The Plessy Case: A Legal-Historical Approach. By Charles A. Lofgren. (New York: Oxford University Press, 1987. Pp. ix, 269. Notes, table of cases, index. $29.95.)

Meticulous and painstakingly detailed, this lawyerly history supersedes all previous accounts of the landmark 1896 U. S. Supreme Court decision. Only tangentially concerned with such broader issues as the course of American race relations or the reasons that southern state legislatures mandated segregation when and where they did, Lofgren devotes four of his nine chapters to the background and arguments in *Plessy* and two more to earlier civil rights and transportation cases. This is a largely "internalist" legal history dedicated to getting the judicially relevant facts and doctrines correctly and neatly sorted out.

A test case of the 1890 Louisiana railroad segregation law, *Plessy* was planned and financed by a group of New Orleans "creole" blacks, with the legal counsel of white southern or formerly southern Republicans. As obscure as Dred Scott, Homer Plessy was chosen to challenge the practice of excluding Afro-Americans from "white" railway cars because he had few Negroid physical traits, and the lawyers wished to raise two due process points: first, the "substantive due process" claim that race was an arbitrary criterion that was in no way connected with the public privilege of riding in a particular car; and second, the "procedural due process" plea that no mere railway conductor should be making decisions on such a "property right" as a person's racial identity. Besides the due process contentions, Plessy's attorneys also charged that racial classifications were badges of slavery, unreasonable, unrepublican, and unequal distinctions, and infringements upon black American citizens' privileges and immunities, rather than valid exercises of the state "police power." When local judge John Ferguson rejected or ignored all of these arguments, Plessy's lawyers appealed to the state and national supreme courts.

At times, Lofgren makes stark distinctions between constitutional, statutory, and common law, and between the Thirteenth Amendment

and the privileges or immunities, equal protection, and due process clauses of the Fourteenth Amendment. Thus, he recounts lawyers' and judges' arguments in exhaustive detail, sometimes chastising them (especially Plessy's counsel) for conflating contentions that rested on separate legal bases or for citing cases in what he thinks were the wrong parts of their briefs or opinions. He strikingly de-emphasizes the public accommodations and school integration laws passed from 1855 to 1900 in virtually all the non-southern states and the fact that blacks won numerous lawsuits to enforce these laws and state constitutional or common law provisions because the protection that they provided was in addition to that in the national constitution. And much like a lawyer attempting to distinguish troublesome precedents, Lofgren construes extremely strictly such court cases as *Railroad Co.* v. *Brown* (U. S. Supreme Court, 1873) and *Coger* v. *Packet Co.* (Iowa Supreme Court, 1873), as well as the 1875 U. S. Civil Rights law, which he reads as perhaps allowing segregation. In other instances, as, for example, in his treatment of *Hall* v. *De Cuir* (U. S. Supreme Court, 1878), he adopts a strikingly loose construction, finding in the majority opinion there a federalization of the right of a public carrier to segregate passengers.

At other points, Lofgren seems to accept what appears to me to be the prevalent nineteenth-century practice of merging all the different categories of law into one central question: was the classification of regulation "reasonable"? In his opinion of the court in *Plessy*, U. S. Supreme Court Justice Henry Billings Brown drew especially on two pre-Fourteenth Amendment lower court cases that held racial segregation not violative of common law standards, and he drifted into matters usually left to legislatures when he termed attempts to mandate "social equality" by law fruitless. By defining "reasonable" as, in effect, any position on questions related to public policy that some substantial number of people endorsed in print, Lofgren justifies discussing late nineteenth-century racism without considering dissent from those views, such as that evidenced by the weak and fading opposition to northern anti-segregation laws. Nor does he feel compelled to determine systematically how prevalent white approval of legal segregation was, and, in fact, his evidence is very selective and often irrelevant, because one could believe blacks mentally or socially inferior without holding that their public rights should be abridged. If all a court had to decide in order to rule a regulation reasonable was that some significant proportion of people thought it so, then Lofgren does not need to analyze elite or mass opinion more rigorously.

But this proposition is surely wrong, and denying it seriously undermines his major point. Lofgren reaches his overall conclusion that the majority opinion in *Plessy* was "largely unexceptional" or "conventional" only by shifting between strict and loose construction when

convenient and by adopting such a weak and vague criterion for justifying a law as "reasonable" that nearly any state legislature that could invent some "arguable" rationalization for a law could constitutionally suppress a minority's rights. If one rejects his premise as to what is constitutionally reasonable, Lofgren—and Justice Brown before him—would logically be required to review much contrary evidence, and to weight it differently and more explicitly. If "reasonable" meant something more like "generally acceptable" in the late nineteenth century, and the barriers between common, statute, and constitutional law were permeable, then northern civil rights laws and pro-civil rights court decisions and black as well as white support for equality before the law should have been reviewed. Had they been, *Plessy* would have seemed less inevitable, less defensible in the context of the era.

Lofgren is certainly not uncritical of *Plessy*, even according to what he takes to be the judicial standards of the time. He thinks the first Justice John Marshall Harlan's dissent more in tune with the original intent of the Reconstruction framers, and certainly the preferable moral stance. He has no more patience with racism or segregation than Thaddeus Stevens or Charles Sumner did. There is no evidence that his assumptions about the law or his decisions about what to emphasize and what to slight—assumptions and decisions that many other scholars share—reflect any current public policy agenda. Nonetheless, his work, however authoritative on *Plessy* itself, fundamentally distorts the character of law and public opinion on racial segregation in the late nineteenth century because it minimizes the plentiful evidence of northern liberalism.

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