have relinquished some discretion to make judgments about the suitability of particular racial policies to particular circumstances, they seem to have retained the discretion to decide what general racial principles the Constitution shall include.

But perhaps this is unfair to Harlan and Scalia both. However loosely Harlan conflated the rules applicable to the state and federal governments, *Plessy* did not actually involve a federal statute. And perhaps one might say that the Equal Protection Clause provides such an obviously plausible source of the color-blind principle as against the states that it should not much matter whether Harlan actually identified the source. Conversely, although Scalia actually invoked his color-blind rule in a case involving a federal statute, equal protection analysis

59. 115 S. Ct. 2097 (1995).

60. *Id.* at 2119 (Scalia, J., concurring in part and concurring in the judgment).

61. Although Scalia embraces the strict scrutiny approach, which could mean many things, his scrutiny would apparently be truly strict, so that the exceptions to his rule of color-blindness would be extremely narrow. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in the judgment).

had repeatedly been applied to federal laws long before Scalia joined the Court. And respect for the Constitution, as everyone agrees, must sometimes be tempered by respect for the principle of *stare decisis*.

These defenses seem unsatisfactory to me, and I find it hard to see why they should be satisfactory to Justice Scalia. First, if the Equal Protection Clause were meant to supply a general color-blind principle of the kind articulated by Harlan and Scalia, then the Fifteenth Amendment would be surplusage and the second section of the Fourteenth Amendment would apparently be nonsensical. This fact may not by itself be fatal to the Scalia position, but it highlights how utterly unobvious it is that the Fourteenth Amendment's carefully articulated distinctions among different kinds of rights should be taken as a confused and prolix substitute for a simple statement that the state governments are required to behave in a color-blind manner in all circumstances.⁶²

Second, Scalia does not say that he is relying on the authority of the unreasoned precedents that grafted modern equal protection analysis onto the Fifth Amendment's Due Process Clause.⁶³ Instead, he cites the Fifteenth Amendment, the Corruption of Blood Clause, and the federal Title of Nobility Clause.⁶⁴ But these specialized provisions simply confirm the obvious absence from the Constitution's text of any general rule of color-blindness for the federal government.⁶⁵

62. I do not claim that it is obvious exactly what rights the first section of the Fourteenth Amendment was meant to protect, or how this constitutional provision should be applied to all the myriad questions that have arisen in a changing society. In fact, it is partly because some of these questions appear so difficult that Scalia's general rule of governmental color-blindness seems to me to require a careful and detailed justification before it can be accepted as a matter of constitutional construction.

63. Someone might contend, though Scalia did not, that the line of modern precedents applying equal protection analysis under the aegis of the Fifth Amendment has become such an important part of our legal fabric that it would be irresponsibly disruptive to return to the original meaning of the Constitution. Even if one assumes that this highly debatable conclusion could be sustained by persuasive arguments, it would not follow that the color-blind principle that Scalia advocates is a settled part of the law. On the contrary, it is clear that it is not. *Adarand* itself overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). *Adarand*, 115 S. Ct. at 2113. And Scalia's color-blind principle would pretty clearly require overruling *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

64. *Adarand*, 115 S. Ct. at 2118-19.

65. In *Croson*, a case that did not involve action by the federal government, Scalia had recognized that the "substance of the Civil War Amendments" creates a "sound

Harlan and Scalia offer some attractive political reasons for a constitutional principle requiring American governments to behave in a color-blind manner. Any other principle, indeed, may serve primarily to accentuate the difficulties of the present situation.⁶⁶ It may therefore be appropriate to amend the Constitution, through the procedures set out in Article V, so as to authorize the courts to apply that principle. Until that is done, however, the legal principle adopted by Justice Scalia may have little more strength than the number of votes he can get for it on the Court. And that power, as Justice Curtis pointed out long ago, is good only "for the time being."

Judges who long for a color-blind law⁶⁷ may find that desire partially satisfied by the Constitution, but not completely. If they want a supplement, they should look not to phantom constitutional provisions of their own invention, but to statutes like the Civil Rights Act of 1964, which actually contains numerous color-blind provisions whose meaning is quite clear indeed. But doing that, of course, would require the Court to correct its own mistakes⁶⁸ rather than the mistakes of those who framed the Constitution.

distinction" between the state and federal governments when it comes to action based on race. 488 U.S. 469, 522 (1989) (Scalia, J., concurring in the judgment). In *Adarand*, when the distinction may actually have mattered, Scalia ignored it.

66. Scalia asserts, for example: "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Adarand*, 115 S. Ct. at 2119. There is a substantial literature elaborating this view. Among many examples, see TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996); THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* (1990); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986); NELSON LUND, *REFORMING AFFIRMATIVE ACTION: HOW TO RESTORE THE LAW OF EQUAL TREATMENT*, HERITAGE FOUNDATION REPORT TO CONGRESS (Aug. 2, 1995).

67. Justice Scalia has made his policy preferences with respect to affirmative action quite clear in many of his writings on and off the bench. A statement of those preferences in the context of constitutional adjudication can be found in his concurring opinion in *Croson*. See 488 U.S. at 520-28 (Scalia, J., concurring in the judgment).

68. See, e.g., *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).