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Plessy v. Ferguson *and the Legacy of "Separate but Equal" After 125 Years*

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Plessy v. Ferguson and the Legacy of "Separate but Equal" After 125 Years

ISSUE EDITORS
john a. powell, University of California, Berkeley
Samuel L. Myers Jr., University of Minnesota
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Introduction to the Issue

JOHN A. POWELL, SAMUEL L. MYERS JR.,
AND SUSAN T. GOODEN

The occasion of the 125th anniversary of *Plessy v. Ferguson* offers the opportunity for a general retrospective consideration of the legacies of state-sanctioned racial oppression as well as specific inquiries into plausible connections between the Supreme Court's approval of state-imposed racial segregation-hierarchy and ongoing racial disadvantages and inequities. This symposium examines novel interpretations and new insights about the legacy of "separate but equal." It provides specific explorations into connections between "separate but equal" during the first half of the twentieth century, observed racial disparities in the twenty-first century, and policy implications for the future. Recognizing that establishment of a causal link between a single Supreme Court decision and contemporary social and economic outcomes is fraught with limitations, the symposium includes authors from multiple disciplines designed to shed new light on the racial inequalities that persist today.

As the title implies, the focus of the volume is on the legacy of *Plessy v. Ferguson* and not necessarily on the direct impacts of the causal effects of the Supreme Court decision.[1] The symposium is guided by the question of how it is that something that happened 125 years ago—and was presumably reversed more than fifty years ago—still has an enduring impact on racial disparities. The 125th anniversary of *Plessy v. Ferguson* in 2021 provides an appropriate forum to bring a magnifying glass to race and segregation in the United States—past and present—along with a robust conversation around citizenship, colorism, and civil rights.

Plessy is perhaps one of the most significant U.S. Supreme Court decisions affecting race re-

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1. *Plessy v. Ferguson*, 136 U.S. 537 (1896).

lations in America.[2] In its decision, the Court enshrined the doctrine of "separate but equal," which arguably has left a lasting impact on race relations (Woodward 1974). The legacy of *Plessy* is anything but neat. "Separate but equal" public policies shaped the seating in movie theaters, the building of public swimming pools, the location of telephone booths, the placement of water fountains, the location and financing of housing, and the creation of racially segregated schooling, buses, hospitals, restaurants, and public parks. The decision permeated virtually all aspects of the social order in very complex and nuanced ways. The *Plessy* legacy, then, is messy and perhaps uneven across domains. Perhaps the neglect of the importance of *Plessy* in recent generations of social science scholarship stems from the apparent reversal of the tenets of the decision in *Brown v. Board of Education*.[3] Yet in virtually every sphere of social and economic life in the twenty-first century, racial disparities persist despite the putative removal of the constitutionality of one of the primary mechanisms for maintaining racial inequality throughout the first half of the twentieth century—"separate but equal" policies. A central motivation for revisiting the legacy of *Plessy v. Ferguson* and the impacts of state-enforced racial segregation is to question how or whether something that happened 125 years ago might have left a lasting impression on social and economic outcomes facing racial and ethnic minority group members.

Legal scholars have pointed out that the decision itself has implications for more than just the issue of whether "separate but equal" is constitutional. Related issues that are part and parcel to the decision include definitions of whiteness and the relationship between white spaces and black bodies; the creation and sustaining of state-supported institutions; definitions of race and citizenship; and the role of the Court in creating, sustaining, or reversing social systems that reproduce racism, racial discrimination, and racial inequality.

Readers of this issue will be rewarded with a series of essays that illuminate a wide range of aspects of the legacy of *Plessy v. Ferguson* into the twenty-first century. The phrase used in the majority opinion—"separate but equal"—is one of the most memorable phrases regarding racial issues in the nation's history. "Separate but equal" enshrines a public policy that racial separation in public spaces was constitutionally permissible. Readers of this journal issue will discover or rediscover some of the lasting implications of *Plessy* on its 125th anniversary.

As coeditors, we face a formidable challenge. The volume was conceived prior to the killing of George Floyd in May 2020 and the ensuing nonviolent marches in hundreds of cities protesting systemic racism and police abuse. These national protests focused on racial disparities in educational attainment, employment, occupational achievement, wealth holdings, morbidity, and mortality as well as racial separation in residences. Elected officials, policymakers, and corporate executives may ask what should be done to address systemic racism. This volume does not attempt to provide a magic bullet for remedying the problem that ignited widespread outrage in hundreds of cities during the summer of 2020.

This introduction instead highlights how state-sanctioned racial separation—enshrined by the Supreme Court in *Plessy v. Ferguson*—became an enduring contributor to racial inequality in many of its manifestations in the twenty-first century. Although very little in the articles that follow details remedies to the legacy of racial separation in America, much can be said about the nature of systemic racism, a concept that has often eluded contemporary policymakers, corporate executives, and community leaders with little knowledge of the continuing impacts of "separate but equal."

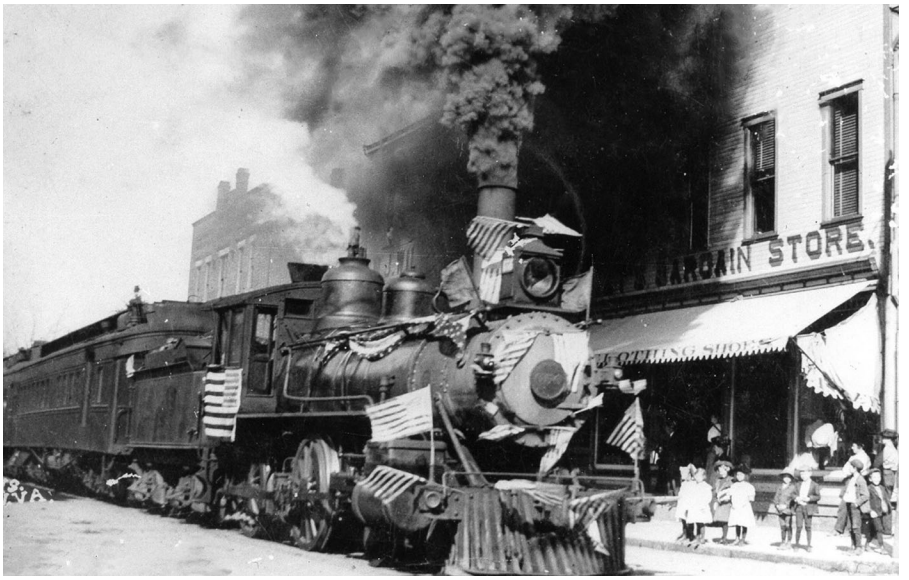
THE LEGACY

When considering the legacy of *Plessy v. Ferguson*, it is essential to situate the case within a broader historical context. The *Plessy* case occurred after the Civil War, which ended in 1865, and followed the Reconstruction period (1865–1877). During Reconstruction, the Thirteenth,

2. The 1857 *Dred Scott v. Sandford* (60 U.S. 393) ruling is also, arguably, just as significant as *Plessy*, as the case ruled the Constitution provided no rights to free or enslaved blacks.

3. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Photograph 1. Nineteenth-Century Steam Engine



Source: Adam Burns, American-Rails.com.

Fourteenth, and Fifteenth Amendments were ratified, respectively, in 1865, 1868, and 1870. These amendments ended slavery and involuntary servitude other than lawful imprisonment, provided citizenship to all persons born or naturalized in the United States (including individuals formerly enslaved), and prohibited the denial of the right to vote based on race or previous condition of servitude.[4] As Pulitzer-winning author Eric Foner (2019) discusses, this period ushered in a "second founding" of the U.S. Constitution by considering what rights come along with the abolishment of slavery. Will African Americans have the same rights as white Americans or are they going to be second-class citizens? The *Plessy* ruling was seminal in addressing these questions and, as such, reaffirming white supremacy.

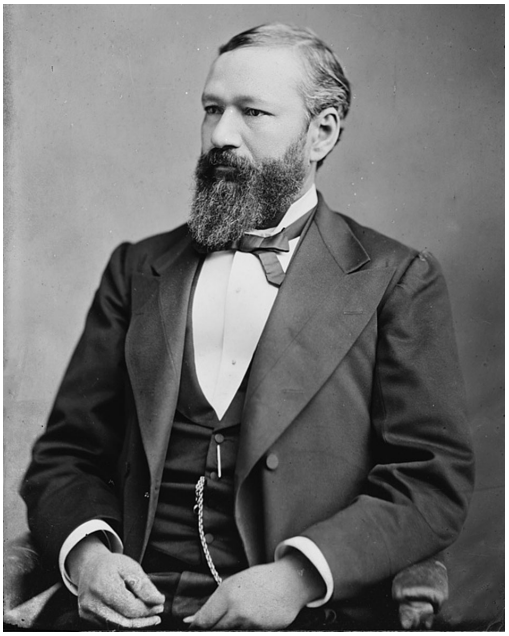
In 1892, Homer A. Plessy was arrested for refusing to leave a whites-only railway car in Louisiana. An octoroon, or someone with a racial heritage of seven-eighths white and one-eighth black, Plessy was considered black and was required to sit in a "colored" railway car under Louisiana law (Luxenberg 2019) (see photograph 1).[5] He, his allies, and his lawyers argued that his rights had been denied under the Thirteenth and Fourteenth Amendments. Judge John H. Ferguson sided with the State of Louisiana and found the Separate Car Act of 1890 constitutional. The case was appealed and made its way to the United States Supreme Court.

On May 18, 1896, the Supreme Court issued its landmark decision in the case, ruling that Louisiana had the authority to exercise its "police powers" to pass and enforce a separate car act. The decision stated that each state could define race and its mechanism of segregation individually. Thus, it was not a matter for the federal government to determine. This ruling would later become a landmark decision routinely cited by the Supreme Court and established the constitutionality of "separate but equal" laws created by many states. The decision also recognized and justified the power of individual states to enforce their state segrega-

4. The Fourteenth Amendment was heavily influenced by understandings of race at the time. As it went through Congress, it was amended to make sure that citizenship and voting rights were not extended to Native Americans who were not taxed even if they were born in the United States.

5. *Octoroon* is a term used in the mid- to late nineteenth century that has negative connotations today.

Photograph 2. Pinckney Benton Stewart Pinchback



Source: Library of Congress, Prints and Photographs Division, LC-DIG-cwpbh-03857.
Caption: P.B.S. Pinchback, first black governor of Louisiana and leader of Creole plaintiffs in *Plessy v. Ferguson*. Pinchback was a quadroon (three-quarters white), son of a mulatto mother and a white father. This picture is often erroneously used to depict Homer Plessy. Historians disagree about the authenticity of other alleged photographs of Homer Plessy.

tion laws. As a result, the decision has had implications for such issues as the definition of blackness, the acknowledgment of gradients of whiteness, the significance of citizenship, and the interpretation of the state's regulatory role in the separation of races in public space.

Plessy's legal team's goal for the case was to end segregation for multiracial people with predominantly white heritage (see photograph 2). The legal team advocated that Plessy's proximity to whiteness allowed him more privileges than those granted to him at the time.[6] Some scholars propose that had had the team succeeded in their case, the United States would have more resembled Latin American countries or apartheid South Africa, where a class of mixed-raced people is separated from those considered black.

The most potent and long-lasting impact of *Plessy v. Ferguson* is the creation of blackness as an identity that is defined by the state, absent of enslavement (see Gaynor, Kang, and Williams 2021, this issue; Davis 2021, this issue). The U.S. government has always had a vested interest in defining race in relation to citizenship and rights. When the Constitution was written, it explicitly defined those who were eligible to be citizens, along with the parameters for who was to be counted a person in the decennial census, noting different groups and their rights of citizenship: Native Americans who paid taxes, Native Americans who did not pay taxes, free persons, indentured servants, and enslaved peoples. Free persons were to be counted as a whole person and slaves as three-fifths of a person; at the time, the majority of blacks in the United States were enslaved.

Plessy, like many Louisiana Creoles, was an octoroon and had a family legacy of being free.[7] Freed blacks had more rights than enslaved blacks and, in some communities, more citizenship privileges. After slavery was abolished, all blacks were given equal rights with the ratification of the Thirteenth and Fourteenth Amendments—although segregation was emerging as a practice, as john powell points out (2021, this issue). Ideologies of blackness were in flux, due to the changing status of blacks as a whole. The *Plessy v. Ferguson* decision was used to justify segregation, antiblack ideologies, and the creation of white identity. Once it was used to create the parameters of whiteness and blackness, it was used to regulate black bodies in white spaces, through state-enforced segregation.

What *Plessy* represents is much more than a decision. It refortified the idea of white supremacy, after the Thirteenth and Fourteenth

6. The train was an accessible and well-used service at the end of the nineteenth century. Railroads physically linked the country and served as the avenue for expansion, progress, and the everchanging race relations.

7. Plessy's lawyer Albion Tourgee and Plessy's legal team wrote in their brief that Plessy's racial heritage was an octoroon, yet Steven Luxenberg, in his book *Separate*, offers research that Plessy was 1/4 black.

Photograph 3. Ruby Bridges on School Steps with Federal Marshals, November 14, 1960



Source: U.S. Department of Justice.
Caption: Ruby Bridges being escorted by federal marshals to the all-white William Frantz Elementary School in Louisiana on November 14, 1960.

Amendments, at a time when whites believed white supremacy was being challenged. After *Plessy*, white supremacy was institutionalized and crystallized across the country, but especially in the South. The highest law of the land codified legal, structural racism in American institutions. In essence, public policy inequities based on race were mainstreamed. Although the specific complaint that produced the decision involved seating on a train, the Supreme Court's decision went far beyond racial segregation in transportation.

Not only did the decision have direct implications for education, housing, public health, employment, and many forms of public access, but it also had little-known profound impacts. Emblematic of this, in the 1940s, President Truman pushed for universal health care, which included his support for desegregated hospitals. The South, fearing a challenge to segregation, would not support it. Another sixty years would pass before even a semblance of universal health care was legislated. Thus *Plessy* was a watershed moment in how Americans lived and saw themselves. Its impact permeated definitions of identity, family, marriage, and community.[8] Ultimately, the decision was so broad that it was not just about segregation on trains, but instead an ideological representation of the United States as a nation. *Plessy* has implications for such issues as skin color and colorism as a marker for race and racial hierarchy. It can be seen as a turning point in the changing social construction of race in America. It occurred at a time when the U.S. Census had extended its list of "races" to include mulattos, quadroons, and octoroons. *Plessy* has implications for notions of citizenship, whiteness, and deviations from the binary of black versus white.

8. Whether President Eisenhower would or would not use federal power to enforce the school integration rulings of federal courts in southern cities in the 1950s was an issue.

The Empirical Evidence

The Supreme Court ruling in *Plessy* solidified racial separation in public and private life. The codification included segregation in schools, public swimming pools, private social clubs, the workplace, occupations, churches and places of worship, and virtually every sphere of social and economic life (see photograph 3).

The social science literature documenting the extent and patterns of segregation in American life is voluminous (Farley and Frey 1994; Frey and Myers 2001, 2005; Iceland, Sharp, and Timberlake 2013). Richard Rothstein, in his award-winning book *The Color of Law* (2017), helpfully distinguishes between private acts of racial animus related to segregation (de facto segregation) and public acts deriving from explicit government policies at the local, state, and federal levels (de jure segregation) designed to ensure the separation of African Americans from whites. The literature points to segregation in public transportation (Seymore 2005), in residential neighborhoods (Rothstein 2017; Logan and Parman 2017), in the labor market and the workplace (Hutchison 2011), in higher education (Kauper 1954), in elementary and secondary public schools (Reardon and Yun 2002; Johnson 2011; Pinder and Hanson 2010; Liu 2006), and in public accommodations, movie theaters, hotels, restaurants, meeting places, and even swimming pools (Henry 1998). A substantial social science literature also links racial residential segregation to outcomes such as employment, wages, access to credit, insurance, business capital, and crime (Myers and Phillips 1979; Kain 1968; Harrison 1974).

Establishing any causal relationship between this state-enforced segregation and specific outcomes experienced by African Americans as a group is difficult. Even the measurement and nature of the patterns of segregation are heatedly contested in the literature. An illustration involves the relationship between residential segregation and income inequality. Two widely used measures of segregation are the index of dissimilarity and the index of isolation. The index of dissimilarity measures how similar the distribution of minority residents among geographical units is to the distribution of nonminority residents among those same units, whereas the index of isolation measures the exposure of minority residents to other individuals outside of their group or the racial composition of the census tract for the average minority resident (Logan and Parman 2017; Massey and Denton 1988; Andrews et al. 2017; Adams 2006).

Figure 1 reports two published measures of residential segregation from 1890 to 2000—an index of dissimilarity and an index of isolation. Both can be criticized for their failure to account for the greater ethnic and racial diversity in neighborhoods in urban areas where often the numbers of different nationalities, ethnicities, and social and economic backgrounds are large (Iceland, Sharp, and Timberlake 2013). The conventional measures of segregation capture an older and perhaps outdated black-white conceptualization of what it means to be segregated.[9]

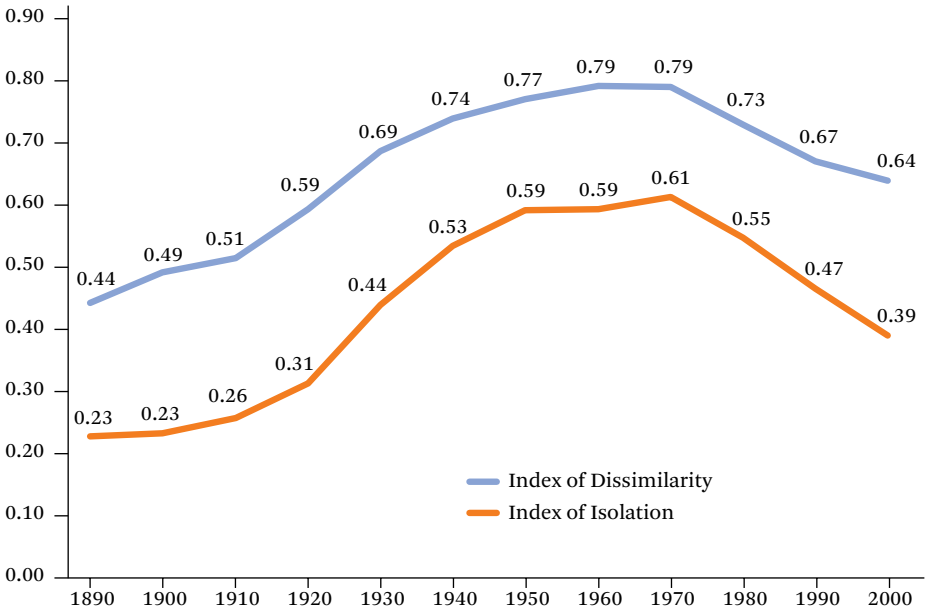
Figure 1 provides compelling evidence concerning the rise and fall of residential segregation since the late nineteenth century. The figure shows increasing racial segregation in the United States from 1890 to 1960 and then sharp declines after the 1970s. The dissimilarity measure in 2000 was 0.64; in 1920 it was 0.59. The inclusion measure in 2000 was 0.39; in 1920 it was 0.31.[10] Both measures show increases in segregation from 1890 to 1920. The conclusion from this visualization of the broad trends in segregation, then, is that America was more segregated in 2000 than it was when *Plessy* was decided in the 1890s.[11] Others have computed measures of segregation using large metropol-

9. Two studies estimate the indices for each metropolitan statistical area (Cutler, Glaeser, and Vigdor 1999; Glaeser and Vigdor 2001). To derive the overall rate for the United States, the authors aggregated each index into the overall level. They used a simple average and the weighted average by the black population. Figure 1 reports the indices that evaluated the average index value weighted by the black population.

10. The method of weighing may contribute to this difference in calculation between the two periods.

11. Excellent articles update measures of dissimilarity and inclusion indices to more recent years. The measures are not always directly comparable to the Glaeser and Vigdor calculations because of differences in coverage.

Figure 1. Weighted Segregation Measures, 1890–2000



Source: Produced by the authors based on original data from Glaeser and Vigdor 2001.

itan areas for periods after the 1970s and well into the twenty-first century. We do not replicate those estimates in figure 1 because of nontrivial differences in coverage, producing even higher levels of segregation in recent years. The trends, nonetheless, are essentially the same as shown in figure 1: declines in segregation after the 1970s.

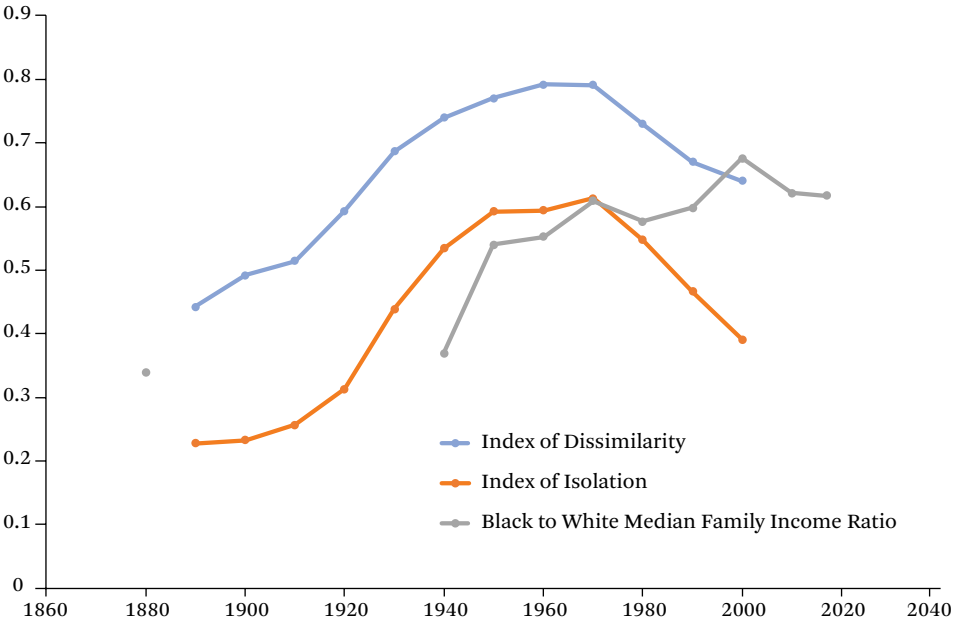
What then can we say about the association between racial income inequality and racial segregation? Figure 2 reveals that racial residential segregation trends and trends in the ratio of black family income to white family income do not always move in the same direction. From 1940 to 1970, racial residential segregation increased but the ratio of black to white income also increased. From 1970 to 2000, black-white residential segregation declined but the black-white ratio of family income continued to rise.

In short, the descriptive evidence about the linkage between racial segregation and black-white income is inconclusive. Figure 2 juxtaposes the data on residential segregation with measures of black-white income ratios by year. Comparing income across census years is notoriously difficult. In some of the years, income measures are for households; in other years, they are for families (which can be subunits within a household), but the broad trends evidenced in the figure are consistent with widely acknowledged patterns in the literature. Before *Plessy*, black households (families) earned 34 cents for every dollar that white households (families) earned. By 1940, they received 36 cents. The black-white income ratio peaked in 2000 and has been on the decline since then.

Figure 2 shows two patterns of association between the measures of segregation and the measures of income inequality. From 1940 to 1970, when black-white income ratios were rising, both measures of residential segregation were also increasing. The positive association between black-white income ratios and segregation belies the contention that segregation causes inequality. Looking at the patterns and

Some of the measures cover metropolitan areas of a half million or more and others cover areas of one million or more. But in all of these calculations is a downward trend in the series after 1970, and that downward trend continues until the twenty-first century.

Figure 2. Segregation Indices Versus Income Ratios, 1880–2019



Sources: Authors' calculations based on Glaeser and Vigdor 2001; Ng and Virts 1989; U.S. Census Bureau 1975.

Notes: Weighted value of segregation indices (Glaeser and Vigdor 2001); income ratios for 1880 (Ng and Virts 1989); income ratios for 1940 (U.S. Census Bureau 1975, Series G 353-371, Median Money Wage or Salary Income of Primary Families and Unrelated Individuals with Wage or Salary Income, by Selected Characteristics: 1939 to 1970); income ratios for 1950 and 1960 (U.S. Census Bureau 1975, Series G 189-204, Median Money Income of Families and Unrelated Individuals in Current and Constant (1967) Dollars, by Race of Head, 1947 to 1970). Income ratios for all other years, from U.S. Census Bureau Current Population Survey, 1968 to 2019 Annual Social and Economic Supplements.

trends after 1970 reveals a different association between segregation and inequality. The dissimilarity index and the isolation index were both declining, whereas the ratio of black to white incomes declined, flattened, rose, and then fell again from 1970 to 2017. Some authors claim that the post-1970s era ushered in a period of the elimination of the black ghetto, but the reduced segregation did not always guarantee reductions in racial economic inequality.[12]

The point that this empirical exploration is designed to illustrate is that the legacy of *Plessy* via state-enforced segregation is far from obvious. Even more difficult to fathom is how or whether the remnants of racial segregation documented during the 1890s to the 1950s can affect current social and economic outcomes—the purpose and theme of this issue (Harris 1983).

WHY RACIAL SEGREGATION PERSISTS: COMPETING EXPLANATIONS

Taking on its face the documentation in figure 1 that shows a rise and then a fall in residential

12. Note that other estimates of segregation (see, for example, Frey 2015a, 2015b, 2016, 2020) show continued declines in the dissimilarity index for periods up to 2017, in an era when black-white income ratios were not always rising. For the short period between 1970 and 2000 an inverse relationship is discernible between segregation and racial income inequality. Thereafter, when alternate measure of segregation showed declines, income inequality widened.

racial segregation, we can explore the various explanations for these trends and patterns. The most widely cited reason for the persistence of racial segregation is the institutionalization of housing segregation through federal housing policies. These policies included the Home Owners' Loan Corporation Act, the GI Bill, and urban renewal plans that federalized a national segregation policy. For example, the New Deal housing programs implemented lending criteria that made it extremely difficult for would-be black homeowners to benefit, especially in integrated neighborhoods. The result was that segregation, which had primarily been state, regional, and local before 1930, was now pushed through federal policy and remains even today.

Federal housing policies played a significant role in exacerbating and extending racial residential segregation nationally (Wagmiller, Gage-Bouchard, and Karraker 2017), but cannot be considered a core cause of national levels of segregation. As critics point out, "federal intervention in local housing policy was nonexistent before the 1930s, [and] black segregation was firmly established throughout urban America." Although true, this critique ignores the fact that national levels of black-white segregation peaked sometime between 1950 and 1970, depending on the measure of segregation used (Farley and Frey 1994).

Another frequently cited source of housing segregation is white prejudice and discrimination in housing markets. Data on the frequency of discrimination were not systematically collected or generally available until the 1970s (Frey 2015b). However, the General Social Survey (GSS), which tracks white attitudes on race, finds that the proportion of whites who support residential segregation has fallen significantly since the early 1970s (Myers and Ha 2018). Specifically, the share of whites who would vote to prohibit racial discrimination by homeowners rose from 30 to 40 percent in the 1970s to 60 to 70 percent in 1996, when the GSS removed the question. Moreover, the share of whites who say that they strongly disagree with the statement "whites have a right to segregated neighborhoods" rose similarly during the same period, from a minority to a substantial majority supporting the position.

That discrimination in the housing market exists is without question. A recent study by *Newsday* found systematic discrimination, for example, on Long Island (McDermott and Herbert 2019). The social science literature, however, is not uniform about the degree to which discrimination shapes segregation. For instance, in the late 1990s, economists found that outright discrimination declined substantially from the 1970s to the 1990s, but that whites preferred to live in racially homogenous neighborhoods.

Even if the number of housing discrimination incidents per year totals one million, and that estimate may be conservative, scholars have reasons to doubt the degree to which those instances could maintain or perpetuate segregation, especially given that many of those instances may be relatively minor differences in treatment, rather than outright denials. More generally, despite ample evidence of discrimination in housing markets, levels of segregation cannot be explained by discrimination alone (Myers and Lee 2018). National fair housing audits typically find evidence of discrimination, but the types and frequency have declined over time. The economist Stephen Ross, who helped develop many discrimination studies, concluded in 2008 that the discrimination paradigm could no longer explain persistently high levels of segregation. In a review of national audit studies financed by the Department of Housing and Urban Development, Sun Jung Oh and John Yinger (2015) found that measures of discrimination in housing rentals and sales related to whether the advertised unit was available declined from 1977 to 2015 but other measures of discrimination, such as whether the applicant inspected more units or was offered financing, did not decline as much. This suggests the evidence from audit studies points to a more complex rendering of the trends in housing market discrimination over the decades since the 1970s.

Adding another nuance to the "white prejudice" explanation for housing segregation is what Maria Krysan and Kyle Crowder (2017) refer to as the cycle of segregation. In this twist on the discrimination view, the housing market search process relies on preferences for neighborhoods that are known to friends, family, and relatives as "good places to live." The lack of

racial diversity in social networks tends to perpetuate racial residential segregation. In this version of the white prejudice argument, the culprit is not overt discrimination against blacks but instead within-group preferences.[13]

Another competing explanation relates to labor markets and residences. Under this explanation, blacks moved to cities to find employment, and the employment centers for factory work and related jobs that often were the source of unionization and strikes were almost exclusively in the urban core. Blacks were often brought in as strikebreakers and housed in tenement housing close to their jobs. The rise in housing segregation in this model is associated with the increase in black migration to urban jobs located near the centers of trade. These residential areas had seen successive movements of immigrants and were not exclusively black when blacks moved in. However, as jobs moved to suburban areas, white flight led to the blackening of these residential areas. In many instances, the movement of blacks depended on the willingness of whites to rent or sell to blacks.

Opposition to race-conscious remedies to problems of racial inequality and segregation are strongly related to white perceptions about the causes of black-white disparities. Samuel Myers and Inhyuck Ha (2018), using data from the General Social Survey, estimated a model of the determinants of white opposition to policies designed to reduce racial segregation and discrimination. They controlled for age, gender, education, time, location, and beliefs about the causes of racial inequality. Possible responses to the GSS question of why blacks have lower incomes, more inadequate education, worse jobs, and more inadequate housing included discrimination, less innate ability to learn, lack of opportunity for the education it takes to rise out of poverty, or lack of motivation or willpower to escape poverty. The vast majority of whites, regardless of age, education, gender, or location, believed that the problem of racial inequalities was not due to racial discrimination. A significant minority thought it due to either lack of motivation or an inborn inability to learn. Moreover, white opposition to programs designed to remedy inequality was primarily related to their beliefs that the cause of the inequality was not discrimination.

One enduring explanation for the rise of the ghetto in northern and midwestern cities is that black migrants from the South moved into established black neighborhoods, where churches, barbershops, beauty parlors, and local schools would support their families and household. An example is the Rondo neighborhood in St. Paul, Minnesota, which had one of the highest black homeownership rates in the country in the 1920s and the 1930s. This economically diverse neighborhood included manual laborers, domestic servants, small shop owners, Pullman porters, dentists, pharmacists, doctors, lawyers, schoolteachers, social workers, and ministers. Many of the professionals had their degrees from the University of Minnesota, and some were architects and chemists with degrees from Howard University who found employment at firms such as General Mills, Pillsbury, Honeywell, and other national corporations that did not practice the forms of employment prevalent in many southern states. Others came to Minnesota via the Northern Pacific Railroad and other major railroad companies as Pullman porters, established roots in the Rondo neighborhood, and formed social clubs such as the Sterling Club—one of the oldest African American men's social clubs in the nation. Rondo is where the Prince Hall Mason Lodge and Odd-Fellows Lodge were located, as was St. Peter Claver Church, the only black Catholic Church in the upper Midwest (whose black pastor was also Archbishop John Ireland's canon lawyer). This is where representatives from Minnesota to the Niagara movement lived and where black newspapers flourished. It was the Harlem of Minnesota. Following this explanation, the move to black enclaves was predicated on preferences by blacks to live with other blacks.

These explanations are neither exhaustive

13. White preferences not to rent or sell to blacks can coexist with black preferences to live in residences that are not all-white. The growing black middle class of civil servants in many large metropolitan areas is often accompanied by the growth in predominantly black suburban residences, such as those in Prince George's County, Maryland.

nor necessarily mutually exclusive. The central task of answering the question of how the legacy of *Plessy v. Ferguson* could have an enduring impact on contemporary inequalities is to establish what precisely did or did not happen as the result of this Supreme Court decision. Although many observers claim that *Plessy* produced the rising and persistent racial segregation observed in the first half of the twentieth century, the following section argues that perhaps observers have overstated the role of the Court's decision in causing the isolation and racial separation that is the topic of this issue.

OVERVIEW OF THE ISSUE

This issue of *RSF: The Russell Sage Foundation Journal of the Social Sciences* serves as a platform for a more comprehensive discussion among scholars, policymakers, and community leaders to explore the intersection of race, color, whiteness, and citizenship, along with the historical impacts of state-enforced segregation. From separate railroad cars to state-sanctioned spatial separation in education, housing, policing, and voting, this issue focuses on these components of public space, schooling, housing, policing, and voting in relation to the legacy of *Plessy*. It brings together the best scholarly research on the long-term and perhaps uneven impacts of *Plessy*, relying on interdisciplinary scholarship, a variety of research and methodological approaches, as well as the historical-legal analysis and sociology of identity, racism, and colorism.

The issue is divided into three sections. The first, "Historical and Legal Context of Racial Exclusion," is devoted to how *Plessy* affected understandings of frequently unexplored areas of race and exclusion. Four articles explore the legal and historical foundations of *Plessy* and the unique legacies of the ruling. The essay by john powell, "The Law and Significance of *Plessy*," shows that *Plessy* was the culmination rather than the foundation of retrenchment during Reconstruction. powell writes that racial residential segregation is and remains the foundation of structural racism today, by separating people from life-enhancing resources, just as the Court in *Brown* recognized more than sixty years ago. Finally, powell shows that Justice Harlan's impressive and largely overlooked jurisprudence (despite his well-known dissent in *Plessy*) is a roadmap for constitutional remediation. Next, Thomas Davis provides a different perspective on the legal history covering the same evidence, contending in "Who Gets to Say Who's Who? *Plessy*'s Insidious Legacy" that a central lasting feature of *Plessy* was the construction of racial identity in America. Tia Sherèe Gaynor, Seong Kang, and Brian Williams explore the relationship between state-sanctioned violence and place in "The Legacy of *Plessy v. Ferguson*: The Relationship Between State-Sanctioned Violence, Race, and Place." In "'Separate, Therefore Equal': American Spatial Segregation from Jim Crow to Kiryas Joel," Shai Stern provides a unique application of socio-legal analysis to four phases of spatial segregation in America.

The second section of the issue, "Housing and Spatial Segregation," continues to analyze racial exclusion and segregation. Leland Ware offers a historical analysis of *Plessy*'s legacy on housing segregation; Jason Reece revisits the impacts of exclusionary real estate practices on contemporary housing policies; and Paru Shah and Robert Smith point to the implications of housing segregation on voter disenfranchisement.

A third section, "Educational Segregation," focuses on one of the forms of segregation putatively abolished by the 1954 *Brown v. Board of Education* decision. The impetus for asking "how can racial segregation persist long after it has been banned?" is illustrated prominently in the analysis of persistent disparities in classrooms and educational outcomes in America more than a century and a quarter after the institutionalization of the "separate but equal" doctrine and a half-century after its formal reversal. The separate articles by political scientist Douglas Reed and stratification economists Timothy Diette, Darrick Hamilton, Arthur Goldsmith, and William Darity, as well as the article by Dania Francis and William Darity, all explore different facets of the enduring legacies of racial segregation in schools.

Summaries of Papers

In part I, "Historical and Legal Context of Racial Exclusion," john powell (2021) writes in his essay, "The Law and Significance of *Plessy*," that

though a defining feature of *Plessy v. Ferguson* was the demarcation of whiteness and the codification of the "separate but equal" doctrine, "for all its symbolic importance, the *Plessy* decision does not implicate the type or form of segregation we live with today, nor is it even directly connected to it." He notes that "contrary to the significance accorded to the *Plessy* court for sanctioning racial segregation in public facilities, residential segregation was not primarily an outgrowth of Jim Crow." powell concludes that most of the segregation observed after *Plessy* occurred in northern metropolitan areas and that patterns of Jim Crow segregation in the South differed from those in the north. powell challenges the reader to consider whether any meaningful relationship is to be found between residential segregation today and the Supreme Court decision in *Plessy v. Ferguson* 125 years ago.

In "Who Gets to Say Who's Who? *Plessy*'s Insidious Legacy," Thomas Davis (2021) examines in greater detail the historical backdrop of the "equal but separate" doctrine, as well as arguments and the majority opinion of *Plessy v. Ferguson*. His article argues that the core of Plessy's argument was personal agency over self-identity. By overruling such an agency, the Supreme Court granted the state the power to define one's racial identity and assign social and economic benefits based on such identity. Davis points out that landmark legislation after *Plessy v. Ferguson*, such as the 1964 Civil Rights Act, has similarly failed to reach fundamental issues of state power and personal agency over identity. The Court's rationale in *Plessy v. Ferguson* reached far beyond a black-and-white racial dichotomy to a full range of identity-based social relations along the lines of race, gender, religion, and so forth. The real legacy of *Plessy,* in Davis's view, lies in the arguments made for U.S. law to recognize and accept human diversity and in the process to abolish state authority to assign and sustain personal identity arbitrarily.

In "The Legacy of *Plessy v. Ferguson*: The Relationship Between State-Sanctioned Violence, Race, and Place," Tia Sherèe Gaynor, Seong Kang, and Brian Williams (2021) discuss the long-term effects of segregation by examining the intersection of state-sanctioned violence, policing, race, and place. Specifically, they address two questions: how the legacy of *Plessy v. Ferguson* has helped maintain state-sanctioned racially based violence, and what the relationship is between space and the rate of deaths of black people caused by the police. Drawing data from Mapping Police Violence from 2013 to 2017, the authors use ordinary least squares regressions to determine what factors predict the percentage of black people killed by police, especially the roles of space and place. Results show that the percentage of the black population, the percentage of black officers, and the black-white dissimilarity index all are significant predictors. The authors conclude by calling for local law enforcement agencies and individual officers to recognize, acknowledge, and understand how the historical legacy and practice of the police profession still affect the perception and participation of black communities.

In "'Separate, Therefore Equal': American Spatial Segregation from Jim Crow to Kiryas Joel," Shai Stern (2021) identifies three generations of spatial segregation in the United States through the lens of socio-legal analysis. The law, according to Stern, played different roles in these generations with different characteristics. Stern argues that a fourth generation featuring the "separate, therefore equal" doctrine has come. In the new generation, minority communities require voluntary self-segregation to achieve equality. Stern provides analysis and justifications of and objections to such a new generation of exceptional separation and concludes the article with proposed roles of law in this generation. The law should embrace a protective role by which it will defend the ability of minority communities to segregate spatially, the autonomy of individual community members, and the welfare of the society at large.

In part II, "Housing and Spatial Segregation," Leland Ware (2021) argues in his article "*Plessy*'s Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods," that *Plessy v. Ferguson* provided the foundation for a discriminatory structure that continues to burden the lived experiences of African Americans. Ware revisits federal policies in the twentieth century to demonstrate how government policies have

created residential segregation, which in turn has a long-lasting negative impact on the well-being of various aspects of African Americans. Ware concludes that the real legacy of *Plessy* is that "The architecture of America's built environment reflects decades of government-sponsored segregation. High levels of residential separation persist, causing public schools in urban communities to remain segregated. African Americans and Latino/as possess less wealth than whites, fewer opportunities for upward mobility, lower income levels, and fewer chances to build wealth."

In "Confronting the Legacy of 'Separate but Equal': Can the History of Race, Real Estate, and Discrimination Engage and Inform Contemporary Policy?" Jason Reece (2021) conducts a case study of two Ohio community-based initiatives, one in Cleveland and one in Columbus. These initiatives used historical analysis of racial discrimination in development practices as the focus of a community engagement process. Drawing from critical race theory and theories of structural racism, Reece argues that in-depth historical analysis is needed to contextualize and understand the history of discrimination. Structural analysis is required to generate solutions and policymaker consensus to address the contemporary patterns of segregation and opportunity isolation in the twenty-first century metropolis. In-depth historical analysis of surveys, participant observations, and interviews collected from these two initiatives and GIS analysis using historical redlining maps support his argument. Reese concludes that "historical analysis of Cleveland and Columbus clearly document the cumulative discriminatory structures that shared each city, thus modeling today's geography of opportunity and segregation. The longevity of these discriminatory structures and their reinforcing characteristics created apartheid-like conditions . . . [and] a legacy of discrimination that our various civil rights acts and inclusionary housing tools have yet to fully overcome."

In "Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States," Paru Shah and Robert Smith (2021) explore how remnants of *Plessy* remain alive in current efforts to disenfranchise black and Latino voters through devices such as voter ID laws. Regarding *Frank v. Walker* and Wisconsin Act 23, Shah and Smith conclude that the measure is a naked attempt to disenfranchise voters in a city that is now home to a black population of more than 40 percent and a Latino population nearing 20 percent. This case study also revealed how long-standing patterns and practices with residential segregation allow for political manipulation and voter dilution through legislative mechanisms in the form of race-neutral policy.

In part III, "Educational Segregation," Douglas Reed (2021) revisits in his article "Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution" the discussion of colorism and racial identity introduced in the first section of this issue. He links the Harlan dissent to issues of citizenship and colorism and their implications for education and examines the origins and consequences of the ascendance of colorblind logic in educational law. The ability to acknowledge, use, or even develop racial perception and racialized knowing, he argues, is essential to eradicating the educational harms of *Plessy*. Reed highlights the progression of the colorblind logic in the Supreme Court school desegregation case law from 1954 to 2007, discerning theories that undermine racial formalism and endorse racial awareness and racial consciousness in pedagogy. Reed admonishes the reader that "a cruel irony that Harlan's courageous dissent in *Plessy v. Ferguson* has since the 1970s been deployed to thwart the implementation of policies that might undo some of the long-lasting effects of the majority opinion in *Plessy v. Ferguson*."

In "Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success," Timothy Diette, Darrick Hamilton, Arthur Goldsmith, and William Darity (2021) test three hypotheses of the linkage between the racial composition of high schools and educational attainment. The conventional hypothesis states that a higher share of white peers is associated with higher levels of educational attainment of black students. The Du Bois hypothesis states that white peers harm the educational attainment of black students, who will be better served by attending predom-

inantly black high schools as long as society engages in racial discrimination. Both hypotheses assume a monotonic relationship between the racial composition of high school and the educational attainment of black students. The functionality of discrimination theory, however, predicts a nonmonotonic relationship between these two variables because of the functionality of discrimination given different levels of competition and threats posed to the whites. Specifically, black students attending mixed-race high schools achieve less education than those attending predominantly black schools. However, black students attending predominantly white schools complete more education. Using data of the National Survey of Black Americans, Diette and colleagues find evidence to support a nonmonotonic relationship between the racial composition of high schools and educational achievements of black students. Robustness checks using different measures confirm the findings. Diette and colleagues also test the long-term impacts of the racial composition of high schools on employment and homeownership of black students. Results also show a nonmonotonic relationship. These findings have important implications, specifically that the current efforts to shift black students from predominantly black high schools to mixed-race high schools may actually be harmful.

In "Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation," Dania Francis and William Darity (2021) use North Carolina public high school administrative data to examine the effects of within-school segregation on the propensity of academically eligible black high school students to take advanced math courses. Using a novel identification strategy that takes account of the timing of the shares of black students enrolled in eleventh and twelfth grade advanced math courses when a given student enters high school in the ninth grade, the authors establish a causal relationship between tracking and within-school segregation. They argue persuasively that persistent, present-day, within-school segregation at the high school level is linked to the legacy of racialized tracking born from the resistance to the desegregation of schools by race.

POLICY IMPLICATIONS FOR THE TWENTY-FIRST CENTURY

Lawrence Bobo has written extensively on how racially segregated communities affect political attitudes, political power, crime and justice, and overall economic opportunities. Racial segregation is a key driver of the black-white divide in America. He writes, "Processes of racial residential segregation are a key factor in contemporary racial inequality. Despite important declines in overall rates of segregation over the past three decades and blacks' increasing suburbanization, blacks remain highly segregated from whites" (Bobo 2011, 22).

Often policy interventions have impacts that persist long after the interventions have been reversed. Arguably, many of those impacts have been negative, but positive impacts are possible as well. *Plessy v. Ferguson* legitimized state-sanctioned racial segregation and separation. The range of laws and conventions is surprisingly enormous, and some may have persisted unwittingly into the twenty-first century. Well-known and well-documented examples include early twentieth-century racial covenants and twenty-first-century patterns of racial segregation. It is plausible that "separate but equal" legislation, rulings, conventions, practices, or institutional structures have current policy implications, but as john powell argues in his article (2021, this issue), it may not have been *Plessy* that solidified the form and content of racial separation we observe today. Perhaps it was the social mores and the institutionalization of racial exclusion in public and private life that explains the twenty-first-century form of racial separation.

Racial inequities in the United States are saturated. This means the pattern of racial distribution is mutually compounding and permeates multiple aspects of public policies that significantly affect life choices. For example, environmental inequities affect health inequities, which affect educational inequities and so forth. These inequities compound in predictable patterns and are maintained from generation to generation. For example, although Jim Crow laws have ended, they have been replaced by covert statutes and practices that maintain racial disparities. Although pockets of a racial group, such as the very wealthy, may be only

minimally affected by these inequities, the general pattern holds for the racial group at large.

These persistent patterns of racial inequality that seem to reproduce themselves across generations are easily defined using a term understood by many African Americans across all parts of the distribution of education, income, wealth, and proximity to political power—*structural racism*. An intractable, structurally embedded process, its roots run much deeper than merely the Supreme Court decision in *Plessy v. Ferguson*. The official stamp of approval of state-sanctioned and enforced racial separation, though, is as clear a manifestation of structural racism as one can find. The reason that racial disparities in virtually every aspect of life in America did not suddenly disappear after *Plessy* was implicitly overturned in *Brown v. Board of Education* is that, unlike conventional policy interventions that can reverse undesirable behaviors, structural racism—deeply embedded in institutions—can reproduce racial disparities even when laws prohibiting overt racial discrimination are on the books.

Many public policy interventions since the 1960s have been ostensibly designed to slow down or potentially reverse the legacy of the "separate but equal" doctrine, but these policies are also designed and implemented in an underlying context of nervousness in government. Public agencies that deliver public policies have a historical and contemporary record of how equitably their services have been provided across racial groups.

The award-winning journalist Steve Luxenberg writes in his best-selling book *Separate: The Story of Plessy v. Ferguson and America's Journey from Slavery to Segregation* (2019) that *Plessy* was the most important Supreme Court decision of the nineteenth century. Could such an important decision have remnants scattered into the twenty-first century?

The articles here elevate crucial public policy considerations as we progress through the twenty-first century. What is the role of the state in addressing racial exclusion and segregation of place and space? How can public policy reverse the harmful effects of residential and educational segregation—both of which have real implications for one's life chances—including economic self-sufficiency and well-being, earnings, and the accumulation of assets and wealth? And perhaps most important, how can public policy aggressively fulfill the enduring American ideal of equality for all?

REFERENCES

Adams, Michelle. 2006. "Radical Integration." *California Law Review* 94(2): 261–311.

Andrews, Rodney, Marcus Casey, Bradley L. Hardy, and Trevon D. Logan. 2017. "Location Matters: Historical Racial Segregation and Intergenerational Mobility." *Economics Letters* 158 (September): 67–72.

Bobo, Lawrence D. 2011. "Somewhere Between Jim Crow & Post-Racialism: Reflections on the Racial Divide in America Today." *Daedalus* 140(2): 11–36.

Cutler, David M., Edward L. Glaeser, and Jacob L. Vigdor. 1999. "The Rise and Decline of the American Ghetto." *Journal of Political Economy* 107(3): 455–506. DOI: 10.1086/250069.

Davis, Thomas J. 2004. "More than Segregation, Racial Entity: The Neglected Question in *Plessy v. Ferguson*." *Washington & Lee Journal of Civil Rights & Social Justice* 10(1): Article 3. Accessed September 18, 2020. https://scholarlycommons.law.wlu.edu/crsj/vol10/iss1/3.

———. 2021. "Who Gets to Say Who's Who? *Plessy*'s Insidious Legacy." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 32–49. DOI: 10.7758/RSF.2021.7.1.03.

Diette, Timothy M., Darrick Hamilton, Arthur H. Goldsmith, and William A. Darity Jr. 2021. "Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 166–86. DOI: 10.7758/RSF.2021.7.1.10.

Farley, Reynolds, and William H. Frey. 1994. "Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a Racially Integrated Society." *American Sociological Review* (February): 23–45.

Foner, Eric. 2019. *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. New York: W. W. Norton.

Francis, Dania V., and William A. Darity Jr. 2021. "Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation." *RSF: The Russell*

Sage Foundation Journal of the Social Sciences 7(1): 187–202. DOI: 10.7758/RSF.2021.7.1.11.

Frey, William H. 2015a. "Census Shows Modest Declines in Black-White Segregation." *The Avenue* (Brookings Institution blog), December 8. Accessed October 12, 2020. https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/.

———. 2015b. "Diversity Explosion: Book Excerpt." *Milken Institute Review* 2015 (Third Quarter): 67–83.

———. 2016. "Census Shows Modest Declines in Black-White Segregation." In *The Broadview Anthology of Expository Prose*, Third Edition, edited by Laura Buzzard, Don LePan, Nora Ruddock, and Alexandria Stuart. Ontario, Canada: Broadview Press.

———. 2020. "Even as Metropolitan Areas Diversify, White Americans Still Live in Mostly White Neighborhoods." Washington, D.C.: Brookings Institution, March 23. Accessed October 12, 2020. https://www.brookings.edu/research/even-as-metropolitan-areas-diversify-white-americans-still-live-in-mostly-white-neighborhoods/.

Frey, William H., and Dowell Myers. 2001. "Segregation: Dissimilarity Indices." CensusScope. Accessed October 12, 2020. http://www.censusscope.org/us/s40/p75000/chart_dissimilarity.html.

———. 2005. "Racial Segregation in US Metropolitan Areas and Cities, 1990–2000: Patterns, Trends and Explanations." Research Report no. 05–573. Ann Arbor: University of Michigan Population Studies Center.

Gaynor, Tia Sherèe, Seong C. Kang, and Brian N. Williams. 2021. "Segregated Spaces and Separated Races: The Relationship Between State-Sanctioned Violence, Place, and Black Identity." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 50–66. DOI: 10.7758/RSF.2021.7.1.04.

Glaeser, Edward L., and Jacob L. Vigdor. 2001. "Racial Segregation in the 2000 Census: Promising News." *Brookings Institution Survey Series,* April. Accessed October 12, 2020. https://www.brookings.edu/wp-content/uploads/2016/06/glaeser.pdf.

Harris, Cheryl I. 1983. "Whiteness as Property." *Harvard Law Review* 106(8): 1707–91. DOI: 10.2307/1341787.

Harrison, Bennett. 1974. *Urban Economic Development: Suburbanization, Minority Opportunity, and the Condition of the Central City*. Washington, D.C.: Urban Institute Press.

Henry, A'Leila Robinson. 1998. "Perpetuating Inequality: *Plessy v. Ferguson* and the Dilemma of Black Access to Public and Higher Education." *Journal of Law & Education* 27(1): 47–72.

Hutchison, Harry G. 2011. "Waging War on the Unfit: From Plessy v. Ferguson to New Deal Labor Law." *Stanford Journal of Civil Rights & Civil Liberties* 7(1): 1–46.

Iceland, John, Gregory Sharp, and Jeffrey M. Timberlake. 2013. "Sun Belt Rising: Regional Population Change and the Decline in Black Residential Segregation, 1970–2009." *Demography* 50(1): 97–123.

Johnson, Rucker. 2011. "Long-Run Impacts of School Desegregation & School Quality on Adult Attainments." *NBER* working paper no. 16664. Cambridge, Mass.: National Bureau of Economic Research. Accessed September 18, 2020. https://www.nber.org/papers/w16664.pdf.

Kain, J. F. 1968. "Housing Segregation, Negro Employment and Metropolitan Decentralization." *Quarterly Journal of Economics* 82 (May): 175–98.

Kauper, Paul G. 1954. "Segregation in Public Education: The Decline of *Plessy v. Ferguson*." *Michigan Law Review* 52(8): 1137–58.

Krysan, Maria, and Kyle Crowder. 2017. *Cycle of Segregation: Social Processes and Residential Stratification*. New York: Russell Sage Foundation.

Liu, Goodwin. 2006. "Education, Equality, and National Citizenship." *Yale Law Journal* 116(2): 330–411. DOI: 10.2307/20455723.

Logan, Trevon D., and John M. Parman. 2017. "Segregation and Homeownership in the Early Twentieth Century." *American Economic Review* 107(5): 410–14.

Luxenberg, Steve. 2019. *Separate: The Story of* Plessy v. Ferguson *and America's Journey from Slavery to Segregation*. New York: W. W. Norton.

Massey, Douglas S., and Nancy A. Denton. 1988. "The Dimensions of Residential Segregation." *Social Forces* 67(2): 281–315.

McDermott, Maura, and Keith Herbert. 2019. "Cuomo Orders Probe into Real Estate Discrimination on LI." *Newsday*, November 21. Accessed September 18, 2020. https://www.newsday.com/long-island/cuomo-housing-discrimination-1.38771129.

Myers, Samuel L., Jr., and Inhyuck Ha. 2018. *Race Neutrality: Rationalizing Remedies to Racial Inequality*. Lanham, Md.: Lexington Books.

Myers, Samuel L., Jr., and Won Fy Lee. 2018. "Racial Disparities, Homeownership, and Mortgage Lending in the Post-Great Recession Period: the Case of the Minneapolis-St. Paul Metropolitan Area." *Journal of Economics, Race, and Policy* 1(2): 47–59.

Myers, Samuel L., Jr., and Kenneth E. Phillips. 1979. "Housing Segregation and Black Employment: Another Look at the Ghetto Dispersal Strategy." *American Economic Review* 69(2): 298–302.

Ng, Kenneth, and Nancy Virts. 1989. "The Value of Freedom." *Journal of Economic History* 49(4): 958–65. DOI: 10.1017/s0022050700009529.

Oh, Sun Jung, and John Yinger. 2015. "What Have We Learned from Paired Testing in Housing Markets?" *Cityscape: A Journal of Policy Development and Research* 17(3): 15–60.

Pinder, Kamina Aliya, and Evan R. Hanson. 2010. "360 Degrees of Segregation: A Historical Perspective of Segregation-Era School Equalization Programs in the Southern United States." *SSRN Electronic Journal* 2(3). DOI: 10.2139/ssrn.1876362.

powell, john a. 2021. "The Law and Significance of *Plessy*." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 20–31. DOI: 10.7758/RSF.2021.7.1.02.

Reardon, Sean F., and John T. Yun. 2002. "Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000." *North Carolina Law Review* 81(4): 1563–96. Accessed September 18, 2002. https://scholarship.law.unc.edu/nclr/vol81/iss4/5.

Reece, Jason. 2021. "Confronting the Legacy of 'Separate but Equal': Can the History of Race, Real Estate, and Discrimination Engage and Inform Contemporary Policy?" *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 110–33. DOI: 10.7758/RSF.2021.7.1.07.

Reed, Douglas S. 2021. "Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 148–65. DOI: 10.7758/RSF.2021.7.1.09.

Ross, Stephen L. 2008. "Understanding Racial Segregation: What Is Known About the Effect of Housing Discrimination?" In *Neighborhood and Life Chances*, edited by Harriet B. Newberger, Eugenie L. Birch, and Susan M. Wachter. Philadelphia: University of Pennsylvania Press. DOI: 10.9783/9780812200089.288.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright Publishing.

Seymore, Sean B. 2005. "Set the Captives Free: Transit Inequity in Urban Centers, and the Laws and Policies Which Aggravate the Disparity." *George Mason University Civil Rights Law Journal* 16(1): 57–114. Accessed September 18, 2020. https://crljdotorg.files.wordpress.com/2020/03/16geomasonucrlj57.pdf.

Shah, Paru, and Robert S. Smith. 2021. "Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 134–46. DOI: 10.7758/RSF.2021.7.1.08.

Stern, Shai. 2021. "'Separate, Therefore Equal': American Spatial Segregation from Jim Crow to Kiryas Joel." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 67–90. DOI: 10.7758/RSF.2021.7.1.05.

U.S. Census Bureau. 1975. "Consumer Income and Expenditures: Family and Individual Income (Series G 1-451)." Washington. Accessed October 12, 2020. https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chG.pdf.

———. 2010. "Census Regions and Divisions of the United States." Washington. Accessed September 18, 2020. https://www.census.gov/geographies/reference-maps/2010/geo/2010-census-regions-and-divisions-of-the-united-states.html.

Wagmiller, Robert L., Jr., Elizabeth Gage-Bouchard, and Amelia Karraker. 2017. "Does Black Socioeconomic Mobility Explain Recent Progress Toward Black-White Residential Integration?" *Demography* 54(4): 1251–275. DOI: 10.1007/s13524-017-0593-z.

Ware, Leland. 2021. "*Plessy*'s Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 92–109. DOI: 10.7758/RSF.2021.7.1.06.

Woodward, C. Vann. 1974. *The Strange Career of Jim Crow*, 3rd ed. New York: Oxford University Press.

PART I

Historical and Legal Context of Racial Exclusion

The Law and Significance of *Plessy*

JOHN A. POWELL

In this article, the author explores the legal history that precluded and followed the case of Plessy v. Ferguson*, setting up the historical context and significance of the case. Here, powell shows the embeddedness of structural racism in the American legal system and the slow work done to untangle racism from the law.*

Keywords: legal history, structural racism, segregation

It is helpful to social science researchers unfamiliar with legal scholarship to understand how a U.S. Supreme Court decision can shape public policies more than a century later.[1] The decision in *Plessy v. Ferguson* looms large in our nation's historical memory, but it is both more significant than we generally appreciate and less so.[2] Ostensibly about little more than the separation of railway passengers by race as required by a state ordinance, the decision cemented rather than inaugurated many changes in public policy across the South as White-dominated governments sought new ways to institutionalize racial stratification after 1863. Nonetheless, it has become an arch symbol of jurists going awry and a talisman of racial oppression. Indeed, in his now-famous and lone dissenting opinion, Justice John Marshall Harlan wrote that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case," with *Dred Scott* being another touchstone of judicial malfeasance.[3]

Yet, for all its symbolic importance, the

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1. This article provides a layman's introduction to the legal and historical essays in this volume and provides details about the reasoning behind and consequences of the *Plessy* decision.

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

3. *Plessy*, 163 U.S. at 559. In *Dred Scott*, the Supreme Court held that the Constitution did not intend to extend citizenship privileges to African Americans, whether they were born free or in slavery or in a free or slave state.

Plessy decision does not implicate the type or form of segregation we live with today, nor is it even directly connected to it. Racial residential segregation across the United States was relatively low and generally nowhere more than moderate, in the late nineteenth and early twentieth centuries. Not until the interwar and postwar periods nearly a half century later did racial residential segregation become an accomplished fact in the United States (see Massey and Denton 1993, 47). Contrary to the significance accorded to the *Plessy* Court for sanctioning racial segregation in public facilities, residential segregation was not primarily an outgrowth of Jim Crow.

Indeed, it was northern cities, not southern ones, that segregated most rapidly from 1920 to 1940. Thus, by 1940, urbanized areas of most northern cities had high levels of Black residential racial segregation, and southern cities lagged behind. Moreover, although *Plessy* was decided in 1896, racial residential segregation in the United States, at least as measured by the dissimilarity index, peaked somtime between 1950 and 1970, depending on the region of the country measured (Massey and Denton 1993, 47).

Because segregation was already accomplished by social mores and in public spaces, municipal or state ordinances mandating racial residential segregation were not only generally unnecessary but also would not have served the regions' labor arrangements, in which domestic workers and agricultural workers needed close access to their employers (Sander, Kucheva, and Zasloff 2018, 24–25). Because segregation was in effect in restaurants, theaters, schools, and recreational facilities, residential segregation to maintain racial hierarchy and inequality was not needed.

An interaction is implicit between mores—what are thought of as informal practices—and more formal norms and standards such as those implemented by law and policy. As Richard Rothstein points out, it can often be difficult to distinguish between de facto and de jure forms of segregation or discrimination: "for example, if it becomes a community norm for whites to flee a neighborhood where African Americans were settling, this norm can be as powerful as if it were written into law" (2017, xv).[4]

Segregation, however, was never just about separating people by race physically; it was primarily about preserving White supremacy and opportunity. In the Jim Crow South, residential segregation was not needed to maintain either. Segregation can be thought of as a form of opportunity hoarding (Rury and Saatcioglu 2015). The denial of transportation opportunities at the end of the nineteenth century and the more explicit subjugation of Black spatial geographic segregation was neither necessary nor practical. Thus the expression of segregation evolves—and will continue to evolve—as circumstances change. It is one of many ways to maintain the racial status quo. With the increase in public and private transportation, the need for workers to live close to work became less important and thus supported spatial segregation.

Plessy is not only not the root of the segregation so pervasive today, it is also not the root of Jim Crow segregation. Far from inaugurating a new regime of Jim Crow, *Plessy* is better viewed as the impetus for backsliding on the commitments embodied in the Reconstruction amendments to the Constitution. Indeed, it was preceded by decisions like the *Civil Rights Cases*, which struck down the Civil Rights Act of 1875 as reaching beyond the domain of state action into private activity, *United States v. Cruikshank*, in which the Supreme Court gutted the Force Acts of the early 1870s and overturned convictions of White men associated with the Klu Klux Klan who massacred freedmen in Louisi-

In that decision, the Court also struck down the 1820 Missouri Compromise. In this way, the decision intensified debates about the extension of slavery in the western territories that was a contributory cause of the Civil War. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

4. Rothstein argues that the racial residential segregation we live with today is de jure, not de facto, and that therefore a powerful federal response is constitutionally required to remediate it.

ana, and the *Slaughter-House Cases*, which constricted the meaning of federal citizenship and eviscerated the Privileges and Immunities Clause of the Fourteenth Amendment (see Black 1999).[5] *Plessy* was the crystallization of a long process by which a reactionary and increasingly conservative Supreme Court drained those amendments of their full meaning and import, a pullback from Lincoln's call for "a new birth of freedom."

Nonetheless, the *Plessy* decision reverberated across the nation and became both a symbol of oppression for a burgeoning civil rights movement and the ultimate target of Thurgood Marshall and Charles Hamilton Houston's grand, multidecade legal strategy to attack Jim Crow. The culmination of this strategy was the unanimous Supreme Court opinion in *Brown v. Board of Education*, which declared unconstitutional the segregation of educational facilities and, by extension, the segregation of public spaces.[6] Although the Court in *Brown* did not explicitly overturn *Plessy*, it did ultimately reject the doctrine of "separate but equal" announced in *Plessy*.[7]

THE DOCTRINE OF "SEPARATE BUT EQUAL"

The Equal Protection Clause of the Fourteenth Amendment simply requires that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Unfortunately, it does not clearly explain what is meant by this.[8] The Louisiana state ordinance challenged in *Plessy* required that "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white and colored races." Stringent penalties for violation applied to both passengers and employees of the railway, in the form of a $25 fine or imprisonment in lieu thereof.[9] The act created a single exception for "nurses attending children of the other race." It did not, however, create similar exceptions for White passengers traveling with or attending to "children of the other race" nor "colored attendants traveling with adults," even where a White passenger's "condition of health requires the constant, personal assistance of such servant."[10] The concept of equality both as a constitutional provision and social norm is anything but intuitive. Although the ordinance explicitly required that all such accommodations be "equal," the Court accepted the fiction that separate could be equal, in part, by parsing the scope of equality ever so narrowly. As the Court explained, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely

5. *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Slaughter-House Cases*, 83 U.S. 16 (1873), at 36. Charles Black (1999) argues that *Slaughter-House* decision was the worst Supreme Court opinion in American jurisprudence.

6. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

7. The decision in *Brown* could have easily gone the other way. "But probably the most important single factor in the victory over school segregation was the presence of Earl Warren as Chief Justice. President Dwight Eisenhower named Warren to the Court to replace Chief Justice Fred Vinson, who had generally favored separate-but-equal laws. . . . Warren used his influence among Court members to consolidate a unanimous decision to outlaw *Plessy*" (Marable 1999, 85).

8. As one constitutional scholar observed, "Although the equal protection clause assumedly means what it says—that is, we ought not interpret it inconsistently with its words—it does not very clearly say what it means. Three things are clear: First, the clause imposes some kind of duty having to do with equality. Second, that which must be equalized is denominated as protection. Third, the bearer of the equalization duty is the state" (Roosevelt 2008).

9. Louisiana Railway Accommodations Act (1890), http://railroads.unl.edu/documents/view_document.php?id=rail.gen.0060 (accessed September 2, 2020).

10. *Plessy*, 163 U.S. at 553.

because the colored race chooses to put that construction upon it."[11]

From the post-Reconstruction era until the early twentieth century, the prevailing meaning or interpretation of the Equal Protection Clause was that it prohibited legislation that was "stigmatizing" or "intended to oppress" (Roosevelt 2008, 1202). Although dominant for the first century of interpretation, this interpretation no longer prevails. Yet both the Court in *Plessy* and the Court in *Brown* adopted this position that stigma and dominance was important in the interpretation of the Equal Protection Clause. As one scholar explains, "Where *Plessy* and *Brown* differ . . . is their application of that test to particular facts. If you think Louisiana's segregation of railroad cars is stigmatic, *Plessy* says, that's your problem—it's only because you choose to place that construction on it" (1203). In short, both *Plessy* and *Brown* adopted the same construction of the equal protection clause; the difference was in their application of that standard to the facts.

Brown, backed by then-groundbreaking psychological evidence like the "doll tests," asserts that "to separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community."[12] In *Brown*, it is not the student's construction of the policy of segregation that fails her, but the system of segregation—the psychological impact of racial stratification itself—that produces the stigma. What is clear is that the Civil War amendments were meant to go beyond the formal equality the Court adopted beginning with *Plessy* and completed in a number of cases in the late twentieth century.

The key premise which underlies the *Plessy* Court's ability to ignore the obvious is an incredible exercise in hairsplitting. The Court distinguished between three types of equality: legal, political, and social. It then suggested, distorting the meaning and intent of the Civil War amendments, that the Equal Protection Clause of the Fourteenth Amendment was intended to extend only to political and legal equality, not to social equality. Indeed, they expressed flinty skepticism that legislation could ever reverse engineer social prejudice: "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."[13]

Of course, the law at issue would prohibit such associations in public spaces, undermining the Court's underlying premise here. Only by distinguishing social equality from political and legal equality could the Court plausibly argue that laws mandating the segregation of races could not violate the Equal Protection Clause, and, insidiously, might serve it, as later defenders of *Plessy*, such as Herbert Wechsler, argued to undermine the Court's legitimacy following the *Brown* decision.

In his enormously influential article "Toward Neutral Principles of Constitutional Law," Wechsler (1959) argues that the chief flaw in the *Brown* decision was that the Court lacked a "neutral" basis. Although obscure today, Wechsler's argument carried tremendous weight in the 1950s and 1960s as the debate over the justification for *Brown* continued into the legislative debates over civil rights legislation and into the progeny of *Brown*, that is, subsequent desegregation cases (Snyder 2000). Wechsler argues that the First Amendment "associational" rights of Whites to avoid associating with Blacks could not be squared with the associational rights of Blacks to integrate with Whites (Wechsler 1959).[14] He argues that be-

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

12. *Brown*, 347 U.S. at 494.

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

14. Though the First Amendment does not state associational rights explicitly, the Supreme Court held in *NAACP v. Alabama* that the freedom of association is protected by the First Amendment because it is encompassed in the freedom of speech. *NAACP v. Ala. Ex rel. Patterson*, 357 U.S. 449, 461 (1958).

cause no basis for this determination was "neutral," the decision in *Brown* was effectively illegitimate (Snyder 2000).

The flaw in Wechsler's argument was his assumption that amendments requiring equality were indeed neutral, when logically and in practice any command of equality is hardly neutral when instituted to rectify state-imposed White supremacy, segregation, and domination. Even the *Slaughter-House* Court understood that "the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery."[15] Although the Equal Protection Clause was framed in universalistic terms (applying to everyone), its purposes were hardly neutral, in that they clearly aimed at protecting freed slaves and their descendants.

The doctrine of "separate but equal" is a blatant fiction. But an alternative to a direct, facial attack on that doctrine, as was led by Marshall and Houston, was to press for enforcement of that doctrine by its own terms, so that it was true in fact, and not a legal fiction: a demand that school districts, municipalities, and other state instrumentalities equalize their investments in separate Jim Crow facilities, and that dilapidated buildings and aging books be replaced and modernized (Tushnet 2012).

The NAACP (National Association for the Advancement of Colored People) lawyers who led the strategy to attack *Plessy* refused to accept this alternative. In fact, as they traveled through the South, they told parents and community members that they would take on their cause and press their case if and only if they were willing to attack the doctrine directly rather than demand its enforcement (Tushnet 2012). Although skepticism prevailed in many quarters (for many Black parents saw little reason to demand integration, and saw it simply as a way to equal provision), the architects of the strategy to overturn *Brown* understood, and as the Court in *Brown* ultimately observed, that separate could never be equal. The notion of "separate but equal" itself was the fiction, not just its lack of enforcement.[16] The Court in *Brown* assumed that material conditions were equal. It found the separation itself violated the Fourteenth Amendment.

This becomes even clearer if one of the central purposes of segregation under *Plessy* was not just opportunity hoarding, but also maintaining caste oppression and stigma. Indeed, in *Brown*, the Court explicitly said that "there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors."[17] It therefore refused to rest its conclusion that the doctrine of "separate but equal" was unconstitutional as applied, but that it was facially so because segregation itself was harmful. Under *Plessy* and its progeny, segregated conditions were separate and unequal, not just materially but symbolically as well. Unfortunately, today, we have lost sight of this truth.

Toward the end of his life, the great legal scholar Derrick Bell became disenchanted with the progress made since *Brown*, and reluctantly concluded like others before him that many Black children might have been better off had *Plessy* been enforced, rather than the doctrine of "separate but equal" overturned (Trei 2004). His pessimism was unwarranted. Longitudinal research on the effects of "desegregation" on Black students is unequivocal: they have better outcomes across the board, and few to no harmful effects on similarly integrated White students. Indeed, most of the White students who integrated report being grateful for their experience (Johnson 2011).

Despite this, many Black people have been and continue to be ambivalent about the practice and goal of integration. This is complicated by the confusion of desegregation and integration, terms which have never been fully

15. *Slaughter-House Cases*, 83 U.S. at 2.

16. *Brown*, 347 U.S. at 483.

17. *Brown*, 347 U.S. at 486–96.

defined or clearly understood. As Elizabeth Anderson and others note, true integration has remained largely elusive in America despite *Brown I* (Anderson 2010). Part of the problem was *Brown II*, which commanded "all deliberate speed." Full-on integration of schools only occurred for a brief period from the late 1960s, commencing with *Green v. County School Bd.* (1968), to the early 1970s, when the Supreme Court began to pull back the throttle. By the time the Supreme Court decided *Milliken v. Bradley* in 1974, intradistrict integration was no longer possible in many districts because of White flight.[18] Moreover, the practice of integration left much to be desired, given that what was practiced constituted assimilation rather than transformation (Adams 2006). A more robust approach would have been for the Court to enforce meaningful integration rather than desegregation.

Society today is in many ways more segregated than at the times of *Plessy* and *Brown*, and certainly more than a generation ago. However, the types and forms of segregation have changed over the years. Maria Krysan and Kyle Crowder describe the persistence of racial residential segregation as also a product of constrained market choice. When searching for new housing, potential homeowners and renters start with areas they know well or that their social networks recommend. Whether on the basis of familiarity or selection bias, they overwhelmingly choose to live in communities that reflect their homogeneous network (Krysan and Crowder 2017). This sentiment is furthered in this volume by Shai Stern's article, "'Separate, Therefore Equal': American Spatial Segregation from Jim Crow to Kiryas Joel," which identifies minority religious communities that choose to perpetuate voluntary self-segregation to preserve their culture and religious identity. Although the causes of continued segregation vary, at least one is that today, in addition to Whites, many minority groups are choosing, whether consciously or unconsciously, to segregate themselves.

However, the choice of self-segregation is not permitted or possible for all. The deep history of redlining and public policy has disproportionately determined housing outcomes for African Americans. This issue of *RSF* expands on types of segregation, reasons segregation persists, and segregation that continues to harm Blacks and other non-Whites, even in the presence of tangible equality of resources or the absence of segregation by law. In the spirit of *Plessy*, this issue recognizes and takes seriously the symbolic and intangible inequality that segregation perpetuates as much as its material effects, as well as the role that intangible forces, such as social networks, play in sustaining and exacerbating material inequality.

The Public-Private Penumbra

Modern readers may puzzle at how a state ordinance interfering so baldly into the affairs of private companies could be upheld, especially when the Civil Rights Act of 1875 was held unconstitutional for requiring the opposite of so-called public facilities. Jim Crow and the doctrine of "separate but equal," however, extend deep into the heart of public life—to businesses, institutions, and facilities owned and operated by private actors but held out to the public, including restaurants, lunch counters, theaters, and, yes, railway cars. It also extends (or extended) to the instrumentalities of the state, including public schools, public transportation, swimming pools, parks, and drinking fountains.

Not until the attack on Jim Crow was well under way did the public-private distinction acquire so much significance, both as a sword to attack laws designed to extend and protect civil rights, and as a shield to defend Jim Crow traditions from federal encroachment. It is little wonder then that much of the opposition to the Fair Housing Act of 1968 was grounded in concerns that it went beyond state action and regulated private economic activity, such as the right of a homeowner to refuse to sell their house to a person on the basis of their race. This is why the authors of the Fair Housing Act based their authority in the Commerce Clause, which explicitly permits the regulation of pri-

18. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968); *Milliken v. Bradley*, 418 U.S. 717 (1974).

vate activity, rather than just the Fourteenth Amendment.[19]

This question of state action and the public-private distinction became even more pressing in the dilemma over racially restrictive covenants—covenants that bound homeowners in mass tract developments from selling their homes to anyone that might integrate a development or community. In the landmark case of *Shelley v. Kraemer* (1948), the Supreme Court again split hairs ever so finely, arguing that racially restrictive covenants were actually unenforceable under the Equal Protection Clause of the Fourteenth Amendment, not because the covenants were illegal but because to use the courts was a public act.[20] The dissent noted that such logic would destroy the public-private distinction. Another example is *Jones v. Alfred H. Mayer Co.*, in which the Supreme Court found that a federal statute intending to bar all private and public racial discrimination was a valid exercise of power to enforce the Thirteenth Amendment.[21] Thus the doctrine of public and private in the law is very much bound up with racial inclusion and exclusion.

Much of the fighting between conservative and liberal jurists over the last 150 years has revolved around citizenship or the distinction between public and private under the Fourteenth Amendment, as well as what constitutes "badges and incidents" of slavery under the Thirteenth (Ware 1989). The turmoil in this area of law has led to remarkable scholarship, including a notable essay by the famous jurist Judge Henry Friendly (1968), which sought to delineate the precise line between public and private action. Unsettled by the ambiguities and potential for litigation upon a "liberating or even obliterating view of what constitutes state action," Judge Friendly explored fact patterns in which state action and private activity seemed interlaced, or perhaps deeply coordinated. "No pat formula," he concluded, "will solve our problems."

The question of the line between public and private activity has never been resolved, and in fact the sharp distinction has been rejected by some leading jurists. As former Supreme Court Justice Anthony Kennedy wrote in 2007, "The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices."[22]

Indeed, Justice Kennedy is right from a historical vantage point, but the enduring persistence of racial residential segregation—the segregation of private space—even as our public spaces have never been more integrated—merely underscores the problem. In *Brown*, the Court said that the "Segregation of white and colored children in public schools has a detrimental effect upon the colored children."[23] But what it said next is not fully appreciated: "The impact is *greater* when it has the sanction of the law."[24] The implication is that segregation is still harmful to African Americans, even when

19. The Fair Housing Act (Title VIIII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 et seq., was based on the Commerce Clause, but, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that, although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. *United States v. Guest*, 383 U.S. 745, 761, 774 (1966) (concurring opinions); *Griffin v. Breckenridge*, 403 U.S. 88 (1971). id. 951 Clause 3. "The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

20. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

21. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

22. *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701 (2007), Justice Kennedy Concurrence: III B.

23. *Brown*, 347 U.S. at 494, n.10.

24. *Brown*, 347 U.S. at 494.

it does not have the sanction of law. African Americans were never really meant to benefit from the "separate but equal" doctrine, rather, the goal was to benefit Whites and teach African Americans "their place" as an inferior race. And yet our jurisprudence of late shields so-called de facto segregation from a mandatory constitutional remedy (Green 1999). In this way, the public-private distinction continues to operate in a way that frustrates any current as well as future attempts to fully extirpate the legacy of *Plessy*.

The First Justice Harlan

Homer Plessy, the petitioner before the Supreme Court in 1896, argued that the Louisiana ordinance not only violated the Fourteenth Amendment's Equal Protection Clause, Privileges and Immunities Clause, and Due Process Clause, but also the Thirteenth Amendment's prohibition of "badges and incidences" of slavery. As we have seen, the Court dismissed these arguments on grounds that those amendments did not require "social equality," and that the ordinance was a "reasonable regulation" of railway carriers.

In his dissent in *Plessy*, Justice Harlan disagreed with the Court to a truly remarkable breadth and extent. His understanding of the Reconstruction amendments was more progressive and expansive than perhaps any current member of the Supreme Court. To appreciate just how radical his understanding of those amendments was, we must dig into his dissent in *Plessy* and other cases.

Harlan's dissent in *Plessy* is perhaps most famous for the phrase "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[25] This quote has been broadly deployed, much like a similar quote from Martin Luther King Jr., to suggest a kind of colorblindness, and the attendant notion that the truest path to racial equality is to ignore race (M. King 1963, 1964). Unfortunately, this interpretation ignores the true meaning of Harlan's dissent, and on multiple levels (Berry 1996; M. King 1963, 1964).

To begin, Harlan would not only have held that the Louisiana statute at issue violated the Equal Protection Clause, but also violated the Thirteenth Amendment, and remarkably, but rarely acknowledged, the "guarantee" clause (Article IV, Section 4) of the Constitution (by which the Constitution requires that every state have a "Republican Form of Government"). In other words, he found that the separation of race systematically violated the Constitution in multiple respects.

Unlike his colleagues, Harlan saw the Reconstruction amendments in their whole, and as part of the larger fabric of the Constitution. Rather than seeing the amendments as simply constraining state action, he saw those amendments as an affirmative "font" of authority for Congress to enact legislation designed to achieve the ultimate purpose of those amendments (Liu 2006). First and foremost, Harlan believed that the Citizenship Clause of the Fourteenth Amendment, which was intended to bring freed slaves and their descendants fully into the political community, clothed Congress with the power to take affirmative steps to secure that right, including regulating pernicious laws such as those enacted by Louisiana. The Civil War amendments were unusual in giving Congress explicit rights of enforcement.

Justice Harlan viewed the Reconstruction amendments as infusing the entire Constitution with new meaning and purpose. They redefined the "we" in "we the people" expansively and inclusively. In particular, Justice Harlan understood the Thirteenth Amendment as doing more than prohibiting slavery, emphasizing that it "decreed universal civil freedom in this country" via the enforcements powers of Section 2, which granted Congress the authority to legislate against the "imposition of any burdens or disabilities that constitute badges of slavery or servitude." Harlan further explained that the Thirteenth Amendment, "having been found inadequate to the protection of the rights of those who had been in slavery," was intended to be read and enforced in conjunction with the Fourteenth Amendment, adding greatly to the "dignity and glory of American citizenship, and to the security of personal liberty." Harlan further asserted that "these two amendments, *if enforced according to their true intent and mean-*

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

ing, will protect *all* the civil rights that pertain to freedom and citizenship" (emphasis added).[26] Against this backdrop, Harlan held that "the arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution," and could not "be justified upon any legal grounds."[27]

Seeing through the fiction surrounding the doctrine of "separate but equal," Harlan wrote that "the thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone"[28] and further, that the concept of "separate but equal" could hardly be understood as the true intent behind the statute in question:

> Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.[29]

Although his dissent in *Plessy* is more famous, his dissent in the *Civil Rights Cases* is more revealing. There, he presented the full scope of his views on the Reconstruction amendments. He explained that the power to enforce those provisions through affirmative legislation must be coterminous with the previous power to protect slavery. As he put it, "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." If Justice Harlan's views prevailed, the Thirteenth Amendment, the Citizenship Clause, and the Privileges and Immunities Clause would be vital and active parts of the Constitution, not the narrow and moribund script they are today.

Interestingly, Justice Harlan's personal views on race may well have been far more constricted than his otherwise expansive interpretation of the Reconstruction amendments. In his dissent, he admitted that "the white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time."[30] In this regard, Justice Harlan was also a slave owner, defended the institution, and manumitted his slaves only when the Thirteenth Amendment compelled him to do so (Gordon 1993).

Speculation on Harlan's views abound. Could it be that Harlan's expansive interpretation of the Constitution was possible, at least in part, because of a high degree of confidence in the ability of White supremacy to live on in society indefinitely? Could Harlan have been signaling to Whites that they need not worry about changes in law because society would continue to recognize and support their supremacy? Whether his statements were merely an observation of reality circa 1896, or a confession of personal belief in White supremacy, we may never know. What is clear is that such observations may be regarded as racist today despite his progressive and inclusive jurisprudential vision.

This perplexing and paradoxical contrast between Justice Harlan's personal beliefs and public jurisprudence perhaps highlights a distinction between personal prejudice and structural inclusion to which we should pay greater heed. Too often, we assume that personal prejudice and exclusionary policy preferences are conjoined. The case of Justice Harlan reminds

26. *Plessy*, 163 U.S. at 555.

27. *Plessy*, 163 U.S., dissent at 562.

28. *Plessy*, 163 U.S., dissent at 562.

29. *Plessy*, 163 U.S. at 557.

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

us that they may not be, a lesson that matters greatly as NIMBY suburbanites express support for the Black Lives Matter movement while opposing school integration or affordable housing (Joffe-Walt et al. 2020).

Finally, Harlan's dissent is remarkable in that it has proven to be a chillingly accurate harbinger for much of what has come in the 125 years since *Plessy* was decided. For example, new and enduring patterns of race-based hatred and violence, pervasive implicit biases against Blacks, the continued maintenance of White supremacy, and patterns of judicial interference and overreach:

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge.[31]
>
> What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?[32]
>
> State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.[33]
>
> There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution.[34]

Although the doctrine of "separate but equal" has been overturned, Justice Harlan's sweeping vision for the Reconstruction amendments lies dormant in our jurisprudence, waiting to arise again.

Whiteness and Gradients of Color

One of the ironies of *Plessy v. Ferguson* is that Homer Plessy was phenotypically White and, in fact, sought better conditions than his Black fellow citizens. Part of what Homer Plessy argued for was a due process ground, that he was being denied the property interest in his Whiteness (Harris 1993). Although the Court declined to consider whether Plessy met any statutory definition of Whiteness, and deferred to state law on this issue, the Court signaled that an incorrect classification could provide grounds for a suit and corresponding damages.

There is a vigorous debate among legal scholars about whether *Plessy* was primarily about race, citizenship, or Whiteness. Much of this debate arises from Harlan's prominent role in the case as a dissenter. Not only was Justice Harlan a wealthy slave owner, but he had a half-brother who was Black (G. King 2011). The Harlan dissent famously stated, "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . . . The arbitrary separation of citizens on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law

31. *Plessy*, 163 U.S. at 560.

32. *Plessy*, 163 U.S. at 560.

33. *Plessy*, 163 U.S. at 560–61.

34. *Plessy*, 163 U.S. at 558.

established by the Constitution. It cannot be justified upon any legal grounds."[35]

The Harlan dissent also explicitly raised the issue of citizenship and the counting of persons who are neither White nor Black:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.[36]

The race line affirmed by the Supreme Court held that "one drop" of Black blood rendered a person non-White. In this way, Whiteness was not only a racial classification, but also an explicit property interest that conferred benefits denied to non-Whites. Anti-miscegenation laws reinforced property interests tied to Whiteness and were often designed to punish and regulate those who threatened the exclusivity of Whiteness by crossing racial boundaries. Not only did anti-miscegenation laws function as protective measures for Whiteness and its associated property interests, they helped expose the public and private nature of racial boundaries and identities, and became integral in the creation of Whiteness itself. This, too, is a legacy of *Plessy*. When immigration debates presume fitness based on race, *Plessy* extends its shadow.

Ultimately, the expression of state-sponsored intolerance and racial hierarchy cannot be reduced to a single case or law. The space for interpretation means that who decides matters, and it is the justices sitting on the Supreme Court who matter. If Justice Harlan's views prevailed, our jurisprudence would look quite different today. Still, *Plessy* rightfully stands as one of the continuing stains on the history of our country in its ambivalence and unwillingness to address White dominance with many lessons for our current and continuing racial travails.

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

36. *Plessy*, 163 U.S. at 561.

REFERENCES

Adams, Michelle. 2006. "Radical Integration." *California Law Review* 94(2): 261–311.

Anderson, Elizabeth S. 2010. *The Imperative of Integration*. Princeton, N.J.: Princeton University Press.

Berry, Mary Frances. 1996. "Vindicating Martin Luther King, Jr.: The Road to a Color-Blind Society." *Journal of Negro History* 81(1): 137–44.

Black, Charles L., Jr. 1999. *A New Birth of Freedom: Human Rights, Named and Unnamed.* New Haven, Conn.: Yale University Press.

Friendly, Henry. 1968. "Dartmouth College Case and The Public-Private Penumbra." Lecture, Dartmouth College, New Hampshire (May 10).

Gordon, James W. 1993. "Did the First Justice Harlan Have a Black Brother?" *Western New England Law Review* 15(2): 159–238. Accessed September 2, 2020. https://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1092&context=facschol.

Green, Preston C., III. 1999. "Can State Constitutional Provisions Elimate De Facto Segregation in Public Schools?" *Journal of Negro Education* 68(2): 138–50.

Harris, Cheryl I. 1993. "Whiteness as Property." *Harvard Law Review* 106(8): 1701–791.

Joffe-Walt, Chana, Julie Snyder, Sarah Koenig, Neil Drumming, and Ira Glass. 2020. "Introducing Nice White Parents." *New York Times* (podcast series), July 23. Accessed September 2, 2020. https://www.nytimes.com/2020/07/23/podcasts/nice-white-parents-serial.html.

Johnson, Rucker. 2011. "Long-Run Impacts of School Desegregation & School Quality on Adult Attainments." *NBER* working paper no. 16664. Cam-

bridge, Mass.: National Bureau of Economic Research. Accessed September 2, 2020. https://www.nber.org/papers/w16664.

King, Gilbert. 2011. "The Great Dissenter and His Half-Brother." *Smithsonian Magazine*, December 20. Accessed September 2, 2020. https://www.smithsonianmag.com/history/the-great-dissenter-and-his-half-brother-10214325.

King, Martin Luther, Jr. 1963. "I Have a Dream Speech." Lincoln Memorial, Washington D.C., August 28.

———. 1964. *Why We Can't Wait.* New York: Harper & Row.

Krysan, Maria, and Kyle Crowder. 2017. *Cycle of Segregation: Social Processes and Residential Stratification*. New York: Russell Sage Foundation.

Liu, Goodwin. 2006. "Education, Equality, and National Citizenship." *Yale Law Journal* 116(2): 330–411.

Marable, Manning. 1999. *Black Liberation in Conservative America*. Boston, Mass.: South End Press.

Massey, Douglas S., and Nancy A. Denton. 1993. *American Apartheid.* Cambridge, Mass.: Harvard University Press.

Roosevelt, Kermit, III. 2008. "Judicial Supremacy, Judicial Activism: *Cooper v. Aaron and Parents Involved*." *St. Louis University Law Journal* 52(4): 1191–210. Accessed September 2, 2020. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1653&context=faculty_scholarship.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: W. W. Norton.

Rury, John L., and Argun Saatcioglu. 2015. "Opportunity Hoarding." In *The Wiley Blackwell Encyclopedia of Race, Ethnicity, and Nationalism*, edited by Anthony D. Smith, Rutledge Dennis, Polly Rizova, and Xiaoshuo Hou. New York: John Wiley & Sons. DOI:10.1002/9781118663202.wberen43.

Sander, Richard H., Yana A. Kucheva, and Jonathan M. Zasloff. 2018. *Moving Toward Integration*. Cambridge, Mass.: Harvard University Press.

Snyder, Brad. 2000. "How the Conservatives Canonized *Brown v. Board of Education*." *Rutgers Law Review* 52(2): 383–494. Accessed September 2, 2020. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485466.

Thomas, William G. 2006–2017. "Railroads and the Making of Modern America." "The Louisiana Railway Accommodations Act." In *Louisiana Laws, 1890*, no. 111, 153–54. Lincoln: University of Nebraska, Digital History Project. Accessed September 2, 2020. http://railroads.unl.edu/documents/view_document.php?id=rail.gen.0060.

Trei, Lisa. 2004. "Black Children Might Have Been Better Off Without *Brown v. Board*, Bell Says." *Stanford Report*, April 21. Accessed September 2, 2020. https://news.stanford.edu/news/2004/april21/brownbell-421.html.

Tushnet, Mark. 2012. *The NAACP's Legal Strategy Against Segregated Education, 1925–1950*, vol. 2. Chapel Hill: University of North Carolina Press.

Ware, Leland B. 1989. "Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases." *Washington University Law Quarterly* 67(3): 737–72. Accessed September 2, 2020. https://openscholarship.wustl.edu/law_lawreview/vol67/iss3/5.

Wechsler, Herbert. 1959. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73(1): 1–35.

Who Gets to Say Who's Who? *Plessy*'s Insidious Legacy

THOMAS J. DAVIS

Plessy v. Ferguson*'s legacy reaches far beyond Jim Crow's "separate but equal" doctrine to perpetuate state control of personal identity. The 1896 U.S. Supreme Court decision upheld white supremacy's slave law power to say who's who, epitomized in state power to declare some human beings not persons but mere property. It sanctioned government power to identify and categorize individuals and to direct their actions and interactions based on such identities and categories. In perpetuating unchecked state determination of individual identities,* Plessy *persists in its insidious denial of basic human rights and fundamental freedoms. To reestablish birthright personal autonomy over identity free of state subordination requires reforming U.S. law to recognize and accept the individuality of human diversity. Such a process requires abolishing state authority to arbitrarily assign personal identity by decree and recognize the basic personal autonomy of individuals to define, redefine, and express their individual identities.*

Keywords: U.S. law, personal identity, personal autonomy, identity categories, state authority, segregation, discrimination, human rights

Control over identity lay at the heart of *Plessy v. Ferguson*.[1] Yet the case has usually gone unrecognized as contesting state power over personal identity. From the case's beginning in June 1892, the popular narrative has long settled it as the Supreme Court of the United States' black-and-white sanction of Jim Crow segregation (on the initiation and development of the case, see Davis 2012, 1–15). Its recognized legacy has been narrowed to the "separate but equal" doctrine. For although the decision treated only intrastate rail transportation, it became the touchstone of Jim Crow segregation. It became most associated with state-mandated racial segregation in public schools, especially after the 1954 *Brown v. Board of Education* ruling that "in the field of public education the doctrine of 'separate but equal' has no place."[2] That narrative, like the Court's 7–1 decision on May 18, 1896, has neglected the core of Homer A. Plessy's challenge to the state of Louisiana's asserting authority in its 1890 Separate Car Act to

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

2. *Brown v. Board of Education of Topeka*, 397 U.S. 483, 495 (1954).

say who he was and deny him the personal autonomy of self-identification, giving rise to an insidious legacy (for more on the Court's neglect, see Davis 2004).

The Court's rationale in its *Plessy* decision reached far beyond a black-and-white racial binary to stealthily encompass a full range of legal relations attached to personal identity (Davis 2002, 61–76). In rejecting Plessy's appeal that Louisiana law unconstitutionally and unconscionably declared him to be someone he was not, or at least someone he said he was not, the Court implicitly affirmed state authority to say not only who Plessy was but also who is who for all persons within the state's jurisdiction. The decision breached the boundary between personal autonomy and state authority. It afforded few legal protections for any individual right of personal self-determined identity and confirmed state power to assign personal identity in classes with consequences of inclusion and exclusion. That legacy has continued to traverse a complex landscape connecting individual identities, social norms, and state power, for the decision quashed any claim of right to determine or express individual self-identity in the face of categorical state decrees.

The most intimate and essential life activities remain captive to *Plessy*'s legacy. From sex and marriage to adoption, gender recognition, employment, and voting, persistent discrimination turns in various degrees on state authority to define, categorize, and deny or abridge freedom of personal identity. The battle for individual self-determination against state invasion of such intimate aspects has been long and hard-fought in courts of law and in courts of public opinion (Kennedy 2004).

Personal identity looms large in almost every aspect of human life in the twenty-first century. Simultaneously taken for granted and highly contested, identity serves as a currency in negotiating both social acceptance and self-acceptance. It is a mainstay in civic life and in legal and social relations. It purchases positions in the ongoing processes of everyday living and also within the past and future connections of community and lineage. It is a private and public matter, a matter of fact and a matter of fascination. It captures not only the ego's attention but also commercial marketplaces enriched by popular yearnings for self-determination, self-discovery, and self-identification.

Who gets to say who's who matters. In recent years the question has flared, for example, over who can use what public toilets. Indeed, state authority over personal identity has continued to implicate self-definition and self-expression in relations with government, in social settings, in interconnections with others, and in personality formation and manifestation, including gender presentation and sexual orientation. It has been, and promises to continue to be, no trivial matter in its inheritance from the 1896 *Plessy* decision.

So how did this legacy arise? Examining afresh the origins of Plessy's case, the arguments for Plessy, and the Court's rationale in disposing of the case, reveals the harm beyond "separate but equal" that the *Plessy* decision handed down and that remains for U.S. law to address. The policy analysis that follows aims to define, describe, and evaluate the substance and structure of the problematic legacy the Court bequeathed in confirming the state of Louisiana's authority to arbitrarily assign personal identity and to delegate to others power to discriminate on the basis of the state's determination, regardless of any individual's self-identification.

This article aims to expose the roots and reach of the Court's upholding state power to say who's who. It treats the Court's *Plessy* decision and the decision's legacy as implicating more than race in denying individual autonomy to determine personal identity, given that the ruling sanctioned state imposition of embedded social prejudices and practices to deny Plessy, and by extension all others, any right of self-identity without state determination. The article views the Court's allowing the state to subjugate personal autonomy as permitting the state to extend the effects of slave law that determined not only civil privileges and immunities but more fundamentally legal personality.

Further discussion opens by retracing the case's roots in the growth of prescriptive legislation in the former slave states after the Civil War to preserve the civic and social distances and distinctions white supremacy imposed on blacks and whites before the Thir-

teenth Amendment in 1865 nullified the laws of slavery. It exposes parts of the attitudes, thinking, and legal process that created the doctrine of "separate but equal" as an anchor for Jim Crow segregation, particularly as it arose in railway transportation. Parting with traditional views of the Court's response to Plessy's appeal, the article focuses on the arguments for Plessy, not the state, to control his personal identity and on the Court's willful blindness to that challenge. Also, it treats the injurious implications of the Court's allowing the state to continue to control personal identity as it had in the laws of slavery. The article further treats the need to dismantle state control and so quash the continuing insidious reach of the *Plessy* decision into the complex of personal identity that rests on basic human rights to autonomy.

ARRIVING AT THE TOUCHSTONE FOR JIM CROW

The *Plessy* ruling sanctioned state action requiring physical separation of persons by race. Specifically, it upheld Louisiana's 1890 statute formally titled "An Act to promote the comfort of passengers on railway trains."[3] Also known as the Louisiana Railway Accommodations Act, but popularly referred to as the Separate Car Act, the legislation required that "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations."[4] The ruling immediately attached only to intrastate railroads, as the Louisiana act pointedly exempted "street railroads."[5] Yet in time the ruling came to cover public transportation generally. Indeed, it became the legal touchstone for the twentieth-century U.S. system of apartheid known as Jim Crow segregation (Davis 2012, 143–56).

The ruling came as a confirmation not a commencement. When the Court handed down its decision on May 18, 1896, eight states already had separate car acts in place.[6] The first legislation had appeared in 1865–1866, before the Fourteenth Amendment in 1868 with its due process guarantees of life, liberty, property, and equal protection of the laws. The first legislation after the amendment came in April 1881, when Tennessee mandated separate cars by race.[7]

In aim and affect, the Tennessee statute stood in contradistinction to later separate car acts, such as the 1890 Louisiana law, as it arose as a remedy for blacks rather than as a restriction (Stephenson 1909, 181–82; Mack 1999, 377).[8] The statute's title—"An act to prevent discrimination by railroad companies"—signaled its distinction. Its preamble announced its aim to correct a blatant and common fraud and to provide for blacks to get what they paid for on railroads. "It is the practice of railroad companies located and operated in the State of Tennessee to charge and collect from colored passengers traveling over their roads first-class passage fare, and compel said passengers to occupy second-class cars," the legislature found. To counteract that discrimination and extortion, the law required that "all railroad companies

3. 1890 La. Acts 152 (1890).

4. 1890 La. Acts, sec. 1.

5. 1890 La. Acts, sec. 3.

6. The eight states, and the year each adopted a separate car act for the races, were Tennessee (1881), Florida (1887), Mississippi (1888), Texas (1889), Louisiana (1890), Alabama (1891), Arkansas (1891), and Georgia (1891).

7. "An act to prevent discrimination by railroad companies among passengers who are charged and paying first-class passage, and fixing penalty for the violation of same." 1881 Tenn. Pub. Acts ch. 155 (April 7, 1881).

8. This article uses the terms *black, colored, Negro,* and *nonwhite* as synonyms, accepting the white supremacist dichotomy that prevailed at the time of the *Plessy* case. The prevalent and persistent colorism of then and now, along with the developing understanding of race as a social construct, of course, distinguishes among the categories. Homer Plessy certainly was not *black* and would have objected to being termed so, as much as he refused also to simply call himself *white*, rejecting binary racial categories and, indeed, racial categorization. His case argued for a self-designated, self-determined identity.

located and operated in this State shall furnish separate cars, or portions of cars cut off by partition walls, in which all colored passengers who pay first-class passenger rates may have the privilege to enter and occupy."[9]

Tennessee further required that the separate cars or the separate spaces within cars that the statute and contemporaries termed "apartments" for colored persons "shall be kept in good repair, and with the same conveniences, and subject to the same rules governing other first-class cars." The "separate but equal" formula was enunciated clearly—"separate cars, or portions of cars cut off by partition walls" plus "the same conveniences, and subject to the same rules governing other first-class cars."[10]

The act thus furnished blacks a right to ride and get what they paid for on railroads in Tennessee. Also, it allowed them to sue any railroad that refused to deliver accommodations as the law required for their paid passage. Gaining such accommodations, however, came at a price: in exchange for escaping being extorted or excluded, blacks suffered being physically separated from whites by law (Rabinowitz 1976, 325–50).

The 1881 statute advanced Tennessee from the position it had adopted in 1875 to empower unfettered racial discrimination. Halting the Reconstruction progress of colored persons' civil rights, the legislature dominated by white conservative Redeemers abrogated the common-law rule allowing persons to sue for damages if excluded from service at public accommodations (Davis 2016, 125). The 1875 act abolished liability for common carriers and facilities, such as railroads, hoteliers, innkeepers, restaurateurs, and public amusements, if they discriminated in providing services. The law permitted owners and operators of such businesses absolute discretion "to control the access & admittance or exclusion of persons." In short, owners and operators could exclude anyone for any reason, and the person excluded had no recourse at law. To the contrary, recourse lay on the other side because the act made any person who protested being excluded from public accommodations liable for civil damages of $500 and a criminal fine of not less than $100.[11]

SEPARATE CARS WERE NOT UNUSUAL

Although an advance from Tennessee's 1875 position, the 1881 separate car approach was not original. Separate cars emerged as a common practice after the Civil War to accommodate class and gender. And they were not fixed by race or region. The expanding mode of passenger transportation that postbellum railroads provided created increasingly accessible public spaces that had the potential for unaccustomed close contact for persons across the social spectrum (Welke 2000, 267–68; Mack 1999, 381–82). In fact, expanding postbellum railroads created highly contested spaces, and fierce competition for control and definition surfaced on almost every facet of the business. Typical of U.S. development, evolving law stood in the midst of the contention. Legislatures strove to alter common law to meet current circumstances as railroads themselves sought to fashion suitable company rules, leaving the courts to judge what was reasonable under the law (Welke 2001, 3–4; Minter 1995, 995).

As many saw it, decorum demanded separate spaces to maintain, or at least protect, distinctions in social status. Thus first-class cars and ladies cars cordoned off persons of means and the "fairer sex" deemed "ladies" from the hoi polloi relegated to cars that allowed smoking and often vulgar or obscene language (Welke 2000, 267–68; Mack 1999, 381–82). Further, in speaking of separate cars, it is well to note that in regard to race such cars existed before the Civil War and originated outside the South. The phrase "Jim Crow" was first attached to arrangements for seating and service in Massachusetts in 1841, during agitation over railroad cars set aside there for blacks (Davis 2012, 144; Ruchames 1956, 61–75).

9. 1881 Tenn. Pub. Acts ch. 155.

10. 1881 Tenn. Pub. Acts ch. 155.

11. "An act to define the rights, duties, and liabilities of inn keepers, common carriers and proprietors." 1875 Tenn. Pub. Acts ch. 130 (March 24, 1875). For traditional common-law liabilities related to travel services, see Sandoval-Strausz 2005, 53–94.

SEPARATION REPLACED EXCLUSION

Tennessee did not start the shift from exclusion to segregation. That began in the wake of the Thirteenth Amendment, submitted to the states in February 1865 and ratified that December. Outlawing slavery ended legal distinctions that excluded blacks not in service from access to all manner of public places and provisions. Before the Civil War, enslaved persons accompanied their holders to serve them in many places they had no access to on their own. Blacks had little or no independent access to public transportation in most slave states, and no access to public institutions such as hospitals, poor houses, and orphanages (Rabinowitz 1974, 327–54).

Separation by exclusion had been a fact with slavery. In the wake of the Thirteenth Amendment, three ex-Confederate states scurried to maintain the fact of separation on railroads by enacting exclusion by law. Mississippi rushed in November 1865 to ban blacks from railroad cars set apart for whites, providing for penalties of fine and imprisonment.[12] Florida's legislature in December 1865 banned blacks from "intruding" in any public vehicle set apart for whites. Further, revealing its aim to extend racial rules that prevailed during slavery, the Florida law provided for punishing by pillorying or whipping.[13]

The Florida and Mississippi acts were part of the notorious 1865–1866 Black Codes in the former slave states designed to limit blacks' post-abolition personal rights (Stephenson 1909, 181–82). The federal Civil Rights Act of April 1866 outlawed many of those provisions.[14] Texas in November 1866 suggested part of the approach Tennessee would adopt in 1881 when it mandated that railroads in the state "attach to each passenger train run by said company one car for the special accommodation of Freedmen."[15] The effect eliminated exclusion by providing blacks a place to ride.

Eliminating exclusion became a necessary change in postbellum public policy, but separation came with it to preserve the caste division of the color line. Rather than admit blacks to existing facilities that served whites, separate public facilities sprang up across the South in 1866 and 1867. Nashville and New Orleans, for example, provided separate streetcars for blacks. Before the war, blacks were simply excluded. Similarly, Nashville opened separate schools for blacks in 1867, for the first time admitting them to its public schools. No discussion of equal accommodations accompanied such separate facilities (Rabinowitz 1976, 326–28; Rabinowitz 1974, 327–54).

"SEPARATE BUT EQUAL" TO SATISFY EQUAL PROTECTION

Tennessee's 1881 separate car act also exhibited a shift in law occasioned by the U.S. Supreme Court's 1880 decision in *Strauder v. West Virginia*, holding that state laws excluding blacks from public services violated the Fourteenth Amendment's Equal Protection Clause.[16] And more than exclusion was on the table in 1881. The federal Civil Rights Act of 1875 had provided that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."[17]

Outlawing exclusion proved too much for whites who insisted on being separate. They demanded the right to discriminate or at least not

12. 1865 Miss. Laws 231, 232 (November 21, 1865).

13. 1865 Fla. Laws 25 (December 1865).

14. "An Act to protect all Persons in the United States in their Civil Rights and liberties, and furnish the Means of their Vindication." 14 Stat. 27 (April 9, 1866).

15. "An act requiring railroad companies to provide convenient accommodations for Freedmen." 1866 Tex. Gen. Laws 97 (November 6, 1866).

16. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

17. "An act to protect all citizens in their civil and legal rights." 18 Stat. 335, sec. 1 (March 1, 1875)

to be legally liable for discriminating. The Supreme Court obliged in its 1883 decision in the *Civil Rights Cases*. With Justice John Marshall Harlan alone dissenting, the Court quashed the 1875 Civil Rights Act holding that federal prohibitions could not reach private racial discrimination.[18] That decision allowed railroads—such as the Memphis & Charleston Railroad, which had been a party in the 1883 case—to discriminate as they pleased, in the absence of state regulation (Horan 1972). Perhaps foreseeing the demise of federal antidiscrimination protections for nonwhites, Tennessee had enacted regulations to provide "colored passengers . . . the same conveniences, and subject to the same rules" in railroad transportation in the state.[19]

Beginning with Florida in 1887, other southern states joined Tennessee with separate car acts. Their focus fell, however, on separating colored and white passengers. Access was no longer the focus, as it had been in the 1881 Tennessee statute. Separation was the exclusive mandate. Equal accommodations got little more than lip service. The duplicative cost of maintaining dual accommodations doomed equality; indeed, the cost factor would prove telling for all segregated facilities, from transportation to education. Railroads and other public service providers balked at duplicative cost as southern state laws turned former matters of custom and practice into binding constraints that carried civil and criminal penalties (Osborn 2002, 395; Roback 1986, 894). Supply and demand in that political economy time and again left blacks with less than whites.

The growing wave of separate car acts stirred fundamental objections to the underlying matter of the state's asserting and delegating authority over personal identity—arbitrarily deciding who individuals were and where they belonged. Enter Louisiana with its exceptional history of multiple colonial regimes and demographic intermixture. Its incomparable Francophone community of colored Creoles had much to say in opposition to the state's escalating racial decrees. To challenge the 1890 Separate Car Act, they organized the Comité de Citoyens, which chose Homer A. Plessy to make their case against what they viewed as the state's arrogation of their right to self-identity (Davis 2012, 157–74).

PLESSY'S ARGUMENTS FOR IDENTITY

In simplest terms, the legal case constructed to represent Homer Plessy boiled down to who got to say who he was. That was the focus when the Comité de Citoyens recruited Plessy and hired his local lawyer James C. Walker and his primary appellate advocate Albion W. Tourgée to challenge the constitutionality of the state's nonwhite-white binary assignment of race and, in fact, the concept of race itself. In his brief on Plessy's behalf, Tourgée asked the U.S. Supreme Court rhetorically, "Is not the question of race, scientifically considered, very often impossible to determination?" (Davis 2012, 195). With that and other interrogatories posed against the state, Tourgée disputed Louisiana's authority to determine not simply Plessy's race but his personal identity (Davis 2012, 157–74; 2004, 1–41; Kurland and Gunther 1975, 13:33–57).

Tourgée argued that Louisiana's 1890 separate car act not only arrogated authority to determine personal identity but also overreached in asserting authority to delegate that power to private persons, in that it directed railway officials "to assign each passenger to the coach or compartment used for the race to which the passenger belongs."[20] That authorized officials to say who was who and where the law allowed

18. *Civil Rights Cases*, 109 U.S. 3 (1883).

19. 1881 Tenn. Pub. Acts ch. 155. Notice the decision in *Munn v. Illinois*, 94 U.S. 113 (1876), allowing state regulation of grain elevators and, by extension, railroads on a public use theory. This position was overturned in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), which held that under the Constitution's Commerce Clause, Article I, Sec. 8, cl. 3, states lacked authority to regulate interstate railroads. The Court had adopted a similar position earlier in *Hall v. DeCuir*, 95 U.S. 485 (1877), treating riverboat transportation, in invalidating an 1868 Louisiana statute prohibiting racial discrimination on all common carriers, whether interstate or intrastate, operating in the state.

20. 1890 La. Acts 152, sec. 2.

their passage. Usually such decisions fell on conductors, as they were the immediate operating officers on trains. They were responsible for making sure all was in good order, from the equipment to the passengers; and that responsibility entailed assuring that all on the train complied with applicable laws, rules, and regulations (Gibbard 2017, 53–56).

Having the state delegate an assignment added another bother to the trainmen's tasks. For the most part, however, sorting passengers in the state-mandated nonwhite-white binary posed no problem. No questions arose with most passengers: their self-identification matched their publicly perceived identity—that is, their appearance. Their choice of coach or compartment fit their appearance and so tended to satisfy all concerned, leaving neither the conductor nor anyone else to say anything in regard to who they said they were in complying with the law. No burdens arose for or with such passengers.

Yet passengers' coach or compartment selection necessarily concerned conductors and other railway officials because the law made them liable for allowing any passenger to use "a coach or compartment which by race he does not belong." For such a violation, company officers and directors were liable for a misdemeanor and a fine of not less than $100 nor more than $500. Conductors were liable for a fine of not less than $25 nor more than $50.[21]

Liability lay further because the law recognized that railroad officials might misidentify a passenger by race. "Any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs" faced a fine of $25 or imprisonment for not more than twenty days. A like punishment faced any passenger who insisted on using "a coach or compartment which by race he does not belong." That was the penalty Homer Plessy faced.[22]

So identifying passengers by race was no trivial matter. But how was such identification to be made? Were there creditable indicia or instructions? Was the identification wholly subjective, based on the perception of a conductor or other railroad official? Were there objective facts or principles to guide such identification? Tourgée pounded such questions in pressing Plessy's case to the Supreme Court. "Is the officer of a railroad competent to decide the question of race?" he demanded. "What evidence" were railroad officials supposed to use in "the absence of statutory definition," Tourgée pressed further, emphasizing that Louisiana then had no law defining or describing racial character (Davis 2012, 195; Kurland and Gunther 1975, 13:33–57).

Tourgée's arguments for Plessy outlined points later developed as the foundation for critical race theory (Jones 2006, 1–26; Crenshaw et al. 1996, xi–xxxii). Recognizing white privilege, Tourgée defined identity as property and denial of identity as a deprivation of that property and of liberty, in that such a denial reduced personal autonomy, independence, and integrity. It followed then that state action involved in such deprivation denied or abridged the constitutional equality implicit in the freedom the Thirteenth Amendment established when it prohibited slavery and explicit in the Fourteenth Amendment's protections of personal rights, including those of life, liberty, property, and equal protection of the laws, Tourgée maintained (Davis 2004, 29–41; Kurland and Gunther 1975, 13:33–57).

Tourgée's arguments in Plessy's case reached beyond race to touch the nexus of state power over the complex of personal identity. So much in regard to an individual centered on identity, Tourgée pointed out. Life, or at least quality of life, depended largely on identity, he noted. Was the state to have unlimited control over so crucial a lever of life? Were there no substantive restraints to state action? Did not the absence of such restraints return the law of slavery by allowing unfettered state control of persons? What interests, if any, permitted the state "to assort its citizens" in categories such as "colored" or "white" that lacked any standards-based measures? Tourgée's questions for the Court were many (Davis 2012, 195–198; Kurland and Gunther 1975, 13:33–57).

21. 1890 La. Acts 152, sec. 3.

22. 1890 La. Acts 152, sec. 2.

PLESSY CHALLENGED THE BINARY

The challenge Plessy posed was not about deciding a place along a color line. It was more fundamental. It was about who had the power to draw lines and, ultimately, decide his personal identity: Plessy or the state? Did Louisiana have authority to say who Plessy was or to empower others to say who he was, regardless of who Plessy said he was? Did the state have authority to decide his choices of identity, to tell him he had to say he was one or another in a binary? Did Plessy have no right to determine his own choices of personal identity?

Throughout his arrest, arraignment, and appeals, Plessy rejected Louisiana's binary determination, refusing to identify himself as colored or white. He persisted in his pleadings to the Supreme Court. When obliged there to identify himself in relation to the challenged act, he stated simply he was "seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him."[23] He was not claiming to be white. He rejected that box. Nor was he claiming to be colored. He rejected that box too. He asserted autonomy, claiming self-identification as a right beyond state encroachment. And he did so not simply for himself but for the community of persons describing themselves as "*gens de couleur*," Francophone Creole people of color, whom he represented (Davis 2012, 1–3).

Plessy's challenge embodied personal agency in self-identity. He purposely refused to identify himself according to the nonwhite-white binary Louisiana's Separate Car Act decreed. His reported violation of the act arose only through collusion. The East Louisiana Railroad conductor who confronted Plessy and the City of New Orleans police detective who arrested him for violating the act did so only by prior arrangement, for nothing distinguished Plessy on either side of the binary. He had been pointed out to officials for the purpose of challenging the law decreeing that someone other than himself got to say who he was (Davis 2012, 1–3, 157).

Plessy's case contested the state's interest in imposing on his person a binary racial identity, and it flatly refuted the state's authority to criminalize him for refusing to conform to the state's binary mandate. It disputed state authority to usurp autonomy to self-identify and to authorize private persons to do so. It was one thing for the state to say who Plessy was; it was by far another for the state to authorize others, such as train conductors, to say who he was. And what was the basis of their decision to be—appearance, ancestry, the white supremacist one-drop rule adopted during slavery? The rule and laws based on it were dismissive, carrying the taint of hypodescent that relegated children to their nonwhite ancestors' assigned lower status, with no recognition of their white ancestry (Davis 1991, 4–6).

Louisiana's separate car act, and those of its southern sister states with their binary racial schemes, erased from legal recognition mixed elements of identity Plessy and his fellow *gens de couleur* held as essential to their identity as individuals and as members of a community (Davis 2012, 165–70; Dunbar-Nelson 2009). Such laws were denials of Plessy and his people's culture and ancestry, desecrating the identity that was their heritage. That was what Plessy's challenge to the statute represented. It was not about him. It was not about one but about many; it was about individuality and lineage, about the here and now, about forebears and progeny. The challenge was to be free of the dictates and coercion in the state's usurping Plessy and his people's autonomy to recognize themselves and say who they were for themselves.

THE MAJORITY'S SHORT SHRIFT

Despite the pleadings for Plessy, the U.S. Supreme Court hardly recognized identity as an issue for it to consider in the case. The 7–1 Court majority showed no interest in any complexity on the subject the pleadings introduced. Rather, they viewed personal identity as simple and straightforward. If contestable, identity was in the majority's mind a matter of legal definition not personal expression. Chief Justice Roger B. Taney seemingly settled the point in his 1846 pronouncement in *United States v. Rogers*, holding personal identity immutable in

23. *Plessy*, 163 U.S. at 541.

terms of race and more.[24] No person had freedom to declare who they were outside of the law's sanction, Taney had ruled (Berger 2004, 1960–65, 2008–17).

The majority effectively dismissed the arguments for Plessy about state power and personal identity and scarcely considered the Louisiana Separate Car Act's connections to slavery and the prohibitions of the Thirteenth Amendment. It gave only slightly more consideration to his Fourteenth Amendment arguments that insisted on U.S. constitutional protection for him to determine and express his own identity as rights guaranteed by his U.S. citizenship and by his personal rights to "life, liberty, or property" and "equal protection of the laws."

The arguments for Plessy maintained that the Fourteenth Amendment prohibited the state from abridging or depriving him of his self-determined identity. Further, the arguments maintained that a single, unwavering standard circumscribed the state's reach to Plessy's personal identity. As Tourgée argued to the Court and as Justice Harlan agreed in his dissent, the only significant identity the state had constitutional authority to recognize in regard to the exercise of rights was Plessy's citizenship (Davis 2012, 195–98).

Going beyond the Constitution, the arguments for Plessy rested on fundamental human rights to self-definition of personal identity. The arguments asserted autonomy but rested on no atomistic or simplistic vision. Nor were they any nihilistic denial of state interests. The arguments for Plessy were narrowly focused. They attacked only restrictions the nonwhite-white binary imposed. They skirted the broad state power to recognize, regulate, or enumerate persons within the state's jurisdiction. The exercise of such power reached back to antiquity, after all. The ancient Babylonians, Chinese, Egyptians, Greeks, Romans, and others classified and documented populations for such purposes as food inventorying, taxing, and registering males eligible for military service (Whitby 2020, 23–54; Alterman 1969). The census authorized in the Constitution and inaugurated in 1790 developed an increasingly extensive statistical system with equally extensive controversies attached to being essentially a political undertaking (Skerry 2000, 43–79). But Plessy's challenge was not about general data-gathering—about age, ownership, or residence, for example. Rather, the arguments for Plessy challenged the Court to grasp the importance of reaching beyond convention or the status quo to protect personal autonomy and freedom. They pushed the Court to see the white supremacist binary for what it was, arbitrary and oppressive.

The justices in Plessy's case took no cognizance of any human rights norms, as typical of U.S. courts historically (Bayefsky and Fitzpatrick 1992, 2–5). The U.S. rule of law offered no alternatives: in a challenge to a statute, such as Louisiana's Separate Car Act, a court was obliged to presume the act constitutional. As the challenging party, Plessy bore the burden of proving the act constitutionally unreasonable (Nachbar 2016, 1627–690). Thus the weight of the case rested on the state's side, and in the majority's view the arguments for Plessy wholly failed to budge that weight. The majority saw nothing procedurally or substantively wrong with the Louisiana legislation.

Not even a hint of substantive due process protections against state interference with fundamental rights appeared anywhere in the *Plessy* majority's consideration, as would famously appear less than ten years later in the Court's 5–4 decision in *Lochner v. New York* (1905).[25] The individual economic liberty to contract that the majority found in *Lochner* to deny state authority to restrict the working hours of bakers found no parallel in the individual freedom of personal identity for which Plessy argued. In *Lochner*, the majority found that the Fourteenth Amendment guarantee of liberty protected the self-determination of bakery owners and workers (Bernstein 2011, 1–7). In *Plessy*, the Court's 7–1 majority found no Fourteenth Amendment protection for self-determination of personal identity.

The *Plessy* Court understandably took no judicial notice of the psychological or interpersonal aspects of personal identity the case sug-

24. *United States v. Rogers*, 45 U.S. 567 (1846).

25. *Lochner v. New York*, 198 U.S. 45 (1905).

gested. At best, such aspects were novel in legal consideration long after the 1890s. Boston attorney Samuel D. Warren and future U.S. Supreme Court Justice Louis D. Brandeis's 1890 *Harvard Law Review* article "The Right to Privacy" had broached some aspects of U.S. law's need to provide protections and remedies for the intangible character of human personality, including identity. In phrasing Tourgée might well have uttered before the Court in 1896, Warren and Brandeis opened their article declaring, "That the individual shall have full protection in person and in property is a principle as old as the common law," as they proceeded to call for "a recognition of man's spiritual nature, of his feelings" and noted that "the term 'property' has grown to comprise every form of possession—tangible, as well as intangible" (Warren and Brandeis 1890, 193–94; Kurland and Gunther 1975, 13:33–57; Davis 2012, 194–98). Protecting Plessy's self-determination of his identity as integral to his person and property was, in fact, the fundamental legal principle of his case. In dismissing that argument, the Court's *Plessy* decision bequeathed a legacy of U.S. law's indifference and injustice based on personal identity (Davis 2004, 1–41).

SCRUTINIZING THE STATE POLICE POWER

For the *Plessy* Court, the fundamental legal principle in the case was whether Louisiana's Separate Car Act conformed to the U.S. constitutional concept called the state police power doctrine. Extending as an element of state sovereignty and acknowledged in the Tenth Amendment,[26] the doctrine recognized state authority to legislate for its inhabitants' health, safety, welfare, and morals. The influential nineteenth-century jurist Lemuel Shaw, chief justice of the Massachusetts Supreme Judicial Court (1830–1860), in 1851 articulated the framework of the power in responding to the question "What are the just powers of the legislature to limit, control, or regulate?"[27] U.S. Supreme Court Justice Joseph McKenna in 1911 in writing for a unanimous Court upheld state power to legislate for "health, safety, morals, or general welfare," declaring simply that "the police power is but another name for the power of government."[28]

In the *Plessy* majority's eyes, Louisiana's mandating separation of nonwhites and whites on railroads in the state easily passed its constitutional test. The purpose announced in the act's title, "to promote the comfort of passengers," sat solidly within the police power definition and was "a reasonable regulation" that fell within the state legislature's "large discretion," to which the Court gave explicit deference. The majority discerned no element of "annoyance or oppression" in the application of the act, nor did they see it as aimed at "a particular class." They deemed the legislation "enacted in good faith for the promotion of the public good." It was not arbitrary or unjust discrimination in their view, because the statute had done no more than codify "the established usages, customs and traditions of the people," Justice Henry Billings Brown wrote.[29]

The *Plessy* majority took notice of "natural affinities" and the "voluntary consent of individuals" in endorsing the view New York State's highest court in 1883 expressed on racial discrimination and separation, saying that laws were best when they did not "conflict with the general sentiment of the community."[30] When a state "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 and performed all of the functions respecting social

26. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. Amend. X (1791).

27. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 65 (1851).

28. *Mutual Loan Co. v. Martell*, 22 U.S. 225, 233 (1911) (upholding against Fourteenth Amendment due process and equal protection challenges a Massachusetts statute restricting assignment of wages, holding the state legislation was not "arbitrary and unreasonable").

29. *Plessy*, 163 U.S. at 550.

30. *Plessy*, 163 U.S. at 551, quoting with approval, *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883).

advantages with which it is endowed," the New York Court of Appeals had ruled in upholding racially separate public schools in Brooklyn.[31]

Using a theory called "equal application," which captured much of the Court's equal protection jurisprudence until the 1950s and 1960s, the *Plessy* majority held that the Louisiana statute was not racially discriminatory in that it treated nonwhites and whites alike (Green 2009, 219–310; Williams 2007, 1207–214). The statute excluded no one from rail travel when it mandated "equal but separate accommodations for the white and colored races."[32] Neither race nor identity were a bar, which appeared the majority's only concern. They turned a blind eye to the exclusion that in fact occurred in coaches and compartments, viewing the segregation there as applicable alike to all and thus impartial or at least as not legally objectionable.

Not only did the majority see nothing wrong with Louisiana's separate car act, it also explicitly took judicial notice of the existence of "social prejudices" and accepted that nonwhites stood as the object of such prejudices. More than merely consenting to the operation of such prejudices, the majority denied law's reach to, or possible remedy for, the resulting discrimination, explicitly rejecting what it described as the proposition that "social prejudices may be overcome by legislation."[33]

More pointedly, the majority rejected any claim that prejudice arising from notions of white supremacy related to appearance in the form of race, color, or previous condition of bondage could be "justly regarded as imposing any badge of slavery or servitude."[34] Justice Brown sealed the majority's position by quoting approvingly Justice Joseph P. Bradley's dismissive declaration in the 1883 *Civil Rights Cases* that "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make."[35]

DISMISSING PERSONAL AUTONOMY OVER IDENTITY

Asserting the limits of the law to redress or remedy racial discrimination, the Court majority also boldly asserted the power of law to identify persons by race. The last paragraph of Justice Brown's majority opinion offered curt notice of the arguments for Plessy's claim of personal autonomy in challenging state power over personal identity in general and racial identity in particular. Brown conceded that identity "may undoubtedly become a question of importance." But not for the Court or, at least, not in Plessy's case. The majority refused to countenance in any way the concept of race as insubstantial. They accepted race as a reality and with it the white supremacist binary. If there were a question as to whether Plessy "belongs to the white or colored race," in the majority's view that was for the laws of Louisiana to determine, as such questions were "to be determined under the laws of each State," the Court concluded.[36]

Even Justice Harlan in his powerful, prescient dissent hardly touched state control of identity. He disparaged Louisiana's nonwhite-white binary only to the degree that his own intolerance of Chinese allowed no place for them (Chin 1996, 151–82). He decried the Louisiana statute for providing "a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race" were denied that right.[37] Such

31. *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883).

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

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

34. *Plessy*, 163 U.S. at 542.

35. *Plessy*, 163 U.S. at 543, quoting with approval *Civil Rights Cases*, 109 U.S. at 24.

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

37. *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting). On Justice Harlan's intolerance toward the Chinese, further note his concurring in Chief Justice Melville Fuller's dissent in *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898), that "the children of Chinese born in this country do not, ipso facto, become citizens of the United States."

an outcome belied reasonableness in Harlan's view as the statute purported to provide noncitizens privileges and rights denied to citizens. And there he took his stand: Louisiana's separate car act failed because it was unreasonable and thus unconstitutional, as he illustrated with a litany of examples.[38]

Justice Harlan bottomed his argument on citizenship. His view was that "the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States." No state had any authority under the Constitution "to regulate civil rights, common to all citizens, upon the basis of race," Harlan famously declared (Scott 2010, 324–27).[39]

Adult male citizenship was the sole identity that concerned Justice Harlan. To him it was what mattered most in Plessy's case. Louisiana had violated rights attached to citizenship in violation of the Reconstruction Amendments that "established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and," Harlan maintained, "placed our free institutions upon the broad and sure foundation of the equality of all men before the law."[40]

A REASONABLE DISMISSAL?

Justice Harlan demanded stricter scrutiny of Plessy's case, but the Court majority saw no need. The state police power question was all the majority saw the need to consider, and that required only a simple twofold test, as their reasonableness inquiry earlier demonstrated. First, did the act touch and concern the health, safety, welfare, or morals of the state's inhabitants? That, after all, was the definition of the state police power. The Louisiana legislature anticipated and aimed to answer that question in titling the statute one "to promote the comfort of passengers." Second was whether the act conformed to the doctrine of reasonableness. As courts commonly explained the doctrine, it posited that the legislation needed "in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, the general welfare."[41] The test was clearly circular in repeating its terms without identifying any fixed limits or guide for judgment.

Writing for the *Plessy* majority, Justice Brown added a bit more definiteness to the standard for constitutional unreasonableness in stating that "every exercise of the police power must . . . extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[42] His use of the word *class* reflected an acceptance of the nonwhite-white binary at the core of Plessy's challenge. That acceptance was the basis for allowing an equal application doctrine to satisfy the Fourteenth Amendment's Equal Protection Clause. At least on that point, it settled the constitutionality of a law, such as a separate car act, that imposed the same regulations and restraints on both nonwhites and whites.

The reasonableness standard provided none of the scrutiny for which Plessy pleaded. In using it, the Court majority granted the Louisiana legislature broad discretion, accepting without question its "good faith" in enacting its Separate Car Act. The majority raised no questions about its actual application or the results it achieved. Nor did they inquire into the state's interests or objectives in decreeing a nonwhite-white binary. The standard allowed the majority to ratify what Justice Brown described as "the established usages, customs and tradi-

38. *Plessy*, 163 U.S. at 552–64.

39. *Plessy*, 163 U.S. at 563.

40. *Plessy*, 163 U.S. at 563.

41. *Ex parte R. F. Quarg*, 149 Cal. 79, 81 (1906), holding invalid a state statute criminalizing ticket scalping—"sale [of] any ticket or tickets to any theater or other public place of amusement at a price in excess of that charged originally by the management of such theater or public place of amusement"—because "the legislation in question is an unwarrantable interference with the inherent and constitutional rights of individuals" (80, 83).

42. *Plessy*, 163 U.S. at 550.

tions of the people."[43] Doing so effectively stripped away public protections for minority persons or positions that challenged the majority. Moreover, in refusing to recognize any fundamental right in Plessy's pleas for personal autonomy over his identity, the Court's *Plessy* decision bequeathed a legacy of indifference and injustice arising from arbitrary and oppressive governmental labeling of individuals.

CONSEQUENCES OF DISMISSAL

The *Plessy* decision settled U.S. law into a position where the state had unchallenged control of personal identity, leaving individuals without self-definition or self-determination in regard to their identities. Further, it denied legal recognition of particular personal identities and of diverse personal identities, and left all persons on an unequal footing in regard to identity. It elevated state authority over personal self-possession and extended slave law's unbalanced disregard for the person, lineage, and connections in self-selected communities (Marshall 2014, 4–22). It simply sanctioned state determinism.

The decision left a legacy of physical appearance discrimination, not only by the state but also by private persons cloaked with state authority. It left the state to decide who was who and to delegate that power to others, making personal identity turn on observers' subjective perceptions. Others got to say who a person was and what a person was permitted to have or do on the basis of how the person appeared to them. The decision thus sanctioned what has come to be termed *lookism*—one of the most pervasive but denied prejudices (Safire 2000, 25; Tietje and Cresap 2005, 31; Mahajan 2007, 163; Rhode 2014).

The arguments for Plessy contended for his identity to be self-determined and taken in its entirety, encompassing his self-realized lived experience in a distinct community with a fully recognized ancestry. His identity was not nonwhite or colored; it was not white; it did not fit into the state-decreed binary, the arguments insisted (Davis 2012, 157–74). The Court's dismissal of Plessy's arguments for personal autonomy over self-identification left a legacy of practices denying personal autonomy in regard to sexual identity, sexual intercourse, and sexual orientation (Hellum 2018, chap. 1). It left the state to dictate who's who and who could do what on the basis of the state's definition of who the state decreed they were.

The *Plessy* Court's decision arose from its refusal to scrutinize its thinking about biology and blood, about its assumptions of the thing it thought of as race and the state's control of bodies marked by race. Considerations of personal identity connected to privacy were clearly nowhere in the Court's thinking, just as privacy as a right was then nascent, at best, in the law's development (Richardson 2017, chap. 2, app. 11). Everywhere in the decision, Warren and Brandeis's admonitions went wanting on the "necessity from time to time to define anew the exact nature and extent of such protection" of person and property as accorded with individual integrity (Warren and Brandeis 1890, 193).

Infamous practices of Jim Crow segregation followed from the Court's decision, as the companion articles in this *RSF* journal issue detail. As the most often focused-on extension of *Plessy*, the decision's continued reach into public schooling at all levels has remained prominent in its legacy. Douglas Reed (2021, this issue) shows "the influence of colorblind logics in public education." Also the data analysis of Dania Francis and William Darity (2021, this issue) shows how the legacy of racialized tracking perpetuates segregation within schools. Such demonstrations reflect on the standing of the 1954 *Brown* decision to outlaw *Plessy*'s reach to public education. Yet, as Timothy Diette and coauthors (2021, this issue) establish, much remains to be understood about what the *Brown*-initiated school desegregation really did and did not do. But the *Plessy* decision reached far beyond schoolrooms. In revisiting *Plessy*'s legacy, Leland Ware (2021, this issue) exposes the decision as a foundation for a federally facilitated system of residential segregation and exclusion. Jason Reece (2021, this issue) adds a perspective on *Plessy*'s impact on contemporary policies controlling real estate. All of these continuing lived experiences reflect *Plessy*'s enduring legacy of discrimination on the basis of

43. *Plessy*, 163 U.S. at 550.

racial identity. Such experiences persist, as Paru Shah and Robert Smith (2021, this issue) illustrate in their Wisconsin case study of contemporary voter identification campaigns.

Over the years, piecemeal attacks on the *Plessy* decision have failed to reach the Court's core rationale about the right of personal identity. Instead, attacks have largely targeted time, place, and manner of discrimination based on state-determined identity. Consider landmarks in countering state authority to deny or restrict personal rights based on racial identity, Court decisions such as *Morgan v. Virginia* (1946), *Brown v. Board of Education* (1954), *Boynton v. Virginia* (1960), *McLaughlan v. Florida* (1964), and *Loving v. Virginia* (1967). *Morgan* and *Boynton* outlawed racial segregation on interstate common carriers and accommodations.[44] *Brown* limited itself to pronouncing "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[45] *McLaughlan* and *Loving* each treated sexual intimacy, *McLaughlan* in the context of cohabitation and *Loving* in marriage.[46] In both cases the Court pronounced racial classification suspect—but no more. State power to classify remained unchecked. The decisions were, of course, of immense importance. The *Loving* decision concluded that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[47] That finally dismissed the misguided equal application doctrine (Williams 2007, 1208–12).

None of the landmarks reached the core of state authority to classify or identify persons. Statutory responses to *Plessy*'s legacy of Jim Crow and its remnants, such as the historic Civil Rights Act of 1964, have tended to codify socially designated markers and failed to reach fundamental issues of identity (Heitzeg 2015, 54–79).[48] Recognition has focused largely on characteristics presumed immutable—such as race, color, sex, and national origin. Religion has stood most prominently among the basic categories as belonging to personal identity by individual choice. Such antidiscrimination measures aimed to reach segregation's broad expanse in public and private practice but at most merely tangentially touched state power to classify personal identity. The so-called race-neutral movement in U.S. law has left unchallenged the legitimacy of the *Plessy* decision's legacy of state-imposed and state-sanctioned invasions of the right to personal identity (Kuznicki 2009, 417–64).

A WAY FORWARD

The failure in U.S. law to reach the issues of personal identity broached in *Plessy* stands out starkly when compared with European progress to protect the right of personal identity. Increasingly robust applications of the European Convention for the Protection of Human Rights and Fundamental Freedoms, since 1953, when the 1950 agreement went into force, have illustrated how protections for individual identities attach to and operate in the context of human rights to which the arguments for Plessy pointed.[49] Particularly Articles 8 and 14, treating privacy and discrimination, respectively, have provided for authentic recognition of self, which the legacy of *Plessy* has obstructed in the United States.

The European Court of Human Rights' (ECHR) recognition of and protection for the right of choice to enable and empower personal identity runs in opposition to the state determination the *Plessy* decision sanctioned for personal identity in the United States, particularly for individuals and communities deemed nonwhite or counter-conventional. Admittedly,

44. *Morgan v. Virginia*, 328 U.S. 373 (1946); *Boynton v. Virginia*, 364 U.S. 454 (1960).

45. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954).

46. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967).

47. *Loving v. Virginia*, 388 U.S. at 11–12.

48. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).

49. Convention for the Protection of Human Rights and Fundamental Freedoms. Details of Treaty No. 005 (Rome, April 11, 1950; March 9, 1953), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005 (accessed September 10, 2020).

majority community and cultural norms have presented challenges for the ECHR, just as Christian, heterosexual, male-dominated white supremacy has in the United States. Yet the ECHR has pushed back, not always successfully, against criminalizing anyone for appearance or for "looking" a particular way (Marshall 2014, 214–15).[50]

The *Plessy* Court's refusal to check state authority over personal identity bequeathed a legacy that has continued to extend persistent and intractable inequalities throughout the U.S. economy and society. Such state control reaches back to slavery, when states exercised authority not merely to control but also to obliterate personal identity, refusing by law to identify a class of human beings as persons and insisting instead on identifying them as mere property, denying them all self-determination and self-identification. That authority affirmed the doctrine of white supremacy to decree and direct identity as a matter of ancestry, appearance, or any other basis the state decided. The Court's preserving that authority has allowed arbitrary governmental decisions to intrude on personal self-determination in complex and nuanced ways with messy and uneven results.

Confronting *Plessy*'s legacy of legally sanctioned discriminations that reduce or render personal identity in favor of state-defined categories and classes demands a reassessment in U.S. law of the concept of personal identity and the attached value of individual autonomy. What compelling state interest required Louisiana to tell Homer Plessy who he was and to deny him any right to say who he was? The fictive binary of race is only one facet of the clash between state dictation and self-determination of personal identity.

Wholesale reassessment of governmental categorizing has long been necessary (Caplan and Torpey 2001). Multiplying category options to disguise the persistence of racial demarcation has failed to address articulation of the governmental interests that compel such use of specific categories for personal identity. Since the first census, in 1790, the political and popular contention over categorization within the federal statistical system has underscored both increasing diversity in the U.S. population and movements to assert personal autonomy over individual identity.

The Russell Sage Foundation's 2002 collection *The New Race Question: How the Census Counts Multiracial Individuals* documented and illustrated the complex of tensions attached to governmental categorizations (Perlmann and Waters 2002). Moreover, what governmental purposes does checking what boxes serve? (Prewitt 2013; Linehan 2000, 43–72; Dyson 2004, 387–420). What, for instance, is the governmental interest in defining and directing categories that create sex-segregated spaces? Scrutinizing the agenda underlying structuring and sustaining categories for personal identity has long been overdue, as anticlassification and antisubordination proponents have maintained (Balkin and Siegel 2002, 1–17; Siegel 2004, 1470–547; Epstein 2017, 433–72).

The arguments for Plessy exposed the fiction of race as an inherent and immutable reality and state imposition of personal identity in a racial binary as a violation of fundamental rights. The progress of time since 1896 has increasingly eroded essentialist concepts of im-

50. European Court of Human Rights, *SAS v. France*, 60 EHRR 11 (2015), prominently illustrated for many the failure of Convention protections, as the ECHR upheld France's Law no. 2010-1192 of October 11, 2010, that banned "wearing clothing designed to conceal one's face in public places," against the challenge of a twenty-three-year-old female French national who described herself as "a devout Muslim" and argued that her wearing a full face veil (niqab) was within her Convention Articles 8 and 9 rights, and further, that the ban violated her Convention rights to private life, freedom of religion, freedom of expression, and her right not to be discriminated against. The court majority found that the law "has an objective and reasonable justification" and could be regarded as "necessary in a democratic society," and further, that it "can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'" (at 58–59). Reasoning that "less restrictive measures" were available, the dissent argued that the French measure "cannot readily be reconciled with the Convention's restrictive catalog of grounds for interference with basic human rights . . . [and] has therefore been a violation of Articles 8 and 9 of the Convention" (at 66–67).

mutable characteristics (Rainier 2012, 1–13; Ortiz 1993, 1833–58). What about a person in today's world or tomorrow's is essential or immutable? Consider traditional markers beyond the construct of race or the concept of gender: what facial or other features of appearance or anatomy are unchangeable with evolving technology, science, and social acceptance?

U.S. law needs to come to grips with more than changing technology, however; it needs to reflect both the complexity of identity formation and presentation and the realities of the intersectionalities of overlapping identities and the discriminations they may engender. Throughout the momentous civil rights movement of the 1940s through the 1960s too little attention attached to state control of personal identity. Presumptive links between anatomy, appearance, and identity were often simply unchallenged in law or were rarely remarked upon. Like the majority and dissent in *Plessy*, courts and lawmakers have too often routinely accepted racial and other personal identification as given or immutable, accepting state designated identifiers such as race as fact rather than as social construct. And not race alone. Gender and sexual identity have also fallen in a similar binary and fixed regime.

State authority to identify and categorize individuals and to direct their actions and interactions on the basis of such identities and categories has marked *Plessy*'s most insidious legacy. That in no way discounts the horrors and injustice the "separate but equal" doctrine produced and prolonged as they have continued to manifest themselves with reemergent vigor approaching the third decade of the twenty-first century. *Plessy*'s legacy in regard to identity has further been insidious in that its harms have persisted in characteristically "flying under the radar," as the saying goes.

Too seldom have recollections of *Plessy* included recognition of its implications for personal agency and autonomy over identity. Struggles over racial identity led the way in challenging for the right of self-definition, but at the forefront of the struggle in the twenty-first century has been the right to define gender identity. The arguments of biology and birth long used in pseudo-definitions of race have stood squarely in opposition to the right to define gender identity. The International Bill of Gender Rights adopted in 1993 directly displays the issues in declaring that "Individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned at birth sex, or initial gender role" (Feinberg 1996, app.; Alston 1999, 329).

To reestablish a birthright of personal autonomy over identity free of state subordination requires reforming U.S. law to recognize and accept the individuality of human diversity. Such a process requires abolishing state authority to arbitrarily assign personal identity by decree. Progress toward such a result may well begin with reassessing governmental identification categories. The radical feminist legal scholar Catharine A. MacKinnon pointed toward a positive direction decades ago in pushing to transform legal thinking about sexual harassment of working women. In classifying identity, MacKinnon wrote, framers and judges of U.S. law need to weigh "whether the policy or practice integrally contributes to the maintenance of an underclass or a deprived position" (1979, 117).

REFERENCES

Alston, Andrew. 1999. "Transgender Rights as Legal Rights." *Canterbury Law Review* 7:329–42.

Alterman, Hyman. 1969. *Counting People: The Census in History*. New York: Harcourt.

Balkin, Jack M., and Reva B. Siegel. 2002. "The American Civil Rights Tradition: Anticlassification or Antisubordination." *Issues in Legal Scholarship* 1(1): 1–17.

Bayefsky, Anne, and Joan Fitzpatrick. 1992. "International Human Rights Law in United States Courts: A Comparative Perspective." *Michigan Journal of International Law* 14(1): 1–89.

Berger, Bethany R. 2004. "Power Over This Unfortunate Race: Race, Politics and Indian Law in *United States v. Rogers*." *William and Mary Law Review* 45(5): 1957–2052.

Bernstein, David E. 2011. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*. Chicago: University of Chicago Press.

Caplan, Jane, and John Torpey. 2001. *Documenting Individual Identity: The Development of State Practices in the Modern World*. Princeton: Princeton University Press.

Chin, Gabriel J. 1996. "The Plessy Myth: Justice Harlan and the Chinese Cases." *Iowa Law Review* 82(1): 151–82.

Crenshaw, Kimberlé, Neil Gotanda, Gary Peller, and Kendall Thomas. 1996. *Critical Race Theory: The Key Writings That Formed the Movement*. New York: The New Press.

Davis, F. James. 1991. *Who Is Black: One Nation's Definition*. University Park: Pennsylvania State University Press.

Davis, Thomas J. 2002. "Race, Identity and the Law*: Plessy v. Ferguson* (1896)." In *Race on Trial: Law and Justice in American History*, edited by Annette Gordon-Reed. New York: Oxford University Press.

———. 2004. "More than Segregation, Racial Identity: The Neglected Question in *Plessy v. Ferguson*." *Washington and Lee Race and Ethnic Ancestry Law Journal* 10(1): 1–41.

———. 2012. *Plessy v. Ferguson*. Santa Barbara, Calif.: ABC-CLIO.

———. 2016. *History of African Americans*. Santa Barbara, Calif.: ABC-CLIO.

Diette, Timothy M., Darrick Hamilton, Arthur H. Goldsmith, and William A. Darity Jr. 2021. "Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 166–86. DOI: 10.7758/RSF.2021.7.1.10.

Dunbar-Nelson, Alice Moore. 2009. "People of Color in Louisiana." In *Creole: The History and Legacy of Louisiana's Free People of Color*, edited by Sybil Kein. Baton Rouge: Louisiana State University Press.

Dyson, Maurice R. 2004. "Multiracial Identity, Monoracial Authenticity & Racial Privacy: Toward an Adequate Theory of Multiracial Resistance." *Michigan Journal of Race & Law* 9(2): 387–420.

Epstein, Daniel C. 2017. "Black and White and Gray All Over: How Anticlassification Theory Can Endorse Race-Based Affirmative Action Policies." *University of Pennsylvania Journal of Constitutional Law* 20(2): 433–72.

Feinberg, Leslie. 1996. *Transgender Warriors: Making History from Joan of Arc to Dennis Rodman*. Boston, Mass.: Beacon Press.

Francis, Dania V., and William A. Darity Jr. 2021. "Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 187–202. DOI: 10.7758/RSF.2021.7.1.11.

Gibbard, Frank. 2017. "Defamed on a Train: Conductors Behaving Badly." *Colorado Lawyer* 46(6): 53–56.

Green, Christopher R. 2009. "The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application." *George Mason University Civil Rights Law Journal* 19(2): 219–310.

Heitzeg, Nancy A. 2015. "On the Occasion of the 50th Anniversary of the Civil Rights Act of 1964: Persistent White Supremacy, Relentless Anti-Blackness, and the Limits of the Law." *Hamline Journal of Public Law & Policy* 36(1): 54–79.

Hellum, Anne. 2018. *Human Rights, Sexual Orientation, and Gender Identity*. New York: Routledge.

Horan, Michael J. 1972. "Political Economy and Social Life as Influences on Judicial Policymaking: The *Civil Rights Cases* of 1883." *American Journal Legal History* 16(1): 71–86.

Jones, Bernie D. 2006. "When Critical Race Theory Meets Legal History." *Rutgers Race & the Law Review* 8(1): 1–26.

Kennedy, Randall L. 2004. *Interracial Intimacies: Sex, Marriage, Identity, and Adoption*. New York: Vintage Books.

Kurland, Philip B., and Gerald Gunther. 1975. *Landmark Briefs and Arguments of the Supreme Court of the United States*. Washington, D.C.: University Publications of America.

Kuznicki, Jason. 2009. "Never Neutral State: American Race Relations and Government Power." *Cato Journal* 29(3): 417–54.

Linehan, Patrick F. 2000. "Thinking Outside the Box: The Multiracial Category and Its Implications for Race Identity Development." *Howard Law Journal* 44(1): 43–72.

Mack, Kenneth W. 1999. "Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905." *Law & Social Inquiry* 24(2): 377–410.

MacKinnon, Catharine A. 1979. *Sexual Harassment of Working Women: A Case of Sex Discrimination*. New Haven, Conn.: Yale University Press.

Mahajan, Ritu. 2007. "The Naked Truth: Appearance Discrimination, Employment, and the Law." *Asian American Law Journal* 14(6): 165–203.

Marshall, Jill. 2014. *Human Rights Law and Personal Identity*. London: Routledge.

Minter, Patricia Hagler. 1995. "The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth Century South." *Chicago-Kent Law Review* 70(3) 993–1009.

Nachbar, Thomas B. 2016. "The Rationality of Rational Basis Review." *Virginia Law Review* 102(7): 1627–90.

Ortiz, David R. 1993. "Creating Controversy: Essentialism and Constructivism in the Politics of Gay Identity." *Virginia Law Review* 79(7): 1833–58.

Osborn, William S. 2002. "Curtains for Jim Crow: Law, Race, and the Texas Railroads." *Southwestern Historical Quarterly* 105(3): 393–427.

Perlmann, Joel, and Mary C. Waters. 2002. *The New Race Question: How the Census Counts Multiracial Individuals*. New York: Russell Sage Foundation.

Prewitt, Kenneth. 2013. *What Is Your Race? The Census and Our Flawed Efforts to Classify Americans*. Princeton N.J.: Princeton University Press.

Rabinowitz, Howard N. 1974. "From Exclusion to Segregation: Health and Welfare Services for Southern Blacks, 1865–1890." *Social Service Review* 48(3): 327–54.

———. 1976. "From Exclusion to Segregation: Southern Race Relations, 1865–1890." *Journal of American History* 63(2): 325–50.

Rainier, Elias. 2012. "Identity, Law, and Essentialism: What's Love Got to Do with Same-Sex Marriage." *The Crit: A Critical Studies Journal* 6(1): 1–13.

Reece, Jason. 2021. "Confronting the Legacy of 'Separate but Equal': Can the History of Race, Real Estate, and Discrimination Engage and Inform Contemporary Policy?" *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 110–33. DOI: 10.7758/RSF.2021.7.1.07.

Reed, Douglas S. 2021. "Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 148–65. DOI: 10.7758/RSF.2021.7.1.09.

Rhode, Deborah L. 2014. "Hooters Hires Based on Looks. So Do Many Companies. And There's No Law Against It." *New Republic*, August 30. Accessed September 10, 2020. https://newrepublic.com/article/118683/why-we-need-law-protect-against-appearance-discrimination.

Richardson, Megan. 2017. *The Right to Privacy: Origins and Influence of a Nineteen Century Idea*. New York: Cambridge University Press.

Roback, Jennifer. 1986. "The Political Economy of Segregation: The Case of Segregated Streetcars." *Journal of Economic History* 46(4): 893–917.

Ruchames, Louis. 1956. "Jim Crow Railroads in Massachusetts." *American Quarterly* 8(1): 61–75.

Safire, William. 2000. "The Way We Live Now: 8–27–00: On Language: Lookism." *New York Times Magazine*, August 27.

Sandoval-Strausz, Andrew K. 2005. "Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America." *Law and History Review* 23(1): 53–94.

Scott, Grinsell. 2010. "The Prejudice of Caste: The Misreading of Justice Harlan and the Ascendancy of Anticlassification." *Michigan Journal of Race & Law* 15(2): 317–68.

Shah, Paru, and Robert S. Smith. 2021. "Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 134–46. DOI: 10.7758/RSF.2021.7.1.08.

Siegel, Reva B. 2004. "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*." *Harvard Law Review* 117(5): 1470–547.

Skerry, Peter. 2000. *Counting on the Census? Race, Group Identity, and the Evasion of Politics*. Washington, D.C.: Brookings Institution Press.

Stephenson, Gilbert Thomas. 1909. "The Separation of the Races in Public Conveyances." *American Political Science Review* 3(2): 180–204.

Tietje, Louis, and Steven Cresap. 2005. "Is Lookism Unjust? The History and Ethics of Aesthetics and Public Policy Implications." *Journal of Libertarian Studies* 19(2): 31–50.

Ware, Leland. 2021. "*Plessy*'s Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 92–109. DOI: 10.7758/RSF.2021.7.1.06.

Warren, Samuel D., and Louis D. Brandeis. 1890. "The Right to Privacy." *Harvard Law Review* 4(5): 193–200.

Welke, Barbara Y. 2000. "Beyond *Plessy*: Space, Status, and Race in the Era of Jim Crow." *Utah Law Review* 2000(2): 267–300.

———. 2001. *Recasting American Liberty: Gender, Race, Law and the Railroad Revolution, 1865–1920*. New York: Cambridge University Press.

Whitby, Andrew. 2020. *The Sum of the People: How the Census Has Shaped Nations*. New York: Basic Books.

Williams, Jeffrey A. 2007. "The Equal Application Defense." *University of Pennsylvania Journal of Constitutional Law* 9(5): 1207–32.

Segregated Spaces and Separated Races: The Relationship Between State-Sanctioned Violence, Place, and Black Identity

TIA SHERÈE GAYNOR, SEONG C. KANG, AND BRIAN N. WILLIAMS

This article explores segregation and the social status of black people, focusing in particular on the ripple effects of Plessy v. Ferguson *on policing in the United States. Specifically, we ask how the legacy of* Plessy v. Ferguson *has helped maintain state-sanctioned racially based violence. We draw from Mapping Police Violence, which compiles data on the number of police-involved homicides in large police departments in the United States from 2013 to 2017. Using these data, we analyze the relationship between space and the number of deaths of black people caused by police. The findings reveal a positive association between segregated communities, the percentage of black people in a population, and the number of police killings of black people. This study provides a unique opportunity to examine the impact that segregation and place have on state-sanctioned violence, particularly for those who identify or are identified as black.*

Keywords: policing, state violence, race, segregation

The history of the United States has been tainted by the social construction of race and reflects the calamities and conquests of society's tribulations. Rhetorically, America was founded on the principle that all men are created equal, thereby placing value on individual rights and freedoms. In practice, however, the nation began as a slaveholding society (Wil-

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liams et al. 2016). Consequently, many Africans in America were, in the words of Jefferson Davis, "stamped from the beginning" (Kendi 2016). This conundrum resulted in an American dilemma and a lasting legacy of socially constructed and politically reinforced practices that limited access to space along racial lines (Myrdal 1944).

Segregation was "a brutal regime of systematic degradation and oppression that was all encompassing in the South and widely practiced in the North" long before the *Plessy v. Ferguson* Supreme Court ruling in 1896 (Ware 2018, vii).[1] The *Plessy* decision, however, did far more than simply uphold segregation. The ruling doubled down on the constitutionality of "separate but equal," advancing racial segregation as public policy and formalizing a race-based caste system in the United States. With the *Plessy* decision, the system of Jim Crow thrived without legal scrutiny and allowed for racial segregation to persist while setting the course for long-standing residential segregation across the country (Alexander 2012).

The racial caste system maintained by *Plessy* and strengthened with Jim Crow fostered the perfect political and social conditions for the continuance of residential segregation. Even after the passage of civil rights acts in the nineteenth and twentieth centuries, African Americans and black people continued to overwhelmingly be relegated to the worst parts of town (Alexander 2012). Further, *Plessy* "confirmed state power to assign personal identity in classes with consequences of inclusion and exclusion" (Davis 2021, this issue). Thus *Plessy*'s ever-present legacy is shaped by the long-term effects of segregation on the social status of black people and African Americans.

The *Plessy* effect, according to Lorenzo Morris (1979), offers the guise of equality in broad and elusive ways but avoids the actual implementation of policy and practices that provide tangible and meaningful equality for black people. From the blatant discrimination in the case's decision to the notion of colorblindness in the dissent, *Plessy* has set a precedent allowing for public agencies and actors to use racial hierarchy as a tool to explicitly and implicitly segregate public spaces. *Plessy*'s ripple effect is felt across time and in all aspects of life, including but not limited to inequitable access to quality public and higher education (Henry 1998), public housing (Peel, Pickett, and Buehl 1970) and the criminalization and incarceration of black people (Brewer and Heitzeg 2008). Ultimately, *Plessy*'s legacy reinforces difference as deviance, deeming black people unfit and thus socially illegitimate (Hutchison 2011). The *Plessy* effect advances Darwinistic thought of blackness as inferior and thus requiring and deserving of administrative and policy burdens.

The unspoken "rules" of residential segregation dictated one's worthiness and sent strong messages of who belonged where, hoarding opportunity "and asset accumulation for whites while confining aggrieved communities of color to impoverished, under-resourced and criminogenic neighborhoods" (Lipsitz 2015, 119). Consequently, the negative social constructions of criminality that were linked to blackness also became associated with neighborhoods deemed appropriate for black and African American residence. The result was the overpolicing of such communities and the continuance of social control of black and brown bodies.

The *Plessy* decision left a legacy that defines blackness in stark opposition to whiteness—"a status conferring distinct—yet conjoined—social, political, and economic freedoms across a vertiginously unequal property order" (Singh 2014, 1019). Whereas whiteness "suggested a relationship between differential human valuation and materially valuable access" (Singh 2014, 1019), blackness signified a "legally sanctioned inferior status" (Alexander 2012, 195). The negative status conferred on blackness affected the environments where black people lived and resulted in the underpolicing or tolerating of certain crimes in black neighborhoods while simultaneously overpolicing these same communities through the use of excessive force and violence against residents (Hawkins and Thomas 2013). This duality crafted a context in which state-sanctioned racially based violence is not only condoned but also led by police officials and agencies.

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

This article explores the long-term effects of segregation on black and African American people in the United States. Although we do not seek to make direct connections between the legal concept of "separate but equal" on train cars in Louisiana, as Justice Henry Billings Brown wrote for the majority in the *Plessy* decision, we do offer that the ripple effect of whiteness as the dominant race—as maintained by the Supreme Court's decision and thus its legacy—has shaped today's institutions including but not limited to housing and policing. Specifically, we examine the relationship between the legacy of *Plessy v. Ferguson* and policing institutions in the United States by analyzing state-sanctioned violence perpetrated against black people. Bearing on the notions of whiteness and blackness in the context of space (Alexander 2012; Singh 2014), we distinguish between the concepts of "black space"—a "destitute and fearsome locality"—and "white space"—predominantly white and off-limit spaces for black people—as presented by Elijah Anderson (2015, 10). Our proposition is that the creation and perpetuation of black space with the "second-class status" construction of blackness (Ware 2021, this issue) has resulted in a disproportionate number of black people killed by law enforcement actors.

To test this proposition, we drew data from Mapping Police Violence, an advocacy organization that collected data on the number of known police killings across the United States. We used a sample of the number of killings in the hundred largest U.S. cities by population for the years 2013 to 2017. We used these data, coupled with additional demographic and socioeconomic factors, to analyze the factors associated with an increase in the number of black people killed by police. Through these analyses, we seek to understand the role of race and place in the number of police homicides of black people. Overall, this study provides a unique opportunity to draw correlations between space, policing, race, and state-sanctioned violence.

DESEGREGATED, YET STILL SEPARATE

In 1917, the United States Supreme Court ended legalized residential segregation with *Buchanan v. Warley* (Rice 1968, 179).[2] Yet the legacy of the *Plessy* ruling, rendered merely twenty years earlier, was long lasting and far reaching, aiding segregation to endure as the customary practice in states across the country. Just nine years after the *Buchanan* decision, the Supreme Court authorized the use of restrictive covenants in Washington, D.C., with *Corrigan v. Buckley*.[3] Residential segregation ordinances were passed in northern states such as Maryland, racially restrictive covenants were deployed on a wide scale by the real estate industry, and redlining practices associated property values with the racial composition of neighborhoods (Ware 2021, this issue). In 1948, although not overturning *Corrigan*, the *Shelley v. Kraemer* decision determined racially restrictive covenants unenforceable and *Jones v. Mayer Co.* (1968) barred racial discrimination in both public and private sales or rentals of property.[4] Although seemingly advancing housing equality, the Supreme Court also made it more difficult to prove housing discrimination. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), the Court determined that racially discriminatory intent was required to bring such a claim and imposed major limitations on the application of disparate impact in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* (2015).[5]

Narratives advanced after World War II conceived of segregation as comprising low-income

2. *Buchanan v. Warley*, 245 U.S. 60 (1917).

3. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

4. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Jones v. Mayer Co.*, 392 U.S. 409 (1968).

5. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 4219 U.S. 252 (1977); *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. (2015). The Supreme Court's *Village* ruling, in favor of the plaintiffs, was a small, and limited, win for fair housing advocates. Justice Clarence Thomas' strongly worded dissent has the potential to affect future decisions as the Court shifts toward a more conservative orientation.

"urban" centers and affluent suburban rings. Contemporary residential segregation, however, has evolved to become more complex. William Goldsmith and Edward Blakely argue that this complexity is akin to a checkerboard of "prosperity and poverty" (2010, 112). These complex checkerboard spaces suggest that though the city center and suburban rings may be composed of diverse social groups and income strata, sharp geographic variations by neighborhood in income, race, ethnicity, and advantage still distinguish daily opportunities and experiences. In this regard, segregation is at the level where people live their daily lives. Even in seemingly diverse communities such as San Francisco and New York City, variations in neighborhood wealth create economically, educationally, and racially segregated neighborhoods.

The intersection of race, economic status, and educational attainment in communities across the United States operates to either promote or limit opportunities for mobility and residential choice. The more affluent can choose a housing location based on personal preferences, neighborhood amenities, and accessibility. Those with lower incomes, however, have less choice and are limited to passively moving out of declining neighborhoods as opposed to actively choosing neighborhoods to move into based on individual or familial preferences (Goldsmith and Blakely 2010). For many, the existence of segregated neighborhoods is not a surprising phenomenon. This is evidenced by the fact that the affluent flee declining neighborhoods and those of lower economic status remain in areas that are economically shrinking or stagnant as well as characterized by underfunded schools and environmental pollutants (Goldsmith and Blakely 2010).

The variability in U.S. community characteristics is considerable and the customary segregation associated with such variation is the embodiment of what Manning Marable (2000) calls the "underdeveloped black America." Marable argues that the economic and political history of the United States has led to the systematic underdevelopment of black people. Specifically, segregation, caused by a racial caste system, has resulted in unemployment, underemployment, economic exploitation, and political disenfranchisement. Michelle Alexander (2012) adds that racial segregation is what relegated black people to the worst communities, creating fertile ground for the underdevelopment of black neighborhoods and people across the country.[6]

Through legal segregation advanced by the *Plessy* ruling, these communities received far fewer governmental resources and services than white communities, and the black residents living in these neighborhoods were seen as inferior (Alexander 2012). For black people in the United States, the notion of "separate but equal" was nonexistent. Legal and customary segregation expanded racial stigmata in the United States. The notion of blackness and the communities where black people lived became synonymous with dilapidation, poverty, and crime. Such racial stigmata persist today and operate to maintain customary segregation along racial, economic, and residential lines.

Stereotypes of unworthiness spurred by economic, racial, and residential segregation have also operated to conflate race and crime, creating seemingly natural associations between the two. The everyday lived experiences of those living in lower-income communities are rarely seen in plain sight. In fact, customary segregation isolates those living in lower-income communities from their more affluent neighbors and vice versa. Such conflations of race and crime have led to associations of wrongdoing and criminality that are almost exclusively linked to racial identity and economic status, yet understood as truth. Notions of increased crime and criminal proclivity combined with the directive to control illegal activity have resulted in the overpolicing of communities perceived to be associated with higher crime rates (Weitzer, Tuch, and Skogan 2008). As a result,

6. Historically, American racism operates to maintain a myth of race-based hierarchy in which white people are the most dominant group and all other groups experience varying degrees of dominance. Thus, for many social indicators race and economic status are generally negatively correlated. This discussion does not, however, suggest that all black communities are dilapidated and crime prone.

individuals living in overwhelmingly black and low-income communities find themselves interacting with police at much greater rates than those who can make active residential decisions.

RACE, SPACE, AND SOCIAL CONTROL: THE REALM OF LAW ENFORCEMENT

Since the founding of the United States, two criminal justice systems existed—one for black people and one for white people. Enslaved Africans and later black Americans were forced to navigate both formal law enforcement, by way of policing organizations, and the informal terroristic social control practices of the Ku Klux Klan and lynching mobs (Ware 2018). Those (suspected of) committing a crime or engaged in behavior considered unacceptable for black people were often forced to deal with these systems. Operating often in tandem, these formal and informal enforcement practices embodied violence and intimidation as social control tactics designed to keep black people in their metaphorical and physical spaces. Lynching is "an act of homicidal aggression committed by one people against another through mob action for the purpose of suppressing either some tendency in the latter to rise from an accommodated position of subordination or for subjugating them further to some lower social status" (Cox 1945, 576). In the United States, the act of lynching served as an attack against the entire black community rather than an individual, in that, "the destruction of almost any Negro will serve the purpose as well as that of some particular one" and operated as "the most powerful and convincing form of racial repression" (Cox 1945, 581). Formal law enforcement agencies as well as local and state judicial systems offered limited protections against lynching and lynch mobs, reifying to black people that the criminal legal system in the United States was not designed to protect their rights or to apply the law in their favor (Cox 1945). Whites, in general, were the beneficiaries of the system. Yet in the context of the labor-intensive economy in the South that depended on black workers, limited protection was afforded in the early 1900s to black people in some instances to stem the possible out-migration of African Americans to the North (Beck and Tolnay 1990; Tolnay and Beck 1995). Nonetheless, the two-tiered justice system also operated to reinforce the tension between black communities and law enforcement agencies. Tensions between the police and racial-ethnic minority communities is a persistent problem across the globe. This has created what has been described as "nervous landscapes," where spatial separation between races has been legislated and implemented (Byrne 2003a). Consequently, segregation has emerged as the spatial face of racism (Byrne 2003b) and this policy has been enforced by formal (institutional or organizational) and informal (individual and collective or communal) approaches to social control.

Similar to what occurs in other settings across the globe, the current state of police-community relations in the United States is in a perilous position. Recent, highly publicized encounters between police and black people have exacerbated already low levels of public trust and confidence in local law enforcement. Tensions between the police and the black community have been and continue to be one of the most pressing issues facing U.S. police organizations (Williams 1998; Barak et al. 2001; Websdale 2001; Culver 2004; Hawkins and Thomas 2013). Such tensions arise from the interactive relationship between race, place, and policing (Bass 2001). As true of residential segregation, the history of policing in the United States has been tainted by legally sanctioned, disparate service delivery and tarnished by the enforcement of racially motivated laws and statutes. The present-day relationship between black communities and the police is one affected by the historical legacies of slavery, segregation, discrimination, and mass incarceration, all part and parcel of racism at the formal and informal levels (Russell 1998; Barak et al. 2001; Alexander 2012; Rothstein 2017; Owusu-Bempah 2017). The antecedent of these policies and practices has been the social construction of race.

Race is a historical social construction yet it continues to be a significant feature of U.S. society, especially because it reinforces and fortifies the lasting, stigmatized legacy of blackness (West 1994). Glenn Loury (2002) uses three dimensions to emphasize the historical germane-

ness of race and surmises the impact it has in contemporary society. The first is the relative ease in identifying the other, the second is the relative unchanging quality of this construct, and the third is the social significance of this designation. Loury's concept of race is a by-product of social construction, yet bolsters an additional construct of stigma. Stigma has been described as a bodily sign that exposes something unusual and negative about the moral status of the signifier (Goffman 1963).

The coupling of race and stigma—in terms of blackness—resulted in an insidious theory of black criminality that has transcended continental boundaries and time and has been embraced by secular and sacred institutions (Gabbidon 2015; Williams et al. 2016). From the writings of John Van Evrie (1861), the U.S. Supreme Court (1860), Cesare Lombroso (2006), and others, a notion that blacks were biologically inferior and innately criminalistic advanced. Hence they advocated for the mass incarceration and enhanced criminal penalties for black people, a practice echoed by U.S. public institutions as part of the country's war on drugs (Alexander 2012). These punitive measures are part and parcel of state-sanctioned violence.

The stigma that accompanied blackness as a race in the socially constructed and politically reinforced global and U.S. society of yesterday, resulted in Billy Close's (1997) conception of black *crimmythology*—a biased social cognition that continues to affect Americans of African descent. Black crimmythology is used to describe the numerous faulty myths and pseudo-scientific facts, historically and contemporarily, which have been generated by racist and/or misguided individuals to explain black criminality. It projects blackness as a defect best understood as a manifestation of an immutable, transgenerational, and permanent condition of black inferiority (Close 1997).

These historical notions of blackness, black criminality, and black crimmythology reinforce and propel into the future Howard Becker's "different as deviant narrative" (1963), while continuing to color in shades of black and brown the portrait of America's symbolic assailant (Skolnick 1998). This lasting legacy of blackness projects all of the assumed dangers and criminality of what Elijah Anderson (2012) has described as the "iconic ghetto"—an individual black male who symbolizes the violent, impoverished, crime-prone, and drug-infested environment of black people. This ascription of ghetto manifested in the black body continues to persist as U.S. society evolves away from the segregated black and white spaces of our past and into the relatively more cosmopolitan or, seemingly, racially diverse spaces or enclaves of our present and projected future (Anderson 2011, 2012, 2015).

Franklin Zimring (2017) conducted a comprehensive study of police use of lethal force in the United States. Simultaneously, he explored the phenomena of violence by police against civilians and violence by civilians toward police. His findings reveal that of the 1,100 killings by police in the United States in 2015, the death rates for African American and Native Americans were twice their respective shares of the population and, among other things, when police officers felt threatened or attacked, they were more likely to fatally shoot a civilian. This was particularly the case when officers were alone and feared that a gun was involved. Zimring's research calls into question the theoretical civility associated with our contemporary times and our cosmopolitan canopies. In particular, his findings seem to reinforce the notion that blackness endures as a powerful source of stereotype, prejudice, and discrimination that impacts the American psyche. Today's reminders seem ever present—the deaths of Breonna Taylor, Ahmaud Arbery, George Floyd, and the all-too-often social media postings where black people are assumed dangerous as they engage in mundane tasks (exercising, bird-watching, golfing)—of the threat and promise that random and arbitrary violence can occur when black people venture beyond the traditional "black space" into the "white space" and the cosmopolitan canopy (Anderson 2011, 2015). This brings into focus a poignant observation of Loury: the need to continue exploring "the enigma of the stigma" and not necessarily "the figment of the pigment" (2002, 143). Moreover, this sets the stage for our inquiry.

METHODOLOGY

This study examines how the creation and maintenance of black space with second-class status—one aspect of *Plessy*'s legacy—has led to a disproportionate number of black people killed by police in predominantly black communities. We operationalize state-sanctioned violence as the actions of U.S. law enforcement actors that result in a disproportionately high rate of deaths of black people. Based on a literature review, we argue that black space is associated with a higher rate of police homicides of black people. Primary data are derived from Mapping Police Violence, an advocacy organization that has collected data on the number of known police killings across the country. Although Mapping Police Violence currently provides data for the years between 2013 and 2019, the 2017 data were the most recent available to us at the time of this study. We used a sample of the number of killings in the hundred largest U.S. cities by population, ranging from around two hundred thousand to about eight million residents. These data are limited to cities, not to metropolitan areas or a larger geographic unit. According to the organization, a police-involved homicide refers to a case in which an on-duty or off-duty police officer either intentionally or accidentally kills a person in the process of chasing, beating, arresting, restraining, shooting, pepper spraying, Tasering, or harming the person by other use-of-force actions (Mapping Police Violence 2019). Each homicide is coded by the police department and the gender and race of the victim. The dataset was assembled based on data from the three largest, most comprehensive crowdsourced databases on police killings in the country: FatalEncounters.org, the U.S. Police Shootings Database, and KilledbyPolice.net. The majority of the data are derived from KilledbyPolice.net because, according to Mapping Police Violence, this was fact-checked by Nate Silver's FiveThirtyEight research organization. KilledByPolice.net aggregates links from major social media sites to news articles on police-related killings, and FiveThirtyEight selected a random sample of approximately 10 percent of the links from the original news stories (Fischer-Baum and Johri 2014). Reuben Fischer-Baum and Al Johri find that all of the links were accurate and that 93 percent of reported incidents were either incidents in which the victims were fatally shot by on-duty officers or the victims died after being restrained by force in some way by law enforcement.

Mapping Police Violence undertook extensive data gathering of its own to improve the accuracy and completeness of the data from the three crowdsourced databases on police killings in the United States. Using cases from FatalEncounters.org, the U.S. Police Shootings Database, and KilledbyPolice.net as the starting point, the organization used social media, newspaper accounts, obituaries, police reports, and other sources to confirm the occurrence of a death and identify the race of approximately 90 percent of victims. In addition, it used other crowdsourced databases, media sources, and criminal records databases, and performed additional inquiries to fill in additional information, such as whether the victim was armed or unarmed. While some police killings may not have been reported, such as those unreported by the media, Mapping Police Violence estimates that their figures capture approximately 93 percent of all police killings since 2013.

We supplement the analysis with additional data derived from the U.S. Census Bureau American Community Survey and FBI Uniform Crime Reports from 2013 to 2017.

Variables

The dependent variable is a count of the number of police homicide victims who were black or African American for each year between 2013 and 2017. Count data follow a Poisson distribution, and the descriptive statistics and a significant likelihood ratio test suggest that a Poisson binomial model is the best estimator. To account for unequal exposure to the number of black homicides by police in each city, we account for the total number of homicides by each police department as the exposure variable in the model.

We include several independent variables that represent "black space." The first measure is a binary indicator coded 1 if a state is a former Confederate state (yes=1; no=0). Although the "separate but equal" doctrine applied to all states, and "white supremacy was institutionalized and crystallized all over the country," more

pervasive and blatant instances of segregation and discrimination were perpetuated and documented throughout southern states that coincide with the former Confederacy (powell, Myers, and Gooden 2021, this issue).

Cities with a large population of black people may be associated with a higher incidence of police violence because officers often engage in social control policing, particularly toward groups considered to be threatening the social order (Carbado 2017). We include the percentage of black population in a city to capture this expectation. Based on data availability, we also include two specific measures of residential segregation (Massey and Denton 1988). First, the black-white dissimilarity index is a measure of segregation based on the relative separation or integration of groups, specifically within the context of the black population, across all neighborhoods of a city. The second is the spatial proximity index, which measures the average of intragroup proximities for the minority and majority populations, weighted by the proportions that each group represents of the total population. For both measures, a higher score represents higher dissimilarity and more racial clustering among neighborhoods.

To improve model specification, we include the Gini index, which is a measure of income inequality operationalized as a function of the cumulative share of people from lower income to the cumulative share of income earned. A perfect 0 corresponds to perfect income equality, whereas 1 corresponds to perfect income inequality. Additionally, we include a poverty rate variable because residential segregation has led to the concentration of poverty in many communities of color (Osypuk et al. 2009). If police violence serves as a method of social control for groups that threaten the social order, communities with higher poverty rates may experience greater violence. We derive data for these variables from the U.S. Census Bureau American Community Survey for each year between 2013 and 2017.

We also include a variable for the percentage of black officers in the police department involved in the police killing. We derive this variable from the 2013 Law Enforcement Management and Administrative Statistics survey, the most recent version at the time of this study, which contains information regarding the number of full-time sworn personnel according to race. According to representative bureaucracy theory, police organizations with a higher proportion of black officers may be more prone to advocate for the interests of black citizens and to address negative behaviors such as racial profiling and use of force against minorities (Bradbury and Kellough 2011). In this regard, we argue that more black officers may represent broader efforts to create safer spaces for black people.

We control for the violent crime and the murder rate based on the assumption that police violence is a response to the level of conflict or violence that police officers face in the environment (Nicholson-Crotty, Nicholson-Crotty, and Fernandez 2017; Ouimet and Pare 2003; Weisburd et al. 2010). We also control for the population size to account for differences in jurisdiction sizes. Other studies use population to control for the fact that larger jurisdictions are more likely to face higher crime and officers face more difficulty in addressing crime problems (Felson and Eckert 2016). For this study, however, we do not propose any particular hypothesis regarding population because our sample is derived from the hundred largest U.S. cities by population. Finally, we include year dummy variables, using 2013 as the base year, to control for unobserved year-specific effects in the data.

Estimation Method

Our data consist of a panel dataset for the years 2013 to 2017. Most of the independent variables change from one year to another, but the binary variable *former Confederate state* (yes=1; no=0) is a time-invariant state-level characteristic. Also, the variable for the percentage of black officers is time variant, but because of data limitations data are only available for the year 2013. This renders it difficult to estimate the model using either a fixed-effects or a random-effects model. Thus we use a mixed-effects Poisson regression, which allows us to specify *former Confederate state* as a random intercept while modeling the percentage of black officers as fixed effects (Hsiao 2014). However, we acknowledge the limitation of the latter because we are extrapolating trends from a single year 2013 to the

Table 1. Descriptive Statistics

Variables	N	Mean	SD	Min	Max
All citizens killed	500	4.11	3.65	0	24
White	500	1.19	1.35	0	7
Black	500	1.58	2.07	0	14
Hispanic	500	0.94	1.64	0	14
Asian	500	0.10	0.36	0	4
Native American	500	0.04	0.25	0	3
Pacific Islander	500	0.02	0.14	0	1
Unknown race	500	0.24	0.72	0	7
Former Confederate state	500	0.33	0.47	0	1
Percent black population	500	21.24	17.87	0.48	81.98
Black-white dissimilarity	500	47.77	15.99	17.24	82.48
Spatial proximity	500	0.55	0.31	0.01	1.64
Gini index	500	47.81	3.86	39.13	58.34
Percent poverty	500	19.96	6.33	4.9	40.3
Percent black officers (2013)	500	14.38	14.19	0.23	62.59
Violent crime rate, per 1,000	500	20.11	10.94	0	64.54
Murder rate, per 1,000	500	0.11	0.11	0	0.6
Population	500	623,254	945,128	209,463	8,560,072

Source: Authors' tabulations.
Note: Pooled data are from 2013 to 2017 unless otherwise noted. Former Confederate states are time-invariant. Data on the proportion of black officers are available for 2013 only.

dependent variable, which spans 2013 to 2017. Therefore, we interpret the estimate for the percentage of black officers with caution because the coefficient may be biased. Table 1 presents the descriptive statistics on variable measurement, means, standard deviations, and scale ranges. Although it is not used in the main analysis, we include information on the number of citizens killed for other racial categories. Table 2 displays the correlation matrix for the variables.

FINDINGS

Before discussing the findings of the mixed-effects Poisson regression, we first present information regarding the number of persons killed by police relative to the total population. According to table 3, although the black population makes up only about 12.3 percent of the total population of the United States, the percentage of black homicides by police amounts to nearly 25 percent of all persons killed by police between 2013 and 2017. The numbers illustrate how the killing of black and African American people are disproportionately high relative to other racial categories.

We proceed to analyze the findings for the mixed-effects Poisson regression in table 4 to understand what factors predict the number of black homicide victims by police.

The analysis provides evidence that indicates the percentage of black population, the black-white dissimilarity index, the spatial proximity index, percent poverty, and the percentage of black officers are all significant predictors of the number of police homicides of black people. The variable *former Confederate state* is not statistically significant, suggesting that areas containing a high rate of police homicides of black people are not specific to former Confederate states. Although Jim Crow was more prevalent throughout the former Confederate states, our findings reveal no relationship between police homicides of black people and former Confederate states. This supports Goldsmith and Blakely's (2010) checkerboard analogy of segregation in that predominantly black and white spaces are likely to be segregated by

Table 2. Correlation Matrix

	1	2	3	4	5	6	7	8	9	10	11	12
1. allhomicides	1											
2. blackhomicides	0.72	1										
3. confed	−0.13	−0.06	1									
4. perblack	−0.01	0.30	0.23	1								
5. dissimilarity	0.33	0.51	0.15	0.69	1							
6. spatial	0.01	0.28	0.12	0.92	0.59	1						
7. gini	0.25	0.36	0.11	0.50	0.75	0.43	1					
8. poverty	0.08	0.16	0.01	0.57	0.51	0.49	0.50	1				
9. ftsperblack	0.04	0.29	0.22	0.89	0.67	0.84	0.59	0.52	1			
10. vltrate	−0.03	0.11	0.13	0.63	0.45	0.53	0.36	0.55	0.54	1		
11. murdrate	0.07	0.29	−0.03	0.78	0.57	0.73	0.47	0.60	0.75	0.59	1	
12. population	0.65	0.59	−0.08	0.01	0.38	0.04	0.30	0.04	0.05	−0.12	−0.04	1

Source: Authors' tabulations.

Table 3. Number of Homicides by Police Relative to Population, 2013–2017

	Population	Population (%)	Total Number Killed by Police	Killed by Police (%)
White only	197,277,789	61.46	2,998	43.85
Black only	39,445,495	12.29	1,727	25.26
Hispanic	56,510,571	17.60	1,151	16.83
American Indian, Alaska Native	2,098,763	0.65	99	1.45
Asian	16,989,540	5.29	105	1.54
Native Hawaiian, Pacific Islander	515,522	0.16	35	0.51
Other, including two or more races	8,166,727	2.54	722	10.56
Total	321,004,407	100	6837	100

Source: Authors' tabulations based on American Community Survey five-year estimates (U.S. Census Bureau 2017) and Mapping Police Violence data, 2013–2017.

adjacent neighborhoods. The next set of statistically significant findings provide indications of this trend. We find that the percentage of black population (significant at $p < .01$) and the black-white dissimilarity index (significant at $p < .01$) are positively associated with the number of police homicides of black people. A one-unit increase in the percentage of black population increases the incident rate of the dependent variable by a factor of 0.041, or 4 percent ($p < .01$), holding other variables constant. A one-unit increase in the dissimilarity index increases the incident rate of the dependent variable by a factor of 0.024, or 2 percent ($p < .01$), holding other variables constant. These findings reveal that cities that have higher populations of black people and areas characteristic of greater racial dissimilarity across neighborhoods are associated with a higher number of black people killed by police. However, although the spatial proximity index is significant, it displays a negative relationship with the number of black homicides by police, although significant at the $p < .10$ level.

Meanwhile, the correlation matrix shows that the violent crime rate (0.11) and the murder rate (0.29) display a somewhat weak positive correlation with the number of black homi-

Table 4. Mixed-Effects Poisson Regression Results, Change in Number of Black Homicides by Police, 2013–2017

Variables	Coefficients	IRR[a]
Formerly Confederate state	−0.134(0.112)	0.875(0.098)
Percent black population	0.056(0.012) ***	1.058(0.013) ***
Black-white dissimilarity	0.021(0.006) ***	1.021(0.006) ***
Spatial proximity	−0.997(0.611)*	0.369(0.226)*
Gini index	0.017(0.022)	1.017(0.022)
Percent poverty	−0.032(0.012)**	0.969(0.012) **
Percent black officers	−0.020(0.007)**	0.980(0.007) **
Violent crime rate, per 1,000	−0.001(0.005)	0.999(0.005)
Murder rate, per 1,000	−0.493(0.560)	0.611(0.342)
Population (logged)	−0.069(0.072)	0.933(0.068)
Year 2014	0.157(0.130)	1.169(0.152)
Year 2015	0.265(0.128)	1.303(0.167)*
Year 2016	0.237(0.131)	1.268(0.166)
Year 2017	0.072(0.141)	1.075(0.152)
N[b]	407	
Wald chi^2	188.95	

Source: Authors' tabulations based on American Community Survey five-year estimates (U.S. Census Bureau 2017) and Mapping Police Violence data, 2013–2017.

Note: Exposure variable (total homicides by police) not reported.

[a] Z-scores reported

[b] Exposure variable must be greater than 0; model automatically drops observations that are 0 for total homicides by police.

*p < .05; **p < .01; ***p < .001

cides by police (see table 2). The regression results show that these two variables are not statistically significant when controlling for other variables in the model. These nonsignificant findings coupled with the significant variables for the percentage of black population and the black-white dissimilarity index indicate that police homicides of black people are not driven by high crime rates. Rather, these findings suggest that black communities continue to bear a disproportionate brunt of police homicides and that racial stigmata may underlie a reason for such high figures.

The variable for percentage of black officers is negatively associated with the percentage of black people killed by police (significant at p < .05). A one-unit increase in the percentage of black officers decreases the incident rate of the dependent variable by a factor of 0.031, or 3 percent (p < .001), holding other variables constant. This indicates that having more black officers in the ranks of the police department may reduce the number of police homicides of black and African American residents. These findings lend support to some research on representative bureaucracy (see, for example, Nicholson-Crotty, Nicholson-Crotty, and Fernandez 2017) that suggest having more black officers leads to a decrease in police violence or mistreatment of people of color. In other words, adding more black officers to the personnel ranks could serve as a potential route for creating "safer" spaces in predominantly black and African American communities. However, we interpret these estimates with caution because the data for the percentage of police officers were available only for 2013 and do not account for changes in personnel from 2014 to 2017.

Meanwhile, we found that the poverty rate and the spatial proximity index display a negative relationship with the number of deaths of black citizens. Although the correlation matrix indicates that there is a weak but positive association between poverty and black homicides

by police (0.16), the regression displays a significant negative relationship when controlling for other variables. Also, spatial proximity displays a somewhat weak positive relationship, whereas the regression results suggest a significant negative relationship. These findings may be partly explained using Devon Carbado's (2017) police violence model. In this model, Carbado argues one of the dynamics of predatory policing is social control. Other studies exploring poverty in the context of policing have discussed how individuals in targeted social groups may have less access to the protections of law enforcement as a crime victim; that is, these communities may experience underpolicing (Black 1976; Gross and Mauro 1989; Sampson, Raudenbush, and Earls 1997; Pare, Felson, and Ouimet 2007). As Carbado presents, black people, as members of a vulnerable racial group, experience social control policing through practices of spatial management, monitoring, and the directing of their movements (2017). The apparent mobility of black individuals with greater economic means may, for police, challenge preconceived notions of belongingness, thus leading to greater incidents of police violence. Hence the negative relationship may be another indicator of social control policing toward black people.

DISCUSSION

The results of our statistical analysis offer insight for policy implications indicating that race and residential segregation are significant indicators of police killings of black people in the United States. These findings align with Brad Smith (2003), who determined that in cities with one hundred thousand or more residents, racial threat (measured by the proportion of black residents) was significantly related to police-caused homicides. Additionally, these results reinforce the thesis of Cornel West (1994) and the theories of Anderson (2011, 2012, 2015), respectively. Findings support the notion that race still matters and that the iconic ghetto represented by black bodies, perceptions of crime, disorder, and dystopia associated with black spaces, and the negative connotations of blackness continue to endure as powerful sources for stereotype, prejudice, discrimination, and state-sanctioned violence. Black people are more likely to be killed by police in areas where dissimilarity is greater, for example, in more segregated communities. For black people living in white spaces, spaces that are not implicitly associated with crime, their proximity to whiteness may offer increased security that those who live in black spaces do not have. Conversely, these individuals may also have to contend with their neighbors alerting police of their whereabouts because they may be deemed suspicious and out of place. In these regards, black people in the United States continue to navigate social control, as experienced by violence and intimidation by police officers and agencies, similar to their ancestors who navigated lynching mobs and white supremacist organizations.

Black people and black spaces are vilified and victimized, and the marker of "blackness" is instinctively conflated with race and criminal proclivity. Yet, much as the insightful title of Ralph Ellison's (1952) seminal work *Invisible Man* suggests, the disparate pain and suffering of black people in black spaces seem invisible—out of sight and out of mind of the body politic. To paraphrase Ellison, black people and black spaces represent figments of the public's imagination: Both are invisible because the public and the public servants charged with protecting and serving refuse to see them. Checkerboard segregated communities and the purposeful isolation of these communities from more affluent ones allows this willful ignorance to go unchallenged. Even in the twenty-first century and its prevalence of camera phones and social media, as well as the influx of videos capturing the murder of black men and women by police, the refusal to see persists. What has emerged are what Geoff Ward (2016) has poignantly theorized as *microclimates of racial meaning*—areas plagued by racial violence—both in the American past and present. This is due to the lasting legacy of race-based stigma and the consistency of racial violence through informal or formal mechanisms of social control pre- and post-*Plessy*.

Although we find black spaces are significantly associated with the killing of black people in the United States, these spaces are not specific to former Confederate states. Segregation and Jim Crow were an explicit part of the

Confederacy, though not exclusive to it, yet the relationship between police killings of black people and former Confederate states is not statistically significant. The nonsignificance of these findings goes against common perceptions about the concentration of discrimination in southern states and illustrates the pervasiveness of these practices across the country. These findings challenge discourse that aligns oppressive policing squarely with the South and realigns the narrative in a broader context relating the omnipresence of state violence against black people as a national phenomenon.

Social narratives and political arguments for tough-on-crime policies regularly link high rates of violent crime with a need for increased police presence in communities. Our findings reveal an interesting lack of a statistically significant relationship between police killings of black people and violent crime rates. The policing of black communities and police homicides, as evidenced by our research, are disproportionately higher for black people in the United States. This finding reinforces the pervasiveness of race as an indicator for police killings rather than for the rates at which violent crimes are committed. The nonsignificant finding may also offer insights for policing agencies and local governments on the current allocation of policing resources in black communities.

So, as we consider the future, where do we go from here? Roy Austin and Hiroko Dodge propose that "it is the reality blacks perceive that influences their discontent [with the police]. They [blacks] may base their expectations on the past and present of racial inequality and discrimination" (1992, 594). This notion offers important policy and practical implications for local law enforcement, especially considering the contemporary, polarized context of U.S. society and the need to formulate and implement inclusive policies and practices. In essence, local law enforcement agencies need to acknowledge their past as functional, and in some respects, intentional actors and instruments of state-sanctioned violence to support the spatial face of racism before and after the *Plessy* decision. Law enforcement also needs to acknowledge the impact these actions and inactions have had on present-day perceptions and realities. Such an acknowledgment needs to be accompanied with the recognition that the present state of discontent with police is not solely because of a few rogue officers, but more so reflective of the organizational culture of U.S. policing institutions as a whole. Most important, these institutions need to take advantage of the opportunity to leverage and learn from the past to create a brighter future that is just and constructive.

Meanwhile, one finding that lends guidance for improvement is in the negative relationship between the percentage of black officers and the number of black people killed by police. This finding may suggest that the presence of black officers in the department and in the community has some role in reducing state-sanctioned violence. Hiring more black officers may integrate nontraditional perspectives into policing policies and practices. Further, a critical mass of black police officers and their collective voice may function as advocates in advancing the interests of black communities within policing organizations while discouraging colleagues from engaging in social control policing that results in higher numbers of police killings. The broader implications are that local law enforcement agencies need to be more creative and aggressive in their attempts to diversify their departments and to repair the damage done by centuries of past police practices that supported a system of race- or ethnicity-based segregation and oppression. Likewise, police agencies and individual officers need to be sensitive to the perceptions that persist.

Franklin Zimring (2020) argues that hundreds of killings each year of civilians by police reflect a power and expertise vacuum and is a problem of governance. He highlights how procedural and jurisdictional problems coalesce and limit the effectiveness of governmental efforts to save the lives of civilians subject to lethal police force. We join Zimring in advocating for more oversight and authority by state governments and their federal counterpart over local police forces, as well as creating the infrastructure for more research that will result in action and administrative reforms to address this issue. These efforts to fill in the governance

gaps may have a positive impact on policy, practice, and the profession, and more importantly, save the lives of people.

Moreover, police agencies need to be intentional to effect change in a positive, constructive, and coproductive way. They need to become more aware of the lived experiences of those in which they are tasked to serve and be more responsive to the ever-evolving landscape of U.S. society and the resulting expectations that accompany it. These changes call for embracing a more community-oriented and culturally competent approach to policing. One approach is to promote the cocreation and coproduction of public safety by partnering with residents as they become involved as active participants in all stages of the recruitment, selection, training, promotion, and sanctioning process for police officers. Similarly, police departments need to become more responsive and transparent by embracing civilian review boards. Such an aggressive, planned, and purposeful approach would affect and adapt professional practices and services to better align with the changing landscape and resulting expectations of U.S. society.

Further, racial justice advocates suggest a shift in public budgeting policies that "defund the police." This movement asks not to eradicate policing agencies, but instead for more equitable budgeting policies by reallocating public resources from police departments to other local government and community agencies to support community safety and wellness. The defund movement is, at a fundamental level, aligned with procedural justice and fairness, which "requires administrators to ensure the due process rights of all individuals and to treat all equally" (Johnson and Svara 2011, 167). Further, procedural justice speaks to the idea of fairness that resolves disputes, allocation and reallocation of resources (possibly additional ones), the desire to actualize positive organizational change, and the facilitation of better relationships between the public and police. To assist in these efforts, agencies, organizations, and activists can leverage materials from the President's Task Force on 21st Century Policing (2015), guidelines offered by Community Oriented Policing Services, and the New Era of Public Safety Toolkit offered by the Leadership Conference on Civil and Human Rights (2019), as their guides.

CONCLUSION

Neil Websdale poignantly notes "remarkable and disturbing historical homologies among the control of African slaves in the American colonies, the regulation of freedmen and freedwomen during nineteenth-century Reconstruction and Redemption, and the close surveillance and punitiveness directed at blacks [and other minorities] in postindustrial inner cities" (2001, 8). He highlights the strained and interactive relationship that continues to exist between the African American and black communities and local law enforcement agencies. Tall, well-rooted, and established trees do cast long shadows. This reality presents a challenge and an opportunity for the profession of policing because these issues are long standing and deeply rooted. Local law enforcement today needs to understand and acknowledge how the historical legacy and practices of the police profession as instruments of state-sanctioned violence and social control still affect the perception and participation of black communities in collaborative problem-solving and the coproduction of public safety and order. Creative approaches that engender confidence and stimulate the support of historically marginalized and Othered communities can work to begin to reconcile the damage that has been done to foster a symbiotic relationship between black communities and local law enforcement. Out of the historical and contemporary darkness, light can emerge.

REFERENCES

Alexander, Michelle. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.

Anderson, Elijah. 2011. *The Cosmopolitan Canopy: Race and Civility in Everyday Life*. New York: W. W. Norton.

———. 2012. "The Iconic Ghetto." *Annals of the American Academy of Political and Social Science* 642(1): 8–24. DOI: 10.1177/0002716212446299.

———. 2015. "The White Space." *Sociology of Race and Ethnicity* 1(1): 10–21. DOI: 10.1177/2332649214561306.

Austin, Roy, and Hiroko Hayama Dodge. 1992. "De-

spair, Distrust, and Dissatisfaction Among Blacks and Women, 1973–1987." *Sociological Quarterly* 33(4): 579–98.

Barak, Gregg, Jeanne M. Flavin, and Paul S. Leighton. 2001. *Class, Race, Gender, and Crime: Social Realities of Justice in America*. Los Angeles: Roxbury Publishing.

Bass, Sandra. 2001. "Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions." *Social Justice* 28(1): 156–76.

Beck, E. M., and Stewart E. Tolnay. 1990. "The Killing Fields of the Deep South: The Market for Cotton and the Lynching of Blacks, 1882–1930." *American Sociological Review* 55(4): 526–39.

Becker, Howard S. 1963. *Outsiders: Studies in the Sociology of Deviance*. New York: Free Press.

Black, Donald. 1976. *The Behavior of Law*. New York: Academic Press.

Bradbury, Mark, and J. Edward Kellough. 2011. "Representative Bureaucracy: Assessing the Evidence on Active Representation." *American Review of Public Administration* 41(2): 157–67.

Brewer, Rose M., and Nancy A. Heitzeg. 2008. "The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex." *American Behavioral Scientist* 51(5)(January): 625–44. DOI: 10.1177/0002764207307745.

Byrne, Denis R. 2003a. "Nervous Landscapes: Race and Space in Australia." *Journal of Social Archaeology* 3(2): 169–93. DOI: 10.1177/1469605303003002003.

———. 2003b. "Segregated Landscapes: The Heritage of Racial Segregation in New South Wales." *Historic Environment* 17(1): 13–17.

Carbado, Devon W. 2017. "Predatory Policing." *University of Missouri at Kansas City Law Review* 85(1): 548–73.

Close, Billy. 1997. "Toward A Resolution of the Non-Discrimination/Discrimination Thesis Debate in Criminology and Criminal Justice: Revisiting Black Criminality and Institutional Racism." Ph.D. diss., Florida State University.

Cox, Oliver Cromwell. 1945. "Lynching and the Status Quo." *Journal of Negro Education* 14(4): 576–88.

Culver, Leigh. 2004. *Adapting Police Services to New Immigration*. New York: LFB Scholarly Publishing.

Davis, Thomas J. 2021. "Who Gets to Say Who's Who? *Plessy*'s Insidious Legacy." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 32–49. DOI: 10.7758/RSF.2021.7.1.03.

Ellison, Ralph. 1952. *Invisible Man*. New York: Random House.

Felson, Marcus, and Mary A. Eckert. 2016. *Crime and Everyday Life*. Thousand Oaks, Calif.: Sage Publications.

Fischer-Baum, Reuben, and Al Johri. 2014. "Another (Much Higher) Count of Homicides by Police." *FiveThirtyEight*, August 25. Accessed September 16, 2020. http://fivethirtyeight.com/features/another-much-higher-count-of-police-homicides.

Gabbidon, Shaun. 2015. *Criminological Perspectives on Race and Crime*. New York: Routledge.

Goffman, Erving. 1963. *Stigma: Notes on the Management of Spoiled Identity*. New York: Simon and Schuster.

Goldsmith, William, and Edward Blakely. 2010. *Separate Societies: Poverty and Inequality in US Cities*. Philadelphia, Pa.: Temple University Press.

Gross, Samuel R., and Robert Mauro. 1989. *Death and Discrimination: Racial Disparities in Criminal Sentencing*. Boston, Mass.: Northeastern University Press.

Hawkins, Holmer, and Richard Thomas. 2013. "White Policing of Black Populations: A History of Race and Social Control in America." In *Out of Order? (Routledge Revival): Policing Black People*, edited by Ellis Cashmore and Eugene McLaughlin. New York: Routledge.

Henry, A'Lelia Robinson. 1998. "Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education." *Journal of Law & Education* 27(1): 47–72.

Hsiao, Cheng. 2014. *Analysis of Panel Data*. Cambridge: Cambridge University Press.

Hutchison, Harry G. 2011. "Waging War on the Unfit: From *Plessy v. Ferguson* to New Deal Labor Law." *Stanford Journal of Civil Rights & Civil Liberties* 7(1): 1–46.

Johnson, Norman J., and James H. Svara, eds. 2011. *Justice for All: Promoting Social Equity in Public Administration*. New York: M. E. Sharpe.

Kendi, Ibram X. 2016. *Stamped from the Beginning: The Definitive History of Racist Ideas in America*. New York: Nations Book.

Leadership Conference on Civil and Human Rights. *New Era of Public Safety: An Advocacy Toolkit for Fair, Safe, and Effective Community Policing*.

Washington, D.C. Accessed September 17, 2020. https://policing.civilrights.org/toolkit.

Lipsitz, George. 2015. "From Plessy to Ferguson." *Cultural Critique* 90 (Spring): 119–39.

Lombroso, Cesare. 2006. *Criminal Man*. Translated by Mary Gibson and Nicole Hahn Rafter. Durham, N.C.: Duke University Press.

Loury, Glenn. 2002. *The Anatomy of Racial Inequality*. Cambridge, Mass.: Harvard University Press.

Mapping Police Violence. 2019. "About the Data." Accessed September 17, 2020. https://mappingpoliceviolence.org/aboutthedata.

Marable, Manning. 2000. *How Capitalism Underdeveloped Black America: Problems in Race, Political Economy, and Society.* Cambridge, Mass.: South End Press.

Massey, Douglas S., and Nancy A. Denton. 1988. "The Dimensions of Residential Segregation." *Social Forces* 67(2): 281–315.

Morris, Lorenzo. 1979. *Elusive Equality: The Status of Black Americans in Higher Education*. Washington, D.C.: Howard University Press.

Myrdal, Gunnar. 1944. *An American Dilemma*, vol. 2: *The Negro Problem and Modern Democracy*. New York: Harper & Brothers.

Nicholson-Crotty, Sean, Jill Nicholson-Crotty, and Sergio Fernandez. 2017. "Will More Black Cops Matter? Officer Race and Police-Involved Homicides of Black Citizens." *Public Administration Review* 77(2): 206–16.

Osypuk, Theresa L., Sandro Galea, Nancy McArdle, and Dolores Acevedo-Garcia. 2009. "Quantifying Separate and Unequal: Racial-Ethnic Distributions of Neighborhood Poverty in Metropolitan America." *Urban Affairs Review* 45(1): 25–65.

Ouimet, Marc, and Paul-Philippe Pare. 2003. "Modelling Performance: How to Analyze the Clearance Rate." *Revue Internationale de Criminologie et de Police Technique et Scientifique* 56(1): 23–42.

Owusu-Bempah, Akwasi. 2017. "Race and Policing in Historical Context: Dehumanization and the Policing of Black People in the 21st Century." *Theoretical Criminology* 21(1): 23–34. DOI: 10.1177/1362480616677493.

Pare, Paul-Philippe, Richard B. Felson, and Marc Ouimet. 2007. "Community Variation in Crime Clearance: A Multilevel Analysis with Comments on Assessing Police Performance." *Journal of Quantitative Criminology* 23(3): 243–58.

Peel, Norman D., Garth E. Pickett, and Stephen T. Buehl. 1970. "Racial Discrimination in Public Housing Site Selection." *Stanford Law Review* 23(1): 63–147. DOI: 10.2307/1227754 .

powell, john a., Samuel L. Myers Jr., and Susan T. Gooden. 2021. "Introduction to the Issue." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 1–17. DOI: 10.7758/RSF.2021.7.1.01.

President's Task Force on 21st Century Policing. 2015. *Final Report of the President's Task Force on 21st Century Policing*. Washington: Office of Community Oriented Policing Services. Accessed September 17, 2020. https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

Rice, Roger L. 1968. "Residential Segregation by Law, 1910–1917." *Journal of Southern History* 34(2): 179–99.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America.* New York: Liveright Publishing.

Russell, Katheryn. 1998. *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment and Other Macroaggressions*. New York: New York University Press.

Sampson, Robert J., Stephen W. Raudenbush, and Felton Earls. 1997. "Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy." *Science* 277(5328): 918–24.

Singh, Nikhil P. 2014. "The Whiteness of Police." *American Quarterly* 66(4): 1091–99.

Skolnick, Jerome H. 1998. "The Color of the Law." *American Prospect* 39 (July-August): 90–96.

Smith, Brad W. 2003. "The Impact of Police Officer Diversity on Police-Caused Homicides." *Policy Studies Journal* 31(2): 147–62.

Tolnay, Stewart E., and E. M. Beck. 1995. *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930*. Champaign: University of Illinois Press.

U.S. Census Bureau. 2017. "ACS Demographic and Housing Estimates." Accessed September 17, 2020. https://data.census.gov/cedsci/table?q=population&tid=ACSDP1Y2019.DP05&hidePreview=false.

U.S. Supreme Court. 1860. *The Dred Scott Decision: Opinion of Chief Justice Taney*. New York: Van Evrie, Horton & Co. Accessed September 17, 2020. https://www.loc.gov/item/17001543.

Van Evrie, John H. 1861. *Negroes and Negro Slavery: The First an Inferior Race; the Latter its Normal Condition*. New York: Van Evrie, Horton & Co.

Ward, Geoff K. 2016. "Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts." *Wisconsin Law Review* 3:576–626.

Ware, Leland. 2018. *A Century of Segregation: Race, Class, and Disadvantage*. New York: Lexington Books.

———. 2021. "*Plessy*'s Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 92–109. DOI: 10.7758/RSF.2021.7.1.06.

Websdale, Neil. 2001. *Policing the Poor: From Slave Plantation to Public Housing*. Boston, Mass.: Northeastern University Press.

West, Cornel. 1994. *Race Matters*. New York: Vintage Books.

Weisburd, David, Badi Hasisi, Tal Jonathan, and Gali Aviv. 2010. "Terrorist Threats and Police Performance: A Study of Israeli Communities." *British Journal of Criminology* 50(4): 725–47.

Weitzer, Ronald, Steven A. Tuch, and Wesley G. Skogan. 2008. "Police-Community Relations in a Majority-Black City." *Journal of Research in Crime and Delinquency* 45(4): 398–428.

Williams, Brian N., Billy R. Close, and Seong C. Kang. 2016. "Out of the Recent Darkness and into the New Light: Managerial Implications Emerging from the Martin-Zimmerman Encounter." *Journal of Public Management & Social Policy* 23(1): 3–17. Accessed September 17, 2020. http://digitalscholarship.tsu.edu/jpmsp/vol23/iss1/2.

Williams, Brian N. 1998. *Citizen Perspectives on Community Policing: A Case Study in Athens, GA*. Albany: State University of New York Press.

Zimring, Franklin E. 2017. *When Police Kill*. Cambridge, Mass.: Harvard University Press.

———. 2020. "Police Killings as a Problem of Governance." *The Annals of the American Academy of Political and Social Science* 687(1): 114–23. DOI: 10.1177/0002716219888627.

“Separate, Therefore Equal”: American Spatial Segregation from Jim Crow to Kiryas Joel

SHAI STERN

In rejecting Plessy v. Ferguson*’s “separate but equal” doctrine in* Brown v. Board of Education*, the U.S. Supreme Court created a presumption that segregation equals discrimination. However, alongside this assertion, American space has become increasingly separate. A socio-legal analysis identifies three generations of spatial segregation in the United States and calls for recognizing the fourth generation—separate, therefore equal—in which minority communities require voluntary self-segregation to achieve equality. This fourth generation of spatial separation requires the law to embrace a protective role, by which it will defend the ability of minority communities to segregate spatially, the autonomy of individual community members, and the welfare of the society at large.*

Keywords: segregation, “separate but equal,” Kiryas Joel, ultra-Orthodox, First Amendment

Spatial segregation involves the “separation of socially defined groups in space, such that members of one group are disproportionately concentrated in a particular set of geographic units compared with other groups in the population” (Massey, Rothwell, and Domina 2009, 74). Although the segregation of social groups is present and expressed in a wide range of fields and spheres, spatial segregation carries with it the unique characteristic that every person needs a living space in the first instance. Unlike other spheres, such as education or public services, no one does not take up space. Thus, although segregation in some areas may affect sections of the population, spatial segregation affects the entire population. Second, given the physical characteristics of space, spatial segregation can be more clearly identified, diagnosed, and measured than in other spheres (Massey and Denton 1988). Third, control of space and its distribution is a prime source for the development of segregation and discrimination on other levels (Massey 1990; powell 2002; Acevedo-Garcia and Lochner 2003; Klar-

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man 2004; Myers, Darity, and Marsh 2009; Bischoff and Reardon 2014; Williams and Collins 2001). Finally, spatial separation presents unique difficulties related to the possible reparation of historical distortions (Rothstein 2017). Therefore, although spatial segregation is both influenced by and affects the separation of social groups in other spheres, its unique characteristics enable a distinct socio-legal investigation into the role of the law in establishing and maintaining spatial separation. This analysis enables the identification of three generations of American spatial segregation; in each, the law plays a different role in the construction of space. The different roles the law plays in these three generations enable the operation of different mechanisms and form a different perception of spatial justice (Soja 2010). Several caveats are important to recognize. First, this article is socio-legal and thus does not pretend to be absolute or ultimate. A socio-legal approach analyzes the law as directly linked to the analysis of the social situation to which the law applies and examines the role that the law plays in creating, maintaining, and changing the social situation (Schiff 1976). Such analysis recognizes other possible classifications and categorizations of space construction and separation in American space. Its aim is to contribute to the understanding of separation in American society in general and separation in space in particular, a perspective that enables a discussion on the various functions of law and its impact on society and space. Second, although analysis of American space cannot ignore the powerful governmental and private economic mechanisms used to preserve space separation (Gotham 2000a; Klarman 2004; Lamb 2005; Massey 2008; Brooks and Rose 2013; Rothstein 2017; Taylor 2019), the goal here is to provide a socio-legal examination of spatial processes. Thus the article does not include in-depth analysis of the mechanisms and economic measurements that have affected it. The analysis instead offers a broad-brush characterization of the role of law in each generation. In each period, instances sometimes contradict the main characteristics of the generation. These instances are discussed as part of the bigger picture.

THREE GENERATIONS OF A CONSTANT STRUGGLE BETWEEN SEPARATION AND EQUALITY

The first generation of American spatial segregation began with the founding of the United States and lasted until the Court's decision in *Plessy v. Ferguson*.[1] Over this extended period, American society underwent significant changes and transformations, both politically and economically. The decision to include this period within a single generation is based on the similarities in both the social groups involved and the characteristics of spatial separation. Throughout the period, racial subordination was prevalent in most spheres of American life (Smith 2006; Omi and Winant 2014). Relationships between social groups have been examined in a prism of slavery, its abolition, and the social and economic processes that followed abolition (Woodward and McFeely 2002, 12; Van Cleve 2010; Guelzo 2012; Rael 2015). Abolition did not end racial subordination in American society; in fact, in a variety of areas, subordination remained and even intensified (Smith 2006). It is therefore surprising to find that, in terms of space, separation was relatively marginal (DuBois 1899; Weaver 1948; Bauman 1974; Woodward and McFeely 2002). The data show that until the end of the nineteenth century, separation in the American space was relatively low, and separate neighborhoods in urban or rural environments were not the norm (Weaver 1948; Kushner 1979; Cutler, Glaeser, and Vigdor 1999). The literature suggests a number of explanations for this, the most prominent being that spatial segregation would have been an inconvenience and an obstruction to slavery (Taeuber and Taeuber 1965; Woodward and McFeely 2002, 12). Recognition that space was integrated does not contradict the systematic race-based discrimination and subordination practiced throughout the first generation; on the contrary, integration was one of the constitutive components of the racial subordination system (Woodward and

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

McFeely 2002, 12). The role of law in the first generation was therefore less concerned with racial segregation and more with preserving and legitimizing racial inequality and subordination. The spatial concept dominating American space during the first generation was thus "unequal though integrated." The abolition of slavery, alongside the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution between 1865 and 1870 not only changed the formal legal status of African Americans throughout the United States, but also marked a substantive change in the role the law played in the construction of space.

This undermining of the racial subordination system led southern states and local governments to create legislation that enforced racial segregation (Kennedy 2011). Racial segregation, therefore, enabled white supremacists to preserve the discriminatory and subordinate racial system that had been lost with the abolition of slavery and the enactment of constitutional amendments (Emerson 1994; Klarman 2004; Brown and Webb 2007, 180–81; Brooks and Rose 2013). Jim Crow laws mandated racial segregation in all public facilities in southern states from the 1870s and 1880s forward (Brown and Webb 2007; Woodward and McFeely 2002, 12). In 1896, the Supreme Court approved the discriminative concept underlying these laws, rejecting constitutional challenges against the discrimination they would generate. In *Plessy v. Ferguson*, the Court established the "separate but equal" doctrine, which suggested that as long as the facilities provided to each race were equal, state and local governments could apply policies that separated different races (Klarman 2004). In this sense, *Plessy v. Ferguson* is the mirror image of the law's role; whereas the aim in the first generation was to legitimize racial inequality rather than to be concerned with spatial segregation, in the second generation, the law, which was bound to constitutional equality duties, not only approved but also facilitated racial segregation. Therefore, *Plessy v. Ferguson* marks the beginning of the second generation in American spatial separation, in which allegedly equally funded segregation had become legitimate, if not worthy (Klarman 2004). Although *Plessy v. Ferguson* did not deal with spatial separation per se, its impact on spatial and residential separation was significant. The reason is that the ruling—although not directly dealing with spatial separation—established the principle that guided the Supreme Court throughout the entire second generation, according to which racial segregation, in itself, is not legally ineligible. Implementing *Plessy v. Ferguson*'s insight into the spatial dimension was accomplished through two landmark 1926 Supreme Court cases. In *Village of Euclid v. Ambler Realty Co.*, the Court provided municipalities with the right to zone land use.[2] The Court found that the government had a valid interest in maintaining the character of a neighborhood and in regulating where certain land uses should occur. In *Corrigan v. Buckley*, the Court ruled that a racially restrictive covenant was a legally binding document.[3] These two cases incorporated *Plessy v. Ferguson*'s insight regarding the legality of segregation into the spatial plane and affirmed discriminatory and separative spatial practices. Data show that American cities in 1890 were not exceptionally segregated (Weaver 1948; Cutler, Glaeser, and Vigdor 1999). However, the rapid spread of the Jim Crow laws, now constitutionally backed by the Supreme Court, changed the American space, making it more segregated than it ever had been (Cutler, Glaeser, and Vigdor 1999; Massey, Rothwell, and Domina 2009). In the South, the abolition of slavery and the expansion of white supremacy sentiments increased spatial separation in the main cities (Taeuber and Taeuber 1965; Emerson 1994). In the North, where demand for labor in industrial cities was strong, an influx of southern African Americans escaping the Jim Crow laws settled in separate areas within the cities (Scott 1986; Cutler, Glaeser, and Vigdor 1999). The spatial separation in the North was a result not only of prejudices on the part of veteran residents, but also economic and social

2. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

3. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

considerations on the part of the migrants (Weaver 1948; Lieberson 1980; Klarman 2004). The legal backing for spatial segregation granted by the Supreme Court in *Plessy v. Ferguson*, *Village of Euclid v. Ambler Realty Co.*, and *Corrigan v. Buckley* found expression in a variety of legal practices, which were designed to establish and maintain this separation. To prevent racial spatial integration, local governments made use of racial zoning ordinance (Aloi, Goldberg, and White 1969; Rabin 1989; Silver 1997), as well as enforcing racially restrictive covenants (Dean 1947; Jones-Correa 2000; Gotham 2000b). Although racial zoning ordinances were declared unconstitutional by the Supreme Court in *Buchanan v. Warley* as early as 1917,[4] courts constantly rejected challenges to the enforcement of racially restrictive covenants (Brooks and Rose 2013). These practices were widespread by 1940, and all the major industrial centers in the North had ghettos, which kept African Americans segregated spatially (Massey and Denton 1993; Cutler, Glaeser, and Vigdor 1999). The Supreme Court's support for segregation, even if purportedly only with equal funding, as well as its legitimization of discriminatory and spatially segregating practices, made the law an active agent in the implementation of spatial segregation. In the second generation, therefore, the law facilitated the creation and maintenance of racial-based spatial segregation (Klarman 2004).

The third generation of spatial segregation began with the Supreme Court's rejection of the "separate but equal" doctrine in *Brown v. Board of Education*.[5] After more than half a century of steady rise in the rate of spatial separation, the Court in *Brown* ruled that racially based separation should be considered categorically as discrimination and therefore as unconstitutional. However, it can be argued that this was only the symbolic beginning of the third generation, for two reasons. First, although the "separate but equal" doctrine was officially rejected in *Brown*, from a spatial perspective, this ruling was preceded by another in *Shelley v. Kraemer*.[6] Here, the Supreme Court forbade racially restrictive housing covenants, denying the ability of state authorities, including courts, to enforce racial segregation, though it was privately initiated (Brooks and Rose 2013). As Richard Rothstein argues, *Shelley v. Kraemer* was to spatial segregation what *Brown* was to education (2017). Second, the first practical expression of the principled determination given in *Brown* came only after more than a decade, in the enactment of civil rights laws that outlawed housing discrimination based on race, color, religion, sex, or national origin. But *Brown*'s symbolism is important not only in the question of the starting point of the third generation, but also in the role of the law in perpetuating spatial separation in this generation. The third generation of American spatial segregation is distinct from the previous two concerning both the social groups involved and the role that the law played in perpetuating separation in space. Unlike the previous generations, the third generation of American spatial separation made the issue of separation more extensive in all aspects related to the social groups involved. Thus, whereas the first two generations focused on race- and ethnicity-based segregation, the third expanded the potential for spatial segregation along economic lines (Abramson, Tobin, and VanderGoot 1995; Jargowsky 1996; Massey and Fischer 2003; Massey 2008). Shifting the basis for spatial separation from race and ethnicity to income widens the circle of those involved in spatial separation, although differences in income level are often proxies for racial and ethnic affiliation (Reeves, Rodrigue, and Kneebone 2016). This ongoing change in the basis for segregation, however, was a direct result of the role the law played in the third generation.

The beginning of the third generation was encouraging in terms of the role of law in the construction of space. On a declarative, constitutional level, the law denied the legitimacy of segregation and established the legal presumption that separation is categorically unequal. *Brown* was followed by several important civil

4. *Buchanan v. Warley*, 245 U.S. 60 (1917).

5. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

6. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

rights laws, which had a significant impact on American society. These laws, especially the Civil Rights Act of 1964[7] and the Fair Housing Act of 1968,[8] changed basic principles in American law and outlawed discrimination with regard to residence or employment on grounds of race, color, religion, gender, and national origin. However, although in its constitutional capacity the law rejected separation and advocated equality, in its private capacity it legitimized separation and arguably turned it into a constitutive feature of the American space. In this sense, the law created a gap between the declarative dimension and the practical one. The prohibitions on discrimination and segregation, which the law established on a public-constitutional level, disappeared when they were implemented in private law. The public-private distinction was introduced for the first time at *Shelley v. Kraemer*, which allowed racial restrictive covenants but forbade their state enforcement. However, even after the enactment of the Fair Housing Act, which prohibited discrimination on a private level, various exemptions were prescribed in the act itself that allowed the preservation and perpetuation of spatial separation (Schwemm 1978; Walsh 1999; powell 2008). These exemptions continue to allow spatial separation despite the Supreme Court ruling in *Jones v. Alfred H. Mayer Co.*[9] that overturned *Corrigan v. Buckley* and upheld the constitutionality of the Fair Housing Act. The public-private distinction led to a number of significant spatial processes, the effects of which are still evident in the American space. One of these processes is known as *white flight*, the large-scale migration of white populations from racially mixed urban areas to more racially homogeneous suburban regions (Frey 1979; Conley 2010; Woldoff 2011). Although the reasons for the white migration are varied (Frey 1979), the legal possibility of limiting entry into residential projects by private proprietary mechanisms has enabled the preservation of separation between the suburbs and urban space (Rothstein 2017). Another interrelated spatial process was the flourishing of homeowners associations (HOAs); private associations formed for managing residential subdivision. HOAs were first established in the United States in the mid-nineteenth century but flourished in the third generation of spatial segregation (Reichman 1976; Ellickson 1982; Brooks and Rose 2013). Along with the development in infrastructure and transportation, the main reason for the frequent use of HOAs since the 1960s was their identification as frameworks for exclusion and spatial separation, which were protected by private law (Ellickson 1982; Massey and Denton 1993, 36; Ford 1993; Roithmayr 2010). Another process that has gained momentum since the 1970s is gentrification; the spatial process of changing the character of neighborhoods through the influx of more affluent residents and businesses (Smith 2005; Lees, Slater, and Wyly 2013). Gentrification often increases the economic value of a neighborhood but forces low-income residents out because of the increased cost of rent and goods (Smith 2005; Boyd 2008; Goetz 2011; Lees, Slater, and Wyly 2013). This involuntary residential displacement of economically weak population groups is a prominent expression of the third generation of American spatial segregation (powell and Spencer 2002). It is the result of the abandonment of space for private law and the market forces which, despite the declarations of integration and equality, establish and perpetuate spatial segregation on the ground. The third generation of American spatial separation is ongoing; income-based separation is becoming both rooted in the American space and an integral part of social stratification in the United States (Massey and Eggers 1993; Abramson, Tobin, and VanderGoot 1995; Fischer 2003; Reardon and Bischoff 2011). The characteristics of the three generations of American spatial separation (table 1) reveal significant differences in terms of the basis for separation and the mechanisms used to implement it.

At the same time however, it seems that the United States has recently entered the fourth

7. Pub.L. 88–352, 78 Stat. 241, enacted July 2, 1964.

8. Pub.L. 90–284, 82 Stat. 73, enacted April 11, 1968.

9. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Table 1. Three Generations of American Spatial Segregation

Generation	De Jure	De Facto	Segregation Bases	Legal Instruments Applied	Milestone Supreme Court Rulings	Segregation Mechanisms
First	Unequal though integrated	Low-level segregation	Racial-based subordination	Thirteenth, Fourteenth, and Fifteenth Amendments		Racial subordination through slavery
Second	Separate but equal	High-level segregation	Racial-based segregation	Jim Crow laws	*Plessy v. Ferguson*	Separation in public facilities (transportation, schools, hotels, and restaurants)
Third	Separate is inherently unequal	High-level segregation	Racial, ethnic, and *economic* based segregation	Civil Rights Act of 1964 Civil Rights Act of 1968	*Shelley v. Kraemer* *Brown v. Board of Education*	Private law mechanisms (HOA, gated communities, restrictive covenants) Suburbanization and local policies (white flight) Federal policies (redlining mortgages)

Source: Author's tabulation.

generation of spatial separation, a generation characterized by the voluntary separation of minority groups holding a distinct religious or cultural conception of the good.

FROM NEW YORK TO LOUISIANA: THE EMERGENCE OF THE FOURTH GENERATION

In a referendum held in November 2017 in the upstate New York town of Monroe, the majority of residents voted to separate from the village of Kiryas Joel. This decision ended a long period of clashes between the two groups of residents, which was mainly related to cultural differences between the two populations. It also marked the beginning of the fourth generation of spatial separation in the United States.

To understand the depth of the differences between the two social groups involved, we need to look closely at the Kiryas Joel community and its defining characteristics. Kiryas Joel was founded in the early 1970s as a semi-rural outpost of the Satmar Hasidic sect based in Brooklyn, and grew rapidly, creating the need for multifamily housing and additional land for it (Stolzenberg 2011; Grumet, Caher, and Kaye 2016). The Satmar are the largest, most devoted Hasidic community in America (Mintz 1992; Rubin 1997). Even among ultra-Orthodox sects, it is considered one of the most zealous in its implementation of Jewish law and opposition to reforms or innovation (Magid 2014; Wood and Watt 2014). The Satmar brought their way of life with them from Hungary to Brooklyn after World War II, where the separation of religion and state, combined with Brooklyn's housing opportunities, enabled the expanding Satmar community and other Central European Jewish immigrants to establish isolated, illiberal communities that functioned independently of many state-regulated structures (Rubin 1997). Satmar families, eschewing birth control, typically have eight to ten children (Mintz 1992; Wood and Watt 2014; Stolzenberg 2015). They speak Yiddish, dress in long clothes to avoid revealing body parts in public, engage in full gender separation outside the home, and generally refrain from consuming American media or publications that do not come from within the community (Minow 1995).

The Satmar community proliferated so rapidly that lack of housing acted as a catalyst for the 1974 establishment of the second location of the Satmar sect in the town of Monroe, New York. This community was named Kiryas Joel (Stolzenberg 1993; Minow 1995; Myers 2013). The establishment of the village of Kiryas Joel symbolized not only a split in the American Satmar community but also a turning point in the community's struggle for spatial separation (Stolzenberg 1993; Minow 1995; Myers 2013). The village saw value in convergence within itself, providing for its needs autonomously, and maintaining spatial and social separation from external populations. These characteristics naturally led to a distance between residents of the village of Kiryas Joel and residents of the town of Monroe, so that even before the referendum on municipal separation, the residents of Kiryas Joel were spatially and culturally separated. At the same time, attempts to obtain legal approval for this separation were repeatedly rejected.

The most striking legal confrontation concerned the Kiryas Joel residents' aspirations to establish a separate and independent board of education. Although most of the village children attended private schools that were gender segregated in accordance with the religious norms of the community, the children who had disabilities were sent to a Monroe public school. Because of Monroe's refusal to gender segregate its public school, the New York legislature authorized Kiryas Joel to establish a public school that would serve the village's children with disabilities. Citizen taxpayers and the New York School Board Association sued, claiming that the statute creating this special school district was not neutral and violated the requirement to separate church and state as mandated by the First Amendment. The case went to the Supreme Court, which in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet* ruled that the special school district gave too much authority over a secular function of society to a religious group and unconstitutionally delegated a secular function to a religious body. The New York legislature responded by adopting new legislation that appeared to be more general and more neutral, but the suit was also taken to the Supreme Court. The *Grumet* case is one prominent example among many of the tension be-

tween the two social groups, which arose from fundamental differences in their worldviews and ways of life. The case also attests to the fact that spatial and cultural separation existed between the village of Kiryas Joel and the town of Monroe even before the 2017 referendum. However, I argue that the municipal separation, to which both the residents of Monroe and the residents of Kiryas Joel agreed, marked a new era of spatial separation in the United States.

The reason for seeing Kiryas Joel's case as the beginning of the fourth generation of American spatial separation is not that the separation between the groups was allegedly voluntary. Consider another case of an alleged voluntary separation—St. George and East Baton Rouge Parish, Louisiana. In October 2019, after years of trying to create a separate school system, residents of a white suburb of Baton Rouge voted to become a new city called St. George. Fifty-four percent of voters in the community approved the amendment, but other Baton Rouge residents were not allowed to express their position (due to state laws). St. George was accordingly incorporated as a separate city and gained control over its taxes and schools (Wilson 2016). Although the case of St. George is timely and occurs, expectedly or not, in Louisiana, which has been the focus of *Plessy v. Ferguson,* it is not a unique case. According to recent research, most of the cases in which communities aim to self-segregate themselves from their parish do so to control their taxes and school systems (Wilson 2016; EdBuild 2017; Taylor, Frankenberg, and Siegel-Hawley 2019). Thus, states set different statutory processes for school district secessions that isolate students and resources (Shoked 2013; Wilson 2016; EdBuild 2017). Thirty states have a policy defined in law. Some require actions by voters; others require the state's approval and even constitutional amendment. Since 2000, no fewer than seventy-three U.S. communities have attempted to secede from schools in an effort to strengthen resources (EdBuild 2017). Some, like St. George, aimed to achieve school segregation by promoting municipal secession.

The case of St. George and similar communities that struggle to segregate themselves from their less affluent surrounding parishes should not be considered as part of the fourth generation because for the most part they have maintained the characteristics of segregation in previous generations. Thus, St. George, a largely white and more affluent suburb of Baton Rouge, seeks to separate spatially from the majority of nonwhite, less affluent residents of the East Baton Rouge Parish (Runnels 2016). Spatial separation is promoted by the powerful to avoid integration with the less powerful on racial and economic grounds. These are precisely the characteristics of the separation against which the *Brown* Court came out, and the same bases for separation in the post-*Brown* generation. Therefore, seeing such a separation, despite being ostensibly voluntary, as one that deserves any protection cannot be justified. The case of Kiryas Joel, however, is quite different.

The reason to view the municipal separation of Kiryas Joel and the town of Monroe as the beginning of the fourth generation of American spatial segregation is that it altered the roles of the social groups involved as well as the legal and social implications of this decision. The official separation of the village from the town created, in practice, the first town in the United States exclusively for ultra-Orthodox Jews. Moving to the present day, the new town of Palm Tree is expected to be run according to the rules and the religious norms held by residents of Kiryas Joel. These norms, as well as the characteristics of the residents, are expected to affect the town's zoning laws—to emphasize apartments for large families as well as the provision of public institutions for study and ritual—and the educational institutions and the norms according to which they will operate (Minow 1995). Therefore, the establishment of Palm Tree marks the emergence of a new generation of segregation in the American space, one that differs from the three generations that preceded it. This fourth generation is not based on race, religion, ethnicity, or income. Instead, the social groups involved are, respectively, a majority group in American society and a minority community that seeks to live in accordance with its unique, often illiberal norms. In the case of Kiryas Joel, the group is defined as a minority because of its religious affiliation, but future cases that rely on the Kiryas Joel prece-

dent will not necessarily be limited to religious minorities. Indeed, the fourth generation provides the opportunity for various minority communities—religious, ethnic, cultural, and even economic—to demand spatial separation from the majority group. Focusing on the majority-minority tension justifies viewing the Satmar community's struggle for spatial segregation as manifesting a fourth generation of American spatial separation and not just as another link in the historical chain of religious communities seeking to differentiate on a religious basis. American history is replete with multiple struggles on behalf of religious communities to maintain their religious practices and to preserve their religious freedom. Kiryas Joel's separation illustrates a broader struggle for spatial autonomy that does not settle for religious freedom but instead demands a spatial expression of government.

Placing the majority-minority tension at the core of the fourth generation of American spatial segregation, however, requires us to recognize that Kiryas Joel is not the first case where this tension was the basis for a claim. African American separatists opposed integration and called for the concept of self-segregation of blacks out of community empowerment (Hamilton and Ture 1967; Hall 1977; Pettigrew 1977). In the late nineteenth and early twentieth centuries, African American activists established several black-only towns, believing that blacks would never find peace or prosperity living in white-dominated areas. The assumption behind such towns—such as Boley and Langston in Oklahoma and Mound Bayou in Mississippi—was that only by controlling the governmental institutions would the empowerment of the community be possible (Meier 1954; Tolson 1970; Stuckey 2009). Almost a century later, minority communities in East Palo Alto, California, and Boston, Massachusetts, made several efforts to incorporate as independent municipalities (Goel et al. 1988). These attempts, though abandoned eventually, were symptomatic of the negative reaction to the implementation of integration that had been guaranteed by law in the third generation of American spatial segregation, as well as the desire to assert political control over their community (Goel et al. 1988). However, these separatist calls and self-segregation attempts were rejected, either because of the belief that segregation is unequal and inappropriate or a more practical understanding that granting such a possibility would make it possible to preserve the discriminatory situation in effect at the time. The failure of previous self-segregation attempts, therefore, should be attributed to the message conveyed by both *Plessy v. Ferguson* and *Brown v. Board of Education*. Although these two judgments did not deal directly with spatial separation, they did link separation and equality. In that sense, the judgments made segregation the ultimate cause for inequality in American society. Although the place of racial-, religious-, ethnic-, or income-based segregation in creating and preserving inequality in American society is undisputable, labeling it as the ultimate and perhaps even the only cause of inequality is problematic for two reasons. First, it hides other political, economic, and social causes of inequality and therefore prevents those causes from being identified and treated. Second, and more important, it does not allow for a more distinct observation of the circumstances of each case (Bayer, Fang, and McMillan 2014). Setting an irrefutable presumption that segregation is unequal denies claims for spatial separation that may not only not harm equality but instead—as in self-segregation claims on behalf of suppressed minority communities—enhance it.

The Kiryas Joel case changed this common understanding by allowing minority communities to segregate themselves voluntarily from general American society. In this sense, the fourth generation opens anew the discussion about the applicability of the *Plessy v. Ferguson*'s "separate but equal" doctrine in American spatial policy. However, it not only reinforces the debate but also suggests that the implementation of this doctrine may be legitimate and even desired if a minority community requests it. The fourth generation, therefore, presents a different concept of spatial justice in which a separate space may be required for a minority community to gain equality. Spatial separation, therefore, is no longer an obstacle to equality but instead a condition for it—in other words, "separate, therefore equal." This is, of course, a meaningful change in the Amer-

ican spatial policy, one that has both legal and social implications.

Kiryas Joel was the first town to be incorporated as an ultra-Orthodox-only settlement, but many other towns face a similar threat. The experience of New York towns such as East Ramapo and Bloomingburg and New Jersey towns such as Riverdale, Mahwah, Jackson, Upper Saddle River, and Montvale is much the same as what led to Kiryas Joel's municipal separation. In all these cases, the ultra-Orthodox community argues that segregation will reflect justice and equality by serving the unique community's needs. "Separate, therefore equal" is slowly becoming a normative claim for spatial justice for many communities (see table A1). The return to the forefront of the legitimate connection between separation and equality in space poses significant legal challenges and requires investigation of its implications for society as a whole, for the segregated community, and for the individual members of the community. This examination must be based on arguments about the justifications of or objections to the spatial separation of minority communities, as discussed in the following section.

JUSTIFICATIONS FOR FOURTH-GENERATION SPATIAL SEGREGATION

Can the spatial segregation of minority communities, especially those organized around illiberal norms, be socially and legally justified? Should the liberal state allow such segregation, or should it struggle to prevent it? Should the fact that the segregation is voluntary affect the answer to these questions?

Stronger Alone: Empowerment

Minorities have often been the victims of spatial and residential segregation (Nelson 1996; Seitles 1998). As Douglas Massey, Jonathan Rothwell, and Thurston Domina demonstrate, minorities such as African Americans, Latinos, and Asians were the most prominent victims of spatial separation, based, at least until the 1970s, on race and ethnicity (2009; Jennings 2000). The change in the characteristics of American spatial segregation, from that based on race and ethnicity to that based on income, did not significantly change the location of minorities in this equation. Then, as today, minorities in American society lived with spatial exclusion (Yinger 1995; Seitles 1998; Trifun 2009) as well as repeated attempts by government and private parties to create spatial separation (Trifun 2009). The social and legal battle to diminish racial and ethnic spatial segregation in the United States was primarily the battle of minorities seeking to be considered as equals in society (Valocchi 1996). The rejection of the "separate but equal" doctrine has been a significant yet symbolic milestone in the struggle for equality for minorities in the United States, in effect declaring that a worthy society cannot legitimize separation between people because of their racial, ethnic, or religious difference. The Court's legal declaration in *Brown* celebrates equality and inclusiveness. It failed to recognize, however, that sometimes spatial separation empowers minorities instead of marginalizing them.

Attempts to prevent racial and ethnic spatial segregation over the years led both state and local governments to adopt inclusive spatial policies, such as subsidized housing, inclusionary zoning, and restrictions on discrimination. In response to these efforts, some scholars argue that in the quest for equality, the right of minorities to not integrate was obscured. The law, as expressed in the Supreme Court ruling in *United States v. Fordice*—where Justice Clarence Thomas's concurring opinion suggesting that historically black colleges should not be destroyed or severed of their traditions and histories was not adopted by the opinion of the Court—showed little tolerance for these claims.[10] However, scholars as well as social activists suggest that in some cases segregation may be desirable (Jennings 2000). Take, for example, a situation in which integration strips the minority community of essential characteristics, history, and values (Goel et al. 1988; Jennings 2000). Another argument is that separation may in times empower minorities, whether because they are able to preserve their history and values, or because they may develop a sense of belonging and social affiliation (Brooks 1996; Tomlins 2000; Kaplan and Woodhouse

10. *United States v. Fordice*, 505 U.S. 717 (1992).

2004). The empowerment justification was at the core of both the black separatism movement of the 1960s and the incorporation attempts of black communities in the 1980s. These arguments still find expression in the recent flourishing of Afrocentric schools in Brooklyn, New York. Approximately six Afrocentric schools in Brooklyn, in which about 2,300 children are enrolled, decided to provide African American children with an educational framework that would celebrate black culture and history. As Rafiq Kalam Id-Din II, the founder of the Ember Charter School, described its mission, "Everything you do needs to be focused on agency and empowerment" (Shapiro 2019).

Segregation as empowerment justifies spatial segregation when it contributes to a minority's ability to flourish. This understanding echoes some of the arguments on behalf of multiculturalism, which support limited segregation of minorities from general society. However, the empowerment justification depends on the characteristics of the community and the need, insofar as it exists, for spatial segregation to preserve those characteristics. Such a demand must come from the minority community and cannot be imposed by an external party (Goel et al. 1988). The significance of these qualifications is that the empowerment justification for spatial segregation cannot and should not be broadly exercised. It requires a careful examination of the circumstances of each case and the characteristics of each community.

Live and Let Live: Pluralism

Another justification for the spatial segregation of minority communities is rooted in a fundamental pluralistic approach, which imposes a duty on liberal states to allow all citizens to live their lives in accordance with whatever concept of good they deem appropriate (Anderson 1995; Stern 2015). At the core of this approach is the understanding that every person may hold different beliefs and values. Elizabeth Anderson identifies this principle, saying that "people experience the world as infused with many different values" (1995, 1). She also explains that the state should therefore be obligated to allow all people to live by their values through the establishment of diverse social institutions, which people can use to promote these values (Anderson 1995; Stern 2015). Anderson thus argues that the state has an obligation "to expand the range of significant opportunities open to its citizens by supporting institutions that enable them to govern themselves by the norms internal to the modes of valuation appropriate to different kinds of goods" (1995, 149).

Applying Anderson's pluralistic approach to the spatial discourse means that the liberal state must be prepared to allow spatial segregation if it contributes to individuals' actualization of their values and norms (Stolzenberg 2002). It also requires the state to preserve the ability of all individuals and communities to realize their values and norms and therefore should be done in a way that prevents externalizing one group's norms over another's (Stern 2015). The case of Kiryas Joel is a good example of the pluralistic justification. The ultra-Orthodox community of Kiryas Joel maintains strict adherence to *halakhah* (Jewish religious law), which affects all aspects of their lives, from spiritual concepts to everyday life (Mintz 1992; Norgren and Nanda 2006). To maintain their religious worldview in accord with the community, members of the community cannot integrate with institutions in general society (Rubin 1997). It was no accident that the main legal event in which the Kiryas Joel community was involved had to do with the schools to which the community sent its children (Rubin 1997). A community that meticulously preserves gender segregation in its schools cannot exercise its religious worldview if the community's children enroll in mixed-gender institutions (Mintz 1992). It should not be surprising, therefore, that the tension related to the educational institutions between the residents of Monroe and the residents of Kiryas Joel eventually led to a decision on separation. Thus the community's requirements for maintaining its values and norms give rise to the pluralistic justification for spatial segregation.

The pluralistic justification and the empowerment justification have certain similarities. Both seek to enable communities to preserve their characteristics, values, and norms. Neither applies to forced spatial segregation, but instead conditions separation on the commu-

nity's free will or demand. However, the two justifications also differ. The most prominent of these differences relates to the characteristics of communities that may require spatial segregation. The empowerment justification holds that only minority communities that have historically experienced oppression, discrimination, and exclusion by a majority population should be permitted to implement spatial segregation in the name of empowerment. The legitimization of spatial segregation, a policy perceived as discriminatory and socially harmful, stems from a long history of discrimination and exclusion. According to this justification, minority communities can now correct past injustices by using tools to which they are accustomed. It is different, however, if the pluralistic justification is examined. The pluralistic justification holds that spatial segregation is not unique to minority communities. Any community whose unique characteristics and ability to realize that its members' worldview requires spatial separation should be permitted to do so. Whereas the empowerment justification is based primarily on using the past to construct the future, the pluralistic justification aims mainly to foster the ability of communities to function properly in the present.

Good Fences Make Good Neighbors: Utilitarianism

Another way to justify spatial segregation both in general and between particular communities is utilitarian. This justification assumes that the inability of two or more parties to reach an agreement about the proper use or management of shared resources requires division and separation (Ostrom 1990). This assumption underlies Garrett Hardin's "tragedy of the commons" (1968), in which he advocates adopting a private property regime rather than a common one (Demsetz 1967; Hardin 1968). To overcome the collective action problem in regard to shared resources, and to avoid inefficiency, it would be better to divide ownership of the resource so that each owner is able to use and manage their own plot efficiently (Ostrom 1990). This rationale, which calls for division and separation to ensure efficiency, may also justify spatial separation between different communities. When communities holding distinctly different values and norms are required to share resources, such as schools, they may face ongoing conflicts that prevent any of them from deriving the proper and desired benefit of those institutions.

This argument also holds true for decision making in the design of common space. Consider the various needs of the Monroe and the Kiryas Joel populations. Those of the Monroe population were more or less identical to those of any average American community, but those of Kiryas Joel were quite different. The large number of children per family, the gender segregation in educational institutions and the public sphere, and their need for various institutions of worship all led to ongoing conflicts regarding local zoning and the characteristics of public institutions. From the utilitarian point of view, these confrontations and therefore this partnership were undesirable. Protracted confrontations between parties not only caused significant delays in the satisfaction of public needs but also resulted in the failure to satisfy either side. Economic losses related to litigation or constant threats of it were a factor (Trubek et al. 1983; Ribstein 2001), as was frustration on all sides with the inability to implement programs and services (Michelman 1967) that, in a sense, paralyzed the shared city. These costs, all embedded in the collective action problem, militate for the separation of communities that have been paralyzed and depleted by costly sharing. In this sense, spatial segregation may efficiently ease tensions and confrontations among communities, or, as one Kiryas Joel official said, "We can each have our own town and be good neighbors."

The empowerment and pluralistic justifications have numerous similarities, but the utilitarian justification involves a completely different view. According to it, segregation should also be implemented if one of the communities using a common space does not wish to implement it. The reasoning here lies in the perspective that characterizes utilitarian perceptions, which is the consideration of aggregate welfare, regardless of the will of those who make up the equation. This aspect of the utilitarian justification has the potential to facilitate the imposition of spatial segregation on various communities, ignoring their characteristics and the

implications of that separation on the conduct of the community. In a sense, the utilitarian justification's disregard for the volitional choice of spatial segregation is reminiscent of the dark ages, when racial segregation was justified for utilitarian reasons, in service of perceived aggregate welfare (Hayman 2002; Klarman 2004). These and other objections are the focus of the next section, which explains the reasons for opposing spatial separation.

OBJECTIONS TO FOURTH-GENERATION SPATIAL SEGREGATION

Each of the three justifications for spatial segregation, though differing in scope and scale of application, holds that communities should be allowed to segregate spatially in certain circumstances. Whether because segregation is required to empower long oppressed communities, because of its essential role in preserving a community's norms and values, or because it contributes to the aggregate welfare, spatial segregation may be legitimized despite its moral flaws and its historic role in fostering discrimination.

Influences on Society

One objection to legitimizing it, despite its potential contribution to minority communities or to society generally, is that it imposes costs and inappropriate norms. This objection has multiple layers. The first, often referred to as the slippery slope argument, suggests that legitimizing spatial separation will not successfully be restricted within defined boundaries, as in the case of a voluntary demand of a minority community. Instead, it will cross borders and expanses, eventually spreading to the entire American space (Kymlicka 1997, 80).

According to this view, even under the allegedly egalitarian spatial policies of the third generation of spatial segregation, racist and discriminatory attitudes remain, if dormant. Widening the prohibitions on segregation in public law has led to discriminatory and racist views being expressed mainly through market forces and private law. Reinstating the possibility of spatial separation could, on a public level, therefore incite racist and discriminatory behaviors, and drive spatial segregation even in situations for which no justification is possible. In a sense, the slippery slope argument seeks to prevent the return of America to the second generation, in which spatial separation was legitimate and justified in various ways by a large portion of the population (Edmonds 1957). Spatial separation should therefore be prohibited now just as it has been.

A second aspect of the influence objection concerns the possibility that community norms, for the sake of which the community has separated from society, will bleed into the common space outside the community. Communal norms will cross the boundaries of the community and affect the external space. For example, it is possible that different religious or cultural norms, some of which could conflict with liberal norms such as gender segregation and gender discrimination, would affect the liberal space outside the community. The community that differentiates itself spatially in order to continue and even intensify its practices of nonliberal norms within its discrete communal space will, somewhat paradoxically, exert greater influence on the general space from which it withdrew (Stolzenberg 2002). Although it is possible to argue that communities such as Kiryas Joel exercised nonliberal norms even before separating from the town of Monroe, separation increases its ability to do so, both in terms of enforcement and scope, because segregation facilitates the practice of nonliberal norms in the public sphere. The influence objection, then, calls for the prohibition of spatial separation in the fourth generation out of concern that such separation would impose improper costs and norms in the space around the community.

Harm to Community Members' Autonomy

A different objection to legitimizing spatial segregation stems from a concern for the individual autonomy of members of the segregated community (Buchanan 1989; Pildes 1998; Dagan and Heller 2001). According to this argument, the three justifications for spatial segregation ignore both the interests of individual members of the community and their autonomy. The objection to spatial segregation out of concern for the individual autonomy of community members recognizes that communities, although important to their members,

may violate their autonomy to the point of claiming that individuals will sacrifice themselves for the sake of the community. In such cases, communities, however important they may be, can effectively become prisons for individuals.

Spatial segregation does not create communities or shape their characteristics. The various justifications discussed earlier refer to existing communities that seek to differentiate themselves spatially. However, spatial separation of the community from other communities intensifies, or is likely to intensify, the violation of the autonomy of individual members of the community, for two reasons (Stern 2015). First, spatial segregation empowers the community as a whole and its leaders in particular (Phillips 2005). Empowering community leaders creates the potential for further reduction of individual autonomy, subordinating the individual's discretion to the directives of leadership. Second, and equally important, spatial segregation creates a barrier between those who belong to the community and those who do not. This barrier, although it may have existed socially or covertly when the communities intertwined, prevents individual members of the community from being exposed to other norms and to those who believe in them (Stern 2014). Exposure to alternatives generally develops the ability to think autonomously. As noted, this barrier also reduces the ability of individual members of the community to create social, economic, and cultural affiliations with those who do not belong to the community, and thus has a chilling effect on their ability to exit the community as they choose (Simmel 1955; Bolt, Burgers, and Van Kempen 1998).

The Utilitarian Objection

Another objection to the spatial segregation of minority communities involves society as a whole. This utilitarian objection has many aspects, the common denominator of which is the conclusion that granting legitimacy for spatial segregation may harm aggregate welfare (Glyn and Miliband 1994; Carr and Kutty 2008). One suggests that segregation involves an inherent reduction in the ability of isolated communities to maximize their economic activity. Another is that spatial segregation creates enclaves that, over time, will become completely disconnected from general society, so that society loses significant forces that might otherwise contribute to aggregate welfare. The first objection focuses on the segregated communities and the implications of spatial separation on their economic situation. Most of the research regarding the economic implications suggests that segregation leads to severe consequences for the separatist community and its members (Massey, Gross, and Eggers 1991; Massey and Fischer 2000; Wilson 1990). These consequences are the result of poor education, poor health, and lack of training and mobility, but also stem from the lack of economic ties with nonmembers (Massey, Gross, and Eggers 1991; Massey and Denton 1993; Massey and Fischer 2000). Segregation impairs the economic strength of the community because it radically restricts the opportunities available to its members. An examination of the ultra-Orthodox communities in the New York area reveals that their economic conditions are significantly worse than those of the national and state average. According to the 2014–2018 American Community Survey, all-ultra-Orthodox communities, such as Kaser, New Square, and Palm Tree, have per capita incomes one-quarter to one-third of the state average and poverty rates three to four times that of the state. The childhood poverty in these communities is almost three times that of the state (U.S. Census Bureau 2019, annex 1). From a utilitarian point of view, the economic weakness of the community is not expected to remain an intracommunal problem. Communities that collapse impose a heavy economic burden on the state to subsidize and support them through various educational, health, and rehabilitation programs (Massey and Denton 1993). The concern for economic damage, then, justifies its prevention from a utilitarian point of view. However, the utilitarian objection has a second aspect, which is related to the disengagement of those segments of the population from general society. According to this argument, the state's labor capacity and productivity are impaired when segments of the labor force disengage. The spatial segregation of minority communities may lead to enclaves be-

coming completely detached from the general economic activity in the country as a whole. Whereas earlier this concern was the motive for increasing mobility and improvements in the ways in which minority groups were integrated into the economy, complete separation implemented voluntarily by the community today can lead to the loss of significant parts of the labor force, thus harming aggregate welfare.

SEPARATE, THEREFORE EQUAL: THE PROTECTIVE ROLE OF LAW

As discussed, in each of the three previous generations, the law played a different role regarding separation in space. In the first generation, it functioned as the guardian of racial subordination through the institution of slavery and was therefore indifferent to spatial separation. In the second generation, after the abolition of slavery, it preserved white supremacy, legitimizing and even facilitating spatial segregation. In the third generation, it became a constituent component of spatial separation, because despite its declarations regarding the prohibition on separation, it supported and expanded its existence through private law and market forces. The fourth-generation characteristics no longer allow the law to continue playing a dual role in the same way. Incorporation as a municipality prevents minority communities from continuing to use private law as a method of segregation and discrimination. The choice to incorporate as a municipality changes the status of those communities, shifting them from private to public law. The meaning of incorporation as municipalities goes beyond attempts of individuals and private developers to exclude others and forces the law to consider the implications of such segregation on the community, its individual members, and society at large. The justifications and objections for spatial separation in the fourth generation require that the law intervene in the construction of space and play a major, protective role in maintaining the boundaries of separation and its consequences.

Three constitutional challenges require a rethinking of the role of the law in establishing the separate, therefore equal policy. The first lies in the connection that fourth-generation spatial segregation creates between community authority and government authority. Such a connection expands the authority given to community leaders, therefore extending the threat posed to the autonomy of individual community members, as well as their constitutional rights. The second challenge is the role of the law in ensuring the ability of a minority community to maintain its activities and characteristics. This challenge sharpens when the community that seeks to segregate spatially is a religious community, a reality that evokes the Establishment Clause of the First Amendment and concerns state contribution to the establishment of religion. The third challenge relates to the protection that the law should provide to those who are not community members. In this context, the law should accommodate the concern that spatial segregation of minority communities will establish discriminatory norms between those who are members of the community and those who are not; for example, in the fields of housing, employment, and education. Protecting the community, the individual community members and society at large, therefore becomes a significant part of defining the role of the law in the fourth generation of spatial separation.

The Role of Law in Protecting Community Members

The first challenge the fourth generation of spatial segregation poses before the law is the extension of the authority and power of the community and its leaders. If before incorporating as a municipality the community benefited mostly from community forces, which were based on internal community norms maintained primarily by social sanctions, its incorporation as a municipality adds a governmental layer to the variety of methods available to the community and its leaders when seeking to impose their judgment on community members. In this sense, empowering a minority community to be incorporated as a municipality connects community authority and governing authority, a connection that raises concern about the preservation of the autonomy and constitutional rights of the community members. One example of such a challenge may be the design of public space in accordance with

community norms. In 2013, the New York Civil Liberties Union and the American Civil Liberties Union sued the village of Kiryas Joel after press reports documented a public park in which women and girls were confined to an area with red benches and playground equipment, with boys and men to a blue area. The lawsuit was settled after the town of Monroe government agreed not to endorse segregation of the sexes in the public sphere. However, the separation of Kiryas Joel from Monroe raised concerns that providing governing powers to the Satmar community would reawaken its leaders' desire to shape the public sphere to align with community norms. Another challenge concerns the enforcement of community norms through governing powers. In this sense, the concern is that establishing the connection between community authority and government authority would extend the violation of the autonomy of individual community members, especially when it comes to their right to oppose the leadership, to protest against it, and to suggest alternatives to a path chosen by the community leadership. These concerns become more acute because the sanctions held by the municipal government are no longer informal, social sanctions, but instead governmental and legal ones.

The concerns reinforce the notion that the law should play a protective role that would protect individual members of the community from extending the infringement to their autonomy, as well as from the loss of their constitutional rights. To fulfill its protective role, the law should address these concerns primarily through strict adherence to the constitutional rights of the community members, emphasizing the rights enumerated in the First Amendment: freedom of expression, freedom of speech, and freedom of association. Thus any attempt by the municipal government to restrict or limit the exercise of individual members' constitutional rights should be under strict scrutiny and under the assumption that the restrictions on these rights should be reduced as far as possible. When illiberal minority communities incorporate as municipalities, they bind together both communal and governing authorities. This consolidation of powers diminishes the ability of individuals, as community members, to exercise their autonomy. If community members who violated community codes were primarily subject to community and social sanctions until the community's incorporation as a municipality, they would be subject to government sanctions after incorporation. The unification of powers, therefore, sharpens the importance of the role of law as the protector of community members' rights.

THE ROLE OF LAW IN PROTECTING COMMUNITIES' ABILITIES TO SELF-SEGREGATE

The Establishment Clause is a limitation placed on governments to prevent actions that may contribute to the establishment of religion, making it illegal for the government to promote theocracy or a specific religion. Government support for spatially segregated religious minority communities could trigger Establishment Clause concerns because the segregation could be seen as a way of realizing religious community norms. This question was at the core of the *Grumet* case, in which the New York legislature's special state statute established a separate board of education along the village boundaries of Kiryas Joel to serve this distinctive religious population.[11] Justice David Souter reached the conclusion that the legislators' decision, one counter to regular state practice, was undermining the state's constitutional obligation to act in neutrality, therefore violating the Establishment Clause. Although the ruling in *Grumet* was widely criticized (Minow 1995; Greene 1996),[12] it seems that the challenge that the Establishment Clause poses to fourth generation spatial segregation claims should be examined differently. As noted, the fourth-generation of spatial separation does not necessarily concern religious communities exclusively, though it is reasonable to assume that these may play a major role in community quests for segregation. Instead, the main characteristic of the community that seeks to seg-

11. *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994).

12. *Kiryas Joel Village School Dist.*, 512 U.S. 687 (Scalia, A., dissenting).

regate itself voluntarily is that it is a minority community. An examination of the justifications for spatial separation also reveals that none are unique to religious communities. All three justifications may apply to religious communities but do not depend on religious affiliation, only concerns relating to minority status. A decision on whether the state should permit, support, or regulate self-segregated communities should thus be based on nonreligious justifications as specified. In the context of spatial segregation, the state should accommodate religion as long as segregation is justified according to secular (social) justifications. Such recognition should also be accompanied by the verification that the social costs highlighted in the objections specified do not impose too heavy a burden on society. When the state acts according to this principle, it does so out of a secular respect for the needs of religious communities or any other minority community. It does not violate the Establishment Clause because it is motivated by secular and social concerns rather than religious ones.

THE ROLE OF LAW IN PROTECTING SOCIETY AT LARGE

American law established antidiscrimination duties through several antidiscrimination laws, among them the Civil Rights Act of 1964, the Fair Housing Act of 1968, and the Americans with Disabilities Act of 1990. These laws provide protection for race, color, religion, sex, and national origin in the areas of voting, education, employment, public accommodation, and housing. In addition to federal legislation, numerous state and local laws address discrimination that is not covered by these laws (Hunt 2012). This set of rules challenges a minority community that seeks to segregate spatially because it reinforces its commitment to equality, even to those who are not members of the community or who do not share the conception of good that it holds. Consider, for example, a situation in which a minority community seeks to segregate spatially because of its unique cultural characteristics. Antidiscrimination laws require the community to refrain from discriminating against those who are not members of the community in regard to housing, employment, and education, but allowing such a possibility could thwart the purpose of segregation in the first place. In the case of Kiryas Joel, the main motive for segregation was the reluctance of members of the community to compromise their religious worldview on gender segregation in schools and public spaces. Applying antidiscrimination laws in the new town of Palm Tree, therefore, would frustrate the entire purpose of segregation. Spatial segregation in the fourth generation thus poses a significant challenge to the law because it is forced to examine the boundaries of segregation as well as its implications for the community, its members, and those who are not members of the community.

As a result, the law in the fourth generation of spatial segregation needs to take a protective role. On the one hand, it should protect the ability of minority communities to exercise their right to spatial segregation, whether for empowerment, pluralism, or utilitarian purposes. On the other hand, it should protect individual members of the community, as well as those who are not members of the community, from the discriminatory consequences that this separation may have. This tension sharpens when the community that seeks to self-segregate is a religious one. When it comes to a religious minority community, the attempt to compel it to comply with antidiscrimination laws provokes an additional constitutional challenge—the Free Exercise Clause, which aims to limit the state's actions to restrict religion-related activities. Over the last few years, the extent of exemption from antidiscrimination laws granted for religious reasons has expanded. After the Supreme Court's ruling in *Oregon v. Smith*,[13] which held that judicially mandated religious exemptions from generally applicable legislation are normally inappropriate, the Congress offered a swift counterresponse, enacting the Religious Freedom Restoration Act of 1993.[14] This was followed by the

13. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

14. 42 U.S.C. § 2000bb.

Religious Land Use and Institutionalized Persons Act of 2000.[15] These acts elevate the Free Exercise Clause over antidiscrimination laws and provide additional exemptions for religious reasons. Additional expansion of the religion-based exemptions from antidiscrimination laws come in two recent Supreme Court rulings: *Burwell v. Hobby Lobby Stores*[16] and *Masterpiece Cakeshop. v. Colo. Civil Rights Commission*.[17] It seems, therefore, that the Court's tendency is to extend the application of exemptions by virtue of the Free Exercise Clause, meaning that in more and more cases, individuals or companies arguing that a regulation or a legislation violates their religious faith may be exempted from compliance (Luchenister 2015; Sepper 2015). In other words, religious people can use their beliefs to evade the application of antidiscrimination laws. The legal tendency to expand the scope of religious exemptions may also be significant in the fourth generation of spatial segregation, especially as far as religious communities are concerned.

In regard to the Free Exercise Clause, it can also be argued that to determine the appropriate role of the law, it is necessary to consider the justifications for and objections to spatial segregation in general, and in regard to minority communities in particular. However, this question is different from the one discussed earlier, which focuses on state support or funding of such communities. This question relates to the ability of the community to exclude others or to discriminate against them by preventing them from purchasing housing within the segregated town, or from employing them in its institutions. Although such actions may contribute to fulfilling the justifications for segregation, they nevertheless pose threats to individual insiders, outsiders, and society as a whole, thus requiring a strict examination of their circumvention of the inherent objections to segregation. In other words, although the question of state funding should be examined primarily for its contribution to the fulfillment of the justifications, the question of the community's exemption from antidiscrimination laws should depend on its ability to answer the objections described in regard to spatial separation, especially those that impose costs on outsiders.

CONCLUSION

The separation of Kiryas Joel from the town of Monroe and the establishment of the new town of Palm Tree as an exclusive ultra-Orthodox town have spawned a new generation in the American spatial segregation chronicle. This generation is characterized by minority communities that demand self-segregation from their surroundings as part of their quest for spatial justice. Although fourth-generation claims might be justified for various reasons, they are also objected to for various reasons. This article outlines both the justifications and objections to examine the role of the law in the fourth generation of spatial segregation.

Voluntary segregation on behalf of minority communities requires the law to play a protective role, to protect the communities' ability to exercise their aspiration to segregate spatially, the individual members of the community, and those who are not members of the community from the consequences that this separation may have. A hard look at the justifications for and objections to spatial segregation forces a rethink of how to address the legal challenges facing spatial segregation, which have fourth-generation characteristics. The proliferation of minority communities seeking to segregate spatially, as well as the various challenges these actions pose, required the law to address the challenges and to become a dominant player in the field. In this sense, the challenges that the fourth generation of American spatial segregation poses allow the law to ensure that the renewed legitimacy for spatial segregation will not restore the application of the "separate but equal" doctrine, but instead serve as a basis for separation only in those instances in which separate, therefore equal is in play.

15. 42 U.S.C. § 2000cc.

16. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __ (2014).

17. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. __ (2018).

Table A1. Ultra-Orthodox Towns and Villages in New York and New Jersey

	Municipal Status	Population	Ultra-Orthodox Population	Steps Taken Toward Separation	Major Friction Points
Palm Tree (Kiryas Joel), N.Y.	Town	25,292	100%	October 2017, incorporation as a new town	Control over Board of Education, territorial annexation
Lakewood, N.J.	Township	104,157	>50	—	—
Mahwah, N.J.	Township	26,380	>30	—	Calls to avoid selling apartments to the ultra-Orthodox, struggle for prevention of gender segregation in the public sphere
Bloomingburg, N.Y.	Village in town of Mamakating	450	>60	—	Territorial annexation, public institutions
New Square, N.Y.	Village in town of Ramapo	8,586	100	1961, incorporation as a village	Struggles around planning laws and building large houses suitable for ultra-Orthodox families, legal clashes over incorporation as a village
Kaser, N.Y.	Village in town of Ramapo	5,380	100	1990, incorporation as a village	Incorporation as a village approved without conflict
Spring Valley, N.Y.	Village in towns of Ramapo and Clarkstown in Rockland County	32,261	30		Control over Board of Education, territorial annexation
Ramapo, N.Y.	Town	136,848	50		Control over Board of Education, financing school transportation to private schools, territorial annexation

Source: Author's tabulation from U.S. Census data.
Note: The data are taken from the 2018 census. Estimated population data for Bloomingburg, N.Y., are from "Population and Housing Unit Estimates."

REFERENCES

Abramson, Alan, Mitchell S. Tobin, and Matthew R. VanderGoot. 1995. "The Changing Geography of Metropolitan Opportunity: The Segregation of the Poor in U.S. Metropolitan Areas, 1970 to 1990." *Housing Policy Debate* 6(1): 45–72.

Acevedo-Garcia, Dolores, and Kimberly A. Lochner. 2003. "Residential Segregation and Health." In *Neighborhoods and Health*, edited by Ichiro Kawachi and Lisa F. Berkman. New York: Oxford University Press.

Aloi, Frank A., Arthur Abba Goldberg, and James M. White. 1969. "Racial and Economic Segregation by Zoning: Death Knell for Home Rule." *University of Toledo Law Review* 1(1): 65–108.

Anderson, Elizabeth. 1995. *Value in Ethics and Economics*. Cambridge, Mass.: Harvard University Press.

Bauman, John F. 1974. "Black Slums/Black Projects: The New Deal and Negro Housing in Philadelphia." *Pennsylvania History* 41(3): 311–38.

Bayer, Patrick, Hanming Fang, and Robert McMillan. 2014. "Separate When Equal? Racial Inequality and Residential Segregation." *Journal of Urban Economics* 82(1): 32–48.

Bell, Derrick. 2004. *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*. Oxford: Oxford University Press.

Bischoff, Kendra, and Sean F. Reardon. 2014. "Residential Segregation by Income, 1970–2009." In *Diversity and Disparities: America Enters a New Century*, edited by John R. Logan. New York: Russell Sage Foundation.

Bolt, Gideon, Jack Burgers, and Ronald van Kempen. 1998. "On the Social Significance of Spatial Location; Spatial Segregation and Social Inclusion." *Netherlands Journal of Housing and the Built Environment* 13(1): 83–95.

Boyd, Michelle. 2008. "Defensive Development: The Role of Racial Conflict in Gentrification." *Urban Affairs Review* 43(6): 751–76.

Brooks, Richard R. W., and Carol M. Rose. 2013. *Saving the Neighborhood: Racially Restrictive Covenants: Law, and Social Norms*. Cambridge, Mass.: Harvard University Press.

Brooks, Roy L. 1996. *Integration or Separation?* Cambridge, Mass.: Harvard University Press.

Brown, David, and Clive Webb. 2007. *Race in the American South: From Slavery to Civil Rights*. Edinburgh: Edinburgh University Press.

Buchanan, Allen E. 1989. "Assessing the Communitarian Critique of Liberalism." *Ethics* 99(4): 852–61.

Carr, James H., and Nandinee K. Kutty. 2008. "The New Imperative for Equality." In *Segregation*, edited by James Carr and Nandinee Kutty. New York: Routledge.

Conley, Dalton. 2010. *Being Black, Living in the Red: Race, Wealth, and Social Policy in America*. Berkeley: University of California Press.

Cutler, David M., Edward L. Glaeser, and Jacob L. Vigdor. 1999. "The Rise and Decline of the American Ghetto." *Journal of Political Economy* 107(3): 455–506.

Dagan, Hanoch, and Michael Heller. 2001. "The Liberal Commons." *Yale Law Journal* 110(4): 549–52.

Dean, John P. 1947. "Only Caucasian: A Study of Race Covenants." *Journal of Land and Public Utility Economics* 23(4): 428–32.

Demsetz, Harold. 1967. "Toward a Theory of Property Rights." *American Economic Review* 57(2), Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association (May): 347–59.

DuBois, W.E.B. 1899. *The Philadelphia Negro*. Philadelphia: University of Pennsylvania Press.

EdBuild. 2017. "Fractured: The Breakdown of America's School Districts." Accessed September 12, 2010. https://edbuild.org/content/fractured.

Edmonds, Richard W. 1957. *Segregation, Is It Justified?* Muscogee: University of Michigan Press.

Ellickson, Robert C. 1982. "Cities and Homeowners Associations." *University of Pennsylvania Law Review* 130(6): 1519–80.

Emerson, Michael O. 1994. "Is It Different in Dixie? Percent Black and Residential Segregation in the South and Non-South." *Sociological Quarterly* 35(4): 571–80.

Fischer, Mary J. 2003. "The Relative Importance of Income and Race in Determining Residential Outcomes in US Urban Areas, 1970–2000." *Urban Affairs Review* 38(5): 669–96.

Ford, Richard Thompson. 1993. "Boundaries of Race: Political Geography in Legal Analysis." *Harvard Law Review* 107(8): 1841–921.

Frey, William H. 1979. "Central City White Flight: Racial and Nonracial Causes." *American Sociological Review* 44(3): 425–48.

Glyn, Andrew, and David Miliband. 1994. *Paying for Inequality: The Economic Cost of Social Injustice*. London: Institute for Public Policy Research/Rivers Oram Press.

Goel, Ankur J., Willie J. Lovett Jr., Robert Patten, and Robert L. Wilkins. 1988. "Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker than Brown." *Harvard Civil Rights–Civil Liberties Law Review* 23(2): 415.

Goetz, Edward. 2011. "Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities." *Urban Studies* 48(8): 1581–604.

Gotham, Kevin Fox. 2000a. "Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration." *Sociological Perspectives* 43(2): 291–317.

———. 2000b. "Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a US City, 1900–50." *International Journal of Urban and Regional Research* 24(3): 616–33.

Greene, Abner S. 1996. "Kiryas Joel and Two Mistakes About Equality." *Columbia Law Review* 96(1): 1–86.

Grumet, Louis, John Caher, and Judith Kaye. 2016. *Curious Case of Kiryas Joel: The Rise of a Village Theocracy and the Battle to Defend the Separation of Church and State*. Chicago: Chicago Review Press.

Guelzo, Allen C. 2012. *Fateful Lightning: A New History of the Civil War and Reconstruction*. Oxford: Oxford University Press.

Hall, Raymond L. 1977. "Introduction." In *Black Separatism and Social Reality: Rhetoric and Reason,* edited by Raymond L. Hall. Elmsford, N.Y.: Pergamon Press.

Hamilton, Charles V., and Kwame Ture. 1967. *Black Power: Politics of Liberation in America*. New York: Vintage Books.

Hardin, Garrett. 1968. "The Tragedy of the Commons." *Science* 162(1243)(December 13): 1243–48.

Hayman, Robert L., Jr. 2002. "Neutral Principles and the Resegregation Decisions." *Widener Law Symposium Journal* 9(1): 129–64.

Hunt, Jerome. 2012. "A State-by-State Examination of Nondiscrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed." Washington, D.C.: Center for American Progress.

Jargowsky, Paul A. 1996. "Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas." *American Sociological Review* 61(6): 984–98.

Jennings, James. 2000. *The Politics of Black Empowerment: The Transformation of Black Activism in Urban America*. Detroit: Wayne State University Press.

Jones-Correa, Michael. 2000. "The Origins and Diffusion of Racial Restrictive Covenants." *Political Science Quarterly* 115(4): 541–68.

Kaplan, David H., and Kathleen Woodhouse. 2004. "Research in Ethnic Segregation I: Causal Factors." *Urban Geography* 25(6): 579–85.

Kennedy, Stetson. 2011. *Jim Crow Guide to the U.S.A.: The Laws, Customs and Etiquette Governing the Conduct of Nonwhites and Other Minorities as Second-Class Citizens*. Tuscaloosa. University of Alabama Press.

Klarman, Michael J. 2004. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. Oxford: Oxford University Press.

Kushner, James A. 1979. "Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States." *Howard Law Journal* 22(2): 547–60.

Kymlicka, Will. 1997. "Do We Need a Liberal Theory of Minority Rights? Reply to Carens, Young, Parekh and Forst." *Constellations* 4(1): 72–87.

Lamb, Charles M. 2005. *Housing Segregation in Suburban America Since 1960 : Presidential and Judicial Politics*. Cambridge: Cambridge University Press.

Lees, Loretta, Tom Slater, and Elvin Wyly. 2013. *Gentrification*. New York: Routledge.

Lieberson, Stanley. 1980. *A Piece of the Pie: Blacks and White Immigrants Since 1880*. Berkeley: University of California Press.

Luchenister, Alex J. 2015. "A New Era of Inequality: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws." *Harvard Law and Policy Review* 9(1): 63–88. Accessed September 12, 2020. https://harvardlpr.com/wp-content/uploads/sites/20/2015/04/9-1_Luchenitser.pdf.

Magid, Shaul. 2014. "'America Is No Different,' 'America Is Different'—Is There an American Jewish Fundamentalism?" In *Fundamentalism: Perspectives on a Contested History*, edited by Simon A. Wood and David H. Watt. Columbia: University of South Carolina Press.

Massey, Douglas S. 1990. "American Apartheid: Segregation and the Making of the Underclass." *American Journal of Sociology* 96(2): 329–57.

———. 2008. *Origins of Economic Disparities: The Historical Role of Housing Segregation*. New York: Routledge.

Massey, Douglas S., and Nancy A. Denton. 1988. "The Dimensions of Residential Segregation." *Social Forces* 67(2): 281–315.

———. 1993. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, Mass.: Harvard University Press.

Massey, Douglas S., and Mitchell L. Eggers. 1993. "The Spatial Concentration of Affluence and Poverty During the 1970s." *Urban Affairs Quarterly* 29(2): 299–315.

Massey, Douglas S., and Mary J. Fischer. 2000. "How Segregation Concentrates Poverty." *Ethnic and Racial Studies* 23(4): 670–91.

———. 2003. "The Geography of Inequality in the United States, 1950–2000." *Brookings-Wharton Papers on Urban Affairs* 1:1–40.

Massey, Douglas S., Andrew B. Gross, and Mitchell L. Eggers. 1991. "Segregation, the Concentration of Poverty, and the Life Chances of Individuals." *Social Science Research* 20(4): 397–420.

Massey, Douglas S., Jonathan Rothwell, and Thurston Domina. 2009. "The Changing Bases of Segregation in the United States." *Annals of the American Academy of Political and Social Science* 626(1): 74–90.

Meier, August. 1954. "Booker T. Washington and the Town of Mound Bayou." *Phylon (1940–1956)* 15(4): 396–401.

Michelman, Frank I. 1967. "Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law." *Harvard Law Review* 80(6): 1165–258.

Minow, Martha. 1995. "The Constitution and the Subgroup Question." *Indiana Law Journal* 71(1): 9–10.

Mintz, Jerome R. 1992. *Hasidic People: A Place in the New World*. Cambridge, Mass.: Harvard University Press.

Myers, David N. 2013. "'Commanded War': Three Chapters in the 'Military' History of Satmar Hasidim." *Journal of the American Academy of Religion* 81(2): 311–56.

Myers, Samuel L., Jr., William A. Darity Jr., and Kris Marsh. 2009. "The Effects of Housing Market Discrimination on Earnings Inequality." In *The Integration Debate: Competing Futures for American Cities*, edited by Gregory D. Squires and Chester W. Hartman. New York: Routledge.

Nelson, Jania S. 1996. "Residential Zoning Regulations and the Perpetuation of Apartheid." *UCLA Law Review* 43: 1689–730.

Norgren, Jill, and Serena Nanda. 2006. *American Cultural Pluralism and Law*. Westport, Conn.: Greenwood Publishing.

Omi, Michael, and Howard Winant. 2014. *Racial Formation in the United States*. New York: Routledge.

Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.

Pettigrew, Thomas F. 1977. "Racially Separate or Together." In *Black Separatism and Social Reality: Rhetoric and Reason*, edited by Raymond L. Hall. Elmsford, N.Y.: Pergamon Press.

Phillips, Anne. 2005. "Dilemmas of Gender and Culture: The Judge, the Democrat and the Political Activist." In *Minorities Within Minorities: Equality, Rights and Diversity*, edited by Avigail Eisenberg and Jeff Spinner-Halev. Cambridge: Cambridge University Press.

Pildes, Richard H. 1998. "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism." *Journal of Legal Studies* 27(S2): 725–63.

powell, john a. 2002. "Opportunity-Based Housing." *Journal of Affordable Housing and Community Development* 12(2): 188–228.

———. 2008. "Reflections on the Past, Looking to the Future: The Fair Housing Act at 40." *Indiana Law Review* 41(3): 605–27. Accessed September 10, 2020. http://journals.iupui.edu/index.php/inlawrev/article/view/3949/3911.

powell, john a., and Marguerite L. Spencer. 2002. "Giving Them the Old One-Two: Gentrification and the KO of Impoverished Urban Dwellers of Color." *Howard Law Journal* 46(3): 433–90.

Rabin, Yale. 1989. "Expulsive Zoning: The Inequitable Legacy of Euclid." In *Zoning and the American Dream: Promises Still to Keep*, edited by Charles Haar. New York: Routledge.

Rael, Patrick. 2015. *Eighty-Eight Years: The Long Death of Slavery in the United States, 1777–1865. Race in the Atlantic World, 1700–1900*. Athens: University of Georgia Press.

Reardon, Sean F., and Kendra Bischoff. 2011. "Income Inequality and Income Segregation." *American Journal of Sociology* 116(4): 1092–153.

Reeves, Richard, Edward Rodrigue, and Elizabeth Kneebone. 2016. "Five Evils: Multidimensional Poverty and Race in America." Washington, D.C.: Brookings Institution. Accessed September 10, 2020.

https://www.brookings.edu/wp-content/uploads/2016/06/reeveskneebonerodrigue_multidimensionalpoverty_fullpaper.pdf.

Reichman, Uriel. 1976. "Residential Private Governments: An Introductory Survey." *University of Chicago Law Review* 43(2): 253–306.

Ribstein, Larry E. 2001. "Law v. Trust." *Boston University Law Review* 81(2): 553–90.

Roithmayr, Daria. 2010. "Racial Cartels." *Michigan Journal of Race and Law* 16(1): 45–80.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright Publishing.

Rubin, Israel. 1997. *Satmar: Two Generations of an Urban Island*, 2nd ed. Bern: Peter Lang.

Runnels, Gabriella. 2016. "Breaking Apart: Confronting Race in East Baton Rouge Parish." *Women Leading Change: Case Studies on Women, Gender, and Feminism* 1(2): 59–78.

Schiff, David N. 1976. "Socio-Legal Theory: Social Structure and Law." *The Modern Law Review* 39(3): 287–310.

Schwemm, Robert G. 1978. "Discriminatory Effect and the Fair Housing Act." *Notre Dame Lawyer* 54 (December): 199–262.

Scott, A. J. 1986. "Industrialization and Urbanization: A Geographical Agenda." *Annals of the Association of American Geographers* 76(1): 25–37.

Seitles, Marc. 1998. "The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies." *Journal of Land Use and Environmental Law* 14(1): 89–124.

Sepper, Elizabeth. 2015. "Free Exercise Lochnerism." *Columbia Law Review* 115(6): 1453–519.

Shapiro, Eliza. 2019. "'I Love My Skin!' Why Black Parents Are Turning to Afrocentric Schools." *New York Times*, January 8. Accessed October 8, 2020. https://www.nytimes.com/2019/01/08/nyregion/afrocentric-schools-segregation-brooklyn.html.

Shoked, Nadav. 2013. "Quasi-Cities." *Boston University Law Review* 93(6): 1971–2032.

Silver, Christopher. 1997. "The Racial Origins of Zoning in American Cities." In *Urban Planning and the African American Community: In the Shadows*, edited by Thomas Manning and Marsha Ritzdorf. Thousand Oaks, Calif.: Sage Publications.

Simmel, Georg. 1955. *Conflict and the Web of Group-Affiliations*. New York: Free Press.

Smith, Mark M. 2006. *How Race Is Made: Slavery, Segregation, and the Senses*. Chapel Hill: University of North Carolina Press.

Smith, Neil. 2005. *The New Urban Frontier: Gentrification and the Revanchist City*. New York: Routledge.

Soja, Edward W. 2010. *Seeking Spatial Justice*. Minneapolis: University of Minnesota Press.

Stern, Shai. 2014. "Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities." *Journal of Law and Policy* 23(1): 141–202.

———. 2015. "When One's Right to Marry Makes Others Unmerry." *Albany Law Review* 79(2): 627.

Stolzenberg, Nomi Maya. 1993. "'He Drew a Circle That Shut Me Out': Assimilation, Indoctrination, and the Paradox of a Liberal Education." *Harvard Law Review* 106(3): 581–667

———. 2002. "The Return of the Repressed: Illiberal Groups in a Liberal State." *Journal of Contemporary Legal Issues* 12(1): 897.

———. 2011. "Board of Education of Kiryas Joel Village School District v. Grumet: A Religious Group's Quest for its Own Public School." In *Law and Religion*, edited by Leslie C. Griffin. New York: Aspen Publishers.

———. 2015. "Is There Such a Thing as Non-State Law? Lessons from Kiryas Joel." In *Negotiating State and Non-State Law: The Challenge of Global and Legal Pluralism*, edited by Michael Helfand. Cambridge: Cambridge University Press.

Stuckey, Melissa Nicole. 2009. *All Men Up: Race, Rights, and Power in the All-Black Town of Boley, Oklahoma, 1903–1939*. New Haven, Conn.: Yale University Press.

Taeuber, Karl E., and Alma F. Taeuber. 1965. *Negroes in Cities: Residential Segregation and Neighborhood Change*. Chicago: Aldine Publishing.

Taylor, Keeanga-Yamahtta. 2019. *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership*. Chapel Hill: University of North Carolina Press.

Taylor, Kendra, Erica Frankenberg, and Genevieve Siegel-Hawley. 2019. "Racial Segregation in the Southern Schools, School Districts, and Counties Where Districts Have Seceded." *AERA Open* 5(3). Published online September 3. DOI: 10.1177/2332858419860152.

Tolson, Arthur l. 1970. "Black Towns of Oklahoma." *The Black Scholar* 1(6): 18–22.

Tomlins, Richard. 2000. "Addressing the Housing Needs of Minority Ethnic Communities: Towards a Pluralistic Ethnic Housing Policy." In *Ethnicity and Housing: Accommodating Differences*, edited by Frederick W. Boal. Aldershot, UK: Ashgate Publishing.

Trifun, Natasha M. 2009. "Residential Segregation After the Fair Housing Act." *Human Rights* 36(4): 14–19.

Trubek, David M., Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer, and Joel B. Grossman. 1983. "The Costs of Ordinary Litigation." *UCLA Law Review* 31(1): 72–127.

U.S. Census Bureau. 2019. "2014–2018 American Community Survey 5-Year Estimates." Washington: Government Printing Office. Accessed September 10, 2020. https://www.census.gov/data/developers/data-sets/acs-5year.html.

Valocchi, Steve. 1996. "The Emergence of the Integrationist Ideology in the Civil Rights Movement." *Social Problems* 43(1): 116–30.

Van Cleve, George. 2010. *A Slaveholders' Union : Slavery, Politics, and the Constitution in the Early American Republic*. Chicago: University of Chicago Press.

Walsh, James D. 1999. "Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act." *Harvard Civil Rights–Civil Liberties Law Review* 34(2): 605–34.

Weaver, Robert Clifton. 1948. *The Negro Ghetto*. New York: Russell & Russell.

Williams, David R., and Chiquita Collins. 2001. "Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health." *Public Health Reports* 116(5): 404–16.

Wilson, Erika K. 2016. "The New School Segregation." *Cornell Law Review* 102(3): 139–210.

Wilson, William Julius. 1990. *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy*, repr. ed. Chicago: University of Chicago Press.

Woldoff, Rachael A. 2011. *White Flight/Black Flight: The Dynamics of Racial Change in an American Neighborhood*. Ithaca, N.Y.: Cornell University Press.

Wood, Simon A., and David Harrington Watt. 2014. *Fundamentalism: Perspectives on a Contested History*. Columbia: University of South Carolina Press.

Woodward, Comer Vann, and William S. McFeely. 2002. *The Strange Career of Jim Crow*. New York: Oxford University Press.

Yinger, John. 1995. *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation.

PART II

Housing and Spatial Segregation

Plessy's Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods

LELAND WARE

Plessy v. Ferguson *provided the foundation for a system of segregation and exclusion that adversely affected African Americans throughout the twentieth century. Segregation was perpetuated by federal policies. During the 1940s and 1950s, the federal government facilitated the construction of suburban communities with Veterans Administration– and Federal Housing Authority–insured mortgages. These agencies invented redlining and required lending institutions to insert racially restrictive covenants in deeds for properties they insured. In the 1950s and 1960s, the federal government facilitated the construction of the interstate highway system. The freeways were frequently constructed through African American neighborhoods, displacing the residents. Urban renewal programs caused the destruction of African American communities across the nation. This long and tragic history of structural racism continues to adversely affect the well-being of African American families.*

Keywords: segregation, redlining, restrictive covenants, exclusionary zoning, urban renewal, school desegregation, busing, suburbanization, Veterans Administration, Federal Housing Authority, social determinants of health, structural racism, implicit bias, interstate highway system, slums, blight

The Supreme Court's decision in *Plessy v. Ferguson* provided the legal foundation for an elaborate system of subordination and exclusion.[1] The case was the culmination of a series of post-Reconstruction actions that reestablished white supremacy in the South. This article explains how *Plessy*'s "separate but equal" principle facilitated segregation in the nation's housing markets. *Plessy* did not directly cause residential segregation, but it did legitimize the laws, customs, and practices that established the Jim Crow regime.

In the first decades of the twentieth century, responding to a severe labor shortage, thousands of European immigrants poured into the United States. Ethnic enclaves were established in rapidly growing cities. African Americans, unlike European immigrants, were confined in separate neighborhoods to the least desirable areas in urban communities. Other barriers

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

were also erected. In the 1930s, a federal agency created a system of rating neighborhoods. Black neighborhoods were redlined. Lenders did not make loans in these areas. The American suburbs were developed in the 1940s and 1950s, communities that could not have been established without Veterans Administration (VA) and Federal Housing Administration (FHA) insured mortgages. Those agencies required lenders to include racially restrictive covenants on all properties with federally insured mortgages.

In the 1950 and 1960s, the federal government subsidized the construction of the interstate highway system. Highways were frequently built through black neighborhoods, many of which were physically destroyed in the process. Some local officials used highways to separate black and white neighborhoods, reinforcing residential segregation.

Under the authority of the Housing Act of 1949, the federal government subsidized slum clearance and urban renewal programs. In the years that followed, many black neighborhoods were declared blighted, seized by local governments exercising eminent domain powers, and demolished. In the 1960s, many local governments enacted zoning codes that disproportionately excluded black families from suburban communities.

For more than half of the twentieth century, policymakers at the federal, state, and local levels pursued development strategies that had a devastating effect on African American families. These policies included redlining, restrictive covenants, the interstate highway system, urban renewal, and exclusionary zoning. Federal housing policies barred black families from the largest wealth-producing program in the nation's history—single-family homes in suburban communities. In 2016, the median black family wealth was $13,460, less than 10 percent of the counterpart $142,180 white family wealth. Slightly more than 25 percent of blacks had no or negative wealth, relative to only a little more than 10 percent of whites (Hanks, Solomon, and Weller 2018). These wealth disparities are largely the product of post–World War II government policies that facilitated home ownership and wealth-building for the white families that became America's middle class (Ware 2018).

SEPARATE AND UNEQUAL

Plessy v. Ferguson was not as much an interpretation of constitutional principles as it was a declaration of white supremacy. Decided at the cusp of the twentieth century, the case provided the legal justification for an all-encompassing system of discrimination and exclusion. The events leading to the case began in 1890, when Louisiana enacted a law requiring railway companies to provide separate cars for black and white passengers.[2]

A civic group organized a challenge to the law. Homer Plessy, a thirty-year-old French-speaking Creole, who was seven-eighths Caucasian and one-eighth African, agreed to serve as the plaintiff. The committee selected him in part because of his light complexion. Plessy bought a ticket and boarded a train traveling to Covington, Louisiana. After an orchestrated confrontation with the train's conductor, Plessy was ejected and imprisoned in the parish jail.

The separate car law was challenged on the grounds that it violated the Thirteenth and Fourteenth Amendments of the Constitution. The Thirteenth Amendment outlawed slavery. The Court majority summarily rejected the Thirteenth Amendment argument, stating that "a statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races or reestablish a state of involuntary servitude."[3]

The Fourteenth Amendment prohibits states from denying any person equal protection of the laws. In *Plessy*, the Court agreed that the intent of the amendment was to enforce the equality of the two races before the law, "but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished

2. *Plessy*, 163 U.S.

3. *Plessy*, 163 U.S. at 543.

from political, equality, or a commingling of the two races upon terms unsatisfactory to either." The majority concluded that "the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment."[4]

Plessy's lawyers argued that the law deprived him of a valuable property right. The majority disagreed, stating, "we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man."[5]

Plessy argued that the segregation law stamped the black race with a badge of inferiority. The majority disagreed. If this were true, it asserted, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." Justice Henry Billings Brown's opinion stated further "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences. . . . If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[6]

Plessy argued that the equal but separate premise was irrational and would authorize a state to require separate cars for people whose hair was a certain color, or who are aliens, or who belong to certain nationalities. This would allow states to enact laws requiring blacks to walk on one side of a street and white people on the other; requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors based on the reasoning that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The majority rejected, but did not refute, this argument. It said Plessy's hypotheticals went too far. The Court's vague and ambiguous response declared that every exercise of a state's police power must be "reasonable," guided by the established usages, customs, and traditions of their citizens and providing for the preservation of the public peace and order.

Associate Justice John Marshall Harlan authored what became a historic dissent. He exposed the majority's disingenuous reasoning stating, "everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons."[7]

Harlan continued, "in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. . . . In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case.*"[8] This was a prescient observation (Hoffer 2012).

PLESSY AND THE BETRAYAL OF RECONSTRUCTION

Plessy was one of a series of cases that eviscerated the post–Civil War amendments. C. Vann

4. *Plessy*, 163 U.S. at 543.

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

6. *Plessy*, 163 U.S. at 551–552.

7. *Plessy*, 163 U.S. at 557.

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

Woodward explains in *The Strange Career of Jim Crow* (2002) that racial segregation emerged in the final decades of the nineteenth century but was uneven in its development and implementation. Practices were different in different localities. *Plessy* was the culmination of a gradual movement that virtually nullified the Fourteenth and Fifteenth Amendments in the South. It expressly endorsed segregation and gave the green light to what became an all-encompassing system of subordination.

A series of nineteenth-century cases culminated with *Plessy*. In *United States v. Reese*, a black man residing in Kentucky attempted to vote but his poll tax payment was rejected, and he was not allowed to vote.[9] The Supreme Court rejected his challenge, holding that the Fifteenth Amendment did not affirmatively ensure the right to vote but instead merely prohibited states from denying it.

Another case, *U.S. v. Cruikshank*, involved the massacre at which a group of Ku Klux Klansmen used deadly force to break up a black political rally in Colfax, Louisiana.[10] Hundreds of African Americans were shot or killed. Three Klansmen were convicted for violations of an 1870 law that forbade conspiracies to deny the constitutional rights of individuals. The Supreme Court reversed the convictions. It ruled that the First and Second Amendment rights to assembly and bearing arms were intended only to restrict the actions of the federal government and did not apply to the states or private citizens. The Fourteenth Amendment rights to due process and equal protection applied only to state action, not the actions of individuals.

The 1875 Reconstruction Civil Rights Act prohibited discrimination in public accommodations. Five consolidated cases (*United States v. Stanley*, *United States v. Ryan*, *United States v. Nichols*, *United States v. Singleton*, and *Robinson v. Memphis & Charleston Railroad*) involved civil actions filed by African Americans claiming that they had been illegally refused equal access to restaurants, hotels, theaters, and trains as required by the 1875 law.

In the *Civil Rights Cases*, decided in 1883, key provisions of the 1875 act were declared unconstitutional.[11] The Court held that Congress did not have the authority to regulate private acts of discrimination. The Fourteenth Amendment applied only to the actions of state officials. These decisions undermined the rights established by the Fourteenth and Fifteenth Amendments. *Plessy* was the coup de grâce.

THE SPREAD OF SEGREGATION

After the Supreme Court's endorsement in *Plessy*, racial separation was imposed on virtually all aspects of everyday life in the South. Whites and blacks were born in separate hospitals, educated in different schools, and buried in segregated graveyards. Schools, restaurants, hotels, theaters, public transportation, and waiting rooms were segregated as were elevators, parks, public restrooms, hospitals, drinking fountains, prisons, and places of worship. Segregated waiting rooms were required in professional offices, as well as building entrances and cemeteries. Amusement parks had separate cashier windows for blacks and whites.

Segregation was enforced for public pools, telephone booths, asylums, jails, and homes for the elderly and people with disabilities. The labor market was segmented. Jobs were for whites or for blacks, for men or for women. African Americans were domestics, janitors, laborers, and the like. These were the lowest paying and least desirable occupations. New Orleans mandated the segregation of prostitutes according to race. In Atlanta, African Americans testifying in court cases were sworn in using a different Bible than the one used for whites. Marriage and cohabitation between whites and blacks was strictly forbidden in most southern states. "Sundown towns" were not uncommon across the Midwest. In some cases, signs were posted at city limits warning African Americans that they were not welcome at night (Loewen 2006). In other towns, it was simply understood that blacks were not welcome after sundown.

9. *United States v. Reese*, 92 U.S. 214 (1876).

10. *U.S. v. Cruikshank*, 92 U.S. 542 (1876).

11. *Civil Rights Cases,* 109 U.S. 3 (1883).

The country had, in effect, two criminal justice systems: one for whites and another for blacks. When the color line was breached, violence was unleashed against offenders by the Ku Klux Klan and local whites, often in concert with local law enforcement officials.

All branches of the U.S. military were segregated. In 1913, President Woodrow Wilson segregated the federal civil service (Yellin 2013). In 1915, he screened D. W. Griffith's *Birth of a Nation* in the White House. The movie glorified the Ku Klux Klan and portrayed blacks as ignorant brutes. Wilson supposedly said, "It's like writing history with lightning. And my only regret is that it is all terribly true" (Benbow 2010, 509). In 1917, the Wilson administration named ten southern military installations after Confederate generals (Editorial Board 2020). Segregation was codified in state and local laws and enforced by intimidation and violence (Litwack 1998).

In Atlanta, Georgia, for example, blacks could not serve on juries. The races were indexed separately on tax rolls. Atlanta's banks maintained separate teller windows for white and black customers. The Rhodes-Haverty building in Atlanta had four elevators. Three of those going up were for whites and one was for blacks. All four going down, however, were integrated. The apparent logic was that whites and blacks go to separate heavens but the same hell (Pomerantz 1997; Ruechel 1997). Blacks could not try on clothes in department stores. They were expected to wait until all of the white customers were served before they were helped.

A Jim Crow etiquette was scrupulously observed in interactions. Blacks were expected to address a white person by the title of *Mr.*, *Mrs.*, or *Miss*. Whites addressed blacks by their first names no matter if they hardly knew each other or by the epithets *boy*, *uncle*, *auntie*, or the like. If a black person entered a white person's home, they were obligated to use the back door. The purpose of these unwritten but well-known rules was to provide a continual demonstration blacks were inferior to whites and to recognize and acknowledge their inferiority (Myrdal 1944).

THE GREAT MIGRATION AND SUBURBANIZATION

The federal government played an essential role in the development, institutionalization, and perpetuation of residential segregation. When northern and midwestern cities began to industrialize at the beginning of the twentieth century, thousands of African American families migrated from the rural South to cities in the Northeast and Midwest (Wilkerson 2010; Lemann 1991). They were pushed by the violence and intimidation in the segregated South and pulled by the lure of better-paying factory jobs and a higher standard of living. Like the foreign immigrants pouring in from Europe, blacks worked in factories in a rapidly industrializing economy.

When black migrants arrived in urban communities, they encountered many obstacles. In some towns, municipal ordinances prohibited African Americans from occupying properties except in designated neighborhoods. In 1910, Baltimore became the first city in America to adopt a residential segregation ordinance (Power 1983). The laws were challenged and declared unconstitutional as violations of the Fourteenth Amendment in a 1917 decision, *Buchanan v. Warley.* The ruling was based on the rights of whites to sell their property to whomever they wished rather than on the equality rights of African Americans.[12]

After *Buchanan*, the real estate industry devised another tactic: racially restrictive covenants. The covenants were clauses in deeds that prohibited property owners and subsequent purchasers from selling their homes to racial and religious minorities. The Supreme Court implicitly endorsed the covenants in a 1926 decision, *Corrigan v. Buckley*.[13] The Fourteenth Amendment applies only to actions taken by state and local governments. The Court did not decide the merits of *Corrigan,* but did issue an opinion that the Fourteenth Amendment did not prohibit private parties from controlling the use and disposition of their property.

As the northern migration continued, an already severe housing shortage for African Americans grew worse. Blacks were crowded

12. *Buchanan v. Warley*, 245 U.S. 60 (1917).

13. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

into existing ghettos that expanded as whites moved out of adjacent neighborhoods. The overcrowding created financial incentives to violate the covenants. In many cases, a white strawman purchased a property and immediately resold to a black purchaser, usually at a significant profit. In the 1940s, the National Association for the Advancement of Colored People (NAACP) launched a formal litigation campaign that challenged restrictive covenants. In 1948, the Supreme Court held in *Shelley v. Kraemer* that restrictive covenants were private arrangements, but judicial enforcement of discriminatory agreements constituted state action that violated the Fourteenth Amendment.[14] After *Shelley*, the covenants could not be enforced in courts. This was an important but largely symbolic victory for the NAACP (Ware 1989; Ware and Davis 2012). Discriminatory practices continued.

The American middle class grew rapidly during and after World War II (Massey and Denton 1993; Rothstein 2017; Fox 1990). Before the war, working-class whites lived in ethnic enclaves in cities or in small towns and rural communities. Extended families often occupied the same residence. As the nation industrialized, wages grew after the 1935 Wagner Act facilitated the formation of labor unions and collective bargaining. The 1944 G.I. Bill provided returning veterans with financial assistance for college expenses and insurance for home mortgages. Millions of servicemen were able to afford homes for the first time. In 1947, real estate developer William Levitt purchased four thousand acres of farmland on Long Island, New York, and converted it into the largest privately planned community in American history.

Suburban communities could not have been developed without the federal government's support. Communities such as Levittown were constructed in metropolitan regions across the nation. Residential construction rose from 114,000 new homes in 1944 to 1.7 million by 1950 (Suddath 2009). All of this was facilitated by the introduction of fixed-rate, thirty-year mortgages insured by the Veterans Administration and Federal Housing Authority (Massey and Denton 1993; Ware 2018; Jackson 1985; Freund 2010). Mortgage interest and local property taxes could be deducted from federal income taxes. In many cases, buying a home was cheaper than renting. Middle-class American families could achieve the American dream—a single-family, detached home on a quarter-acre lot.

Housing segregation was mandated by the federal government. The Home Owners' Loan Corporation (HOLC), a federal agency established during the 1930s Depression, fostered residential segregation by redlining (Oliver and Shapiro 1997; Rothstein 2017). Land economists believed that property values were closely linked to the racial composition of neighborhoods. The HOLC rated every neighborhood in America A, B, C, or D using color-coded maps. The lowest quality rating, D, was red. Neighborhoods rated A had to be homogenous and occupied by the families of business and professional men who were white and usually native born. Neighborhoods in which blacks resided were rated D. Lenders were discouraged from making loans in those neighborhoods (Howell 2006). The HOLC neighborhood risk maps institutionalized discrimination based on race and geography.

The FHA used HOLC's system to develop criteria for selecting the mortgages it would insure. The FHA's underwriting standards reflected the model of neighborhood change developed by the economist Homer Hoyt (1933). Hoyt describes the patterns of development of residential neighborhoods according to his "sector theory" of neighborhood change. According to sector theory, areas developed along certain sections of a city. A high-grade residential area was the center of attraction that pulled other residential areas toward it. However, if a high-rent district was established in another sector, other high-rent districts would extend out from that point and pull the growth of the city in that direction as lower-income groups moved into the houses in older neighborhoods. In this invasion-succession model, newly constructed neighborhoods were occupied by white families (Gordon 2005). Over time, the neighborhood transitioned from white Protestant to Jewish families and finally African Amer-

14. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

icans as the housing stock grew older and began to deteriorate.[15]

The FHA developed Residential Security Maps that assigned every neighborhood a place somewhere along this continuum (Nelson et al. 2020). The FHA's *Underwriting Manual* warned lenders that neighborhoods could retain their values only if the properties were occupied by the same social classes and racial groups. The agency urged the use of restrictive covenants to maintain neighborhood stability. The FHA's 1935 manual stated, "If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in value." The 1939 *Underwriting Manual on Racial Restrictive Covenants* stated,

> The Valuator should realize that the need for protection from adverse influences is greater in an undeveloped or partially developed area than in any other type of neighborhood. Generally, a high rating should be given only where adequate and enforced zoning regulations exist or where effective restrictive covenants are recorded against the entire tract, since these provide the surest protection against undesirable encroachment and inharmonious use. To be most effective, deed restrictions should be imposed upon all land in the immediate environment of the subject location. . . . Recommended restrictions should include provisions for the following. . . . Prohibition of the occupancy of properties except by the race for which they are intended. (Weaver 1948, 72)

After the decision in *Shelley v. Kraemer*, the FHA made some largely cosmetic changes to its manual. Explicit references to race were removed. However, the *Manual* continued to warn against introducing adverse influences that would diminish the desirability of the neighborhood or lower property values. Local real estate boards warned members not to introduce elements into a neighborhood that would be detrimental to the property values and explicitly included blacks among the undesirable elements. Real estate publications used in college and university courses and by practicing realtors continued to urge separating "inharmonious" populations.

Revised editions of *Hoyt's Principles of Urban Real Estate* toned down some of its racial references but did not abandon its message that white neighborhoods needed protection from "inharmonious groups" (Weimer and Hoyt 1939). Home equity is the principal source of wealth for most American families. The federal government's discriminatory policies excluded African Americans from the largest wealth-producing programs in the nation's history; single-family homes in suburban communities purchased with VA- and FHA-insured mortgages (Rothstein 2017; Oliver and Shapiro 2019). The continuing black-white wealth disparities are largely the product of post–World War II government policies that excluded African Americans.

REVERSE REDLINING AND GHETTO LOANS

For most of the twentieth century, redlining prevented African Americans from securing mortgage loans. Reverse redlining is essentially the opposite; minority populations are targeted by lenders who provide mortgages for higher fees and costs than those to similarly situated white customers. The loans, many of which were made with inadequate regard for the borrowers' ability to make payments, resulted in defaults, massive foreclosures, and the loss of billions of dollars in home equity. In *Race for Profit: How Banks and the Real Estate Industry*

15. "If the entrance of a colored family into a white neighborhood causes a general exodus of the white people it is reflected in property values. Except in the case of Negroes and Mexicans, however, these racial and national barriers disappear when the individuals of the foreign nationality groups rise in the economic scale or conform to the American standards of living. . . . While the ranking may be scientifically wrong from the standpoint of inherent racial characteristics, it registers an opinion or prejudice that is reflected in land values; it is the ranking of race and nationalities with respect to their beneficial effect upon land values. Those having the most favorable effect come first in the list and those exerting the most detrimental effect appear last: 1. English, Germans, Scots, Irish, Scandinavians 2. North Italians 3. Bohemians or Czechoslovakians 3. Poles 4. Lithuanians 5. Greeks 6. Russian Jews of lower class 6. South Italians 6. Negroes 7. Mexicans" (Hoyt 1933, 314–16).

Undermined Black Homeownership, Keeanga-Yamahtta Taylor shows how many financial institutions used exploitative loan products that drained the wealth of African Americans (Hauser 2008; Brescia 2009; Squires 2005; Fisher 2009; Taylor 2019).

The products that created this problem were subprime mortgages. Prior to the emergence of subprime lending, most mortgage lenders made mainly prime loans to borrowers with incomes and credit histories that indicated they were unlikely to default on their obligations. In the early 1990s, technological advances in automated underwriting allowed lenders to predict with improved accuracy the likelihood that borrowers with blemished credit histories would repay loans (Steil et al. 2018).

By the early 2000s, lenders dramatically increased their marketing of these products. From 2000 to 2005, housing prices rose dramatically and many borrowers therefore viewed adjustable rate mortgages as a good bet. They frequently used adjustable rate mortgages with low payment in the first two years. In 2006, home values started to decline. By 2008, the United States found itself in a housing crisis. Supply outstripped demand and home values declined for the first time in many decades.

Financial institutions targeted low-income borrowers in inner-city communities with subprime loans that had higher interest rates and fees. To gain the trust of borrowers, originators worked through local social structures and interpersonal networks to enlist trusted intermediaries such as religious leaders, small business owners, and individuals in community-based organizations. These mortgages were called ghetto loans by some of the lenders' employees.

In many cases, borrowers could handle the monthly payments at the relatively low teaser rate, but after the new interest rates went into effect, they could not afford the increased payments. Declining home prices pushed a record number of borrowers under water, meaning the balances owed on their mortgages were higher than the market value of their homes. An oversupply of homes, declining home values, rising unemployment levels, and other problems significantly decreased the demand for homes.

These conditions resulted in a massive wave of defaults and foreclosures. The impact was devastating. African Americans lost more than half of their wealth through falling homeownership rates and job losses (Rugh and Massey 2010). A number of class actions were filed against lenders (Relman 2008; Husain 2016). Most of them settled. These activities violated the Fair Housing Act and the Equal Credit Opportunity Act, but the federal regulatory and enforcement agencies did not intervene in a meaningful way.

SEPARATE NEIGHBORHOODS PERPETUATE SEGREGATED SCHOOLS

One of the lingering vestiges of the Jim Crow era is de facto segregation in central city schools. In the early 1930s, the NAACP decided to launch a legal campaign in courts that challenged segregation. Charles Houston, the Harvard-trained dean of Howard Law School, was hired as the NAACP's first full-time counsel. Houston developed what became known as the equalization strategy. A series of cases would be filed arguing that the segregated educational institutions in the South did not comply with *Plessy*. Black and white schools were separate but not equal. Houston and his NAACP colleagues believed that if the equality aspect of the "separate but equal" principle were enforced, southern states could not bear the burden and expense of maintaining a dual educational system that was equal. Segregation would eventually collapse under its own weight (Kluger 2004; Greenberg 1994; Cottrol et al. 2003).

The first cases targeted graduate and professional education in Maryland, Missouri, Texas, and Oklahoma. After the successes in the equalization cases in the 1930s and 1940s, the direct challenge was launched in 1950. *Brown v. Board of Education* consisted of six cases filed in five jurisdictions. The case in South Carolina was *Briggs v. Elliott* and in Virginia was *Davis v. Prince Edward County*. The two Delaware cases were *Beulah v. Gephardt* and *Belton v. Gephardt*. *Brown v. Board of Education* involved a school district in Kansas. The District of Columbia case was *Bolling v. Sharpe*.[16]

The cases were consolidated at the Supreme

16. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Court level, argued in 1952, and reargued in 1953. The decision in the *Brown* cases was announced on May 17, 1954. Chief Justice Earl Warren read the unanimous opinion. After emphasizing the importance of education to a democratic society, the Court framed the issue as whether "segregation of children in public schools solely on the basis of race. . . deprives the children of the minority group of equal educational opportunities."[17] The Court found that it did, concluding that "to separate [black] children from others of similar age and qualifications generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely ever to be undone." The Court went on to rule that "separate educational facilities are inherently unequal."[18]

School desegregation efforts were undermined in the early 1970s. In a Detroit, Michigan, case, the NAACP argued that school desegregation efforts could not succeed without including suburban districts. The Supreme Court held in that suburban school districts could not be required to participate in court-ordered desegregation plans unless it could be proven that their actions contributed to segregation in the jurisdiction in which the case arose.[19] This meant that suburban communities from which blacks had been excluded were effectively protected from school desegregation efforts. Over the next thirty years, busing was used to promote diversity in schools with limited success. The levels of neighborhood segregation in many urban communities is still quite high.

When *Brown II* was decided in 1955, neighborhoods were already segregated after decades of discriminatory practices the federal government had mandated. In the 1940s and 1950s, white families in cities were rapidly moving to the surrounding suburbs. With the advent of school desegregation, *white flight* to suburban communities accelerated. A demographic pattern developed that continues into the present. Black families were confined to large, continuous settlements of densely inhabited neighborhoods packed tightly around the urban core. Whites lived in suburban neighborhoods with separate school districts. This frustrated school desegregation efforts in urban communities.

URBAN RENEWAL AND "NEGRO REMOVAL"

The Housing Act of 1949 had the ambitious goal to "provide a decent home and suitable environment for every American family."[20] Despite its lofty aspirations, the act facilitated the use of urban renewal programs to create racially separate neighborhoods. Efforts to develop federal housing policies began in the mid-1920s when the market for the development of land in cities was shrinking because of the movement of middle-income families and industry to surrounding areas. Neighborhoods adjacent to the central business districts (CBDs) were home to deteriorating buildings, decreased occupancies, and unsafe structures. Downtown business owners feared that property values in the CBD would decline rapidly. These areas were low-income neighborhoods occupied by recent immigrants and racial minorities. Redlining and restrictive covenants confined African American families to geographically compact areas near the CBD that had the oldest buildings and deteriorating infrastructures.

Downtown elites, business owners, universities, elected officials, and other groups wanted large areas to be redeveloped for high-end commercial and residential uses surrounded by parks, efficient transportation systems, and attractive amenities. Proposals were made that included enacting state laws empowering municipalities to redevelop declining and dilapidated areas adjacent to central business districts. The transition could be accomplished by demolition of the existing structures followed by large-scale rebuilding. Sizable tracts of land had to be assembled within a reasonable time at an affordable price. The redevelopment proposals included public-private coordination of

17. *Brown,* 347 U.S. at 483.

18. *Brown,* 347 U.S. at 494–495.

19. *Milliken v. Bradley*, 418 U.S. 717 (1974).

20. Congressional declaration of national housing policy. 42 U.S. Code § 1441.

urban land use, long-term federal loans to cities at low interest rates, generous tax subsidies, and write-offs for local redevelopers. This approach became the core of urban revitalization programs throughout the nation. It tended to enhance residential segregation.

The acquisition of large contiguous tracts would have been difficult because of the various parties and interests that owned and controlled the properties. The solution was to use local governments' eminent domain powers to acquire the land and resell it to private corporations at a discounted price coupled with tax abatements. Local governments were expected to bear the cost of amenities such as new street systems, transportation facilities, schools, playgrounds, buildings, and utilities such as water and sewer lines.

The Housing Act of 1937 authorized local communities to create housing authorities with the legal power of eminent domain to acquire privately owned land for slum clearance and new construction. After the Housing Act of 1954 was adopted, cities could use federal funds to build new housing in cleared areas and to pay private developers to construct highways, office buildings, and shopping malls.

Local real estate officials and local elites viewed the Housing Act as a mechanism for eliminating blighted areas surrounding the central business district and using federal subsidies to engineer downtown redevelopment and growth. The act stipulated that major urban cities would receive funds to renovate blighted areas, including neighborhoods classified as slums and buildings deemed unsafe and uninhabitable. In *Berman v. Parker*, the District of Columbia's Planning Commission proposed to begin redevelopment in the southwestern area of the city.[21] That section was home to approximately five thousand people, 98 percent of whom were African American. Surveys prepared for the commission found that 58 percent of the dwellings had indoor toilets, more than 80 percent had no central heating, and 29 percent had no electricity.

Included in the properties to be condemned was a department store in reasonably good condition. The store's owners sued, arguing that the store posed no threat to public order, health, or safety. The Supreme Court held when a locality determines that the post-redevelopment use of private property has a public purpose, it is free to undertake reasonable methods to see that the purpose is promoted.

Urban renewal projects were intended to condemn slum neighborhoods, tear down the buildings, and resell the cleared land to private developers at a reduced price. In addition to relocating the residents to safe and sanitary housing, the program was intended to stimulate large-scale private rebuilding, add new tax revenues for cities, revitalize downtown areas, and halt white flight to the suburbs. Local housing authorities constructed low-income housing developments in segregated, inner-city neighborhoods. Because urban renewal was intended to clear areas of concentrated poverty, low-income families and minorities were disproportionately affected (Anderson 1964). Public housing was expected to replace the homes that were razed, but the new projects did not have enough units to house the displaced families (Austin, Popkin, and Rawlings 2008).

During the late 1950s and 1960s, multifamily buildings dominated American public housing. Housing officials in America and Europe were inspired by Le Corbusier's visions of towers rising out of vast expanses of grass and greenery. Le Corbusier, a Swiss-born modernist-architect, exerted a powerful influence on a generation of designers who were mesmerized by his bold drawings of what he called the radiant city (Fishman 1977). The movement for modernism also gained support from city officials and developers, who saw sleek skyscrapers as a way of modernizing the aging urban landscapes of postwar America. Many public housing complexes adopted the Brutalist style that evolved from the modernist architectural movement of the early twentieth century.[22]

Public housing contributed to social problems because it concentrated impoverished

21. *Berman v. Parker*, 348 U.S. 26 (1954).

22. The term originated from the French word for *raw*, as Le Corbusier described his choice of material, *béton brut*.

families in high-density, multifamily dwellings. The housing projects erected to replace slums soon became dilapidated and crime ridden. They were disproportionately home to poor, single-parent households. Many projects became lawless places, overrun by gang activity. They were a cold and alienating urban presence. Among some tenants, a feeling of being crowded into housing with other tenants from similar backgrounds made some residents feel that they were being excluded from mainstream society. In many cases, inadequate funding and poor management caused many developments to fall into disrepair. Urban renewal was labeled "Negro removal" because of the ways it destroyed many thriving, black communities (Baldwin 1963). An estimated 80 percent of the people displaced were African Americans (Price 1991; Teaford 2000; Pritchett 2003).

Low-income, multifamily housing developments intensified racial and economic segregation. The Housing Act of 1949 intended to relieve a housing shortage, but the program destroyed thousands more units than it replaced and dislocated tens of thousands of small businesses and residents. In 1974, the federal government discontinued the urban renewal program amid widespread urban protest and neighborhood discontent about the destabilizing effects of the program on inner-city communities (Gotham 2001; Teaford 2000).

THE INTERSTATE HIGHWAY SYSTEM

The interstate highway system transformed transportation in America but destroyed many black neighborhoods. In 1919, Lieutenant Colonel Dwight Eisenhower participated in a transcontinental convoy organized by the U.S. Army Motor Transport Corps. The group traveled three thousand miles from Washington, D.C., to Oakland, California, and by ferry to San Francisco. The participants encountered difficult conditions. Half the distance was over dirt roads, wheel paths, desert sands, and mountain trails. During World War II, Eisenhower was stationed in Germany, where he was impressed by the network of high-speed roads then known as the Reichsautobahnen. After he was elected president in 1952, Eisenhower was determined to build an American system of interstate highways.

The interstate highway system revolutionized transportation but inflicted irreparable damage on urban neighborhoods (Caro 1975). The roads displaced families from their homes, sliced communities in half, and led to abandonment and decay in urban communities (DiMento and Ellis 2013). On June 26, 1956, Congress passed the Federal-Aid Highway Act of 1956. Revenue from the federal gas and other motor-vehicle taxes was credited to the Highway Trust Fund to pay the federal share of interstate construction and all other federally aided highway projects. The intent was the program would be self-financing.

Interstate highways are controlled-access expressways with no at-grade crossings. They have overpasses and underpasses instead of intersections. They are at least four lanes wide and designed for high-speed driving. They were intended to eliminate traffic congestion, replace undesirable slum areas with attractive roadways, and make transportation more efficient. The interstates made travel in and out of American cities simpler and sped the growth of suburbs. The highways increased the mobility of Americans, allowing them to move out of cities and establish homes in suburban communities and to travel quickly from one region to another for vacation and business.

The 1956 Highway Act authorized the construction of a forty-one-thousand-mile network of interstate highways and allocated $26 billion to pay for them. The act set the federal share for interstate construction at 90 percent in recognition of the national scope of the project. Each state transportation department managed its own program for location, design, right-of-way acquisition, and construction. States are responsible for the ownership and maintenance of the system.

In many cases, local officials used highways to separate black and white neighborhoods, reinforcing residential segregation (Badger and Cameron 2015). Interstate highway construction destroyed entire neighborhoods and isolated others, creating inner-city ghettos. As former U.S. Department Transportation Secretary Anthony Foxx explained,

> The interstate highway system is at once a marvel of ingenuity and efficiency . . . and an

example of how physical barriers can create and exacerbate social ones. No city was spared the system's effects, largely affecting minority and low-income areas in Detroit, New Orleans, Los Angeles, Chicago, New York City, and my hometown, Charlotte [North Carolina]. . . . Many routes cut through the hearts of low-income and minority communities, often in conjunction with urban renewal programs that purported to remove urban blight. There are numerous examples of ensuing disparate impacts, be it the Dan Ryan Expressway in Chicago separating the Robert Taylor homes (an iconic, largely African American housing project constructed in the late 1950s and demolished in the mid-2000s) from the rest of the city or I-95 displacing 1,093 (out of 1,289) minority families in Camden, New Jersey. (Foxx 2018)

The combination of cars, highways, concrete, and oil made the central cities the chief casualty of suburbanization. The combination of urban renewal's demolition and the construction of interstate highways turned many central city communities into ominous, dystopian landscapes of poverty and despair (Biles 2014; Biles, Mohl, and Rose 2014; Lee 2016).

EXCLUSIONARY ZONING

Local governments have the legal authority to regulate the use of land within their borders. Over the years, they have used their zoning powers to perpetuate segregated neighborhoods. New York City was the first municipality to enact zoning ordinances.[23] In *Euclid v. Ambler Realty*, the Supreme Court held that municipalities could regulate private property even if the zoning decreases the value of the property.[24] This case gave rise to the concept of Euclidean zoning, a system in which a municipality is divided into areas in which specific uses of land are permitted. Planners believed that the uses to which land was dedicated should be separated. This meant, for example, that one area within a municipality would be the devoted to factories, another to retail and commercial developments. Other areas will be devoted to farmland and finally specific areas would be limited to residential uses.

In residential areas, disputes arose concerning the zoning that tended to exclude African Americans. A typical example of exclusionary zoning is a limitation of residential development to single-family housing on large lots. This practice has been challenged because it excludes a disproportionate proportion of racial minorities. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a development organization applied to the Village of Arlington Heights for rezoning of a fifteen-acre parcel from single-family residential to multifamily residential, intending to build federally subsidized low-income housing.[25]

After the request was denied, a civil action was filed claiming that the denial of rezoning violated the Fourteenth Amendment and the Fair Housing Act. The Supreme Court held that a municipality's zoning decision would not be held unconstitutional solely because it had a racially disproportionate impact. The development organization did not prove that the zoning board acted with a discriminatory intent, which is required to prevail on a claim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment.[26]

In *Huntington Branch, NAACP v. Town of Huntington* a suit was filed by a developer claiming that the New Jersey township violated the Fair Housing Act by restricting private construction of multifamily housing to a narrow urban re-

23. NYC Planning, "Zoning Background," accessed September 8, 2020, https://www1.nyc.gov/site/planning/zoning/background.page.

24. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

25. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

26. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court held that the disparate impact theory applies to housing discrimination claims. This was significant because the Court had not previously applied the disparate impact theory to housing discrimination cases. 135 S. Ct. 2507 (2015).

newal area and refusing to rezone the parcel outside of this area where the organization desired to build multifamily housing.[27] The district court refused to invalidate the zoning restriction. The appellate court held that the zoning restriction had a discriminatory effect and that the town had not shown a legitimate justification for its actions that outweighed the adverse effect.

In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, a civil action was filed challenging the township's system of land use regulation on grounds that low- and moderate-income families were unlawfully excluded from the municipality.[28] The New Jersey Supreme Court held that a municipality may not, by a system of land use regulation, make it physically and economically impossible to provide low- and moderate-income housing in the township. The ordinance, which allowed only upscale, single-family houses on large lots, was so restrictive that it was contrary to the state's general welfare (Massey et al. 2013). The Court ordered that all New Jersey municipalities take affirmative actions to provide realistic opportunities for their fair share of the region's need for affordable housing for low- and moderate-income people. The state subsequently enacted legislation requiring municipalities to enact zoning that facilitates the construction of affordable housing.

Climbing Mount Laurel includes a systematic evaluation of the Ethel Lawrence Homes, a housing development produced after the *Mount Laurel* decision. The authors assessed the consequences for the surrounding neighborhoods and their inhabitants, the township of Mount Laurel, and the residents of the Ethel Lawrence Homes. Their analysis reveals what social scientists call *neighborhood effects*, the notion that neighborhoods can shape the life trajectories of their inhabitants. *Climbing Mount Laurel* shows that building affordable housing projects is a cost-effective approach to integration and improving the lives of the poor that has no adverse effects for the surrounding community.

SEGREGATION AND THE SOCIAL DETERMINANTS OF HEALTH

According to the leading public health researchers, the single most important condition that continues to have adverse effects on the socioeconomic status and the health of African Americans is residential segregation (Williams and Collins 2001). The state of an individual's health is the result of a complex web of influences, including social, economic, political, physical, behavioral, and biological factors. Health is influenced by innate physical factors, such as age, gender, and genetic predisposition. It is also affected by behaviors and lifestyle factors, such as tobacco use and physical activity. However, lifestyle choices are made within the context of a person's social and community networks as well as the broader social, economic, and physical environment. What public health researchers refer to as the "social determinants of health" are the conditions in which people live, learn, work, and play. Communities experience health burdens grounded in inequities in these social determinants.

Racial boundaries are widely used in the United States to keep nonwhites from achieving their full potential through political policies, social policies, and family wealth. Neighborhoods characterized by few or otherwise lacking economic and employment opportunities are likely to have underfunded educational systems and inadequate access to health and social services. They also lack healthy food retailers, stable housing, and safe recreational spaces. These conditions are influenced by larger structural forces, including economic, education, and political systems, social norms, culture, and power. The negative aspects of living and working conditions in inner-city communities are largely the result of historic and contemporary policies, practices, and attitudes that have caused an unequal distribution of resources across communities (Gee and Ford 2011; Bailey et al. 2017).

The history and legacy of structural racism has resulted in many black neighborhoods facing a lack of employment opportunities. Resi-

27. *Town of Huntington v. NAACP*, 488 U.S. 1023 (1988). See also Fair Share Housing Center, "Mount Laurel Doctrine," accessed September 8, 2020, https://fairsharehousing.org/mount-laurel-doctrine.

28. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, N.J. (1975).

dential segregation is the legacy of the nation's history and has long been identified as the root of many social and racial inequities in American cities. Where you live determines how long you live (Teitelbaum and Lawton 2017). Although different racial, ethnic, and immigrant groups have experienced segregation in the United States, African Americans have been victims of an unparalleled level of deliberate segregation that is perpetuated today through individual actions, institutional practices, and public policy (Williams and Braboy Jackson 2005; Schulz et al. 2002).

Today at least one in four minority home seekers will encounter some form of racial discrimination. African Americans are "steered" away from white neighborhoods by real estate agents (Galster and Godfrey 2005). African Americans are turned down for mortgages and charged higher interest rates and points at disproportionate rates. Health inequities are largely a function of the separate and unequal neighborhoods in which most blacks and whites reside. The inequities for blacks include low access to credit, insecure land tenure, a lack of access to healthy food, and a high prevalence of a range of illnesses. Research demonstrates that racial health inequities grounded in segregation are more than a function of diminished socioeconomic status of individuals living in segregated communities. Health inequities remain even after income and education levels are considered (Williams and Sternthal 2010; Williams and Collins 2011).

The ways in which segregation contributes to health inequities include poor quality housing, inadequate heat, noise, overcrowding, and the presence of environmental hazards and allergens. Segregation perpetuates negative social environments that include exposure to violence, crime, and systematic differences in policing and incarceration. Inner-city residents live in a substandard environment populated by ubiquitous fast food outlets and alcohol retailers. These conditions have a devastating effect on inner-city residents.

CONCLUSION

Segregation is a tool used to promote and preserve white supremacy. Racial separation makes it easier to isolate, surveil, and police black people concentrated in inner-city communities. *Plessy v. Ferguson* provided the legal foundation for a discriminatory structure that continues to burden the lived experiences of African Americans.

Substantial progress has been made since the enactment of the civil rights laws of the 1960s. Progress in eliminating vestiges of segregation has been significant, but the pace has been slow. As one study explains,

> Residential segregation has generally slowly declined over the past several decades following the passage of the 1968 Fair Housing Act. Yet today it remains a pressing issue throughout many areas of the country. . . . Of the different demographic groups examined, by far the highest levels of segregation were between non-Hispanic whites and blacks. The Milwaukee-Waukesha, Wisc., metro area recorded the highest dissimilarity index, followed by New York, Chicago and Detroit-Warren-Dearborn, Mich. Nationally, the median black-white dissimilarity index—which ranges from 0 (fully integrated) to 1 (fully segregated)—was 0.526.[29]

The black population residing in U.S. cities has declined steadily for decades. Between 1970 and 1995, seven million blacks moved to suburban communities. This number is considerably larger than the 4.5 million who moved from the south to the north during the Great Migration during the first half of the twentieth century. The percentage of African Americans living in urban cores shrank from 47 to 41.7 percent between 1990 and 2017. The black population of the central cities in the nation's hundred largest metropolitan areas declined by three hundred thousand between 2000 and 2010. By 2010, most African Americans nationwide lived in suburban communities. Affluent black families have moved to suburban communities, leaving

29. *Governing*, "Residential Segregation Data for U.S. Metro Areas," September 2018, https://www.governing.com/gov-data/education-data/residential-racial-segregation-metro-areas.html (accessed September 8, 2020).

lower-income families in impoverished, inner-city neighborhoods.

The architecture of America's built environment reflects decades of government-sponsored segregation. High levels of residential separation persist causing public schools in urban communities to remain segregated. African Americans and Latinos and Latinas have less wealth than whites, fewer opportunities for upward mobility, lower income levels, and fewer chances to build wealth. This is *Plessy*'s legacy.

Recommendations

Reinstate HUD regulations that required localities to implement the requirement to develop plans that affirmatively further fair housing by taking meaningful actions that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that address significant disparities in housing needs, replacing segregated living patterns with integrated living patterns and transforming racially and ethnically concentrated areas of poverty into areas of opportunity.

Increase the level of African American of homeownership. In 2004, the height of homeownership in the United States, nearly half of all African American families owned homes. It fell to 43 percent in 2017, virtually erasing all the gains made since the passage of the Fair Housing Act in 1968.

Expand credit availability, particularly for Federal Housing Administration lending, which black families rely on for 45 percent of their purchase loans (Lamb et al. 2016).

Allow greater use of alternative data in mortgage underwriting decisions, including use of rental payment history, and utilities to benefit black homebuyers.

Incorporate new options such as rental payment history and utilities into the mortgage evaluation process which could help black families build credit and buy homes without having to resort to less desirable lenders such as subprime mortgages.

Report payments on telecommunication and utility bills to credit bureaus.

Develop a more thoughtful approach for lenders to recognize the realities of income variability and focus more on consumer education and housing counseling related to building credit and using low and no down payment and down payment assistance programs.

Improve financial literacy. American homebuyers' lack of knowledge and understanding of personal finances, economics, risk, and money-related subjects in general was a major cause of the millions of home foreclosures and the collapse of the housing market in 2008.

Require implicit bias training for lending officials. Racial disparities in the approval rates for mortgage loans are striking. This may be at least partly attributed to implicit bias. Often operating outside the decision maker's attentional focus, and outside a person's awareness, negative stereotypes can covertly but powerfully influence the way information about the stereotyped target is processed and used. Decision makers can act based on a person's race or sex, even subjectively believing that they are acting based on a legitimate, nondiscriminatory reason.

REFERENCES

Anderson, Martin. 1964. *The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962.* Cambridge, Mass.: M.I.T. Press.

Austin, Margery, Susan J. Popkin, and Lynette A. Rawlings. 2008. *Public Housing and the Legacy of Segregation*. Washington, D.C.: Urban Institute Press.

Badger, Emily, and Darla Cameron. 2015. "How Railroads, Highways and Other Man-Made Lines Racially Divide America's Cities." *Washington Post*, July 16. Accessed September 8, 2020. https://www.washingtonpost.com/news/wonk/wp/2015/07/16/how-railroads-highways-and-other-man-made-lines-racially-divide-americas-cities.

Bailey, Zinzi D., Nancy Krieger, Madina Agénor, Jasmine Graves, Natalia Linos, and Mary T. Bassett. 2017. "Structural Racism and Health Inequities in

the USA: Evidence and Interventions." *Lancet* 389(10077): 1453–463.

Baldwin, James. 1963. "Urban Renewal Means Negro Removal." PBS interview by Kenneth Clark, YouTube.com. Uploaded June 3, 2015. Accessed September 8, 2020. https://www.youtube.com/watch?v=T8Abhj17kYU.

Benbow, Mark E. 2010. "Birth of a Quotation: Woodrow Wilson and 'Like Writing History with Lightning.'" *Journal of the Gilded Age and Progressive Era* 9(4): 509–33.

Biles, Roger. 2014. "Expressways Before the Interstates: The Case of Detroit, 1945–1956." *Journal of Urban History* 40(5): 843–54.

Biles, Roger, Raymond A. Mohl, and Mark H. Rose. 2014. "Revisiting the Urban Interstates: Politics, Policy, and Culture Since World War II." *Journal of Urban History* 40(5): 827–30.

Brescia, Raymond H. 2009. "Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues Regarding the Subprime Mortgage Crisis." *Albany Government Law Review* 2(1): 164–215. Accessed September 8, 2020. http://www.albanygovernmentlawreview.org/Articles/Vol02_1/2.1.164-Brescia.pdf.

Caro, Robert A. 1975. *The Power Broker: Robert Moses and the Fall of New York*. New York: Alfred A. Knopf.

Cottrol, Robert J., Raymond T. Diamond, and Leland B. Ware. 2003. *Brown v. Board of Education: Caste, Culture, and the Constitution.* Lawrence: University Press of Kansas.

DiMento, Joseph F. C., and Cliff Ellis. 2013. *Changing Lanes: Visions and Histories of Urban Freeways*. Cambridge, Mass.: MIT Press.

Federal Housing Administration. 1939. *Underwriting Manual*. Washington: Government Printing Office. Accessed September 9, 2020. https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf.

Editorial Board. 2020. "Putting Heroes, and Traitors, Where They Belong." *New York Times*, July 11. Accessed September 9, 2020. https://www.nytimes.com/2020/07/11/opinion/confederate-rename-military-bases.html.

Fisher, Linda E. 2009. "Target Marketing of Subprime Loans: Racialized Consumer Fraud and Reverse Redlining." *Journal of Law and Policy* 18(1): 121–55. Accessed September 8, 2020. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1132&context=jlp.

Fishman, Robert. 1977. *Urban Utopias in the Twentieth Century: Ebenezer Howard, Frank Lloyd Wright, Le Corbusier*. New York: Basic Books.

Fox, Kenneth. 1990. *Metropolitan America: Urban Life and Urban Policy in the United States, 1940–1980*. New Brunswick, N.J.: Rutgers University Press.

Foxx, Anthony. 2018. "More Than Engineering: Infrastructure Shapes Places." Urban Institute, January 16, 2018. Accessed September 8, 2020. https://www.urban.org/infrastructure/more-engineering-infrastructure-shapes-places.

Freund, David M. P. 2010. *Colored Property: State Policy and White Racial Politics in Suburban America*. Chicago: University of Chicago Press.

Galster, George, and Erin Godfrey. 2005. "By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000." *Journal of the American Planning Association* 71(3): 251–68. DOI: 10.1080/01944360508976697.

Gee, Gilbert C., and Chandra L. Ford. 2011. "Structural Racism and Health Inequities: Old Issues, New Directions." *Du Bois Review* 8(1): 115–32.

Gordon, Adam. 2005. "The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks." *Yale Law Journal* 115(1): 186–227.

Gotham, Kevin Fox. 2001. "A City Without Slums: Urban Renewal, Public Housing, and Downtown Revitalization in Kansas City, Missouri." In "City and Country: An Interdisciplinary Collection." Special issue, *American Journal of Economics and Sociology* 60(1): 285–316.

Greenberg, Jack. 1994. *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*. New York: Basic Books.

Hanks, Angela, Danyelle Solomon, and Christian E. Weller. 2018. "Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap." Washington, D.C.: Center for American Progress. Accessed September 8, 2020. https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality.

Hauser, Susan E. 2008. "Predatory Lending, Passive Judicial Activism and the Duty to Decide." *North Carolina Law Review* 86(6): 1501–56.

Hoffer, Williamjames Hull. 2012. *Plessy v. Ferguson: Race and Inequality in Jim Crow America*. Lawrence: University Press of Kansas.

Howell, Benjamin. 2006. "Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination." *California Law Review* 94(1): 101–47.

Hoyt, Homer. 1933. *One Hundred Years of Land Values in Chicago: The Relationship of the Growth of Chicago to the Rise in Its Land Values, 1830–1933.* Chicago: University of Chicago Press.

Husain, Asma. 2016. "Reverse Redlining and the Destruction of Minority Wealth." *Michigan Journal of Race & Law* 22 (November 2). Accessed September 8, 2020. https://mjrl.org/2016/11/02/reverse-redlining-and-the-destruction-of-minority-wealth.

Jackson, Kenneth T. 1985. *Crabgrass Frontier: The Suburbanization of the United States*. New York: Oxford University Press.

Kluger, Richard. 2004. *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Vintage Books.

Lee, Timothy B. 2016. "Before-and-After Maps Show How Freeways Transformed America's Cities." *Vox,* June 19, 2016. Accessed September 27, 2020. https://www.vox.com/2014/12/29/7460557/urban-freeway-slider-maps.

Lemann, Nicholas. 1991. *The Promised Land: The Great Migration and How it Changed America*. New York: Vintage Books.

Litwack, Leon F. 1998. *Trouble in Mind: Black Southerners in the Age of Jim Crow*. New York: Vintage Books.

Loewen, James. 2006. *Sundown Towns: A Hidden Dimension of American Racism*. New York: Touchstone.

Lamb, Charles M., Randolph S. Kent, Jacqueline M. Sievert, Michael R. Staszkiw, and Elizabeth A. Tillman. 2016. "HMDA, Housing Segregation, and Racial Disparities in Mortgage Lending." *Stanford Journal of Civil Rights & Civil Liberties* 12(2): 249–82.

Massey, Douglas S., and Nancy A. Denton. 1993. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, Mass.: Harvard University Press.

Massey, Douglas S., Len Albright, Rebecca Casciano, and Elizabeth Derickson. 2013. *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb*. Princeton, N.J.: Princeton University Press.

Myrdal, Gunnar. 1944. *An American Dilemma: The Negro Problem and Modern Democracy*. New York: Harper and Row.

Nelson, Robert K., LeDale Winling, Richard Marciano, Nathan Connolly, et al. 2020. "Mapping Inequality: Redlining in New Deal America." *American Panorama*, edited by Robert K. Nelson and Edward L. Ayers. Accessed September 8, 2020. https://dsl.richmond.edu/panorama/redlining/#loc=4/36.71/-96.93&opacity=0.8

Oliver, Melvin L., and Thomas M. Shapiro. 1997. *Black Wealth / White Wealth: A New Perspective on Racial Inequality*. New York: Routledge.

———. 2019. "Disrupting the Racial Wealth Gap." *Contexts* 18(1): 16–21.

Pomerantz, Gary. 1997. *Where Peachtree Meets Sweet Auburn: A Saga of Race and Family*, repr. ed. New York: Penguin Books.

Power, Garrett. 1983. "Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913." *Maryland Law Review* 42(2): 289–328. Accessed September 8, 2020. http://digitalcommons.law.umaryland.edu/mlr/vol42/iss2/4.

Price, Alfred D. 1991. "Urban Renewal: The Case of Buffalo, N.Y." *Review of Black Political Economy* 19(3-4): 125–59. DOI:10.1007/BF02895341.

Pritchett, Wendell E. 2003. "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain." *Yale Law & Policy Review* 21(1): 1–52. Accessed September 9, 2020. https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1451&context=ylpr.

Relman, John P. 2008. "Foreclosures, Integration, and the Future of the Fair Housing Act." *Indiana Law Review* 41(3): 629–52. Accessed September 8, 2020. http://journals.iupui.edu/index.php/inlawrev/article/view/3950/3912.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright.

Ruechel, Frank. 1997. "New Deal Public Housing, Urban Poverty, and Jim Crow: Techwood and University Homes in Atlanta." *Georgia Historical Quarterly* 81(4): 915–37. Accessed September 9, 20020. http://www.jstor.org/stable/40550189.

Rugh, Jacob S., and Douglas S. Massey. 2010. "Ra-

cial Segregation and the American Foreclosure Crisis." *American Sociological Review* 75(5): 629–51. DOI:10.1177/0003122410380868.

Schulz, Amy J., David R. Williams, Barbara A. Israel, and Lora Bex Lempert. 2002. "Racial and Spatial Relations as Fundamental Determinants of Health in Detroit." *Milbank Quarterly* 80(4)(December): 677–707.

Squires, Gregory D. 2005. "Predatory Lending: Redlining in Reverse." *Shelterforce*, January 1. Accessed September 9, 2020. https://shelterforce.org/2005/01/01/predatory-lending-redlining-in-reverse.

Steil, Justin P., Len Albright, Jacob S. Rugh, and Douglas S. Massey. 2018. "The Social Structure of Mortgage Discrimination." *Housing Studies* 33(5): 759–76. DOI: 10.1080/02673037.2017.1390076.

Suddath, Claire A. 2009. "Brief History of The Middle Class," *Time*, February 27. Accessed September 9, 2020. http://content.time.com/time/nation/article/0,8599,1882147,00.html.

Taylor, Keeanga-Yamahtta. 2019. *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership*. Chapel Hill: University of North Carolina Press.

Teaford, Jon C. 2000. "Urban Renewal and Its Aftermath." *Housing Policy Debate* 11(2): 443–65. DOI: 10.1080/10511482.2000.952137.

Teitelbaum, Joel, and Ellen Lawton. 2017. "The Roots and Branches of the Medical-Legal Partnership Approach to Health: From Collegiality to Civil Rights to Health Equity." *Yale Journal of Health Policy, Law & Ethics* 17(2): 343–77.

Ware, Leland. 1989. "Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases." *Washington University Law Quarterly* 67(3): 737–72.

———. 2018. *A Century of Segregation: Race, Class, and Disadvantage*. Lanham, Md.: Lexington Books.

Ware, Leland, and Theodore Davis. 2012. "Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama." *Howard Law Journal* 55(2): 533–74.

Weaver, Robert. 1948. *The Negro Ghetto*. New York: Harcourt, Brace and Company.

Weimer, Arthur M., and Homer Hoyt. 1939. *Principles of Urban Real Estate*, rev. ed. New York: Ronald Press.

Wilkerson, Isabel. 2010. *The Warmth of Other Suns: The Epic Story of America's Great Migration*. New York: Random House.

Williams, David R., and C. Collins. 2001. "Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health." *Public Health Reports* 116(5): 404–16.

Williams, David R., and Pamela Braboy Jackson. 2005. "Social Sources of Racial Disparities in Health." *Health Affairs* 24(2): 325–34.

Williams, David R., and Chiquita Collins. 2011. "Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health." *Public Health Report* 116(5): 404–16.

Williams, David R., and Michelle Sternthal. 2010. "Understanding Racial-Ethnic Disparities in Health: Sociological Contributions." *Journal of Health and Social Behavior* 51(1): S15–27. DOI:10.1177/002214651038383.

Woodward, C. Vann. 2002. *The Strange Career of Jim Crow: A Commemorative Edition*. New York: Oxford University Press.

Yellin, Eric S. 2013. *Racism in the Nation's Service: Government Workers and the Color Line in Woodrow Wilson's America*. Chapel Hill: University of North Carolina Press.

Confronting the Legacy of "Separate but Equal": Can the History of Race, Real Estate, and Discrimination Engage and Inform Contemporary Policy?

JASON REECE

Rarely do the public, community leaders, or policymakers engage the history of structural racialization. Despite this lack of public awareness, a large body of literature illustrates the importance of urban development history as a mechanism of upholding the philosophy of segregation upheld by Plessy v. Ferguson*. The history of structural racialization in development is fundamental to understanding contemporary challenges such as segregation, concentrated poverty, and racial disparities. The following case study explores two Ohio community-based initiatives (in Cleveland and Columbus) that used historical analysis of racial discrimination in development practices as the focus of a community engagement process. Surveys, participant observations, and interviews document the outcomes, benefits, and impacts associated with engaging stakeholders using historical records of discrimination to inform contemporary policymaking. The study lends support to the importance of public engagement processes to uncover the various long-term ramifications of the "separate but equal" doctrine of* Plessy.

Keywords: redlining, planning history, health equity, segregation

Although the system of White supremacy in the United States predates *Plessy* by centuries, the "separate but equal" doctrine emerging from *Plessy v. Ferguson* would be another foundational step in the development of structural racialization through most aspects of twentieth-century society.[1] As Leland Ware (2021) illustrates in "*Plessy*'s Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods" earlier in this issue, urban development policies in the twentieth century would be one of the primary domains deeply transformed by America's embrace of segregation. Racial zoning, restrictive covenants, and exclusionary and expulsive zoning practices would be just the beginning of a complex policy and legal infrastructure to maintain separation in housing and neighborhoods. These policies would be particularly effective in segregating cities outside the traditional Jim Crow South.

Despite the significance of this history, deep

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

historical analysis of the African American experience is rarely reflected in policy and public discourse. For policymakers, urban development history is often viewed as a distant abstraction, interesting fodder for historic markers, but not a topic receiving deep reflection. The history of discriminatory U.S. policy and practices are a greater unknown outside traditional academic environments; even seminal court cases such as *Plessy* are vaguely understood (Luxenberg 2019). Understanding of the history of structural racialization is limited among the general public. As Tim Wise notes in his essay "Forget STEM, We Need MESH: The Importance of Media Literacy, Ethics, Sociology and History Education," historical illiteracy of America's racial history undermines democracy and fuels contemporary social conflict (2019). Author Robin DiAngelo ties America's racial illiteracy to *white fragility*, the nonproductive and hostile response from White Americans when their understanding of race is challenged with historical or contemporary facts (2015).

Although our history of discriminatory development practices is well documented (Rothstein 2017), research in exploring the potential of using this historical record to engage contemporary policymakers and planning stakeholders is limited. Yet a deeper understanding of this historical context is critical to addressing contemporary racial, social, and geographic disparities. As June Manning-Thomas notes, a better understanding of the historical Black experience and the history that produced disparities between communities can help us understand how to support racial equity and address contemporary community-based disparities: "As planners wrestle with the problems facing today's central cities, it is important to draw upon all the intellectual tools possible in order to understand how this situation came to be and how it affects planning efforts. Those who work in conditions of suburban prosperity rather than central city decline need to understand why such stark contrasts linger. Planning history, a field that has flourished in recent years, is an important part of our intellectual arsenal" (1994, 1).

The scholar George Lipsitz believes that our lack of knowledge of who benefits from historical systems of structural racialization in land use fuels feelings of White entitlement, White fear, and the stigmatization and devaluation of communities of color. He describes this in *From Plessy to Ferguson*:

> Residential segregation orders urban geography. It promotes opportunity hoarding and asset accumulation for whites while confining aggrieved communities of color to impoverished, underresourced, and criminogenic neighborhoods. This system subsidizes whites, offering them unfair gains and unjust enrichments while saddling communities of color with artificial, arbitrary, and irrational obstacles to asset accumulation. Yet whites view themselves as innocent and unaccountable for a system that is rigged in their behalf. They attribute the social skewing of opportunities and life chances along racial lines to the allegedly deficient character and behavior of blacks. Neighborhoods created by white flight become suffused with white fright, and that fear is used to justify the taking of black lives. (2015, 119)

Building on this scholarship, I argue that a deep historical analysis is needed to contextualize and understand this history, as well as to generate solutions and policymaker consensus to address contemporary patterns of segregation and opportunity isolation in the twenty-first-century city. To assess the benefits of engagement processes that document and educate on the processes of structural racialization in land use, a case study approach is used to understand whether greater historical awareness can be transformational in guiding policy change.[2]

2. Since the engagement processes in this study were completed, several new online resources have emerged to provide historical data and analysis pertaining to history of discrimination in housing policy. These resources can be tapped to support similar historical engagement processes. Several focus on histories of individual cities, such as the *Seattle Civil Rights and Labor History Project*, which documents restrictive covenants throughout the city (http://depts.washington.edu/civilr/index.htm). For multicity resources, the University of Richmond's

This article presents a case study in two urban Ohio counties, Cuyahoga (home to the city of Cleveland) and Franklin (home to the city of Columbus), to explore the conceptualization, development, and long-term impact of the infrastructure of residential segregation. Specifically, the cases seek to document the historical development and intersection of each city's infrastructure of segregation, better understand the long-term impacts of discriminatory policies on contemporary racial disparities in wealth and health, and assess the utility of a historically informed engagement process with policymakers to build modern solutions to support racial equity.

SEGREGATION AND LAND USE: THE LEGACY OF *PLESSY* IN SEGREGATING URBAN SPACE

Twenty-first-century cities in the United States remain highly segregated along the dimensions of race and class. Rates of residential segregation, though, have consistently declined in recent decades (Frey 2018). Despite these improvements, residential segregation remains extremely high in many areas of the country, most notably the Northeast and industrial Midwest (Brown University 2017). Segregation is not racial separation alone but also separation into areas of intense poverty and separation from opportunity structures (powell 2003). Segregation and isolation into poverty also equates with separation from strong schools, safe or healthy environments, and economic opportunity (Acevedo-Garcia et al. 2014).

Today's patterns of segregation and opportunity isolation are not a natural phenomenon or free market urban development. Many layers of pro-segregation policies and practices saturated the development of the twentieth-century American metropolis (Rothstein 2017). As the historian Carl Nightingale describes in *Segregation: A World History of Divided Cities*, great effort and intentionality enforced the value of segregation on U.S. cities: "Segregation never comes about because it 'just is,' as the term 'de facto' might also suggest. The bottom line is this: segregation has always involved some form of institutionally organized human intentionality, just as those institutions have always depended on more broadly held beliefs, ideas, and customs to sustain their power" (2012, 7).

Nightingale documents not only both the policies and practices enforcing the norm of segregation, but also the intellectual, economic, and cultural forces, which were the building blocks of the philosophical foundation of segregated neighborhoods (2012). Traditional urban planning history has often neglected the role of planning in enforcing racial segregation or, more specifically, the "relationship between residential controls and racial oppression" (Manning-Thomas 1994, 1).

CONCEPTUALIZING THE IMPACT OF HISTORY: THEORETICAL GROUNDING

A growing body of literature has identified the role of historical discriminatory housing and development practices in contributing directly to contemporary racial justice challenges. Critical race theory (CRT) emerged in the 1970s and 1980s, led by scholars who were frustrated by the lack of progress in promoting racial equality in the aftermath of the civil rights era (Bell 1980; Delgado and Stefancic 2000). CRT perceives race as a purely social construction and therefore racial inequalities as social constructions supported by policy, law, and institutions. Today's societal institutions and structures are deeply influenced by historically racist policies and thus will continue to perpetuate racial inequalities in American society. For example, although legally sanctioned segregation has been abandoned in America, legal and institutional structures still support de facto segregation. Additionally, the exclusion of the history of marginalized communities presents a false view of the dominance of meritocracy and equality in opportunity. Ignoring our nation's discriminatory past presents a false narrative, challenging how we view contemporary racial disparity.

Theories of structural racism have also focused on the long-term consequences of his-

American Panorama: An Atlas of United States History is the most comprehensive (http://dsl.richmond.edu/panorama/#maps). The site provides detailed data on redlining, urban renewal, and forced migrations in the United States.

torical discrimination. Structural racism presented several new conceptual theories of racial inequity. First conceptualized by Eduardo Bonilla-Silva (1997), structural racism examines "racialized social systems" as a way of understanding racialized outcomes, focusing on the interactions of social systems, institutions, and other structural connections in perpetuating racial inequities.

More important, this system can perpetuate even in the absence of traditionally "racist" actors (Bonilla-Silva 1997). Theories of structural racism speak directly to the impact of our discriminatory history. Structural racism views contemporary inequities as grounded in historical norms, behaviors, or policies, or as Andrew Grant-Thomas and john powell describe it, racialized outcomes are grounded on the "sediment of history" (Bonilla-Silva 1997; Grant-Thomas and powell 2006).

The direct impact of systemic historical discrimination in housing and development practices manifests in two direct consequences today. First, the continued segregation and isolation from neighborhoods of opportunity for communities of color can be attributed to policies supporting residential segregation and the institutionalized disinvestment produced by redlining practices, urban renewal programs, and highway construction (Cashin 2004).

Second, the financial consequences of historical discrimination and more recent subprime lending practices manifest in the racial wealth gap, the largest racial disparity in our society. Much of individual wealth in America, primarily for the middle class, is tied to home equity. Barred from access to homeownership in neighborhoods experiencing property appreciation, people of color were denied access to the primary wealth-building tool for America's middle class (Conley 1999; Shapiro 2003).

Not only have pathways to wealth building been blocked for generations of African American homeowners, policies have also actively suppressed and extracted wealth from African American neighborhoods. African American wealth suppression and extraction have occurred as a direct result of expulsive zoning practices (which concentrated noxious land uses into communities of color), redlining, blockbusting, and most recently from the subprime lending crisis.

The 2008 housing crisis would further exacerbate the wealth gap, particularly in racially segregated cities and neighborhoods. Jacob Rugh and Douglas Massey found Black residential segregation (measured via the dissimilarity index) and racial isolation to be predictors of metropolitan foreclosure rates (2010). Research has also linked historic redlining practices to contemporary vulnerability to predatory mortgage lending (Hernandez 2009). Prior to the 2008 housing crisis, a disproportionate number of subprime loans (and corresponding foreclosures) were concentrated in previously redlined neighborhoods. The fallout from the housing crisis would further destabilize these neighborhoods and contribute to widening the existing racial wealth gap.

Because of this history, the median White household has 900 percent more wealth than African American or Latino households. In 2016, the median figure for White household wealth was $171,000 versus $17,600 for African American and $20,700 for Latino households respectively (Dettling et al. 2017). Ta-Nehisi Coates documents the long-term financial impacts of housing discrimination to the African American community in *The Case for Reparations*. He concludes that the institutionalized housing discrimination of the twentieth century was a continuation of America's historical extortion of African American wealth (Coates 2014).

Residential segregation into unstable neighborhood environments also contributes to lower levels of income and reduced social mobility. When ranking social mobility at the metropolitan scale both Cleveland (fortieth worst) and Columbus (forty-fourth) rank near the bottom of social mobility rankings for the fifty largest metropolitan areas (Chetty et al. 2014). More recent analysis of the Move to Opportunity experimental housing mobility program from the 1990s indicates that children who relocated from a "low opportunity" to "high opportunity" neighborhood had increased lifetime earnings of 31 percent (Chetty, Hendren, and Katz 2015).

The impacts of historical discrimination extend beyond economics and wealth. Scholar-

ship in public health further strengthens understanding of the relevance of history to current community health challenges. The life course model has identified the role of the accumulation of life course stress on contemporary health challenges. Discrimination is a primary stressor and directly degrades health outcomes. According to the life course model, historical discrimination, even if experienced decades earlier, has a long-term effect on health outcomes (Lu and Halfon 2003; Lu and Chen 2004).

Historical forms of racism or discrimination are a significant "psychosocial" stressor that has had long-term impacts on health in communities of color (Vick and Burris 2017; Sullivan 2013). Additionally, discrimination in housing, which often forced non-White communities into more heavily polluted neighborhood environments, is a physical health risk factor that increases intergenerational health risk.

Public health literature is now beginning to explore the link between historical discrimination in development and contemporary health outcomes. In *The Color of Health*, Andrew Beck and colleagues identify the influence of historical discrimination and segregation as contributing to today's racial disparities in preterm birth, and in undermining advances in perinatal and neonatal care (2019).[3] Studies explicitly focusing on redlining practices by the Home Owners' Loan Corporation (HOLC) have identified a connection between historic redlining, community health, and violence (McClure et al. 2019; Jacoby et al. 2018).

CASE INTRODUCTION AND METHODS

The case studies that follow document two participatory community-planning processes. Between 2013 and 2016, in collaboration with students from the City and Regional Planning program at The Ohio State University, the participatory research project History Matters engaged stakeholders in Cuyahoga County and Franklin County. Both projects focused on the urban county within each region, including stakeholders from the central city and various suburban jurisdictions. Working directly with leaders in the nonprofit, public, and philanthropic sectors, the initiatives used a historical analysis of discriminatory development practices to document historical patterns of discrimination. Each project also sought to better understand the history of neighborhoods currently struggling with concentrated poverty, segregation, blight, and poor health outcomes.

The persistence of racial- and class-based residential segregation and opportunity isolation are prevalent in both regions (Logan and Stults 2011). Analysis by William Frey indicates that, among the nation's fifty-one largest metropolitan areas, the Cleveland region ranks fifth and the Columbus region twenty-first in regard to Black-White residential segregation (Frey 2018). Among the largest hundred metropolitan areas, analysis by the Urban Institute has ranked Cleveland the eleventh and Columbus the thirteenth most economically segregated regions (Acs et al. 2017). More than one in two poor residents in the Columbus region and two in three poor residents in the Cleveland region live in a high-poverty neighborhood (Kneebone and Holmes 2016).

Longitudinal analysis produced by Brown University tracks residential, school, and economic segregation for the past three decades (table 1). In both cities, Black-White residential segregation has decreased but remains relatively high; Black-White school segregation and economic segregation have increased in both regions since 1980 (Brown University 2017). Relative rankings of economic segregation show a substantial increase in economic segregation for the Columbus region (table 1). For example, according to the neighborhood sorting index for families with children, Columbus has moved from the thirty-sixth most economically segregated region in 1980 to the eighth in the 2012 to 2016 period.

In addition to these patterns of segregation, neighborhood-based disparities in education, employment, and health correlate with each city's most segregated and impoverished areas (Acevedo-Garcia et al. 2020). For example, when

3. Contemporary racism facing African American women is also a contributing factor to maternal health disparities. Studies have demonstrated that higher-income African American women living in majority White neighborhoods have disproportionately high infant mortality rates (Kothari 2016).

Table 1. Measures of Racial and Economic Segregation

	Black-White Residential Dissimilarity			Black-White School Dissimilarity	
	1980 (rank)	2010 (rank)		1980 (rank)	2010 (rank)
Cleveland MSA	85.8 (3rd)	72.6 (9th)	Cleveland MSA	77.7 (12th)	80.9 (7th)
Columbus MSA	72.9 (38th)	59.9 (33rd)	Columbus MSA	66.5 (47th)	69.0 (39th)
	Economic Segregation (All Households)			Economic Segregation (Families with Children)	
	1980 (rank)	2012/2016 (rank)		1980 (rank)	2012/2016 (rank)
Cleveland MSA	0.168 (14th)	0.179 (23rd)	Cleveland MSA	0.206 (12th)	0.265 (12th)
Columbus MSA	0.139 (47th)	0.190 (16th)	Columbus MSA	0.173 (36th)	0.280 (8th)
	Economic Segregation (Poverty)			Economic Segregation (Affluence)	
	1980 (rank)	2012/2016 (rank)		1980 (rank)	2012/2016 (rank)
Cleveland MSA	0.207 (2nd)	0.212 (1st)	Cleveland MSA	0.131 (48th)	0.206 (27th)
Columbus MSA	0.151 (19th)	0.184 (7th)	Columbus MSA	0.144 (34th)	0.224 (15th)

Source: Author's tabulations based on Diversity and Disparities Database, Brown University (Brown University 2017).
Note: Rank among the hundred largest metro areas (dissimilarity indices) and ninety-five largest metro areas (economic segregation measures). MSA = metropolitan statistical area.

comparing neighborhoods by their relative opportunity index ranking, substantial health disparities can be seen between high opportunity areas (the top 20 percent of neighborhoods on the opportunity index) and low opportunity areas (the bottom 20 percent). Both regions have some of the largest life expectancy gaps between neighborhoods in the nation, with Columbus at fifth (9.6 years) and Cleveland at eighth (9.3 years) (Acevedo-Garcia et al. 2020).

The two cities differ in their long-term population trends. Cleveland has followed the typical trajectory of a midwestern industrial region, rapidly losing population to its suburbs and exurbs; Cleveland's current population (381,000) is 41 percent of its peak of 914,000 in 1950. The trend in Columbus is the opposite, the population increasing from 375,000 residents in 1950 to 898,000 in 2019. The Columbus figures can be misleading because the city has pursued an aggressive annexation policy since 1954, growing from 40 square miles to more than 200 between 1950 and 2000. A highly elastic city, Columbus has not experienced the same strain on its municipal finances as Cleveland (Rusk 1993).

Despite this population growth, Columbus also experienced population decline in many of its core urban neighborhoods, continued segregation, and population decline in the city school district (Jacobs 1998). The city's annexation policy was also highly racialized. Following the *Brown v. Board of Education* decision in 1954, the Ohio state legislature allowed municipal annexation without extension of municipal school district boundaries.[4] Columbus political leadership took advantage of this change to expand annexation. The city could offer city services to newly annexed areas while assuring predominantly White suburban jurisdictions that they would not be forced to join the city's racially diverse urban school district (Jacobs 1998). Although Ohio's historical use of annexation without school district representation is unique to the state, more generally, research has found policies to further splinter and segment school district boundaries were often designed as a direct challenge to desegregation efforts (Frankenberg 2009).

Both projects began with several fundamental research questions. How did the contemporary geography of opportunity (and more specifically in Cleveland, health inequity) emerge in each community? How did discriminatory development practices influence each community's most marginalized neighborhoods? Finally, are any insights to be derived from our history that can be informative for policymakers and other stakeholders seeking to support community development and racial equity in the future?

To answer these questions, we conducted an in-depth historical analysis and a contemporary GIS analysis using historical redlining maps.[5] Research documented the history of restrictive covenants, redlining practices, urban renewal, postwar suburban growth, and school segregation-desegregation efforts in each community. The history of discrimination in development practices is multifaceted, interconnected, and reinforcing. The research documented the relationship between restrictive covenants and HOLC (redlining) assessments.[6] The research also explored how redlined areas were often targeted for the location of highway construction and urban renewal projects. His-

4. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

5. Redlining maps were produced by the HOLC, an agency created in 1933 as a New Deal response to help homeowners defaulting on mortgages. In 1935, the agency was asked to create standardized real estate risk assessments of 239 cities. These assessments color coded neighborhoods on a four-tier risk scale, with the lowest-rated (D) neighborhoods presented in red on the maps.

6. HOLC neighborhood designations were made by local assessors often representing the real estate industry. Assessors graded neighborhoods based on physical characteristics (environmental quality, housing quality, infrastructure, and proximity to employment or services) and social factors (socioeconomic demographics, infiltration of "undesirables," and the presence of racial, socially, ethnically, or religiously mixed community). An analysis of HOLC assessments for all Ohio cities finds that although some environmental conditions were identified in downgraded (C, D) neighborhoods, the majority of content in assessments focused on the social characteristics of neighborhoods (Reece 2019).

toric HOLC maps were digitized to analyze the correlation between redlining practices and contemporary community indicators of health, blight, and racial and economic segregation (Reece et al. 2015).

We also held a series of stakeholder and community engagements to disseminate the findings of this work and engage leaders to reflect on how the community's history can provide insight or be informative in addressing contemporary community challenges. Stakeholders participating in each process were selected by the lead collaborative organizations. Stakeholder selection in each community was slightly different: the Columbus process focused on forging new relationships across particular sectors (nonprofit, business, government); the Cleveland effort integrated into the already formed multisector and multijurisdictional Place Matters initiative. The degree of existing relationships and trust among many of the stakeholders before the engagements was influential in producing a more productive engagement process. Several multimedia tools (ESRI storymaps) were developed and media engagements were conducted (radio, web, and print media) to further engage the public (Stephens 2014). The outcomes documented here are based on data collected through participant observation, research analysis, and informal semi-structured interviews and surveys with participants.

History Matters: Cuyahoga County (Cleveland)

The History Matters Cuyahoga County initiative began with an inquiry from the Place Matters team for Cuyahoga County and Cuyahoga County Public Health. Place Matters Cuyahoga County was a multiyear planning process documenting the relationship between "place" or community conditions and health. The process engaged stakeholders from the city of Cleveland (public health and city planning) and the county (public health). Additional stakeholders included philanthropic entities, community-based organizations, and nonprofit organizations focused on racial equity, community development, and health.

In addition to engagement with Place Matters, Cuyahoga County Public Health had also recently adopted "eliminating structural racism" as a goal of their community health plan.[7] In addition to these core organizations, additional stakeholders from public, nonprofit, and community-based organizations took part in the project. The History Matters project was designed to assist stakeholders to better understand the legacy of racially discriminatory policy in contributing to structural racism in the community. Specifically, the project was to assist in documenting the role of historical policy practices in shaping conditions in neighborhoods with the worst health disparities.

History Matters: Franklin County (Columbus)

The Franklin County (Columbus) initiative is embedded within a collective impact effort, Franklin County Thrive. Thrive was a community planning effort begun to understand and address the growth of poverty in Franklin County and the City of Columbus. Despite tremendous economic growth in the city and the Columbus region, poverty had grown substantially in the community. Between 2000 and 2015, the number of residents living at or under 200 percent of the poverty rate increased from one in four in 2000 to more than one in three in 2015. Poverty rates had not declined as unemployment decreased, and Columbus became recognized as the secondmost economically segregated city in the United States. These growing challenges had created an urgency for community leaders across sectors to discuss

7. Cuyahoga County Board of Health's declaration to address structural racism motivated their participation in the History Matters initiative. The agency's definition of structural racism focused on the intersection of access to opportunity, unhealthy environments, and health outcomes. The county had identified three actions to address structural racism: helping organizations learn how to recognize and address structural racism; encouraging organizations to work closely with community members; and developing policies to create social and economic opportunities for all people in Cuyahoga County. The History Matters initiative was identified as essential in supporting the county's goal of educating organizations on recognizing and addressing structural racism (for more, see https://hipcuyahoga.org/eliminating-structural-racism).

solutions to address the community's widening inequality.

The collective impact planning effort included approximately two dozen community leaders from various sectors. Primary leadership organizations for the effort included the United Way of Central Ohio and Mid-Ohio Foodbank. Additional participants included philanthropy, public-sector representatives, and business and nonprofit organizations from the community development, health, education, social service, and affordable housing sectors. The History Matters initiative was the first research effort undertaken by Thrive, and was focused on understanding how the community had reached this point.

History Matters: Engagement Process

Each engagement process began with an overview of the community's current racial and spatial disparities, including an analysis of disparities in socioeconomics and health. Participants were then led through an exercise that documented the processes of discrimination in housing and development policy throughout the twentieth century. A conceptual model was presented that outlined the evolution and interconnection of policies and practices foundational to segregating the city.

Following the conceptual model, participants reviewed historical documents and local examples of discriminatory practices. Language from restrictive covenants, HOLC redlining maps and written neighborhood assessments for HOLC, and historical photography were part of the local document review.[8] The Columbus project benefited from a recently digitized archive of historical neighborhood photos from the 1920s, allowing participants to visualize conditions in neighborhoods prior to redlining.[9]

After document review, the project included an analysis in which formerly redlined areas were juxtaposed against current community data. In Cleveland, redlined areas were digitized and current census, housing, and health data were assessed within the geography of redlining in 1940. The Columbus project overlaid contemporary concentrations of poverty, health disparities, subprime lending, foreclosure, and food insecurity with the 1934 HOLC map.

After capacity building with the primary stakeholders in each project, a series of public engagement activities were held in each community. In Cleveland, training activities were led by the primary project stakeholders with peer or partner organizations. A report was completed and a public unveiling was the focus of an event at the prestigious City Club of Cleveland. Media interviews followed the engagement and Cuyahoga County developed an interactive video to disseminate the work. The research would eventually be integrated into the recently developed Health Improvement Plan for Cuyahoga County.

Columbus engagement included a more formal stakeholder-driven process. A half-day retreat, at which the research was presented, was held with more than forty community leaders, including incoming Columbus Mayor Andrew Ginther. Following this direct engagement, presentations of the research were given to the boards of directors for philanthropic and public agencies, including the Board of The Columbus Foundation, the United Way of Central Ohio, Mid-Ohio Foodbank, Community Shelter Board, and the cabinet of Mayor Ginther. Additional engagement included media outreach and a video presentation of the materials available on social media by the United Way of Central Ohio, which generated more than thirty-five thousand viewings.

Evaluation of Impact: Analysis of Post-process Stakeholder Perspectives

To better understand the utility of the History Matters engagement in each community, ten

8. Many policy reforms emerging in the aftermath of the civil rights era and the Johnson administration's war on poverty were referenced in the historical engagement process but were not the focus of the engagement process. These included the 1968 Fair Housing Act, the 1978 Community Reinvestment Act, the 1974 Housing and Community Development Act, and the introduction of the Low-Income Housing Tax Credit program in 1986.

9. Photography capturing neighborhood conditions prior to the Depression for the Columbus area was gathered from the historical resource site "Engaging Columbus: Historical and Contemporary Maps of Columbus for Engaged Learning" produced by Ohio Wesleyan University (see https://engagingcolumbus.owu.edu).

Table 2. Semi-structured Interview Questions and Interviewed Stakeholders

Open-Ended Questions	Interviewees
1. Why were you interested in documenting the history of discrimination in the community's development? 2. What did you or other stakeholders take away from the work, what was learned or documented which helped community planning efforts? 3. Did viewing the real historical documents (redlining maps and text, covenant language) impact you or the process? 4. Were there any direct outcomes informed by the process? (For example, enhanced community dialogue, greater awareness, concepts which informed planning efforts or goals).	Columbus Initiative • Todd Dieffenderfer, formerly with the United Way of Central Ohio, currently with the City of Columbus • Kim Dorniden, Mid-Ohio Foodbank • Matt Habash, Mid-Ohio Foodbank • Michelle Heritage, Community Shelter Board • Kermit Whitfield, United Way of Central Ohio Cleveland Initiative • Gregory Brown, PolicyBridge Inc. • Sandra Chapelle, Strategic Solutions Partners, LLC • Freddy Collier, City of Cleveland Department of Planning • Martha Halko, Cuyahoga County Board of Health • Richard Stacklin, Cuyahoga County Board of Health

Source: Author's tabulation.

project stakeholders (five in each site) were surveyed to understand their experience with the process. Although each process involved more than five stakeholders, interviewees were lead stakeholders for the participatory processes, that is, those most engaged in the process and its aftermath. Stakeholders represented public and nonprofit organizations. Participants were asked four open-ended questions that focused on their motivation for taking part in the process, the knowledge generated by the process, the impact of working with real historical documents, and what direct outcomes in the community were informed by the process.

Analysis was also conducted to assess primary themes in responses from participants. This involved standard methodological techniques of coding qualitative data and developing themes through six phases of analysis. These phases include familiarization with data, development of codes, theme identification with codes, review of themes, definition of themes, and thematic report production (see table 2).

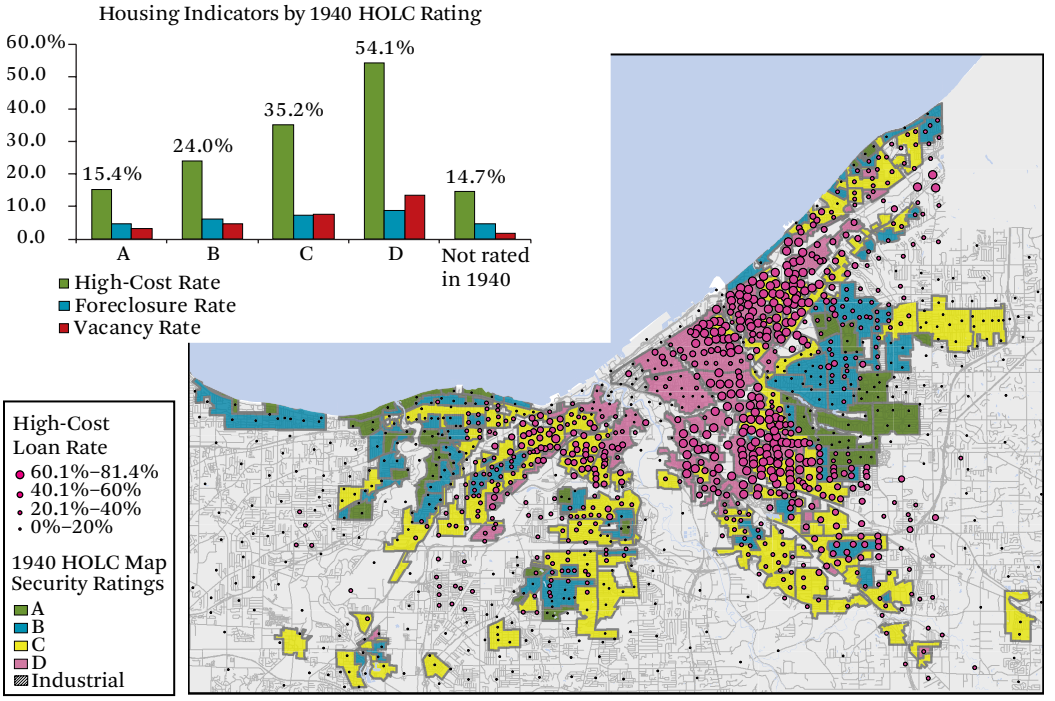
ANALYSIS: DOES EXPLORATION OF PLANNING HISTORY MATTER?

Analysis in both Cleveland and Columbus demonstrated a clear connection between formerly redlined areas and current community challenges. The disinvestment resulting from redlining caused a chain reaction in the decades that followed. Being starved of capital, the C- and D-rated neighborhoods (those identified as yellow and red on maps) slid further into disrepair, blight, and eventually high rates of vacancy. Urban renewal projects and the construction of the interstate highway system would compound these challenges in some hard-hit neighborhoods. Meanwhile, growing suburbs in each community remained highly inaccessible to communities of color.[10] The exodus of jobs in the 1970s and 1980s (due in part to de-industrialization) and the subprime lending and foreclosure crisis of the 1990s and 2000s have exacerbated the challenges faced by formerly redlined communities.

In Cleveland, formerly redlined areas were still highly segregated; two in three African Americans in Cuyahoga County lived in these

10. African American suburbanization has occurred in both case study sites, though these migration patterns have primarily occurred in older suburban jurisdictions in the counties. Most notably, the Shaker Heights suburb in Cuyahoga County was a national model for supporting suburban racial integration in the late twentieth century.

Figure 1. HOLC (Redlining Map) of Cleveland 1940 and High-Cost Loans in 2008



Source: Created by author from 1940 HOLC map and U.S. Department of Housing and Urban Development Neighborhood Stabilization Program data (adapted from analysis in Reece et al. 2015).
Note: Areas in light gray were unrated in 1940. The optimal way to view figures 1–5 is in color. We refer readers of the print edition of this article to https://www.rsfjournal.org/content/7/1/110 to view the color versions.

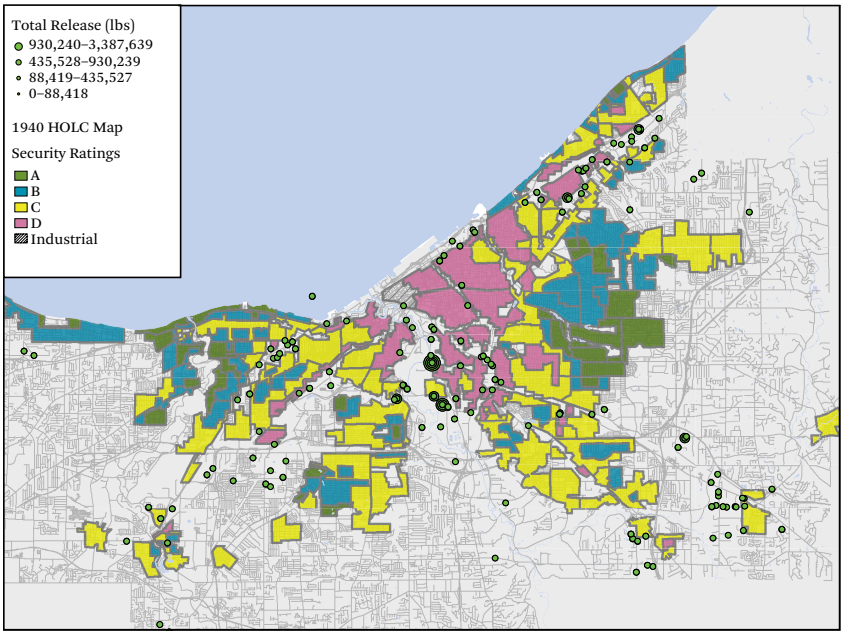
communities versus only one in four Whites. The segregative effects of the HOLC assessment have also had implications for housing and health outcomes. One of the more startling findings was that foreclosures and subprime lending activities were heavily concentrated in neighborhoods that were redlined in the 1940 HOLC map. In fact, between 2004 and 2007, the high-cost loan rate was 54.1 percent in formerly redlined areas versus only 15.4 percent in A-rated areas. Similar disparities existed in rates of vacant property found (figure 1).

Critical environmental and public health concerns, such as the distribution of toxic release sites, rates of infant mortality, and occurrences of diabetes reflect the historic imprint left by redlining (see figure 2). Infant mortality rates were 800 percent higher in redlined areas than in nonredlined communities (see figure 3). Additionally, the highest incidents of lead paint exposure occur in traditionally redlined areas, which is consistent with theories that suggest lack of capital can inhibit housing renovations critical to reducing exposure to lead paint (see figure 4). Life expectancy differences also reflects the same general patterns of these other critical health measures. Analysis found a thirteen- to fifteen-year gap between life expectancy in former green (A-rated) neighborhoods and those that were redlined (see figure 5).

An analysis of contemporary conditions in neighborhoods within Columbus, relative to the 1934 HOLC map, found similar patterns.[11]

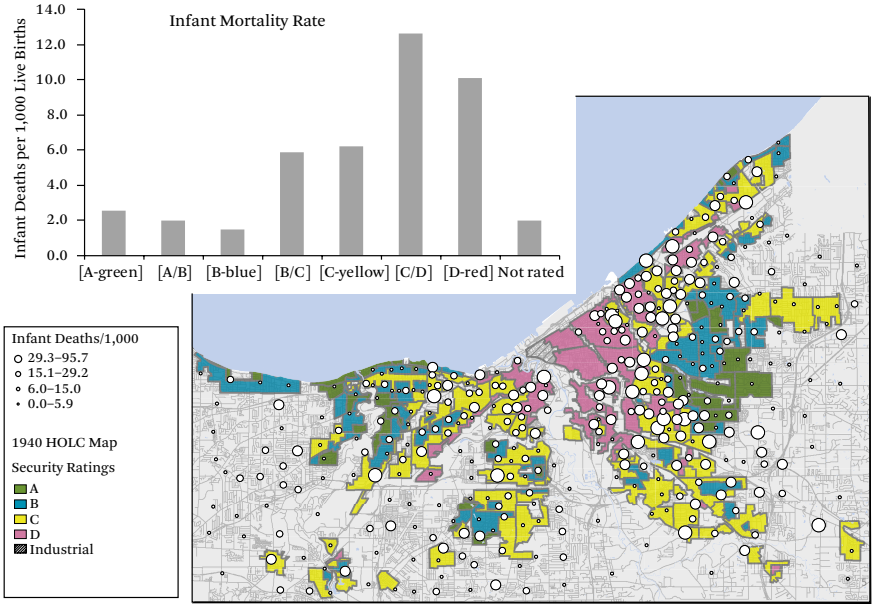
11. The comparable maps for Columbus are not included in this article. Visual materials from this project are hosted by the United Way of Central Ohio (see "Understanding Poverty in Franklin County," December 30, 2016, https://www.facebook.com/watch/?v=10154936716140337).

Figure 2. HOLC (Redlining Map) of Cleveland 1940 and Current Location of Toxic Waste Release Sites



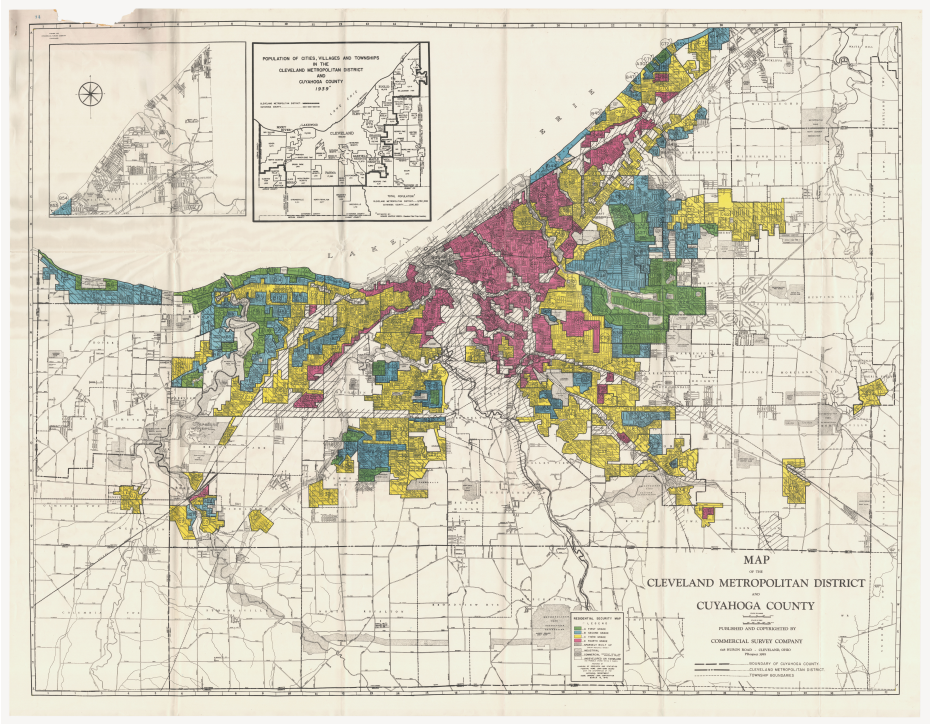
Source: Created by author from 1940 HOLC map and U.S. Environmental Protection Agency Toxic Waste Release Inventory data (adapted from analysis in Reece et al. 2015).
Note: Areas in light gray were unrated in 1940.

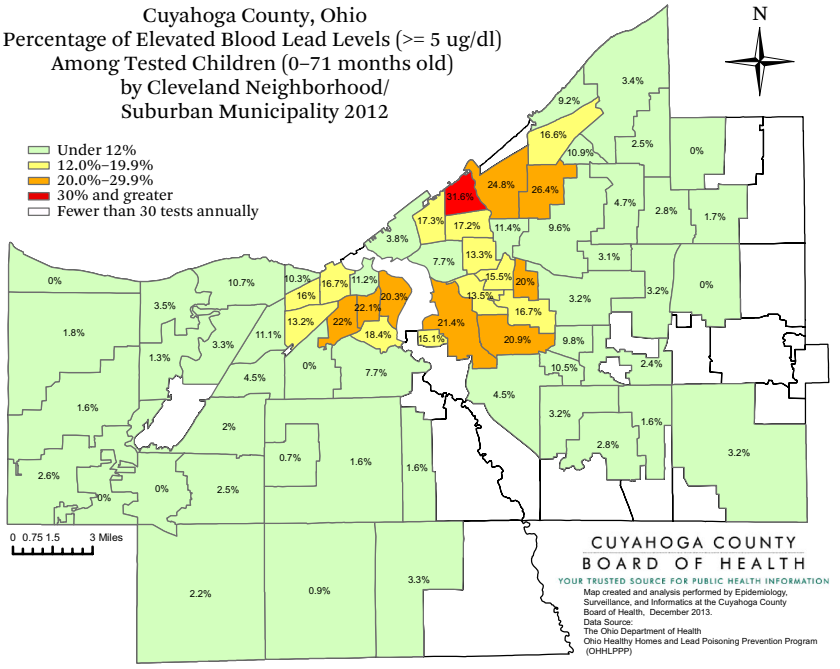
Figure 3. HOLC (Redlining Map) of Cleveland 1940 and Current Infant Mortality Rates



Source: Created by author from 1940 HOLC map and 2010 Infant Mortality data from the Ohio Department of Health (adapted from analysis in Reece et al. 2015).
Note: Areas in light gray were unrated in 1940.

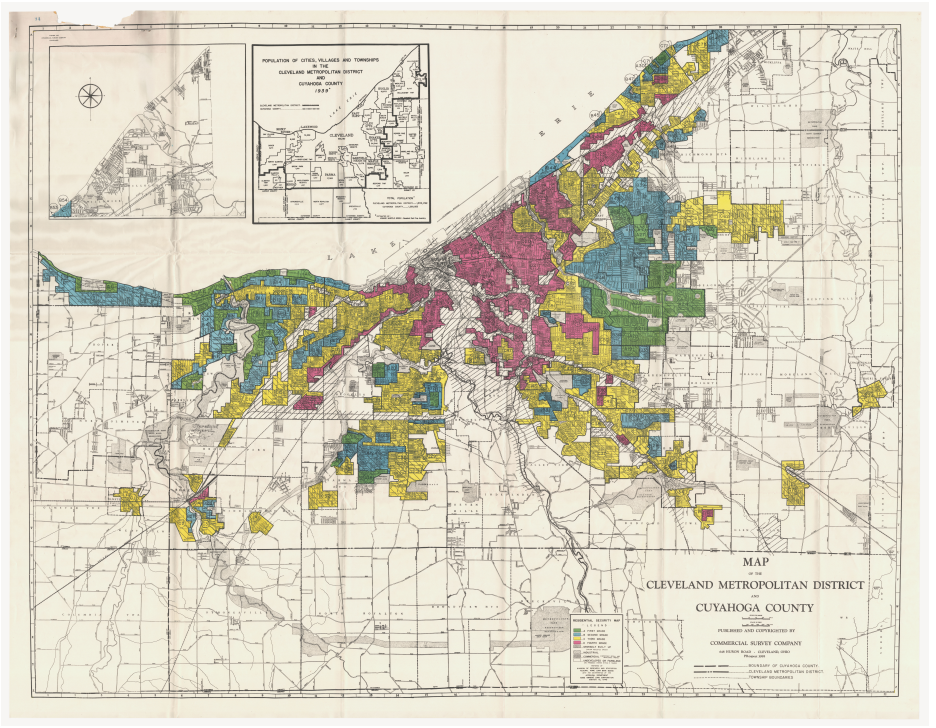
Figure 4. HOLC (Redlining Map) of Cleveland 1940 and 2012 Child Lead Poisoning

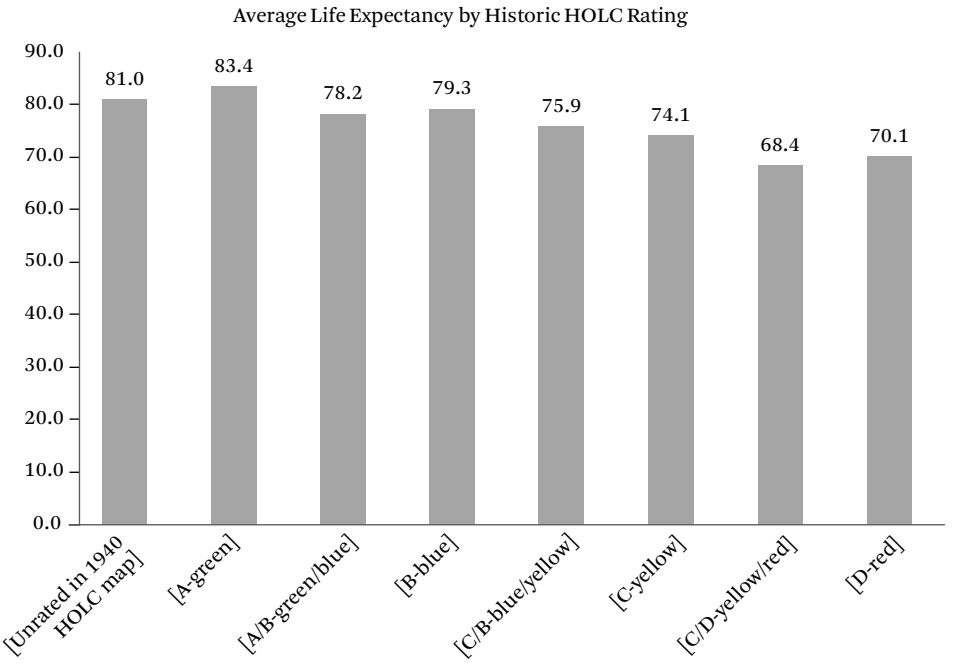




Source: Created by author from 1940 HOLC map and 2012 lead test results from Cuyahoga County Board of Health (adapted from analysis in Reece et al. 2015).

Figure 5. HOLC (Redlining Map) of Cleveland 1940 and 2008–2010 Life Expectancy





Source: Created by author from 1940 HOLC map and Cuyahoga County Board of Public Health 2008/2010 life expectancy data (adapted from analysis in Reece et al. 2015).

Formerly redlined areas included five of the region's eight highest infant mortality zones, neighborhoods whose infant mortality rates were on par with developing nations. Redlined areas included the majority of the county's highest poverty areas and the densest concentrations of food insecurity. Formerly redlined communities also correlated with the county's highest rates of subprime lending and foreclosure. Additionally, analysis of contemporary financial institutions found an absence of mainstream financial institutions (banks) and the densest concentration of predatory creditors (such as payday lenders) in formerly redlined areas (Reece et al. 2015).

Evaluation of Impact: Stakeholder Perspectives

Stakeholders identified both institutional or organizational and personal motivations for taking part in the process. Stakeholders identified their interest in deepening knowledge of efforts to address racial equity, health equity, and poverty in their communities. Participants from both regions sought to better understand how historical discrimination has influenced current challenges in the community, as described by participants. A Cleveland stakeholder, for example, put it this way: "to understand how Greater Cleveland's history of discrimination shaped our current differences in opportunities to be healthy." Another, in Columbus, explained that "A new group called Thrive was being formed to look at the issue of poverty in our community. To center all of the members of Thrive and provide a solid foundation for the development of a communitywide poverty reduction plan, we realized the need to understand our history and how it contributed to today's challenges."

Stakeholders also noted the process's importance in legitimizing efforts to support racial equity within their organization and in supporting capacity-building for other organizations in the community. A Cleveland participant said that the process "help[ed] me build the case for equity and racial inclusion in my current work within the health department, as part of the past Place Matters Team. . . to have the tools and resources to build the capacity of others (partners, decision makers, etc.) on how historical policies and practices shape current inequities and the role values play in decision making." As a stakeholder in Columbus explained, "At United Way of Central Ohio one of the key principles that guides our work is a commitment to addressing racial disparities. In order to do that we need to have good data on where disparities exist in our community. History Matters was an invaluable resource for UWCO when we conducted a thoughtful and comprehensive review of our investment strategies. It helped us identify priority neighborhoods that have long histories of disparities and helped us decide where we would concentrate funding."

Pursuing the historical analysis (and providing evidence) was described as critical to providing tangible examples of abstract concepts such as structural or institutional racism to decision makers. "It's really important," another Columbus stakeholder said; "in order for us to solve the problems of today, it's essential that we understand how we got here. If you don't understand how we got it, it becomes difficult, bordering on impossible to solve the problem. These ideas that we talk about, institutional racism, structural racism, most people don't understand what that means. We throw these terms around, we don't understand how that started, what exactly does it mean, this leads to people not being willing to look at them."

Stakeholders also identified personal motivations for being part of the project, specifically their firsthand experience living through the historical events reflected in the project. One Cleveland stakeholder identified their experience living through the peak of the civil rights movement as fundamental to why they were motivated to take part in this process. The stakeholder believed documenting and educating the public about historical discrimination was critical to address contemporary racial disparities in the community:

> As an African American male who was born in the early 1950s and who came of age in the 1960s and 1970s, [the civil rights movement] which occurred in my youth shaped my life. . . . The civil rights movement had a significant influence on me and my family because we experienced racial discrimination

> and segregation . . . the treatment of African Americans in American society have had a direct impact on my development as a person and a professional. I decided to work to eliminate the legal and social barriers that impeded opportunities for African Americans. One way I have engaged in the pursuit of increasing opportunities for African Americans is through the study of historical policies in housing, education and health care that need to be addressed to increase African American opportunities in this country.

Stakeholders described several ways the knowledge generated by the project informed their (or their organization's) thinking. Stakeholders from both cities found the historical analysis important in helping them contextualize the long-term nature of challenges the city's most impoverished communities faced, changing their perspective on how to best intervene to address community challenges. As one Columbus participant said, "The research was very useful because it made clear that the issues facing high poverty neighborhoods did not emerge overnight and sustained investment would be needed to make a difference." Another offered this angle: "We destroyed these neighborhoods over decades, so what does that mean, we are not fixing things in five years, and it was multiple policies, we have to be patient, we need that long-term perspective."

> Based on the History Matters report, [a Cleveland stakeholder explained,] we were also able to change our strategies for solving the challenges confronting African Americans living in communities that were the targets for historical racial discrimination and segregation. No longer did we believe that grassroots individual interventions alone would be sufficient to address historical community ills. Instead, we adjusted our focus to systems, structures and institutions that perpetuate racism, discrimination and segregation. Focusing on systems, structures and institutions changes the ownership for the conditions that exist from the individual to the society and makes the identification of effective solutions the responsibility of our society not just the individuals impacted by the existing conditions. We also now understand that solving conditions that are steeped in a racially-tinged historical context means that multi- and cross-sector strategies, collective action and collective impact will be required.

Stakeholders noted that the research expanded their perspective on the "unnatural" nature of neighborhood segregation or community disinvestment. The project clearly documented how discriminatory values or norms shaped housing and development policies, evident in these remarks from a Cleveland and a Columbus participant respectively: "From this work, the concept that values shape decisions became clearer as policies like redlining were not policy decisions made based on data"; "I also found it useful to highlight for some audiences that current conditions are not a result of free market forces but intentional enforcement of policies that limited investment."

Stakeholders discussed the process's ability to identify the role of policy in shaping inequity as critical to pushing back against the narrative of blaming the victim. "If policies got us here, then policies can get us out of this," a Columbus participant remarked. "Complicated concepts, and complexity, are very hard for people to wrap their minds around, so what we do is then blame the person, because it's complicated and the average person doesn't understand it."

Viewing historical documents, for example, language from HOLC assessments, deed restrictions, and redlining maps, provided tangible evidence of how racism shaped the region. Stakeholders found these historical documents to be compelling in making the region's history more concrete (less abstract) and documentation clearly emphasized the obvious discriminatory values embedded in policy. One in Cleveland explained: "Viewing the real historical documents impacted me significantly, because they highlighted and validated the discriminatory nature of these past policies and practices." A counterpart in Columbus spoke similarly: "Yes, it was very powerful to see original documents that made clear discriminatory practices did exist in Columbus (this was not just an issue found in southern states)."

Redlining maps were particularly effective in documenting the geography of historical discrimination. Additionally, maps enabled stakeholders to visually align (or analyze) the correlation between communities of historic discrimination and contemporary challenges, such as patterns of poverty or community-based disparities. A Cleveland participant focused on the technical angle: "The maps draw a clear connection between our history and our current landscape of inequities as we are able to overlay redlining with a host of other maps of determinants of health and health outcomes." A Columbus stakeholder emphasized the emotional takeaway: "Seeing the actual historical maps and how the areas of redlining continue to be areas of high poverty today is very impactful and made a strong impression on our team and our volunteer leadership."

Stakeholders in both cities identified direct capacity-building, enhanced community awareness, and policy impacts from the History Matters effort. Project participants in both cities identified how the process sparked new community conversations, engaging multiple stakeholders across each community: from Cleveland, "I can say that the documents and text in the report was used to stimulate community conversations and the intersection of racial discrimination, equity and health. The report has also increased awareness of the connections between historical policies and practices and the conditions that exists in many Cuyahoga County communities today"; and from Columbus, "community dialogue—the portion of Mayor Ginther's most recent state of the city speech that focused on poverty [which discussed redlining in high poverty areas] certainly made clear how the research initially created for Thrive was spurring conversation across the community on what can be done."

Stakeholders also identified the importance of utilizing the research to foster better cross-cultural understanding in their respective communities: "There has been subsequent conversation, where my African American board members have said, we have known this all along, this is our lived experience, and that has helped with my White board members, who have said 'wow' I had no idea, this started a conversation, and strengthened relationships on the board. For my African American board members, it's almost like hashtag #me too [used by women who were documenting sexual harassment via social media]. When we bring the issues to light and show the data, it dispels a lot of myth."

In respect to policy impacts, both Columbus and Cleveland stakeholders emphasized how the project informed efforts to enhance place-based investment:

> This research was very helpful as United Way's Community Impact team finalized the new community investment model. It provided a way to focus the issue for the Board of Trustees prior to their vote on the investment framework. It was useful in the development of the approach for the two neighborhoods that were selected and helped to set expectations for how long the work would take. The research made clear the importance of investing in public policy and efforts to ensure systems work effectively for everyone. The knowledge gained also helped to make sure we invested in those programs that helped those who were most vulnerable.

> The Mayor's Neighborhood Transformation Initiative was in part based on the historical data that was provided through the history Matters Report. . . . it also influenced the recently released race relations report issued by our community relations department. The City Planning Department has developed a community-driven strategy that focuses on inherently disadvantaged communities. We are investing fiscal, human and other resources in targeted geographies as well as generating partnerships to connect our collective resources into these targeted locations. Our approach is intentional and, if successful, can create a model for how to transform urban core communities. It is not a report but instead a strategy that helps guide decision making.

In Cuyahoga County, History Matters directly informed the county's health improvement plan, and shifted organizational narratives in how issues of inequity are discussed in the region: "Facts, data, information and maps

from the History Matters report were integrated into the community health improvement planning process as a means of building the knowledge and capacity of partners. The goal is to have our partners achieve perspective transformation—that is, understand, think and value differently, and in turn take action differently to address equity and racial inclusion. This information is now part of HIP-Cuyahoga's new narrative. We highlight the history of discrimination in the final community health improvement plan and continue to communicate this narrative through our messaging and communications."

In Franklin County, many of the participants in the History Matters initiative would later guide the development of a countywide poverty reduction plan that referenced the importance of structural racism in historical housing and development policy in contributing to contemporary racial disparities. The plan acknowledged the importance of historical factors in its policy goal to "disrupt the institutional racism and unconscious biases that continue to permeate the community" (Franklin County 2019, 3).

DISCUSSION AND POLICY RAMIFICATIONS

Historical analysis of Cleveland and Columbus clearly document the cumulative discriminatory structures that shaped each city, thus molding today's geography of opportunity and segregation. The longevity of these discriminatory structures and their reinforcing characteristics created apartheid-like conditions in most communities of color. The robust nature of these multiple barriers to opportunity created a legacy of discrimination that various civil rights acts and inclusionary housing tools have yet to fully overcome.

Although the case studies represent the experience of two cities, the analysis and process create policy implications for other places and communities. Policy solutions generated during both planning processes emphasized several primary themes.[12] First, stakeholders identified the importance of centering racial equity as a value in policymaking (in contrast to more general technocratic policy development). Centering racial equity seeks to ensure that racial equity is a driving value at the forefront of policy design and that all policies are evaluated through a racial equity lens.

Second, the long history of discriminatory policy in both cities speaks to policy solutions which are sustained over the long term. As one stakeholder in the Franklin County engagement process noted, "conditions which emerged over a half century or more require more than a one- or two-year plan or grant to fix."

Third, the intersection of space, place, and racial equity are profoundly important for designing policy solutions. This includes racial equity–centered efforts to guide reinvestment into historically disadvantaged community, and policies that dismantle spatial barriers to opportunity (such as exclusionary housing policies or inadequate transportation infrastructure). Finally, both planning efforts emphasized using the multisector and multistakeholder collective impact model to address historical impacts of structural racism. The collective impact model differs from traditional collaborative planning processes in that it overtly focuses on equity while developing a backbone organization to support long-term collaboration among multiple stakeholders (Reece and Gough 2019).

These themes are illustrated in policy statements and plans emerging from Cuyahoga County stakeholders that were informed directly by the historical participatory process. These statements speak to the importance of a historically grounded racial equity lens for all of our policies. "[First] Values influence policy. Value-infused policies shape systems, which either help to produce prosperity for all or create

12. Neither planning process emphasized federal policy solutions, deferring to local initiatives and policy solutions in their identification of policy actions (including no discussion of the emerging federal Opportunity Zone program). I conclude that the overwhelming influence of neoliberal policy and philosophy of recent decades created a barrier to thinking beyond local policy solutions. Earlier in the process several stakeholders noted that earlier federal efforts to address racial equity and poverty (such as the Johnson administration's War on Poverty) were a failure. The influence of neoliberal narratives on local policymakers in their understanding of history and contemporary policymaking requires further exploration.

barriers to opportunity for some. [Second] Historical policies have long-term, residual impacts that need to be taken into account when designing solutions for today. [Third] There is nothing 'natural' about today's challenges, nor are they unsolvable. Significant change can begin through coordinated efforts focused on principles of equity and inclusion" (Reece et al. 2015, 4).

The policy recommendations emerging directly from the History Matters planning process to remedy structural racism were integrated into the Cuyahoga County's Health Improvement Plan. These recommendations include the following strategies.

> Developing a community-level understanding of the historical forces involved in creating current inequities; using health equity data to illuminate how race-based policies and practices created opportunities for some and restricted possibilities for others; supporting organizational, institutional, and community leaders to work closely with community members to create an awareness of how and why assumptions about racial and ethnic populations can impact their thinking, feeling, and actions; and using an equity-focused approach to develop policies that increase social and economic opportunities for racial and ethnic minorities, change individual and organizational behaviours, and significantly improve conditions for all people living in Cuyahoga County. (Health Improvement Partnership Cuyahoga 2015, 28)

Plessy, and by extension policies motivated by the *Plessy* doctrine, have a multigenerational historic impact. We see this deeply in land use and development policy, where impacts of historical discrimination reach across generations and domains such as economics, wealth, and health. The case studies demonstrate the necessity and value of participatory efforts that document the legacy of *Plessy* and other structural forms of discrimination. Stakeholders identify several direct advantages of engaging contemporary planning challenges through the lens of historical research. Learning about our often "hidden" history of discrimination and development can provide deep insights into how to approach contemporary racial equity challenges.

As we look back on historical policies like those codified through the Home Owners' Loan Corporation maps, it is easy to denigrate the social mores of Depression-era thinking around the themes of race, ethnicity, and class. Terms such as *infiltration* and *low-grade population* that referred to immigrants and African Americans in the HOLC assessor notes suggested that individuals from these communities represented a risk to public health as if they themselves were a disease. Today we can fall into the trap of acknowledging how archaic these views appear in twenty-first-century America, as if no contemporary societal values will be looked on similarly by future generations.

It is important to recognize that many of the beliefs about race and class that gave birth to racial zoning and redlining are alive today, even though they may now manifest themselves in both unsubtle and subtle ways. Many urban areas are experiencing another era of demographic transition, and racial tensions and anti-immigrant sentiments are vividly present in political and public debates.

These concerns are not limited to just the racism of the Alt-Right. It is important to consider how current language, messaging, and values may contain aspects of explicit and implicit racism. Racism or bias may seep into well-intended initiatives such as urban redevelopment, affordable housing policy, smart growth, sustainability, and local food production in subtle ways. All of these initiatives carry a host of implications for low-income communities and people of color, especially in an age when genuine civic engagement and democracy are under duress in many marginalized communities.

For example, gentrification pressures in formerly redlined and segregated communities present another potential form of wealth extraction. The artificially suppressed property values in these neighborhoods creates the potential for investors and developers to create tremendous profit as population moves back into many urban neighborhoods. These profits from rapidly redeveloping spaces are built on

the legacy of segregation and are direct by-products of structural racism. As plans to revitalize urban neighborhoods arise and evolve, the deep-rooted values on which they are based should always be considered for how they will affect the families and children of today and tomorrow.

The lessons of history are of little consequence if we fail to learn from them. One of the important themes of this research is that although plans and policies can be more harmful to some neighborhoods than others, they can also be used to acknowledge harm and bring about a sense of restorative justice by helping to rebuild and revive communities. The events of history cannot be changed, but many of its lingering effects can be mitigated or even reversed through the decisions made today.

Stakeholder input from the case studies presented here illustrates the utility of an engagement process which emphasizes historical understanding as a primary outcome. History matters, particularly when we attempt to understand our complex contemporary challenges, our inequities, and the conditions of our built environment. Understanding our history is essential to cultivating contemporary community change, particularly in long-marginalized communities, where we battle disengagement, distrust, and popular narratives about neighborhoods, none of which acknowledge the legacy of discriminatory policy.

The history articulated through this historical engagement process speaks to the need for a robust policy framework to produce racially just cities and a racially just society. Cities built on a foundation of racial discrimination should embrace a racial equity in all policies lens moving forward. A racial equity lens to transform neighborhoods and cities should not only bring restorative investment and opportunity to formerly marginalized spaces, but also affirmatively connect marginalized communities to opportunity.

If we are to move forward, we need to deeply engage the legacy of our discriminatory past in multifaceted ways, including engaging decision makers and embedding it in education and in societal conversations. Understanding our history is necessary to informing decision makers, many of whom have little to no historical context for why the city looks the way it does today. As our cities and demographics continue to change, we need to be deliberate in acknowledging our discriminatory past while affirmatively seeking restorative investment and community empowerment in those neighborhoods devastated by our legacy of twentieth-century philosophies of "separate but equal."

Remedying the racial wealth gap, reducing disparities across various domains (housing, education, employment, and others) require a direct challenge to our continued system of racialized spatial planning. Although the civil rights movement and fair housing efforts dismantled some elements of this system, discrimination in development policies continues, particularly through de facto forms of segregation, such as class-based exclusionary zoning. Exclusionary zoning barriers continue to provide barriers to areas of opportunity, but market-driven reinvestment back into urban communities can displace marginalized communities while excluding them from the wealth generated in the twenty-first-century movement back to the city.

In *Whiteness and Urban Planning*, Edward Goetz, Rashad Williams, and Anthony Damiano argue that twenty-first-century planning practice and scholarship must acknowledge, challenge, and decenter Whiteness as a dominant paradigm in development policy (2020). The authors call for a race-conscious analysis of development policies that brings heightened awareness of the benefits accrued to White space from our development system. Addressing racial inequity in planning practice fixates on problematizing communities of color but does not examine the unearned benefits accrued to White spaces from development practices. Decentering Whiteness also requires challenging the norm of exclusion in land use policy, valuing community power building and supporting innovative ways of fostering wealth building for communities of color. Goetz, Williams, and Damiano also call for questioning integration strategies that are centered on supporting the ideal of Whiteness as represented

as "areas of opportunity" in the suburban landscape.

Assuming that movement back to the city is a permanent trend, massive wealth will be generated from redevelopment in these areas. These real estate profits are artificially created by structures that historically devaluated non-White space. If we are going to address issues such as the wealth gap or foster reparations, we need to work to ensure that communities of color benefit from the reinvestment occurring today. Current market-based efforts to expand urban reinvestment, such as the recently introduced Opportunity Zone initiatives, may stimulate investment but not connect it to existing communities. They may also hasten the displacement of marginalized communities of color from areas of revitalization. Policies such as community benefit agreements and community land trusts can help ensure that marginalized communities benefit from reinvestment. For these measures to be effective at any scale, however, affordable housing programs are needed in areas of redevelopment to stem the displacement produced by market-driven redevelopment.

At the same time, the distinct geography of opportunity created by our legacy of racist spatial policy is entrenched in local land use policy. De facto segregation is upheld through a combination of policies related to local land use control, exclusionary zoning, and market forces. Efforts to address this exclusion through regional housing mobility programs have rarely been attempted on a large scale, relegated instead to a handful of court-ordered remedies or limited to the Department of Housing and Urban Development's Move to Opportunity program in the 1990s.

Despite the limited scope of these programs, the evidence of their effectiveness in improving outcomes for youth is compelling and should motivate further implementation. Communities also need to work to dismantle exclusionary land use restrictions. These efforts may be in their infancy as interest grows in restricting the dominance of single-family residential zoning (Manville, Monkkonen, and Lens 2020; Wegman 2020). Although the efforts are fledgling, they are a starting point to dismantling discriminatory land use policies.

Housing policy debates to remedy the legacy of "separate but equal" have been broken into a false dichotomy of either mobility or revitalization, but a broader transformation of our development system is needed. This transformation should uphold agency and choice for marginalized communities of color. Policies that open access to opportunity are needed, as are policies that ensure that redevelopment in existing communities benefits marginalized communities while building true community wealth. The transformation also requires an intensive examination and dismantling of policy centered on maintaining the benefits, durability, and invisibility of Whiteness (Goetz, Williams, and Damiano 2020).

REFERENCES

Acevedo-Garcia, Dolores, Nancy McArdle, Erin F. Hardy, Unda Ioana Crisan, Bethany Romano, David Norris, Mikyung Baek, and Jason Reece. 2014. "The Child Opportunity Index: Improving Collaboration between Community Development and Public Health." *Health Affairs (Project Hope)* 33(11)(November): 1948–957. DOI: 10.1377/hlthaff.2014.0679.

Acevedo-Garcia, Dolores, Clemens Noelke, Nancy McArdle, Nomi Sofer, Nick Huntington, Erin Hardy, Rebecca Huber, Mikyung Baek, and Jason Reece. 2020. "The Geography of Child Opportunity: Why Neighborhoods Matter for Equity." Waltham, Mass.: Brandeis University, The Heller School for Social Policy and Management.

Acs, Gregory, Rolf Pendall, Mark Treskon, and Amy Khare. 2017. "The Cost of Segregation: National Trends and a Case Study of Chicago, 1990–2010." Washington, D.C.: The Urban Institute.

Beck, Andrew F., Erika M. Edwards, Jeffrey D. Horbar, Elizabeth A. Howell, Marie C. McCormick, and DeWayne M. Pursley. 2019. "The Color of Health: How Racism, Segregation, and Inequality Affect the Health and Well-Being of Preterm Infants and Their Families." *Pediatric Research*, July 29. DOI: 1038/s41390-019-0513-6.

Bell, Derrick A., Jr. 1980. "*Brown v. Board of Education* and the Interest-Convergence Dilemma." *Harvard Law Review* 93(3): 518–33. Accessed September 19, 2020. https://harvardlawreview.org/wp-content/uploads/1980/01/518-533_Online.pdf.

Bonilla-Silva, Eduardo. 1997. "Rethinking Racism:

Toward a Structural Interpretation." *American Sociological Review* 62(3): 465–80. DOI: 10.2307/2657316.

Brown University. 2017. "Diversity and Disparities: Racial Segregation Dissimilarity Rankings." American Communities Project, Spatial Structures in Social Sciences. Accessed September 21, 2020. https://s4.ad.brown.edu/projects/diversity/Data/data.htm.

Cashin, Sheryll. 2004. *The Failures of Integration: How Race and Class Are Undermining the American Dream*. New York: PublicAffairs.

Chetty, Raj, Nathaniel Hendren, and Lawrence F. Katz. 2015. "Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment." *American Economic Review* 106(4): 855–902.

Chetty, Raj, Nathaniel Hendren, Patrick Kline, and Emmanuel Saez. 2014. "Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States." *Quarterly Journal of Economics* 129(4): 1553–623.

Coates, Ta-Nehisi. 2014. "The Case for Reparations." *The Atlantic* 313(5): 54–71.

Conley, Dalton. 1999. *Being Black, Living in the Red: Race, Wealth, and Social Policy in America*. Berkeley: University of California Press.

Delgado, Richard, and Jean Stefancic. 2000. *Critical Race Theory: The Cutting Edge*. Philadelphia, Pa.: Temple University Press.

Dettling, Lisa J., Joanne W. Hsu, Lindsay Jacobs, Kevin B. Moore, and Jeffrey P. Thompson. 2017. "Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances." FEDS Notes, September 27. Washington, D.C.: Board of Governors of the Federal Reserve System. DOI: 10.17016/2380–7172.2083.

DiAngelo, Robin. 2015. "White Fragility: Why It's So Hard to Talk to White People About Racism." The Good Men Project, January 15. Accessed September 21, 2020. https://medium.com/@GoodMenProject/white-fragility-and-the-rules-of-engagement-d1ec0f95ef22.

Frankenberg, Erica. 2009. "Splintering School Districts: Understanding the Link between Segregation and Fragmentation." *Law & Social Inquiry* 34(4): 869–909.

Franklin County. 2019. "Rise Together: A Blueprint for Reducing Poverty in Franklin County." Franklin County Board of Commissioners. Accessed October 12, 2020. https://commissioners.franklincountyohio.gov/COMM-website/media/Documents/FRANK-Report-1-10-Web-Ready-(Large)_1.pdf.

Frey, William H. 2018. "Black-White Segregation Edges Downward Since 2000, Census Shows." *The Avenue* (Brookings Institution blog), December 18. Accessed September 21, 2020. https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows.

Goetz, Edward G., Rashad A. Williams, and Anthony Damiano. 2020. "Whiteness and Urban Planning." *Journal of the American Planning Association* 86(2): 142–56. DOI: 10.1080/01944363.2019.1693907.

Grant-Thomas, Andrew, and john a. powell. 2006. "Toward a Structural Racism Framework." *Poverty & Race* 15(6)(November-December): 3–6.

Health Improvement Partnership Cuyahoga. 2015. "Cuyahoga County Health Improvement Plan." Cleveland, Ohio: Cuyahoga County Board of Public Health.

Hernandez, Jesus. 2009. "Redlining Revisited: Mortgage Lending Patterns in Sacramento 1930–2004." *International Journal of Urban and Regional Research* 32(2): 291–313.

Huggins, John C. 2017. "A Cartographic Perspective on the Correlation Between Redlining and Public Health in Austin, Texas—1951." *Cityscape* 19(2): 267–80.

Jacobs, Gregory S. 1998. *Getting Around Brown: Desegregation, Development, and the Columbus Public Schools*. Columbus: Ohio State University Press.

Jacoby, Sara F., Beidi Dong, Jessica H. Beard, Douglas J. Wiebe, and Christopher N. Morrison. 2018. "The Enduring Impact of Historical and Structural Racism on Urban Violence in Philadelphia." *Social Science & Medicine* 199 (February): 87–95. DOI: 10.1016/j.socscimed.2017.05.038.

Kneebone, Elizabeth, and Natalie Holmes. 2016. "U.S. Concentrated Poverty in the Wake of the Great Recession." Washington, D.C.: Brookings Institution. Accessed September 21, 2020. https://www. brookings.edu/research/us-concentrated-poverty-in-the-wake-of-the-great-recession.

Lipsitz, George. 2015. "From Plessy to Ferguson." *Cultural Critique* 90 (Spring): 119–39.

Logan, John R., and Brian J. Stults. 2011. "The Per-

sistence of Segregation in the Metropolis: New Findings from the 2010 Census." *Project US2010*, March 24 . Accessed September 21, 2020. https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf.

Lu, Michael C., and Belinda Chen. 2004. "Racial and Ethnic Disparities in Preterm Birth: The Role of Stressful Life Events." *American Journal of Obstetrics and Gynecology* 191(3): 691–99.

Lu, Michael C., and Neal Halfon. 2003. "Racial and Ethnic Disparities in Birth Outcomes: A Life-Course Perspective." *Maternal & Child Health Journal* 7(1)(March): 13–30.

Luxenberg, Steve. 2019. *Separate: The Story of Plessy V. Ferguson and America's Journey from Slavery to Segregation.* New York: W. W. Norton.

Kothari, Catherine L., Rajib Paul, Ben Dormitorio, Fernando Ospina, Arthur James, Deb Lenz, Kathleen M. Baker, Amy B. Curtis, and James Allen Wiley. 2016. "The Interplay of Race, Socioeconomic Status and Neighborhood Residence Upon Birth Outcomes in a High Black Infant Mortality Community." *SSM Population Health.* 2016 (October); 2: 859–67. DOI: 10.1016/j.ssmph.2016.09.011.

Manning-Thomas, June. 1994. "Planning History and the Black Urban Experience: Linkages and Contemporary Implications." *Journal of Planning Education and Research* 14(1): 1–11.

Manville, Michael, Paavo Monkkonen, and Michael Lens. 2020. "It's Time to End Single-Family Zoning." *Journal of the American Planning Association* 86(1): 106–12. DOI: 10.1080/01944363.2019.1651216.

McClure, Elizabeth, Lydia Feinstein, Evette Cordoba, Christian Douglas, Michael Emch, Whitney Robinson, Sandro Galea, and Allison E. Aiello. 2019. "The Legacy of Redlining in the Effect of Foreclosures on Detroit Residents' Self-Rated Health." *Health & Place* 55 (January): 9–19. DOI: 10.1016/j.healthplace.2018.10.004.

Nightingale, Carl H. 2012. *Segregation: A Global History of Divided Cities*. Chicago: University of Chicago Press.

powell, john a. 2003. "Opportunity-Based Housing." *Journal of Affordable Housing & Community Development Law* 12(2): 188–228.

Reece, Jason. 2019. "Defining Space, Defining the Other, Constructing Structural Racism: Content Analysis of HOLC Assessor Documents in 12 Ohio Cities." Presentation to the 2019 Society of City & Regional Planning History Conference "Planning for In/Equality". Arlington, Va. (November 2, 2019).

Reece, Jason, and Meghan Z. Gough. 2019. "Planning for Regional Sustainability and Justice: The Role of Collective Impact." *Community Development* 50(3): 368–86.

Reece, Jason, Matt Martin, Joshua Bates, Amanda Golden, Kelsey Mailman, and Ronni Nimps. 2015. "History Matters: Understanding the Role of Policy, Race and Real Estate in Today's Geography of Health Equity and Opportunity in Cuyahoga County." Cleveland, Ohio: Kirwan Institute for the Study of Race & Ethnicity. Accessed September 21, 2020. http://kirwaninstitute.osu.edu/wp-content/uploads/2015/06/The-History-of-Race-Real-Estate-Cuyahoga-County-Final-Report-February-2015.pdf.

Rothstein, Richard. 2017. *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: Liveright Publishing.

Rugh, Jacob S., and Douglas S. Massey. 2010. "Racial Segregation and the American Foreclosure Crisis." *American Sociological Review* 75(5): 629–51. Accessed June 6, 2020. DOI: 10.2307/20799483.

Rusk, David. 1993. *Cities Without Suburbs.* Washington, D.C.: Woodrow Wilson Center Press.

Shapiro, Thomas M. 2003. *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality*. New York: Oxford University Press.

Stephens, Alexis. 2014. "Online Story Map Connects History and Cleveland's Health." Next City, November 7. Accessed September 21, 2020. https://nextcity.org/daily/entry/health-policy-cleveland-redlining-history.

Sullivan, Shannon. 2013. "Inheriting Racist Disparities in Health: Epigenetics and the Transgenerational Effects of White Racism." *Critical Philosophy of Race* 1(2): 190–218.

Thomas, J. M. 1994. "Planning History and the Black Urban Experience: Linkages and Contemporary Implications." *Journal of Planning Education and Research* 14(1): 1–11. DOI: 10.1177/0739456X9401400101.

Vick, Alexis D., and Heather H. Burris. 2017. "Epigenetics and Health Disparities." *Current Epidemiology Reports* 4(1)(March): 31–37. DOI: 10.1007/s40471-017-0096-x.

Ware, Leland. 2021. "*Plessy's* Legacy: The Government's Role in the Development and Perpetuation of Segregated Neighborhoods." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 92–109. DOI: 10.7758/RSF.2021.7.1.06.

Wegmann, Jake. 2020. "Death to Single-Family Zoning . . . and New Life to the Missing Middle." *Journal of the American Planning Association* 86(1): 113–19. DOI: 10.1080/01944363.2019.1651217.

Wise, Tim. 2019. "Forget STEM, We Need MESH: The Importance of Media Literacy, Ethics, Sociology and History Education." *Medium*, September 19, 2019. Accessed September 21, 2020. https://medium.com/our-human-family/forget-stem-we-need-mesh-43ab6f6273cd.

Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States

PARU SHAH AND ROBERT S. SMITH

This article explores how voter ID laws further the dismantling of voting rights and the promises of full political engagement for racial minorities, especially African Americans. The authors highlight the racial politics that inform the emergence of these laws, and the racial intent and impact these laws have in diluting minority voting access and therefore political power. It begins with a short historical overview of voting rights since the eradication of slavery, then offers background on the current legal climate in which voter ID laws are situated. The essay concludes with an analysis of Frank v. Walker *as a case study exposing the intent and impact of voter ID laws.*

Keywords: voter disenfranchisement, Voting Rights Act, voter IDs, *Frank v. Walker*

The eradication of race-based slavery brought America face to face with its first experiment with racial democracy. Decades of African American voting after 1865 would ultimately be undermined using barely sophisticated mechanisms that mocked and skirted constitutional protections of political engagement. Most notably, Black electoral participation was violently crushed by forces sympathetic to the South's commitment to White supremacy and Jim Crow segregation. Throughout the Black Freedom Struggle of the late nineteenth and twentieth centuries, restrictions on voting rights were routinely challenged. These challenges culminated in important legal victories that stymied mechanisms to undermine access to voting during the Jim Crow era. By the 1960s, nonviolent demonstrations and political organizing gave rise to the Voting Rights Act of 1965 (VRA), one of the key legislative victories in the fight for civil rights. The VRA ushered in dramatic changes to America's racial and political order, and stands as one of the most important pieces of legislation in American history.

The Voting Rights Act democratized American politics and political representation in profound ways. In response to its passage, attacks on the expanded political protections it pro-

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Table 1. Voter Identification Laws in Force in 2019

	Photo ID	Non-photo ID
Strict	Georgia[a]	Arizona[a]
	Indiana[a]	North Dakota[a]
	Kansas[a]	Ohio[a]
	Mississippi[a]	
	Tennessee[a]	
	Virginia[a]	
	Wisconsin[a]	
Nonstrict	Alabama[a]	Alaska
	Arkansas	Colorado
	Florida[a]	Connecticut
	Hawaii	Delaware
	Idaho[a]	Iowa[a]
	Louisiana[a]	Kentucky[a]
	Michigan[a]	Missouri[a]
	North Carolina[a]	Montana[a]
	Rhode Island	New Hampshire
	South Carolina[a]	Oklahoma[a]
	South Dakota[a]	Utah[a]
	Texas[a]	Washington
		West Virginia[a]

Source: Authors' tabulation based on NCSL 2020.
Note: This table refers to laws that are in effect in 2019; Pennsylvania also has enacted a strict photo voter ID law, but it has been struck down by state court and is not in effect. North Carolina also enacted a photo voter ID law that has been struck down by the courts. Therefore, these states are not included in this chart of in-force laws. Photo versus non-photo identification: Some states request or require voters to show an identification document that has a photo on it, such as a driver's license, state-issued identification card, military ID, tribal ID, and many other forms of ID. Other states accept non-photo identification such as a bank statement with name and address or other document that does not necessarily have a photo. Nonstrict: At least some voters without acceptable identification have an option to cast a ballot that will be counted without further action on the part of the voter. Strict: Voters without acceptable identification must vote on a provisional ballot and also take additional steps after Election Day for it to be counted.
[a] Denotes a Republican-majority legislature.

vides have been incessant. Since 2010, thirty-five states have laws requesting or requiring voters to show some form of identification (see table 1). The vast majority of these states (twenty-seven) have Republican-controlled state legislatures that have argued for stricter laws under the auspices of attempting to prevent voter-impersonation fraud and inspiring confidence in the state's electoral process.

These laws have in their intent and effect diluting minority votes and weakening minority political power. In their operation, voter ID laws are effective holdovers from the Jim Crow era in their capacity to circumscribe political access, particularly for Black and Latino voters. Because of the burdens associated with costs prohibiting would-be voters, voter ID laws operate as modern-day poll taxes. Although current registered voters with IDs are not affected, voter ID laws include remnants of grandfather clauses of the Reconstruction and Jim Crow eras. Also, given that many of those affected by voter ID laws are urban Blacks and Latinos, the laws have equipped Republican legislatures with another weapon to weaken Democrat-leaning voters. These urban geographies have

long been sorted along racial and political lines. Separating the two is almost impossible.

Voter ID laws help fuel the quiet dismantling of the promises of full citizenship and political engagement. This article highlights both the racial politics that inform the emergence of these laws, and the racial intent and impact these laws have on diluting minority voting access and therefore political power.

PROMISES OF FULL VOTER RIGHTS: A BRIEF HISTORY

The United States has a long political tradition of limiting the voting rights of the poor, ethnic and racial minorities, and those considered outside the privileges extended to elite White men. After the American Revolution, nearly all states restricted voting rights to property owners. Indeed, the first state-mandated literacy test was enacted in Connecticut in 1855 to deny voting rights to Irish immigrants. Native Americans endured voting rights restrictions well into the twentieth century, particularly in Arizona and New Mexico. Asian immigrants were ineligible for citizenship and voting rights until the Immigration and Naturalization Act of 1952. But efforts to deny African Americans voting rights would lead to a collection of mechanisms and explicit political violence that would forever mar the nation's claims on democracy and continue to haunt the nation's political process today.

As the guns of the Civil War fell silent in April 1865, nearly four million African Americans had long recognized that Union victory would bring an end to slavery. Yet, as Black people actualized their understandings of freedom and citizenship, these new social and political landscapes became heavily contested terrain. The end of the war and emancipation gave way to the passage of the Fourteenth and Fifteenth Amendments, which together "endowed all citizens with the right to vote free from racial discrimination. And both expressly gave Congress the power to enforce their guarantees through legislation" (ACLU 2019a, 6). Immediately thereafter, the federal government provided assurances that Black males could exercise their newly granted rights without fear of violence, hostility, and intimidation. During Reconstruction, it became a federal crime to interfere with access to the ballot box using fraud, violence, or other forms of intimidation (ACLU 2019a; USCCR 1968).

Federal intervention ended in 1876, however, which ultimately gave southern states the autonomy to create and implement policies of their own design. By the late nineteenth century, often in the language of progressive reform, southern states passed a wide array of voting restrictions including but not limited to "'eight-box' laws, registration acts, secret ballot laws, poll taxes, literacy and property tests, 'understanding' qualifications, and white primaries."[1] Although these laws—alongside state-sanctioned violence and terror—sought to remove Black people from the political process, they also were part of the broader agenda of White supremacy to crush African American socioeconomic mobility. Indeed, "the effort to safeguard an elite monopoly over policy and governance arose as early as 1870 with the implementation of varied voter disenfranchisement tactics, all of which were grafted from an agenda working against blacks' social mobility" (Kerrison 2009, 5).

By the 1880s, Jim Crow segregation had supplanted slavery as the system of White supremacy that emerged across the South in response to emancipation.[2] Indeed, Jim Crow was exhaustive in its reach. The system was codified by state law, recognized in the federal courts, and defended with pseudoscientific research. Scholars have concluded that Jim Crow extended beyond the South, particularly as Black southerners migrated out of the region.

Jim Crow is most notable as a system of legal segregation attributed to the infamous *Plessy v. Ferguson* decision and the codification of the "separate but equal" doctrine.[3] Yet Jim Crow Era

1. Brief for Amici Curiae of Historians and Other Scholars in Support of Petitioners, 6, *William Crawford, et al. v. Marion County Election Board et al.,* 553 U.S. 181 (2008).

2. *Civil Rights Cases*, 109 U.S. 3 (1883).

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

practices and policies also secured the economic subjugation of the masses of Black southerners by relegating them to jobs that reinforced White supremacy. Sharecropping and domestic work, two prime examples, were eerily reminiscent of slavery. Racial violence was used to maintain social, economic, and political dominance over Blacks, and became the extralegal instrument to order society along racial lines. Whites engineered race riots to destroy the socioeconomic and sociopolitical power Black towns and communities had amassed since Reconstruction. Some of the most notable tragedies occurred in Atlanta, Georgia (1906), Springfield, Illinois (1908), Chicago and East St. Louis, Illinois (1919), Tulsa, Oklahoma (1921), and Rosewood, Florida (1923). Because of the rising tide of White supremacy, by the late 1890s the majority of African American men had been removed from the electoral process leaving Black southerners no way of changing or even impacting law and policy governing the system.

As Jim Crow reached its zenith at the turn of the twentieth century, the full-scale disenfranchisement of African American southerners became another of the era's hallmarks. Gone, but not forgotten, were the political gains of Radical Reconstruction that witnessed Black congressmen, state legislators, and local officials across the South. This political insurgency became a prominent target for White southerners who countered with rancid violence aimed at Black politicians, White Republican sympathizers, and ultimately any Black person attempting to cast a vote.

During Jim Crow, policies disenfranchising African Americans were unequivocally racist (Blessett 2015). An early example is the implementation of the grandfather clause, which "excused persons registered on or prior to January 1, 1866, and their descendants from having to comply with any literacy or property requirements for [voting] registration" (Contreras 2002, 59). Before 1866, Black people were not eligible to register and therefore were unable to cast a ballot, so their descendants would have been ineligible to vote based on the parameters of the grandfather clause. Additionally, it was illegal for African Americans to learn to read and write, making literacy among the formerly enslaved population extremely limited.

Another race-conscious strategy was rooted in conceptions of criminality, which have resulted in Blacks being the target population for felony disenfranchisement policies (Loury 2008). "Alabama, for instance, included a provision in its Reconstruction Constitution that denied the right to vote to those convicted of crimes of 'moral turpitude,' a class of crimes in which African Americans are disproportionately represented" (Preuhs 2001, 736). The purposeful intent of marginalization was exemplified further by a delegate at the 1901 Alabama Constitutional convention when he stated "everybody knows that this Convention has done its best to disenfranchise the negro in Alabama" (Blessett 2015, 35).

By the turn to the twentieth century, White southerners had functionally crushed nearly all expressions of Black political access and power across the region. Indeed, all-White, Democratic primaries emphasized the reach of White political supremacy across the region. Once *Plessy* emerged as the undergirding legal justification for racial segregation, disenfranchisement provided political sustenance to the system. African Americans responded with decades of legal activism, earning victories in the courts over grandfather clauses in 1915, exclusion from the southern-based Democratic Party in 1927 and 1932, and all-White primaries in 1944. Nonetheless, although voting litigation challenged the system of disenfranchisement, no substantive changes in the Black electorate emerged until the 1960s.[4]

In broad terms, disenfranchisement would remain intact across the South until the civil rights legislative victories of the sixties, most notably the Civil Rights Act of 1964 and the Voting Rights Act of 1965 (VRA). The VRA led to immediate advances in Black electoral reengagement in ways not witnessed since Reconstruction. It banned discriminatory voting practices and procedures. Section 2 of the act barred states and local jurisdictions from

4. *Guinn v. United States*, 238 U.S. 347 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Smith v. Allwright*, 321 U.S. 649 (1944).

adopting voting qualifications, prerequisites, standards, practices, or procedures that result in discriminatory outcomes. The VRA also permits the Department of Justice to supervise "the registration of voters and to certify election observers to help ensure compliance with federal laws." The VRA would ultimate permanently ban voting limitations such as literacy tests. The act also included Section 5 preclearance requirements that included a rigorous review process whereby jurisdictions must demonstrate that any changes to voting practices would not have the purpose or effect of denying the right to vote on account of race. States and jurisdictions with a history of disenfranchisement were accountable to Section 4b's coverage formula, which captured jurisdictions in which fewer than half of voting age residents had voted or were registered to vote prior to the act (ACLU 2019a). Because of the law's reach and protections, African American voting and elected officials increased substantially in the aftermath of its passage. Efforts to weaken the VRA emerged in its aftermath as well.

The efforts to roll back voter rights and protections are numerous, some more sophisticated than others. More recent attacks have been galvanized by the Supreme Court's landmark decision *Shelby County v. Holder*, in which the Court found the coverage formula in Section 4b outdated and therefore unconstitutional. The majority went so far as to suggest that problems with electoral access were in the past, stating that "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African Americans attained political office in record numbers."[5] However, throughout the 2012 election reports were consistent of long voting lines, challenges to voters based on "questionable" citizenship status, and inaccurate voter information distributed to language minorities, thus revealing the racially disproportionate effect voting obstacles continued to present (Agraharkar, Weiser, and Skaggs 2011). Immediately after the *Shelby v. Holder* decision, several states—Texas, Florida, South Carolina, and North Carolina—that had been covered by the preclearance provision announced plans for new voting restrictions, the most common of which have been voter identification laws. By August 2013, an additional seventeen states had either proposed new voter ID laws or attempted to make their current laws stricter (NCSL 2013).

THE NEW SELMA: VOTER DISENFRANCHISEMENT AND RACE-NEUTRAL POLICIES

Today's disenfranchisement, however, is only somewhat subtle and seemingly race neutral. In this regard, race-neutral or colorblind policies refers to procedures that do not explicitly identify or articulate a relationship to any specific racial or ethnic group, but instead produce racially disproportionate outcomes after implementation. Voter ID laws, provisional ballots, changes to voter registration procedures, and decreasing the number of early voting days have been adopted under race-neutral premises, but all minimize the minority voters (Kam 2012).

In her analysis of voter law changes, Brandi Blessett finds that some states have passed disenfranchisement policies that are complex and multifaceted, thus having wide-ranging impacts on prospective voters. "While the diminished use of violence is a tremendous step in the right direction, the colorblind nature of disenfranchisement is just as dangerous and frightening based on its outward appearance that all laws are equally applied to all groups. In this regard, the colorblind nature for which these policies have emerged does not acknowledge the long-standing disparities that exist with regard to minorities being able to access the ballot and certainly does not recognize the role of state legislatures in their attempts to circumvent suffrage rights for racial and ethnic minorities" (2015, 37).

Additionally, all of the nine states that were required to request preclearance to change voting laws prior to Section 4b's being deemed un-

5. *Shelby County v. Holder*, 570 U.S. 529 (2013). The Supreme Court reviewed the constitutionality of two provisions of the Voting Rights Act: Section 5, which requires certain "covered" jurisdictions to obtain federal preclearance before implementing any changes to their voting practices or laws; and Section 4(b), which contains the coverage formula that determines which jurisdictions are subject to preclearance.

constitutional passed at least five disenfranchisement policies that included financial hardships, created confusion among voters, limited access to the ballot, diluted the vote geographically, and used subjective eligibility measures (Blessett 2015, 37). Voter ID laws, such as Wisconsin's, further exacerbate this foray of policies and have been accepted by the federal courts.

The partisan nature of these laws is well established (Rocha and Matsubayashi 2014; Bentele and O'Brien 2013). Most have been sponsored by Republican legislators and passed by states with Republican governors. They are more common in states with Republican legislative majorities. Their passage into law is tied to partisan competition at the state level: competitive states controlled by Republican legislatures are particularly likely to pass these laws, presumably to protect their slim electoral margins. In addition, studies find that racial demographic change also matters. Republican states where the non-White electorate is growing rapidly are also much more likely to see these laws proposed and passed.

In 2008, the Supreme Court handed down a ruling that gave rise to the current protections voter ID laws enjoy. A review of *Crawford v. Marion County* is therefore essential given the precedent set, and because of important particulars not broadly apparent at the time.[6] Indeed, the highly respected jurist, author, and law professor Richard Posner admitted that his opinion from the Seventh Circuit Court of Appeals was a mistake. Posner noted that voter ID laws like Indiana's are "now widely regarded as a means of voter suppression rather than fraud prevention" (Schwartz 2013).

Passed in 2005, Indiana's voter ID law, SEA 483, is race neutral and on its face politically neutral.[7] Indiana asserted that it was grounded in the state's interest to prevent voter fraud, particularly fraud that might occur because of name discrepancies in its voter rolls and to protect public confidence in elections. Passed on a straight Republican party-line vote, the law requires voters in a primary or general election to present a government-issued photo ID. The law does not apply to absentee ballots, and exceptions are made for those living in state-licensed facilities such as nursing homes. Also, provisional ballots are available for the indigent, those who object to being photographed for religious reasons, and for voters without identification on election day. For provisional ballots to be counted, those in these circumstances have ten days to present identification to the circuit county clerk. Indiana does not require ID to register to vote and does offer free photo identification to qualified voters able to provide proof of residence and identity (*Harvard Law Review* 2007).

Two complaints were filed and consolidated in the Federal District Court for the Southern District of Indiana soon after SEA 483 was enacted.[8] The plaintiffs argued that the law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification."[9]

The district court was not convinced. Judge Sarah Evans Barker ruled in favor of Indiana, stating that the plaintiffs had not proven how the law will prevent residents from voting or how the right to vote will become unduly burdensome under the law. Judge Barker dismissed the plaintiff's expert witness, who claimed that SEA 483 would affect nearly a million Indiana voters. That Judge Barker found that nearly forty-three thousand residents were without valid state ID did not raise enough concern to strike down the law.

6. *Crawford v. Marion County Election Board*, 553 U.S.

7. Senate Enrolled Act No. 483, 2005 Ind. Acts at 2005.

8. Plaintiffs included William Crawford, Joseph Simpson, Concerned Clergy of Indianapolis, Indianapolis Resource Center for Independent Living, Indiana Coalition on Housing and Homeless Issues, Indianapolis Branch of the National Association for the Advancement of Colored People, and United Senior Action of Indiana.

9. *Crawford*, 553 U.S. at 187.

The law was affirmed on appeal. A majority of the Seventh Circuit Court of Appeals agreed that the voter ID would not insert undue burdens on voters, accepting that some Democrats would be affected by the Republican-sponsored legislation. Writing for the majority, Judge Posner found "a sufficient need for the voter ID law" and discounted the complete absence of voter fraud throughout Indiana's history. Posner blamed this absence on poor enforcement and the difficulties with apprehending voter impersonators. The majority also argued that the law would not be subject to strict scrutiny. Judge Evans dissented, calling for a higher standard of scrutiny and finding the law to indeed pose an undue burden in violation of the First and Fourteenth Amendments (*Harvard Law Review* 2007).

On appeal to the Supreme Court, a higher level of scrutiny was encouraged and especially articulated in key amicus briefs favoring striking down Indiana's law. For example, the Mexican American Legal Defense and Education Fund (MALDEF) emphasized "the application of strict scrutiny is necessary to ensure that voter identification schemes ostensibly based on the need to police voting fraud are not a subterfuge for outright discrimination."[10] MALDEF argued because it was "enacted amidst a racially-charged debate" and given its impact on Latino and Native American voters, Arizona's voter ID law, Proposition 200, deserved strict scrutiny by the courts, and the same should be applied to Indiana's law.

In another amicus, a team of "Historians and Other Scholars in Support of Petitioners" traced the history of poll taxes and other disenfranchising mechanisms and linked those to contemporary voter ID laws. The authors found that antifraud claims were central to nineteenth-century efforts to disenfranchise Black voters, much like claims of preventing fraud propel arguments supporting voter ID laws today. They also highlighted one other important historical parallel from the same era. The rhetoric of fraud prevention was also used to advance the passage of "immigrant registration laws." The authors stated that "numerous states placed new obstacles in the path of immigrant voters . . . justified on the grounds that they would reduce fraud. One such obstacle was to require naturalized citizens to present their naturalization papers to election officials before registering or voting. Although not unreasonable on its face, this requirement, as lawmakers knew, was a significant procedural hurdle for many immigrants, who might easily have lost their papers or been unaware of the requirement."[11]

The Court ultimately found Indiana's voter ID law constitutional even though it would clearly reduce voting access to the poor, racial minorities, recent immigrants, and other populations.

One specific development in Indiana that certainly propelled passage of SEA 483 was the tremendous growth in the state's Latino population. As MALDEF warned, SEA 483 had indeed emerged amid a racially charged moment in the state's history, which census data confirm. The Latino population was 98,601 in 1990. By 2000, it had grown to 217,326. By 2010, it had climbed to 391,487 (Strange 2013; U.S. Census Bureau 2020). That the growth is almost entirely absent from *Crawford* deliberations and documents is curious. The numbers alone, however, suggest that it was a key social factor during the time SEA 483 would have been under consideration by the legislature. These kinds of dramatic demographic trends typically cause any number of local debates and critiques. By the passage of Wisconsin's 2011 voter ID law, Act 23, Latino immigrants would be directly named and scapegoated as the possible perpetrators of the kind of in-person voter fraud the Supreme Court upheld in *Crawford*.

ENTER *FRANK V. WALKER*

Although *Crawford* shaped the legal protections for voter ID laws, Wisconsin's Act 23 nonetheless relied on the brand of racial scapegoating that defined Jim Crow era racial propaganda aimed at Blacks and immigrants. Like Indiana's law, Act 23 emerged in a state undergoing significant growth in its Latino population. In the

10. Brief for Amicus Curiae of Mexican American Legal Defense and Educational Fund in Support of Petitioners, 2, *Crawford*, 553 U.S.

11. Brief for Amici Curiae of Historians And Other Scholars In Support Of Petitioners, 10, *Crawford*, 553 U.S.

state's most urban region, the Latino population grew by 213 percent. In 1990, Latinos made up 3.6 percent of the Milwaukee region, by 2015 more than 10 percent, totaling over 160,000 residents (Levine 2016). From the 1940s forward, the city's Black population had soared above 40 percent. In tandem, Blacks and Latinos make up a majority in a city that also leans heavily Democratic.

When Wisconsin's legislature passed Act 23 in 2011, requiring residents to produce a photo ID to vote, this law was nestled in a mix of barely colorblind policies intended to preserve the system of racial inequality for which the state is now infamous. The law also stood to greatly limit the impact of Black and Latino voters. In his 2014 *Frank* opinion, District Court Judge Lynn Adelman found that "the plaintiffs have shown that the disproportionate impact of the photo ID requirement results from the interaction of the requirement with the effects of past or present discrimination. Blacks and Latinos in Wisconsin are disproportionately likely to live in poverty."[12]

A few additional points provide important context for Wisconsin's law and the *Frank v. Walker* case. First, Wisconsin's Republican-controlled state legislature regularly passes measures that greatly exacerbate racial inequality to levels reminiscent of the Jim Crow era. Second, although Act 23 appears colorblind, its context and glaring impact force one to assume that it was passed with both politically charged and racially motivated intentions. Finally, as a deeper look into Judge Adelman's lower court opinion reveals, Act 23 includes built-in features that forced the plaintiff's legal team and even the casual observer to make clear connections to Jim Crow era efforts to disenfranchise Black voters.

Plaintiffs in the case argued that Wisconsin Act 23 violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. Judge Adelman limited his opinion to whether Act 23 placed an unjustified burden on the right to vote and indeed violated Section 2.[13] Defendants, the State of Wisconsin, argued that Act 23 was necessary to the state's interest in "preventing and deterring fraud and ensuring the integrity of elections"[14] Appropriate identification under Act 23 includes a state driver's license, a state ID card, military ID, a U.S. passport, a naturalization certificate issued within the last two years, an unexpired receipt for a state ID card application, a recognized Native American tribe ID card, and an unexpired student university ID accompanied by proof of enrollment. Veterans ID cards and student ID cards from two-year technical colleges are not acceptable. Any accepted ID must be presented when voting.

To determine whether Act 23 imposed an unjustified burden on the right to vote, Adelman first evaluated the four arguments raised regarding state interest, which included the following: detecting and preventing in-person voter-impersonation fraud, detecting and deterring "other types of voter fraud," and promoting public confidence in the integrity of the electoral process. Regarding voter-impersonation fraud, the court transcript reveals and Adelman explained, "In the present case, no evidence suggests that voter-impersonation fraud will become a problem at any time in the foreseeable future. As the plaintiffs' unrebutted evidence shows, a person would have to be insane to commit voter impersonation fraud. The potential costs of perpetrating the fraud, which include a $10,000 fine and three years of imprisonment, are extremely high in comparison to the potential benefits, which would be nothing more than one additional vote for a preferred candidate (or one fewer vote for an opposing candidate), a vote which is unlikely to change the election's outcome."[15]

12. *Ruthelle Frank et al. v. Scott Walker*, 17 F. Supp. 3d 837 (E.D. Wisc. 2014), 877.

13. "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301.

14. Transcript of Court Trial, vol. 1, 33, *Frank v. Walker*, 17 F. Supp. 3d.

15. *Frank v. Walker*, 17 F. Supp. 3d at 850.

Although the claim of preventing voter-impersonation fraud seemed ridiculous to Adelman, the question of deterring "other types of voter fraud" played into the racial tropes that have lingered since the Jim Crow era. The defendants suggested that a convicted felon or noncitizen might somehow register to vote and attempt to cast a fraudulent ballot. Although this is equally ridiculous, in a state as committed to incarceration as Wisconsin is, felon and minority are virtually synonymous in the imagination of the Republican Party's largely White base.

By 2011, Wisconsin led the nation in Black mass incarceration with almost 13 percent of all working-age Black men behind bars. From 1980 to 2016, the state's prison population increased by 456 percent, to roughly 23,413 people. These numbers are largely attributed to the state's Truth-in-Sentencing law, which included mandatory minimum sentences, abolished parole, and eliminated credit for good behavior. As of 2016, nearly sixty-five thousand people were on some form of community-based extended supervision in the state. One in eight Black men are under community supervision, and their freedom is tenuous given that they could be reincarcerated for technical violations even if they commit no new crimes (ACLU 2019b; Williams, Schiraldi, and Bradner 2019). Most people of color in the state's carceral system are from Milwaukee. As of 2012, only 10 percent of African American men with incarceration records had a valid Wisconsin driver's license and no recent suspensions or revocations (Pawasarat and Quinn 2013).

Adelman agreed that the state has an interest in protecting the public's confidence in the integrity of its elections, but he was unmoved because the state failed to produce any evidence to support that a photo ID requirement would accomplish this. The expert witness for the plaintiff, however, showed "zero relationship between voter ID laws and a person's level of trust or confidence in the electoral process." In an interesting twist, Adelman questioned whether ID laws actually undermine the public's confidence in the electoral process. Trial experts confirmed that these laws create false perceptions that voter impersonation not only exists, but is also widespread, thus potentially damaging that desired integrity.[16]

Adelman found that Act 23 violated the Fourteenth Amendment and determined that "invalidating Act 23 is the only practicable way to remove the unjustified burdens placed on the substantial number of eligible voters who lack IDs." The support used to reach this conclusion reads as a lesson in Milwaukee urban history. It is not necessary to move point by point through the opinion, but the evidence used to arrive at his conclusion is valuable. Adelman pinpointed the very socioeconomic realities supporting notions that the remnants of *Plessy* are still with us today, as evident in policies like Act 23. Indeed, the thin veneer of colorblindness nearly crumbles altogether under Adelman's review.

However, it is fair to suggest that Act 23 was not only intended to negatively affect racial minorities. In many respects, the act includes the vestiges of grandfather clauses and poll taxes, which can disenfranchise the poor more broadly. Lessons from the Jim Crow South remind us that poor Whites remained on the margins of society even if they bought into the racial hierarchies of the day. Roughly three hundred thousand registered voters in Wisconsin, nearly 9 percent of the total, lacked a qualifying ID. "Thus, the number of registered voters who lack a qualifying ID is large enough to change the outcome of Wisconsin elections." In Milwaukee County, 63,085 eligible voters lacked a qualifying ID at the time of the case.[17] Seen through the microcosm of Wisconsin politics, Act 23 can be interpreted as an attack on the state's most diverse, most Democratic-leaning region.

Indeed, research on the effects of the voter ID in Wisconsin paints a bleak picture. For example, a study by Priorities USA compared turnout in states that adopted strict voter ID laws between 2012 and 2016, like Wisconsin, with turnout in states that did not (2017). States that did not implement changes to voting ID laws witnessed an average increase of

16. *Frank v. Walker*, 17 F. Supp. 3d at 851.

17. *Frank v. Walker*, 17 F. Supp. 3d at 854.

turnout of +1.3 percent from 2012 to 2016. Wisconsin dropped by -3.3 percent in that time. Moreover, the loss skewed more African American and Democratic. In a state where Donald Trump won by fewer than thirty thousand votes, this was a loss of more than two hundred thousand votes from Democratic voters.

Adelman, however, left no doubt that Act 23 placed significant burdens on residents without satisfactory identification, such as a birth certificate, on residents who cannot afford IDs, and on residents who simply do not have the time, resources, or daytime flexibility needed to obtain either. Those who already have appropriate identification are essentially grandfathered into the electoral process. Seniors, especially those from the rural South, or people born elsewhere may not be able to secure copies of birth certificates in order to then receive state-approved IDs. If so, such documentation may not be accurate for any number of reasons, injecting new, unforeseen burdens into the process.

Of the more than sixty-three thousand eligible voters without an approved ID in Milwaukee County, anywhere between twenty and forty thousand earn less than $20,000 a year. Given costs associated with travel and fees, Act 23 then operates as a modern-day poll tax.[18] For many who face economic hardships in a post-industrial, rust-belt city such as Milwaukee, voting looks more like a luxury of those with means than a right and duty of citizenship. As Adelman summarized, "There is no way to determine exactly how many people Act 23 will prevent or deter from voting without considering the individual circumstances of each of the 300,000 plus citizens who lack an ID. But no matter how imprecise my estimate may be, it is absolutely clear that Act 23 will prevent more legitimate votes from being cast than fraudulent votes."[19]

In determining that Act 23 violates Section 2, Adelman drew from a wide body of research on the socioeconomic realities facing Black and Latinos in Wisconsin, the great majority of whom live in Milwaukee. This research led him to conclude that the voter ID law would unfairly affect Blacks and Latinos. Adelman writes,

> Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing. Based on this evidence, I conclude that Act 23's disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance. Act 23 therefore produces a discriminatory result. . . . Accordingly, the photo ID requirement results in the denial or abridgment of the right of Black and Latino citizens to vote on account of race or color.[20]

Poverty, lack of education, limits on physical mobility, age, and unemployment are all known suppressors of political participation. The costs associated with voting directly reduce the turnout of economically struggling voters of all backgrounds. Pervasive racial disparities and racially based socioeconomic distress in Milwaukee and Wisconsin provide compelling evidence of the kinds of resource discrepancies likely to impede full and equal participation in the electoral process. When considered alongside Act 23, these conditions effectively establish a violation of Section 2.

CONCLUSION

The impact of the VRA cannot be overstated. Yet, although the United States from the beginning limited voting privileges to a narrow community of educated and economic elites, a wide array of legal and political jockeying since then has laid the groundwork for the momentous impact the VRA would ultimately have on electoral engagement after 1965. Once African Americans entered electoral politics during Reconstruction, they were met with a bevy of schemes intended to crush their electoral

18. *Frank v. Walker*, 17 F. Supp. 3d at 855.

19. *Frank v. Walker*, 17 F. Supp. 3d at 862.

20. *Frank v. Walker*, 17 F. Supp. 3d at 878–79.

power. In response, Black electoral activism took on many forms to challenge the various obstacles erected to preserve political power for edifice of White supremacy.

Because *Frank* is now overturned on appeal, there are several reasons to believe that Wisconsin's voter ID law will present lasting barriers to political participation that disproportionately and deleteriously affect disadvantaged minority communities. The research on the costs of voting reveals that requirements ranging from advance registration to strict voter ID laws "do reduce voter turnout to some degree and that the impact seems to fall disproportionately on the least educated and the least wealthy" (Priorities USA 2017). Although the literature on the impact of voter ID laws on turnout is not vast, evidence suggests that requirements have indeed depressed turnout. The most extensive study, by Michael Alvarez, Delia Bailey, and Jonathan Katz, finds that stricter rules—the combination of having to present an ID and a signature match, and the photo ID requirement—did depress the turnout of registered voters relative to the requirement of stating one's name at the polls. Although the study, which used individual-level CPS data, did not find a specific disproportionate racial effect of strict voter ID laws over four election cycles between 2000 and 2006 (controlling for socioeconomic status), it did find that "voters with lower levels of income of all racial/ethnic groups are less likely to vote the more restrictive the voter identification regime" (Alvarez, Bailey, and Katz 2007, 20).

Opening arguments by ACLU of Wisconsin Attorney Karyn Rotker spell out the significance of *Frank* and Act 23's voter ID requirement. Rotker stated before the court,

> The right to vote is sacred. For the State of Wisconsin to impose these unreasonable burdens in the near total absence . . . of any evidence that doing so will in any way reduce the problem of which defendants complain, and in the presence of substantial evidence that doing so will disenfranchise and burden many voters, disproportionately minority voters, violates the equal protection clause, imposes substantial costs that constitute poll taxes, and unreasonably and arbitrarily deprives voters of their voting rights in violation of the 14th Amendment and it does so in a manner that violates Section 2 of the Voting Rights Act. These restrictions cannot be allowed to stand.[21]

Nonetheless they do stand, and were upheld on appeal to the Seventh Circuit Court. As a result, more conservative-led state legislatures have anchored these laws into their political processes, presenting significant challenges to full and open participation by affected individuals and communities that could pose political challenges. Although *Plessy*'s "separate but equal" doctrine ended more than sixty years ago, its residue remains woven in the socioeconomic and sociopolitical landscapes of the nation, and has been revived again through voter ID laws and other mechanisms to disenfranchise American citizens.

EPILOGUE: DYING TO VOTE

On April 7, 2020, Wisconsin held the only in-person primary election in the month. The Wisconsin election crystallized what is expected to be a high-stakes, state-by-state legal fight over how citizens can safely cast their ballots if the coronavirus outbreak persists into the November 2020 general election. Over the course of three days, residents were informed first, that the election had been postponed by executive order of the governor; second, that this executive order was overturned by the Wisconsin state Supreme Court; and, third, that the U.S. Supreme Court had blocked the extension of absentee voting. This political gamesmanship sowed chaos and confusion.

A study using county-level data from the entire state of Wisconsin analyzed whether the election held in Wisconsin on April 7 was associated with the spread of COVID-19 (Cotti et al. 2020). The results confirm the Wisconsin Department of Health Services findings on the link between the spread of COVID-19 and in-person voting. The results also show that counties that had more in-person voting per voting location (all else equal) had a higher rate of

21. Transcript of Court Trial, vol. 1., 12, *Frank v. Walker*, 17 F. Supp. 3d.

positive COVID-19 tests than those with relatively fewer in-person voters.

In the face of the pandemic, Wisconsin residents faced an imminent threat and cruel quandary. Vote in person and risk their lives. Do not vote and lose the right to shape their political and socioeconomic futures. These circumstances are not unfamiliar to many Black Milwaukeeans, who have witnessed the state legislature cut hundreds of millions of dollars to public education even as millions are funneled into law enforcement and incarceration. Nonetheless, although this moment in Wisconsin and across the nation is reminiscent of the voting challenges that engulfed the Jim Crow era in the immediate aftermath of the *Plessy* decision, the state and nation are also in the midst of massive resistance to attacks on voting as citizens far and wide work to secure their right to vote.

REFERENCES

Agraharkar, Vishal, Wendy Weiser, and Adam Skaggs, 2011. "The Cost of Voter ID Laws: What the Courts Say." New York: Brennan Center for Justice. Accessed September 24, 2020. https://www.brennancenter.org/sites/default/files/2019-08/Report_Cost_of_Voter_ID_Laws.pdf.

Alvarez, R. Michael, Delia Bailey, and Jonathan Katz. 2007. "The Effect of Voter Identification Laws on Turnout." *SSRN Electronic Journal*, November. Accessed September 24, 2020. DOI: 10.2139/ssrn.1084598.

American Civil Liberties Union (ACLU). 2019a. *The Case for Restoring and Updating the Voting Rights Act: A Report of the American Civil Liberties Union*. Washington, D.C.: ACLU. Accessed September 24, 2020. https://www.aclu.org/report/aclu-report-voting-rights-act.

———. 2019b. "Blueprint for SmartJustice Wisconsin." Milwaukee: ACLU Wisconsin. Accessed September 24, 2020. https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-WI.pdf.

Bentele, Keith G., and Erin E. O'Brien. 2013. "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies." *Perspectives on Politics* 11(4): 1088–116.

Blessett, Brandi. 2015. "Disenfranchisement: Historical Underpinnings and Contemporary Manifestations." *Public Administration Quarterly* 39(1): 3–50.

Contreras, A. Reynaldo. 2002. "Minority Voting Issues." *Educational Policy* 16(1): 56–71.

Cotti, Chad, Bryan Englehardt, Joshua Foster, Erik Nesson, and Paul Niekamp. 2020. "The Relationship Between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on COVID-19: Evidence from the Wisconsin Primary." *NBER* working paper no. 27187. Cambridge, Mass.: National Bureau of Economic Research.

Harvard Law Review. 2007. "Seventh Circuit Upholds Voter ID Statute." 121(7): 1980–987. Accessed September 24, 2020. https://harvardlawreview.org/wp-content/uploads/pdfs/crawford_v_marion.pdf.

Kam, Dara. 2012. "Former Florida GOP Leaders Say Voter Suppression Was Reason They Pushed New Election Law." *Palm Beach Post*, November 27. Accessed September 24, 2020. https://www.palmbeachpost.com/article/20121125/news/812021098.

Kerrison, Erin. 2009. "The Color of Suffrage: Voter Disenfranchisement, Power Threat Hypotheses and Modern Democracy." *Concept* 32(1): 1–15.

Levine, Marc V. 2016. *Latino Milwaukee: A Statistical Portrait*. Milwaukee, Wisc.: Center for Economic Development. Accessed September 24, 2020. https://dc.uwm.edu/ced_pubs/5.

Loury, Glenn C., ed. 2008. *Race, Incarceration and American Values*. Cambridge, Mass.: MIT Press.

National Conference of State Legislatures (NCSL). 2013. "Voter ID: 2013 Legislation." Washington, D.C.: NCSL. Accessed September 24, 2020. https://www.ncsl.org/research/elections-and-campaigns/voter-id-2013-legislation.aspx.

———. 2020. "Voter Identification Requirements | Voter ID Laws." Washington, D.C.: NCSL. Accessed September 24, 2020. https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx.

Pawasarat, John, and Lois M. Quinn. 2013. "Wisconsin's Mass Incarceration of African American Males: Workforce Challenges for 2013." Milwaukee: Employment and Training Institute, University of Wisconsin-Milwaukee. Accessed September 24, 2020. https://dc.uwm.edu/cgi/viewcontent.cgi?article=1008&context=eti_pubs.

Preuhs, Robert R. 2001. "State Felon Disenfranchisement Policy." *Social Science Quarterly* 82(4): 733–48.

Priorities USA. 2017. "Voter Suppression Analysis." Press Release, May 3. Washington, D.C.: Civic

Analytics. Accessed September 24, 2020. https://priorities.org/press/priorities-usa-unveils-findings-voter-suppression-study-showing-significant-decrease-voter-turnout-2016-election-states-strict-id-laws.

Rocha, Rene R., and Tetsuya Matsubayashi. 2014. "The Politics of Race and Voter ID Laws in the States: The Return of Jim Crow?" *Political Research Quarterly* 67(3): 666–79.

Schwartz, John. 2013. "Judge in Landmark Case Disavows Support for Voter ID," *The New York Times*, October 15. Accessed September 24, 2020. https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html.

Strange, Rachel. 2013. "Exploring Hoosier Minority Groups: Indiana's Hispanic Population." *IN Context* 14(4)(July-August). Accessed September 24, 2020. http://www.incontext.indiana.edu/2013/july-aug/article3.asp.

U.S. Census Bureau. 2020. "Indiana: 2019 Population Estimates." Accessed September 24, 2020. https://www.census.gov/search-results.html?searchType=web&cssp=SERP&q=Indiana%20Latino%20Population.

U.S. Commission on Civil Rights (USCCR). 1968. *Political Participation*. Washington, D.C.: USCCR. Accessed September 24, 2020. https://www2.law.umaryland.edu/marshall/usccr/documents/cr12p753.pdf.

Williams, Jared, Vincent Schiraldi, and Kendra Bradner. 2019. *The Wisconsin Community Corrections Story*. New York: Columbia University Justice Lab.

PART III

Educational Segregation

Harlan's Dissent: Citizenship, Education, and the Color-Conscious Constitution

DOUGLAS S. REED

In his dissent in Plessy v. Ferguson, *Justice John Marshall Harlan wrote, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." Racial conservatives have argued that Harlan's dissent should invalidate policies that partially redress the historical injuries inflicted on African Americans. This article contends that the concept of colorblindness misstates Harlan's central claim. His dissent insisted black Americans are entitled to the full fruits of citizenship. This rearticulation reveals that race-*conscious *policies, particularly within public education, fulfill, rather than undermine, Harlan's primary objective of defending black citizenship. The article shows that racial conservatives' colorblind ideology emerged as a strategic response to their legal defeats over segregated schools and to attack affirmative action. The Supreme Court's later use of colorblind principles is contrasted with empirical evidence of the efficacy of color-conscious pedagogies within schools. The recent* Gary B. v. Whitmer *case highlights the linkages between full citizenship and race-conscious pedagogies.*

Keywords: colorblind Constitution, desegregation, integration, citizenship, culturally relevant pedagogy, affirmative action, John Marshall Harlan

The notion of colorblind justice is—at this historical moment—ludicrous. The murders of George Floyd, Breonna Taylor, and Ahmaud Arbery—and a long, long list of others—have sparked massive protests over police violence. These murders, the protests, and the violent reaction of police to those protests all give lie to the notion that justice is administered equally to black, brown, and white. Within the confines of the legal system, this structural racism produces gross inequities not only in the experience of police violence but also in punitive fines, incarceration, solitary confinement, and capital punishment. *Colorblind* is perhaps the least accurate way to describe the justice system. A deep and rich literature documents these disparities and their causes (Alexander 2012; Butler 2018). A central aim of this issue is to map the ways that the *Plessy* decision has sustained and entrenched the systemic racial injustice and racism that structures much of social, economic, and political life in the United States. Whether the issue is redlining and its health effects (Reece 2021, this issue), the dis-

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enfranchisement of voters (Shah and Smith 2021, this issue) or the use of within-school tracking to maintain segregated classrooms (Francis and Darity 2021, this issue), the effects of *Plessy* have been anything but colorblind.

Nonetheless, since the 1970s, racial conservatives have advanced the notion that colorblindness is the best way to advance equality in the United States. For many racial conservatives, the ideal of a colorblind legal system has an appeal that stems from notions of fairness and impartiality before the law. They may concede that we are far from achieving it but contend that colorblindness should guide our development of social policy. To treat people equally as individuals, they argue, we must ignore the racial identities of citizens (and noncitizens) in our policymaking. In a historical sense, this turn to colorblindness was a strategic retreat by segregationists and architects of the post-*Brown* Massive Resistance. In the face of the accomplishments of the civil rights movement, segregationists and others turned to the language of colorblindness to argue against affirmative action, in favor of a greater reliance on market mechanisms to drive out racist practices, and against policies aimed at compensating, in some fashion, African Americans for the hundreds of years of enslavement, labor and land theft, and denied social, economic, and political opportunities.

Almost without fail, these racial conservatives invoked Associate Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896) as an exemplar of a "colorblind" constitutional theory.[1] Known as the Great Dissenter for his dissents in the *Civil Rights Cases* (1883) and in *Plessy*, Harlan took stances that cut through the racial hypocrisy and double standards of the post-Reconstruction Era.[2] It is, undoubtedly, a cruel irony that Harlan's courageous dissent in *Plessy v. Ferguson* has since the 1970s been deployed to thwart the implementation of policies that might undo some of the long-lasting effects of the majority opinion in *Plessy v. Ferguson*.

In the second half of the twentieth century, in the aftermath of the civil rights movement, racial conservatives—who were opposed to affirmative action and an activist civil rights enforcement regime, more generally—strategically adopted Harlan's use of the term *colorblind* to simultaneously oppose segregation and the steps governments were taking to reverse it. In so doing, they explicitly relied on social inequality generated by hundreds of years of repression to preserve a racial hierarchy in the United States. This conservative effort has shifted not only public rhetoric but also doctrine on the Supreme Court. Since the late 1970s, justices opposed to the use of explicit racial categories in social policy have used the concept of colorblindness to reverse affirmative action in public-sector employment and contracting and nearly prevented the use of race in admissions decisions in competitive universities and colleges. It has been used most recently to prevent school districts from voluntarily using race to increase racial integration within schools.[3]

This article seeks to understand the legacy of *Plessy* by exploring the reception of Harlan's dissent, first examining carefully the basis on which Harlan ruled against Louisiana's Jim Crow law and then exploring the reaction of segregationists to the advances in civil rights in the mid-twentieth century—particularly as the Supreme Court's focus shifted from ending school segregation to requiring school integration. The article argues that Harlan's dissent is best understood as a defense of the rights of citizenship rather than an application of the Equal Protection Clause. Shifting our understanding of Harlan's dissent turns the focus away from discriminating or treating individuals differently on account of race and toward fully recognizing African American citizenship.

In reality, Harlan's use of the term *colorblind* was secondary to his focus on the meaning and content of citizenship, which was the central analytical point of the opinion (Aleinikoff 1992). As Alex Aleinikoff (1992) notes, Harlan's

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

2. *Civil Rights Cases*, 109 U.S. 3 (1883).

3. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

primary objection to the Louisiana statute was its preservation and extension of a second-class citizenship for anyone who was not white. Harlan's emphasis on citizenship rather than unequal treatment shifts the frame on the use of race within public policy. Applying Aleinikoff's perspective shows that Harlan was less concerned with the use of race in public policy (that is, the practice of not being colorblind in policymaking) than with ensuring that African Americans enjoyed the full fruits of U.S. citizenship. If the popular metaphor of the colorblind Constitution is one of the legacies of Harlan's dissent in *Plessy v. Ferguson*, it stems, in fact, from a misreading of the dissent and an explicit political campaign in the 1960s and 1970s to use colorblind logics to stymie or halt material progress on civil rights for African Americans. Such use has also made suspect the use of race to promote better educational outcomes for children. By examining how pedagogical practices within schools might use race, as well as reviewing the social science on the effectiveness of these pedagogies, this article seeks to show the increasing value of color-conscious policies within education and how Harlan's dissent in *Plessy* can help evaluate their constitutionality under a theory of full citizenship.

The recent case of *Gary B. v. Whitmer* provides an opportunity to evaluate how Harlan's concern for full citizenship translates into a claim for an effective and relevant education.[4] In *Gary B.,* a three-judge panel of the Sixth Circuit Court of Appeals found that the learning conditions in five Detroit public schools violated the U.S. Constitution, based on the theory that literacy is essential to the ability to exercise one's citizenship. Although this ruling was quickly vacated (and later dismissed) by the full Sixth Circuit, it was the first time a federal court had ruled that a federal right to education existed. Although no longer binding law, the decision in *Gary B.* highlights the linkage between effective citizenship and schooling, giving credence to policies that use race and ethnicity as a pedagogical strategy to connect student identity to the educational task.

HARLAN'S DISSENT, FULL CITIZENSHIP, AND EQUAL PROTECTION ANALYSIS

Associate Justice Henry Billings Brown's majority ruling in *Plessy v. Ferguson* drew on a number of judicial approaches to segregation prevailing at the time, but did so in a way that elided the central claim of Homer Plessy. According to historian Charles A. Lofgren, the decision was "to put it charitably, obscure" (1987, 175). Jumbled and exhibiting faulty logic, Brown's ruling hung on the reasonableness of the racial classification used to separate whites and blacks in Louisiana railcars: "Laws permitting, and even requiring, [the] separation [of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."[5]

This understanding of the reasonableness of state-mandated segregation relies on a formalism that neatly delineates legal treatment of African Americans and their social status. For Brown, the two are unconnected: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[6]

The law, in Justice Brown's view, does not generate inequality; instead, African Americans' perception of the law creates inequality. To not put too fine a point on it, Brown's hard and fast formalist separation between the legal and social spheres amounts to a kind of constitutional gaslighting in which Brown denies the effects of the law that are visible to anyone on a train in Louisiana in 1896.

When we turn to Harlan's dissent, his sense of frustration is palpable, but even as he is chal-

4. *Gary B. v. Whitmer*, 957 F. 3d 616 (2020).

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

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

lenging the effects of the law, he also maintains a formal division between law and social relations. In Harlan's view, we cannot allow the social inequality to construct a legal inequality. Thus his dissent echoes Brown's formalism: "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[7] Harlan's dissent rests in part on a legal formalism that forces public actors to hold reality at bay, to ignore the lived realities of inequality within the American experience, and to grasp onto a strict separation between public, legal categories and private, social standing.

The analytical problem of viewing Harlan's position as merely advocating colorblindness is that colorblindness as a principle is unable, by itself, to overcome the distinctions between legal and social inequality. In this sense, formally equal treatment that meets the colorblind test entrenches and maintains the social inequality that African Americans' prior legal status as slaves created. In short, colorblindness enables equality to be used to defeat equity.

One possible way out of this box is what Reva Siegel (2004) calls the antisubordination tradition of Fourteenth Amendment jurisprudence. In her discussion of the politics surrounding the remedial phase of the *Brown v. Board of Education* decision, Siegel defines the antisubordination principle as "the conviction that it is wrong for the state to engage in practices that enforce the social status of historically oppressed groups" (2004, 1472–473). Subordination, in this view, rather than the act of classification itself constitutes the violation of the Equal Protection Clause.

A third way to approach Harlan's dissent is through the lens of citizenship. Alex Aleinikoff (1992) makes a compelling argument that Harlan's dissent is best understood less as an argument against the use of race to discriminate against African Americans and more as a claim that state laws cannot deny African Americans the full rights of U.S. citizenship. In fact, Aleinikoff argues, "Harlan never argued that the Equal Protection Clause ought to be understood as establishing a norm of color blindness." He adds that "The dissent is not about the Equal Protection Clause, but rather about the meaning of freedom embodied in the Thirteenth Amendment and the nature and scope of rights inhering in national citizenship as embodied in the Fourteenth Amendment" (1992, 963–64).

From Aleinikoff's perspective, Harlan was focused primarily on the effects of the post–Civil War amendments and the ways that they reshaped the relationship between the states and the federal government. An essential element of that reconfiguration was a robust limitation on the ability of states to take away from African Americans what the first sentence of the Fourteenth Amendment provided to slaves recently emancipated by the Thirteenth Amendment—U.S. citizenship. Thus "the new amendments provided, for the first time, a constitutional definition of citizenship and sought to guarantee that no citizen would be denied those fundamental rights generally recognized as inhering in citizenship" (Aleinikoff 1992, 964). A citizenship perspective on the central claim of Harlan's dissent is important because it changes the way we read the most commonly quoted portions of the dissent. It also opens our eyes to other portions of the dissent that are not as frequently quoted in constitutional law textbooks. In particular, we see that Harlan was less concerned with the differences of treatment and more concerned with the state's efforts to deny rights of citizenship to Homer Plessy. Thus Harlan writes that the Louisiana statute sought "under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. . . . The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens."[8] The citizens referred to here are African American citizens.

Turning now to the most famous quote from

7. *Plessy*, 163 U.S. at 559 (Harlan, dissenting).

8. *Plessy*, 163 U.S. at 557.

Harlan's dissent, we can now understand better the significance of the phrase *class of citizens*: "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[9]

The emphasis in this quote is on the word *citizens*—stated three times in four sentences. For Harlan, the state of Louisiana is attacking a unitary notion of citizenship and endowing some citizens with more rights than other citizens and granting them a greater capacity to realize those rights. When Harlan turns a few lines later to the harms of the Louisiana statute, the cost—to whites and African Americans—of that second-class citizenship is made clear: "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana."[10]

For Harlan, citizenship is premised on equality, and to enjoy the rights of citizenship is to be equal. The language of colorblindness is not a principle by which we evaluate the kinds of policies that states can adopt. The term was an afterthought, a throwaway line lifted, most likely, from the plaintiff's brief. The central core of Harlan's dissent is anchored in the notion that states cannot impair the rights of U.S. citizenship. The wrong lesson to draw from his dissent is that states must ignore the racial identities of those citizens as it enacts policies.

BROWN AND THE STRATEGIC DEPLOYMENT OF COLORBLINDNESS

In the aftermath of the Plessy decision, the dimensions of "separate but equal" within the realm of education emerged quickly. In 1899, only three years after *Plessy*, the Supreme Court upheld the closure of a black high school in Georgia to pay for two elementary schools for black students. At the same time, the school district kept open the whites-only high school.[11] In 1908, the Court further entrenched "separate but equal" when it upheld a 1904 Kentucky statute that barred any school—public or private—from educating black and white students together. The aim of the statute in question was clear enough from its title—"An Act to Prohibit White and Colored Persons from Attending the Same School"—but Justice David Josiah Brewer contended that state police powers to regulate corporations enabled Kentucky to "withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers, the legislature may deem that the best interests of the state would be subserved by some restriction."[12] In other words, the power to regulate Berea College, as a corporation, enabled the state to eliminate any integrated schooling within Kentucky.

The story of the fight for African American students and an end to racial segregation in education has been told well (see, among others, Kluger 1976; Patterson 2001; Tushnet 1987; Walker 2018). *Brown v. Board of Education*, a key milestone in that effort, was however both the

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

10. *Plessy*, 163 U.S. at 560.

11. *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899). This case merits further discussion than space allows here, primarily because Harlan was the author of a unanimous opinion upholding the closure of the black high school. Complicating matters for the Great Dissenter was, most likely, that both white and black high schools were publicly supported tuition schools and that three other private tuition high schools were available to black students. Moreover, the plaintiffs did not seek the maintenance of the black high school, but the closure of the white one, an outcome that would have eliminated public high schools in the county (for a detailed examination of the case, see Connally 2000).

12. *Berea College v. Kentucky*, 211 U.S. 45 (1908) at 54.

product of intense judicial negotiation and compromise and unclear on whether it fully reversed the *Plessy* decision. *Brown* stands, now, as both a hallowed and increasingly hollow landmark in constitutional history, its original moral voice and potentially transformative effects diminished by the Supreme Court's failure to vigorously articulate its scope and meaning in the early years after the decision and a conservative effort in the 1970s and 1980s to reduce *Brown*'s capacity to achieve racial justice in the United States.

A central element of the effort to limit *Brown*'s impact has been a decades-long campaign by racial conservatives to develop and deploy a colorblind constitutional theory, which they claim is inspired by Harlan's dissent in *Plessy v. Ferguson*. Through a strategic retreat on the maintenance of segregation and the advocacy of a colorblind agenda, racial conservatives have limited the ability of *Brown* and race-conscious policies more generally to achieve social and educational equality.

The linkage between *Brown v. Board of Education* and Harlan's dissenting colorblind language began shortly after the opinion was handed down in May 1954. In a lead editorial titled "Justice Harlan Concurring" the *New York Times* proclaimed, "the words [Harlan] used in his lonely dissent . . . have become in effect by last Monday's unanimous decision of the Supreme Court a part of the law of the land." The paper then quoted the colorblind passage and added, "There was not one word in Chief Justice [Earl] Warren's opinion that was inconsistent with the earlier views of Justice Harlan. This is an instance in which the voice crying in the wilderness finally becomes an expression of the people's will and in which justice overtakes and thrusts aside a timorous expediency" (Editorial Board 1954).

Despite the *New York Times'* enthusiastic endorsement of *Brown*, the Supreme Court toed a cautious path as the desegregation cases proceeded in lower courts. Indeed, beyond the *Brown II* decision in 1955 and an emergency order upholding President Eisenhower's use of federal troops to integrate Central High School in Little Rock, Arkansas, the Supreme Court did not issue another school desegregation opinion until the 1968 *Green v. New Kent County* decision.[13] The momentum for racial justice in the intervening fourteen years came instead from the streets and from Congress, with the 1964 Civil Rights Act and the 1965 Voting Rights Act transforming the national agenda on race. Perhaps emboldened by shifts in public sentiment and support from the executive and legislative branches, the Supreme Court with its *Green* decision finally undertook an energetic and vigorous effort to actively undo the effects of formal segregation.

The High-Water Mark of Color-Conscious School Integration

With *Green* in 1968 and *Swann v. Charlotte Mecklenburg* in 1971, the Supreme Court focused on reversing the harms of mandatory racial segregation.[14] *Green,* in particular, shifted the burden of proof onto Jim Crow school districts that had not meaningfully integrated to do so immediately. The *Green* decision came out of rural New Kent County, Virginia, which, prior to *Brown,* had operated only two public schools: one for whites and one for blacks. When *Brown* compelled New Kent County to desegregate the two schools, the school system simply allowed students, under a "freedom of choice" plan, to attend either school. Few students elected to exercise this "choice." Writing for a unanimous Court, Justice William Brennan stated that any segregated district at the time of *Brown* was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[15] In short, "school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'" This was no longer the words of a colorblind logic; policies that were neutral to race—such as school choice systems—had failed to integrate

13. *Green v. County Sch. Bd. of New Kent County,* 391 U.S. 430 (1968).

14. *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971).

15. *Green,* 391 U.S. at 437–38.

schools and failed to end the constitutional harm identified in *Brown.* As a result, the only option left available to school officials was to develop a plan that "promises realistically to work, and promises realistically to work now."[16] In the view of Stephen Caldas and Carl Bankston, the *Green* decision marked the beginning of a decade that saw the "greatest extension of judicial power over school districts ordered to desegregate." (Caldas and Bankston 2007, 232).

One element of that power was court-ordered busing for integration. In *Swann*, the Supreme Court approved court-ordered busing to achieve the objective laid out in *Green*: an integration plan that works immediately. *Swann* was perhaps the most far-reaching integration decision because it required the immediate implementation of an effective integration plan that reached throughout metropolitan Mecklenburg County, not just within the City of Charlotte. Further committing the Supreme Court to race-conscious strategies to reverse the constitutional harm it defined in *Brown*, Chief Justice Warren Burger, a Nixon appointee, wrote that "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."[17] Because Jim Crow school districts had not met the constitutional obligation to their students, "a district court has broad power to fashion a remedy that will assure a unitary school system."[18] In so ruling, Burger gave a green light to federal judges to impose busing plans on any recalcitrant school district.

Significantly, the *Swann* ruling discarded the language of colorblind policymaking in the wake of an ongoing civil rights violation. As Burger noted in a companion case, the Mobile, Alabama, school board "argued that the Constitution requires that teachers be assigned on a 'color blind' basis. It also argues that the Constitution prohibits district courts from using their equity power to order assignment of teachers to achieve a particular degree of faculty desegregation. We reject that contention."[19] By turning away from the colorblind logic, the *Green* and *Swann* rulings defined a much more energetic role for federal judges in school desegregation cases. As a result, the racial patterns of southern school districts changed dramatically in a short time frame. In 1967, prior to the *Green* decision, roughly 17 percent of black schoolchildren in the South attended school with whites. By the 1972–1973 academic year, that figure was over 91 percent (Rosenberg 1991, 50, table 2.1). In roughly six years, the Supreme Court's color-conscious approach had brought the South substantially into compliance with the *Brown* ruling.

Another area in which the impulses of the Warren era continued to thrive was language rights for linguistic minorities. In 1974, the Supreme Court broadened the scope of the Civil Rights Act by ruling that the City of San Francisco had violated the civil rights of some 1,800 students who spoke only Chinese by failing to provide them with instruction (whether English language courses or bilingual instruction) that they could understand. As Justice William O. Douglas wrote, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[20] The Court explicitly declined to decide that San Francisco's practices violated the Fourteenth Amendment's Equal Protection Clause, but instead declared the school district to be in violation of the 1964 Civil Rights Act for engaging in discrimination based "on the ground of race, color, or national origin."

Congress codified this judicial expansion eight months later when it enacted the Equal Educational Opportunity Act. For English learners, the key element of this wide-ranging law was its mandate that "No State shall deny equal educational opportunity to an individual

16. *Green*, 391 U.S. at 439.

17. *Swann*, 402 U.S. at 15.

18. *Swann*, 402 U.S. at 16.

19. *Swann*, 402 U.S. at 19.

20. *Lau v. Nichols*, 414 U.S. 563 (1974) at 566.

on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[21] This statutory language has provided the basis for most if not all of the litigation aimed to advance the rights of English learners in U.S. schools since the mid-1970s. The challenge for litigators is that the definition of what constitutes appropriate action has been variously interpreted by courts and has, in general, been exceedingly deferential to state and local authorities as they design educational programs for English learners.[22]

The Colorblind Conversion of a Segregationist

Much of the Supreme Court's success at ensuring compliance with *Brown* by the early 1970s was due to the abandonment of school segregation as a rallying cry for southern politicians. In the immediate wake of *Brown*, state legislatures undertook a campaign of Massive Resistance, beginning in Virginia and quickly spreading throughout the South (Lewis 2006). James Kilpatrick, an indefatigable editor at the *Richmond News Leader,* stood at the center of Massive Resistance, inveighing readers and politicians alike to pursue more obstructionist measures. Kilpatrick began his campaign against *Brown* with a revival of the states rights theory of "interposition" advanced by James Madison, Thomas Jefferson, and John Calhoun. That theory contended the states held a veto over unconstitutional actions by the federal government, thereby protecting the liberty of the people. In Kilpatrick's hands, *Brown* was a resumption of the war of northern aggression against a southern way of life. An unreconstructed segregationist, he claimed Earl Warren's decision was "a revolutionary act by a judicial junta which simply seized power, and thus far has managed to get away with its act of usurpation" (Hustwit 2011, 647). In a seemingly endless series of editorials, Kilpatrick railed against school desegregation, and, in the view of one historian, his editorial campaign in Richmond "helped ignite resistance to civil rights and the Court in Virginia and the South" (Hustwit 2011, 647).

His media savvy and stinging pen brought Kilpatrick to the attention of other, northern conservatives who used his states rights perspective in their broader effort to limit the role of government, particularly on civil rights. William F. Buckley sought out Kilpatrick to write for the *National Review* on civil rights and the Constitution; the intellectual veneer of "interposition" made the fire-breathing segregationist palatable to Buckley and other conservatives who offered him platforms in their own publications.

Kilpatrick's role as a popularizer for southern intransigence brought him considerable fame and career success as he continued to write on race and equality into the 1960s. But as the historian William Hustwit notes, Kilpatrick demonstrated a remarkable ability to adapt rhetorical positions while remaining committed to the objective of preserving a racial hierarchy. Having lost the battles of interposition and Massive Resistance, Kilpatrick sought out the language of colorblind policymaking as a means to achieving the same objective. As he grappled with the intellectual and logical puzzle of how to ensure that African Americans received the short end of the stick while abandoning the explicit language of white supremacy, Kilpatrick wrote the following to a friend and collaborator:

> I think your idea of emphasizing the "difference" instead of the "inferiority" of the Negro race is absolutely sound. . . . Like yourself, I believe the Negro race is inferior, and I don't see how any person who weighs the evidence objectively could come to any other conclusion. Be that as it may, the word "inferior" is semantically bad. It goes with "white supremacy," which is another phrase difficult to manage in a public opinion struggle. By

21. Pub. L. 93–380, title II, § 204, Aug. 21, 1974, 88 Stat. 515.

22. The Fifth Circuit Court of Appeals articulated a set of criteria by which to evaluate the appropriateness of state policies for English learners in 1981 in *Castañeda v. Pickard* 648 F.2d 989 (5th Cir. 1981), but subsequent court decisions have eroded those standards (Haas and Gort 2009).

> dwelling upon the "difference" between the races, we can establish the case for inferiority without involving ourselves in a value judgment. (Hustwit 2011, 652)

In his 1962 book, *The Case for School Segregation,* Kilpatrick contended that the differences between African Americans and whites were numerous and deep, ranging from the nature of black family to lousy test scores. The differences established, Kilpatrick could then make the argument that race-conscious governmental policies that aided African Americans were simply an effort to cover up for those irredeemable differences. As Hustwit writes, "Kilpatrick put the task of creating equality and progress on blacks and nudged them to fulfill the American Dream without government aid. . . . The freedom to rise to unequal levels would determine whether blacks could compete in an open society" (2011, 653).

This shift marked a change in Kilpatrick's public rhetoric, away from the fire-breathing segregationist and toward the colorblind policy wonk. More important, his shift shaped the language of twentieth-century conservativism more broadly. "Kilpatrick contributed to mainstream political dialogue with the conservative argument that many of the most venerated civil rights laws and accomplishments were, in fact, corrupt, dangerous, unlawful, and un-American because they impinged on American individualism and freedom" (Hustwit 2011, 645). By the late 1970s, the public tenor of Kilpatrick's commitment to colorblind rhetoric sounded almost charitable and big-hearted: "I spent years as a Southern editor, filled with old-fashioned Southern racial prejudices, fighting to preserve segregation in our schools. Then came the light. Today I am just as incensed as my Yankee critics were incensed 30 years ago at what seems to me the virulent evils of a pervasive racism throughout our society. That men and women must be hired, promoted, educated, transported, assigned or not assigned solely because of the color of their skin strikes me as indefensible" (666).

In private, however, a more revealing position emerged in his letters. Hustwit summed up Kilpatrick's colorblind "transformation": "During the 1970s, he hid his distaste for integration in the respectable language of color blindness to defy racial egalitarianism and diversity, but the change was a façade."

THE SUPREME COURT MOVES TOWARD COLORBLIND CONSTITUTIONALISM

Kirkpatrick was not the only public figure undergoing a transformation on race in the early 1970s. After the high-water mark of judicial commitment to integration in *Swann*, the Supreme Court began to back off aggressive judicial strategies to address continuing segregation. After a 1973 case upholding a finding of segregation in Denver, the Court began to tame the ambitions of its education rulings.[23] In particular, the 1974 Supreme Court's Detroit case, *Milliken v. Bradley*, saw the Court begin to unwind its commitment to a more racially equal school system.[24] The plan at issue in *Milliken* reached beyond the confines of the city limits of Detroit. Because of white flight, too few white students remained within Detroit public schools to effectively integrate the schools. As a result, the federal district court drew up a metropolitan-wide busing plan that encompassed fifty-three suburban school districts, in addition to Detroit. Although the plan promised to effectively integrate the metropolitan area, it also engendered wide opposition.

The plaintiffs contended that because the state of Michigan created school district boundaries, it, ultimately, was responsible for the segregation of students, but the Supreme Court rejected this logic, contending that the fifty-three surrounding school districts were not subject to the court-imposed remedy because they committed no acts of discrimination themselves. The earlier efforts by Detroit public schools to hold onto its dwindling white student population were the only judicially cognizable acts of discrimination the lower court could address.

The 5–4 *Milliken* decision effectively prevented courts from addressing metropolitan-wide area segregation. Arguing that an interdis-

23. *Keyes v. School Dist. No. 1,* 413 U.S. 189 (1973).

24. *Milliken v. Bradley,* 418 U.S. 717 (1974).

trict remedy for an intradistrict violation too roughly abrogated the traditions of local control in U.S. schooling, Chief Justice Warren Burger handed down the first post-*Brown* decision that found black plaintiffs on the losing end of the decision.

A key factor in the Supreme Court's retrenchment on school integration was the growing influence of Nixon appointees on the high court. In particular, Associate Justice William Rehnquist, appointed in 1971, began to argue more forcefully for colorblind interpretations of policy in order to limit the scope of school integration remedies. In fact, shortly after his confirmation, Rehnquist was the lone dissenter in the *Keyes* case out of Denver, arguing that the unofficial racial gerrymandering undertaken by Denver school officials did not meet the same level of state action as the dual systems invalidated in *Brown*. In that dissent, he also sought to restrict the scope of the *Green* ruling, particularly its language on an "affirmative duty to integrate."[25]

Later, during the Reagan and Bush presidencies, Justices Antonin Scalia and Clarence Thomas joined Rehnquist on the Court, and advanced firm originalist views that race-conscious policies violated the Constitution. These conservative justices all sought to limit the ability of Congress and the judiciary to employ race-conscious strategies in the effort to protect civil rights. According to Brad Snyder, this power to reconstruct the civil rights framework in the United States came about as conservatives made a strategic retreat on the moral and legal validity of *Brown v. Board of Education*. After the political mobilization of the civil rights movement and the legal and statutory civil rights victories, many conservative judicial nominees came to the same conclusion as Kilpatrick: fighting *Brown* was a lost cause. In his examination of the Supreme Court confirmation process, Snyder contends that the failed Nixon appointments of Clement Haynsworth and G. Harrold Carswell signaled to conservatives that accepting the fundamental legitimacy of *Brown* was required to secure confirmation. By accepting *Brown* as canonical, in Senate testimony, and simultaneously employing a colorblind framework to implement it, legal conservatives could both gain influence and limit the scope of the new civil rights regime. As Snyder writes, "Rehnquist was the first conservative to recognize that the rules of the game had changed—agreeing with the validity of *Brown* was the only way to participate in the constitutional debate and to get confirmed to the Supreme Court. In so doing, he began the widespread endorsement of *Brown* by conservatives" (Snyder 2000, 449).

The bargain had limited payoffs at first for racial conservatives because Nixon appointees did not always have the votes to overcome the remaining Warren-era justices. Still, with public opposition growing against court-ordered integration in the North and West, the Supreme Court declared in 1973 that education is not a fundamental right as it ruled that extreme funding inequalities in Texas's system of financing public education did not violate the Equal Protection Clause.[26] As the 1970s wound down, the Supreme Court became increasingly reluctant to expand its role in adjudicating race-based discrimination in schools. Over the course of the 1980s, as Reagan-era appointees joined the Court, Justices Clarence Thomas and Antonin Scalia explicitly employed colorblind language to express their opposition to an assertive civil rights enforcement regime. Prior to his appointment to the Court, Clarence Thomas penned an originalist argument for incorporating the Declaration of Independence into constitutional interpretation. Noting that the phrase *colorblind Constitution* does not appear in Supreme Court rulings after *Plessy* until the 1961 sit-in case of *Garner v. Louisiana*, Thomas wrote, "Justice Harlan's reasoning, as we understand him, provides the best basis for the Court opinions in the Civil Rights cases from *Brown* on" (Thomas 1987, 922). As Snyder summarizes it, "In enforcing *Brown*, the conservatives never overruled *Green* and reinstituted freedom of choice plans. They did, however, reduce the power of federal courts over the decisions of local school boards. They also limited the reach of *Brown* so as to leave *de facto*

25. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) at 256–58.

26. *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1974).

school segregation undisturbed. . . . By linking the color-blindness theory of the elder Justice Harlan's dissent in *Plessy v. Ferguson* with their modern interpretation of *Brown*, the conservatives transformed the laws governing race relations in this country" (Snyder 2000, 465).

THE COLORBLIND REFORMULATION OF AFFIRMATIVE ACTION

This influence was perhaps most sharply seen in the realm of affirmative action. Although a full accounting of the development of related law and the conservative reaction to it is beyond the scope of this article, a brief examination of how legal conservative rhetoric shaped Supreme Court doctrine on affirmative action during the era of Nixon, Reagan, and Bush appointments highlights how the Supreme Court's enduring struggles over affirmative action stemmed from an inability to reconcile two commitments. First, the Court has persistently recognized that racial diversity within higher education is a positive good that leads to better educational outcomes and, second, has repeatedly insisted that applications to competitive institutions of higher education must be evaluated individualistically. Colorblindness as a trope within affirmative action has been used to alleviate that tension, but it can do so only by ignoring the ways that the existing pre-K–12 pipeline is wholly inadequate to meeting the demands of both commitments simultaneously.

Affirmative action in higher education is relevant only for the roughly fifty colleges and universities that employ highly competitive criteria for undergraduate admission, given that they compete for approximately twenty-five thousand students each year. Of course, those highly competitive universities are elite and set up their students for both lucrative and high-status careers. If these institutions were to employ only colorblind metrics, such as standardized test scores, the result would be gross racial disparities in elite university enrollment. According to an examination of SAT test results from 2005, the disparities in standardized college admission test scores were staggering, in both percentages of African Americans scoring in the top tier and in the absolute number of students. Looking at the absolute number of African American students who scored 750 on either the math or verbal SAT in 2005 (the average score of students entering the most competitive institutions), one study found "that in the entire country 244 blacks scored 750 or above on the math SAT and 363 black students scored 750 or above on the verbal portion of the test" (*Journal of Blacks in Higher Education* 2005). To put those numbers in perspective, Harvard's entering class in the fall of 2005 was 1,655 students (Harvard University 2006, 6). If Harvard enrolled all of the African American students in the nation who scored at or above the mean math SAT score of their entering class in 2005, the percentage of African American students in that class would be 14.7 percent—roughly representative of the percentage of African Americans in the nation. Of course, none of the other approximately forty-six institutions that the Pew Research Center identified as "extremely competitive" would have any African Americans enrolled, assuming their mean scores were the same as Harvard's (Desilver 2019). Little to no evidence indicates that these test score disparities have changed in the intervening fifteen years. In short, the pre-K–12 pipeline for African American students is simply inadequate for the task that a presumption of colorblindness requires.

Colorblindness articulates an expectation of individualized fairness, but it drastically reduces the collective access of students of color to higher education, particularly black students. In 1995, the Regents of the University of California banned the use of race-based affirmative action across all of the system's campuses. A year later, a statewide ballot measure (Proposition 209) banned all race-based affirmative action and financial aid at all public universities in the state. Both bans took effect at the undergraduate level in 1998. The following year, "At UC Berkeley and UCLA there were dramatic declines of 55% in admission offers to African Americans" (Kidder and Gándara 2015, 15). Although African American California high school graduates were nearly 8 percent of all statewide graduates in 1998, they constituted only roughly 3 percent of all UC admitted students that year (16).

In *Regents of the University of California v. Bakke*, the Supreme Court first articulated the

notion that diversity in higher education was a sufficiently compelling justification for public officials to consider race within the admissions process.[27] Despite numerous and repeated efforts to reverse race-based affirmative action, that compelling rationale has held firm since *Bakke*. Racial conservatives have been more successful, however, at striking down race-based affirmative action plans in which the method of considering race was not individualized. That is, any use of a race-based criteria in college admissions must employ a holistic, individualized review of an applicant's qualifications. This individualized assessment of the qualities that a student may bring to campus has been a hallmark of constitutionally acceptable affirmative action programs since *Bakke*, with the narrowly tailored requirements becoming increasingly stringent over time.

Indeed, both the efforts to narrow the technical ways universities use race in their admissions decisions and the elimination of race-based considerations in governmental hiring and contracting reflect the sentiment expressed by Justice Antonin Scalia in *Adarand Constructors v. Peña* that "under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual."[28] The effort by Scalia, and judicial conservatives more broadly, to discredit the notion that race-based policymaking can be used to compensate for diffuse and widespread societal discrimination rests fundamentally on obscuring the ways that the "individual" talents of those who are rewarded are, simultaneously, the product of that very societal discrimination Scalia is saying is irrelevant. In a competitive environment, one's social advantages accrue within one's individual skills and talents. An assertion that individual merit is divorced from social context is a variant of the logic of colorblindness, particularly when the social construction of race distributes opportunities so surgically and unequally to whites and blacks in the United States.

THE TRIUMPH OF COLORBLINDNESS AND THE END OF *BROWN*

This logic is carried to its conclusion in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1*.[29] In conjunction with a companion case out of Louisville (*Meredith v. Jefferson County Board of Education*),[30] the Seattle case tackled the question of whether school districts could use race to promote greater school integration, absent a finding of official discriminatory conduct. In effect, can a school district promote integration as a social good rather than as a remedial effort to address past discrimination? The answer from a bare majority of the Supreme Court was, in a word, no.

In Seattle, the issue was the use of race as a tiebreaker to determine admission to the city's array of open-enrollment high schools. If a school had more applicants than capacity, then a student's race (after sibling status and residence within the school neighborhood) would be used to promote greater racial diversity within schools. For example, if two students sought admission to a majority-white high school that was at capacity, to promote diversity under the Seattle plan the nonwhite student would have preference over a white student. The relative criterion is the student's racial identity and whether that identity reinforces the existing racial demographics of the school.

There are multiple, legitimate, policy objections to this scheme. The white-nonwhite racial designation was ham-handed and ignores real and powerful differences among racial groups and experiences. The distribution of white and nonwhite students across the city of Seattle meant that high schools in the north end of the city had the largest percentages of white stu-

27. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) at 311–12; *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of TX at Austin*, 570 U.S. 297 (2013) (*Fisher I*); *Fisher v. University of Texas at Austin*, 579 U.S. __ (2016) (*Fisher II*).

28. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) at 239.

29. *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 551 U.S. 701 (2007).

30. *Meredith v. Jefferson County Board of Education*, 548 U.S. 938 (2006).

dents and that black and brown students were more likely clustered in the southern part of Seattle. Given Seattle's hour-glass geography and the horrific traffic bottlenecks that ensue, transportation between north and south Seattle would inevitably limit the capacity of this plan to generate meaningful integration, rendering the policy ineffectual. Despite these deficiencies, the Supreme Court's majority focused on the use of student racial identity to make decisions about enrollment. After quoting Justice Harlan's dissent in *Plessy*, Chief Justice John Roberts concluded his opinion in the 5–4 case by contending that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[31] Roberts's opinion does not acknowledge that to stop discriminating on the basis of race—given the racial geography of Seattle—meant that Seattle's schools would be more segregated, resulting in more unequal schooling apportioned on the basis of student skin color.

This use of colorblind logic locates the harm of race-based decision making not in the consequences of public acts, but in simply fostering the ability of governments to see race and to use race as a basis for public policy. To do so, the argument goes, is to embed racism into the design of public policies. The use of race, in other words, is fundamentally and inevitably racist and must be avoided by public actors at all costs. As Chief Justice Roberts writes in *Parents Involved in Community Schools,* quoting the *J.A. Croson* case, "Government action dividing us by race is inherently suspect because such classifications promote 'notions of racial inferiority and lead to a politics of racial hostility.'"[32]

As a result of the Seattle case, the Supreme Court's position in school desegregation cases has moved from one in which school districts must undo the effects of segregation "root and branch" (the language used in *Green* in 1968) to one in which school districts may not acknowledge or use the racial identity of students to combat the massive de facto segregation students confront on a daily basis. The result is a kind of policy paralysis, in which the injury of racial segregation is imposed on students by anonymous and unknown actors, but school officials are unable to meaningfully address the issue by acknowledging and using the racial identity of students to promote greater racial heterogeneity in schools. In other words, the colorblind logic of public actors effectively perpetuates the very color-aware, de facto segregation that generates educational inequality. The ghost of *Plessy* lives on in the Supreme Court's adoption of Harlan's colorblind dissent.

CRITICAL RACE THEORY AND COLOR-CONSCIOUSNESS IN THE CLASSROOM

In a law review article assessing twenty years of scholarship in critical race theory (CRT) and its applicability to a seemingly post-racial Barack Obama presidency, Kimberlé Williams Crenshaw relates that the group of minority scholars that gathered for the first formal meeting of Critical Race Studies in the summer of 1989 "were all veterans, in one way or another, of particular institutional conflicts over the nature of colorblind space in American law schools." As she writes, there had been "by this time many fights, both within the academy and in society at large, over how far and to what ends the aftershocks of white supremacy's formal collapse would travel. These tensions were evident in struggles ranging from the raw contestations over schools and public resources in the public sphere to the more refined debates about 'diversity' in the walled-off worlds of the nation's editorial rooms and faculty lounges" (Crenshaw et al. 2019, 58–59).

Informed by their direct experiences and struggles over the hiring of black law professors and admitting black students to law schools, these scholars have over the past thirty years developed a collective body of work that critically examines the nature of race and law in the United States, particularly the dynamics of power and white supremacy. The works are numerous but cluster around a number of central themes: critiques of liberalism, including colorblindness and meritocracy; storytelling and counter-storytelling; critical race feminism;

31. *Parents Involved in Community Schools*, 551 U.S. at 748.

32. *Parents Involved in Community Schools*, 551 U.S. at 746; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469.

race, class, sex and their intersections; revisionist histories and interpretations of civil rights law, among others (for an introduction, see Delgado and Stefancic 2017; for two extensive annotated bibliographies of related works, see Delgado and Stefancic 1993, 1995).

A central aim of CRT is to unsettle the strictly bounded legal categories of race in use within U.S. law and challenge the public-private distinction that allows these definitions to exercise such a potent check on redressing racial and ethnic inequality in the United States. Simultaneously, these authors highlight how multiple dimensions of marginality—particularly gender identity, class, sexual orientation, disability, and language—further distance individuals from the loci of power within legal and social structures, thereby compounding and complicating important questions of privilege and the engagement of questions of racial and ethnic equality. Their central analytical claim is that the normalization of a particular perspective within the law as a universal metric—the reasonable man test, for example—encodes a series of assumptions and statuses that, on examination, fundamentally reveal the narrow, biased, and particularistic views of particular constituents within the legal and social communities. What counts as normal or neutral is not only highly contingent, but also deeply tied to racial, economic, gendered, or linguistic assumptions that often are unwarranted.

As its influence expanded, CRT has found a particularly welcoming reception within the field of education. Educational scholars have fused the analytical insights of CRT with ethnic studies, and stirred in their critical and radical traditions, in particular, the pedagogy of Brazilian theorist Paolo Freire (1970). The resulting framework has in many ways moved beyond critique and devised specific pedagogical strategies, within the policy confines of school systems, that draw on race, ethnicity, and culture to help children learn better. In contrast to colorblind policies, these approaches surface and acknowledge the ongoing power and force of race. This pedagogical view, however, is less of a static characteristic or status and more of a socially organizing and individually constituting set of practices, habits, and acts that both motivate and constrain actors. These culturally responsive pedagogies and curricula explicitly invoke and utilize the racial identities of students to cultivate student learning.

Gloria Ladson-Billings's foundational article "Toward a Theory of Culturally Relevant Pedagogy" (1995) uses an anthropologist's lens to examine how a teacher's pedagogy might help her forge a relationship with her African American students that aligned with their home and community cultures in a way that could foster academic success. Ladson-Billings fused her research on highly effective teachers of African American students with a deep empirical research base on language and literacy. Together, these two research streams led her to develop a pedagogical approach that embraced and used the cultural awareness and identities of students in the course of building academic skills.[33]

Ladson-Billings's work has been central to the emergence of what has become known as asset-based pedagogy (ABP). ABP inverts the conventional understanding of the relationship between academic performance and student backgrounds. Most discourse about academic achievement constructs students of color and poor students as operating under an accumulating load of deficits: their parents' educational backgrounds limit them; their poverty limits them; their home language limits them. In contrast, ABP seeks to use the strengths and assets of all households and communities to connect students to learning opportunities. Heeding Ladson-Billings's call to pay close attention to the race, ethnicity, cultural contexts, and dynamics of students' lives, ABP enables teachers and schools to draw on the racial identities, as well as the home and community environments of students to use as resources and strengths within the project of teaching, rather

33. Ladson-Billings regards "culturally relevant pedagogy" (CRP) as pedagogy that, first, disrupts the prevailing cultural deficit approach (which assumes something is "wrong" with some children that prevents their achieving at a high level) and, second, both affirms students' cultural identities and helps them develop a critical understanding of how inequality is generated (1995, 469).

than viewing these aspects of students' lives as deficits to be overcome. Although asset-based pedagogy is not limited to the racial and ethnic dimensions of students' lives, in the contexts of racial, ethnic, and economic segregation of U.S. schools, it represents a deep commitment by public actors (teachers) to acknowledge and utilize the racial and ethnic identities of students to improve learning. It is explicitly and intentionally color aware rather than colorblind—precisely because colorblind policies have helped construct the inequality that students confront.

EMPIRICAL EXAMINATIONS OF THE EFFECTS OF COLOR-CONSCIOUS PEDAGOGIES

Recent research into the efficacy of ABP suggests that these approaches can change student academic outcomes. Although much of the work on the efficacy of asset-based pedagogy has been qualitative and based on case studies, other recent works have sought to use quantitative strategies to examine the effects of ABP on student outcomes.[34] Multiple studies provide clear empirical evidence of the efficacy of racially and culturally anchored curricula on student learning, particularly among historically marginalized youth (Cabrera et al. 2014; Dee and Penner 2017; López 2017).

Nolan Cabrera et al.'s 2014 study emerged out of the controversy that arose after the Arizona state legislature banned a Mexican American Studies (MAS) program designed in part to comply with a federal desegregation consent decree that required the Tucson Independent School District to address the educational inequality experienced by Mexican American youth in Tucson. The MAS program—focused on a critical engagement of the literature and history of the greater Southwest—explicitly addressed the historical discrimination of indigenous, Latino, and immigrant communities in Arizona (for an overview of the Mexican American Studies program and its intellectual foundations, see Cammarota and Romero 2014). Cabrera summarized the goal of MAS: "Within this framework, the more Latina/o students see themselves and their experiences reflected in the curriculum, the more likely they are to be engaged in school, leading to greater educational success" (Cabrera et al. 2014, 1086–87).

Examining two dependent variables—high school graduation and passing the state-mandated assessment test (AIMS) after an initial failure of the test—Cabrera et al. found that MAS course-taking had significant effects on both dependent variables. Studying the academic outcomes of roughly eight thousand students across four cohorts, the authors found that taking at least one MAS course increased the likelihood of graduation by 9.5 percent, with the likelihood of graduating jumping 16.1 percent for one cohort. The likelihood of passing the state-mandated assessment also increased for those who took at least one MAS class, even for the math assessment (by 8.7 percent), which was not a subject covered in MAS courses. Cabrera et al. found "the MAS students outperformed their non-MAS peers in terms of AIMS passing and graduation despite having 9th- and 10th-grade academic performances that were significantly lower" (2014, 1106).

Thomas Dee and Emily Penner (2017) find similarly encouraging results in their analysis of the San Francisco Ethnic Studies program, using a regression discontinuity analysis. Because the San Francisco Unified School District assigned ninth grade students to an ethnic studies (ES) course if their eighth grade GPA was below 2.0, Dee and Penner could compare their performance with students whose GPA just above 2.0 made them ineligible for the program. The effects of ethnic studies on attendance, ninth grade GPA, and credits earned were striking: "Taking ES increased attendance by 21 percentage points, GPA by 1.4 grade points, and credits earned by 23 credits (or roughly four courses)" (145). Although they were cautious about the interpretation and generalizability of these findings, Dee and Penner conclude that their work aligned with the qual-

34. Many ABP scholars may argue that quantitative approaches are reductive and inapposite to the task of examining how school structures alienate and disenfranchise students. The fact remains, however, that the policy community often gives greater credence—fairly or not—to positivistic accounts that rely on sophisticated modeling techniques.

itative and theoretical work about the power of culturally sustaining pedagogies: "Taken at face value, these findings provide a compelling confirmation of an extensive literature that has emphasized the capacity of CRP to unlock the educational potential of historically marginalized students" (158).

Francesca López (2017) offers another confirmation of effectiveness of asset-based approaches in her study of teacher expectations and practices. She begins with noting that asset-based pedagogies posit that teachers who have a critical awareness of the socioracial history and contexts of their students' lives can better connect a student's existing cultural knowledge to the teacher's instructional practices. In turn, this helps develop students' academic identities. Using a survey of teacher expectations, beliefs, practices, and critical awareness, as well as student surveys and achievement scores, López examines the connections between these teacher characteristics and student identities and academic performance. Importantly, teacher critical awareness of the historical contexts of marginalized students—in conjunction with high teacher expectations—had a much stronger effect on reading achievement, than high teacher expectations alone: "There is approximately a ½ SD difference in student reading achievement between teachers who have high expectancy but are on the opposite extremes of critical awareness, suggesting that critical awareness abates bias that teachers may unconsciously hold" (2017, 203). In short, the awareness of race and the ability to employ cultural knowledge of one's students can enable a teacher to grow a child's reading ability significantly better than not being aware of race and not integrating cultural knowledge of one's students.

These findings—and those from numerous other studies—highlight a key dimension of our current understanding of educational practices: taking account of race, ethnicity, and cultural contexts of students transforms the educational task and produces results significantly better than employing colorblind strategies that ignore or deny the salience of race to a student's world (for an extensive review, see Sleeter and Zavala 2020). Equally important, these color-conscious instructional strategies strengthen the capacity of students to be full citizens of their communities and of their nation. To not engage that sense of racial identity is to reject Harlan's commitment to governmental policies that respect and fulfill the rights of all U.S. citizens.

CONCLUSION: COLOR-CONSCIOUS EDUCATION AND THE FULL RIGHTS OF CITIZENSHIP

At the end of April 2020, in the case of *Gary B. v. Whitmer*, a three-judge panel of the Sixth Circuit Court of Appeals ruled in an appeal from the Federal District Court in Detroit that the failure of Detroit public schools to ensure that their students achieved minimal literacy skills violated the U.S. Constitution, declaring that students enjoy a "fundamental right to literacy." While the court rejected the plaintiffs' equal protection claim, the court did find that the state's denial to students of a basic minimum education violated a fundamental due process right. As Judge Eric Clay wrote for the majority, "In short, without the literacy provided by a basic minimum education, it is impossible to participate in our democracy.[35] In the course of reviewing the fundamental nature of a minimal level of education, Judge Clay contended, "education has held paramount importance in American history and tradition, such that the denial of education has long been viewed as a particularly serious injustice." But Clay saved his most forceful language for the rights of citizenship: "every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process."[36] He added a few lines later, "Our nation's history of racial discrimination further reveals the historical and lasting importance of education, and the significance of its

35. *Gary B. v. Whitmer, U.S. Court of Appeals for the Sixth Circuit*, Case nos. 18-1855/1871, at 33. Decided April 23, 2020. For the draft opinion, see https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0124p-06.pdf (accessed September 15, 2020).

36. *Gary B.*, Case nos. 18-1855/1871, at 42.

modern ubiquity. Education, and particularly access to literacy, has long been viewed as a key to political power. Withholding that key, slaveholders and segregationists used the deprivation of education as a weapon, preventing African Americans from obtaining the political power needed to achieve liberty and equality."[37]

Like Justice Harlan's dissent, Clay's language here is focused on the power of governmental practices to create tiers of citizenship. By not merely neglecting the education of Detroit schoolchildren, but by ensuring that it is virtually impossible to receive a basic education within the public schools of Detroit, the state of Michigan is assigning the mostly African American students of Detroit to second-class citizenship. Without fundamental and basic skills of literacy, these students will be unable to fully participate within democratic life—let alone economic life.

The ruling by the three-judge panel opened the door for a trial that would litigate the plaintiffs' claims that their newly found federal rights had been violated. That door closed, however, when the state of Michigan settled the case, agreeing to increase funding for literacy programs in Detroit schools by roughly $94.4 million. After the settlement, the plaintiffs withdrew their claim, but the Sixth Circuit Court of Appeals nonetheless decided, on its own motion, to review Judge Clay's ruling en banc, thereby vacating the decision. The plaintiffs' claim withdrawn, the Sixth Circuit then dismissed the case as moot. In a legal sense, it is as if Clay's opinion was never written. After Clay's ruling was vacated and the case dismissed by the Sixth Circuit, an attorney for the Detroit schoolchildren stated, "The decision was vacated but the words will never disappear."[38]

Like Harlan's dissent, Clay's ruling rejects the way we create formal institutions that subordinate and suppress the full rights of citizenship. Rather than viewing Harlan as the Great Dissenter whose colorblind Constitution prevents governments from seeing (and using) race, we should trace his influence in decisions like Clay's, decisions that reject governmental indifference and overt hostility to students' needs and rights. To continue to view Harlan's dissent as both justifying and defending a colorblind Constitution is to deny Horace Plessy's—and Gary B.'s—demand for fundamental justice.

REFERENCES

Aleinikoff, T. Alexander. 1992. "Re-Reading Justice Harlan's Dissent in *Plessy v. Ferguson*: Freedom, Anti-Racism and Citizenship." *University of Illinois Law Review* 4: 961–78.

Alexander, Michelle. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press.

Butler, Paul. 2018. *Chokehold: Policing Black Men*. New York: New Press.

Cabrera, Nolan L., Jeffrey F. Milem, Ozan Jaquette, and Ronald W. Marx. 2014. "Missing the (Student Achievement) Forest for All the (Political) Trees: Empiricism and the Mexican American Studies Controversy in Tucson." *American Educational Research Journal* 51(6): 1084–118.

Caldas, Stephen J., and Carl L. Bankston III. 2007. "A Re-Analysis of the Legal, Political and Social Landscape of Desegregation from *Plessy v. Ferguson* to *Parents Involved in Community Schools v. Seattle School District No. 1*." *Brigham Young University Education and Law Journal* 2(3): 217–56.

Cammarota, Julio, and Augustine F. Romero, eds. 2014. *Raza Studies: The Public Option for Educational Revolution*. Tucson: University of Arizona Press.

Connally, C. Ellen 2000. "Justice Harlan's 'Great Betrayal'? A Reconsideration of *Cumming v. Richmond County Board of Education*." *Journal of Supreme Court History* 25(1): 72–92.

Crenshaw, Kimberlé Williams, Luke Charles Harris, Daniel Martinez HoSang, and George Lipsitz, eds. 2019. *Seeing Race Again: Countering Colorblindness Across the Disciplines*. Berkeley: University of California Press.

Dee, Thomas S., and Emily K. Penner. 2017. "The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum." *American Educational Research Journal* 54(1): 127–66.

37. *Gary B.*, Case nos. 18-1855/1871, at 44.

38. Mark Walsh, "Full Federal Appeals Court to Reconsider Ruling on Right of Access to Literacy," *Education Week – School Law* (blog), May 19, 2020, https://blogs.edweek.org/edweek/school_law/2020/05/full_federal_appeals_court.html.

Delgado, Richard, and Jean Stefancic. 1993. "Critical Race Theory: An Annotated Bibliography." *Virginia Law Review* 79(2): 461–516.

———. 1995. "Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition." *University of Colorado Law Review* 66(1): 159–94.

———. 2017. *Critical Race Theory: An Introduction*, 3rd ed. New York: NYU Press.

Desilver, Drew. 2019. "A Majority of U.S. Colleges Admit Most Students Who Apply." *FactTank: News in the Numbers* (blog), April 9. Accessed September 15, 2020. https://www.pewresearch.org/fact-tank/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply.

Editorial Board. 1954. "Justice Harlan Concurring." *New York Times*, May 23.

Francis, Dania V., and William A. Darity Jr. 2021. "Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 187–202. DOI: 10.7758/RSF.2021.7.1.11.

Freire, Paulo. 1970. *Pedagogy of the Oppressed*. New York: Seabury Press.

Haas, Eric, and Mileidis Gort. 2009. "Demanding More: Legal Standards and Best Practices for English Language Learners." *Bilingual Research Journal* 32(2): 115–35.

Harvard University. 2006. *Harvard University Fact Book, 2005–2006*. Cambridge, Mass: Office of Budgets, Financial Planning, and Institutional Research. Accessed September 15, 2020. https://oir.harvard.edu/files/huoir/files/harvard_fact_book_2005-2006.pdf.

Hustwit, William P. 2011. "From Caste to Color Blindness: James J. Kilpatrick's Segregationist Semantics." *Journal of Southern History* 77(3): 639–70.

Journal of Blacks in Higher Education. 2005. "The Widening Racial Scoring Gap on the SAT College Admissions Test." 49(Autumn): 88–93. Accessed September 14, 2020. https://www.jbhe.com/news_views/51_graduate_admissions_test.html.

Kidder, William C., and Patricia Gándara. 2015. "Two Decades After the Affirmative Action Ban: Evaluating the University of California's Race-Neutral Efforts." Los Angeles: The Civil Rights Project, University of California.

Kluger, Richard. 1976. *Simple Justice*. New York: Alfred A. Knopf.

Ladson-Billings, Gloria. 1995. "Toward a Theory of Culturally Relevant Pedagogy." *American Educational Research Journal* 32(3): 465–91.

Lewis, George. 2006. *Massive Resistance: The White Response to the Civil Rights Movement*. London: Hodder Arnold.

Lofgren, Charles A. 1987. *The Plessy Case: A Legal-Historical Interpretation.* New York: Oxford University Press.

López, Francesca A. 2017. "Altering the Trajectory of the Self-Fulfilling Prophecy: Asset-Based Pedagogy and Classroom Dynamics." *Journal of Teacher Education* 68(2): 193–212. DOI: 10.1177/0022487116685751.

Patterson, James T. 2001. *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy*. New York: Oxford University Press.

Reece, Jason. 2021. "Confronting the Legacy of 'Separate but Equal': Can the History of Race, Real Estate, and Discrimination Engage and Inform Contemporary Policy?" *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 110–33. DOI: 10.7758/RSF.2021.7.1.07.

Rosenberg, Gerald N. 1991. *The Hollow Hope*. Chicago: University of Chicago Press.

Shah, Paru, and Robert S. Smith. 2021. "Legacies of Segregation and Disenfranchisement: The Road from *Plessy* to *Frank* and Voter ID Laws in the United States." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 134–46. DOI: 10.7758/RSF.2021.7.1.08.

Siegel, Reva B. 2004. "Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*." *Harvard Law Review* 117(5): 1470–547.

Sleeter, Christine E., and Miguel Zavala. 2020. *Transformative Ethnic Studies in Schools*. New York: Teachers College Press.

Snyder, Brad. 2000. "How the Conservatives Canonized *Brown v. Board of Education*." *Rutgers Law Review* 52(2): 383–494.

Thomas, Clarence. 1987. "Toward a Plain Reading of the Constitution — The Declaration of Independence in Constitutional Interpretation." *Howard Law Journal* 30(4): 983–96.

Tushnet, Mark. 1987. *NAACP's Legal Strategy Against Segregated Education, 1925–1950*. Chapel Hill: University of North Carolina Press.

Walker, Vanessa S. 2018. *The Lost Education of Horace Tate: Uncovering the Hidden Heroes Who Fought for Justice in Schools*. New York: The New Press.

Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success

TIMOTHY M. DIETTE, DARRICK HAMILTON, ARTHUR H. GOLDSMITH, AND WILLIAM A. DARITY JR.

W.E.B. Du Bois asserted that black students are better served by attending predominantly black schools than hostile integrated schools in a context of racial discrimination. The conventional assumption is that black students benefit educationally by attending schools with more white peers, which have access to greater resources. However, the theory of the functionality of discrimination advances the idea that black students may face greater discrimination in school settings with numerous white peers as a result of a competitive process and white appropriation of preferred resources. Using the National Survey of Black Americans, we find evidence of a nonmonotonic relationship between high school racial composition and years of schooling completed, high school graduation, likelihood of being employed, and likelihood of owning a home. We conclude, contrary to conventional belief, that it is not unambiguously the case that black students gain from attending schools with more white peers.

Keywords: stratification economics, desegregation, high school graduation, high school dropouts, racial composition

Does attending a school with a greater presence of white children improve the academic performance of black children? Do black children need to be in a school with white children to learn? The conventional wisdom has it that attending school with white peers benefits black students on a wide array of fronts, including their academic outcomes (Orfield and Lee 2005;

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Hanushek, Kain, and Rivkin 2009; Johnson and Nazaryan 2019). The conventional wisdom prevails despite conflicting evidence and the concerns expressed by no less a luminary than W.E.B. Du Bois (1935) about the physical, emotional, and intellectual maltreatment black students might face when they attend desegregated schools, rather than schools where virtually all of their peers are black.[1]

Moreover, to the extent that academic gains for black students are associated with attending desegregated or integrated schools, existing research is not clear about the mechanism producing those gains. Does a sheer benefit accrue to black students from having contact with white students? Or are the putative gains attributable to integrated schools having better resources in terms of the quantity and quality of teachers per student, superior equipment, books and materials, classrooms, and curricula?

Indeed, would it be possible to achieve at least the same level of academic gains for black students if predominantly black schools had been upgraded to a comparable level of resources as predominantly white schools? In short, could the perverse policy of "Deluxe Jim Crow" applied to schooling actually have produced similar academic gains for black students as school desegregation, if in fact, "separate but equal" were really realized (Cobb 1952; Thomas 2011)?[2]

The latter question has immense policy relevance. The combination of a tendency toward the resegregation of schools at the facility level coupled with the tenacious nexus between sustained residential segregation and school composition (Clotfelter 2004) means that the process of school integration has not been completed and shows signs of regressing (Fiela 2013; McNeal 2009; Orfield and Lee 2007). Furthermore, evidence suggests that many integrated schools implement racially stratified curricula, where black students are overwhelmingly "tracked" into a low achieving curriculum and the high achieving curriculum remains overwhelmingly the domain of white students (Oakes 2005; Tyson, Darity, and Castellino 2005; Darity and Jolla 2010; Diette 2012).

Therefore, an interesting question is whether efforts to close the racial schooling gap should prioritize desegregation or improved quality of facilities, curriculum, and instruction for black students wherever they attend school. If a more diverse racial composition of schools does not reliably produce an intrinsic academic benefit for black students, it may be appropriate to prioritize the improvement of existing schools rather than relocating students for greater racial balance without adequate attention to how curricular and instructional resources are distributed within more racially balanced schools.

To date, research on the link between educational attainment for black students and the racial composition of the schools they attend has for the most part focused on the racial makeup of high schools. The convention (the *conventional hypothesis*) in this literature is to assume that as the high school black students attend becomes more white, the educational attainment of black students rises at a monotonic rate.

We extend the literature in two ways using data from the National Survey of Black Americans. First, we investigate whether the association between black students' educational attainment—both years of schooling completed and the probability of graduating from high school—and the share of their high school that is white is monotonic. Second, we investigate the association between the racial composition of the high school blacks attend and two im-

1. A number of researchers have found that black students complete more years of school, and hence are more likely to finish high school, when they attend schools with a higher white enrollment share (Crain 1970; Boozer, Krueger, and Wolkon 1992; Reber 2010; Guryan 2004; Johnson 2011). However, other studies find no link between educational attainment and more integrated schooling (Rivkin 2000; Bifulco, Fletcher, and Ross 2009). Studies exploring the link between standardized test scores of black students and the proportion of the school they attended that is black are mixed also (for a recent review of this literature, see Card and Rothstein 2007).

2. The concept of Deluxe Jim Crow refers to an imagined regime where separate black and white health-care facilities had similar resources (see Thomas 2011). Correspondingly, Deluxe Jim Crow in the educational sphere refers to no gap in school resources across racially separate schools.

portant measures of subsequent financial well-being.

We find evidence at odds with the common view that educational attainment for blacks increases monotonically with the percentage of their high school peers who are white. Our findings do reveal that relative to blacks who attend a high school that is predominantly black, those attending a high school that is predominantly white are more likely to graduate and to complete more years of schooling. However, our results also reveal that black students attending a racially balanced high school, one with approximately equal shares of black and white students—which we also refer to as mixed or integrated schools—complete less schooling or no more schooling relative to those enrolled in predominantly black high schools and predominantly white high schools. These findings are particularly striking given potential concern about selection bias—that parents with the wherewithal will select into the schools with more resources and a larger share of white peers—which would bias the results in favor of integrated and predominantly white schools.

That black students who attend racially balanced high schools do not complete more schooling than black students who attend predominantly black high schools calls into question whether white peers, in and of themselves, necessarily have a direct and positive impact on black students' academic achievement. This is consistent with the hypothesis advanced in stratification economics that blacks will face more discrimination in racially balanced schools than if they attend predominantly black or predominantly white schools (Darity 2001, 2005; Darity, Hamilton, and Stewart 2015; Hamilton 2017).

The relationship between employment and homeownership and the share of white high school peers for black students is also nonmonotonic. Thus our findings outside the educational sphere further demonstrate that black students do not consistently benefit from attending more-white high schools.

The following section presents a conceptual discussion of the potential link between the racial composition of schools that black students attend and their educational and economic outcomes.

CONCEPTUAL FRAMEWORK

In a 1935 essay, during the interim between the *Plessy* and the *Brown* decisions,[3] W.E.B. Du Bois anticipated the hostility that black youth might experience in integrated schools. He also expressed an awareness that the production of knowledge is a complex process involving both technical and human inputs. A proper education, he asserted, required nurturing or a "sympathetic touch between teacher and pupil" (1935, 328), as well as a knowledgeable educator with appropriate infrastructure or facilities. Further, he advocated for curriculum content relevant and appropriate to the life experiences of black students.[4]

In addition, Du Bois was a proponent of learning outside the classroom and engagement in practical activities to provide opportunities to apply and refine knowledge and to foster excitement about the life of the mind. He understood that peers have skills they can share with classmates that promote learning. Moreover, he observed that administrators, teachers, and students shape a culture that plays a substantive role in the educational process by influencing students' norms, motivations, and aspirations.

His primary policy concern was not the racial composition of schools per se, but instead that black youths receive quality education:

> It is simply calling a spade a spade. It is saying in plain English: that a separate Negro school, where children are treated like human beings, trained by teachers of their own race, who know what it means to be black in the year of salvation 1935, is infinitely better than making our boys and girls doormats to be spit and trampled upon and lied to by ignorant social climbers, whose sole claim to superiority is ability to kick "niggers" when

3. *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

4. For instance, Du Bois recollects that he arrived at "Atlanta University to teach history in 1897, without the slightest idea from my Harvard tuition that Negroes ever had any history" (1935, 335).

> they are down. I say, too, that certain studies and discipline necessary to Negroes can seldom be found in white schools. (1935)

In the post–Civil War era, black and white students were taught in almost exclusively racially segregated schools. The question Du Bois wrestled with was whether black students could receive a strong education in desegregated schools given the hostility they would likely face from white students. In integrated schools, he noted, blacks were tolerated at best, but not embraced, and thus wondered whether black youths would receive a proper education in such an environment.[5] He concluded that black students "will have separate schools or [they] will not be educated" (Du Bois 1935, 330). In Du Bois's view, to endure a poor education simply because schools are integrated "is a costly if not fatal mistake" (330). Given these circumstances, he was a fierce critic of school desegregation even as white society continued its discriminatory treatment toward blacks and excluded curricula essential to the black historical and current experience.[6]

His critics argued that supporting segregated schools would be giving up or backpedaling on the principle of equal access to quality public education. Du Bois recognized, though, that "the Negro needs neither segregated schools nor mixed schools. What he needs is Education" (1935, 355). For Du Bois, "a mixed school with poor and unsympathetic teachers with hostile public opinion . . . is bad," and a segregated school with "inadequate equipment, poor salaries, and wretched housing is equally bad" (for a discussion, see Hamilton 2014).

Du Bois (1970) made clear that his opposition was to discrimination in the provision of schooling, not desegregated schooling per se. Thus he opted to focus his attention on securing better funding for predominantly black schools so they could offer better services to their students.

Du Bois's objective of closing the racial school resource gap—ironically an objective shared with Booker T. Washington, with whom he often wrangled—was supported by Julius Rosenwald, president of Sears from 1908 to 1922 and a leading philanthropist of the early twentieth century (Ascoli 2006). Through the Rosenwald Foundation, he financed the construction of five thousand schools between 1917 and 1932 to serve black children exclusively. The Rosenwald Foundation also supported a number of NAACP initiatives, so Rosenwald knew Du Bois's position on race and schooling. More than one-third of the black children in the rural South during this period were educated in Rosenwald Schools, which were located in the eleven states of the former Confederacy as well as Oklahoma, Missouri, Kentucky, and Maryland.

Grants from the Rosenwald Foundation to facilitate construction of the Rosenwald Schools required matching monetary contributions from the black students' parents, amounting in total to $4.7 million, as well as parental contributions of labor and land. The idea was that this would ensure deep parental commitment to the goal of better educational facilities for their children. Indeed, the parents' devotion to the importance of education for their sons and daughters was so pronounced that in addition to raising the money to complement the foundation's donations they paid local taxes that went to support the public schools their children could not attend.

Rosenwald Schools, operating under conditions that necessarily made them all-black schools, were highly successful. Although rural black schools rarely if ever had the same monetary resources as the white schools, Daniel

5. The legal scholar Davison Douglas (2005) offers convincing evidence that during the first half of the twentieth century both racially segregated schooling and a hostile reception for black students in desegregated schools also existed in the northern part of the United States. He documents how most northern states enacted laws prohibiting school segregation following the Civil War, yet in many northern communities—especially those in states that bordered southern states—local school boards acted in defiance of the law and maintained sharply segregated schools.

6. Of course, this view was not shared universally in the black community, including the leadership of National Association for the Advancement of Colored People (NAACP), which he helped found in 1909, an organization at odds with his position on this topic.

Aaronson and Bhashkar Mazumdar (2011) report that the improved educational opportunities associated with the Rosenwald Schools led to a 40 percent closure of the gaps in educational achievement between blacks and whites for the relevant cohorts.

Drawing on census data and World War II records, they "find significant effects on school attendance, literacy, years of schooling, cognitive test scores, and northern migration [with] gains are highest in the most disadvantaged counties, suggesting that schooling treatments have the largest impact among those with limited access to education" (2011, 821). Because the Rosenwald Schools were not directly under the control of local all-white school boards, black parents could exercise authority over hiring teachers and curriculum content. This also played a role in the positive effect of attending a Rosenwald School. Thus, experience with the Rosenwald Schools seems to confirm Du Bois's belief that improved quality of education, regardless of the demographic composition of the school, is what matters the most.

Ultimately, Du Bois concluded that caring teachers, supportive peers, and exposure to the truth about black history would be more beneficial to black youths than education in "hostile" integrated schools.[7] Thus what we label the Du Bois hypothesis is the premise that black students are better served by attending predominantly black high schools, relative to integrated schools, as long as society engages in racial discrimination. The Du Bois hypothesis posits that white peers, as a result of their ability to influence the distribution of resources and opportunities within a school and their desire for preferred educational and economic outcomes, have a negative effect on educational attainment of black students.

STRATIFICATION ECONOMICS, FUNCTIONAL ROLE OF DISCRIMINATION THEORY, AND SCHOOL INTEGRATION

Stratification economics asserts that discrimination functions as a mechanism dominant groups use to maintain their relative social hierarchical position over subaltern groups. A similar perspective was advanced by both Herbert Blumer (1958), who characterized race prejudice as a sense of group position, and the Nobel laureate W. Arthur Lewis (1985), who deployed the concepts of competing and noncompeting groups.[8]

Stratification economics assigns a functional role to discrimination (Darity 2001; Hamilton 2017). Discriminatory practices by the dominant group intensify when potential competition over valued resources and access to opportunities between the two groups is greater. Thus, whites would not bother to discriminate against blacks to a great extent in the absence of perceived gain or if blacks are not perceived as threatening their position of privilege.

In the context of schooling, in a racially balanced environment, white students and their parents are likely to consider black students as serious competitors for relative access to resources. Examples include gaining teacher at-

7. Many of the factors that concerned Du Bois in the early part of the twentieth century remain intact: better funding for schools that are predominantly white (Condron and Roscigno 2003), a level of racial discomfort borne of limited contact, and the persistence of negative stereotypes. Indeed, Derrick Bell (2005, 1062) looking back on the fiftieth anniversary of the *Brown* decision, noted that "desegregated schools adopted tracking mechanisms that placed most blacks on non-academic tracks. Black children were disproportionately disciplined, and there was little consideration given to black cultural interests." Given these discrepancies, researchers show that strong differences in the experiences of white and black students are still evident today (Diette 2012; Lucas 1999).

8. Lewis describes how members from a dominant group render individuals from subaltern groups as noncompeting by using their dominant position to limit access to market-rewarded credentials, such as educational degrees, to subaltern groups to maintain their social hierarchical position. He also describes two other strategies that dominant groups deploy when subaltern groups are able to overcome structural barriers and acquire competitive credentials. First, dominant groups can alter the credentialing criteria to favor their own attributes (changing the rules in the middle of a game). In addition, they may simply discriminate by limiting rewards to competitive, or "credentialed" members of the subaltern group (wage discrimination).

tention, seats in desirable classes, and positions of status in the school involving leadership, athletics, and academics. Access to these resources and positions are thought to lead to positive economic returns. Competition for these advantages may lead to hostility and discrimination that undermines black educational achievement. However, when white students have only a handful of black peers, they will see their position of privilege as less threatened and engage in relatively less discrimination against their black classmates.

Thus, our application of the functionality of discrimination hypothesis makes two claims. First, it predicts that in racially balanced schools, the competitive threat to white students for preferred academic advantages posed by black students will be enough to foster a hostile treatment effect that offsets, and possibly dominates, the resource effect. Second, it posits that in predominantly white schools, the more limited threat to white students for preferred positions will not lead the hostile treatment effect to dominate the resource effect. Thus our functionality of discrimination hypothesis predicts that black students who attend racially balanced schools may not acquire more schooling and may have a lower level of educational attainment relative to those who attend either a predominantly black school or a predominantly white school.

PREDICTING THE LINK BETWEEN RACIAL COMPOSITION OF PEERS AND EDUCATIONAL ATTAINMENT

We consider three hypotheses regarding the impact on black student's educational attainment of the share of their high school peers who are white: the conventional hypothesis, the Du Bois hypothesis, and the functionality of discrimination hypothesis. These hypotheses are generated by different perspectives about the combined impact of differences in both high school resources and discrimination against black students in school settings that differ in terms of the racial composition of their peers. Each of the three hypotheses embeds the assumption that school resources are greater when the white share of students in a school is larger and these resources will enhance black student educational attainment.[9] Moreover, they each acknowledge that racial discrimination undermines learning and may prevent black students from accessing school resources. They differ, however, on the extent of discrimination that prevails when the racial composition of school peers differs.

The conventional hypothesis assumes that the benefits from additional resources always outweigh any negative effects of discrimination (which may include denied access to these resources) or, in some cases, does not acknowledge the potential presence of negative effects of desegregation. Thus the standard view is that a higher share of white peers is associated with greater educational achievement among black students. This produces a positive relation between more white peers in high school and black students' educational attainment.

However, the Du Bois hypothesis, set out earlier, suggests that the negative effects of discrimination in the form of poor treatment from white students, teachers, and administrators will be larger than the benefits of additional school resources. It implies that black students complete less schooling as the proportion of their white peers increases, which yields a negative relation.

The functionality of discrimination hypothesis posits that discrimination against black students is much stronger at racially balanced schools than at predominantly white schools—where poor treatment of black students is expected to be modest.[10] Recall that school re-

9. Today a 13 percent gap in per pupil expenditure for black and white students remains (Morgan and Amerikaner 2018). The gap in expenditures required to equalize services or expected outcomes may be larger, however (Bifulco 2005).

10. When schools were first desegregated with only a small number of black children, such as the Little Rock Nine, the students likely faced severe discrimination. However, after the early phase of desegregation is complete poor treatment of black children in such a setting is expected to be small. Thus, the *functionality of discrimination theory* we specify applies to a situation where black children are enrolled in mostly white schools that have been integrated long enough for white members of the school community to adapt to desegregation.

sources rise as the share of white peers increases. Thus, the functionality of discrimination hypothesis we advance asserts that, relative to their peers who attend predominantly black schools, black students attending racially balanced schools will complete equivalent or less schooling than their black peers (discrimination effect is equivalent to or dominates resource effect respectively). In operationalizing the functionality of discrimination hypothesis, we contend that black students at schools with a high proportion of white students will finish more schooling (resource effect dominates a diminished discrimination effect).

DATA, MEASUREMENT, AND DESCRIPTIVE STATISTICS

We analyze data from the National Survey of Black Americans (NSBA) (Jackson and Gurin 1996). The NSBA was designed to collect information on the economic conditions of black Americans, including their educational attainment and health status. The initial wave was carried out on a nationally representative group of black respondents age eighteen and older between 1979 and 1980. The data were gathered in face-to-face interviews with respondents conducted in the privacy of their homes. Three subsequent waves of data collection were conducted eight, nine, and twelve years after the initial interview. Because of extensive sample attrition, our analysis uses variables drawn only from the first wave.

A desirable feature of the data is that the survey collected retrospective respondent information on the level of education completed along with the racial composition of the high school they attended.[11] NSBA respondents were given five response options for the question relating to school racial composition: *all blacks*, *mostly blacks*, *about half blacks*, *mostly whites*, and *almost all whites*.[12] This information allows us to parse individuals who experienced different high school racial environments.[13] Thus we are able to investigate whether the relationship between the racial composition of the high schools black students attended and their educational attainment is systemic.

In a well-known study, Michael Boozer, Alan Krueger, and Shari Wolkon (1992) used data drawn from the NSBA to evaluate whether the racial composition of the high school black youths attended influenced years of education completed. They converted the categorical responses provided by NSBA respondents on the racial structure of the high school they attended into a proportional measure of the share of peers who were black. They did so by assigning numerical values to the Likert-score responses: 1 (*all blacks*), 0.75 (*mostly blacks*), 0.50 (*about half blacks*), 0.25 (*mostly whites*), and 0.1 (*almost all whites*). Using this continuous measure, they estimated a model of educational attainment under the presumption of a direct and linear relationship between the share of black classmates in high school and the educational attainment of blacks.

We use the five possible responses to identify three types of high schools: *white* (*almost all white* or *mostly white*), *racially balanced*

11. Respondents who attended a number of different high schools were asked to answer the question for the high school they primarily attended.

12. The share of public school students of Latino ancestry in U.S. high schools in 1972, the furthest year back that the government published such data, was 5.6 percent. The share rose modestly to 6.3 percent in 1979. Thus, NSBA respondents indicating they attended a "mixed" school probably were attending a school that was largely white and black. By 2012, a much larger share of public school students were Latino (23.1 percent of high school students).

13. It is possible that self-reported measures of childhood environmental context are inaccurate. The potential imprecision could be due to many factors including poor recollection, which could worsen with aging, and retrospection bias (framing responses to explain life outcomes). However, a body of scientific literature has emerged suggesting that memories of emotionally salient childhood experiences—such as the racial composition of the high school attended—are clear and reliable (that is, do not substantially change with aging) and largely independent of gender and mood at survey baseline (Corso et al. 2008; Yancura and Aldwin 2009). Thus many scholars now view measures of emotive life-events based on retrospective self-reports as reliable for analysis (Corso et al. 2008; Yancura and Aldwin 2009; Hardt and Rutter 2004; Dube et al. 2004).

Table 1. Schooling Outcomes and High School Racial Composition

	Full Sample (1)	Black (2)	Racially Balanced (3)	White (4)
Years of education (mean)	12.64	12.55	12.33	13.15***$^{+++}$
	(2.02)	(2.03)	(1.75)	(2.10)
Graduate high school (share)	0.77	0.74	0.76	0.87***$^{+++}$
	(0.42)	(0.44)	(0.43)	(0.34)
Observations	1,121	735	153	233
Percent of observations	100.0%	65.6%	13.6%	20.8%

Source: Authors' tabulation based on the National Survey of Black Americans (Jackson and Gurin 1996).

Note: Means of variables. Standard deviations in parentheses.

Different from the black high school sample: *$p < .1$; **$p < .05$; ***$p < .01$

Different from the racially balanced high school sample: $^{+}p < .1$; $^{++}p < .05$; $^{+++}p < .01$

(*about half black and half white*), and *black* (*mostly black* or *all black*).

In addition, we construct a measure of the share of high school peers who are white, called *percent white*, following the Boozer, Krueger, and Wolkon methodology. To test for a nonmonotonic relationship between educational outcomes and the racial composition of the high school peers, we generate *percent white-squared* and test a quadratic specification.

The categorical approach to measuring school racial composition allows us to compare schooling outcomes for students attending schools that are highly racially stratified relative to each other and schools that are racially balanced—rather than the effect of a one-unit increase in the share of students who are black.

In our empirical work, we explore the link between the racial composition of the high school attended and educational attainment, using both of these methods (continuous and categorical measures of high school racial composition) to account for the racial makeup of schools. For conciseness, we discuss the results of the categorical model in the body of this article and the continuous findings in the footnotes.

We adopt virtually the same approach in selecting the sample to analyze as Boozer, Krueger, and Wolkon did (1992). We restrict the sample to persons between the ages of twenty-five and sixty-five, who have completed at least nine years of education, and were born in the United States. Therefore, our analysis sample includes 1,121 respondents.[14] Following Boozer, Krueger, and Wolkon, our analysis of the association between educational attainment and the racial composition of high school peers uses this sample. In addition, we also estimate a model specification that allows this effect to vary by gender; we find no statistical difference between females and males at conventional levels.

Summary Statistics

Table 1 provides educational attainment information for the entire sample and for the sample separated into the three categories of the racial composition of the high school attended. Educational attainment is measured in two ways: years of schooling completed and whether the respondent graduated from high school.

Respondents completed an average of 12.6

14. Our analysis sample contains nineteen more observations than the Boozer, Kreuger, and Wolkon study because their study limited the sample to individuals who completed at least ten years of schooling, whereas we included those who completed nine or more years. Because the respondents ranged in age from twenty-five to sixty-five around 1980, the sample analyzes the high school experiences in the time period from the 1930s to the early 1970s.

years of education, and 77 percent completed high school. Most—approximately two-thirds of the sample—attended a black high school. Those who attended a white high school were the most likely to graduate (87 percent) and attain the highest average years of education (13.2 years), and both of these differ statistically from the educational outcomes at black high schools. Those who attended a racially balanced high school had the lowest average years of education (12.3). Only 74 percent and 76 percent of those black students who attended a black or a racially balanced high school respectively graduated.

METHODOLOGY

We estimate three specifications of equation (1) using ordinary least squares (OLS). Each specification includes the indicator variables for white high school and racially balanced high school while black high school is the reference category.

$$\text{Schooling} = \alpha_1 + \alpha_2(\text{Racially Balanced HS}_i) + \alpha_3(\text{White HS}_i) + \alpha_4(X_i) + \mu_i. \quad (1)$$

The dependent variable *Schooling* indicates the number of years of formal education completed, as in the Boozer, Krueger, and Wolkon study (1992). We also estimate an OLS linear probability model with *Schooling* as a binary outcome for whether the individual graduated from high school. In model 1, X includes gender, age, age squared, geographic location, and an indicator for educational context: whether the respondent attended high school after the 1964 landmark Civil Rights Act.[15]

Model 2 also uses equation (1) and adds additional controls for parent education level and family characteristics as a youth. These controls include number of children in their home and their gender, whether the respondent grew up with both biological parents, an indicator of family religiosity, and an indicator that accounts for whether the neighborhood where the respondent grew up was all or mostly black. This last control is included to better isolate the effect on educational attainment of the racial composition of the respondent's high school from the racial composition of the neighborhood in which they lived. Moreover, this model contains an indicator of whether the respondent has light skin shade, a personal characteristic, to account for possible differences in treatment due to colorism (see, for example, Goldsmith, Hamilton, and Darity 2007; Diette et al. 2015).[16]

Finally, we estimate model 3 by interacting the indicator for gender with the type of racial composition of the high school. This specification allows us to evaluate possible differences in the impact of high school peer racial composition on educational attainment between males and females.[17]

15. The Civil Rights Act provided legislative funding mechanisms to enforce school desegregation.

16. Portable skin reflectometers are commonly used in anthropological and biomedical research to obtain reliable quantitative skin tone measurements (see, for example, Jablonski and Chaplin 2000; Keil et al. 1992). However, NSBA interviewers graded respondents on a salient phenotypical dimension, skin shade, using a Likert scale. Prior to conducting interviews, the orientation of NSBA interviewers included training to establish consistency in the coding of respondent skin shade, and reduce the possibility of measurement error. The interviewers used five categories (very dark, dark, medium, light, and very light) when coding to describe the complexion of blacks who participated in the survey. We collapsed the data into two categories: light (which includes very light and light), and dark (containing persons rated as having medium, very dark, and dark complexion). We also estimate the model using the continuous measure of the high school racial composition to replicate the Boozer, Kreuger, and Wolkon study. The only difference is the manner in which geographic location is measured. Boozer, Krueger, and Wolkon use state fixed effects, whereas we use eight regional controls for residence as a youth to allow for greater statistical power. We then add a percentage white squared term to test whether the results of the Boozer, Krueger, and Wolkon study are sensitive to allowing a nonmonotonic relationship between percentage white and schooling.

17. Further, this permits us to assess the validity of pooling the data across gender groups. We acknowledge the potential selection bias due to nonrandom assignment of students to schools and the school's associated racial composition. If parents hold the common view that schools with a higher percentage of white students are likely

Table 2. Impact of Racial Structure of High School Peers on Educational Attainment: OLS Estimates

	Years of School Completed			High School Graduate		
	Model 1 (1)	Model 2 (2)	Model 3 (3)	Model 1 (4)	Model 2 (5)	Model 3 (6)
Racially balanced high school	−0.397**	−0.515***	−0.547*	−0.004	−0.015	−0.033
	(0.017)	(0.002)	(0.057)	(0.915)	(0.710)	(0.622)
White high school	0.431**	0.257	0.193	0.114***	0.093***	0.087*
	(0.013)	(0.142)	(0.480)	(0.000)	(0.007)	(0.086)
Female	−0.313**	−0.317***	−0.345**	−0.005	−0.004	−0.010
	(0.012)	(0.009)	(0.021)	(0.838)	(0.883)	(0.771)
Female*racially balanced high school			0.053			0.028
			(0.876)			(0.727)
Female*white high school			0.102			0.010
			(0.748)			(0.858)
Chi-squared tests						
Pooled: racially balanced high school = white high school	−0.828***	−0.772***		−0.118**	−0.108***	
	(0.000)	(0.000)		(0.040)	(0.008)	
Males: racially balanced high school = white high school			−0.740**			−0.120*
			(0.034)			(0.095)
Females: racially balanced high school = black high school			−0.494**			0.005
			(0.012)			(0.915)
Females: white high school = black high school			0.295			0.097**
			(0.149)			(0.016)
Females: racially balanced high school = white high school			−0.789***			−0.102**
			(0.000)			(0.038)
Geographic location	Y	Y	Y	Y	Y	Y
Age	Y	Y	Y	Y	Y	Y
Attend high school after 1965	Y	Y	Y	Y	Y	Y
Parent and family characteristics		Y	Y		Y	Y
Skin shade		Y	Y		Y	Y
Observations	1,121	1,121	1,121	1,121	1,121	1,121

Source: Authors' tabulation based on National Survey of Black Americans (Jackson and Gurin 1996).
Note: Robust *p*-values in parentheses. Controls: geographic location: eight locations; age: age and age squared; parent and family characteristics: parental level of education, number and gender of siblings, whether or not the respondent grew up with both biological parents, family religiosity, racial composition of the respondent's childhood neighborhood, and respondent's skin shade.
*$p < .1$; **$p < .05$; ***$p < .01$

RESULTS

Table 2 presents OLS results for models 1 through 3 for both years of school completed and high school graduate as the dependent variables. We also present chi-squared tests to evaluate the relative impact of attending a racially balanced high school versus a white high school for the sample as a whole. In addition, results for model 3 include test statistics that indicate the relative impact for men and women

to have more resources and be associated with better academic outcomes, the results will be biased in favor of racially balanced or white schools.

separately of attending each type of high school based on peer racial structure.

Our findings for model 1, using years of education as the dependent variable, suggest that attending a predominantly white high school relative to a predominantly black high school is associated with the completion of 0.431 more years and 0.828 years of school relative to a racially balanced school. However, we also find that attending a racially balanced high school is associated with a reduction of 0.397 years of schooling relative to attending a black high school.

In column 2, model 2 reveals that black students who attend a racially balanced high school complete significantly less schooling than those at either a black or white high school. Our findings reveal that those attending racially balanced high schools complete a half year less of education than those attending a black high school and three-quarters of a year less than those at a white high school. Moreover, black students who attend a white high school complete a quarter of a year more of schooling than those who attend a black high school, but this result is not statistically significant.

Model 3 (column 3), interacting female with our categorical measures, reflects the same pattern for both black men and women; the impact of attending a racially balanced high school relative to both black and white high schools is significantly negative and that of attending a white high school relative to a black high school is negligibly positive. Thus model 2, pooling the data across gender groups, is our preferred model specification.

These results are suggestive of a U-shaped negative and convex relationship between black student years of school completed and school racial composition, moving from black to racially balanced to white high schools. We find that the same nonmonotonic pattern between high school peer racial composition and educational attainment exists for both men and women.[18]

We extend our analysis by assessing the relationship between high school racial composition and a second measure of schooling often of primary concern to policymakers: whether a person graduates from high school. Graduating from high school is an important gauge of educational attainment, especially given the cohort we examine and the substantive wage penalty those who are not high school graduates face.[19] The effects of school racial composition on high school graduation for the pooled sample (model 2) are presented in column 5. Black students who attend a white high school are about 9 percentage points more likely to graduate from high school than their counterparts who attend a black high school, and 11 percentage points more likely to graduate from high school than those who attended a racially balanced high school. These results are statistically significant at the 1 percent level. Our estimate of the likelihood of graduating high school for blacks attending a racially balanced high school is negative relative to those who attend a black high school, but this finding is not significant. This same nonmonotonic pattern can be observed for both men and women in column 6; the distinction between the likelihood of graduating from a black or racially balanced high school is not significant, and the likelihood of graduating from a white high school (relative to both of the other types of high school) is significantly higher.[20]

18. The interaction terms (*female*racially balanced high school* and *female*white high school*) are both statistically insignificant, indicating that the association between attending either of these types of high schools, relative to attending a black high school, is equivalent for men and women.

19. Those who graduate from high school relative to those who complete a GED or drop out have seen their earnings premium increase from 20 percent in 1980 to about 25 percent since 2000 (Murnane 2013; Heckman and LaFontaine 2010; Autor, Katz, and Kearney 2008).

20. When we estimate model 1 with the continuous variable for the school racial composition percent white (but not including a squared term), our findings are very similar in magnitude to the results of Boozer, Kreuger, and Wolkon (1992, table 8). However, when we add additional controls in model 2, the link between *percent white* and years of school completed becomes substantially smaller and statistically insignificant.

Discussion of Core Model Findings

We find evidence of a nonmonotonic relationship between high school racial composition and both measures of educational attainment. As predicted by the Du Bois hypothesis, black students who attend integrated—racially balanced—schools complete fewer years of education than those who attended high schools with peers who are predominantly black. Similarly, we find that the likelihood of graduating from high school is lower, though not statistically significant, for black students who attend racially balanced high schools relative to those who went to a high school where virtually all of their classmates were black. These findings contradict the conventional hypothesis, which predicts greater educational attainment for black students simply from attending more integrated schools.

Our findings also reveal that black students complete more years of schooling and have a greater likelihood of graduating from high school if they attend a largely white high school instead of a more racially balanced high school. These findings match the conventional hypothesis' assertion that the resource effect outweighs the discrimination effect, and more white peers in high school positively affect black students. Our findings add an empirical nuance to the Du Bois hypothesis that measures the conditions by which the school resource effect may dominate or be dominated by the school discrimination effect associated with a white-black competitive process for school resources. The results are consistent with our contention that predominantly white schools are less racially discriminatory than racially balanced schools in which a critical mass of black students are perceived as more of a competitive threat to white students for preferred resources. Thus, neither the conventional hypothesis nor our characterization of the Du Bois hypothesis fully captures the effects on educational attainment of a typical black student attending high schools that differ across the racial-peer spectrum from a predominantly black high school to a racially balanced high school and a predominantly white high school.

Our evidence is consistent with the functionality of discrimination hypothesis. This idea postulates that the intensity of discrimination that black students face will be greater in more racially balanced high schools than in predominantly black and predominantly white high schools. Essentially, for black students attending a racially balanced high school relative to attending a predominantly black school, the discrimination effect dominates the resource effect and results in fewer years of school completed. The likelihood of graduation is smaller as well but not a statistically significant difference.

However, black students' years of schooling completed and high school graduation are both positively affected by attending a predominantly white high school relative to attending a racially balanced high school (and low resourced predominantly black schools). In this case, the benefits of school resources outweigh the negative effect of discrimination. Thus the pattern of a nonmonotonic relationship between the share of white peers in high school and educational attainment for black students

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We evaluate whether the relation between *Schooling* and high school racial composition is nonmonotonic, by including measures for both *percent white* and *percent white-squared* in model 2. We find that both of these results are statistically significant at the 5 percent confidence level, with *percent white* and *percent white-squared* having negative and positive relationships respectively. We perform a chi-squared test of joint significance of the linear and squared terms, which is positive and statistically significant, which indicates that the racial composition of high school is nonlinearly related to years of school completed. This highlights a U-shaped negative and convex relationship between school integration and black student years of schooling.

Our results for the interaction terms *female*percent white* and *female*percent white-squared* are both statistically insignificant at conventional levels, which shows that males and females are not differentially affected by an increase in the share of white high school peers. Using virtually the same data as Boozer, Krueger, and Wolkon (1992) but a different model specification dictated by the functional role of discrimination theory, we offer evidence that runs counter to their claim that school integration is necessarily good for black educational attainment measured by years of schooling completed.

we find is consistent with the functionality of discrimination hypothesis.

Our finding that *Schooling* for blacks is not greater at racially balanced high schools, where resources are presumably higher, is striking. This outcome is unlikely to be the result of omitted variable bias or parental selection.[21] It is possible that black students attending schools with more white peers than the average black student in our sample (see table 1) have families that especially value education. This may lead them to make greater parental investments in the education of their offspring. To the extent that we do not have information in the NSBA to account for such factors, which are also positively correlated with educational attainment, this leads to an upward, or positive, bias in our estimates of the relationship between attending a racially balanced school and *Schooling*. Thus, our findings of a significantly negative relationship between a racially balanced high school and educational outcomes are all the more powerful.

Possible Mediating Factors

We further explore the generality of the nonmonotonic pattern observed by examining whether the association between racial composition of school types and educational attainment is influenced by select individual and family characteristics. We examine four characteristics that may result in a black student being more or less affected by discrimination in high school.

We assess whether the link between high school racial composition and educational outcomes depends on the respondent's: mother's educational attainment, neighborhood racial composition, educational context, and skin shade. To evaluate whether these factors mediate this link, we use equation (1) to sequentially interact four variables—mother has twelve or more years of education, student grew up in an all or mostly black neighborhood, student attended high school after 1965, and student has light skin—with racially balanced high school and white high school.[22] Our analysis is conducted using model 2, which contains our full set of controls. Our results for years of schooling completed and high school graduation are reported in tables 3 and 4.

Table 3 reports the results with years of education as the dependent variable. Each column reveals that for both the reference and the interaction groups, black students who attend a racially balanced high school complete fewer years of education than their counterparts who attend either black or white high schools.

Of the sixteen reported results for these comparisons to racially balanced high school, all have a negative coefficient and thirteen are statistically significant at conventional levels. In addition, our estimates reveal a positive association between attending a white high school

21. Quasi-experimental studies of the link between the racial composition of the schools attended by black youths and their level of educational attainment may suffer from selection bias. For instance, in our case, parents who most highly value education—and thus provide their children more assistance and resources towards education—may be drawn to locate in communities where their children are more likely to attend racially integrated schools because of the greater school resources available. This would lead to the accumulation of more schooling for students who attend racially balanced schools, making it less likely to find, as we do, that black children in racially balanced schools complete less schooling. Thus, we are more confident in our finding that attending school with white peers does not advance educational attainment.

In a cleverly designed study, Rucker Johnson and Alexander Nazaryan (2019) exploit variations in the timing of court-ordered desegregation plans at the municipal or district level to evaluate the effect of school integration on educational attainment. They find that black students who attended schools in districts that underwent desegregation earlier—those who attended integrated school for a longer portion of their education—complete more schooling. This finding is at odds with ours. However, it is possible that court-ordered desegregation plans faced less resistance and thus took place earlier, in communities where black students were likely to face less hostility in school and hence have better educational outcomes. Thus, in their study, selection may contribute to their findings, making it challenging to interpret their results confidently.

22. The reference groups are mother has fewer than twelve years of education, student lives in an integrated neighborhood, student attended high school before 1965, and student has dark skin.

Table 3. Influence of Select Characteristics on Marginal Effect of Racial Composition of Peers on Years of Education

	Family Characteristics		Individual Characteristics	
	Mother's Education Level (1)	Neighborhood Racial Composition (2)	Educational Context (3)	Skin Shade (4)
Racially balanced high school	−0.493**	−0.363	−0.349*	−0.551***
	(0.011)	(0.293)	(0.095)	(0.002)
White high school	0.344*	0.419	0.437*	0.245
	(0.094)	(0.184)	(0.053)	(0.193)
Mediator	0.893***	−0.182	0.598*	0.214
	(0.000)	(0.415)	(0.079)	(0.288)
Mediator*racially balanced high school	−0.083	−0.199	−0.425	0.207
	(0.815)	(0.600)	(0.210)	(0.633)
Mediator*white high school	−0.256	−0.220	−0.432	0.066
	(0.434)	(0.532)	(0.205)	(0.854)
Chi-squared test for reference group				
Racially balanced high school = white high school	−0.837***	−0.782**	−0.786***	−0.796***
	(0.000)	(0.021)	(0.002)	(0.000)
Chi-squared tests for mediator group				
Racially balanced high school = black high school	−0.576*	−0.562***	−0.774***	−0.344
	(0.061)	(0.002)	(0.004)	(0.403)
White high school = black high school	0.088	0.199	0.005	0.311
	(0.753)	(0.315)	(0.986)	(0.359)
Racially balanced high school = white high school	−0.664**	−0.761***	−0.779***	−0.655
	(0.047)	(0.001)	(0.008)	(0.137)
Geographic location	Y	Y	Y	Y
Age	Y	Y	Y	Y
Attend high school after 1965	Y	Y	Y	Y
Parent and family characteristics	Y	Y	Y	Y
Skin shade	Y	Y	Y	Y
Observations	1,121	1,121	1,121	1,121

Source: Authors' tabulation based on the National Survey of Black Americans (Jackson and Gurin 1996).

Notes: Robust *p*-values in parentheses. Mediator terms for columns 1–4: mother has twelve or more years of education, grew up in an all or mostly black neighborhood, attended high school after 1965, and respondent has light skin. Reference groups for columns 1–4: mother has less than twelve years of education, grew up in an integrated neighborhood, attended high school before 1965, and respondent has dark skin. Controls: geographic location: eight; age and age squared; parent and family characteristics: parental level of education, number and gender of siblings, whether the respondent grew up with both biological parents, family religiosity, racial composition of the respondent's childhood neighborhood, and respondent's skin shade. Using extension of specifications used in model 2 in table 2.
*$p < .1$; **$p < .05$; ***$p < .01$

Table 4. Influence of Select Characteristics on Marginal Effect of Racial Composition of Peers on High School Graduation

	Family Characteristics		Individual Characteristics	
	Mother's Education Level (1)	Neighborhood Racial Composition (2)	Educational Context (3)	Skin Shade (4)
Racially balanced high school	−0.032	0.015	−0.011	−0.029
	(0.549)	(0.828)	(0.836)	(0.518)
White high school	0.113**	0.109*	0.068	0.087**
	(0.011)	(0.060)	(0.109)	(0.019)
Mediator	0.139***	−0.020	0.419	−0.001
	(0.000)	(0.890)	(0.572)	(0.977)
Mediator*racially balanced high school	0.047	−0.042	−0.004	0.079
	(0.525)	(0.608)	(0.960)	(0.389)
Mediator*white high school	−0.055	−0.020	0.057	0.032
	(0.315)	(0.762)	(0.398)	(0.614)
Chi-squared test for reference group				
Racially balanced high school = white high school	−0.145***	−0.094***	−0.079	−0.116**
	(0.009)	(0.000)	(0.137)	(0.012)
Chi-squared tests for mediator group				
Racially balanced = black high school	0.015	−0.027	−0.015	0.050
	(0.789)	(0.587)	(0.821)	(0.555)
White high school = black high school	0.058	0.089**	0.125**	0.119**
	(0.160)	(0.024)	(0.023)	(0.049)
Racially balanced high school = white high school	−0.043	−0.116**	−0.14**	−0.069
	(0.431)	(0.030)	(0.027)	(0.387)
Geographic location	Y	Y	Y	Y
Age	Y	Y	Y	Y
Attend high school after 1965	Y	Y	Y	Y
Parent and family characteristics	Y	Y	Y	Y
Skin shade	Y	Y	Y	Y
Observations	1,121	1,121	1,121	1,121

Source: Authors' tabulations based on National Survey of Black Americans (Jackson and Gurin 1996).
Notes: Robust *p*-values in parentheses. Mediator terms for columns 1–4: mother has twelve or more years of education, Grew up in an all or mostly black neighborhood, Attended high school after 1965, and respondent has light skin.
Reference groups for columns 1–4: mother has less than twelve years of education, grew up in an integrated neighborhood, attended high school before 1965, and respondent has dark skin. Controls: Geographic location: eight; age and age squared; parent and family characteristics: parental level of education, number and gender of siblings, whether or not the respondent grew up with both biological parents, family religiosity, racial composition of the respondent's childhood neighborhood, and respondent's skin shade. Using extension of specification used in model 2 in table 2.
*$p < .1$; **$p < .05$; ***$p < .01$

(relative to a black high school) and acquiring additional schooling; two of the eight reported results for these findings are statistically significant. This pattern reflects the same U-shaped relationship observed in table 3 between educational attainment and high school peer racial structure. This pattern holds across all four of the possible mediating factors.

Recall from our findings reported in table 2 that the probability of graduating from high school is statistically equivalent for those attending racially balanced and black high schools. Table 4 shows that the same pattern holds for both the reference and interaction groups who attend a racially balanced or black high school. In addition, table 4 supports our findings in table 2 for black students who attend a white high school: they are more likely to graduate than their peers in either racially balanced or black high schools. These findings are significant for eleven of the sixteen reported results. This nonmonotonic pattern holds for both the reference and the interaction groups within each of the four family and individual characteristics. Thus our finding of a nonmonotonic relationship between high school peer racial composition and educational outcomes is robust to a range of personal and family characteristics.[23]

HIGH SCHOOL RACIAL COMPOSITION: LINKAGES TO EMPLOYMENT AND HOMEOWNERSHIP

How should we interpret our evidence that black students who attend black schools complete more years of schooling than black students who attend racially balanced high schools? In addition, no evidence indicates that black students are more likely to graduate from a racially balanced high school than from a black high school. Is it possible that black high schools offer a significantly lower quality of education and a greater ease of graduation than racially balanced high schools? If this were the case, one could hypothesize that those who attended schools with fewer white peers would be at a distinct disadvantage in both labor and asset-ownership markets.

Thus, to evaluate the long-term impact of attending high schools with a particular racial makeup, we explore the link between the racial structure of high school attended and both subsequent patterns of employment and homeownership. We use both the continuous and discrete measures of high school peer racial composition.[24] We select these outcomes because employment affects earnings and homeownership is an important form of wealth accumulation.

Therefore, to shed light on the possible association between *Economic Status*—employment and homeownership—and the racial composition of the high school attended we utilize an OLS linear probability model to estimate equation (2). This equation is similar to equation (1), which uses a discrete categorization of high school type, respectively, but with employment and homeownership as the dependent variables. Our estimates of equation (2) are conducted using the more complete set of controls described earlier (model 2).

$$\text{Economic Status} = \psi_1 + \psi_2(\text{Racially Balanced HS}_i) + \psi_3(\text{WhiteHS}_i) + \psi_4(X_i) + \varepsilon_i. \quad (2)$$

Our analysis is conducted on subsamples of the data based on gender due to structural differences in the determinants of employment

23. Moreover, none of the interacted terms in tables 3 or 4 (*interaction*racially balanced high school* and *interaction*white high school*) are statistically significant. This indicates that differences are not discernible for each of the four pairs of reference and interaction variables in the association between attending a racially balanced or a white high school, relative to attending a black high school, on *Schooling*.

24. Jomills Braddock and James McPartland (1989) analyzed the long-term effects for black students of attending either segregated or integrated schools on occupational status and racial composition of coworkers using data from the National Longitudinal Surveys Youth Cohort. They find that young black adults who attended majority black high schools are less likely both to have white coworkers and to hold a white-collar job than those who attended majority white high schools. Our study is the first we are aware of to examine the association between the racial structure of the high school attended by black males and females and their subsequent employment status and home ownership.

Table 5. Impact of Racial Composition of High School on Employment and Homeownership: OLS Estimates

	Employed		Own a Home	
	Black Females (1)	Black Males (2)	Black Females (3)	Black Males (4)
Racially balanced high school	0.063	−0.081	−0.106*	−0.075
	(0.306)	(0.254)	(0.063)	(0.331)
White high school	0.004	0.079	−0.003	0.059
	(0.949)	(0.117)	(0.951)	(0.412)
Geographic location	Y	Y	Y	Y
Age	Y	Y	Y	Y
Attend high school after 1965	Y	Y	Y	Y
Parent and family characteristics	Y	Y	Y	Y
Skin shade	Y	Y	Y	Y
Observations	708	413	708	413

Source: Authors' tabulations based on National Survey of Black Americans (Jackson and Gurin 1996).
Notes: p-values in parentheses. Controls: geographic location: eight locations; age: age and age squared; parent and family characteristics: parental level of education, number and gender of siblings, whether respondent grew up with both biological parents, family religiosity, racial composition of the respondent's childhood neighborhood, and respondent's skin shade. Using extension of specification used in model 2 in table 2.
*$p < .1$; **$p < .05$; ***$p < .01$

and asset ownership. Table 5 is a summary table that presents our findings on the connection between the racial composition of the high school and *Employment Status* (columns 1 and 2) along with *Home Ownership* (columns 3 and 4) for both black women and men, respectively.

Table 5 reveals that black men and women who attended black high schools are no less likely to be *Employed* than those who attended racially balanced high schools. Our evidence reveals that, relative to those attending more integrated or racially balanced schools, neither black men nor women are punished in terms of employment by attending a black high school.[25]

Similarly, both black men and women who attended a racially balanced high school are estimated to have a smaller likelihood of homeownership than those who attended a black high school. However, this is statistically significant for black women.[26] Our findings suggest that attending a black high school does not lower quality relative to attending either more integrated or racially balanced schools based

25. The results for the continuous measure of school racial composition are similar. A black person educated in a black high school is no more or less likely to be employed than a similarly situated black person who attends either type of integrated school for women and men.

26. For our sample, 86 percent of females and 87 percent of males who attended a black high school lived in a predominantly black neighborhood as youths. It is possible that the price of housing is lower in communities with a higher share of black high school students, which may explain this result for homeownership by blacks. However, blacks who attended racially balanced schools also mostly lived in black neighborhoods during their youth, 66 percent of females and 61 percent of males. The continuous measure of school racial composition shows statistically significant relationships. Both women and men are more likely to own a home if they attended a black high school rather than a more integrated school.

on the connection between these types of schools and subsequent employment and homeownership.

CONCLUSION

Our findings suggest that in the years following *Brown v. Board of Education,* the Civil Rights Act, and the subsequent efforts to improve opportunities for black students, desegregation did not work as a cure-all to address racial disparity in educational attainment. The results we present, based on national representative data of black Americans, suggest that the relationship between educational attainment for blacks and the share of their high school peers who are white is U-shaped. This contrasts with the conventional underlying presumption that as high schools whiten in terms of the racial composition of students that educational attainment for black students improves monotonically.

We find a U-shaped negative and convex relationship between school integration and black student years of schooling completed. In addition, we find a nonmonotonic relationship between school integration and high school graduation, where the probability of graduating only differs significantly for black students who attend white high schools. These results, in totality, lend significant support to the functionality of discrimination hypothesis. We find these results despite potential selection bias that would likely favor racially balanced schools. The potential for selection bias does temper our confidence in the positive findings for predominantly white schools.

Indeed, the problem is compounded by the fact that in different communities different routes were taken toward school desegregation. For example, long before the *Brown* decision, Cincinnati, Ohio, produced integrated schools by giving parents the option of selecting whether their children would go to predominantly black or predominantly white schools. Unsurprisingly, only black parents exercised the option of sending their children to schools of both types (Crowley 1932).

After *Brown,* some southern communities adopted a parental choice policy putatively to meet the terms of Supreme Court's decision. One example is Drew, Mississippi, where initially only one black family, the Carters, opted to have their children desegregate the all-white schools. As more and more black families followed the Carters' lead, white families withdrew their children from the public schools altogether in favor of all-white private academies, leading to restoration of segregation (*Intolerable Burden* 2003). The sequential character of desegregation under parental choice suggests that one must account for selectivity in family attributes associated with the process.

In addition, our findings provide an important note of caution to researchers whose empirical models of educational attainment do not account for the nonlinear association between racial composition of peers and schooling. A similar note of caution applies to education activists looking to racial desegregation of schools as a panacea for addressing racial differences in educational attainment.

This is especially important given that any contemporary efforts to desegregate our increasingly segregated schools are more likely to shift black students from black high schools to racially balanced high schools instead of from black to white high schools. In light of our findings, greater integration on a real-world scale as a policy in and of itself is unlikely to improve outcomes for these black students and may actually be harmful.

Today, racially balanced schools appear to be a comparatively poor environment for black student education in terms of opportunities and achievement for two major reasons (Gleibermann 2017; Lewis and Diamond 2015). First, evidence indicates that white students are more likely to be selected into advanced and gifted programs than black students with objectively similar academic records (Grissom and Redding 2016). This results in fewer black student enrolled in these paths to success. Given the importance of being with peers with common experiences and histories, an initial round of assignments made based on race may create a social incentive for black students with strong academic records to opt out of such opportunities (Francis and Darity 2020), leading to poorer educational outcomes for blacks attending racially balanced schools.

Second, evidence suggests that in racially

balanced schools black students, especially males, are more likely to be singled out for detention and discipline (Lindsay and Hart 2017), undermining both educational achievement and future career prospects. Indeed, these conditions may undergird the lack of any major relative improvement in relative black-white academic achievement after more than fifty years of school desegregation (Camera 2016).

Our work suggests that if the goal is to ensure that black students are well educated, then it is time to move away from policies that focus exclusively on school integration. Students thrive when they are educated in resource-rich environments with relevant curriculum and are treated with dignity. Moreover, excellence for all is promoted with relevant curriculum; detracking or at least eliminating the discriminatory aspects of tracking that exclude black students; and eliminating the discriminatory treatment of black students in terms of in-school punishment, suspension, and expulsion. These adjustments—in curriculum, school policies, and management—are feasible and essential for black students to be treated fairly and, regardless of the racial composition of the school, to ensure that the school system has their best interests at heart. We conclude with Du Bois's (1935, 335) prophetic eighty-year-old cautionary observation:

> Theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

REFERENCES

Aaronson, Daniel, and Bhashkar Mazumdar. 2011. "The Impact of Rosenwald Schools on Black Achievement." *Journal of Political Economy* 119(5): 821–88.

Ascoli, Peter M. 2006. *Julius Rosenwald: The Man Who Built Sears, Roebuck and Advanced the Cause of Black Education in the American South*. Bloomington: Indiana University Press.

Autor, David H., Lawrence F. Katz, and Melissa S. Kearney. 2008. "Trends in U.S. Wage Inequality: Revising the Revisionists." *Review of Economics and Statistics* 90(2): 300–23.

Bell, Derrick A., Jr. 2005. "The Unintended Lessons in *Brown v. Board of Education*." *New York School Law Review* 49(4): 1053–67.

Bifulco, Robert. 2005. "District-Level Funding Disparities in the United States, 1987–2002." *Journal of Education Finance* 31(2): 172–94.

Bifulco, Robert, Jason M. Fletcher, and Stephen L. Ross. 2011. "The Effect of Classmate Characteristics on Post-Secondary Outcomes: Evidence from the Add Health." *American Economic Journal: Economic Policy* 3(1): 25–53.

Blumer, Herbert. 1958. "Race Prejudice as a Sense of Group Position." *Pacific Sociological Review* 1(1): 3–7.

Boozer, Michael A., Alan B. Krueger, and Shari Wolkon. 1992. "Race and School Quality Since *Brown v. Board of Education*." *Brookings Papers on Economic Activity, Microeconomics* 1992(1): 269–326. Accessed September 14, 2020. https://www.brookings.edu/bpea-articles/race-and-school-quality-since-brown-v-board-of-education.

Braddock, Jomills Henry, and James M. McPartland. 1989. "Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation." *Journal of Black Studies* 19(3): 267–89.

Camera, Lauren. 2016. "Achievement Gap Between White and Black Students Still Gaping." *U.S. News and World Report*, January 13.

Card, David, and Jesse Rothstein. 2007. "Racial Segregation and the Black-White Test Score Gap." *Journal of Public Economics* 91(11-12): 2158–84.

Clotfelter, Charles T. 2004. *After* Brown*: The Rise and Retreat of School Desegregation*. Princeton, N.J.: Princeton University Press.

Cobb, W. Montague. 1952. "The Crushing Irony of De Luxe Jim Crow." *Journal of the National Medical Association* 44(5): 386–87.

Condron, Dennis, and Vincent Roscigno. 2003. "Disparities Within: Unequal Spending and Achievement in an Urban School District." *Sociology of Education* 76(1): 18–36.

Corso, Phaedra S., Valerie J. Edwards, Xiangming Fang, and James A. Mercy. 2008. "Health-Related Quality of Life Among Adults Who Experienced Maltreatment During Childhood." *American Journal of Public Health* 98(6): 1094–100.

Crain, Robert. 1970. "School Integration and Occupational Achievement of Negroes." *American Journal of Sociology* 75(4)(Part 2): 593–606.

Crowley, Mary R. 1932. "Cincinnati's Experiment in Negro Education: A Comparative Study of the Mixed and Segregated School." *Journal of Negro Education* 1(1): 25–33.

Darity, William, Jr. 2001. "The Functionality of Market-Based Discrimination." *International Journal of Social Economics* 28(10): 980–86.

———. 2005. "Stratification Economics: The Role of Intergroup Inequality." *Journal of Economics and Finance* 29(2): 144–53.

Darity, William, Jr., and Alicia Jolla. 2010. "Desegregated Schools with Segregated Education." In *The Integration Debate: Competing Futures for America's Cities*, edited by Chester W. Hartman and Gregory D. Squires. New York: Routledge.

Darity, William, Jr., Darrick Hamilton, and James Stewart. 2015. "A Tour de Force in Understanding Intergroup Inequality: An Introduction to Stratification Economics." *Review of Black Political Economy* 42(1-2): 1–6.

Diette, Timothy M. 2012. "The Whiter the Better? Racial Composition and Access to School Resources for Black Students." *Review of Black Political Economy* 39(3): 321–34.

Diette, Timothy M., Arthur H. Goldsmith, Darrick Hamilton, and William Darity Jr. 2015. "Skin Shade Stratification and the Psychological Cost of Unemployment: Is There a Gradient for Black Females?" *Review of Black Political Economy* 42(1): 155–77.

Douglas, Davison M. 2005. *Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954*. New York: Cambridge University Press.

Du Bois, W.E.B. 1935. "Does the Negro Need Separate Schools?" *Journal of Negro Education* 4(3): 328–35.

———. 1970. "Segregation." In *W.E.B. Du Bois: A Reader*, edited by Meyer Weinberg. New York: Harper.

Dube, Shanta R., David F. Williamson, Ted Thompson, Robert F. Anda, and Vincent J. Felitti. 2004. "Assessing the Reliability of Retrospective Reports." *Child Abuse and Neglect* 28(7): 729–37.

Fiela, Jeremy E. 2013. "Decomposing School Resegregation: Social Closure, Racial Imbalance, and Racial Isolation." *American Sociological Review* 78(5): 828–48.

Francis, Dania V., and William A. Darity Jr. 2020. "Isolation: An Alternative to the 'Acting White' Hypothesis in Explaining Black Under-Enrollment in Advanced Courses." *Journal of Economics, Race, and Policy* 3(2): 117–22.

Gleibermann, Erik. 2017. "The College-Town Achievement Gap: Persistent Inequality Plagues the Places Some Prestigious Universities Call Home. Are the Higher-Education Institutions to Blame?" *The Atlantic*, June 1. Accessed September 14, 2020. https://www.theatlantic.com/education/archive/2017/06/the-college-town-achievement-gap/526305.

Goldsmith, Arthur H., Darrick Hamilton, and William Darity Jr. 2007. "From Dark to Light: Skin Color and Wages Among African-Americans." *Journal of Human Resources* 42(4): 701–38.

Grissom, Jason A., and Christopher Redding. 2016. "Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs." *American Educational Research Association—Open* 2(1): 1–25.

Guryan, Jonathan. 2004. "Desegregation and Black Dropout Rates." *American Economic Review* 94(4): 919–43.

Hamilton, Darrick. 2014. "Not Gifted Education, but Quality Education for All." *New York Times, Room for Debate*, June 4. Accessed September 14, 2020. https://www.nytimes.com/roomfordebate/2014/06/03/are-new-york-citys-gifted-classrooms-useful-or-harmful/not-gifted-education-but-quality-education-for-all.

———. 2017. "The Moral Burden on Economists: 2017 National Economic Association Presidential Address." *Institute of New Economic Thinking* (blog), April 13. Accessed September 14, 2020. https://www.ineteconomics.org/perspectives/blog/the-moral-burden-on-economists.

Hanushek, Eric A., John F. Kain, and Steven G. Rivkin. 2009. "New Evidence About *Why*: The Complex Effects of School Racial Composition

on Achievement." *Journal of Labor Economics* 27(3): 349–83.

Hardt, Jochen, and Michael Rutter. 2004. "Validity of Adult Retrospective Reports of Adverse Childhood Experiences: Review of the Evidence." *Journal of Child Psychology and Psychiatry* 45(2): 260–73.

Heckman, James J., and Paul A. LaFontaine. 2010. "The American High School Graduation Rate: Trends and Levels." *Review of Economics and Statistics* 92(2): 244–62.

The Intolerable Burden. 2003. Dir. Chea Prince. Icarus Films. http://icarusfilms.com/if-into.

Jablonskia, Nina G., and George Chaplin. 2000. "The Evolution of Human Skin Coloration." *Journal of Human Evolution* 39(1): 57–106.

Jackson, James S., and Gerald Gurin. 1996. National Survey of Black Americans, Wave 1, 1979–1980 (Computer File). Conducted by the University of Michigan, Survey Research Center, ICPSR. Ann Arbor, Mich. Inter-university Consortium of Political and Social Research (Producer and Distributor).

Johnson, Rucker C. 2011. "Long-Run Impacts of School Desegregation and School Quality on Adult Attainments." *NBER* working paper no. 16664. Cambridge, Mass.: National Bureau of Economic Research.

Johnson, Rucker C., and Alexander Nazaryan. 2019. *Children of the Dream: Why School Integration Works*. New York: Basic Books.

Keil, Julian E., Susan E. Sutherland, Rebecca G. Knapp, Herman A. Tyroler, and William S. Pollitzer. 1992. "Skin Color and Mortality." *American Journal of Epidemiology* 136(11): 295–1302.

Lewis, W. Arthur. 1985. *Racial Conflict and Economic Development*. Cambridge, Mass.: Harvard University Press.

Lewis, Amanda E., and John B. Diamond. 2015. *Despite the Best Intentions: How Racial Inequality Thrives in Good Schools*. New York: Oxford University Press.

Lindsay, Constance A., and Cassandra M.D. Hart. 2017. "Teacher Race and School Discipline: Are Students Suspended Less Often When They Have a Teacher of the Same Race?" *Education Next* 17(1): 72–79.

Lucas, Samuel Roundfield. 1999. *Tracking Inequality: Stratification and Mobility in American High Schools*. New York: Teachers College Press.

McNeal, Laura R. 2009. "The Re-Segregation of Public Education Now and After the End of *Brown v. Board of Education*." *Education and Urban Society* 41(5): 562–74.

Morgan, Ivy, and Ary Amerikaner. 2018. *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*. Washington, D.C.: Education Trust.

Murnane, Richard J. 2013. "U.S. High School Graduation Rates: Patterns and Explanations." *Journal of Economic Literature* 51(2): 370–422.

Oakes, Jeanie. 2005. *Keeping Track: How Schools Structure Inequality*. New Haven, Conn.: Yale University Press.

Orfield, Gary, and Chungmei Lee. 2005. "Why Segregation Matters: Poverty and Educational Inequality." Cambridge, Mass.: The Civil Rights Project, Harvard University. Accessed September 14, 2020. https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality.

———. 2007. *Historic Reversals, Accelerating Re-Segregation, and the Need for New Integration Strategies*. Los Angeles: Civil Rights Project at UCLA.

Reber, Sarah J. 2010. "School Desegregation and Educational Attainment for Blacks." *Journal of Human Resources* 45(4): 893–914.

Rivkin, Steven G. 2000. "School Desegregation, Academic Attainment, and Earning." *Journal of Human Resources* 35(2): 333–46.

Thomas, Karen Kruse. 2011. *Deluxe Jim Crow: Civil Rights and American Health Policy, 1935–1954*. Athens: University of Georgia Press.

Tyson, Karolyn, William Darity Jr., and Domini Castellino. 2005. "It's Not 'a Black Thing': Understanding the Burden of Acting White and Other Dilemmas of High Achievement." *American Sociological Review* 70(4): 582–605.

Yancura, Loriena A., and Carolyn M. Aldwin. 2009. "Stability and Change in Retrospective Reports of Childhood Experiences over a 5-Year Period: Findings from the Davis Longitudinal Study." *Psychology and Aging* 24(3): 715–21.

Separate and Unequal Under One Roof: How the Legacy of Racialized Tracking Perpetuates Within-School Segregation

DANIA V. FRANCIS AND WILLIAM A. DARITY JR.

In this article, we use administrative data from three cohorts of North Carolina public high school students to examine the effects of within-school segregation on the propensity of academically eligible black high school students to take advanced math courses. Our identification strategy takes advantage of cohort-to-cohort variation in the share of eleventh and twelfth grade black students enrolled in advanced math courses when a cohort first enters a school in the ninth grade. We find that a 1 point increase in the percentage of black eleventh and twelfth graders in advanced math courses increases the likelihood that an academically eligible black student will take an advanced math course before they graduate by 22 percentage points in racially diverse schools. Effects are larger for black males.

Keywords: racial segregation, education, inequality, achievement gaps

Nearly 125 years after the *Plessy v. Ferguson* Supreme Court decision of 1896, which affirmed "separate but equal" public facilities by race, American public schools remain segregated.[1] This segregation persists in spite of decades of efforts aimed at integration after the *Brown v. Board of Education* Supreme Court decision of 1954.[2] In this article, we argue that ongoing within-school segregation at the high school level is linked to the legacy of racialized tracking born from the resistance to the desegregation of schools by race.

In the immediate aftermath of the *Brown* decision, schools mobilized to install policies and

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1. *Plessy v. Ferguson*, 163 U.S. 547 (1896).

2. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

practices that both purposely and inadvertently upheld the status quo of "separate but equal" schooling cemented by *Plessy*. One of these policies was the creation of magnet schools that were designed to attract students from white middle-class families to predominantly black inner-city school districts by offering enriched education experiences housed inside schools that were physically located in inner cities. The legacy of magnet schools, however, was to perpetuate within-school segregation where white middle-class students are mostly situated in classes with advanced and enriched curricula and minority students and those navigating poverty are mostly situated in standard or remedial classes (West 1994).

During the 2015–2016 academic year (the most recent year for which data are available), black students made up 15.4 percent of the U.S. public school student population, but were only 9.4 percent of students taking advanced placement (AP) courses.[3] Black students were underrepresented in AP courses in every U.S. state where black students made up at least 5 percent of the student population (Office for Civil Rights 2018). These data paint a picture of an educational landscape in which black and white students experience separate and unequal education experiences even when they are housed in the same school building.[4]

A portion of the underrepresentation of black students in AP classes can be explained by differences in prior academic preparation (Conger, Long, and Iatarola 2009). However, even after accounting for academic preparation, a racial divide in AP course-taking persists (Klopfenstein 2004). Why are academically prepared black students not enrolling in AP courses?

The sociologist Karolyn Tyson puts forth two plausible explanations—fear of failure and fear of being isolated from same-race peers (Tyson, Darity, and Castellino 2005; Tyson 2011). Conceptually, if a black student in the ninth grade arrives on their high school campus and observes a stark racial contrast in AP course enrollment, they may be less likely to enroll in AP courses, either because the lack of successful black AP course-taking role models in the upper grades contributes to their own fear of failure, or because the lack of black students in AP classes in the upper grades leads them to view AP courses as racially isolated spaces. In either case, a school with segregated courses may continue to have segregated courses even in the absence of explicit racialized tracking policies if the segregation of the upper grades makes those in lower grades less likely to take advanced courses when they reach the upper grades themselves. In this way, segregation begets segregation.

This article adds to the literature by testing this theory empirically using data from three cohorts of North Carolina high school students and a quasi-experimental quantitative estimation strategy. To our knowledge, no study to date uses detailed student-level data to examine past segregation as a determinant of black student AP course-taking. We focus specifically on AP math courses because the prerequisites for taking AP math courses are more likely to be standardized across schools and districts than the prerequisites for English, social science, foreign language, and science courses. This makes it easier to determine student eligibility for AP courses and thus easier to restrict the analysis to those students who are academically eligible to take the courses.

Our identification strategy takes advantage of cohort-to-cohort variation in the share of

3. The College Board administers the AP system. Students who take AP courses (which are offered in a wide variety of subjects) are taught an enriched curriculum and have the option to take a standardized AP exam at the end of the course. Depending on their exam performance, AP classes taken in high school can satisfy college credits and prerequisites at many colleges and universities.

4. Evidence on within-school segregation during the 1980s helped spur the detracking movements of the late 1980s and early 1990s (Oakes 2005); however, even after the concerted movement to eliminate rigid academic tracks in U.S. schools, within-school segregation has persisted and is shown to be greater in high schools and middle schools than in elementary schools, but less than measures of across-school segregation (Clotfelter, Ladd, and Vigdor 2003; Conger 2005; Kalogrides and Loeb 2013).

eleventh and twelfth grade black students enrolled in advanced math courses when a cohort first enters a school in the ninth grade. We use maximum likelihood estimation to predict a binary indicator of whether a student ever took advanced math courses during high school as a function of a prior-period share of students in those classes who are black, controlling for student characteristics. The cohort variation allows us to use a school fixed-effects model that accounts for any unobserved school characteristics that would otherwise confound cross-school estimates. We also estimate the model separately for subsets of schools that are racially diverse and schools that are predominantly black.

We find that a 1 percentage point increase in the share of black eleventh and twelfth graders in advanced math courses increases the likelihood that an academically eligible black ninth grade student will take an advanced math course before they graduate by 22 percentage points in racially diverse schools and 11 percentage points in predominantly black schools. Estimates are even larger when the sample is restricted to black male students.

BACKGROUND

At the high school level, within-school racial segregation often manifests as white and Asian students enrolling in advanced-level courses and black and Hispanic students in standard or remedial-level courses. Why do advanced placement courses matter? Evidence shows that students in advanced courses benefit from exposure to more highly trained and effective teachers, a greater likelihood of matriculation to a four-year college or university, and an increased access to beneficial social networks (Darity and Jolla 2009; Long, Conger, and Iatarola 2012; Oakes 2005; Smith, Hurwitz, and Avery 2017; Yonezawa, Wells, and Serna 2002). For underrepresented minority students, access to advanced math courses can result in improved long-term life outcomes such as earnings and income because math courses operate as a gateway into lucrative STEM career fields such as engineering and computer science (Chetty, Friedman, and Rockoff 2014). In light of these advantages, it is important to explain why black and Hispanic students are less likely to take advanced courses than their white and Asian counterparts.

Much of the disparity can be explained by differential preparation, which can lead to differential eligibility to enroll in advanced courses. For example, Dylan Conger, Mark Long, and Patrice Iatarola (2009) use data from two cohorts of Florida public high school students to show that the racial disparity in course-taking is eliminated after controlling for eighth grade test scores. However, others have demonstrated that a black-white gap in AP course-taking remains even after accounting for preparation (Klopfenstein 2004). This implies that even academically eligible black students are less likely to take AP courses than their white and Asian peers.

What explains the underenrollment of academically eligible black students in AP courses? Research seeking to answer this question has paralleled the literature on explanations for the persistent black-white test score gap where both structural and cultural arguments have been advanced. Structural arguments include the differential likelihood of teachers and academic counselors to encourage similarly qualified black versus white high school students to take advanced coursework and prepare for college (Archbald, Glutting, and Qian 2009; Darity and Jolla 2009; Francis, de Oliveira, and Dimmitt 2019; Gershenson, Holt, and Papageorge 2016; Oakes 2005); racial wealth disparities that lead to differences in access to resources that make AP courses less intimidating like outside tutoring (Diamond 2006); and lack of access to social circles where students and parents trade knowledge on the best courses to take (Coleman 1988; Hale 2001).

In contrast, those who make cultural arguments theorize that black students have less motivation or less of an academic orientation in part because they fear being accused of "acting white" by their black peers (Austen-Smith and Fryer 2005; Klopfenstein 2004; Fryer and Torelli 2010). This argument is typically undergirded by the oppositional culture theory (Fordham and Ogbu 1986; Ogbu 2008), which posits that black Americans, as involuntary minorities in the United States, perceive structural barri-

ers in society such as employment and wage discrimination as inhibiting their chances for successful life outcomes.[5] As a coping mechanism, black Americans then adopt an oppositional cultural stance, devaluing attitudes and behavior that typify the dominant culture such as studying hard, speaking properly, and dressing in a preppy style. Although many researchers have since tested and failed to find support for this theory, it continues to resurface as an explanation for differences in black and white academic outcomes (Cook and Ludwig 1998; Harris 2006; Noguera 2009; for a brief survey of studies that test the hypothesis, see Andrews and Swinton 2014).

Research by the sociologist Karolyn Tyson and coauthors sheds new light on the debate between cultural and structural explanations for black-white differences in AP course-taking (Tyson, Darity, and Castellino 2005; Tyson 2011). In an attempt to explain black student underrepresentation in AP math courses and to investigate the "acting white" hypothesis as a potential explanation, Tyson and her team interviewed and observed dozens of high-achieving black high school students in North Carolina. They find that black students are more likely to point to a fear of failure than a fear of peer rejection as a reason for not taking advanced courses.[6] That black students are or might be more likely to report feeling a fear of failure than other students has no basis. In fact, Kirsten Caraway and colleagues (2003) administered the *Generalized Fear of Failure* instrument to a sample of high school students from the southeast United States and find no differences in the fear of failure by race.

Tyson and her team also find that many white students were as likely as black students to say they faced peer rejection as a result of their academic achievements. Finally, they find that the "acting white" slur became salient only in school settings where the student composition was racially diverse and there was a clear historical pattern of racialized tracking. If the "acting white" phenomenon occurred, it was most likely to happen where a stark racial contrast could be observed—black students occupying general education courses and white (and Asian) students dominating advanced courses. When these two conditions were not met (that is, in predominantly black schools and in diverse schools with proportional racial representation in advanced courses), students did not report feeling any peer pressure to avoid taking advanced courses to deflect the "acting white" charge. Tyson therefore hypothesizes that negative cultural pressures arise only when adverse structural conditions, such as a historical pattern of racialized tracking, are present in schools.

This article tests empirically whether current racial divisions in advanced courses may perpetuate future racial divisions. Conceptually, we ask whether a black ninth grade student is more likely to take an advanced placement course if more black upper-class students are taking those courses. The presence of black upper-class students in AP courses may reduce the fear of failure that many of the students in Tyson's study pointed out. Their presence may also make AP courses seem like less racially isolated spaces. Our analysis will not enable us to distinguish between these two explanations; it will, however, provide evidence as to whether racial segregation within schools can self-perpetuate even in the absence of specific policies or actions by school administrators.

DATA AND METHODOLOGY

We conduct our analysis using North Carolina public school data housed at the North Carolina Education Research Data Center (NCERDC) at Duke University. The NCERDC data are particularly useful because they provide detailed

5. Signithia Fordham and John Ogbu distinguish between voluntary minorities who choose to come to the United States because that choice is better than their alternatives and involuntary minorities who were either historically enslaved (blacks) or occupied (American Indians).

6. Naihobe Gonzalez (2017) finds strong evidence in support of this argument. Using detailed student-level data from Oakland, California, high school students, she demonstrates through a regression discontinuity framework that students who received a positive signal that they have "AP Potential" written on their PSAT score report were more likely to enroll in an AP course than peers who had similar academic records but were just on the other side of the PSAT score cutoff for receiving the AP Potential signal.

Table 1. Student Demographics

	Number of Students	Percent of Sample
American Indian	3,238	1
Asian	4,874	2
Black	69,732	29
Hispanic	12,584	5
Multiracial	4,562	2
White	145,484	61
Female	122,071	51
Male	118,416	49
Parent education high school or less	100,297	43
Free or reduced-price lunch eligible	89,637	37
All students	240,487	—

Source: Authors' calculations based on NCERDC data.

information on the universe of North Carolina public school students that allows researchers to track students over time and across multiple levels, including student-level, course-level, and school-level files. Specifically, we follow three cohorts of public high school students who entered high school in the 2004–2005, 2005–2006, and 2006–2007 school years and were on track to graduate in the springs of 2008, 2009, and 2010.

We construct a student-level dataset containing student academic test scores, the timing and subject matter of courses taken, and demographic variables. We merge these student-level files with school-level files that include school characteristics and school demographic data that allow us to construct the school-level shares of black students taking AP courses. In total, our analysis is based on more than 240,000 students in more than five hundred schools from one hundred school districts. Sample demographics at the student and school levels are presented in tables 1 and 2 respectively.

White students make up 61 percent of the total sample, followed by black students at 29 percent.[7] Hispanic students, Asian students, American Indian students, and multiracial students make up the remainder of the sample, with none of those groups representing more than 5 percent of the sample individually. The sample is split evenly between male and female students. Regarding socioeconomic status, roughly 43 percent of the sample have parents whose highest level of education is a high school diploma and 37 percent are eligible for free or reduced-price lunch. Variation in sample demographics between cohorts is minimal. Demographics separated by cohort are presented in table A1.

Variation in school racial and socioeconomic makeup is considerable. Turning to table 2, the average school is composed of about 30 to 35 percent black students depending on cohort, however, that figure can vary from 0 to 100 percent across the sample. Similarly, the average school is composed of around 55 percent white students with a range from 0 to 99 percent. Free or reduced-price lunch eligible students make up between 40 to 50 percent of the average school depending on cohort, with a range from 0 to 99 percent.

7. These sample percentages are slightly different from the population of North Carolina public high school students because we are focusing on intact cohorts for whom we have records through twelfth grade. Given that black students have a higher dropout rate on average, the percentage of black students in our sample is lower than that in the high school population overall. Our sample closely mirrors the makeup of North Carolina high school graduates, which was composed of 62 percent white students and 29 percent black students in 2008.

Table 2. School-Level Demographic Composition

	N	Mean	SD	Min	Max
Cohort 1					
Percent American Indian	479	0.9	2.9	0.0	27.3
Percent Asian	479	1.8	2.8	0.0	25.1
Percent black	479	34.4	25.6	0.2	100.0
Percent Hispanic	479	7.2	6.5	0.0	41.7
Percent white	479	55.7	27.0	0.0	98.6
Percent free or reduced-price lunch eligible	364	41.2	17.7	0.0	85.6
Cohort 2					
Percent American Indian	495	1.0	3.1	0.0	28.3
Percent Asian	495	1.8	2.9	0.0	27.3
Percent black	495	34.6	25.6	0.2	98.4
Percent Hispanic	495	7.7	7.0	0.0	40.6
Percent white	495	54.9	27.3	0.0	98.3
Percent free or reduced-price lunch eligible	471	48.6	19.8	4.5	98.8
Cohort 3					
Percent American Indian	515	1.1	3.3	0.0	30.3
Percent Asian	515	1.9	3.0	0.0	26.1
Percent black	515	30.5	25.0	0.0	100.0
Percent Hispanic	515	8.9	7.6	0.0	43.9
Percent white	515	54.4	26.6	0.0	98.6
Percent free or reduced-price lunch eligible	515	47.8	21.8	0.0	96.8

Source: Authors' calculations based on NCERDC data.

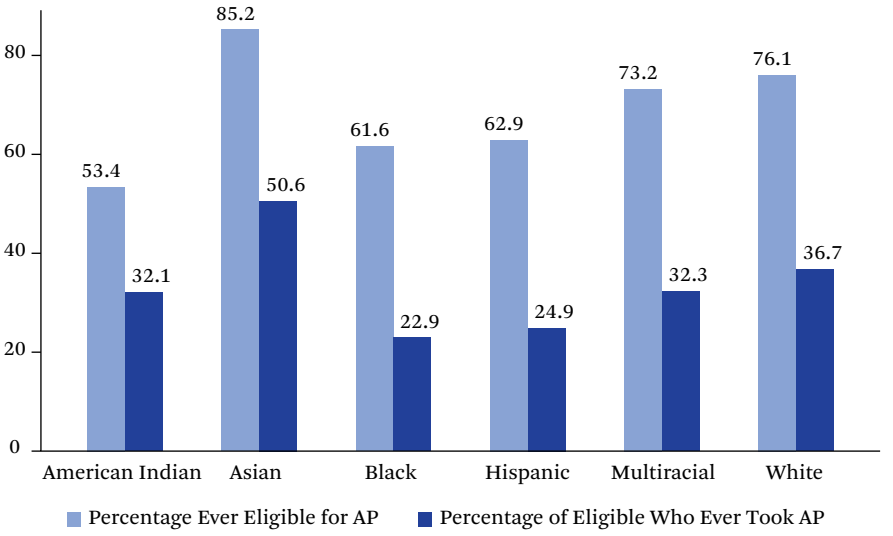
ADVANCED COURSE PARTICIPATION

For a student to be able to choose to take an AP course, they must be academically eligible. Thus, it would be ideal to restrict our analysis to students who are eligible. Our data, however, do not include eligibility indicators for students taking specific courses, presenting a challenge for our estimation strategy. For this reason, we focus specifically on AP math courses. The prerequisites for taking AP Calculus, for example, are more likely to be standardized across schools and districts than the prerequisites for English, social science, foreign language, and science courses because, in most schools, math is still taught sequentially. This sequential nature of math education makes it easier to create a proxy for student eligibility for AP math courses and thus easier to restrict the analysis to those students who are likely to be academically eligible to take the courses.

We define the following six math courses as advanced: AP Calculus (both AB and BC), AP Statistics, IB Math High Level, Discrete Math, and Probability & Statistics.[8] Although we cannot observe the exact prerequisites for all the schools in our sample, a typical prerequisite for

8. IB stands for International Baccalaureate, a nonprofit organization operating in more than one hundred countries to provide enriched academic coursework at the primary and secondary levels that focuses on preparation for a globalized world (see www.ibo.org). We include discrete math and probability and statistics as advanced courses, even though they are not specifically AP or IB courses, for two reasons. First, these courses teach advanced math concepts and require similar prerequisites to the AP and IB courses. Second, we discovered during our data analysis that most students actually take these courses only after they have taken an AP or IB course.

Figure 1. Student AP Math Eligibility



Source: Authors' calculations based on NCERDC data.

taking an advanced placement math course is completion of Algebra II. Like most prerequisites, some students who have not met the requirement may still be allowed to take advanced courses, and some students who appear to have met the prerequisite on paper may not be allowed to take the advanced course for reasons unknown to us as researchers. We feel confident, however, that an indication of whether a student has taken Algebra II is a strong proxy for eligibility. For example, among those students who first took an advanced math course in eleventh grade, 96.5 percent had taken Algebra II by the end of tenth grade and 99.7 percent had taken it the first semester of the eleventh grade (prior to taking their advanced math course). Among students who first took an advanced math course in the twelfth grade, 96 percent had taken Algebra II by the end of the eleventh grade and 99.7 percent in the first semester of twelfth grade (prior to taking their advanced math course). Thus, in our analysis, we consider a student as eligible for advanced math courses if they have taken Algebra II.

To account for the possibility that eligibility may also depend on a student's performance in the prior math classes (not just whether they completed the class), we weight each student observation on a linear transformation of their prior standardized test scores in Algebra, Algebra II, and Geometry such that students with higher scores receive more weight in our estimations.[9]

Based on our proxy for eligibility, the summary statistics in figure 1 reflect student eligibility status as of the beginning of twelfth grade and advanced course take-up by the end of twelfth grade by race and ethnicity. By the beginning of twelfth grade, 62 percent of black students and 63 percent of Hispanic students were eligible to take an advanced math course, but only 23 percent of those eligible black students and 25 percent of those eligible Hispanic students actually took an advanced math course.

Comparatively, 76 percent of white students and 85 percent of Asian students were eligible to take advanced math courses. Thirty-seven percent of eligible white students and 51 percent of eligible Asian students actually took an advanced math course. Restricting our analysis sample to black students who were eligible to take an advanced math course by their eleventh or twelfth grade years leaves us with approxi-

9. Our results are qualitatively similar whether we include or do not include the weighting mechanism. The weighted model produces smaller standard errors and more precise estimates and is therefore our preferred specification.

mately thirty thousand student-level observations.

EMPIRICAL STRATEGY

To estimate the effects of current within-school segregation on future within-school segregation, we predict a binary indicator of whether a student ever took at least one advanced math course during high school as a function of a prior-period share of students in those classes who are black, controlling for student characteristics and school fixed effects. Using a linear probability model, we predict the probability that student i in school j at time t took an advanced math course ($TookAdvanced_{ijt}$):

$$pr(TookAdvanced_{ijt} = 1) = \alpha + \beta ShareAP_{jt\text{-}1} + \Gamma X_i + \delta_c + \delta_j + \varepsilon_i . \quad (1)$$

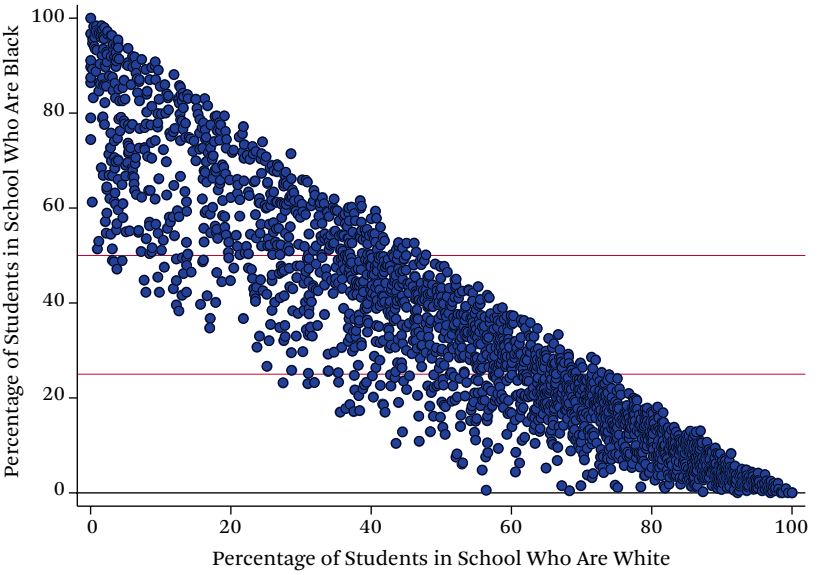
The variable $ShareAP_{jt\text{-}1}$ is a measure of the share of black students in AP courses in school j when student i arrived at the school in ninth grade, before the student himself or herself was typically eligible for advanced courses. This temporal difference is designed to capture the extent to which black students observe segregated classes in their school before they decide whether to take advanced courses. Studies of within-school segregation have often relied on segregation measures that are commonly used in the housing segregation literature such as the dissimilarity index, the isolation index, and the exposure index. (Clotfelter, Ladd, and Vigdor 2003; Conger 2005; Kalogrides and Loeb 2013). These measures, however, are limited in that they require the pairwise comparison of only two racial or ethnic groups, which is not ideal when examining segregation in a multiracial or multiethnic setting. For example, in a school that has a significant share of black, Hispanic, and white students, but the black and Hispanic students are segregated into lower-level classes, the binary black-nonblack segregation measures that have been used in these studies will not accurately reflect the extent to which black (or Hispanic) students are underrepresented in advanced courses. Black students will be in classes with Hispanic students (who are classified as nonblack) and the pairwise measure will count them as not being segregated from other nonblack students, even though both the black and Hispanic students are underrepresented in the advanced classes. In the current context, where we are concerned with black student representation in advanced courses, we use a simple share measure because it more accurately reflects the perceived presence of black students in those courses. It is also easier to interpret and captures the same information as the more complex measures once school-level shares are also controlled for as a covariate.

We control for observable student-level differences (X_i). These include eighth grade math and reading test scores, eighth grade participation in the academically and intellectually gifted program, parent education level, and free or reduced-price lunch eligibility. We take advantage of having three distinct cohorts of students by including school fixed effects (δ_j) that effectively control for unobservable differences between schools that do not vary over time. Thus, identification is based on within-school differences in the prior share of black students in AP math classes across the three cohorts. Finally, we control for which cohort a student belongs to (δ_c) in order to account for unobservable factors that may affect cohort-specific AP course participation such as a change in AP policy in a given year. Our coefficient of interest (β), will give us the effect of the eleventh and twelfth grade share of black students in AP math courses on the propensity of eligible ninth grade students ever to have taken an AP math course by the time they finish twelfth grade.[10]

We estimate each model separately by gender as well as separately for groups of schools

10. By including cohort and school fixed effects, we limit two major threats to the validity of our estimates, however, there could still be a concern that there are unobserved changes happening within schools, over time, other than the share of students in AP math courses who are black, that could bias our estimates. For example, a school could recruit a black AP math teacher, or an engaging principal who succeeds in encouraging more black students to take AP math courses. However, given that fewer than 14 percent of North Carolina public school teachers are black, and administrator turnover is not widespread in any given year, we do not believe

Figure 2. Racial Composition of Sample Schools



Source: Authors' calculations based on NCERDC data.

that are defined as racially diverse, and predominantly black. The precise definition of these school groupings is described in the next section.

SCHOOL RACIAL DIVERSITY GROUPINGS

Within-school segregation may affect black students differently depending on the racial composition of the school. In predominantly black schools, academically advanced black students may feel less racial isolation from taking advanced courses not only because the likelihood of more black students in advanced courses is greater, but also because more of their peer group members are enrolled in the school as a whole (Tyson, Darity, and Castellino 2005; Tyson 2011). Additionally, when racial homogeneity is greater, peer groups are more likely to be formed along dimensions other than race (Tatum 2003). Black students in racially diverse schools with a clear racial divide in classroom composition, however, may be the most vulnerable to racial isolation from taking advanced courses (Diette et al. 2021, this issue). For this reason, we estimate the model separately for racially diverse and for predominantly black schools.

We define predominantly black schools as those in which black students make up 50 percent or more of the student population, and racially diverse schools as those in which black students make up more than 25 percent but less than 50 percent.[11] We eliminate schools where black and white students combined make up less than 50 percent of the student population (fewer than 4 percent of schools in any given year). Figure 2 demonstrates these sample groupings graphically for schools in 2009 (the year the middle cohort was in twelfth grade). The groupings for other analysis years look similar.

these factors pose a serious threat to our identification strategy, which relies on more than five hundred schools and almost 250,000 students.

11. As part of our robustness checks, we vary the thresholds that determine whether a school is labeled racially diverse or predominantly black. Our main results are robust to the following two adjustments: decreasing the lower threshold of the share of black students in racially diverse schools from 25 percent to 15 percent, and increasing the threshold of the share of black students in predominantly black schools from 50 percent to 60 and 75 percent.

Table 3. School and Student Characteristics

	Racially Diverse		Predominantly Black	
	Mean	SD	Mean	SD
School percent black	37.5	7.3	67.8	13.3
[min, max]	[25, 50]		[50, 100]	
AP course percent black	15.9	12.0	38.7	24.0
[min, max]	[0, 100]		[0, 100]	
Number of AP math courses offered	9	14	4	8
[min, max]	[0, 108]		[0, 46]	

Source: Authors' calculations based on NCERDC data.

Table 3 presents summary statistics for the percent of students in a school who are black, the percent of AP course-takers in a school who are black, and the number of AP math courses offered in a school by the racial diversity of the school. In both racial diversity groupings, black students are underrepresented in AP math courses relative to their representation in the school overall. Racially diverse schools, however, offer significantly more AP math courses than predominantly black schools.

RESULTS

Our main results are presented in table 4. In this table, each cell represents the effect of the eleventh and twelfth grade share of black students in AP math courses on the propensity of eligible ninth grade students ever to have taken an AP math course by the time they finish twelfth grade. These values are obtained by estimating equation 1 separately for racially diverse schools and predominantly black schools. Each estimate includes student-level controls and school and cohort fixed effects. Robust standard errors are presented in parentheses.

Individual students can have independent likelihoods of taking an AP math course that are related to their academic preparation, socioeconomic status, race, and more. We estimate the marginal increase in the likelihood that an individual black freshman student would ever take an AP math course if the share of upper-class black students taking AP math courses increased. So, for example, in a racially diverse school, if a black freshman student was 40 percent likely based on their background characteristics to ever take an AP math course, then the estimate in the first row of column 1 of table 4 tells us that a 1 percentage point increase in the share of black eleventh and twelfth graders in AP math courses (for example, going from the mean share of 16 percent up to 17 percent) would increase the likelihood of that student ever taking an AP math course by about 22 percentage points—from 40 percent likely up to 62 percent likely.

The corresponding estimate in predominantly black schools represents an increased likelihood of AP math course participation of about 11 percentage points. The directions and relative magnitudes of these two estimates are what we would expect given our theoretical predictions. The effect is larger in racially diverse schools where a racial separation of students, with white students disproportionately represented in the advanced math courses, may be more salient.[12]

HETEROGENEOUS EFFECTS BY GENDER

We estimate our models separately by gender because both role modeling and avoidance of social isolation may fall along gender as well as

12. As a falsification check on our results, we estimate the effects of the share of AP math students who are black on the likelihood of a white student ever taking an AP math course (that is, we estimate equation 1 on the sample of white students in the cohort, but keep the independent variable of interest unchanged). In both racially diverse and predominantly black schools, the point estimates on β are not significantly different from 0 (0.0087 with a standard error of 0.0083 in racially diverse schools and 0.007 with a standard error of 0.0121 in predominantly black schools).

Table 4. Effects of Share of Black Students in AP Courses on Propensity of Eligible Black Students to Take an AP Course

	(1) All Black Students	(2) Black Female Students	(3) Black Male Students
Racially diverse schools	0.215***	0.234***	0.390***
	−0.013	(0.0219)	(0.0352)
Predominantly black schools	0.110***	0.106***	0.279***
	−0.00756	(0.0129)	(0.0212)

Source: Authors' analyses based on NCERDC data.
Note: Robust standard errors in parentheses. Student controls include eighth grade test scores, eighth grade AIG participation, parent education, and free or reduced-price lunch eligibility. Estimates include school and cohort fixed effects.
*p<.05; **p < .01; ***p < .001

racial lines (Dasgupta 2011). Thus it may not be enough that other black students are taking advanced courses, but it may be important that black male students see other black male students in advanced courses and black female students see other black female students in advanced courses. Column 2 in table 4 replicates the main results for a subsample of female students with the independent variable of interest changed to the share of black female eleventh and twelfth graders. Column 3 in table 4 replicates the main results for a subset of black male students.

A 1 percentage point increase in the share of black female students in the upper grades in AP math courses increases the likelihood of a black female ninth grader taking an AP math class by the time she graduates by 23 percentage points in racially diverse schools, and only 11 percentage points in predominantly black schools. A 1 percentage point increase in the share of black male students in the upper grades in AP math courses increases the likelihood of a black male freshman taking an AP math class by the time he graduates by 39 percentage points in racially diverse schools and 28 percentage points in predominantly black schools. The larger effect sizes for both males and females separately when compared with the combined results indicate that race-gender peer groups have more social power than race groups alone. The largest results are for black male students in racially diverse schools.

DISCUSSION

Empirically, we demonstrate that the racial composition of upper grade advanced math courses in high schools affects the propensity that black students in the lower grades will opt to take those classes at some point before they graduate. The empirical results are consistent with fear of racial isolation as an explanation for black student underenrollment in advanced courses. The results are also consistent with role modeling as an explanation. Black students may believe that they have a better chance of performing well in advanced classes if they see other black students in the upper grades taking those courses. The limitations of our data prevent us from distinguishing between racial isolation and role modeling as explanations for black student underenrollment. Both explanations, however, are produced by structural forces such as racialized tracking that produce a visible racial divide in courses with white students occupying the advanced courses.

The empirical results presented here are less consistent with cultural arguments such as the "acting white" hypothesis and Signithia Fordham and John Ogbu's (1986) oppositional culture theory. If an ingrained culture of oppositionality among black students led them to devalue schooling, we would not expect year-to-year variation in a school's black student representation in advanced courses to influence the propensity of younger black student cohorts to take those courses. Our results indicate that the propensity of black students to take advanced

courses is context specific—a direct contradiction to theories that presuppose that black students are culturally programmed or behaviorally inclined against positive educational investments.

Culturalists may argue that different school contexts can create different cultural landscapes. For example, some culturalists have argued that schools with higher concentrations of poor and minority students may generate more oppositionality because the lack of positive role models and diminished life outcomes create a culture of poverty (Wilson 2011).[13] Although this notion may explain variation in advanced course participation across schools, it does not explain the within-school variation we find.

For culturalists to argue that cultural and behavioral responses can be context specific, they must also then explain why concentrations of black students in advanced classes are higher to begin with in some schools than in others and in some years (within schools) than in others. Why does a critical mass even emerge in some schools that makes it possible to create a magnet effect for other black students to take the classes? We submit that the answer to this question is structural. Some schools have institutional practices and policies that have historically included or excluded black students from advanced classes. At a minimum, culturalists must subscribe to the idea that institutional structures have created the context-specific environments that give rise to school- and year-specific cultures for their theories to be consistent with the evidence presented here.

Our results have important policy implications. Once the initial crowding of white students into higher-level classes (and black students into lower-level classes) takes place, the process of maintaining the effects of racialized tracking becomes self-reinforcing. Moreover, no "natural" self-correcting mechanism reverses this trajectory. The introduction to this journal issue refers to *Plessy v. Ferguson* as the foundation on which "white supremacy was institutionalized and crystallized all over the country" (powell, Myers, and Gooden 2021). Nearly 125 years later, the institutionalization of white supremacy is still reflected in our schools. To address within-school segregation, it is not enough to simply eliminate overt practices of racialized tracking. The legacy of segregation can generate continued segregation even in the absence of tracking. It is also not enough to attempt to desegregate advanced courses in a singleton fashion. Instead, schools would benefit from a concerted short-term effort to increase black students' enrollment in advanced courses (this effort should be coupled with increased academic support for students who do enroll and may need additional support).

What policies can schools implement? One solution is to dismantle the advanced course system and provide enriched education for *all* students—providing additional support to those students who may need it. However, given the amount of political capital, human capital, and profit associated with the advanced course infrastructure, this solution is likely not politically feasible.

Barring a complete dismantling of the infrastructures of segregation, one thing schools can do is address institutional barriers-to-entry into advanced courses that are racially biased. Susan Yonezawa, Amy Wells, and Irene Serna (2002) describe hidden barriers such as counselors, teachers, and administrators distributing information about advanced courses unevenly by race and socioeconomic status or applying prerequisites (whether stated or hidden) to minority students but waiving them for white students. William Darity and Alicia Jolla (2009) describe school counselors who encourage or discourage students from taking advanced courses along racial lines. Dania Fran-

13. Even this argument, however, is debatable. Middle-class black students who have more direct contact with whites may experience more discrimination and racism than their less affluent peers (Cose 1995; Pattillo 2013; Shedd 2015). Further, a consequence of this discrimination is the realization that even though they have played by the rules and achieved education and status, they are still limited in their life outcomes because of their race. According to oppositional culture theory, middle-class black students could be as prone to oppositionality as black students from lower-income backgrounds.

cis, Angela de Oliveira, and Carey Dimmitt (2019) identify bias in the likelihood of school counselors to recommend black female students for advanced math courses. These barriers, sometimes hidden, sometimes overt, are additional obstacles to black students seeking to take advanced courses. Schools should be transparent in the information they disseminate. Decisions about who may take advanced courses should not funnel through only a few gatekeepers, but instead through multiple stakeholders, including parents, teachers, students, and other school professionals.

If schools can reduce these barriers, then given the empirical results in this study, the boost of enrollment for one cohort of students would encourage the next cohort of students to enroll and the next cohort after that. Thus, a short-term, concerted effort could lead to long-term benefits in terms of closing the advanced course participation gap and eliminating institutionalized segregation within our schools.

Table A1. Sample Demographics by Cohort

	Full Sample		Cohort 1		Cohort 2		Cohort 3	
	Number of Students	Percent of Sample	Number of Students	Percent of Sample	Number of Students	Percent of Sample	Number of Students	Percent of Sample
American Indian	3,238	1	974	1	1,110	1	1,154	1
Asian	4,874	2	1,533	2	1,610	2	1,731	2
Black	69,732	29	21,804	29	23,258	29	24,670	30
Hispanic	12,584	5	3,419	4	4,263	5	4,902	6
Multiracial	4,562	2	1,189	2	1,569	2	1,804	2
White	145,484	61	47,151	62	49,087	61	49,246	59
Female	122,071	51	38,547	51	41,112	51	42,412	51
Male	118,416	49	37,523	49	39,786	49	41,107	49
Parent high school or less	100,297	43	31,689	42	34,103	42	34,505	44
Free or reduced-price lunch eligible	89,637	37	26,852	35	30,914	38	31,871	38
All students	240,487	—	76,070	—	80,898	—	83,519	—

Source: Authors' calculations based on data from the NCERDC.

REFERENCES

Andrews, Rodney J., and Omari H. Swinton. 2014. "The Persistent Myths of 'Acting White' and Race Neutral Alternatives to Affirmative Action in Admissions." *Review of Black Political Economy* 41(3): 357–71.

Archbald, Doug, Joseph Glutting, and Xiaoyu Qian. 2009. "Getting into Honors or Not: An Analysis of the Relative Influence of Grades, Test Scores, and Race on Track Placement in a Comprehensive High School." *American Secondary Education* 37(2): 65–81.

Austen-Smith, David, and Roland G. Fryer. 2005. "An Economic Analysis of 'Acting White.'" *Quarterly Journal of Economics* 120(2): 551–83.

Caraway, Kirsten, Carolyn M. Tucker, Wendy M. Reinke, and Charles Hall. 2003. "Self-Efficacy, Goal Orientation, and Fear of Failure as Predictors of School Engagement in High School Students." *Psychology in the Schools* 40(4): 417–27.

Chetty, Raj, John N. Friedman, and Jonah E. Rockoff. 2014. "Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood." *American Economic Review* 104(9): 2633–679.

Clotfelter, Charles T., Helen F. Ladd, and Jacob L. Vigdor. 2003. "Segregation and Resegregation in North Carolina's Public School Classrooms." *North Carolina Law Review* 81(4): 1463–512.

Coleman, James S. 1988. "Social Capital in the Creation of Human Capital." *American Journal of Sociology* 94(S): S95–120.

Conger, Dylan. 2005. "Within-School Segregation in an Urban School District." *Educational Evaluation and Policy Analysis* 27(3): 225–44.

Conger, Dylan, Mark C. Long, and Patrice Iatarola. 2009. "Explaining Race, Poverty, and Gender Disparities in Advanced Course-Taking." *Journal of Policy Analysis and Management* 28(4): 555–76.

Cook, Philip J., and Jens Ludwig. 1998. "The Burden of 'Acting White': Do Black Adolescents Disparage Academic Achievement?" In *The Black-White Test Score Gap*, edited by Christopher Jencks and Meredith Phillips. Washington, D.C.: Brookings Institution.

Cose, Ellis. 1995. *The Rage of a Privileged Class: Why are Middle-Class Blacks Angry? Why Should America Care?* New York: Harper Perennial.

Darity, William, Jr., and Alicia Jolla. 2009. "Desegregated Schools with Segregated Education." In *The Integration Debate: Competing Futures For American Cities*, edited by Chester Hartman and Gregory D. Squires. New York: Routledge.

Dasgupta, Nilanjana. 2011. "Ingroup Experts and Peers as Social Vaccines Who Inoculate the Self-Concept: The Stereotype Inoculation Model." *Psychological Inquiry* 22(4): 231–46.

Diamond, John B. 2006. "Still Separate and Unequal: Examining Race, Opportunity, and School Achievement in 'Integrated' Suburbs." *Journal of Negro Education* 75(3): 495–505.

Diette, Timothy M., Darrick Hamilton, Arthur H. Goldsmith, and William A. Darity Jr. 2021. "Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 166–86. DOI: 10.7758/RSF.2021.7.1.10.

Fordham, Signithia, and John U. Ogbu. 1986. "Black Students' School Success: Coping with the 'Burden of Acting White.'" *Urban Review* 18(3): 176–206.

Francis, Dania V., Angela C.M. de Oliveira, and Carey Dimmitt. 2019. "Do School Counselors Exhibit Bias in Recommending Students for Advanced Coursework?" *B.E. Journal of Economic Analysis & Policy* 19(4): 1–17. DOI: 10.1515/bejeap-2018-0189.

Fryer, Roland G., and Paul Torelli. 2010. "An Empirical Analysis of 'Acting White.'" *Journal of Public Economics* 94(5): 380–96.

Gershenson, Seth, Stephen B. Holt, and Nicholas W. Papageorge. 2016. "Who Believes in Me? The Effect of Student–Teacher Demographic Match on Teacher Expectations." *Economics of Education Review* 52(June): 209–24.

Gonzalez, Naihobe. 2017. "How Learning About One's Ability Affects Educational Investments: Evidence from the Advanced Placement Program." Working paper no. 52. February 27. Oakland, Calif.: Mathematica Policy Research. Accessed October 6, 2020. https://www.mathematica.org/our-publications-and-findings/publications/how-learning-about-ones-ability-affects-educational-investments-evidence-from-the-advanced-placement.

Hale, Janice E. 2001. *Learning While Black: Creating Educational Excellence for African American Children*. Baltimore, Md.: Johns Hopkins University Press.

Harris, Angel. 2006. "I (Don't) Hate School: Revisit-

ing Oppositional Culture Theory of Blacks' Resistance to Schooling." *Social Forces* 85(2): 797–833.

Kalogrides, Demetra, and Susanna Loeb. 2013. "Different Teachers, Different Peers: The Magnitude of Student Sorting Within Schools." *Educational Researcher* 42(6): 304–16.

Klopfenstein, Kristin. 2004. "Advanced Placement: Do Minorities Have Equal Opportunity?" *Economics of Education Review* 23(2): 115–31.

Long, Mark C., Dylan Conger, and Patrice Iatarola. 2012. "Effects of High School Course-Taking on Secondary and Postsecondary Success." *American Educational Research Journal* 49(2): 285–322.

Noguera, Pedro A. 2009. *The Trouble with Black Boys: . . . And Other Reflections on Race, Equity, and the Future of Public Education*. San Francisco: Jossey-Bass.

Oakes, Jeannie. 2005. *Keeping Track: How Schools Structure Inequality*, 2nd ed. New Haven, Conn.: Yale University Press.

Office for Civil Rights. 2018. "Civil Rights Data Collection (CRDC) for the 2015–16 School Year." Washington: U.S. Department of Education. Accessed September 16, 2020. https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16.html.

Ogbu, John U. 2008. *Minority Status, Oppositional Culture and Schooling*. New York: Routledge.

Pattillo, Mary. 2013. *Black Picket Fences: Privilege and Peril Among the Black Middle Class*, 2nd ed. Chicago: University of Chicago Press.

powell, john a., Samuel L. Myers Jr., and Susan T. Gooden. 2021. "Introduction to the Issue." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 7(1): 1–17. DOI: 10.7758/RSF.2021.7.1.01.

Shedd, Carla. 2015. *Unequal City: Race, Schools, and Perceptions of Injustice*. New York: Russell Sage Foundation.

Smith, Jonathan, Michael Hurwitz, and Christopher Avery. 2017. "Giving College Credit Where It Is Due: Advanced Placement Exam Scores and College Outcomes." *Journal of Labor Economics* 35(1): 67–147.

Tatum, Beverly Daniel. 2003. *Why Are All the Black Kids Sitting Together in the Cafeteria? A Psychologist Explains the Development of Racial Identity.* New York: Basic Books.

Tyson, Karolyn. 2011. *Integration Interrupted: Tracking, Black Students, and Acting White After Brown*. New York: Oxford University Press.

Tyson, Karolyn, William Darity Jr., and Domini R. Castellino. 2005. "It's Not 'A Black Thing': Understanding the Burden of Acting White and Other Dilemmas of High Achievement." *American Sociological Review* 70(4): 582–605.

West, Kimberly C. 1994. "A Desegregation Tool that Backfired: Magnet Schools and Classroom Segregation." *Yale Law Review* 103(8): 2567–592.

Wilson, William Julius. 2011. *When Work Disappears: The World of the New Urban Poor*. New York: Vintage.

Yonezawa, Susan, Amy Stuart Wells, and Irene Serna. 2002. "Choosing Tracks: 'Freedom of Choice' in Detracking Schools." *American Educational Research Journal* 39(1): 37–67.