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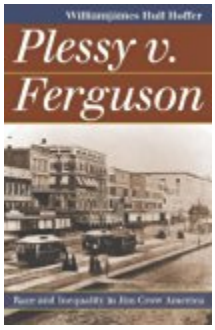
Williamjames Hull Hoffer. *Plessy v. Ferguson: Race and Inequality in Jim Crow America.* Landmark Law Cases and American Society Series. Lawrence: University Press of Kansas, 2012. ix + 219 pp. $34.95 (cloth), ISBN 978-0-7006-1846-0; $17.95 (paper), ISBN 978-0-7006-1847-7.

N. E. H. Hull. *The Woman Who Dared to Vote: The Trial of Susan B. Anthony.* Landmark Law Cases and American Society Series. Lawrence: University Press of Kansas, 2012. xxiii + 236 pp. $34.95 (cloth), ISBN 978-0-7006-1848-4; $17.95 (paper), ISBN 978-0-7006-1849-1.



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Anthony v. Plessy

The years from the end of the Civil War to the turn of the twentieth century, whether described as Reconstruction or the Gilded Age, are nicely bookended by the studies under review: two entries in the Landmark Law Cases and American Society series from the University Press of Kansas. Graduate students in need of reading list material and scholars of the law will find these books incisive and provocative, but those who teach will have the greatest use for these works. For them, N. E. H. Hull's account should prove the most helpful.

Susan B. Anthony, along with fourteen other women from Rochester, New York, registered to vote on November 1, 1872. Nine of the fourteen, in violation of the Enforcement Act of 1870, then voted five days later. Hull's focus is the "test case" trial of *The United States of America v. Susan B. Anthony*, held on June 18-19, 1873. The trial was meant to decide if the right to vote had been extended to women as part of either the Thirteenth or Fourteenth Amendments, though matters did not work out that way. The trial of the inspectors who allowed them to register, and *Minor v. Happersett*, a related case decided by the Supreme Court in 1875, are covered briefly as well.

A two-day trial that proved inconclusive, a case Hull herself drops, and a trial that students will know was unsuccessful, else the Nineteenth Amendment would not have been necessary, do not seem the stuff of lore, much less fitting topics for book-length study. But Hull shows otherwise–and not because the larger context of women's suffrage or the smaller context of Anthony's role in the women's rights movement greatly needed additional consideration (even though they do). Instead, it was the conduct of Anthony's trial as presided over by Justice Ward Hunt that created controversy then and, thanks to Hull, should pose the most questions now. Bringing that aspect of the trial to light is the author's true contribution.

Given the role women played in the abolitionist movement and the triumph of abolition during the Civil War, it appeared at war's close that women's rights advocates were positioned to make additional gains. Even the sharp divisions that cleaved activists–whether to push for suffrage for women prior to black men, whether to hew closely to the Republican Party line or adopt a stance that was nonpartisan, or whether to push for suffrage rights alone or to agitate issues like divorce as well–attracted publicity. Women like Anna Dickinson and Victoria Woodhull, in challenging traditional assumptions and mores, possessed considerable appeal also.[1]

Yet it was the divide between the National Woman Suffrage Association (NWSA) and the American Woman Suffrage Association (AWSA), as well as the rise of Woodhull (who ran for president in 1872 even though she was too young to hold the office), that reduced Anthony's stature. At a time when victory for her cause seemed so near, Anthony faced the unhappy prospect of being sidelined. To make matters even less felicitous, African American men had gained the right to vote first, draining momentum from the suffragists; Lucy Stone and Henry Blackwell of the AWSA cajoled Ulysses S. Grant's Republicans to recognize the movement (in a platform plank Elizabeth Stanton called the "Philadelphia Splinter"), thereby proving the value of partisanship; and Horace Greeley, whose earlier break with Anthony on marriage undercut the influence she might have had in the competition between Republicans that year, relied on Dickinson rather than someone associated with the NWSA.

Anthony's registration and vote consequently did much to restore her standing in the women's movement, and the decision those steps engendered–to move away from the legislature and toward the judiciary for further gains–was a significant stride in the march toward the vote. Unfortunately for Anthony, Hunt's directed verdict at the expense of the jury prevented her case from becoming a true test. Intent on bringing matters to a swift conclusion, Hunt avoided the prospect of jury nullification (which Hull considers a real possibility given Anthony's canvassing between the election and the trial), and simply let Anthony off the hook.[2] The federal attorney prosecuting the case then dropped the proceedings against the other women. Suffrage would remain a male privilege after *Minor v. Happersett* was lost as well.

Hull argues fairly persuasively that it is difficult to divine the rationale for Hunt's actions, but in my view his incompetence seems as compelling a reason as any. Irrespective of his motives, the five hundred thousand votes that Stone claimed women brought Grant over Greeley proved largely worthless six months later.[3] (Hunt was a Grant appointee.) As Liberal Republicans well knew, people are policy. In the modern historiography of Reconstruction, unfortunately, Grant scholars have not always taken that to heart.

In his retelling of *Plessy v. Ferguson* (1896), Williamjames Hull Hoffer moves beyond Hull's reluctance to judge and proves much more willing to hold his subjects to account. In theory this approach could be useful, but in practice it is not as successful as might be hoped. The heroes of Hoffer's study are the Afro-Creoles who had long claimed a role in New Orleans. Included in that small but significant group was Homer Plessy, whose unsuccessful challenge to the Louisiana Separate Car Act of 1890 arguably formed the legal basis for segregation.

So far, so good, particularly since Hoffer's view in this regard is not that different from Justin A. Nystrom's in *New Orleans after the Civil War : Race, Politics, and a New Birth of Freedom* (2010), a fine work that Hoffer unfortunately neglects. In his treatment of Comite des Citoyens's allies, like senior counsel Albion Tourgee, however, Hoffer's take becomes more of an issue. Yet it is in his consideration and choice of villains that his course proves most problematic.

Hoffer's main theme is that *Plessy* was doomed because its advocates failed to push forward a color-blind approach to the law. Too often, Tourgee and Plessy's other allies used race to argue against racism. Rather than take the Fourteenth Amendment's words at face value, those who fought against segregation were trapped in the racial conceptions of the time. Had they not fallen into one-drop categorizations of black and white, Tourgee could have freed minds and made full use of the mixed-race nature of the plaintiff(s) to promote a consistent argument that would have gone behind the statute to reveal the US Supreme Court's inherent contradictions (as seen in its reliance on social conventions); faulty assumptions (separate was not being treated equally in practice); and utter inconsistencies (as demonstrated by its activism in privileging private property). From the Fourteenth Amendment's text, the rest would follow, and race in US history might not have had the deleterious effects that *Plessy* first confirmed and even *Brown v. Board of Education* (1954) in some senses has continued.

To make this case, Hoffer has to take a formalistic approach to the Fourteenth Amendment, not unlike the justices whose legal orthodoxy he otherwise decries. Contrary to Hoffer's emphasis on the role of moderates in Reconstruction, he also has to essentially assert that the Fourteenth Amendment was so race neutral that, irrespective of its origins in the Civil Rights Act of 1866, its purpose was not primarily about the freedmen. Some of the amendment's architects at the time surely thought otherwise. Nor is it persuasive to invoke Frederick Douglass in this context, as Hoffer does, since Douglass was not a moderate Republican and his understanding of the law would not have been the same.

Hoffer also has to be more than nuanced in his han-

dling of Tourgee to further this argument, as Tourgee was not so much advancing a color-blind approach to the law as he was botching that conception through his mistakes. It is a position that runs counter to what Mark Elliot has held in his recent biography of Tourgee, *Color-Blind Justice: Albion Tourgee and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson* (2006), in which Tourgee fared markedly better. Due to his reliance on Tourgee, Justice John Marshall Harlan is open to similar analysis.

But it is the villains of Hoffer's piece that fare worse than should be expected. Given Hoffer's willingness to judge and his difficulty with this topic, this is not entirely surprising. The book apparently was "an emotionally draining experience" and Plessy's world was one that Hoffer had difficulty inhabiting (p. vii). Second-generation Republicans who did not fight in the Civil War, or who fell victim to the sectional reconciliation that lulled the North away from emancipationist sentiment, or who bowed before contemporary mores, as did Justice Henry Brown, the author of the majority opinion in *Plessy*, are particularly subject to criticism as a consequence. This is not to say that Hoffer is not generally even-handed, but his attempts to be so on occasion fall short. This is especially true of his assessment of Brown's thinking in later years; the evidence Hoffer presents is too thin to appear other than stretched.

As much as Brown may deserve censure, Booker T. Washington, whom Hoffer levels fire at on a few occasions, certainly does not. Robert J. Norrell's biography of Washington, *Up from History: The Life of Booker T. Washington* (2009), reveals a much different picture, and one can certainly contrast Washington's approach (and success) in *Bailey v. Alabama* (1911) with Douglass's take or Tourgee's failure in *Plessy* quite favorably.

Interpretative issues of this sort comingle with a few factual errors in the first chapter of Hoffer's account. His legislative summary of the Freedmen's Bureau is inaccurate, as Andrew Johnson's veto was overridden in 1866; E. L. Godkin did not endorse Greeley in 1872; and the Civil Rights Act of 1875 did not apply to public schools (pp. 23-27, 32, 34). Personally, I do not concur with Hoffer's inclusion of the Compromise of 1877 in his analysis of Reconstruction, either, but I do not fault him in that regard, as historians continue to rely on C. Vann Woodward's thesis despite its well-known flaws.[4]

For all these qualms about interpretation and a few quibbles about details, I found Hoffer's book an engaging read. I do think it would work better, however, for graduate students or law scholars than for undergraduates, though I would use it for them without hesitation.

Ultimately, several conclusions could be proffered about each of these period bookends, but one that I would offer is not so much about the perils of pushing change in an era that favored continuity, but rather about how best to shape an era itself. Grant's Republicans did not aid women to the extent suffragists would have preferred. One wonders if Greeley's or, given his death before the inauguration, Benjamin Gratz Brown's Republicans would have been better for the era's activists. Clearly an 1876 election in which Republicans would have been running to the left of a Liberal Republican coalition would have been preferential than an 1876 election in which Republicans ran to the right of a Liberal Republican coalition, as Republicans had to do as they repudiated Grant's two terms in favor of Rutherford B. Hayes and a Liberal platform that year. A Liberal Republican coalition that could have co-opted Northern Democrats, meanwhile, might also have been enough to isolate Southern Democrats after 1876. If so, then Washington's approach after 1895, for all the criticism that has been directed against it, might have been an option rather than a necessity.

Notes

[1]. Though Hull does not mention Dickinson, Hull's case would have been strengthened by her inclusion. On Dickinson, see J. Matthew Gallman, *America's Joan of Arc: The Life of Anna Elizabeth Dickinson* (New York: Oxford University Press, 2006).

[2]. Rochester was not necessarily as progressive as Hull surmises. During the election of 1872, Frederick Douglass's home in Rochester was burned to the ground. See Richard H. White, " 'The Spirit of Hate' and Frederick Douglass," *Civil War History* 46 (2000): 41-49.

[3]. For Stone's quote, see Andrea Moore Kerr, *Lucy Stone: Speaking Out for Equality* (New Brunswick: Rutgers University Press, 1992), 175.

[4]. The latest to weigh in on Woodward's "utterly demolished" thesis is Michael F. Holt, *By One Vote: The Disputed Presidential Election of 1876* (Lawrence: University Press of Kansas, 2008), 277-278.

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