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ONE HUNDRED YEARS AFTER *PLESSY*: THE FAILURE OF DEMOCRACY AND THE POTENTIALS FOR ELITIST AND NEUTRAL ANTI-DEMOCRACY

DANIEL R. GORDON*

I. INTRODUCTION: *PLESSY* AND THE CHALLENGE TO DEMOCRATIC LAWMAKING

May 18, 1996 marks the one hundredth anniversary of the constitutional legitimation of racist law in the United States. The United States Supreme Court decided *Plessy v. Ferguson*[1] on May 18, 1896. *Plessy* validated the separate but equal doctrine[2] and provided federal, constitutional and judicial imprimatur to the system of segregation that developed in the late nineteenth century and lasted through the first half of the twentieth century.[3] Only after a long political, social, and legal struggle,[4] did the African-American community successfully challenge *Plessy* in *Brown v. Board of Education*[5] in 1954. Unfortunately, *Plessy*'s impact did not cease when the *Brown* Court held that separate but equal schools violated the Fourteenth Amendment of the United States Constitution.[6]

To this day, the aftermath of *Plessy* continues to plague the United States' social, political, and legal systems. The struggle against state sponsored and legally sanctioned racism has continued for decades since the *Brown* decision.[7] Patterns of racial segregation in schools and

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

2. *Id.* at 548. The concept of separate but equal in *Plessy* derived from the Louisiana statute analyzed by the *Plessy* Court. *Id.* at 540.

3. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 461-77 (1982).

4. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

5. 347 U.S. 483 (1954).

6. *Id.* at 495.

7. *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 (1988); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

residential neighborhoods continue to exist into the 1990s.[8] African-Americans continue their struggle to gain influence within the political[9] and economic[10] systems. However, the impact of *Plessy* stretches beyond the legally sanctioned racism faced by African-Americans and other people of color.[11] *Plessy* celebrated the virtues of democratically created law which reflected the popular will of the citizenry.[12] The *Plessy* case posited a model of populist lawmaking that would benefit people of all races. The greatest impact of *Plessy* in 1896 involved the failure of democratically created law to be just in the regulation of personal relationships between individuals and social groups. *Plessy* demonstrated why democracy fails when people utilize law to guide social decisionmaking such as who may marry whom,[13] or who may attend

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8. *See generally* DOUGLAS A. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Rodney J. Blackman, *Returning to* Plessy, 75 MARQ. L. REV. 766 (1992); David Crump, *From* Freeman *to* Brown *and Back Again: Principle, Pragmatism, and Proximate Cause in the School Desegregation Decisions*, 68 WASH. L. REV. 753 (1993); Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of* Brown, 20 HASTINGS CONST. L.Q. 649 (1993); Roberta L. Steele, *All Things Not Being Equal: The Case for Race Separate Schools*, 43 CASE W. RES. L. REV. 591 (1993); Juan Williams, *The Survival of Racism Under the Constitution*, 34 WM. & MARY L. REV. 7, 27-31 (1992); Mary E. Wright, *Natural Rights Versus Civil Rights on the African-Americans' Elusive Quest for Parity*, 16 T. MARSHALL L. REV. 1 (1990); Cynthia Burns, Comment, *The Fading of the* Brown *Objective: A Historical Perspective of the Marshall Legacy in Education*, 35 HOW. L.J. 95 (1991).

9. *See* Shaw v. Reno, 113 S. Ct. 2816 (1993); LANI GUINIER, THE TYRANNY OF THE MAJORITY, FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994); Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707 (1991).

10. *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to and striking down Richmond's plan to award minority-owned businesses 30% of the city's construction contracts because there was no showing of past racial discrimination in city's construction industry which could have amounted to a compelling state interest).

11. *See generally* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

12. *See infra* notes 142-48 and accompanying text.

13. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia's law prohibiting marriage between African-Americans and whites).

school with whom.[14] *Plessy* led to restrictions on the democratic creation of law that still exist in the 1990s.[15]

This article examines the negative impact of *Plessy* on the democratic creation of law, identifies two types of anti-democratic processes in lawmaking: the undemocratic creation of law[16] and the neutral prohibition on lawmaking.[17] Finally, the article explains why the neutral prohibition on lawmaking should become dominant constitutional doctrine in the United States.[18]

II. *PLESSY* AND THE CONSTITUTIONALITY OF SEPARATE BUT EQUAL

Homer Adolph Plessy bought a first-class railroad ticket between New Orleans and Covington, Louisiana.[19] He took his seat peacefully in a first-class coach, which was reserved for white passengers only.[20] Authoritites issued an arrest warrant alleging that Plessy insisted on entering and remaining in a coach assigned to white passengers.[21] Plessy was arraigned, and posted $500 for his appearance in the Criminal Court of the Parish of New Orleans.[22] Plessy faced criminal proceedings for allegedly violating a Louisiana act that required the separation of white and black railroad passengers.[23]

The act that Plessy allegedly violated required that railway companies carrying passengers in Louisiana provide equal but separate accommodations for the white and black races.[24] The act gave railway companies the choice of providing two or more passenger coaches for each train or dividing passenger coaches by a partition. The act also prohibited members of either race from sitting in a coach or area not

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14. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (holding that Missouri's failure to admit African-American candidate to law school or open a law school for African-Americans violated the Equal Protection Clause).

15. *See infra* notes 262-85 and accompanying text.

16. *See infra* notes 214-37 and accompanying text.

17. *See infra* notes 238-61 and accompanying text.

18. *See infra* notes 301-05 and accompanying text.

19. Brief for Plaintiff in Error, at 3-4, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210) (Jurisdictional).

20. *Id.* at 4.

21. Brief on behalf of Defendant in Error, at 5-6, *Plessy* (No. 210).

22. Brief for Plaintiff in Error, at 1, *Plessy* (No. 210).

23. *Id.* at 2.

24. *Ex parte* Plessy, 11 So. 948, 948-49 (La. 1892).

assigned to their race.[25] Railroad employees risked penalties if they refused or neglected to assign passengers to the proper racial coach or area. If convicted, Plessy faced as much as a $25 fine or up to twenty days imprisonment under the statute.[26]

When appearing for arraignment in the Criminal Court of the Parish of New Orleans, Plessy objected to the court's jurisdiction,[27] and asserted that the Louisiana act under which he stood charged violated the Thirteenth and Fourteenth Amendments by establishing a discriminatory distinction between citizens of the United States based on race.[28] Plessy's plea setting up the unconstitutionality of the Louisiana railroad segregation act failed in the criminal court when the Judge overruled the plea.[29] Plessy applied for writs of certiorari and prohibition to the Supreme Court of Louisiana.[30] The court issued a provisional writ of prohibition for the duration of deliberations by the Louisiana Supreme Court.[31]

A. *The Louisiana Supreme Court Distinguishes Between Separateness, Community, and Equality*

Plessy's petition for writs of certiorari and prohibition from the Louisiana Supreme Court failed[32] when the Louisiana high court found the Thirteenth Amendment inapplicable[33] and the Fourteenth Amendment not violated.[34] The Louisiana Supreme Court summarily dismissed the relevance of the Thirteenth Amendment to Plessy's objections about Louisiana's railway segregation act. The court relied solely on *The Civil Rights Cases*[35] which held that the Thirteenth Amendment provided narrow protection against slavery and involuntary servitude but no protection against the denial of equal accommodations in public conveyances such as the railway on which Plessy purchased his first class

25. *Id.* at 949.

26. *Id.*

27. Brief on Behalf of Defendant in Error, at 6-10, *Plessy* (No. 210).

28. *Id.* at 10.

29. *Ex parte* Plessy, 11 So. at 948.

30. *Id.*

31. *Id.* at 951.

32. *Id.*

33. *Id.* at 949.

34. *Id.* at 951.

35. 109 U.S. 3 (1883).

ticket.[36] According to the Louisiana high court, the denial of equal accommodations on public conveyances imposed no badge of slavery. At most, denial of accommodations on public conveyances implicated the Fourteenth Amendment.[37] Thus, the Louisiana high court confined its constitutional analysis of the Louisiana railway segregation act to the Fourteenth Amendment.[38]

The Supreme Court of Louisiana held that statutes or regulations enforcing the separation of races on public conveyances or in other public circumstances failed to contravene the equal protection or privileges and immunities clauses of the Fourteenth Amendment.[39] The Louisiana court conceived of a separation of the races as falling within two views of the meaning of equal protection. One view of equal protection conceived of equality in two very narrow terms. Another view utilized a historical analysis to place equality into a historical context.

Equality meant both substantial sameness in accommodations provided[40] and application of a statute or regulation with perfect fairness and sameness.[41] The equality required by the Fourteenth Amendment existed, so long as the railway cars for both races remained substantially similar and the rule requiring that each race rode in a separate car applied the same to each race. In *Plessy*, the Louisiana statute required equal accommodations for each race,[42] and it applied to the races so equally that the record from the New Orleans parish court below failed to disclose whether the person prosecuted was white or black.[43]

The Louisiana high court conceived of the meaning of equality so narrowly that the impact of the separate but equal doctrine on racial identity or sense of community failed to matter in the court's analysis.[44] The court viewed equality in mechanistic terms. No consideration of the impact of racial separation on members of each race entered into the analysis. The court observed that even if prejudice motivated the statute, all that mattered was that railway accomodations remained substantially equal.[45] The Louisiana court succeeded in uncoupling the concept of

36. *Ex parte* Plessy, 11 So. at 949.
37. *Id.*
38. *Id.* at 949-51.
39. *Id.* at 950.
40. *See id.* at 951.
41. *See id.*
42. *Id.* at 949.
43. *Id.* at 951.
44. *Id.* at 950.
45. *Id.* at 951.

separateness from the concept of equality. In the court's view, separateness could not independently create inequality; so long as each race possessed access to similar railway coaches and the statute applied similarly to each race, the impact of separateness remained irrelevant.

In addition to defining the Fourteenth Amendment concept of equality mechanistically and narrowly, the Louisiana high court analyzed the Fourteenth Amendment concept of equality in broad historical terms. The court viewed the adoption and application of the Fourteenth Amendment as part of an almost fifty-year portrait of American legal history. The United States Supreme Court failed, up to the time the Louisiana Supreme Court was considering *Plessy*, to consider the constitutional validity of statutorily required separate but equal doctrine.[46] However, several other state courts had already validated separate but equal law.[47] For example, the Massachusetts Supreme Judicial Court found that separate schools for black children failed to violate civil, social, political, and constitutional rights.[48] The Pennsylvania Supreme Court held that separating races on public conveyances failed to violate anyone's rights.[49] That the Massachusetts and Pennsylvania cases predated the adoption of the Fourteenth Amendment mattered little to the Supreme Court of Louisiana.[50]

The early dates of the Massachusetts and Pennsylvania cases proved irrelevant to the Louisiana Supreme Court for a number of reasons. The Louisiana court chose to interpret the Fourteenth Amendment in the context of a broad historical sweep of time. For the Louisiana Court, Pennsylvania and Massachusetts represented states where the civil rights of blacks existed prior to the adoption of the Fourteenth Amendment.[51] The Louisiana court cited a number of state cases that recognized the validity of the separate but equal doctrine. Not only were cases from Massachusetts and Pennsylvania included on the list, but so were such Union bastions as Ohio,[52] New York[53] and Indiana,[54] as well as

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46. *Id.* at 950; *see* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate But Equal" Doctrine, 1865-1896*, 28 AM. J. LEG. HIST. 17 (1984).

47. *Ex parte* Plessy, 11 So. at 950.

48. Roberts v. Boston, 59 Mass. (5 Cush.) 198 (1849).

49. West Chester & P.R.R. v. Miles, 55 Pa. 209 (1867).

50. *Ex parte* Plessy, 11 So. at 950.

51. *Id.*

52. *Id.* (citing State v. McCann, 21 Ohio 198, 210 (1871)).

53. *Id.* (citing People v. Gallagher, 93 N.Y. 438 (1883)).

54. *Id.* (citing Cory v. Carter, 48 Ind. 327 (1874)).

federal court cases.[55] The Louisiana high court viewed the adoption and application of the Fourteenth Amendment in the political and civil rights contexts of northern states that accorded equal rights to African-Americans when the Fourteenth Amendment became law.[56] If separate but equal existed in northern states at the time of the enactment of the Fourteenth Amendment, certainly, then, the northern authors and supporters of the Fourteenth Amendment intended that equality not require the end of separateness. The Louisiana court capped this analysis by stating that the Fourteenth Amendment "created no new rights whatever, but only extended the operation of existing rights and furnished additional protection for such rights."[57]

The Supreme Court of Louisiana placed the Fourteenth Amendment into the context of separate but equal practices that predated the Amendment. Not only did the Louisiana court point to separation of the races by northern states in public schools and on public conveyances, but the court also mentioned the law of marriage.[58] Separateness failed to create inequality under the Fourteenth Amendment because American legal custom long accepted and recognized separateness as not impacting equality. The very concept of equality meant only that access be accorded to similar accommodations such as railway coaches and that similar enforcement of a statute or regulation be applied to both races. Unfortunately, the United States Supreme Court not only adopted the analysis of the Supreme Court of Louisiana, but expanded that analysis in *Plessy*.

B. Plessy *and the United States Supreme Court: Adopting the Louisiana Approach and More*

Like the Louisiana high court, the United States Supreme Court in *Plessy* dismissed the relevance of the Thirteenth Amendment to the Louisiana railway segregation statute.[59] The Supreme Court restricted the Thirteenth Amendment to the abolition of slavery, peonage, the coolie trade, and involuntary servitude.[60] Discriminatory treatment failed to impose a badge of slavery or servitude and the Supreme Court found that the concept of slavery would be overextended if applied to every act of

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55. *Id.* (citing The Sue, 22 F. 843 (1885); Logwood v. Railroad Co., 23 F. 318 (1885)).

56. *See Ex parte* Plessy, 11 So. at 950.

57. *Id.* at 950-51 (citing Barbier v. Connolly, 113 U.S. 27 (1884)).

58. *Id.* at 951.

59. Plessy v. Ferguson, 163 U.S. 537, 542-43 (1896).

60. *Id.* at 542.

discrimination by private individuals.[61] The Supreme Court focused most of its analytical attention on whether the railway segregation act violated the Fourteenth Amendment.[62]

The Supreme Court found that enforced separation of the races failed to violate the Fourteenth Amendment.[63] The Court grappled with the same issue that faced the Supreme Court of Louisiana when it focused most of its attention on explaining the nature and meaning of equality under the Fourteenth Amendment. The Supreme Court agreed with the Louisiana high court when they found that legal distinctions between the races failed to destroy the legal equality of the races.[64] Separation failed to impose or impact equality, and the races could be required to be separate and not be unequal. Also like the Louisiana court, the Supreme Court focused implicitly on the historical context of the Fourteenth Amendment. School segregation and restrictions on racial intermarriage provided long-held and widely-accepted examples of legally sanctioned segregation in the United States.[65] In addition, the Supreme Court, like its Louisiana judicial counterpart, utilized the Boston school segregation case, *Roberts v. City of Boston*,[66] as a prime example of the acceptance of segregation. The Supreme Court also cited to the Ohio,[67] New York,[68] and Indiana[69] cases referenced by the Louisiana high court. The Indiana case[70] involved the validity of a law forbidding racial intermarriage. The Supreme Court's point in referring to these northern segregation cases mirrored that made by the Louisiana high court. In those northern states where the rights of African-Americans had been traditionally and earnestly enforced, racial segregation had been recognized by the judiciary as a valid exercise of the legislative power.[71] The Supreme Court implicitly established the context for the passage of the Fourteenth Amendment finding that even those northern states that supported the enactment of the Fourteenth Amendment recognized the

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61. *Id.* at 542-43.

62. *Id.* at 543-52.

63. *Id.* at 548.

64. *Plessy*, 163 U.S. at 544.

65. *Id.* at 544-45.

66. 59 Mass. (5 Cush.) 198 (1849).

67. *Plessy*, 163 U.S. at 545 (citing State v. McCann, 21 Ohio 198 (1871)).

68. *Id.* (citing People v. Gallagher, 93 N.Y. 438 (1883)).

69. *Id.* (citing Cory v. Carter, 48 Ind. 327 (1874)).

70. State v. Gibson, 36 Ind. 389 (1871).

71. *See Plessy*, 163 U.S. at 544-45.

validity of racial segregation and therefore equality under the Fourteenth Amendment failed to mean integration of the races.

If equality did not mean integration of the races, then the Supreme Court faced the task of defining the meaning of equality. The Supreme Court moved away from the thinking of the Louisiana high court when it analyzed the meaning of equality. The Louisiana court conceptualized equality as materialistic and mechanistic,[72] and found that equality existed so long as equal access to similar facilities existed.[73] The United States Supreme Court opted for a different analysis. The Supreme Court mentioned briefly that equal access satisfied constitutional requirements of equality,[74] but spent more of its analytical resources defining Fourteenth Amendment equality by distinguishing between political and social equalities.[75] In fact, the Supreme Court's implicit discussion concerning the historical context of the passage of the Fourteenth Amendment occurred within the context of the discussion concerning political and social equalities.[76]

The Supreme Court found that the Fourteenth Amendment protected the African-American's political equality.[77] The Court focused on the right of African-Americans to sit on juries, citing *Strauder v. West Virginia*, which held that African-Americans could not be excluded from juries based on their race.[78] Also, once a law accorded African-Americans the right to mingle with whites, that law could not be overlooked and disregarded.[79] Hence, once the political system provided rights, such rights were inviolable. The Court recognized a public or civic sphere, where the law required that African-Americans and all people be treated the same. In that public or civic sphere, law could act. The Court failed to clarify the makeup or extent of the public or civic sphere. The Court also created a dichotomy between the public or civic sphere and private sphere involving social life.

According to the Supreme Court, the framers of the Fourteenth Amendment never intended to enforce social equality.[80] The separation of the two races in schools, theaters, and railway cars involved social

72. *See supra* notes 44-45 and accompanying text.

73. *Ex parte* Plessy, 11 So. at 950-51.

74. *Plessy*, 163 U.S. at 551.

75. *Id.* at 544-46, 549-52.

76. *See Plessy*, 163 U.S. at 544-45.

77. *See id.* at 545-46.

78. 100 U.S. 303, 310 (1879).

79. *Plessy*, 163 U.S. at 545-46.

80. *See id.* at 544.

choices[81] unenforceable by law and legislation.[82] Social prejudices and beliefs could not be legislated or be overcome by legislation.[83] The Supreme Court failed to pinpoint the contours of what constituted unregulable social life as opposed to regulable political behavior; because in the Court's view social inequality or equality existed subjectively within the minds of those who relate to each other. Hence, legally enforced separation failed to create inequality in any tangible, empirical or observable manner. If African-Americans believed that legally mandated segregation stamped their race with a badge of inferiority, such beliefs existed only because African-Americans chose to conceive of segregation as unequal.[84] Law and the psyche remained in separate spheres of life. Law could require racial separation, but inequality existed only because of individually held beliefs about inequality. Adjustments in attitudes could bring about equality even where people could not intermingle.

In addition to making a distinction between political and social equality, the Supreme Court focused on the federalism impact of the Louisiana railway segregation statute. The Louisiana high court mentioned that the regulation of domestic or intrastate commerce remained exclusively a state function,[85] but failed to expand upon its point. The United States Supreme Court extensively distinguished between federal and state police powers.[86] The Court found that the Commerce Clause[87] and the Fourteenth Amendment applied only narrowly to state legislation involving racial segregation. The Louisiana railway segregation statute fell outside the scope of the Commerce Clause because the statute applied only to intrastate passengers and travel.[88] Hence, federal legislative and regulatory authority failed to apply. The Supreme Court also found that the Fourteenth Amendment did not invest Congress with the power to legislate in areas within the domain of state legislation such as a code of municipal law for the regulation of private rights.[89] The Supreme Court avoided tying together analytically its observations concerning federalism. Overall, the Court concluded that Louisiana and

81. *See id.* at 545, 551-52.

82. *Id.* at 544, 551-52.

83. *See id.* at 551.

84. *Id.*

85. *Ex parte* Plessy, 11 So. 951.

86. *Plessy*, 163 U.S. at 546-48.

87. U.S. CONST. art. I, § 8, cl. 3.

88. *Plessy*, 163 U.S. at 548.

89. *Id.* at 546-47 (quoting The Civil Rights Cases, 109 U.S. 3 (1883)).

other states possessed a police power unhampered by the United States Constitution which would allow the races to remain separated.[90]

Although the United States Supreme Court failed to follow much of the reasoning of the Louisiana high court, the Court still found the separate but equal doctrine to be constitutional. Though each court utilized its own rationale, both the Louisiana and United States Supreme Courts shared similar social and political theories and assumptions when deciding *Plessy*.

III. SOCIAL DARWINISM, DIVINE RACISM, LESS THAN COHERENT FEDERALISM, ATTITUDINAL LAISSEZ FAIRE AND THE CELEBRATION OF DEMOCRACY

The United States Supreme Court and the Supreme Court of Louisiana shared historical views of the segregationist context of the passage of the Fourteenth Amendment.[91] However, they failed to share views about the meaning of equality under the Fourteenth Amendment.[92] Both courts shared underlying theoretical assumptions about the nature of race, the quality of individual attitudes, and the dynamics of American democracy. Overall, the United States Supreme Court expressed underlying assumptions more explicitly than the Louisiana high court, but neither expanded upon those assumptions at any length. The *Plessy* opinions reflect common visions concerning the relations between white and black Americans in the late nineteenth century.

A. *Nature, Religion, and Race*

Both *Plessy* opinions reflected the seriousness with which racial differences were taken in the 1890s. Racial instincts and the physical differences between the races created immutable barriers to legal remedy.[93] Natural differences between the races along with custom and law made legally mandated racial segregation reasonable regulation.[94] As a result, the Fourteenth Amendment could not defy nature by abolishing distinctions based upon the color of races.[95] The *Plessy* opinions based their thinking on assumptions about the strength of the

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90. *Id.* at 548, 550-51.

91. *See supra* notes 62-71 and accompanying text.

92. *See supra* notes 72-77 and accompanying text.

93. *Plessy*, 163 U.S. at 551.

94. *Ex parte* Plessy, 11 So. 948, 950 (La. 1892) (quoting West Chester & P.R.R., 55 Pa. 209, 213-14 (1867)).

95. *Plessy*, 163 U.S. at 544.

natural differences between the white and black races. The distinction founded in the color of the two races must always exist "so long as white men are distinguished from the other race by color."[96] The *Plessy* opinions implicitly created a dichotomy between human law and the law of nature; human law remained powerless to change conditions created by the law of nature.[97]

The strength of the natural difference between the races found in the *Plessy* opinions probably reflected two philosophical views about race existing at the end of the Nineteenth Century. One can only say "probably reflected" because the opinions provide very little direct evidence of broader philosophical insights. Neither *Plessy* opinion stated outright that one race was superior or inferior to the other. In fact, the Louisiana high court wrote, "[t]o assert separateness is not to declare inferiority . . . ."[98] The United States Supreme Court evidenced even greater ambiguity about the social equality of the races when the Court wrote, "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[99] However, the general insistence of both opinions about the natural quality of segregation implied that something more than skin color differences separated the races.

The *Plessy* opinions probably reflected social Darwinism[100] and racist theology.[101] Social Darwinism provided a scientific basis for racist thinking. The concept of survival of the fittest was transformed from a long-term scientific evolutionary phenomenon to a social phenomenon in which the white race became the naturally dominant class.[102] African-Americans were viewed as inferior as evidenced by innate traits such as

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96. *Id.* at 543.

97. *See id.* at 551.

98. *Ex parte* Plessy, 11 So. at 950 (quoting *West Chester*, 55 Pa. at 213).

99. *Plessy*, 163 U.S. at 552.

100. *See* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 170-200 (1955); Irving G. Hindrich, *Stare Decisis, Federalism, and Judicial Self-Restraint: Concepts Perpetuating the Separate But Equal Doctrine in Public Education, 1849-1954*, 12 J.L. & EDUC. 561, 569-70 (1983); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 301 (1983); Schmidt, *supra* note 3, at 453.

101. *See* JOHN B. BOLES, MASTERS & SLAVES IN THE HOUSE OF THE LORD, RACE AND RELIGION IN THE AMERICAN SOUTH, 1740-1870 (John B. Boles ed., 1988); BENJAMIN QUARLES, THE NEGRO IN THE MAKING OF AMERICA 71, 159-62 (1987); H. SHELTON SMITH, IN HIS IMAGE, BUT . . . RACISM IN SOUTHERN RELIGION, 1780-1910, at 208-305 (1972).

102. *See* MERLE CURTI, THE GROWTH OF AMERICAN THOUGHT 652 (3d ed. 1991); Raymond S. Franklin, SHADOWS OF RACE AND CLASS 45 (1991).

immorality, criminality, and degeneracy.[103] Ultimately, this view held that the black race would die.[104] Certainly, such beliefs could explain the briefly stated certitude about the correctness of miscegenation laws reflected in the Louisiana[105] and United States Supreme Court[106] opinions in *Plessy*. Miscegenation laws would seem natural and correct when one race was viewed as inherently inferior or superior to the other. The state possessed the power to prevent the members of a vibrant race from marrying members of a dying race.

Racist theology found its roots in theological attitudes toward slaves[107] and Anglo-Saxon beliefs about their mission to spread modern Christianity.[108] One tenet of racial theology is that the Creator placed blacks under the rule of whites and required blacks to obediently serve whites.[109] As such, American whites accepted the task of civilizing the less sophisticated peoples of color.[110] Thus, there should be no surprise when the Supreme Court of Louisiana in *Plessy* stated, "following the order of Divine Providence, human authority ought not to compel these widely-separated races to intermix."[111]

B. *Less Than Coherent Federalism*

Both *Plessy* opinions discussed and shared a concern about federalism.[112] The Louisiana high court clearly and conclusively stated that regulation of intrastate commerce remained a state power while the regulation of interstate commerce remained a federal power.[113] The Louisiana court also asserted that the regulation of intrastate commerce constituted a state function as much as public schools and the regulation

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103. FRANKLIN, *supra* note 102, at 46.

104. Power, *supra* note 100, at 301.

105. *See Ex parte* Plessy, 11 So. at 951.

106. *Plessy*, 163 U.S. at 545.

107. *See* QUARLES, *supra* note 101, at 71.

108. *See* REGINALD HORSMAN, RACE AND MANIFEST DESTINY 81-91 (1981); James W. Vander Zanden, *The Ideology of White Supremacy*, *in* WHITE RACISM, ITS HISTORY, PATHOLOGY AND PRACTICES 133-34 (Barry N. Schwartz & Robert Disch eds., 1970).

109. *See* QUARLES, *supra* note 101, at 71.

110. *See* HORSMAN, *supra* note 108, at 84.

111. *Ex parte* Plessy, 11 So. at 950 (quoting West Chester & P.R.R., 55 Pa. 209, 213 (1867)).

112. *See supra* notes 85-89 and accompanying text.

113. *See Ex parte* Plessy, 11 So. at 951.

of marriage.[114] The United States Supreme Court lacked the directness and clarity of the Louisiana court, but spent more time and effort analyzing federalism.[115] The United States Supreme Court in *Plessy* reviewed *Hall v. DeCuir*,[116] *The Civil Rights Cases*,[117] and *Louisville v. Mississippi*.[118] *Hall* and *Louisville* were Commerce Clause cases,[119] while *The Civil Rights Cases* were Fourteenth Amendment cases. Based on *Hall*, the *Plessy* Court found that a state statute requiring racial integration on public conveyances could not apply to interstate travel.[120] Based on *Louisville*, the *Plessy* Court found that a state statute requiring separate but equal railway facilities validly regulated travel solely within the state enacting the statute.[121] The *Plessy* Court utilized *The Civil Rights Cases* to state that the Fourteenth Amendment failed to authorize Congress to create statutes regulating private rights. Instead, the states possessed the power to regulate private, individual behavior.[122]

The United States Supreme Court used this jigsaw puzzle analysis of *Hall*, *Louisville*, and *The Civil Rights Cases* to agree with the straightforward conclusiveness of the Louisiana high court. The United States Supreme Court interjected its federalism analysis between a discussion about the nature of political rights[123] and a discussion about whether damages would exist under the Louisiana railway segregation act if a passenger was assigned to the wrong separate car.[124] The Court concluded its federalism discussion by finding that the Louisiana railway line involved in the *Plessy* litigation appeared to be a purely local line.[125] The Court could have made that conclusion without extended analysis. Although the Supreme Court utilized a fair amount of judicial effort, it failed to make the federalism point coherently.

The idea that the state of Louisiana could control its own legal affairs loomed important to the Louisiana high court and the United States Supreme Court. Neither court expansively and clearly stated why that

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114. *Id.*

115. *Plessy*, 163 U.S. at 546-48.

116. 95 U.S. 485 (1877).

117. 109 U.S. 3 (1883).

118. 133 U.S. 587 (1890).

119. *Id.* at 589; *Hall*, 95 U.S. at 487; *see* U.S. CONST. art. I, § 8, cl. 3.

120. *Plessy*, 163 U.S. at 546.

121. *Id.* at 547-48.

122. *Id.* at 546-47.

123. *Id.* at 544-46.

124. *Id.* at 548-49.

125. *Id.* at 548.

should be so. Possibly, *Plessy* reflected a growing post-Reconstruction respect for the sovereignty of the southern states.[126] Also possible is that *Plessy* evidenced a federal judicial sensitivity to the integrity of state functions and state powers.[127] On the other hand, the federalism concerns in the *Plessy* opinions pointed to a broader theme pronounced by both *Plessy* courts concerning democracy.

C. *Attitudinal Laissez Faire and The Celebration of Democracy*

The importance of racial differences between whites and blacks[128] and the inscrutable and less than coherent importance of federalism[129] in *Plessy* were merely two elements of a larger and more dominant theme in the *Plessy* opinions. The celebration of democratic law-creation provided the dominant theoretical basis for both *Plessy* opinions.

In *Plessy*, both the Louisiana high court and the United States Supreme Court coped with the natural difference between the races and the concerns about the powers of the states in the context of a broader problem. Both courts recognized inherent limits on the law's authority and effectiveness to change public opinion concerning the races and racial intermixing. The Louisiana high court and the United States Supreme Court recognized a strong policy of laissez faire toward social attitudes and the regulation of relationships.[130] Legislation remained powerless to change public opinion.[131] Law failed to create social prejudice,[132] and equally failed to overcome racial attitudes.[133] Enforced commingling of the races would not lead to equal rights[134] and compelling blacks and whites to associate together would fail to end prejudice.[135] In fact, such legally compelled intermixing would intensify the repulsion and tensions between the races.[136] For the white and black races to improve their relations and respect for each other, natural

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126. *See* ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 575-601 (1988).

127. Hindrich, *supra* note 100, at 572-73.

128. *See supra* notes 93-99 and accompanying text.

129. *See supra* notes 112-15 and accompanying text.

130. *See Plessy*, 163 U.S. at 550-51; *Ex parte* Plessy, 11 So. at 950-51.

131. *See Plessy*, 163 U.S. at 551.

132. *Ex parte* Plessy, 11 So. at 950 (citing Roberts v. Boston, 59 Mass (5 Cush.) 198 (1849)).

133. 163 U.S. at 551.

134. *Id.*

135. *Ex parte* Plessy, 11 So. at 950.

136. *Id.* at 951.

affinities, mutual appreciation and voluntary consent of individuals in creating relationships must work over a period of time to bring the races together.[137] If anything, the self respect of each race required that neither race be thrown together with the other. The pride of one race would suffer if the other race were legally foisted upon it.[138]

Overall, both *Plessy* courts recognized that law remained powerless to change public opinion.[139] The relationship between law and public opinion was the opposite of law fashioning public opinion. Both *Plessy* decisions implied that public opinion fashioned law. The courts found that public opinion made the Louisiana railway segregation law a reasonable use of legislative powers.[140] The United States Supreme Court explicitly found that the Louisiana legislature could determine the reasonableness of law by referring to "established usages, customs and traditions of the people."[141] The Supreme Court of Louisiana was a little more vague in its deference to the will of the people when the court found that the segregation law reflected the public order, peace, and comfort of Louisiana.[142] The prejudiced opinion of the people, long-held opinion in many circumstances, created a reasonable and rational basis for segregationist laws.[143] Both courts viewed prejudice as just another type of public opinion to which the peoples' representatives in the state and federal legislatures must respond.[144] So long as the commingling of the races remained dissatisfactory to public opinion the legislature could only acquiesce by keeping the races apart.[145]

The United States Supreme Court fashioned a model of democracy that would assure the political as opposed to social equality of both races.[146] Under that model, racial segregation failed to serve as a great burden for either race because the Supreme Court's model of democracy guaranteed both races the same access to law creation. The Court found that should the black race dominate a state legislature, and pass its own set of segregation statutes, such law creation by black politicians would not be seen by the white populace as rendering the white populace inferior to

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137. *Plessy*, 163 U.S. at 551.

138. *Ex parte* Plessy, 11 So. at 951.

139. *Id.* at 950; *Plessy*, 163 U.S. at 551.

140. *Plessy*, 163 U.S. at 550; *Ex parte* Plessy, 11 So. at 951.

141. 163 U.S. at 550.

142. *Ex parte* Plessy, 11 So. at 951.

143. *Id.* at 950.

144. *See id.* at 950-51; *Plessy*, 163 U.S. at 550-51.

145. *See Plessy*, 163 U.S. at 544-45.

146. *Id.* at 544-46; *see supra* notes 74-77 and accompanying text.

the black populace.[147] The Court based its thinking about the application of black-sponsored segregation laws to the white populace on its observations that the black race had been dominant in state legislature in the past and would likely be dominant politically in the future.[148] The Court pointed out that a white majority-sponsored railway segregation statute would not make blacks inferior just as a black-supported railway statute would not make whites inferior. Even law based on biased public opinion[149] was fair so long as everyone possessed an equal opportunity to legislatively indulge their biases. What mattered to the Supreme Court was the openness of the political system; the Court implied by its model that African-Americans would retain the power to translate their popular beliefs into law in the same way as whites. Under the Supreme Court's model of democracy, the natural instincts and differences of the races[150] became irrelevant. The Court reasoned that no matter how wide the gulf between the races became both races could make their attitudes and opinions matter through the state legislatures.

Democracy and the democratic resolution of conflicts between the nature of the races and the attitudes of the races became the safest route to resolve conflicts between the races. So long as everyone had access to the political arena, everyone had a fair chance to fashion law. Democracy thereby became a neutral and passive middle ground between the races. In this intellectual context, the seemingly unfocused concerns of the Supreme Court about federalism became more understandable.[151] The domain of state legislative power needed to be preserved,[152] because the state legislatures provided the neutral, passive, and open points of mediation between two naturally different groups of people who possessed long felt and strongly held biases about each other. Certainly, one place where natural affinities, mutual appreciation, and voluntary consent could exist would be state legislatures where whites and blacks were elected by their respective constituencies.[153]

The *Plessy* decisions celebrated public opinion in the American South. Biased or prejudicial public opinion became legitimate political rhetoric

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147. *Plessy*, 163 U.S. at 551.

148. *Id.*

149. *Ex parte* Plessy, 11 So. at 950 (citing Roberts v Boston, 59 Mass. (5 Cush.) 198, 209-210 (1849); West Chester & P.R.R., 55 Pa. 209, 215 (1867)).

150. *See supra* notes 93-99 and accompanying text.

151. *See supra* notes 112-22 and accompanying text.

152. *Plessy*, 163 U.S. at 546-47 (quoting The Civil Rights Cases, 109 U.S. 3 (1883)).

153. *See id.* at 551.

and the bases for public policy and law.[154] Such public opinion failed to be unfair to any one race so long as both races possessed equal political rights[155] and access to the legislative system.[156] The social attitudes of the South toward separating the races reflected long-held attitudes and public policy in such northern bastions of civil rights as Pennsylvania, Massachusetts, and New York.[157] Democracy in the post-Civil War South involved both the black and white races.

The *Plessy* opinions reflected full recognition of the post-Reconstruction development of political systems in the American South.[158] During Reconstruction, the political system was open to southern blacks.[159] Both races joined the political system, and the natural differences between them and their conflicting racial belief systems would be worked out through an open, legislative political system. However, *Plessy* actually heralded the renewed domination of southern whites in the southern states.

IV. THE FAILURES OF THE *PLESSY* MODEL OF DEMOCRACY: INTERNAL INCONSISTENCY AND OPPRESSIVE AND ANTIDEMOCRATIC NATURE OF THE MAJORITY

The model of democracy conceived by the United States Supreme Court in *Plessy* failed.[160] Separate but equal failed to create two separate societies, one white and the other black, conceived by the United States Supreme Court to be equal before the law.[161] *Plessy* also failed to meet its promise that "when the government . . . has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized."[162] Separate but equal relegated the African-American community in the American South to a lower caste. For example,

154. *Ex parte* Plessy, 11 So. at 950; *Plessy*, 163 U.S. at 550-51.

155. *Plessy*, 163 U.S. at 544-46, 551-52.

156. *Id.* at 551.

157. *Id.* at 544-45; *Ex parte* Plessy, 11 So. at 950.

158. *See* FONER, *supra* note 126, at 587-601.

159. *Id.* at 350-55.

160. *See supra* notes 132-36 and accompanying text.

161. *Plessy*, 163 U.S. at 544, 551.

162. *Id.* (quoting People v. Gallagher, 93 N.Y. 538, 448 (1883)).

African-Americans were not accorded the basic rights of citizenship[163] and the white community restricted the access of the African-American community to basic services and resources.[164] Psychologically, African-Americans became demeaned by the separateness of separate but equal.[165] Some communities even attempted to create a system of apartheid in which African-Americans could not live in neighborhoods or blocks inhabited by whites.[166] African-Americans, especially in rural areas of the American South, became desperately impoverished.[167] In many instances, states failed to obey their own laws by neglecting to provide equal or even somewhat equal separate facilities.[168] Separate but equal led to a sixty-year civil rights struggle in which African-Americans fought for basic freedoms long held by white communities.[169]

The misery and oppression created by the separate but equal legal structure evidenced the failure of the model of democracy posited by the Supreme Court in *Plessy*. The white majority took and maintained political control, and African-Americans found themselves excluded from the political system.[170]

A. *A Failed Model of Democracy: Illogic and Inconsistency*

The Supreme Court of Louisiana and the United States Supreme Court committed themselves to a laissez faire approach to the legal regulation of social attitudes and relations.[171] The relationship between the races had to develop without interference from the law and government.[172] The

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163. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM, A HISTORY OF AFRICAN-AMERICANS 259-63 (1994); FRED POULEDGE, FREE AT LAST, THE CIVIL RIGHTS MOVEMENT AND THE PEOPLE WHO MADE IT 3-23 (1991); WOODWARD, *supra* note 3, at 9, 67-109.

164. *See* SEAN DENNIS CASHMAN, AFRICAN-AMERICANS AND THE QUEST FOR CIVIL RIGHTS, 1900-1990, at 6-8 (1991); RALPH MCGILL, NO PLACE TO HIDE: THE SOUTH AND HUMAN RIGHTS 2 (1984).

165. *See* Appendix to Appellant's Brief, at 3-17, Brown v. Board of Educ., 347 U.S. 483 (1954) (No. 8) (The Effects of Segregation and the Consequences of Desegregation).

166. *See* Power, *supra* note 100.

167. JAMES MACGREGOR BURNS, THE CROSSWINDS OF FREEDOM 313-16 (1989).

168. *See* Belton v. Gebhart, 87 A.2d 862 (Del. Ch. 1952), *aff'd*, 91 A.2d 137 (Del. 1952).

169. *See generally* KLUGER, *supra* note 4.

170. *See* FRANKLIN & MOSS, *supra* note 163, at 259-63.

171. *See supra* note 130 and accompanying text.

172. *Plessy*, 163 U.S. at 551-52.

law remained powerless to change or eradicate prejudice or any other kind of public opinion or attitude.[173] The law failed as a means of forcing members of each race to relate to members of the other race. Both courts implied that public opinion favored the separation of the races, and validated a scheme of law that required the separation of the races.[174] Ironically, the basic philosophical thinking of both courts conflicted with the legal result of both *Plessy* opinions.

Both courts touted a social laissez faire philosophy and analysis, but the Louisiana railway segregation statute and the separate but equal doctrine resulted in the opposite of laissez faire social relations. On the one hand, the law was powerless to force the black and white races to commingle because it failed to change interpersonal attitudes.[175] On the other hand, it created a system that structured the relations between the races and forced upon both races an attitude of separateness. The Louisiana railway segregation act required that railways separate the races even when railway personnel desired a mix of races in their rail coaches.[176] An inconsistency and illogic existed because the law was powerless to require integration and promote integrationist attitudes, but possessed the power to force segregationist behavior and promote segregationist attitudes.

The illogic and inconsistency between a laissez faire approach to integration and a statist approach to segregation created an inherent unfairness and inequality for those in both races who wanted to commingle. In *Plessy*, the Supreme Court indicated that relations between the races would develop as a result of natural affinities, mutual appreciation and voluntary consent of individuals.[177] The separate but equal doctrine hampered the development of natural affinities and voluntary consent because the law backed by state prosecutorial authority, such as the penalties in the Louisiana railway segregation law, penalized those of each race who tried to meet each other in public settings.[178] Therefore, whites and blacks who desired integration were forced to fight against the legal system before they even possessed the opportunity to commingle publicly.[179] Accordingly, laissez faire seemed to run only

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173. *See Ex parte* Plessy, 11 So. 948, 950 (La. 1892).

174. *Id.* at 950-51; *Plessy*, 163 U.S. at 550-51.

175. *Plessy*, 163 U.S. at 551.

176. *Ex parte* Plessy, 11 So. at 949.

177. *Plessy*, 163 U.S. at 551.

178. *See Ex parte* Plessy, 11 So. at 949.

179. *See, e.g.*, BRANCH, *supra* note 7, at 128-32 (discussing the birth of the Montgomery, Alabama bus boycott); Whittington B. Johnson, *The Virgil Hawkins Case: A Near Decade of Evading the Inevitable: The Demise of Jim Crow Higher Education in*

one way, protecting white segregationist attitudes from the heavy hand of the law.[180]

The *Plessy* courts missed the opportunity to apply social relations laissez faire in a logical and consistent manner. To assure consistency, not only should the Louisiana high court and United States Supreme Court have invalidated statutes *requiring* intermingling by members of each race, but both courts should have invalidated the Louisiana railway segregation statute for *forbidding* intermingling. Whites and blacks could not be legally required to relate or not to relate. Unfortunately, both courts constitutionally legitimatized an unfair and unequal system and white America responded to the new segregationist constitutionality. As a result, the *Plessy* model of open democracy for both races crumbled.

B. *The End of the Ultimate Hope for Social Change: Disenfranchisement and the Creation of Selective Lawlessness*

The illogic and inconsistency of the *Plessy* model of democracy weighted the political system against African-Americans. Laissez faire social relations favoring segregationist policies validated racism as a political philosophy. The subtle philosophical validation by the United States Supreme Court in *Plessy* of a one-sided, white-race-dominated political scheme undermined the Supreme Court's commitment to political equality.[181] *Plessy* championed the democratic, legislative creation of law,[182] but the Supreme Court by its support of a one-sided laissez faire philosophy failed to favor the racially open system of legislative representation that eventually could have allowed African-Americans to amend segregationist law.[183] The dominant public policy of separate-but-equal protected the white race as the superior class of citizens,[184] and segregationist law such as anti-miscegenation statutes pandered to popular white prejudices.[185]

Florida, 16 S.U. L. REV. 55 (1989).

180. *See* State v. Board of Control, 83 So. 2d 20, 24-25 (Fla. 1955).

181. *See Plessy*, 163 U.S. at 544-46, 551-52.

182. *Id.* at 550-51; *see* Richard A. Epstein, *Race and the Police Power: 1890 to 1937*, 46 WASH. & LEE L. REV. 741, 746 (1989).

183. *See Plessy*, 163 U.S. at 551.

184. Donald E. Lively, *Separate But Equal: The Low Road Reconsidered*, 14 HASTINGS CONST. L.Q. 43, 66-67 (1986).

185. Comment, *Intermarriage with Negroes—A Survey of State Statutes*, 36 YALE L.J. 858, 860-61 (1927).

The white race exploited its constitutionally legitimated position as the superior citizens, which crushed all hope of attaining the Supreme Court's racially equal and open model of democracy. White America, especially in the southern states, disenfranchised African-Americans, which made it nearly impossible for African-Americans to play roles in creating public policy and law.[186] A number of southern states enacted poll taxes requiring that poll tax receipts be presented before allowing citizens to vote. The poll tax scheme erected inconvenient procedures for registering to vote.[187] Like the separate but equal doctrine, the Supreme Court constitutionally validated the poll tax.[188] White primaries prevented African-Americans from casting the most meaningful vote available in regions where one party dominated.[189] The southern states resisted constitutional challenges to the white primaries for almost three decades.[190] Often, local election officials refused to register African-Americans to vote in primaries.[191] Probably, the most effective means of barring African-American voters were the grandfather clauses included in southern state constitutions which only allowed voters to register when their fathers and grandfathers had been eligible to vote.[192] Thus grandfather clauses prevented large numbers of African-Americans from joining the voter rolls.[193]

The disenfranchisement of African-Americans, especially in the southern states, symbolized the outcast position of African-Americans in the social and legal systems. The ideal of *Plessy* failed. Separation of the races did not result in political equality. Instead, racial separation based on illogical and inconsistent social laissez faire philosophy resulted in

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186. *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 134-45 (1980); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 842-47 (1982).

187. *See* BELL, *supra* note 186, at 142-43.

188. *See* Breedlove v. Shuttles, 302 U.S. 277 (1937), *overruled by* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

189. *See* BELL, *supra* note 186, at 140-42.

190. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Herndon, 273 U.S. 536 (1927).

191. *See* Grovey v. Townsend, 295 U.S. 45, 55 (upholding the constitutionality of the racially restrictive membership policy of the Texas Democratic party which effectively barred African-American participation in primary elections in that state); Nancy K. Bannon, *The Voting Rights Act: Over the Hill at Age 30*, 22 HUM. RTS. 10, 11 (1995); Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1611 (1995).

192. *See* FRANKLIN & MOSS, *supra* note 163, at 260-61.

193. *See id.* at 261.

white supremacy and black denigration.[194] Disenfranchised African-Americans provided a tragic example of how the lack of power to make law through democratic representation results in the failure of law to protect basic rights. African-Americans became dispossessed by a legal system that excluded their policy choices. Mob violence[195] and lynching[196] victimized African-Americans during the decades after *Plessy*. African-Americans lacked the power to reform the law through democratic representation; the law treated them as nearly invisible and as play toys.[197]

White America as a majority commandeered and dominated the legislative, democratic lawmaking system. The majority froze out the African-American minority, and the hope of the United States Supreme Court in *Plessy* that African-Americans would have equal legislative representation faded fast.[198] A racist majority bolstered by the constitutional validation of a one-sided social laissez faire philosophy encouraging racial separation exploited their power position. The white majority did not find satisfaction in merely constituting a democratic majority that organized and shaped a political agenda.[199] Instead, the white majority excluded the African-American minority from even a symbolic presence in the democratic, legislative lawmaking process.[200] Democratic lawmaking lost its universality which resulted in the oppression of a minority. Democratic lawmaking provided no opportunities for the excluded minority to end or even mitigate the oppression.

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194. *See* Aldon Morris, *Centuries of Black Protest: Its Significance for America and the World*, *in* RACE IN AMERICA, THE STRUGGLE FOR EQUALITY 40-43 (Herbert Hill & James E. Jones, Jr., eds., 1993).

195. *See* ROBERT L. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950, at 22-50 (1980).

196. *See* MICHAEL NEWTON & JUDY ANN NEWTON, RACIAL & RELIGIOUS VIOLENCE IN AMERICA: A CHRONOLOGY 284-430 (1991) (detailing instances of lynching during the era between *Plessy* and *Brown)*; ZANGRANDO, *supra* note 195, at 5-8; Schmidt, *supra* note 3, at 454-55.

197. *See* PETER R. TEACHOUT, LOUISIANA UNDERLAW, *in* SOUTHERN JUSTICE 57-60 (Leon Friedman, ed., 1965).

198. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

199. *See* GUINIER, *supra* note 9, at 4, 49-50.

200. *See id.* at 50; WOODWARD, *supra* note 3, at 83-84.

V. THE REMEDY FOR FAILED DEMOCRATIC LAWMAKING: ELITE AND NEUTRAL ANTI-DEMOCRACIES

The separate but equal doctrine led to the failure of American democracy because the white majority excluded the African-American minority completely from legislative, democratic lawmaking. The white majority maintained its exclusive franchise on lawmaking in the American South and African-Americans possessed no democratic power to end or ameliorate separatist oppression.[201] Change could not come from political activism.[202] As a result, the status quo had the force of law behind it.[203] Constitutional litigation became the means and hope for softening the rigors of racial separatism.[204] By the 1940s and 1950s, it became abundantly clear that the status quo nature of the law and the exclusive white-dominated lawmaking system could not be used to bring about the natural affinities between the races mentioned by the United States Supreme Court in *Plessy*.[205] Separatist law blocked racial interaction[206] and African-Americans possessed little or no opportunities to amend separatist law.[207]

Where democracy provided no hope for change in the law, a limited number of alternative means of change existed. Street protests and boycotts provided one option in which an unrepresented community challenged authority directly and attempted to mobilize public opinion to fashion change.[208] Acceptance of oppression represented a second

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201. *See* BELL, *supra* note 186, at 145-47; WOODWARD, *supra* note 3, at 141-42.

202. *See* BRANCH, *supra* note 7, at 143-205 (describing the Montgomery, Alabama bus boycott, which provided a good example of the non-democratic, legislative means that African-Americans utilized to change either law or the application of law).

203. *See* State v. Board of Control, 47 So. 2d 608, 615 (Fla. 1950).

204. *See generally* KLUGER, *supra* note 4, at 53 (stating that "the job of reconciling the country's new moral and constitutional commitment to the Negro with its undiluted distastes for him as a human being fell to that esteemed borker of national disputes, the Supreme Court of the United States").

205. *Plessy*, 163 U.S. at 551.

206. *See, e.g.*, BRANCH, *supra* note 7, at 289-90 (discussing a school that was raided by police officers and described by prosecutors as an "integrated whorehouse"); *see* Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding the constitutionality of a state statute permitting seperate education by an incorporated college).

207. *See* BURNS, *supra* note 167, at 320-21 (describing how civil rights laws were blocked for decades by the United States Congress).

208. *See* BRANCH, *supra* note 7, at 143-205, 412-91; Walker v. City of Birmingham, 388 U.S. 307 (1967) (holding that a state may properly enjoin persons from participating in or encouraging mass street parades without a permit as required by a city ordinance).

option, though one that seemed difficult to accept in a progressive and open democracy.[209] The United States Supreme Court chose to break the legal lockhold of unending separate but equal law with anti-democracy.

Anti-democracy involved discounting and nullifying democratically created and maintained law which retained popular support. Anti-democracy represented more than just the constitutional invalidation of a popular or majority favored law such as a regulation requiring that public school students salute the flag.[210] Anti-democracy restricted democratic lawmaking relating to a discreet and defined area of human behavior for an extended period of time. Economic decision making and contractual relations provided an early twentieth century example of behavior protected by anti-democracy,[211] which was later discredited for frustrating the popular will.[212] To combat the oppressive results of *Plessy's* illogical and inconsistent social relations laissez faire,[213] the United States Supreme Court applied two types of anti-democracy, elitist and neutral.

A. *Elitist Anti-democracy: Fighting Fire with Fire*

Elitist anti-democracy involved the use of a narrowly focused and countervailing set of social values to combat popular social values underpinning democratically created law. The United States Supreme Court in *Brown v. Board of Education*[214] began to dismantle the separate but equal scheme of law by applying elitist anti-democracy. In *Brown*, African-American school children challenged state law that segregated schools as violating equal protection of the laws under the Fourteenth Amendment.[215] The Court held that separate but equal doctrine had no place in public education, finding that racially separated educational facilities were inherently unequal.[216] The *Brown* Court found itself coping with two rationales of the *Plessy* Court that provided the basis for

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209. *See* Morris, *supra* note 194.

210. *See* West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

211. *See* Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Adams v. Tanner, 244 U.S. 590 (1917); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905).

212. *See* Learned Hand, *Due Process of Law and The Eight-Hour Day*, 21 HARV. L. REV. 495, 508-9 (1908); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 464 (1926).

213. *See supra* note 130 and accompanying text.

214. 347 U.S. 483 (1954).

215. *Id.* at 487-88.

216. *Id.* at 495.

constitutional separate but equal doctrine. First, the Supreme Court of Louisiana and the United States Supreme Court in *Plessy* found that separate but equal doctrine curried support in the northern states that favored the passage of the Fourteenth Amendment.[217] Such extensive acceptance of separate but equal doctrine implied that the authors of the Fourteenth Amendment did not intend equality to require racial integration. So long as both races were treated equally in their separation, the Fourteenth Amendment was not violated.[218]

The *Brown* Court failed to discover a way out of the Louisiana Court's and the Supreme Court's historical analysis. Instead, the *Brown* Court sidestepped the issue by finding that Fourteenth Amendment historical documentation was inconclusive concerning the acceptability of racial segregation at the time the Amendment was enacted.[219] Second, the *Brown* Court expanded the definition of equality accepted by the Louisiana and federal high courts in *Plessy*. The Louisiana high court defined equality in materialistic and mechanistic terms by finding that so long as both races had access to similar facilities and the laws were applied similarly to both races, equality existed. The fact that people felt unequal remained irrelevant so long as their facilities and the law enforcement involving them were equal.[220] In contrast, the United States Supreme Court in *Plessy* viewed equality in narrow political terms as opposed to social ones. As long as both races were accorded political equality, the Fourteenth Amendment was not violated.[221] That people felt unequal due to separation was irrelevant so long as government treated them similarly.[222] The *Brown* Court expanded the meaning of equality to include more than tangible factors such as similar school buildings, curricula and teacher salaries.[223] In avoiding a historical analysis and expanding the concept of equality to include more than tangible similarity, the *Brown* Court latched onto a specialized set of social values representative of the mid-twentieth century.

The *Brown* Court found that African-American children were treated unequally even when provided similar school houses and curricula. To reach this conclusion the *Brown* Court turned away from the social

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217. *Ex parte* Plessy, 11 So. 948, 950 (La. 1892); *Plessy*, 163 U.S. at 544-45; *see supra* notes 46-57 and accompanying text.

218. *Plessy*, 163 U.S. at 550-51.

219. *Brown*, 347 U.S. at 489.

220. *Ex parte* Plessy, 11 So. at 950.

221. *Plessy*, 163 U.S. at 544-46.

222. *Id.* at 551.

223. *Brown*, 347 U.S. at 492.

Darwinian, theological and laissez faire thinking underlying *Plessy*.[224] Instead, the Court adopted a modernist view of the value and role of education in contemporary American society[225] and a psychological analysis of how African-American children suffered in segregated classrooms.[226] The Supreme Court found that education constituted a core value of modern America. Not only was education the most important function of state and local governments, but education formed the foundation of good citizenship, cultural values, professional training and psychological adjustment.[227] Unless children possessed the opportunity for an education, they could not reasonably be expected to succeed in life.[228]

The *Brown* Court not only focused on education as a basis for the psychological well being of America's future leaders, the Court utilized psychology more directly to determine that segregation injured children. Separating African-American children from their white counterparts created in African-American children a feeling of inferiority concerning their status in the community.[229] The *Brown* Court found that segregation tended to retard the mental and educational development of African-American children,[230] even citing to psychological treatises for support.[231]

The *Brown* Court found that African-American children were not being treated equally when segregated even where their school buildings and curricula were the same as those of white students because the psychological and educational impact of segregated classrooms fell more negatively on African-American children than on white children. A deep respect for the value of education in determining the quality of life and an appreciation of psychodynamics created the social values context for the *Brown* Court. On the basis of respect for education and psychodynamics the Court limited American state legislatures and the public opinion that motivated state legislatures from maintaining a form of social regulation that had existed in schools for over one-hundred years.[232] The elitist nature of the *Brown* Court's views were not apparent on the face of the opinion, but the response to the opinion evidenced popular dissatisfaction.

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224. *See supra* notes 100-30 and accompanying text.

225. *Brown*, 347 U.S. at 492-93.

226. *Id.* at 495.

227. *Id.* at 493.

228. *Id.*

229. *Id.* at 494.

230. *Id.* (referring to Brown v. Board of Educ., 98 F. Supp. 797 (D. Kan. 1951)).

231. *Id.* at 494 n.11.

232. *See, e.g.*, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849).

Apparently, many white southerners failed to share the *Brown* Court's appreciation of the value of education and psychodynamics.

The response to *Brown* in the American South included outright opposition and defiance by political leaders.[233] In fact, many state and local leaders politically could not avoid opposing and even defying the Court's decision to end segregation in schools.[234] Even jurists protested the anti-democratic nature of *Brown* which defied traditional moral, social, cultural and educational values.[235] Forced integration was viewed as a challenge to majority views.[236] *Brown* ended the popular, legislatively mandated separation of black and white children in the educational context that had been recognized by the *Plessy* Court as existing as early as the mid-nineteenth century.[237] Elitist social views on the value of education and psychodynamics began the dissolution of a whole set of segregationist law. However, the Supreme Court later utilized an alternative type of anti-democracy to defeat another aspect of segregation.

B. *Neutral Anti-Democracy: Limiting the State and Recognizing Liberty*

When faced with determining the constitutionality of an anti-miscegenation statute, the United States Supreme Court turned away from social, scientific and educational values and analytical assumptions.[238] Instead, the Court applied neutral anti-democracy in which certain types of popularly supported, legislatively and democratically created law simply could not exist. No underlying religious, social scientific, or other values needed to provide a rationale for the illegitimacy of the law, except that certain law unto itself was unacceptable for vague traditional reasons. Neutral anti-democracy involved the Supreme Court in delineating sets of human behavior which legislative, democratically created law failed to regulate or control.

The Supreme Court in *Loving v. Virginia*[239] held that the Virginia anti-miscegenation statute violated equal protection and due process guarantees under the Fourteenth Amendment.[240] *Loving* involved a

233. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

234. Crump, *supra* note 8, at 762-63.

235. *See* State v. Board of Control, 93 So. 2d 354, 361-62 (Fla. 1957) (Terrel, C.J., concurring).

236. *Id.* at 361.

237. *Plessy*, 163 U.S. at 544-45.

238. *See supra* notes 163-76 and accompanying text.

239. 388 U.S. 1 (1967).

240. *Id.* at 12.

criminal prosecution of an interracial couple under statutes that forbade Virginians from leaving the state in order to marry interracially.[241] After facing grand jury indictment, the interracial couple pleaded guilty, but later made a motion to the trial court to vacate their convictions. When the trial court refused to do so, the couple appealed unsuccessfully to the Supreme Court of Appeals of Virginia.[242] The couple eventually appealed to the United States Supreme Court.[243]

In *Loving*, the Supreme Court faced the same historical problem that it had faced in *Brown*. The *Plessy* historical view of the passage of the Fourteenth Amendment continued to elude the Supreme Court.[244] In *Plessy*, both the Supreme Court of Louisiana and the United States Supreme Court observed that the United States had a long tradition of forbidding interracial marriage. Both courts implied that the Fourteenth Amendment was enacted and implemented within that context and failed to change the traditional acceptance of anti-miscegenation laws.[245] The *Loving* Court followed *Brown* when finding that the history of the Fourteenth Amendment remained ambiguous in reference to anti-miscegenation laws.[246] However, the *Loving* Court failed to analyze the impact of anti-miscegenation laws on the quality of life of African-Americans as the Supreme Court had done when considering segregated classrooms in *Brown*.[247]

The *Loving* Court utilized a much simpler and more straight forward analysis than did the *Brown* Court. The *Loving* Court simply found that the Fourteenth Amendment restricted the democratic creation of law relative to race[248] and the decision to marry.[249] Having already found that the history of the Fourteenth Amendment was ambiguous,[250] the Court went on to find that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states,"[251] i.e., the Fourteenth Amendment eliminated racial discrimination as a permissible state

241. *Id.* at 4.
242. *Id.* at 3.
243. *Id.* at 4.
244. *See supra* notes 205-10 and accompanying text.
245. *See Plessy*, 163 U.S. at 544-45; *Ex parte* Plessy, 11 So. at 950-51.
246. *Loving*, 388 U.S. at 9.
247. *Brown*, 347 U.S. at 493-94.
248. *Loving*, 388 U.S. at 11-12.
249. *Id.* at 12.
250. *Id.* at 9.
251. *Id.* at 10.

objective.[252] The *Loving* Court also found that the Fourteenth Amendment guaranteed the freedom to marry.[253] The Court provided a very vague historical justification when it stated, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to orderly pursuit of happiness by freemen."[254] Essentially, the *Loving* Court created two areas of life, racial and marital relations, which democratically created law could not regulate no matter how popular the regulation. The state legislatures became powerless to mandate that people discriminate racially or otherwise in choosing a marital partner and in dating and socializing even on an informal, neighborly basis.

The *Loving* Court provided very little rationale. Unlike the *Brown* Court, it did not rely on social scientific thinking or educational values for underlying assumptions and theories. Unlike the Louisiana and United States Supreme Court opinions in *Plessy*, the *Loving* opinion did not refute Social Darwinism, theology, federalism, or laissez faire theories.[255] The *Loving* Court avoided the opportunity to base its decision on social and hard scientific theories. The Commonwealth of Virginia defended its anti-miscegenation statute by arguing that the statute punished members of both races equally[256] and that a rational basis existed for Virginia to treat interracial marriages differently from other marriages.[257] Virginia argued that anthropological and biological evidence conflicted and failed to indicate clearly whether miscegenation was or was not harmful.[258] Virginia focused on a psychological and sociological study indicating that interracial marriage created marital stress for those who chose it.[259] The Lovings, in their brief, continued the analysis by saying, "there is not a single anthropologist teaching at a major university in the United States who subscribes to the theory that negro-white matings cause biologically deleterious results."[260]

The *Loving* Court avoided embroiling itself in biological, anthropological, sociological or psychological theoretical dueling. As a result, the Court shied away from defining underlying social values,

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252. *Id.* at 11.

253. *Id.* at 12.

254. *Id.*

255. *See supra* notes 91-159 and accompanying text.

256. *Loving*, 388 U.S. at 7-8.

257. *Id.* at 8.

258. Brief on Behalf of Appellee at 40-50, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

259. *Id.* at 47-48.

260. Brief on Behalf of Appellants at 36-37, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

popular or elitist, that bolstered the Court's thinking. Instead, the *Loving* Court utilized a much simpler approach when it recognized zones of racial relational and marital freedom into which no legislature could enter without a compelling reason.[261] The *Loving* Court, like the *Brown* Court, implicitly recognized the inherent risks of democratically created law regulating social relations and choices. However, the *Loving* Court, unlike the *Brown* Court, developed social value neutral zones protected from popular whims and desires. Neither religion, philosophy, nor science could influence law in reference to behavior that fell within the social value neutral zones because little law could exist to regulate that behavior.

VI. ONE HUNDRED YEARS AFTER *PLESSY*: THE TRIUMPH OF ELITIST ANTI-DEMOCRACY

Almost one hundred years after the Supreme Court in *Plessy* conceived of a racially open and equal model for democratic lawmaking, the Court employed elitist anti-democracy to threaten increased African-American representation in legislatures, specifically the United States Congress. In *Shaw v. Reno*, the Court utilized the elitist anti-democracy employed by the *Brown* Court in 1954 to question the validity of predominantly African-American election districts.[262] *Shaw* involved the redistricting of United States congressional districts in North Carolina after the 1990 census. In that case, the North Carolina General Assembly responded to an objection by the United States Attorney General under the Voting Rights Act of 1965[263] to the General Assembly's original redistricting plan by creating a second African-American dominated congressional district.[264] The newly created district stretched snake-like along interstate highway I-85. Often the district was no wider than the width of I-85.[265] Residents of North Carolina brought a claim in United

261. *Loving*, 388 U.S. at 12.

262. 113 S. Ct. 2816 (1993); *see also* Emily Calhoun, Shaw v. Reno: *On the Borderline*, 65 U. COLO. L. REV. 137 (1993); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts", and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993); N. Jay Shepherd, Note, *"Abridge" Too Far: Racial Gerrymandering, The Fifteenth Amendment, and* Shaw v. Reno, 14 B.C. THIRD WORLD L.J. 337 (1994).

263. *Shaw*, 113 S. Ct. at 2819-20; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438, 439 (codified as amended at 42 U.S.C. § 1973(c) (1988)).

264. *Shaw*, 113 S. Ct. at 2819-20.

265. *Id.* at 2820-21.

States District Court alleging that the new district violated the Fourteenth Amendment by creating a racial gerrymander.[266]

In *Shaw*, the Supreme Court held that plaintiff North Carolina residents stated a cause of action upon which relief could be granted.[267] The plaintiffs had alleged that legislation which created the majority African-American congressional district, though race-neutral on its face, could not be rationally understood as anything other than creating voting districts on the basis of race without sufficient justification.[268] The Supreme Court made it more difficult for state legislatures to remedy past discrimination in political representation by fashioning irregularly mapped and widely dispersed congressional or other voting districts for racial representation purposes.[269]

In 1995, the Supreme Court applied the rationale and doctrine of *Shaw* to Georgia's congressional redistricting in *Miller v. Johnson*.[270] In the early 1990s, the Georgia General Assembly's proposed congressional redistricting plan failed to obtain United States Justice Department preclearance under the Voting Rights Act.[271] The Justice Department refused preclearance because the Georgia General Assembly failed to create a third African-American majority congressional district.[272] In response to pressure from the Justice Department,[273] the Georgia General Assembly created a congressional district that connected African-American neighborhoods in inland Atlanta with African-American neighborhoods 260 miles away in coastal Savannah. The African-American urban populations were connected by hundreds of miles of narrow rural and swampy land corridors.[274] The Supreme Court accepted a United States District Court finding that race was the predominant factor motivating the creation of the geographically dispersed

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266. *Id.* at 2821.

267. *Id.* at 2828 (remanding to the District Court). The District Court subsequently found the redistricting valid because North Carolina had a compelling state interest to comply with the Voting Rights Act. Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994).

268. *Shaw*, 113 S. Ct. at 2828.

269. *Id.* at 2819-20. *See generally* GUINIER, *supra* note 9 (discussing the history of Black America's struggle against tyrannical majority-rule voting schemes and advocating a system of democracy in which those in power allow the minority to influence decisionmaking).

270. 115 S. Ct. 2475, 2483 (1995).

271. *Id.* at 2483-84.

272. *Id.*

273. *Id.* at 2484.

274. *Id.*

African-American majority congressional district,[275] and held the redistricting as undermining the Fourteenth Amendment and was beyond the scope of the Voting Rights Act.[276]

Shaw and *Miller* are examples of cases where democratic lawmaking was frustrated by anti-democracy in remedying the past discrimination that evolved from the glorification of racist democratic lawmaking by the *Plessy* court. Two other such cases are *Richmond v. J.A. Croson Co.*[277] and *United States v. Fordice*.[278]

The *Shaw* and *Miller* Courts frustrated democratic lawmaking attempts to remedy racist inequality because both opinions in the tradition of the *Brown* Court's elitist anti-democracy favored certain, focused social values that were not necessarily favored by the population at large. The *Shaw* and *Miller* Courts utilized political theory about the ideal nature of American democracy as the basis of their analyses. Much like the *Plessy* Court that constructed an ideal model of separate but equal democratic representation,[279] the *Shaw* and *Miller* Courts implicitly constructed a model of democracy that was close to color blind. Both Courts found that the Constitution sought to weld together a unified community out of the many multiracial, multireligious communities in American society.[280] According to the *Shaw* Court, American society continues to progress

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275. *Id.* at 2488.

276. *Id.* at 2491.

277. 488 U.S. 469 (1988) (invalidating a minority set-aside program created by the Richmond, Virginia, City Council for city-awarded construction contracts). *See generally* David Kairys, *Race Trilogy*, 67 TEMPLE L.Q. 1 (1994); Stephen A. Plass, *Judicial Versus Legislative Charting of National Economic Policy: Plotting a Democratic Course for Minority Entrepreneurs*, 24 LOY. L.A. L. Rev. 655 (1991); Nina Farber, Comment, *Justifying Affirmative Action After* City of Richmond v. J.A. Croson: *The Court Needs a Standard for Proving Past Discrimination*, 56 BROOK. L. REV. 975 (1990); Lori Jayne Hoffman, Note, *Fatal in Fact: An Analysis of the Application of the Compelling Governmental Interest Leg of Strict Scrutiny in* City of Richmond v. J.A. Croson Co., 70 B.U. L. REV. 889 (1990).

278. 112 S. Ct. 2727, 2743 (1992) (finding that a dual-race higher education system in Mississippi violated the Fourteenth Amendment and rejecting a request by private petitioners to order that predominantly African-American state universities be upgraded in order to remain exclusively black enclaves). *See generally* Lorne Fienberg, United States v. Fordice *and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803 (1993); Symposium Issue, 62 MISS. L.J. 259 (1993) (issues dedicated to articles dealing with *United States v. Fordice*).

279. *See supra* notes 130-62 and accompanying text.

280. *Shaw*, 113 S. Ct. at 2827 (quoting Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964)). *Accord Miller*, 115 S. Ct. at 2494.

toward a multiracial democracy.[281] The *Shaw* and *Miller* Courts maintain that racial, religious, and ethnic political allegiances remain divisive, and the only political unit that matters in modern America is the individual citizen-voter.[282] Facilitating representation of racial interests could create political apartheid and racial stereotyping.[283] Elected officials should avoid representing particular racial groups and should represent constituencies as a whole.[284] Americans must avoid racial balkanization.[285]

The *Shaw* and *Miller* Courts lectured all Americans including African-Americans that they must avoid thinking politically in racial contexts. The Supreme Court never seemed to care that African-Americans and other communities might hold common interests that should be represented in the democratic lawmaking processes. It was as if the Court aimed to strip all Americans of the power to determine who they want to represent whatever interests they want represented. The *Shaw* and *Miller* Courts indulged themselves in political model building much like the *Brown* Court indulged itself in psycho-social model building. In building its theoretical model, the Supreme Court in *Shaw* and *Miller* avoided the *Loving* Court's neutrality. Like the *Loving* Court, the modern Supreme Court could have voided the North Carolina reapportionment plan by just stating that legislative decisionmaking based on race was illegitimate. Like the *Loving* Court, the *Shaw* and *Miller* Courts could have implied that democratic lawmaking that involved racial classifications, even subtle or unstated, risked leading to the racist oppression that resulted after *Plessy*.

VII. *SHAW*'S HISTORICAL IRONY AND *PLESSY*'S NINETEENTH CENTURY LESSON FOR THE TWENTY-FIRST CENTURY

Shaw and *Miller* created a historical irony when analyzed in the context of *Plessy*. The *Shaw* and *Miller* Courts utilized a political model consisting of a racially unified political system[286] to frustrate democratic lawmaking that sought to give greater participation by racial minorities in democratic lawmaking. The *Shaw* and *Miller* Courts definitely turned away from the United States Supreme Court's implicit model in *Plessy* of

281. *Shaw*, 113 S. Ct. at 2827 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)).

282. *See id.* at 2827 (quoting *Wright*, 376 U.S. at 66-67); *Miller*, 115 S. Ct. at 2486.

283. *See Shaw*, 113 S. Ct. at 2827; *Miller*, 115 S. Ct. at 2486.

284. *See Shaw*, 113 S. Ct. at 2828; *Miller*, 115 S. Ct. at 2486.

285. *See Shaw*, 113 S. Ct. at 2832; *Miller*, 115 S. Ct. at 2486.

286. *See supra* notes 262-85 and accompanying text.

an open racial democracy in which the democratic process governed. The *Plessy* Court implicitly conceived of racial block voting in the context of a separate but equal social system.[287] The *Shaw* and *Miller* Courts spurned the concept of racial bloc voting, instead conceiving of the ideal American democracy as basing political representation on individual and general community interests.[288] The historical irony is that the impact of *Shaw* and *Miller* and other recent Supreme Court cases such as *Croson* and *Fordice* parallels the socially, politically, and economically negative impact of *Plessy*.[289] Weakening the electoral expression of racial block voting closes an important avenue for African-Americans and other racial minorities to gain access to democratic lawmaking. The political philosophy of the *Shaw* and *Miller* Courts will undermine the legislatures as important places where, using the terms of the *Plessy* Court, "the two races meet upon terms of social equality."[290]

The historical ironies of *Shaw* and *Miller* evidence, at least facially, the weakness of both elitist anti-democracy and neutral anti-democracy. Under both types of anti-democracy, the results of *Shaw* and *Miller* and other recent cases such as *Croson* and *Fordice* would have been the same. Democratic lawmaking that favored discrete racial interests such as predominately African-American congressional districts or minority set asides would fail under a neutral anti-democracy analysis that barred any race-conscious laws because such laws historically resulted in racial oppression and even less access to legislative power for racial minorities. However, that the results of both anti-democracy analyses would have been the same in *Shaw* and *Miller* should not be determinative in condemning both types of anti-democracy equally. On the contrary, the broader impact of neutral anti-democracy differs radically from that of elitist anti-democracy.

Elitist anti-democracy creates a weak analytical framework for protecting human rights over the long run. It depends on the social values of the moment and which remain fleeting and inconsistent. Over a one

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287. *See Plessy*, 163 U.S. at 551.

288. *See Shaw*, 113 S. Ct. at 2827-28, 2832; *Miller*, 115 S. Ct. 2475.

289. *See* Wright, *supra* note 8, at 21-27. *See generally* Rodney J. Blackman, *Returning to* Plessy, 75 MARQ. L. REV. 767 (1992); Kay Ann Hoogland and Condon McGlotheen, City of Richmond v. Croson: *A Set Back for Minority Set Aside Programs*, 15 EMPLOYEE REL. L. J. 5 (1989); Alex M. Johnson, Jr., *Bid Whist, Tonk and* United States v. Fordice: *Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993); Martin J. Katz, *The Economics of Discrimination: The Three Fallacies of* Croson, 100 YALE L.J. 1033 (1991).

290. *Plessy*, 163 U.S. at 551.

hundred year period, Social Darwinism,[291] federalism,[292] theology,[293] laissez faire philosophy,[294] psychology,[295] anthropology,[296] sociology,[297] biology[298] and political theory[299] have been utilized to rationalize the democratic creation of law or restrictions on the democratic creation of law in the context of race relations. *Shaw* and *Miller* demonstrate the potential for variable results when utilizing elitist anti-democracy thinking. The Supreme Court in *Shaw* and *Miller* chose a political model that valued non-racial, individualized and community-wide decisionmaking. The *Shaw* and *Miller* Courts could have just as easily adopted a modernized version of the Supreme Court's model in *Plessy* in which political equality came when races mobilized to gain their share of representation.[300]

The potential variability of *Shaw* and *Miller,* and any other case decided on the basis of elitist anti-democracy, highlights the bankruptcy of elitist anti-democracy. Elitist anti-democracy fails to differ substantially from democratic lawmaking. *Plessy*, *Brown*, *Shaw* and *Miller* reflect social values of the moment.[301] The difference between democratic lawmaking in *Plessy* and anti-democracy in *Brown* and *Shaw* is not a great one. All reflect social values. However, democratic lawmaking reflects widely held popular values and elitist anti-democracy reflects the mindset of a particular set of jurists on a court and those groups such as the

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291. *See* Hindrich, *supra* note 100, at 569-70; Schmidt, *supra* note 3, at 453; Power, *supra* note 100, at 301.

292. *Plessy*, 163 U.S. at 546-48; *Ex parte Plessy*, 11 So. at 951.

293. *Ex parte* Plessy, 11 So. at 950 (citing West Chester & P.R.R. v. Miles, 55 Pa. 209 (1867)).

294. *See Plessy*, 163 U.S. at 551.

295. *See* Appendix to Appellant's Brief, at 3-11, Brown v. Board of Education, 347 U.S. 483 (1954) (No. 8).

296. *See* Brief on Behalf of Appellants, at 37, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395).

297. See Appendix to Appellant's Brief, at 12-17, Brown v. Board of Educ., 347 U.S. 483 (1954) (No. 8).

298. *See* Brief on Behalf of Appellee, at 41-42, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395) (construing Perez v. Lippold, 32 Cal. 2d 711 (1948)).

299. *See Shaw*, 113 S. Ct at 2827-28, 2832.

300. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 260 (1989). "With the admission of southern blacks to political life in the 1960s, after bitter and often violent conflicts, blacks formed the most homogeneous voting bloc in the country." *Id.*; *see also* GUINIER, *supra* note 9, at 45-46.

301. *See, e.g.*, Daniel R. Gordon, *Happy Anniversary* Brown v. Board of Education, 25 COLUM. HUM. RTS. L. REV. 107, 116 (1993).

psychologists in *Brown* who influence those jurists.[302] Ironically, the variability of the elitist model allows jurists to choose widely held populist beliefs as the underlying assumptions for their constitutional analyses.[303]

Neutral anti-democracy differs from elitist anti-democracy by being more enduring. Neutral anti-democracy requires that certain areas of human behavior remain unregulated by democratic law creation because the people's representatives and the people who are represented lack the will and discipline to remain fair and unbiased. Certainly, the decades after *Plessy* demonstrate the suffering, inequity and injustice created by the separate but equal statutory scheme.[304] At the same time, neutral anti-democracy guards against the momentary intellectual predispositions of the judiciary. Neutral anti-democracy requires that the courts follow the lead of the *Loving* Court by delineating areas of human behavior beyond regulation of the police powers of the legislatures because the American constitutional framework recognizes certain personal freedoms such as choosing a mate or relating to people of another race.[305]

VIII. CONCLUSION: *PLESSY* LESSONS FROM THE NINETEENTH CENTURY FOR THE TWENTY-FIRST CENTURY

The United States Supreme Court faces a dilemma as the twenty-first century approaches. The *Shaw* case demonstrates the weakness of elitist anti-democracy, and there are those who urge the Court to avoid any type of anti-democracy.[306] Certainly, African-Americans and other racial minorities may agree after *Shaw*, *Miller*, *Croson*, and *Fordice*. The arguments for avoiding elitist anti-democracy remain sound. However, democratic law creation continues to place human and minority rights at risk.[307] The lessons from *Plessy* concerning the oppressive nature of democratic law creation involving social relations and personal choices

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302. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 494-95 n.11 (1954).

303. *See* Bowers v. Hardwick, 478 U.S. 186, 192-93, 196-97 (1986) (Burger, C.J., concurring). *But see id.* at 205-6 (Blackmun, J., dissenting).

304. *See* WOODWARD, *supra* note 3, at 67-109.

305. Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

306. *See* MARY ANN GLENDON, RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE 6-7 (1991); *see also* Webster v. Reproductive Health Serv., 109 S. Ct. 3040, 3058 (1989).

307. *See, e.g.*, FLA. CONST. art. II, § 9 (making English the official language of the State of Florida). *See also* Hans A. Linde, *When Initiative Law-Making Is Not "Republican Government:" The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

continue to be relevant as the twenty-first century approaches.[308] The best, though imperfect choice for the Supreme Court seems to be neutral anti-democracy which assures that social relational choices such as marriage and whom to befriend at a public school will remain free from the interference of popularly supported law. Changes in social, religious or scientific values and thinking will not make those freedoms vary depending on the political allegiances of legislators or philosophical predilections of Supreme Court majorities. Though neutral anti-democracy may not guarantee that the popular desires of African-Americans or other minority communities for more representation will be satisfied by democratic law creation, neutral anti-democracy, at least, guards against all public opinion being translated into oppressive and unfair law.

308. *See supra* notes 217-37 and accompanying text.