The Supreme Court Case That Enshrined White Supremacy in Law

How Plessy v. Ferguson shaped the history of racial discrimination in America.
***The New Yorker*, February 4, 2019**

By Louis Menand

"White nationalist, white supremacist, Western civilization—how did that language become offensive?" the Iowa congressman Steve King inquired of a *Times* reporter last month. After the remark blew up, King explained that by "that language" he was referring to "Western civilization." He also said that he condemned white nationalism and white supremacy as an "evil and bigoted ideology which saw in its ultimate expression the systematic murder of six million innocent Jewish lives." (It's unclear whether King thinks of Jews as nonwhite.)

However, to answer the congressman's original question: only after a long struggle. Seventeen states had laws banning interracial marriage, which is pretty much the heart of the doctrine of white supremacy, until 1967, when the Supreme Court declared them unconstitutional. From the Compromise of 1877, which ended Reconstruction, to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, American race relations were largely shaped by states that had seceded from the Union in 1861, and the elected leaders of those states almost all spoke the language of white supremacy. They did not use dog whistles. "White Supremacy" was the motto of the Alabama Democratic Party until 1966. Mississippi did not ratify the Thirteenth Amendment, which outlawed slavery, until 1995.

How did this happen? How did white people in a part of the country that was virtually destroyed by war contrive to take political control of their states, install manifestly undemocratic regimes in them, maintain those regimes for nearly a century, and effectively block the national government from addressing racial inequality everywhere else? Part of the answer is that those people had a lot of help. Institutions constitutionally empowered to intervene twisted themselves every which way to explain why, in this matter, intervention was not part of the job description. One such institution was the Supreme Court of the United States.

The case of Martha Lum is typical. She was the daughter of Jeu Gong Lum, who came to the United States from China in 1904. After being smuggled across the Canadian border by human traffickers, he made his way to the Mississippi Delta, where a relative ran a grocery store. In 1913, he married another Chinese immigrant, and they opened their own store. They had three children and gave them American names.

In 1923, the family moved to Rosedale, Mississippi, and Martha, then eight years old, entered the local public school. According to Adrienne Berard, who tells the Lums' story in "Water Tossing Boulders" (2016), nothing seemed amiss for the first year, but when Martha returned to school after the summer

the principal relayed the news that the school board had ordered her to be expelled. Public schools in Mississippi had been racially segregated by law since 1890, and her school educated only whites. The board had decided that Martha was not white and, consequently, she could not study there.

The Lums engaged a lawyer, who managed to get a writ of mandamus—an order that a legal duty be carried out—served on the school board. The board, which must have been very surprised, contested the writ, and the case went to the Supreme Court of Mississippi, which ruled that the board had the right to expel Martha Lum on racial grounds. That part was not so surprising.

The court acknowledged that there was no statutory definition of the "colored race" in Mississippi. But it argued that the term should be construed in the broadest sense, and cited a case it had decided eight years earlier, upholding the right of a school board to expel from an all-white school two children whose great-aunts were rumored to have married nonwhites.

That decision, the court said, showed that the term "colored" was not restricted to "persons having negro blood in their veins"—apparently since the children involved were in fact white. Martha Lum did not have "negro blood," either, but she was not white. She could attend a "colored" school. Mississippi's separate-schools law, the court explained, was enacted "to prevent race amalgamation." Then why place an Asian-American child in a school with African-American children? Because, according to the court, the law was intended to serve "the broad dominant purpose of preserving the purity and integrity of the white race."

The Lums appealed to the U.S. Supreme Court. At issue was the Fourteenth Amendment, which had been ratified in 1868. The first clause of that amendment is the most radically democratic clause in the entire Constitution, much of which was designed to limit what the Founders considered the dangers of too much democracy. It decrees that any person born in the United States is a citizen, and that states may not abridge the privileges or immunities of citizens; nor deprive them of life, liberty, or property without due process of law; nor deny them the equal protection of the laws. The United States has two founding documents: the Constitution, which is a legal rule book, and the Declaration of Independence, a manifesto with no force of law. The Fourteenth Amendment constitutionalized the Declaration.

The U.S. Supreme Court decision in the case, Lum v. Rice, was handed down in 1927, three years after Congress passed the Johnson-Reed immigration act, which barred all Asians from entering the United States. Was Martha Lum a citizen? The Supreme Court said she was. Was she being denied the equal protection of the laws? The Court said that she was not, and cited a series of precedents in which courts had upheld the constitutionality of school segregation.

It was true, the Court conceded, that most of those cases had involved African-American children. But it couldn't see that "pupils of the yellow races" were any different, and the decision to expel such pupils was, it held, "within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment." Even though the Mississippi court had stated that the purpose of the school-segregation law was to preserve "the purity and integrity of the white race," it was not a denial of equal protection to nonwhites. The Lums, of course, knew from firsthand observation what it meant to be classified as "colored" in Mississippi, and they did what a lot of African-American Mississippians were also doing—they left the state.

The decision in Lum v. Rice was unanimous. The opinion of the Court was delivered by the Chief Justice, William Howard Taft, a former President of the United States; among the Justices who heard the case were Oliver Wendell Holmes, Jr., and Louis Brandeis. One of the precedents the Court quoted prominently in support of its decision was a case it had decided thirty-one years earlier—Plessy v. Ferguson.

After Dred Scott, Plessy is probably the most notorious decision involving race in the history of the United States Supreme Court. It is the case identified with the principle of "separate but equal"—the theory that segregation is not per se discrimination. Plessy is the decision the Supreme Court had to overturn, in Brown v. Board of Education, in 1954, to declare that school segregation violated the equal-protection clause of the Fourteenth Amendment.

From our perspective, therefore, Plessy looks huge. So it's revealing that, as the journalist Steve Luxenberg tells us in "Separate: The Story of Plessy v. Ferguson, and America's Journey from Slavery to Segregation," little note was taken of the decision at the time. Even when principal figures in the case died, years later, their obituaries made no mention of it. It's revealing because it suggests that Plessy should never have been brought in the first place. The decision did not create a new justification for racial segregation; it locked an old one into place.

Plessy was a test case. It challenged a law that Louisiana passed in 1890, the Separate Car Act, requiring railroads to maintain separate cars for white and "colored" riders—in order, according to the act, "to promote the comfort of passengers." The penalty for breaking the law was a fine or a short prison sentence. Transportation had been segregated in parts of the country, both North and South, since long before the Civil War, and many cases had been brought by passengers complaining of discrimination, with mixed success. But in those cases segregation was a matter of company policy. In the Louisiana case, the constitutionality of a state law was at issue.

When the South began instituting Jim Crow, after the end of Reconstruction, laws mandating separate cars on trains appeared across the region. One of the first was passed in Florida, in 1887, followed by Mississippi, in 1888, and Texas, in 1889. When Louisiana passed its separate-cars law, a New Orleans lawyer and newspaper editor named Louis Martinet—his mother was born a slave; his father, a Belgian, bought her freedom—formed the Citizens' Committee to Test the Constitutionality of the Separate Car Law, and set about building a case.

First, Martinet approached the Louisville and Nashville Railroad, which agreed to act as a silent partner. It did not do so out of altruism. From a business point of view, segregation represented a cost—the cost of providing separate facilities for black customers. It would have been cheaper for the railroads if the state had mandated integration instead.

Then Martinet recruited a plaintiff, Daniel Desdunes, a young mixed-race musician whose father was on the Committee. On February 24, 1892, Desdunes boarded a train in New Orleans with a ticket for Mobile, Alabama, and sat in a car reserved for whites. He was duly arrested and charged, his case set to be heard by the criminal-court judge in New Orleans, John Ferguson. All had gone as planned, but then, in another case, the Louisiana Supreme Court ruled that the Separate Car Act did not apply to interstate passengers. Because Desdunes had been going to another state, he could not be required to use a separate car, and the prosecution dropped the case.

The interstate-travel issue was a persistent wrinkle in the Jim Crow era, and it inspired some impressive judicial contortions. In 1878, for example, the U.S. Supreme Court struck down a Reconstruction-era Louisiana statute requiring integrated facilities on steamboats. Under the Constitution, only Congress has the power to regulate interstate commerce. Because riverboats stopped in many states, the Court said, they could not be bound by the regulations of one state.

You might assume that a state law requiring *segregated* facilities on interstate carriers would be subject to the same prohibition. In 1890, however, the Supreme Court held otherwise. It declared that an interstate train was subject to a Mississippi law requiring separate cars for "colored" and white passengers for as long as the train was in Mississippi. The Court somehow parsed its way around its own earlier decision.

But now, because of the Louisiana Supreme Court's ruling, Martinet needed another volunteer scofflaw. Fortunately, he had one at hand: Homer Plessy. Like Desdunes, Plessy was light-skinned —"fair-skinned enough to cause confusion," as Luxenberg puts it, suggesting that Plessy might have been accustomed to passing, as many nominally "colored" people in New Orleans did. He was twenty-nine years old, married, and in the shoemaking business. Like Desdunes, he followed the script. On June 7, 1892, he boarded a train, one travelling only within the state of Louisiana, and sat in the car for white passengers. When the conductor asked if Plessy was colored, he said yes, and was removed from the train and booked. (Train conductors were in a ridiculous position: even if the law required trains to have separate cars, riders could still sue the conductor for misclassifying them.)

Plessy came before the same Judge Ferguson, who ruled that, since there had been no claim that the cars for white and black passengers were not "equal," there was no constitutional issue. The Louisiana Supreme Court agreed, adding that, if the Separate Cars Act were declared unconstitutional, many other state laws—on separate schools, intermarriage, and so forth—would be affected. The U.S. Supreme Court finally heard the case four years later, and on May 18, 1896, it issued its opinion.

As Luxenberg points out, the concept "separate but equal" (the phrase the Court used in Plessy was actually "equal but separate") was hardly a novelty. It had been a customary way to throw out complaints about segregation since before the Civil War. In Plessy, the Court added a gloss that became almost as famous as the phrase itself: "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," it said. "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." As Charles Black, a Yale law professor, wrote of these sentences many years later, "The curves of callousness and stupidity intersect at their respective maxima."

The assumption that separate facilities for blacks—railroad cars, steamboat berths, schools—were not inferior is a good example of the Supreme Court's formalism in that period of American law. Everyone knew the assumption was false. The Jim Crow train car was sometimes called "the dirt car," and "colored" schools were often shacks. It was also absurd to claim that the "badge of inferiority" was a black person's construction. In Dred Scott, the Chief Justice, Roger Taney, had said that, constitutionally, black people were "a subordinate and inferior class of beings," with "no rights which the white man was bound to respect."

In Brown v. Board of Education, the Warren Court would cite psychological studies showing that black children are harmed by segregation. That's not something a nineteenth-century court would have considered appropriate (and some people did not consider it appropriate in Brown). In cases like Plessy v. Ferguson, the Court looked to the text of the statute. If the statute did not prescribe unequal conditions, then, legally, conditions were not unequal. 5

The Justices in the Plessy case were aware of the repercussions that a robust interpretation of the Fourteenth Amendment would have, of course. Political realities, as always, put a constraint on judicial reasoning. The Supreme Court in the early twentieth century did decide cases in favor of African-American and Asian-American plaintiffs, but it mostly kept its hands off state racial regulations.

When Louis Martinet formed his Citizens' Committee to Test the Constitutionality of the Separate Car Law, he wrote to Frederick Douglass and asked for his support. Douglass refused. He said he could not see how the case could help things. Douglass was proved correct. The decision was the worst possible outcome, and the one Plessy's lawyers had feared. It stamped a constitutional seal of approval on state-mandated racial segregation. The case may not have received much press attention at the time, but over the next fifty years it was cited in thirteen Supreme Court opinions.

It's true that in 1890, when the Separate Car Act was passed, Southern race relations were still somewhat in flux. Blacks voted and were politically active. The Louisiana legislature that passed the act had sixteen African-American members. And the composition of the Supreme Court is subject to change; the lawyers for Plessy might have hoped that they would draw a winning hand.

By 1896, though, the endgame was clearly in view. Six years earlier, Mississippi had become the first state to contrive laws to disenfranchise black voters, rather than rely solely on terror and fraud. Other states followed, although extralegal methods remained in use, and, by the end of the century, the work of disenfranchisement was complete. There were 130,334 African-Americans registered to vote in Louisiana in 1896; in 1904, there were 1,342. In Virginia that year, the estimated black turnout in the Presidential election was zero.

As for the Supreme Court, it had already made the character of its commitment to civil rights clear. In 1873, the Court ruled that the Fourteenth Amendment did not apply to most state laws. And in 1883 it struck down the anti-discrimination provisions of the Civil Rights Act of 1875—Congress's last attempt to address civil rights until 1957.

"When a man has emerged from slavery," the Court said in 1883, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws." Slavery had been abolished for just eighteen years, but the Court felt that that was enough time for African-Americans to get on their feet.

As Richard White tells us in his excellent volume on Reconstruction and the Gilded Age, published as part of the also excellent Oxford History of the United States, between seventy-eight and a hundred and sixty-one black men were lynched every year in the decade from 1890 to 1899. It was the height of wishful thinking in 1896 to imagine that the Court would undergo a conversion in the case of Homer Plessy. The only consolation Plessy's advocates had was that, when they brought their case, there were

a hundred others also challenging segregation laws in the courts. If it hadn't been Plessy, it would have been someone else.

Luxenberg has chosen a fresh way to tell the story of Plessy. "Separate" is a group biography of three figures in the case: Albion Tourgée, one of Plessy's lawyers; Henry Billings Brown, the Justice who wrote the majority opinion; and John Marshall Harlan, who filed the lone dissent.

Edmund Wilson, in "Patriotic Gore" (1962), his book on the literature of the Civil War, describes Tourgée as "an obstinate man, physically and morally courageous, with bad judgment in practical matters and possessed by an intransigent idealism," and Luxenberg's portrait is much the same. Tourgée fought in the Union Army and was badly wounded. After the war, he moved with his wife and daughter to Greensboro, North Carolina, where he was active politically and as a writer and speaker on behalf of Republican policies. He called himself "a carpet-bagger of the very worst sort."

But by 1877, the year the Army was pulled out of the South and Reconstruction ended, he had come to believe that the whole effort was an exercise in hubris—which would be the line on Reconstruction for decades afterward, and the line taken in two of the most popular Hollywood movies ever made: "The Birth of a Nation" (1915) and "Gone with the Wind" (1939). In 1879, Tourgée published a novel whose title expressed his judgment on Reconstruction—"A Fool's Errand." The book was compared with "Uncle Tom's Cabin" and became a big best-seller. It made Tourgée famous and, for a short time, wealthy.

Tourgée's empathy for the Southern point of view did not erode his commitment to racial justice. After leaving North Carolina, he moved to upstate New York and began writing a column under the name Bystander, advocating for racial equality. At Martinet's invitation, he served as an adviser on the Plessy case, and was instrumental in devising the legal strategy. He presented the case in oral argument before the Supreme Court.

Luxenberg is kinder in his treatment of that argument than other commentators have been. Instead of the standard claim that segregation was a denial of equal protection, Tourgée argued that it was a denial of the Fourteenth Amendment's guarantee of due process. A person's reputation is property, he said, like an inheritance; and "the most precious of all inheritances is the reputation of being white." In being denied seating in the white car, Plessy was deprived of his property without due process of law.

The theory is less cockeyed than it sounds. It turns on the absence of a definition of "colored" in Louisiana law. Tourgée was saying to the Justices: Louisiana law gives state officials complete discretion in determining racial identity. Homer Plessy looks a lot like you. If someone with authority to do so classified you as nonwhite, would you view the situation with equanimity? No, you would think that you had been deprived of something without due process of law.

This is basically the situation the Lums would complain of three decades later. In both cases, the argument was both an appeal to the racial prejudices of the Justices and essentially a racist argument in itself. Whatever the calculation, it went over the heads of the Court. Justice Brown, in his opinion, expressed bafflement. Plessy was colored, he said. How could he be deprived of something—"the reputation of being a white man"—that he never had?

Richard Kluger, in his landmark history of Brown v. Board of Education, "Simple Justice" (1975), called Justice Brown "one of the Court's dimmer lights," and nothing Luxenberg tells us suggests that this was unfair. Brown was from Lee, in western Massachusetts. He went to Yale, then pursued a legal career in Detroit. Like most Northerners, he was a Unionist, not an abolitionist, and he paid a substitute to take his place in the war rather than be drafted, as was perfectly legal. He married a woman with a large inheritance and cultivated a high style of living. He campaigned for Ulysses S. Grant in the 1868 Presidential election. Grant gave him a federal judgeship in 1875, and he was appointed to the Supreme Court by Benjamin Harrison in 1890.

Brown's goals in life, Luxenberg says, were "ascent, dignity, money, stature." He almost certainly saw his opinion in Plessy as a routine disposition of a familiar challenge. What gave his opinion significance was its sweeping justification for segregation laws, and its timing, right at the moment that Jim Crow descended like a cage on the South.

The establishment of Jim Crow was not simply a matter of laws suppressing African-American voting and segregating schools and transportation, or of a pattern of social practices that became ingrained. Jim Crow was a regime that was created over and over again. In 1930, the city of Birmingham made it illegal for a black person and a white person to play dominoes or checkers together. In 1932, Atlanta prohibited amateur baseball clubs of different races from playing within two blocks of each other. In 1935, Oklahoma required the separation of races when fishing or boating. In 1937, Arkansas segregated its horse-racing tracks. Jim Crow required a constant reminder of who was in charge. Its mania for racial separatism was insatiable.

Harlan, the dissenter in Plessy, came from a family with a long history in Kentucky politics. His father was a U.S. congressman; his grandson, also John Marshall Harlan, became an Associate Justice on the Warren Court. Kentucky was a border state—it allowed slavery but did not secede—and Harlan began his career as a pro-slavery Unionist. He led a regiment against rebel forces in Kentucky, but he and his family had owned slaves, and he condemned the Thirteenth Amendment as "the overthrow of Constitutional liberty."

As Luxenberg shows us, Harlan built his reputation mainly by following the political lead of others, but after he was appointed to the Supreme Court, in 1877, he became more independent. He was the only card in the judicial deck that Martinet and Tourgée could count on. He had filed the sole dissent in the so-called Civil Rights Cases in 1883. He had dissented when the Court upheld the Mississippi law mandating segregated cars on interstate trains, in 1890. He would later dissent, along with Oliver Wendell Holmes, Jr., in the Court's pro-business ruling in Lochner v. New York (1905).

Harlan's Plessy dissent seems unequivocal. "In the eye of the law," he says, "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." He saw as well as Douglass did the long-term effect of the Court's ruling, warning, "The judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case." When John F. Kennedy addressed the nation on civil rights from the Oval Office, in 1963—the speech that initiated the creation of the Civil Rights Act of 1964—he quoted from Harlan's dissent.

Harlan's conception of color blindness had limits, however. "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," he wrote in his dissent. "Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." It seemed to him a blatant example of how arbitrary the Louisiana separate-cars statute was that it would permit "a Chinaman [to] ride in the same passenger coach with white citizens," while forbidding African-Americans to do so. This head-spinning obiter dictum about the racial status of the Chinese helps explain why Holmes once compared Harlan's mind to "a powerful vise the jaws of which couldn't be got nearer than two inches to each other."

"Separate" is deeply researched, and it wears its learning lightly. It's a storytelling kind of book, the kind of book that refers to Albion Tourgée as Albion and John Harlan as John, and that paints the scene for us ("On a bright and beautiful night in late October 1858 . . . "). Luxenberg does not engage in psychological interpretation. He doesn't mention, for instance, that Brown's Yale classmates called him Henrietta because they thought he was effeminate—which might have contributed to Brown's eagerness not to appear like a man who didn't belong. And he dismisses in a footnote speculation that Robert Harlan, a man of mixed race who grew up as a member of John Harlan's family, might have been a half brother. Even if he wasn't in fact related to John, however, it might have mattered if John believed otherwise.

Luxenberg skillfully works the military and the political background into his narrative. Still, despite ample quotations from letters and diaries, the three principals retain a sepia quality. They seem stiff, earnest, florid—Victorian. And there is a lot of biographical backstory. It takes four hundred pages to get to Homer Plessy; the argument and the decision are over after just twenty pages, and then the book abruptly ends. The afterlife of the case gets no real attention. Brown v. Board of Education receives a passing mention in a brief epilogue summarizing the post-Plessy lives of Brown, Harlan, and Tourgée.

And it does seem a misjudgment to tell the story of an important civil-rights case as the story of three white men. The temptation is understandable. Tourgée, Brown, and Harlan left large archives; Martinet left nothing. Even Tourgée's letters to Martinet working out their legal strategy are lost; we only have copies of four of them that Tourgée kept. Little is known about Homer Plessy outside his role as a test-case plaintiff. But, if we are trying to understand the Plessy case as a human story, Martinet and Plessy, and millions of other African-Americans, are the ones who took the risks and suffered the consequences.

"Separate" is a different way to tell the story, but it does not give us a new story. It doesn't help us with the big historical questions about the persistence of Southern racism after the Civil War. Those questions are central to David A. Bateman, Ira Katznelson, and John S. Lapinski's "Southern Nation: Congress and White Supremacy After Reconstruction," a fine-grained and valuable scholarly analysis. The authors argue that "rendering the South as peripheral to the history of the United States minimizes the extent to which the South was 'co-creator of the nation's history' and obscures the ways in which the ideas and practices underpinning this racial order were projected across the United States."

As many historians have pointed out, one of the reasons the South was able to exercise a stranglehold on race relations in national politics was the supervention of the famous three-fifths clause, once the focus of abolitionist attacks on the Constitution. When the former slaves were counted as full persons,

the former slave states gained twenty congressional seats, a twenty-five-per-cent bump. They also gained votes in the Electoral College. They suppressed the votes of their African-American residents, then got full representational credit for them.

But where was the political will in the rest of the country? Separation of the races did not originate in the slave South. The nature of the institution made that impractical, if not impossible. As Luxenberg says—repeating one of the main points of C. Vann Woodward's classic study "The Strange Career of Jim Crow," first published in 1955—segregation began in the North, where it was the product not of the practice of slavery but of Negrophobia. In 1835, Alexis de Tocqueville wrote, "The prejudice of race appears to be stronger in the states that have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those states where servitude has never been known." This helps explain why the majority opinion in Plessy was by a man from Massachusetts who had no experience with slavery, and the dissenter was a man from a slave state who had once owned slaves himself.

After 1900, the South had Jim Crow, a legal regime of separatism, but the rest of the country had ghettos, redlining, gerrymandering, quota and exclusion systems, and the artifice of the local school district. De-facto discrimination—we now call it "institutional racism" or "structural racism"—is much harder to address. It requires more of people than just striking down a law. ♦

This article appears in the print edition of the February 4, 2019, issue, with the headline "In the Eye of the Law."