

Winter 1-1-1996

Plessy v. Ferguson - 100 Years Later

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Legal History Commons](#)

Recommended Citation

Plessy v. Ferguson - 100 Years Later, 53 Wash. & Lee L. Rev. 9 (1996),
<https://scholarlycommons.law.wlu.edu/wlulr/vol53/iss1/3>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

Plessy v. Ferguson — 100 Years Later

Honorable John Minor Wisdom*

I am deeply honored to speak to the graduating class of the College of Law at Washington and Lee University. The Lee Chapel, the Lee House, the line of beautiful colonnaded buildings, the lovely campus, the Pines, where my two brothers and I lived when we were students here, the Lewis Building, the Powell Building, and the many great changes that have taken place since I came here as a freshman in September 1921 — have all stirred my heart.**

This attractive group of graduates has helped increase the quality of life at the law school and improved the school's standing in the legal community. It has earned you an escape from the generalizations for success in life and in law which are so often tediously expressed at law graduation exercises. We are lawyers. We shall talk law. We shall talk about *Plessy v. Ferguson*¹ in which the United States Supreme Court gave its blessing to the "separate but equal" doctrine 100 years ago, May 18, 1896. That doctrine served as a thin disguise for Jim Crowism until *Brown v. Board of Education*² on May 17, 1954, demolished it, although *Brown* does not specifically overrule

* United States Court of Appeals for the Fifth Circuit. The following is based on an address given by Judge Wisdom at Washington and Lee University School of Law's 140th Commencement Exercises on May 21, 1995.

** I have had a long connection with Washington and Lee University. My father came up from New Orleans to enter Washington College in 1868. Robert E. Lee was president of the college. Father was only fourteen at the time, too young to have served in what we always did call and still call "The War." Most of his classmates were Confederate veterans whose talk I listened to as a child when his classmates passed through New Orleans and stopped by the house for drinks or dinner. Curiously, my wife's father was at VMI when my father was at Washington College. My wife Bonnie, christened Charles Stewart Mathews, was born on a sugar plantation in LaFourche Parish, near New Orleans. Her great-grandfather attended Liberty Hall, before the name was changed to Washington College. Bonnie was graduated from Sweetbriar. We have been married for nearly sixty-five years and have lived continuously in New Orleans during that time except for four years when I was in uniform in World War II.

1. 163 U.S. 537 (1896).
2. 347 U.S. 483 (1954).

Plessy.³ Indeed, "separate but equal" seems to comply with the equal protection clause of the Fourteenth Amendment; separate but unequal seems to equate with discrimination. We shall talk about Justice John Marshall Harlan's dissent in *Plessy*. We shall talk about Albion Winegar Tourgée, the brilliant but erratic lawyer, crusading carpetbagger, and reconstruction novelist who brain-trusted the losing anti-Jim Crowism committee of black plaintiffs.⁴ It was Tourgée who supplied the dissenting justice in *Plessy*, John Marshall Harlan, with the most powerful maxim in American law: "Our Constitution is color-blind."⁵

Plessy v. Ferguson has always fascinated me. I gave a talk on it in one of the Dreyfous Lecture Series at Tulane in 1972. I called it *Plessy Rides Again*. I never published it because I was not satisfied with my footnotes. That was before Lofgren's fine work on *Plessy*⁶ and Owen Fiss's brilliant and balanced analysis of the case in the recently published Volume VIII of the *Holmes Devise History of the Supreme Court*.⁷ Two years after my talk, my wife gave a lecture on Albion W. Tourgée to her literary club, the Quarante Club, a women's club well older than a hundred years. She called her talk *The Crusading Carpetbagger*.⁸ Bonnie tracked down the source of Justice Harlan's powerful maxim by reading Tourgée's novels. Justice John Harlan's full statement reads: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all

3. Twice, *after* *Brown*, Justice William O. Douglas cited *Plessy* with approval: *Gomperts v. Chase*, 404 U.S. 1237, 1239-40 (1971) (denial of motion for preliminary injunction); *Spencer v. Kugler*, 404 U.S. 1027, 1028 (Douglas, J., dissenting from affirmance).

4. Contrary to the growing custom of revisionist historians, the word "creole" in Louisiana was reserved for whites who are descendants of French and Spanish colonists and Americans. The free *gens de couleur* were frequently well off financially and well educated. As a class, they assumed leadership of the early civil rights movement in Louisiana, and their descendants still do, whether called "creoles," "blacks," or "African Americans."

5. *Plessy v. Ferguson*, 163 U.S. 557, 559 (1896) (Harlan, J., dissenting).

6. CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* (1987).

7. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* (1993) (Vol. VIII — The Oliver Wendell Holmes Devise History of the Supreme Court of the United States).

8. *See generally* OTTO H. OLSEN, *CARPETBAGGER'S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE* (1965). This biography was the result of a long and extensive effort by Professor Olsen to locate letters and papers by Tourgée which finally turned up in old boxes at Chautauqua. The boxes included correspondence with Emma (Mrs. Tourgée), Louis Martinet, Daniel Desdunes, and other members of the Louisiana committee, as well as clippings from old newspapers and many other papers.

citizens are equal before the law."⁹ This quote is a paraphrase of Tourgée's metaphor in his briefs in *Plessy*: "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind." Bonnie commented in her paper: "I am probably unique in that I have carefully read seven of Tourgée's novels all the way through, and I discovered that Tourgée, like Mozart, was simply repeating himself."¹⁰ These famous words first issued from the mouth of Hesden Le Moynes, the hero of Tourgée's *Bricks Without Straw*." Professor Fiss generously repeated this comment in a footnote.¹¹

Certainly at some point I should refer to the fact that Edmund Wilson, probably the leading American writing critic of the midtwentieth century, wrote that Tourgée's *A Fool's Errand*¹² "was received as a sensation in its day and it ought to be an historical classic in ours."¹³ Again, "Tourgée was a special case. He was a Northerner who resembled the Southerners: in his insolence, his independence, his readiness to accept a challenge, his recklessness and ineptitude in practical matters, his romantic and chivalrous view of the world in which he was living."¹⁴

Albion Winegar Tourgée was of French Huguenot stock on his father's side and of sturdy Swiss stock on his mother's side. His parents moved from the Hudson Valley to the little town of Lee, Massachusetts, and then to Williamstown, Ohio where Albion was born in 1838. When he was fourteen, his mother had died and his father had married again. He took himself off to live with a Winegar in Lee, Massachusetts. At about this time he lost an eye as a result of a playmate's exploding a percussion cap. He later returned to his father's home and eventually, at twenty-one, attended the University of Rochester.

When the War began, Tourgée promptly joined the 27th New York Volunteers. He carried off to war with him the Greek Testament and a volume of Cicero's, and later, when taken prisoner, he studied Spanish and Cervantes' *Don Quixote*. His regiment moved into Virginia where, he wrote, there was plundering to a shameful degree. His objections marked

9. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

10. Bonnie Wisdom, *The Crusading Carpetbagger* 25 (unpublished manuscript on file with the author).

11. FISS, *supra* note 7, at 354 n.10.

12. ALBION W. TOURGÉE, *A FOOL'S ERRAND: A NOVEL OF THE SOUTH DURING RECONSTRUCTION* (Torchbook 1961) (1879).

13. EDMUND WILSON, *PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* 536 (1962). Wilson was not interested in the law: *Plessy* is not mentioned in the chapter on Tourgée.

14. *Id.* at 537.

the beginning of a growing compassion for the South and a lasting objection to Union plundering.

On July 4, 1861, in the first battle of Bull Run, he was severely injured by a retreating battery heading for the rear at such speed that Tourgée could not get out of the way. He was out of action for a year and never fully recovered from the injury to his back. He returned to the fight, was wounded and hospitalized again. He returned again, fought in many engagements, was captured and imprisoned for four months. Freed in May 1863 in an exchange of prisoners, he went to Ohio and married his youthful sweetheart, Emma Lodoiska Kibourne. He went back to war a third time and sustained injuries that took him out of the war. When he was ordered to report for possible transfer to the Invalid Corps, he resigned. Shortly before the end of the war, however, he was negotiating for a commission in a Negro regiment.

He had received a law degree at Rochester University, and after the war, he and Emma moved to North Carolina in 1865. He participated in efforts to bring that state back into the Union. He became active in the political life of North Carolina. He was a delegate to the new constitutional convention and was influential in shaping a new constitution. He was successful in getting the convention to authorize a codification of all of the laws of the state. He failed to be elected to Congress but was elected a superior judge in Greensboro, with jurisdiction over eight counties. During his years on the bench he surprised his enemies by his abilities, but he never relaxed in his energetic opposition to the Klan. Governor Jonathan Worth of North Carolina described him as "the meanest Yankee who has ever settled among us."¹⁵ After six years, he did not run for re-election. He had been singularly unsuccessful in business, except as a novelist. In 1879, he headed north and dedicated his life to civil rights. He became a lecturer, newspaper man, and a highly successful novelist. He died in France in 1905, after having received a consular appointment to Bordeaux from President William McKinley the year after *Plessy* came down.

Tourgée put the blame for the Reconstruction disaster not just on the South, but also on Northern politicians who had betrayed the Negro, the poor white, and the impoverished planter. One quotation from a *Fool's Errand* will illustrate Tourgée's perception:

After having forced a proud people to yield what they had for more than two centuries considered a right, . . . they proceeded to outrage a

15. Letter from Jonathan Worth to E. A. Jones (Jan. 7, 1868), in 2 THE CORRESPONDENCE OF JONATHAN WORTH, at 1120 (J. G. de Roulhad Hamilton ed., 1909).

feeling as deep and fervent as the zeal of Islam or the exclusiveness of the Hindoo caste, by giving to the ignorant, unskilled, and dependent race . . . equality of political right! . . . They said to the colored man, in the language of one of the pseudo-philosophers of that day, "Root, hog, or die!"¹⁶

For some time after the Hayes-Tilden deal and the withdrawal of troops from the South, from Louisiana and from South Carolina, relatively good conditions prevailed between the two races. C. Vann Woodward writes:

It was a common occurrence in the 1880s for foreign travelers and Northern visitors to comment . . . on the freedom of association between white and black people in the South. Yankees in particular were unprepared for what they found and sometimes estimated that conditions below the Potomac were better than those above. Segregation was, after all, a Yankee invention. It had been the rule in the North before the Civil War and integration the exception. . . . The age of Jim Crow was still to come.¹⁷

In Louisiana there were almost as many black voters as white voters until the Constitution of 1898 disfranchised 98 percent of the African American voters in the state. The disqualified could not pass the grandfather clause or the understanding clause and other requirements for registration to vote. Jim Crow came quickly in the late eighties and nineties, even before the 1898 Constitution. The Louisiana legislature in 1890 enacted a statute requiring "equal but separate accommodations" on railroad trains.

In New Orleans among whites the term "Creole" refers to whites of French or Spanish and American descent. Among African Americans the term includes descendants of blacks (natives or immigrants) and whites, as it does in the Caribbean, and elsewhere. The Creole Negroes in New Orleans, many well-educated and descendants of free persons of color, provided leadership in civil rights activities. On May 18, 1890, eighteen persons of color under the leadership of Aristide Mary formed the American Citizens' Equal Rights Association and opposed a bill for separate railroad cars as "class legislation." "Citizenship," they said, "is national and has no color." Then, the Louisiana legislators enacted a lottery bill for a favored class. The establishment of a Louisiana lottery had been a political question highly fought over in the state legislature. When the legislators finally approved the lottery, it was no longer necessary for the pro-lottery legisla-

16. TOURGÉE, *supra* note 12, at 137.

17. C. Vann Woodward, *The Case of the Louisiana Traveler, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 157 (John A. Garraty ed., rev. ed. 1987).

tors to appease black legislators by holding out to them the quid pro quo of killing the separate-car statute; thus, a separate-car bill passed requiring "equal but separate" accommodations on all passenger railways.

Louis A. Martinet, a lawyer, doctor, and newspaper editor, was the leading spirit in organizing opposition to the bill. Closely associated with Martinet was Rodolphe Desdunes, a poet and author of a valuable history of blacks in Louisiana, *Nos Hommes at Notre Histoire*. In September 1891, Martinet and Desdunes organized a "*Comité des Citoyens* to Test the Constitutionality of the Separate Car Law." To secure legal talent Martinet solicited Albion Tourgée, who offered his services pro bono.

Besides accepting Tourgée's help, the Committee also employed a New Orleans attorney, James C. Walker, a white criminal lawyer and one time Republican, to assist Tourgée. Walker approached the railroads and found them *not* uncooperative for a proposed test case. One railroad would not work with him because it had never enforced the law. The other railroads were sympathetic because of the extra costs of enforcement. Tourgée advised that a "nearly white" person should be chosen for the test case. Martinet objected that in New Orleans "persons of tolerably fair complexion, even if unmistakably colored, enjoy a large degree of immunity from the accursed prejudice." He would go himself, "but I am one of those whom a fair complexion favors. I go everywhere, in all public places though well-known all over the city, and never is anything said to me." Tourgée expected to argue that the unreasonableness of segregating such persons was a deprivation of property and a violation of the due process clause of the Fourteenth Amendment. It was also a stigma of slavery and therefore violated the Thirteenth Amendment. A few blacks, very few, had an additional point in wishing to pass as white. As Martinet pointed out, however, these critics had contributed little to the movement and had been lacking in education and leadership from the beginning of the community.

On February 24, 1892, Daniel Desdunes, an octoroon, son of Rodolphe Desdunes, bought a ticket from New Orleans to Mobile. He took a seat in a white coach. The railroad had instructed the conductor to request Desdunes to go into the car for colored passengers but not to use force. Instead, Martinet wrote, "our white passenger" swore out an affidavit. Desdunes was arrested and charged. Tourgée and Walker disagreed as to trial strategy. Walker wanted to challenge the law as a burden on interstate commerce. Tourgée wrote him: "What we want is not a verdict of not guilty, nor a defect in this law but a decision whether such a law can legally" exist under the Thirteenth and Fourteenth Amendments. "You are off the

track," he said. Judge Ferguson sustained Desdunes's plea of not guilty on the ground that the law did not apply to interstate travel.

*Hall v. DeCuir*¹⁸ held that a Louisiana statute prohibiting discrimination on account of race was invalid because the steamship was operated under a federally granted coastal license while the ship was on a trip from New Orleans to Vicksburg and that the state could not intrude into a matter left to Congress. In *Wabash, St. L. & P. Ry. v. Illinois*,¹⁹ the Supreme Court, denying the states' power to regulate rates on interstate trips, held that states could not require racial segregation on interstate trips. Then in *Louisville, N.O. & Tenn. Ry. v. Mississippi*,²⁰ over the dissent of Justices Brewer and Harlan, the Court dismissed a Commerce Clause objection to a Mississippi statute requiring *all* carriers to provide separate cars for whites and blacks while operating within the state. The Louisiana car statute was similar to the Mississippi statute.

Desdune's case never reached the Supreme Court of Louisiana. In the meantime, that court had decided in another case that the Jim Crow law did not apply to interstate passengers — otherwise it would violate the Commerce Clause.

Within a few weeks, Walker arranged another suit, again apparently with the cooperation of the railroads. Homer A. Plessy, like Desdunes, was seven-eighths white, and the motions and briefs state that the admixture of colored blood was not discernible in his complexion. Plessy boarded in New Orleans a train bound for Covington, Louisiana. He informed the conductor that he was a Negro as he took his seat in a coach reserved for white passengers. A New Orleans detective, apparently having previous information of the plan, arrested Plessy when he refused to move to the Jim Crow car. The case was assigned to Judge Ferguson who, three weeks later, began by complimenting Tourgée and Walker for "great research, learning and ability," but held the law constitutional. Anytime you hear compliments from a judge before he renders judgment you know that you have lost the case.

In the Louisiana Supreme Court, Tourgée wrote the briefs, but he had not practiced law for some years and Walker argued for Plessy. The Chief Justice was General Francis T. Nicholls, C.S.A., who had signed the bill into law as governor two years before.

At that time interracial marriage in Louisiana was allowed. Tourgée argued: "A man has surely an absolute right to the companionship and

18. 95 U.S. 485 (1878).

19. 118 U.S. 557 (1886).

20. 133 U.S. 587 (1890).

society of his wife; and on the other hand, a wife has claims which cannot be denied on the protection of her husband The statute [also] actually separates parent and child . . . the bottom rail is on top; the nurse is admitted to a privilege which the wife herself does not enjoy."

A good deal of the brief is spent attacking the arbitrary, uncontrolled authority delegated to the conductor. A similar argument was successfully made in the 1960s based on the delegation of arbitrary discretion to registrars of voters who tested applicants on their understanding of the Constitution.²¹

Three weeks after the argument, Justice Charles Erasmus Fenner, for a unanimous court, upheld the statute. The Thirteenth Amendment gave him no trouble. He needed to rely only on the *Civil Rights Cases*,²² decided by the United States Supreme Court in 1883, holding that the Civil War amendments apply only to *state* discrimination, not to private discrimination. The Thirteenth Amendment related only to slavery and involuntary servitude; "denial of equal accommodations . . . [in] inns, public conveyances, and places of public amusements imposes no badge of slavery or involuntary servitude." It is interesting that Justice Fenner relied in good part on a pre-Civil War decision. So too did the United States Supreme Court in 1896 in *Plessy*. This case was *Roberts v. City of Boston*, a noted Massachusetts school segregation case decided in 1849 by Chief Justice Lemuel Shaw, perhaps the leading state jurist of the time. "It is urged," said Justice Shaw,

that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinions and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together may well be doubted²³

In January 1893, Tourgée and Walker filed and were granted an application for a writ of error to the United States Supreme Court. They employed Samuel F. Phillips, an old friend of Tourgée's in Greensboro who had developed a Washington practice, had been a Solicitor General, and had argued the *Civil Rights Cases*. More than *three years* elapsed before the

21. *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

22. 109 U.S. 3 (1883).

23. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 209 (1849).

argument took place in April 1896. During those years Jim Crowism had increased.

The Chief Justice of the United States Supreme Court at that time was Melville W. Fuller. Among the Associate Justices was Edward Douglass White of Louisiana, a Confederate veteran, member of the White League (the Louisiana equivalent of the Ku Klux Klan), and later Chief Justice of the United States Supreme Court. Justice Henry Billings Brown of Lee, Massachusetts, the little town where Tourgée had lived as an adolescent, wrote the majority opinion. Tourgée in his brief emphasized the affirmative aspects of the Fourteenth Amendment more than he had in the lower court. Even when I went to law school, the Fourteenth Amendment was regarded as prohibitory only, and I ran into that contention constantly for many years when I sat on the bench. Basically, Tourgée argued that Section 1 of the Fourteenth Amendment created a new national citizenship. This is an appealing argument on the original understanding of the amendments, but the *Civil Rights Cases* in 1883 had held that the amendments prohibited state, not private, discrimination. Even earlier, *United States v. Cruikshank*,²⁴ not mentioned in the opinion or the briefs, had held that the federal government had only limited powers and that the states were the sole guardians of their citizens' rights. That is close to some recent thinking that an individual state, not the national government, is the proper guardian of its citizens' rights.

Tourgée advanced the Fourteenth Amendment argument that Plessy had been deprived of property without due process of law. The "property" was "the reputation of being white . . . the master key that unlocks the golden door of opportunity . . .," leading to avenues of wealth, prestige, and opportunity. This argument superficially appears not to be a defense of blacks against discrimination but a defense of Homer Plessy and others like him with a large admixture of white blood, who are prejudiced by the penalties of color. But the argument cuts more deeply. It is an *a fortiori* argument that even in the case of an educated man with seven-eighths white blood, the separate but equal doctrine denying access of blacks to association with whites is an economic barrier in the nature of a deprivation of property. Indeed this argument was used effectively later in *Sweatt v. Painter*,²⁵ before *Brown*, to open up the law schools to blacks deprived of referral business because of lack of access to association with white law students.²⁶

24. 92 U.S. 542 (1875).

25. 339 U.S. 629 (1950).

26. See also *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637

Tourgée insisted that the law violated the Thirteenth Amendment as well as the Fourteenth. "In the history of English jurisprudence, only slavery has demanded that distinctions in civil rights on the enjoyment of public privilege be marked by race distinctions." Segregation perpetuates distinctions "of a servile character, coincident with the institution of slavery."

Tourgée emphasized the Fourteenth Amendment's guarantee of equal protection as reasserting the precepts of the Declaration of Independence by granting equality to all citizens.

Why not require all colored people to walk on one side of the street and whites on the other? . . . One side of the street may be just as good as the other The question is not as to the equality of the privileges enjoyed, but the right of the State to label one citizen as white and another as colored in the common enjoyment of a public highway.

It took the Supreme Court over sixty years to accept Tourgée's argument, without any proof of inequality as to buses, drinking fountains, toilets, parks, lunch counters, and many other things used by blacks and whites. The vice is Jim Crowism. In *Bolling v. Sharpe*,²⁷ unlike *Brown* — which relied on the Equal Protection Clause of the Fourteenth Amendment — the Supreme Court had to rely on whatever equality would be found in the Due Process Clause of the Fifth Amendment because the District of Columbia was involved. The two cases were decided the same day — May 17, 1954.

About a month after the argument in *Plessy*, Justice Brown handed down the Court's decision establishing the "separate but equal" doctrine. He followed Justice Fenner's opinion in relying on Justice Shaw in *Roberts*.

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.²⁸

Those who criticize the Warren Court for its reliance in *Brown* on sociology may be surprised to find even more sociological assumptions in *Plessy v. Ferguson*. That opinion declares:

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one

(1950).

27. 347 U.S. 497 (1954).

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

race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.²⁹

Justice Harlan was the only member of the Court to dissent. "In my opinion," he predicted, "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."³⁰ Justice Harlan declared:

[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our constitution is color-blind*, and neither knows nor tolerates classes among citizens. . . . The *thin disguise* of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.³¹

When any person becomes discouraged by what appears to be the failure of African Americans today to recognize the extent of the advances in civil rights since the *Brown* case in 1954, I suggest that person bear in mind the prophetic words of Albion W. Tourgée in 1890.

It is easy for us to excuse ourselves for the wrongs of slavery, but day by day it is growing harder for a colored man to do so; and it is simply to state a universal fact of human nature to declare that a great and lasting wrong like slavery done to a whole people grows blacker and darker for generations as they go away from it. The educated grandchild of a slave who looks back into the black pit of slavery will find little excuse for the white Christian civilization which forbade marriage, crushed aspiration, and after two centuries and a half offered the world as the fruits of Christian endeavor five millions of bastard sons and daughters — the product of a promiscuity enforced by law and upheld by Christian teachings. Slavery will be a more terrible thing to the Negro a hundred years hence than it was to the calloused consciousness of his nameless father. . . .³²

I admire Harlan. But I do not go all the way with his strong words. I have said on several occasions in one form or another: The Thirteenth and Fourteenth Amendments are both color-blind and color-conscious. These amendments took cognizance of the Founding Fathers' decision in 1787 not

29. *Id.* at 551-52.

30. *Id.* at 559 (Harlan, J., dissenting).

31. *Id.* at 559, 562 (Harlan, J., dissenting).

32. Albion W. Tourgée, Address at the First Mohonk Conference on the Negro Question in 1890, at 11 (1880), *quoted in* Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 *RUTGERS L. REV.* 387, 440-41 (1966).

to face up directly to the issue of slavery — in the interest of putting together a viable national government and creating what is, in effect, national citizenship. I see these amendments as reversing *Dred Scott*, bringing the Declaration of Independence into the Constitution, making freed men and their descendants free men and full American citizens. Justice must be color-conscious as well as color-blind — color-conscious when it becomes necessary to remedy the evils of past discrimination based on color or to prevent new evils of discrimination based on color.

Some would call this affirmative action.