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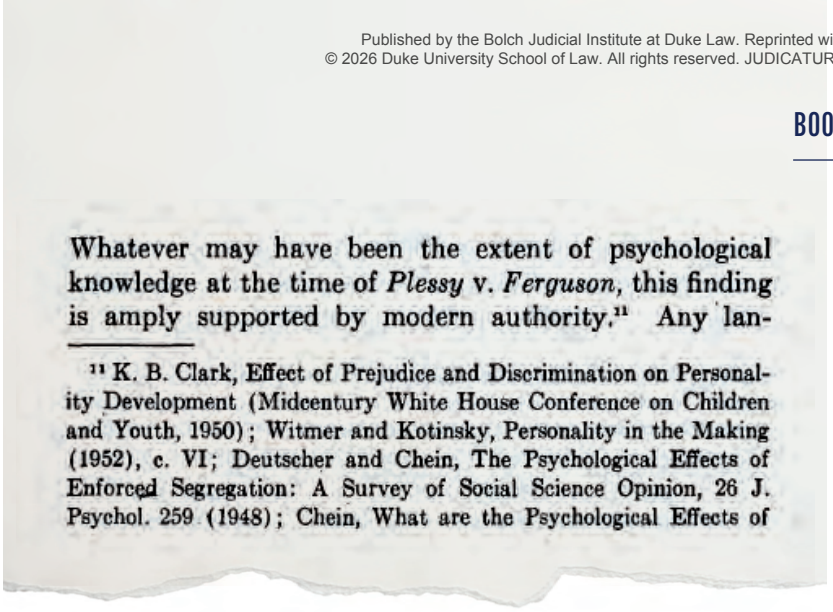
INTERPRETING THE COURT'S FINE PRINT [1]



Whatever may have been the extent of psychological knowledge at the time of *Plessy* v. *Ferguson*, this finding is amply supported by modern authority.[11] Any lan-

[11] K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of

[1] Historian Peter Charles Hoffer traces how U.S. Supreme Court footnotes evolved from routine citations into a consequential form of judicial communication.

How does the highest court in the land use the words that are lowest on the page? University of Georgia professor of history Peter Charles Hoffer set out to answer this question in his book, *The Supreme Court Footnote: A Surprising History* (NYU Press, 2024). He traces the evolution of the Court's footnotes and what they reveal about the justices themselves.

In this conversation with *Judicature*, Hoffer shares his insights — including which footnotes have been most consequential and how the Court's use of them has changed over time.

1. Footnotes often receive little attention from readers. What prompted you to study their use in Supreme Court opinions?

Footnotes have been part of the opinions of some justices on the Court since 1793 and are increasingly important now. Justices use the footnotes to carry on conversations with other justices, as well as to support their arguments in the text.

The attraction of following the notes is to see inside, as it were, the Court's otherwise confidential deliberations.

2. What are the different ways the Court has used footnotes over the years?

The ways in which the justices use the footnotes have changed strikingly over time. At first, they were simple references. Not only did they grow longer and more combative, but they also became something else entirely — miniature arguments, often pointedly directed to the opinions of other justices. They are now a contentious subliminal part of the opinion, hence of the law.

3. Law students learn a lot about footnote four of the 1938 Supreme Court case *United States v. Carolene Products Co.*, which hinted that "more searching judicial inquiry" might be used to review statutes that targeted "discrete and insular minorities." What are some footnotes that receive short shrift and that law students — and perhaps the public — should know more about?

Footnote four of *Carolene Products* — along with footnote 11 in *Brown v. Board of Education*, which cited a series of social science studies suggesting that racial segregation was linked to negative psychological effects — is the most famous. But the footnotes in Justice Antonin Scalia's majority opinion and Justice John Paul Stevens' dissent in *District of Columbia v. Heller*, as well as Justice Samuel Alito's majority opinion and Justice Elena Kagan's dissent in *Dobbs v. Jackson Women's Health Organization*, also deserve close reading and wide attention.

4. Your book suggests that we might use footnotes as tea leaves to determine where the Court might go next. What are your predictions?

Well, they're not quite tea leaves, but certain justices — Chief Justice William Rehnquist was notable for this — used footnotes to tell his colleagues where the law should go.

Here is my guess about the future: more footnotes, on more opinions, growing more acerbic over time. That path follows a Court that seems permanently divided over issues that belong to legislatures, although Congress does not seem to be any better.

PETER CHARLES HOFFER is a distinguished research professor of history at the University of Georgia. He holds a PhD from Harvard and was a liberal arts fellow at Harvard Law. He has written many books on various subjects including the federal courts, the U.S. Supreme Court, impeachment, and the Salem witchcraft trials.