

Joy Milligan

Assistant Professor of Law

University of California, Berkeley

Joy Milligan studies the intersection of law and inequality, with a particular focus on race-based economic inequality. Before entering academia, Milligan practiced civil rights law at the NAACP Legal Defense and Educational Fund, Inc., where she was a Skadden Fellow, and clerked for the Hon. A. Wallace Tashima of the U.S. Court of Appeals for the Ninth Circuit. She holds a Ph.D in Jurisprudence & Social Policy from UC Berkeley, along with a JD (NYU), MPA (Princeton), and BA (Harvard-Radcliffe). At Berkeley Law she teaches Civil Procedure, Civil Rights & Anti-Discrimination Law, and Critical Theories of Law & Legal Education.

Plessy Preserved: Agencies and The Effective Constitution

Sometimes the judicial Constitution is not the one that matters. The administrative state is capable of creating divergent legal frameworks that powerfully shape public life. But to the extent they reside outside of judicial precedent, such administrative regimes can go unrecognized.

In this Article, I chart the history of an alternative “administrative Constitution” that remains etched in U.S. cities. Drawing on original archival research, I show that throughout the twentieth century, the federal administrators that oversaw the nation’s public housing program implemented and defended a legal regime based on *Plessy v. Ferguson*’s “separate but equal” principle—even after the judiciary announced the opposing mandate of *Brown v. Board of Education*, and after the political branches adopted formal civil rights reforms in the 1960s. Why did an agency led by liberal reformers and dedicated to serving the poor do this? Administrators believed the public housing program was politically unsustainable without racial segregation, while agency lawyers argued for preserving the older framework. Procedural barriers shielded the agency from defending its framework in the courts.

Uncovering public housing’s racial Constitution challenges conventional narratives around civil rights history, by foregrounding the role of Northern liberals and federal administrators in thwarting *Brown*. Simultaneously, *Plessy*’s resilience in the administrative realm underscores the ongoing need to unearth such regimes, to better assess agencies’ role in establishing the constitutional principles that actually govern us—*i.e.*, in determining the effective Constitution.