

FROM DRED SCOTT TO BARACK OBAMA: THE EBB AND FLOW OF RACE JURISPRUDENCE

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INTRODUCTION

The Harvard Law School Blackletter Law Journal, affectionately known as BLJ, celebrates its 25th anniversary this year. The BLJ has much to celebrate. During its life span, Harvard Law School and the country as a whole have made great strides in advancing civil rights and racial equality. During this past monumental year alone, Barack Obama, a Harvard Law School graduate and the first African American President of the prestigious Harvard Law Review, became the 44th President of the United States and the first African American to be elected to the nation's highest office. President Obama has appointed Eric Holder as the first African American Attorney General of the United States, as well as Elena Kagan, the first woman to serve as Dean of Harvard Law School, as the first female Solicitor General of the United States. BLJ has been an important part of this national transformation.

Yet, for all of the progress achieved, I am not persuaded that, as some have argued, we have entered into a "post-racial" America. Rather, in this foreword, written in honor of BLS's 25th anniversary, I hope to illustrate how, over the last 150 years, progress in advancing racial equality in the United States has ebbed and flowed. All too often, significant forward motion is followed by a dramatic backward lurch. This pattern is particularly evident when examining major legal decisions pertaining to race rendered by the Supreme Court since the *Dred Scott* decision of 1857. Each decision, along with related developments and events that shaped our nation's discourse and attitudes about race, provides us with a foundation upon which to develop a strategy for addressing racial diversity and jurisprudence in the future.

Perhaps the most biting reference to race occurred more than 150 years ago in the opinion by Chief Justice Roger Taney following a lawsuit by Dred Scott. In denying Dred Scott's application to be considered free

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because of his move from a slave state to a free state, Chief Justice Taney said,

It is difficult at this day to realize the state of public opinion in regard to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far unfit that they had no rights which the white man was bound to respect. . . .²

Nearly forty years later, the majority in *Plessy v. Ferguson* denied Homer Plessy's appeal to seek treatment on an equal basis as a person of African descent attempting to ride the rail system in Louisiana. Summarizing, Justice Brown declared, "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."³

It took a full sixty years before the Supreme Court corrected the evils of *Plessy*. Speaking for a unanimous court, Chief Justice Earl Warren ruled,

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.⁴

2. *Scott v. Sanford*, 60 U.S. 393, 407 (1856).

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

4. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

The next landmark Supreme Court decision on race, issued in 1978, took the country in a different direction. In the *Regents of the University of California v. Bakke*, the Supreme Court upheld the claim of racial discrimination filed by Allan Bakke, a white applicant for admission to the Medical School of the University of California at Davis. Justice Harry Blackmun took umbrage at the majority's conclusion that the medical school could not reserve spaces in its class exclusively for minority applicants. In his dissent, Justice Blackmun observed:

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, 347 U.S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.⁵

Blackmun's words stood unanswered for a quarter century. The opportunity to reexamine *Bakke* occurred in 2003 when Justice O'Connor, writing for a majority, upheld the University of Michigan's system of ensuring racial diversity. Justice O'Connor concluded:

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."⁶

5. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978).

6. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003) (citations omitted).

Unwilling to leave the door completely open to permanent efforts to increase diversity, she set a time limit by noting that,

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. See Tr. of Oral Arg. 43. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁷

Only four years later, after Justice O'Connor retired and Chief Justice Rehnquist died, the Court took yet another turn on race. Finding the voluntary integration program used by public schools in Seattle, Washington and Louisville, Kentucky to be unconstitutional, Chief Justice John Roberts, writing for the plurality, concluded:

The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race”. What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: “We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was “[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*,” and what was required was “determining admission to the public schools *on a nonracial basis*.” What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” *Brown II*, 349 U.S., at 300–301, is to stop assigning students

7. *Id.*

on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.⁸

While it appeared that Chief Justice Roberts' words were the final words on race, the irony is that, just two years later, Senator Barack Obama was elected President of the United States on November 4, 2008. During the course of his campaign for election, he openly and frankly discussed the issue of race in a March 18, 2008 speech given in Philadelphia. In that speech, President Obama could not have been clearer. Speaking about his own background, Obama said:

I can no more disown [Reverend Jeremiah Wright] than I can disown the black community. I can no more disown him than I can my white grandmother—a woman who helped raise me, a woman who sacrificed again and again for me, a woman who loves me as much as she loves anything in this world, but a woman who once confessed her fear of black men who passed by her on the street, and who on more than one occasion has uttered racial or ethnic stereotypes that made me cringe.⁹

These political and legal opinions about race give us a vivid sense of the vastly different ways in which racial identity and equality have been experienced in this country. We constantly re-interpret policies and laws in this area, and disagree profoundly as to the magnitude and extent of the challenges facing us and the remedies that are required. For twenty-five years, much of this debate has been brilliantly captured in the scholarship found on the pages of the *Blackletter Law Journal*. Today we have the enviable tasks of both addressing these challenges and devising creative new solutions that will prepare our children for our increasingly multi-racial society of the 21st century.

In fact, the election of President Obama and the celebration of the 25th anniversary of the BLJ suggest that our hard work has paid dividends small and large. As a nation, we have come a long way from the unconscionable days of slavery and legalized racial segregation, but we have not yet arrived at a time and a place where race no longer matters. We must be as aware as ever of what James Weldon Johnson described in the Black National anthem:

Stony the road we trod,
 Bitter the chast'ning rod,
 Felt in the days when hope unborn had died;
 Yet with a steady beat,
 Have not our weary feet
 Come to the place for which our fathers sighed?
 We have come over a way that with tears has been watered,
 We have come, treading our path through the blood of the
 slaughtered,
 Out from the gloomy past,

8. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2767–68 (2007) (citations omitted).

9. Sen. Barack Obama, *A More Perfect Union* (Mar. 18, 2008).

'Til now we stand at last
Where the white gleam of our bright star is cast.¹⁰

This foreword has two overlapping purposes. The first is to tell the story of the Harvard Black Law Students Association. The second is to connect that story to the larger struggle for racial justice. The pages of the BLJ have chronicled our difficult past, and the history of race relations illustrates a path of struggle and progress. What others have done to open the doors for us to attend Harvard as well as what we do with those opportunities are both critical elements of our obligations to each other and to the larger cause of racial justice. The twenty-five years of the BLJ offer a sample of our progress, and the larger struggle provides a roadmap for our future endeavors.

The first African American known to graduate from Harvard Law School was George Lewis Ruffin, who attended the Law School in 1867 and graduated in 1869. He was followed by a number of African Americans, each of whom became prominent members of the legal community and well-known jurists serving in the state courts. In 1957, Harvard Law School produced its first female graduate, Millicent Fenwick.

A critical turning point occurred in 1919, when Charles Hamilton Houston enrolled at Harvard Law School and became the first African American to serve on the Harvard Law Review. He was soon followed by his cousin, William Hastie, who was the first African American appointed to the federal bench.

Houston left Harvard and eventually taught at Howard Law School, where he encountered such well known students as Thurgood Marshall and Oliver Hill. He subsequently became the NAACP'S principal lawyer and carved out the strategy that eventually led to the end of legal Jim Crow segregation and paved the way for the *Brown v. Board of Education*¹¹ decision in 1954—issued, sadly, four years after Houston's death.

Harvard's role in this struggle for racial justice proceeded unabated into the 1960s as more African American students attended the Law School. Among the pioneers in the founding of the National Black Law Students Association in 1967 were Reginald Gilliam and David Patterson, both students of Harvard Law School. Their groundbreaking work was followed by further efforts to create a community at Harvard Law School and to encourage graduates to follow the path of Houston and others by using their Harvard training to make a difference in the legal arena.

One of the great successes of these early pioneers was their decision to press Harvard Law School to hire black faculty. Derek Bok, who was the Law School dean at the time and who later became president of Harvard University, accepted the students' demands; one of the Harvard Black Law Students Association (HBLSA) leaders, Robert Bell (who is now the Chief Judge of the Maryland Court of Appeals), was allowed to meet with Professor Derrick Bell, then teaching at the University of Southern California, and offer him a position. In 1969, he became the first African

10. NAACP, *History of Life Every Voice and Sing* (2009), http://www.naacp.org/about/history/levas_history/index.htm (last visited June 15, 2009).

11. 347 U.S. 483 (1954).

American member of the Harvard Law School faculty. Harvard students' ability to translate a critical mass of black law students into its first African American faculty member was a celebration to behold.

As the numbers of African American students increased at Harvard Law School, so too did the challenges they faced. The Harvard Black Law Students endeavored to do more than serve on law journals and in student organizations, reflecting a concerted effort to better serve the HBLSA community. When I arrived at Harvard Law School in the fall of 1975, Loretta Argrett, then the president of HBLSA, played a pivotal role in moving the organization to embrace a broad agenda of community service projects. No one could have imagined when the *Blackletter* was distributed in May of 1975, as a community newsletter rather than a scholarly journal, that Loretta Argrett would become, some twenty years later, the first African American woman to serve as the Assistant Attorney General in charge of the Tax Division. No African American had ever held that position, and she held it for both of President Clinton's terms.

While the number of black students attending Harvard Law School in the 1970s and 1980s began to increase, there was also a sharp and focused concern on the dearth of black faculty. This issue exploded in the early 1980s when the black law students, joined by a group called the Third World Coalition, boycotted a class entitled "Racial Discrimination and Civil Rights," jointly taught by NAACP Legal Defense and Education Fund legends Julius Chambers and Jack Greenberg. The purpose of the boycott by the black law students was to highlight that Harvard Law School had too few African American faculty, and, instead of borrowing practitioners to teach courses, should hire full-time professors. The students also emphasized the importance of legal scholarship that focused on issues relevant to the black community, and vowed that, until that happened, there would be no lack of opposition to the Law School's modest efforts. The students went further by organizing their own course and brought in guest lecturers to talk about issues of race and justice, thereby creating quite a stir locally and nationally.

The early BLJs in the 1980s made it clear that activism would be at the heart and soul of black students' agenda. The president of HBLSA 1983, Muhammad Kenyatta, pushed for greater faculty diversity during his tenure at the helm and made it clear that race was at the center of our efforts as black lawyers. In the 1983 BLJ, the students' slogan was clear: one tenured minority, one tenured woman, one sorry situation.¹² The pursuit of more diversity was at the heart of the courses offered as alternatives by HBLSA and the Third World Coalition, and these courses allowed a group of stellar legal scholars, including Professors Denise Carty-Bennia of Northeastern University, Chuck Lawrence of the University of San Francisco, Ralph Smith of the University of Pennsylvania, Richard Delgado of University of California, Los Angeles Law School, and Linda Green at the University of Oregon Law School, among others, to offer perspectives on race and law. The students were unyielding in their goal of ensuring that the issues of diversity in higher education

12. HARV. BLACKLETTER L.J. (1983).

should continue to be addressed, rather than ignored, by the legal academy.

The BLJ, which originally began as an informational newspaper, also was critically important to the formation of the first ever Harvard Law School Black Alumni Association. As a recent graduate of Harvard Law School in 1978, I had the great pleasure of working with alumni such as Loretta Argrett, Melvin Hollis, Frank Reid at Howard Law School, and others to form the first (national?) black alumni organization.

At the same time, the BLJ began its transformation from a newspaper to a legal journal, with articles by the second tenured African American professor in Harvard Law School's history, C. Clyde Ferguson, Jr., and others. In the 1984 BLJ issue, Professor Derrick Bell wrote about the importance of race and how the promises of *Brown* were still yet to be realized.¹³ It was an impressive beginning for the BLJ and was a remarkable indication of what was to come.

In 1985, the BLJ took a more serious look at scholarly issues by discussing the issues of telecommunication regulations and deregulation in an article by Mario Baeza that analyzed recent Supreme Court decisions in these areas impacted the extent and power of race in significant ways.¹⁴ These publications continued as well with a special issue in 1989, as the BLJ celebrated the more than two decades of service of Thurgood Marshall, the first African American Supreme Court Justice, who was appointed by President Lyndon Johnson in 1967. A number of legal scholars and alumni wrote about the importance of Justice Marshall, including Professors William Fischer and Kathleen Sullivan, the Honorable Constance Baker Motley, and myself.¹⁵

During the 1990s the journal began to publish not just important articles by students but commentary by legal scholars and public officials. The 1991 volume contains an impressive article by Professor Charles R. Lawrence, III, that commented on Derrick Bell's retiring from Harvard Law School's faculty because of the failure of the Law School to appoint a black woman.¹⁶ The volume also included several serious articles on issues of privacy,¹⁷ the Supremacy Clause,¹⁸ critical race theory,¹⁹ and the

13. Derrick Bell, *Brown v. Board of Education and the Black History Month Syndrome*, 1 HARV. BLACKLETTER L.J. 13 (1984).

14. Mario Baeza, *Telecommunications Reregulation and Deregulation: The Impact on Opportunities for Minorities*, 2 HARV. BLACKLETTER L.J. 7 (1985).

15. Charles J. Ogletree, *Justice Thurgood Marshall's Criminal Justice Jurisprudence: "The Right thing to Do, the Right Time to Do It, the Right Man and the Right Place,"* 6 HARV. BLACKLETTER L.J. 111 (1989); William W. Fischer, III, *The Jurisprudence of Justice Marshall*, 6 HARV. BLACKLETTER L.J. 131 (1989); Kathleen M. Sullivan, *The Candor of Justice Marshall*, 6 HARV. BLACKLETTER L.J. 83 (1989); The Honorable Constance Baker Motley, *Standing on His Shoulders: Thurgood Marshall's Early Career*, 6 HARV. BLACKLETTER L.J. 9 (1989).

16. Charles R. Lawrence III, *Doing "The James Brown" at Harvard: Professor Derrick Bell as Liberationist Teacher*, 8 HARV. BLACKLETTER L.J. 263 (1991).

17. Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER L.J. 181 (1991).

18. Kevin Little, *Missouri v. Jenkins: Exploring the Judicial Limits of the Supremacy Clause*, 8 HARV. BLACKLETTER L.J. 137 (1991).

crisis in the criminal justice system.²⁰ The expansion of the BLJ to cover a wide range of issues was impressive. It reflected the depth of the analyses of the students and the greater opportunities for those students to engage in more significant analyses.

As the number of black faculty increased at Harvard Law School with my appointment in 1985 and the tenure vote supporting Assistant Professors Chris Edley, Randall Kennedy, and David Wilkins, there was a sense that diversity was moving forward in a positive way at Harvard Law School. At the same time, the BLJ took on increasingly controversial issues. In focusing on police use of deadly force against minorities,²¹ the white perspective on the enforcement of rape laws,²² and a provocative article on urban space and the color line by Richard Ford,²³ the BLJ created space for many diverging points of view. Membership on the journal gave young scholars an opportunity to write about issues they cared passionately about, while strengthening their resumes.

One of the most important issues that the BLJ confronted was the 35th anniversary of *Brown v. Board of Education*. It published a series of commentary by scholars and practitioners suggesting that, even though *Brown* was an important step in the right direction in 1954, its thirty-five-year history reflected inconsistency, turns in the wrong directions, and a general failure to achieve the admirable goals that were so clearly announced in the 1954 decision.²⁴ The BLJ scholarship became not only more significant, but also sobering in its reflections on the painful difficulty of achieving many of *Brown's* ambitious goals.

While there is much history to recount in our path from slavery to freedom, there are some notable points along the way that require a somewhat more extended conversation. We are well aware that those who fail to understand history run the risk of repeating it. That phrase is acutely applicable in our examination of our history here at Harvard Law School. The starting point to understand this history is slavery. This "Peculiar Institution" gives us a rich sense of the past and a reminder of how fortunate we are to be in a position to look back and thank those who suffered much so that we might be free. Slavery became the southern way of life, but its tentacles also extended to the North and East as well to fulfill the economic goals of the Atlantic slave trade. As slavery grew as

19. Anthony E. Cook, *Critical Race Law and Affirmative Action: The Legacy of Dr. Martin Luther King, Jr.*, 8 HARV. BLACKLETTER L.J. 61 (1991).

20. Randolph N. Stone, *Crisis in the Criminal Justice System*, 8 HARV. BLACKLETTER L.J. 33 (1991).

21. Kevin P. Jenkins, *Police Use of Deadly Force Against Minorities: Ways to Stop the Killing*, 9 HARV. BLACKLETTER L.J. 1 (1992).

22. Erin Edmonds, *Mapping the Terrain of Our Existence: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER L.J. 43 (1992).

23. Richard T. Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER L.J. 117 (1992).

24. J. Clay Smith, Jr., et al., Forum, *Education in the 1990s: Re-Examining the Impact and Role of Brown v. Board of Education 35 Years Later*, 8 HARV. BLACKLETTER L.J. 99-154 (1990). The forum included commentary by Smith, Judy Scales-Trent, LeRoy Pernell, Richard Matasar, Kenneth Lasson, and Richard Aynes.

an enterprise, it became a major point of profit and prosperity from the South to the North.

In 1820, Congress passed an act commonly known as the Missouri Compromise, prohibiting slavery in the western territories “north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri”.²⁵ What effect did the Compromise have on one’s status as a slave, upon that individual’s entering free territory? The Court addressed this very question over three decades later in the most reprehensible case in American jurisprudence. In *Dred Scott v. Sandford*,²⁶ the political struggle that existed between northern and southern states over slavery lurked in the background of the litigants’ claims. The Court unhesitatingly seized the opportunity to resolve the dilemma created by the Compromise.

The *Dred Scott* case captures the struggle to define the limits of slavery and the rights of freed persons of African descent. Dred Scott disputed his status as a slave and filed a lawsuit asserting that he should be deemed a free man. One of the key issues in the case was whether a black person, free or slave, whose ancestors were brought to America as slaves, should be considered a citizen of the United States, therefore entitling that person to all the rights, privileges, and immunities guaranteed by the Constitution to citizens, which included the right to bring suit in federal court under specific circumstances.²⁷ Chief Justice Roger B. Taney, speaking for a majority of members of the United States Supreme Court, emphatically denied Dred Scott’s claim, holding that all black persons, whether free or slave, were not and could not become United States citizens, and the plaintiff was therefore barred from bringing his lawsuit.²⁸ Chief Justice Taney’s language, in denying Scott’s claim, was and remains breathtaking:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the constitution was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white races, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.²⁹

The majority believed that the framers of the Constitution did not intend for black persons to be included “under the word ‘citizens’ in the

25. *Scott v. Sandford*, 60 U.S. 393, 432 (1856).

26. 60 U.S. 393 (1856).

27. *See id.* at 403.

28. *See id.* at 404-06.

29. *Id.* at 407.

Constitution.”³⁰ Moreover, in reference to the “all men are created equal” premise of the Declaration of Independence, Chief Justice Taney rather dismissively reasoned that the language “is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration”³¹ The decision was a perpetuation of the racial animus that laid the foundation for American slavery.

A further painful outcome of the *Dred Scott* decision was that it declared the Missouri Compromise unconstitutional,³² thus permitting slavery in territory where it was formerly prohibited and holding that Congress could not prohibit slavery in the newly emerging states. The Court believed that “the right of property in a slave is distinctly and expressly affirmed in the Constitution”³³ and, thus, the slaveholders’ rights must be protected. Accordingly, the Court held that the Compromise, which in effect sought to deprive slaveholders of their property “could hardly be dignified with the name of due process of law.”³⁴

With the demise of the Compromise, the southerners who desired a national system of slavery were granted a substantial step toward having their dream actualized. The Court seemed to function as an extension of the southern slaveholding regime, lending legal support and credence to the institution of slavery. The *Dred Scott* decision aggravated preexisting animosities, which intensified the political and social rift between the North and the South, undoubtedly playing a significant role in fueling the attitudes that triggered the American Civil War.

Given the egregious nature of the decision, Abraham Lincoln was compelled to publicly object to the decision. However, Lincoln’s disgust with the decision was not entirely attributable to its substantive outcome. Lincoln’s condemnation of *Dred Scott* was largely motivated by what he viewed as the Court’s excessive power and ability to set forth a binding political rule through its interpretation of the Constitution. In explaining the nature of his opposition to the *Dred Scott* decision, Lincoln stated,

We do not propose that when Dred Scott has been decided to be a slave by the court, we . . . will decide him to be free . . . but we nevertheless do oppose that decision as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.³⁵

Lincoln disapproved of the Court’s ability to render an absolute interpretation of the Constitution that placed an expectation and considerable amount of pressure upon the remaining arms of government to conform their respective views and behaviors to the principles of the Court.

30. *Id.* at 404.

31. *Id.* at 410.

32. *See id.* at 452.

33. *Id.* at 451.

34. *Id.* at 450.

35. Abraham Lincoln, Speech During Senatorial Campaign (Oct. 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 255, 255 (Roy P. Basler ed., 1953).

Furthermore, Lincoln was troubled by the fact that the citizens—even if citizens did not include black persons—would be stripped of any meaningful opportunity to affect the types of laws and governance they would be subject to by virtue of their ability to vote for and elect individuals that they believed would adopt policies aligned with the interests of their electors. He saw the Supreme Court as an insulated body, which the people had no influence in selecting, that thwarted the will of the people when it made these decisions. After being elected president, Lincoln elaborated: “if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”³⁶

Following Lincoln’s presidential election, tension between the North and the South heightened. Eventually, the South seceded from the United States, forming its own Confederate States of America. The country was carved into two separate spheres, with the institution of slavery functioning as the divider. Shortly thereafter, in 1861, the American Civil War erupted.

For his role in the American Civil War, many revere Lincoln as the “Great Emancipator” who freed the slaves. However, in fact, Lincoln did not free a single slave in territory occupied by the Union when he issued the Emancipation Proclamation. Those slaves were not freed in 1861 or 1863 but rather by the ratification of the Thirteenth Amendment in 1865.³⁷ It was the Thirteenth and Fourteenth Amendments that essentially overturned the grotesque decision rendered in the *Dred Scott* case by granting black persons both citizenship and equal protection of the laws.

Though it is commonly believed that Lincoln fought the Civil War to end slavery and that he favored social and political equality for black persons, these are gross mischaracterizations of Lincoln’s motives in entering the war and attitude toward equal rights for black citizens. I do not wish to belittle Lincoln’s significant contributions to securing freedom for the black race and providing a necessary step toward their securing rights as citizens of the United States. However, I seek to rebut the clear overstatements and misconceptions of Lincoln’s allegiance to the black race by challenging the myths that Lincoln fought the Civil War to end slavery and that he was a champion of equal rights for black people.

It is conceded that Lincoln considered slavery to be a morally questionable practice; however, the enslavement of black persons did not on its own stir Lincoln into action. Instead, the slave institution’s divisiveness and the massive strain it placed on the relationship between northern and southern states that moved Lincoln to act. Oftentimes, Lincoln’s

36. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 MESSAGES AND PAPERS OF THE PRESIDENTS 5, 5 (James D. Richardson ed., 1897).

37. See Abraham Lincoln, Final Emancipation Proclamation (Jan. 1, 1863), in 98 ABRAHAM LINCOLN: GREAT SPEECHES (Roy P. Basler ed., 1991) (noting that the Emancipation Proclamation did nothing to free slaves in states loyal to the Union and that such slaves were freed only by the ratification of the Thirteenth Amendment in Dec. 1865).

political agenda is misconstrued and his overriding interest in reunifying the country is overshadowed by the fact that slaves were freed during his presidency.

Lincoln's primary objective and concern was to preserve the union. Therefore, many benefits afforded to blacks in the attainment of that goal may have been merely incidental. President Lincoln's quite categorical statement that the Union side did not fight the Civil War only to abolish slavery cannot be ignored. In a letter to James Conkling in Illinois, sent as a proxy stump speech during his second campaign for the Presidency during 1863, Lincoln wrote:

You say you will not fight to free negroes. Some of them seem willing to fight for you; but no matter. Fight you, then exclusively to save the Union. I issued the proclamation on purpose to aid you in saving the Union. Whenever you shall have conquered all resistance to the Union, if I shall urge you to continue fighting, it will be an apt, time, then for you to declare you will not fight to free negroes.

I thought that in your struggle for the Union, to whatever extent the negroes should cease helping the enemy, to that extent it weakened the enemy in his resistance to you. Do you think differently? I thought that whatever negroes can be got to do, as soldiers, leaves just so much less for white soldiers to do, in saving the Union. . . . If they stake their lives for us, they must be prompted by the strongest motive—even the promise of freedom. And that promise, being made, must be kept.³⁸

Lincoln, as well as the blacks that fought in the war, made a pivotal contribution to a war to preserve the Union, not abolish slavery.

Additionally, in a letter addressed to the Horace Greeley, Lincoln attempted to silence speculation regarding his political agenda and make his sole interest in Union preservation clear by passionately asserting:

I would save the Union. I would save it the shortest way under the Constitution. . . . If there be those who would not save the Union, unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing any slave I would do it What I do about slavery, and the colored race, I do because I believe it helps to save the Union³⁹

In Lincoln's view, abolishing slavery was solely a necessary step in winning the Civil War. Furthermore, the view that Lincoln was a friend of the black race is tempered by his sentiments, along with many other white (and black) Americans, that blacks neither could be nor deserved to

38. SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* 640 (1963) (quoting Pres. Lincoln).

39. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), in 8 *COMPLETE WORKS OF ABRAHAM LINCOLN* 15, 15–16 (John G. Nicolay & John Hay eds., 1905) (1895).

be considered equal to white citizens. Concededly, this view changed dramatically toward the end of Lincoln's life.

In the great debates between Abraham Lincoln and Stephen A. Douglas during the 1858 campaign for Senate, Lincoln's ambivalence towards blacks shone through, making it clear that, although he helped free the slaves for the sake of the Union, he incontrovertibly disfavored social and political equality for the black race. In the fourth debate, Douglas relentlessly accused Lincoln of supporting and advocating racial equality. Lincoln plainly and unabashedly proclaimed, "I am not, nor ever have been in favor of bringing about in anyway the social and political equality of the white and black races—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people . . ." ⁴⁰ After positing that there were physical differences between the two races that would eternally preclude black and white equality, Lincoln went on to add, "while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race."⁴¹ It was evident that Lincoln, like many white Americans in the late nineteenth century, disapproved of racial equality and interracial marriage, favoring white supremacy.

The attitudes that were shared by Lincoln and the majority of white Americans allowed the Jim Crow system to grow stronger. Jim Crow, a caricature of a black man created by a white minstrel in 1828 to entertain white crowds, had, by late in the century, come to symbolize a systematic political, legal, and social repression of African Americans.⁴² Blacks were subjected to judicially and politically sanctioned segregation, discrimination, and violence. Glenda Elizabeth Gilmore, a professor of history at Yale University, has called the system one of white supremacy—"a system that was established both through legislation and the courts, and through custom. It could mean anything from being unable to vote, to being segregated, to being lynched. It was part and parcel of a system of white supremacy. Sort of like we use the word apartheid as a codeword to describe a certain kind of white supremacy."⁴³

Segregation grew out of white resistance to black emancipation in the wake of the Civil War. Leon Litwack has documented the ways in which southern whites resented and rejected African American attempts to resist work conditions that simply replicated the forced labor of the plantation with the attendant social order of abject deference to whites.⁴⁴ The newly freed African Americans sought inclusion in a wage labor system that respected their transformed status as laborers and citizens who had

40. Abraham Lincoln, *The Lincoln-Douglas Debates*, in *SPEECHES AND WRITINGS, 1832–1858*, at 636 (Library of America, 1989).

41. *Id.*

42. RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* (New York: St. Martin's Press, 2003).

43. National Public Radio (NPR), *Remembering Jim Crow: A Documentary by American RadioWorks* (radio broadcast Oct. 2001), available at <http://www.americanradioworks.org/features/remembering/transcript.html> (last visited April 8, 2009).

44. See LEON LITWACK, *BEEN IN THE STORM SO LONG* 336–38 (1979).

the same legal rights and privileges as whites. But southern whites clung to the old paternalistic myths justifying slavery, seeing themselves as protectors of southern blacks and regarding their former slaves as ignorant and now resentful children. Newly freed African Americans were prohibited from participating on equal terms with whites in the labor market.

In the political sphere, additional barriers were erected to prevent recently freed slaves from enjoying many of the freedoms available to all citizens. In an 1873 decision in three cases known collectively as the “Slaughter-House Cases,” the Supreme Court effectively created two tiers of citizenship, by interpreting the Fourteenth Amendment to guarantee the “privileges and immunities” of citizenship nationally, as enforced by the federal government, but not locally in the individual states.⁴⁵ The states could now determine the citizenship status of those who lived within their jurisdiction, and many created a second-class citizenship for African Americans.

Ten years later, in a number of consolidated cases known as the “Civil Rights Cases,” the Court introduced the non-constitutional requirement of “state action” to undermine the Fourteenth Amendment’s reach beyond governments to the actions of individuals.⁴⁶ Plaintiffs claiming a violation of this amendment were now required to assert that state officials had discriminated against them. The court also distinguished between social and civil rights,⁴⁷ declaring that racial discrimination was a social, and therefore non-legal, matter. Ultimately, the Court refused to outlaw private acts of discrimination, thus setting the stage for permissible segregation that we know as Jim Crow.

During the same year, the Court was compelled to interpret the Equal Protection Clause of the Fourteenth Amendment in the context of interracial intimacy. In 1883, the Court in *Pace v. Alabama*⁴⁸ upheld Alabama’s anti-miscegenation statute, which punished interracial fornication more severely than intraracial fornication. In its brief opinion, the Court legitimized a distorted view of justice and provided an early glimpse of the “separate but equal” interpretation of the Fourteenth Amendment that would resurface in *Plessy v. Ferguson*.⁴⁹ The Court declared that the statute was constitutional under the Fourteenth Amendment and racial discrimination did not exist where the law applied equally to both whites and blacks.⁵⁰ The doctrinal language in the anti-miscegenation statute satisfied the appearance of justice.

Although frequently overlooked, the history behind *Brown v. Board of Education*⁵¹ was as equally crucial to its future success as its progression through the Courts. Inextricably tied to *Brown* in American popular conscience is Thurgood Marshall, the most prominent advocate for the plaintiffs in *Brown*. He along with other lawyers, including Oliver Hill,

45. 83 U.S. 36, 71 (1873).

46. 109 U.S. 3 (1883).

47. *Id.* at 22.

48. 106 U.S. 583 (1883).

49. 163 U.S. 537 (1896).

50. *Id.* at 585.

51. 347 U.S. 483 (1954).

Constance Baker Motley, Robert Carter, Spotswood Robinson, James Nabrit, Jack Greenberg, Jack Weinstein, Louis Pollack, Bill Coleman, Charles Black, and Bob Ming, all executed the role of a legal infantry in arguing the cases and pushing the litigation forward. Many of these lawyers were African-American graduates of Howard Law School, a historically black university located in Washington, D.C. Unknown to most is the general who strategized the desegregation assault encapsulated in *Brown*. His name was Charles Hamilton Houston.

Born in the late 19th century, Charles Hamilton Houston was a valedictorian of Amherst College at the age of 19, a U.S. Army veteran of World War I, a graduate of Harvard Law School, and the first African American elected to the Harvard Law Review.⁵² He received an advanced law degree, an S.J.D., from Harvard Law School, and a doctorate of civil law from the University of Madrid.⁵³ He was a teacher and later dean of Howard Law School, where he gathered a mass of top black lawyers and law professors and relentlessly instructed countless graduates of Howard Law School and future *Brown* litigators. Of the thirty lawyers who served as plaintiffs' counsel in *Brown*, Thurgood Marshall noted that all but two were taught by Houston.⁵⁴ He was special counsel to the NAACP and litigated several of its cases. In this role, he extensively researched segregation and carefully strategized its downfall.

To those aware of this history, Charles Hamilton Houston has become known as the man who killed Jim Crow.⁵⁵ The strategy that Charles Hamilton Houston devised was three-fold.⁵⁶ First, he amassed a nationwide network of prominent African American lawyers to pick and cull possible test cases. Second, he attempted to build the precedential foundation necessary for a direct constitutional assault on segregation. Based on his extensive research on segregation in the American South, he developed the legal theory that the separate-but-equal doctrine put forth in *Plessy v. Ferguson* was fatally flawed. The evidence he gathered demonstrated that separate facilities for African Americans were not equal, and thus, he argued, separate facilities and benefits provided on the basis of racial classification can never be equal. Third, he sought to organize local black communities in broad, unified support of legal, political, and social action against ongoing discriminatory practices.

Shortly before the actual argument of *Brown* was to take place before the Supreme Court, there was a crucial change in the composition of the Court. In the years leading up to *Brown*, Fred Vinson was the Chief Justice of the Court. He, along with four other justices, were reluctant to over-

52. See generally GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983).

53. See U.S. DEPT. OF STATE, BUREAU OF INT'L INFO. PROGRAMS, *FREE AT LAST—THE US CIVIL RIGHTS MOVEMENT* 26 (George Clack et al. eds. 2008), <http://www.america.gov/media/pdf/books/free-at-last.pdf>.

54. See Thurgood Marshall, *Tribute to Charles H. Houston*, *AMHERST MAGAZINE*, Spring 1978, reprinted in *THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, AND REMINISCENCES* 272 (Mark V. Tushnet ed., 2001).

55. *Free At Last*, *supra* note 53, at 26.

56. MCNEIL, *supra* note 52, at 82.

turn *Plessy's* separate-but-equal doctrine.⁵⁷ However, in 1953, Chief Justice Vinson died and was replaced by Earl Warren. Chief Justice Warren would prove to be a linchpin in the unanimous decision rendered by the Court in *Brown*.⁵⁸

It is well-known that *Brown* stood as the judicial death knell to state-mandated racial segregation in American public life and the forced beginnings of racial integration. But it is not as well known that *Brown* was actually the consolidation of five individual cases filed in Kansas, South Carolina, Virginia, Delaware, and Washington, D.C. that, despite their particular local circumstances and facts, all attacked the racial segregation of schools as a violation of the Equal Protection Clause.⁵⁹ The Equal Protection Clause of the Fourteenth Amendment states that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁶⁰ The plaintiffs in *Brown* claimed that they suffered a denial of the equal protection of the laws by their respective local school boards because their “segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws.”⁶¹ This line of argumentation stood in direct conflict with the separate-but-equal doctrine initially put forward in *Plessy*.

In a per curiam decision, the Court agreed with the plaintiffs. First, the Court rejected *Plessy's* separate-but-equal doctrine, stating that “in the field of public education the doctrine of ‘separate but equal’ has no place” on the basis that “[s]eparate educational facilities are inherently unequal.”⁶² The Court framed the case by looking to “the effect of segregation itself on public education.”⁶³ It found that because of the great importance that education has in modern American society, “where the

57. See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 292–320 (2004).

58. Chief Justice Warren’s actions in *Brown* are not untainted and he had a more complicated history. As Attorney General of California, he played a decisive role in the internment of over 100,000 Japanese-Americans. See Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. Rev. 73, 118–19 (1998) (describing Chief Justice Warren’s actions). These American citizens were not spies, nor did they violate the law. In many respects, they were just as or more patriotic than other citizens. But in the time of World War II, the State of California decided to isolate them in internment camps. That is a blight on Chief Justice Warren’s record. Before his passing, Warren later made clear that it was one of the most shameful and regrettable actions he had ever participated in. See EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 149 (1977) (professing “deep regret” for his involvement with the internment).

59. The first footnote in *Brown* cites the consolidation of *Brown v. Bd. of Educ. of Topeka*, 98 F.Supp. 797 (1951) from Kansas, *Briggs v. Elliot*, 98 F.Supp. 529 (1951) from South Carolina, *Davis v. County School Bd. of Prince Edward County*, 103 F.Supp. 337 (1952) from Virginia, and *Gebhart v. Belton*, 91 A.2d 137 (1952) from Delaware into one case. Although the fifth case, *Bolling v. Sharpe*, 347 U.S. 497, dealt with the same constitutional question, the Supreme Court treated it in a separate decision because of Washington, D.C.’s then special status of not having the Fourteenth Amendment explicitly apply to it. The Court did decide the case in the same manner as the other four consolidated cases.

60. U.S. Const. amend. XIV, § 1.

61. *Brown*, 347 U.S. at 488.

62. *Id.* at 494.

63. *Id.* at 492.

state has undertaken to provide [the opportunity of an education, it] is a right which must be made available on equal terms".⁶⁴ Following the same rationale found in previously unsuccessful separate-but-equal litigation cases, the Court relied on the negative psychological impact on and the lost intangible benefits to black students when they are segregated from their white counterparts. Essentially, where the separation of races occurs under the color of law, there is an implication, based on historical practice and belief, that African-Americans are inferior and that "'sense of inferiority. . . has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system'".⁶⁵ Accordingly, separate is inherently unequal.

The logical conclusion to *Brown's* rejection of separate-but-equal was the judicial mandate for racial integration of the nation's educational system. But here, the Court waited for re-argumentation on the question of what racial desegregation implies in effect and how lower courts should deal with its implementation. Regardless, in its narrowest sense, *Brown* clearly made the practice of racially segregated schooling throughout the nation unconstitutional. At its broadest, *Brown* would stand for the end of state-mandated racial segregation. But even in its most confined interpretation, the initial *Brown* decision would have dramatic effects on the social fabric and conscious of the nation.

The follow-up to the initial questions that were left unanswered came in the form of *Brown v. Board of Education* (*Brown II*). The Court requested briefs from all parties-in-controversy and from "Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas".⁶⁶ The parties submitted specific information on the judiciary's role in the implementation of desegregation and integration.⁶⁷

The potential for social change that the Supreme Court telegraphed in *Brown* was sharply curtailed by the practical implications of three simple words found in *Brown II* – "all deliberate speed". These words provided an easily exploitable avenue for segregationists to fight integration. The Court signaled to the nation as a whole, and especially to those unwilling and unprepared to integrate public schools, that the process of desegregation and integration was not to be sudden, immediate, or even speedy. In those three words lie the irony and hypocrisy of *Brown*. There was a clear and decisive decision to move forward, but it was mandated that the motion be a slow one.

The actions taken by and statements made from the White House reinforced *Brown's* overly cautious adoption of desegregation and integration policies. Supporters of *Brown* expected President Eisenhower to support

64. *Id.* at 493.

65. *Id.* at 494.

66. *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955).

67. *Id.* at 299 n.2.

the *Brown* mandate. As President of the United States, and General in World War II, he was certainly the America's most powerful and commanding leader. Of all America's white leaders, he certainly had the moral authority to positively influence the public debate on integration. Moreover, Eisenhower was very popular among white business leaders in the South and leaders of the armed forces who held the keys to community responses to *Brown*.⁶⁸ Eisenhower, like many whites, considered himself a racially tolerant man and issued a number of presidential decrees in support of desegregation of federal facilities and schools in the District of Columbia. The public view, though, was that these actions were more ceremonial than substantive. Eisenhower also grew up at a time when segregation was the general practice in America, and he was well aware of its deleterious effects on African Americans.

Furthermore, as a military man, Eisenhower had directly witnessed what should have provided him with an obvious model for action. His predecessor, President Harry Truman, had made impressive strides towards racial equality in the 1940s by ordering the integration of the armed forces and by making the public aware of the collective benefits of an integrated America. Yet Eisenhower did not follow Truman's example in promoting integration. When he served in the army, it was still under the framework of Jim Crow, and Eisenhower opposed Truman's moves to desegregate the army, deeming them too disruptive.⁶⁹ This view informed his approach to school desegregation as well, especially as he saw his popularity rise with southern voters.

When the Supreme Court ruled on *Brown*, Eisenhower accepted the decision—as he was bound to—but did not endorse it. Publicly he stated, "The Supreme Court has spoken, and I am sworn to uphold their—the constitutional processes in this country, and I am trying. I will obey". Privately, however, he stated that the Court's decision had set race relations progress back fifteen years and that desegregation could lead to social disintegration.⁷⁰ Indeed, though the segregationists who were opposed to *Brown* made their voices heard on the floor of Congress, on national television, and in public forums, the President did not respond.⁷¹ Senator Harry Byrd of Virginia coined the phrase "massive resistance," and 90 percent of the congressional delegation from the South signed a "Southern Manifesto," denouncing *Brown* as a "clear abuse of judicial power" and vowing to reverse it by using "all lawful means" at their disposal.⁷²

In the eleven states of the Deep South, the judges had the job of forcing compliance on unwilling school boards. Because President Eisen-

68. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 80 (2002).

69. *Id.*

70. *Id.* at 82 (citing quotations found in STEPHEN AMBROSE, *EISENHOWER: SOLDIER AND PRESIDENT* 367 - 68 (1990) and EMMET JOHN HUGHES, *THE ORDEAL OF POWER: A POLITICAL MEMOIR OF THE EISENHOWER YEARS* 201 (1963)).

71. J. W. PELTASON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 47 (1961).

72. PATTERSON, *supra* note 68.

hower followed a policy of nonintervention on desegregation, the judges were less likely to act. Though the federal judges may have been politically insulated by lifetime appointments, they were still fearful of taking what could be perceived as an aggressive stance on integration, especially without the full backing of the federal government and the executive branch in particular. Thus, if a judge could imagine a legitimate reason to delay, he would delay; in this way, “the most recalcitrant judge and the most defiant school board were allowed to set the pace”.⁷³

The stunted impact of the *Brown* decision, combined with President Eisenhower’s overly cautious response, limited the potential for real and lasting social change. Segregationist opponents were able to build resistance to the implementation of *Brown*. The opposition to *Brown* manifested itself in myriad ways. In Virginia, an attempt was made to shut down the public education system rather than allow the joint schooling of black children and white children.⁷⁴ Efforts by civil rights leaders to peacefully protest segregation in American society were zealously battled by state and local authorities. In many ways, the fervent opposition to desegregation can be summarized in Governor George Wallace’s infamous statement in his 1963 Inaugural Address: “In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say segregation today, segregation tomorrow, segregation forever.”⁷⁵

In 1955, a young teenager left Chicago to visit his relatives in Mississippi. He whistled at a white woman. His name was Emmett Till. He was lynched in 1955—not 1905, not 1925, but in 1955.⁷⁶ In the same year, a seamstress and NAACP chapter secretary from Montgomery, Alabama, read the *Brown* decision and decided that she would use the bus as her vehicle for challenging segregation. Rosa Parks sat on that bus in Montgomery and was arrested for violating the local ordinance proscribing blacks from sitting in seats. This law remained on the books despite *Brown* having the logical effects of eliminating separate-but-equal facilities.

In an era of intense displays of conflict and hatred, Arkansas Governor Orville Faubus, along with Arkansas National Guard, stood at the entryway of Central High School, defying the *Brown* decision by refusing to allow black students to enter the school. Even the strong language from the nation’s highest court was insufficient to allow the hopes of the first black students at Central High School to be realized. The Governor, via the Guard, stood his ground for the next three weeks.⁷⁷

On September 20th 1957, a federal district court in Arkansas issued a preliminary injunction directing the Governor to allow the nine students into the high school.⁷⁸ The nine students were escorted into the building

73. PELTASON, *supra* note 71, at 55.

74. See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 113 – 14 (1994).

75. George C. Wallace, Governor of Alabama, 1963 Inaugural Address (Jan. 14, 1963).

76. See PATTERSON, *supra* note 68, at 86 – 87.

77. *Id.* at 11.

78. *Id.* at 11-12.

on the following Monday morning, September 23, by the Little Rock and Arkansas State Police Departments.⁷⁹ President Eisenhower dispatched federal troops that same day and the troops remained in Little Rock to protect the black students for the rest of the school year.⁸⁰

The Little Rock School Board petitioned the federal courts to postpone integration as a result of the turbulence caused by the desegregation plan.⁸¹ The district court granted the school board's request. The Eighth Circuit reversed, and then the United States Supreme Court granted certiorari in *Cooper v. Aaron*.⁸² In *Cooper v. Aaron*, the Supreme Court rejected the Governor's plain disobedience to *Brown*. Chief Justice Warren wrote:

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the Courts. We reject these contentions.⁸³

The Court further warned that "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature,"⁸⁴ and then ruled that "[t]he right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law."⁸⁵ Finally, the Court emphasized the strength and solidarity behind the *Brown* decision:

The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who partici-

79. *Id.* at 12.

80. *Id.*

81. *Id.*

82. *Id.* at 14.

83. *Id.* at 4 (citation omitted).

84. *Id.* at 16.

85. *Id.* at 19.

pated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed.⁸⁶

The story of integration at Little Rock's Central High School presents a triumphant, instructive narrative for our contemporary American society and for litigators who, in line with the history of great civil rights lawyers, still see the law as an instrument for social change. It is a story with clearly drawn heroes and villains that celebrates determination and dignity, progress and pride. Fifty years ago, good did indeed face down a kind of evil in Arkansas. Who could forget the image of nine black teenagers bravely attempting to enter Central High School and being turned away by the Arkansas National Guard, deployed by the state's segregationist governor, the notorious Orville Faubus? And most of us surely remember those weeks later, on September 25th, when federal troops finally escorted the nine students into school.

The nationally televised trauma tested the resolve of these nine young people: Ernest Green, Elizabeth Eckford, Jefferson Thomas, Terrence Roberts, Carlotta Walls LaNier, Minnijean Brown Trickey, Gloria Ray Karlmark, Thelma Mothershed-Wair, and Melba Pattillo Beals. Through numerous books, documentaries and media interviews, the "Little Rock Nine" have evolved, quite deservedly, into national heroes.⁸⁷ The integration of Central High in Little Rock is most often recounted through these deeply personal stories. In fact, it may very well be that because Little Rock so exquisitely expressed the human side of jurisprudence and public policy, the events were seared into our collective consciousness. It became an iconic moment. Little Rock in 1957 tested the moral fiber of an entire nation. The United States passed the test.

Looking back now, there is probably something close to universal agreement that the United States did the right thing in Little Rock when it deployed federal troops to enforce the Supreme Court's unanimous *Brown* decision. In fact, there may be close to universal agreement that President Dwight D. Eisenhower, in his repeatedly evasive responses to questions that tried to gauge his support for *Brown I*, took far too long to enforce the ruling.⁸⁸ However, at the time, there was nothing close to universal consensus around the morality of *Brown*, or around the need for racial integration. Thus, Little Rock could be seen as the first significant measure of the federal government's commitment to ridding the nation of Jim Crow segregation. For socially concerned litigators and scholars committed to using their intelligence and training to enhance opportunity and further social equality, it is more important than ever to remember that the United States *progressed* toward the moral clarity related to *Brown* and, by extension, the events in Little Rock in 1957. This comprehension of history, combined with a willingness to form new alliances and creatively construct legal theories, cases, and defenses that wind around significant roadblocks, will lay the groundwork for a civil rights agenda in the 21st century.

86. *Id.*

87. See generally MELBA PATILLO BEALS, WARRIORS DON'T CRY (1994).

88. RICHARD KLUGER, SIMPLE JUSTICE 174 (1975).

With the assassination of President John F. Kennedy in 1963, Vice President Lyndon B. Johnson ascended to the Presidency. Although not initially a strong supporter of the Civil Rights Act of 1954, Johnson showed himself to be a supporter of integration policies throughout his five years in office. He not only appointed Thurgood Marshall to be the first African-American solicitor general, but also the first African American Supreme Court Justice. He described Marshall's appointment as "the right thing to do, the right time to do it, the right man and the right place".⁸⁹ He also appointed Constance Baker Motley to be a federal court judge sitting in the U.S. District Court for the Southern District of New York, the first African-American woman to achieve such a post.⁹⁰ He appointed Wade McCree to the U.S. Court of Appeals for the Sixth Circuit, the first African American to hold that position.⁹¹ As a policy, the Johnson Administration implemented rapid and dramatic changes in the South by vigorously enforcing desegregation. Federal rules implementing legislation became effective in 1965, and civil rights lawyers in the Justice Department began filing suits. The sanctions imposed by the law and the cutoffs to federal aid were effective tools to regulate school districts that refused to desegregate.⁹²

It could be that in giving a commencement speech to Howard University, President Johnson fully understood the sympathies of his audience and accordingly catered to them. It could be that he was also speaking frankly and openly from his own conscience. It could be both. Regardless, in his speech, "To Fulfill These Rights," he outlined his understanding of the plight of African Americans in 1965 in a surprisingly candid and nuanced way that still resonates today.

But [legally enshrined] freedom is not enough. You do not wipe away the scars of centuries by saying, "Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.⁹³

In some ways, Johnson's speech parallels the interpretation of the Fourteenth Amendment found in the fifth footnote in *Brown*, citing the *Slaughter-House Cases* and *Strauder v. West Virginia*, where the amendment

89. CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 297 (1994).

90. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 79 (2004).

91. *Id.* at 157; Brian C. Kalt, *Wade H. McCree, Jr., and the Office of Solicitor General*, MICH. ST. L. REV., 703, 704 (1998).

92. OGLETREE, *supra* note 90, at 132. PATTERSON, *supra* note 68.

93. OGLETREE, *supra* note 90, at 132.

is considered to be designed for the protection of “the colored race”.⁹⁴ The Court further articulates the Fourteenth Amendment’s “necessary implication of a positive immunity, or right” to be legally discriminated against and reduced “to the condition of a subject race”. Here, the Court articulates a deep concern for the subjugation of African Americans as a race. In his speech, President Johnson extends out of this concern an advocacy for the active empowerment of African-Americans to a level consistent with the larger society.

Johnson’s diagnosis of the state of black America remains startlingly accurate today. Despite the many achievements made by African Americans, he saw the problem as “a much grimmer story” lived by “the great majority of Negro Americans—the poor, the unemployed, the uprooted, and the dispossessed.”⁹⁵ He chronicled many of the statistics that paint the stark picture for countless African Americans living with de facto segregation. This current situation, combined with the remnants of slavery and segregation, resulted in “a seamless web” where African Americans are infirmities that “cause each other. . . result from each other. . . reinforce each other”. This plight of “a world of decay” with an “escape [that] is arduous and uncertain, and [where] the saving pressures of a more hopeful society are unknown” is multiplied by the crippling social effect that broken families have on children.⁹⁶

To attack these problems, Johnson included measures aimed at bringing African Americans out of poverty in his plans for the Great Society. His vision included a “poverty program,” an “education program,” a “medical care and. . . other health programs” and “a dozen more of the Great Society programs. . . aimed at the root causes of this poverty.”⁹⁷ Driving these reforms was Johnson’s view of a deeper normative conception of American justice, which he described as a goal to . . . “fulfill the fair expectations of man”. His vision fostered a political justice with a democratic government bound by the rule of law and an economic justice with a “rich land, glowing with more abundant promise than man had ever seen. . . [where] all were to share the harvest.”⁹⁸

What Johnson intended for African Americans as a part of his Great Society design could be seen by some as a variation of affirmative action. As articulated in his speech, the mission of the Great Society would be to usher African American community into the “gates of opportunity” by equipping and training them with the necessary tools and skills to achieve economic and social progress. Importantly, this vision differs substantially from the straw man portrayal of affirmative action in the ensuing decades as reverse discrimination of whites. In Johnson’s larger

94. *Brown v. Bd. of Educ (Brown II)*, 347 U.S. 483, 492 n.5 (citing *In re Slaughter-House Cases*, 83 U.S. 36 (1872) and *Strauder v. State of West Virginia*, 100 U.S. 303 (1879) in interpreting the possible positive rights emanating from the Fourteenth Amendment).

95. Lyndon B. Johnson, President of the United States of America, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965).

96. *Id.*

97. *Id.*

98. *Id.*

view of a more equally prosperous nation, he sees the plight of “the great majority of Negro-Americans—the poor, the unemployed, the uprooted, and the dispossessed” and chooses to affirmatively remedy that situation. First, Johnson’s vision of affirmative action came with an understanding that “[t]he Negro. . . will have to rely mostly upon his own efforts.”⁹⁹ In sharp contrast to what opponents of affirmative action claim, Johnson did not advocate a governmental “free ride.” Rather, he asserted that African Americans must behave like “other American minorities” in putting forth a majority of the work to “emerge from poverty and prejudice”. Second, Johnson recognized that a significant portion of the success of any affirmative action program depends upon a stable and supportive family and community environment. Johnson discussed the negative effects of a divided homes and marriages in damaging the psyche of children and breaking down the fundamental unit of human society. Thus, in order to break the generational ravages of broken homes, the family and the community must be restored and supported. Third, Johnson knew the government would have to provide goods and services to address the harmful effects of poverty. Left alone, those in poverty will most likely continue to remain in poverty, isolated from the larger American prosperity and suffering from its cumulative effects. Thus, as the only entity capable of providing widespread and comprehensive remedies, the government must provide a package of goods and services that will allow “the poor, the unemployed, the uprooted, and the dispossessed” to pass through the “gates of opportunity”. That is where the very limited set of government answers comes into play. In helping to provide jobs, “[d]ecent homes in decent surroundings and a chance to learn,” “[w]elfare and social programs,” and “[c]are for the sick,” the government is taking on its duty “To Fulfill These Rights”.

The passage of the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Public Accommodations Act were the manifestations of Johnson’s effort to open the “Great Society” to African Americans. His efforts reflected a bold and inspiring agenda to transform America’s attitudes toward African Americans. President Johnson successfully accomplished his goal of passing unprecedented civil rights legislation. His success was not without significant political consequences. As Johnson would later note, the push for racial equality would lead to greater setbacks in the South. For a Democratic President, his prescient observation would impact the political terrain for decades: “We have lost the South for a generation.”¹⁰⁰

His fellow justices on the Supreme Court did not take this view. To them, the exclusion of white students without more explicit justification, was pushing the envelope too far. Indeed, Chief Justice Warren Burger and the eventual swing vote, Justice Lewis Powell, did focus on who was being kept out of Davis. This was not surprising, since Bakke himself was a very sympathetic character. For this very reason, Justice William Bren-

99. *Id.*

100. Clay Risen, *How the South was Won*, BOSTON GLOBE, Mar. 5, 2006. Available at http://www.boston.com/news/globe/ideas/articles/2006/03/05/how_the_south_was_won/

nan was strongly against granting certiorari in the *Bakke* case. He feared that a majority of the Court would be offended by the existence of a "quota" and strike down any use of race in admissions programs. But the Justices did accept the case and, with Justice Powell writing for the majority, concluded that, although achieving a diverse student body constituted a compelling state interest, the California program was not narrowly tailored to meet that end and Bakke had to be admitted.¹⁰¹

However, the majority did uphold the facet of the University's plan that allowed the institution to consider diversity as one factor in selecting a class of students. Justices Brennan, White, Marshall, and Blackmun co-authored an opinion concurring with Justice Powell in the dissolution of the lower court's injunction against all consideration of race but dissenting from the invalidation of California's program. They considered Davis's interest in remedying past societal discrimination sufficiently important such that its admissions procedures neither stigmatized a discrete group or individual, nor used race unreasonably.¹⁰²

Thus, on a practical level, *Bakke* would stand for the proposition that the admissions program in its current form was unconstitutional, but an applicant's race could be considered among other factors in the admissions process. Any use of race-based classifications was suspect and subject to a higher level of judicial scrutiny and could only be allowed by a compelling state interest. Achieving diversity in the university was a compelling reason, but insufficiently powerful to justify the exclusion of other qualified non-minorities.

Marshall refuted the claim that all race-based classifications are inherently suspect. In his dissenting opinion, he asserted that "[i]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier".¹⁰³ Marshall went on to recount the long and shameful history of American racism, including the Court's role in affirming the status of slaves as noncitizens and later in emasculating the Civil War amendments.¹⁰⁴ He concluded, "In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society".¹⁰⁵

Views on the lasting effects of *Bakke* can be varied. *Bakke* was not a complete victory for many state efforts to remedy past discrimination. Nor was it an entire success for those opposed to any racially-based remedial efforts. Against the backdrop of an extremely compelling argument

101. *Bakke*, 438 U.S. at 310-15.

102. *Id.* at 379-87 (Justice White wrote a separate opinion, arguing that there was no private right of action under Title VI). *Id.* at 402 (Justice Blackmun also wrote a separate opinion).

103. *Id.* at 387 (Marshall, J., concurring in part and dissenting in part).

104. *Id.* at 387-94.

105. *Id.* at 396.

for purely merit-driven application processes, race could be considered. As long as the state interest was one of composing a diverse student body, institutions of higher education could consider the racial or ethnic background of an applicant. Particularly in light of its tragic history of racism, it was important for the justices to confirm and reinforce the reality that race still plays an important role in opening up doors of opportunity. But, the Court's decision that that all race-based classifications were inherently suspect and subjected to the strictest of scrutiny gave short shrift to the lasting impact of our nation's shameful history of violence and racism, and removed a powerful component in the limited arsenal of tools meant to achieve the elusive goal of equality.

In 1996, Barbara Grutter, a white resident of Michigan, applied to the University of Michigan Law School with a 161 LSAT score and a 3.8 GPA. She was placed on a waiting list initially and subsequently denied admission to the law school. In December of 1997, Grutter filed suit against the law school, the Regents of the University of Michigan, Lee Bollinger¹⁰⁶, Jeffrey Lehman¹⁰⁷, and Dennis Shields¹⁰⁸, in the US District Court for the Eastern District of Michigan, alleging that she was discriminated against on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.¹⁰⁹ Grutter further alleged that she was denied admission because race was a "predominant factor" in the law school's admissions process, giving applicants of certain races or ethnicities "a significantly greater chance of admission" than applicants of other races or ethnicities "with similar credentials".¹¹⁰ She argued that there was no compelling justification for the use of race in the admissions process and sought compensatory and punitive damages, an order mandating that the law school offer her admission, and an injunction prohibiting the law school from continuing "to discriminate on the basis of race".¹¹¹

Regarding the admissions process, Shields testified that he did not seek to admit or instruct his staff to admit a certain number or percentage of minority applicants. Instead, his primary concern was to admit a "critical mass" of underrepresented minority students so that students would receive the educational benefits that result from a diverse student body.¹¹² Lehman testified that critical mass was not quantified in terms of numbers or percentages. He and Erica Munzel, Shields's successor, testified that the term meant "meaningful numbers" or "meaningful representation," a number large enough to make students from underrepresented minority groups feel comfortable participating class and not feel isolated on campus.¹¹³ Munzel also testified that a critical mass of under-

106. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003). Bollinger was the President of University at the time that Grutter applied.

107. *Id.* Lehman was the Dean of the Law School at the time that Grutter applied.

108. *Id.* Shields was the Law School's Director of Admissions at the time that Grutter applied.

109. *Id.* at 317.

110. *Id.*

111. *Id.*

112. *Id.* at 318.

113. *Id.* at 318–19.

represented minority students could not be attained without giving some consideration to an applicant's race.¹¹⁴ Furthermore, an expert testifying on behalf of Grutter analyzed admissions data obtained from the law school and concluded that, although "membership in certain minority groups is an extremely strong factor" in the decision to offer an applicant admission, it is not "the predominant factor in the [l]aw [s]chool's admissions calculus".¹¹⁵

Applying strict scrutiny, the District Court concluded that the "attainment of a racially diverse student body" was not a compelling interest because it was not recognized by the Court in *Bakke* and "was not a remedy for past discrimination."¹¹⁶ The Court of Appeals reversed and held that the attainment of a racially diverse student body was a compelling interest under *Bakke* and that the law school's admissions process was narrowly tailored because race was only "a potential 'plus' factor."¹¹⁷ The Supreme Court affirmed the judgment of the appellate court, holding that the law school's asserted interest in "the educational benefits that of a diverse student body" was a compelling interest¹¹⁸ and that the program was narrowly tailored because it was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."¹¹⁹

Jennifer Gratz and Patrick Hamacher, both Caucasian Michigan residents, applied for admission to the University of Michigan's College of Literature, Science, and the Arts ("LSA"). Gratz applied for admission to the LSA for the fall of 1995. In January of 1995 she was informed that a final decision on her application was being deferred until April. In April she was informed that the LSA was unable to offer her admission. Hamacher applied for admission to the LSA for the fall of 1997. In January he was informed that his application was being deferred, and he was notified in April that his application denied. The university stated that the reason for the delay in both cases was that the applicant's credentials were not at the level required for admission upon first review.¹²⁰

The university's admissions office used guidelines in making admissions decisions, considering high school grades, standardized test scores, high school quality, strength of high school curriculum, geography, alumni relationships, demonstrated leadership potential, and race. The university changed its guidelines several times during the period relevant to the case.¹²¹ During 1995 and 1996, the university made admissions decisions using a set of charts recommending a particular action based on an applicant's standardized test score(s) and "GPA 2" score. The GPA 2 was calculated by combining an applicant's grade point average with a score based on her "SCUGA" factors: school quality, curriculum strength, unu-

114. *Id.* at 319.

115. *Id.* at 320.

116. *Id.* at 321.

117. *Id.*

118. *Id.* at 333.

119. *Id.* at 334.

120. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

121. *Id.* at 253-57.

sual circumstances, geographical residence, and alumni relationships. The action recommended on the chart would vary depending on whether the applicant belonged to an underrepresented minority group and whether the applicant was a resident of Michigan or of another state.

In 1997 the admissions office began adding additional points under the “U” category of the SCUGA factors for underrepresented minority status, socioeconomic disadvantage, attending a high school with a student body predominantly comprised of underrepresented minorities, and underrepresentation in the unit of the university to which the applicant sought admission. The following year, the university ceased using this system and began to use a “selection index”. An applicant could accumulate a maximum of 150 points under the index. It was divided linearly into ranges and a different course of action would be recommended with regard to a particular application depending upon which range the applicant’s score fell into. An applicant accumulated points based on her grade point average, standardized test score(s), high school quality, strength of curriculum, in-state residency, alumni relationship, personal essay, and personal achievement/leadership. An applicant would receive twenty points if she belonged to an underrepresented racial or ethnic minority group. According to the university, the selection index changed the mechanics, but not the substance, of the admissions process.

From 1995 to 1998 the admissions office began to utilize “protected seats” to permit the consideration of applications submitted later in the admissions season by applicants belonging to certain “protected categories”. Those protected categories included athletes, foreign students, ROTC candidates, and minority students. Near the end of the admissions season, if the protected seats were not filled by qualified applicants from the protected categories, then the seats yet to be filled would be offered to “qualified candidates remaining in the admissions pool, including those remaining on the waiting list.”¹²²

Beginning in 1999, admissions counselors could “flag” some applications for review by an Admissions Review Committee after determining that the applicant (1) was prepared to succeed academically at the university, (2) had accumulated a minimum selection index score, and (3) had a quality or characteristic that the university deemed important to the composition of its freshman class. The committee would then decide whether to admit, defer, or deny the applicant.

Gratz and Hamacher filed a class-action suit against James Duderstadt, Lee Bollinger, and the University of Michigan Board of Regents in the U.S. District Court for the Eastern District of Michigan, claiming that the LSA’s use of race in its admissions process violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.¹²³ Gratz and Hamacher sought compensatory and punitive damages, declaratory relief, an injunction prohibiting the university from continuing to use race in its admissions process, and an order mandating

122. *Id.* at 256.

123. *Id.* at 252.

that the university offer transfer admission to Hamacher.¹²⁴ The District Court granted the plaintiffs' request for summary judgment as to the university's admissions practices from 1995 to 1998, but the court granted the university's request for summary judgment in regard to its practices during 1999 and 2000.¹²⁵ On interlocutory appeal, the Sixth Circuit heard the case on the same day as *Grutter*. After the court issued the *Grutter* opinion, Grutter petitioned the Supreme Court for a writ of certiorari, and the plaintiffs in this case did as well. The Supreme Court granted certiorari despite the fact that the appellate court had not yet rendered judgment.¹²⁶

Applying strict scrutiny, the Court held that educational diversity was a compelling interest but that the university's admissions process was not narrowly tailored to that interest because awarding twenty points to certain minority applicants when only one hundred was needed to guarantee admission made race the deciding factor "for virtually every minimally qualified minority applicant".¹²⁷ The Court concluded that the university's admissions process was not like the individualized selection process of Harvard College that was cited by Powell in *Bakke*.¹²⁸

What seemed an open question in *Bakke* in 1978 was answered in the affirmative by Justice Sandra Day O'Connor in *Grutter*. O'Connor seemed an unlikely supporter of the Michigan diversity plan, given her earlier skepticism about the use of race in such highly charged cases as *Croson v. City of Richmond* in the 1980s, and in the context of race in voting, in *Shaw v. Reno* in the 1990s. In the *Grutter* case, hearing very strong and uniform pleas to maintain diversity by military veterans, corporate leaders and public and private universities, among others, she embraced the important, though limited use of race in higher education.

O'Connor began by noting that the Michigan Law School's status as one of the nation's top law schools and indicating that the admission to the law school is competitive. She mentioned that the law school, through its admissions process, sought "a mix of students with varying backgrounds and experiences who will respect and learn from each other".¹²⁹ O'Connor described how the law school considers all information available in an applicant's file when making an admissions decision. She also highlighted that the law school's admissions policy clearly states that "even the highest score possible does not guarantee admission," and a low score does not automatically remove an applicant from consideration.¹³⁰ After expounding upon the law school's longstanding commitment to diversity, specifically mentioning its commitment in regard to race and ethnicity, O'Connor proceeded to summarize the facts of the case.

After summarizing the facts, O'Connor began to examine whether educational diversity was a compelling interest justifying the narrowly tai-

124. *Id.*

125. *Id.* at 259.

126. *Id.* at 259–60.

127. *Id.* at 272, 275–76.

128. *Id.* at 272.

129. *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003).

130. *Id.* at 315.

lored use of race in the law school's admissions process.¹³¹ First, she revisited Justice Powell's opinion in *Bakke*. She mentioned how the case resulted in six separate opinions, none of them being joined by a majority of the justices. The only holding in the case was that "a 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.'" ¹³² Describing his opinion as the touchstone of constitutional analysis of race-conscious admissions policies, O'Connor identified the three interests that Powell rejected and then stressed that the only interest he approved was "the attainment of a diverse student body."¹³³ The diversity that qualifies as a compelling interest refers to more than just ethnic diversity.¹³⁴ O'Connor then calls into question whether Powell's opinion, which concurred in the judgment on the narrowest ground, was really binding under *Marks v. United States*.¹³⁵ Nevertheless, she declines to pursue the *Marks* inquiry and states that the Court fully endorses the view expressed by Powell in his opinion that the attainment of a diverse student body is a compelling interest that can justify the use of race in university admissions.¹³⁶

Citing *Adarand Constructors, Inc. v. Peña*, O'Connor reasoned that, since the Equal Protection Clause of the Fourteenth Amendment protects persons and not groups, any classification based on membership in a racial or ethnic minority group must be carefully examined by the court to ensure that it does not violate one's personal right to equal treatment.¹³⁷ In applying strict scrutiny, judges must determine whether racial classifications are benign or remedial, or if such classifications motivated by illegitimate ideas of racial inferiority or racial politics. If the use of racial classifications serves a compelling governmental interest, then it will survive strict scrutiny as long as the use meets the narrow-tailoring requirement.¹³⁸

O'Connor concluded that the law school's use of race in its admissions process is justified by a compelling interest.¹³⁹ She noted that the Court has never held that remedying past discrimination is the only permissible use of race and that the issue has not been addressed by the Court since *Bakke*.¹⁴⁰ Drawing on a tradition of educational autonomy and the First Amendment and citing Justice Powell's opinion in *Bakke*, she reasoned that the law school's freedom to make its own judgments about education extends to the selection of its student body. If, in its judgment, a school believes that a diverse student body will contribute to the robust ex-

131. *Id.* at 322.

132. *Id.* at 322–23.

133. *Id.* at 323–24.

134. *Id.* at 324–25.

135. *Id.* at 325.

136. *Id.*

137. *Id.* at 326.

138. *Grutter*, 539 U.S. at 326–27.

139. *Id.* at 328.

140. *Id.*

change of ideas, then the Court should defer to the law school in good faith absent evidence to the contrary.¹⁴¹

O'Connor also emphasized that the law school did not seek to enroll a specific number or percentage of minority students, which merely would amount to racial balancing.¹⁴² Instead, the law school sought to enroll a critical mass of students from underrepresented racial and ethnic groups, "critical mass" being defined in relation to the educational benefits of student body diversity. Such benefits include breaking down stereotypes, the facilitation of "cross-racial understanding," the promotion of "learning outcomes," students being better prepared to enter "an increasingly diverse workforce and society," and class discussions that are more lively, enlightening, and interesting.¹⁴³ While recognizing that race does affect an individual's views to some degree, law school officials did not argue that all individuals belonging to an underrepresented racial or ethnic group express or have the same viewpoint. In fact, one of the law school's main goals was to dispel this view by enrolling more than a token number of minority students.¹⁴⁴

O'Connor then discussed the importance of education, describing it as the foundation of our citizenship.¹⁴⁵ Ensuring equal access to higher education will provide the opportunity to participate in the civic life of our nation to people of all races, helping us to realize our dream of "one Nation."¹⁴⁶ Universities, particularly law schools, serve as training grounds for our nation's leadership, and the legitimacy of that leadership requires education opportunities to be "visibly open" to all races.¹⁴⁷

O'Connor began to consider whether the law school admissions program met the narrow-tailoring requirement by noting that the distinct issues presented by race-conscious admissions programs necessitates calibration of the narrow-tailoring inquiry to fit those issues.¹⁴⁸ Citing *Bakke*, she concluded that quota systems are not narrowly tailored because they "insulate categories of applicants with desired qualifications from competition with other applicants."¹⁴⁹ To meet the narrow-tailoring requirement, an admissions program's use of race must "be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."¹⁵⁰ Thus, race can be considered a "plus factor" in the individualized evaluation of an applicant who is not shielded from competing with other applicants.¹⁵¹

Turning to the admissions program in question, O'Connor concluded that it meets the narrow-tailoring requirement.¹⁵² To support her conclu-

141. *Id.* at 328-29.

142. *Id.* at 329-30.

143. *Grutter*, 539 U.S. at 330.

144. *Id.* at 333.

145. *Id.* at 331-33.

146. *Id.* at 332.

147. *Id.*

148. *Id.* at 333-34.

149. *Id.* at 334.

150. *Id.*

151. *Id.*

152. *Id.*

sion, she compared the law school's program to the Harvard plan cited approvingly by Justice Powell in *Bakke*.¹⁵³ She points out that neither program reserves a certain number or percentage of seats exclusively for minority applicants. Reasoning that, though Harvard did not have any specific number in mind, it certainly had minimum goals for minority enrollment, she finds that the critical mass of underrepresented minority students sought by the law school is not the same as a quota.¹⁵⁴ Some attention to numbers is necessary to ensure that the benefits of having a diverse student body are reaped, and such attention does not automatically transfer the system into a quota.

O'Connor rejected Justice Kennedy's argument that the admissions counselors' practice of consulting daily reports keeping track of the race, residency, and gender of admitted students suggests that there was no attempt at individualized evaluation of applications, noting that the law school officials testified that they did not give race more or less weight based on information contained in the reports.¹⁵⁵ She also points out that the percentage of the incoming class comprised of underrepresented minority students varied between 13.5 and 20.1 percent from 1993 to 1998 and that this is inconsistent with any suggestion that there was a quota.¹⁵⁶ O'Connor also declines to accept the argument that the law school engages in racial balancing by discriminating among the different minority groups, observing that the number of minority students that choose to enroll differs greatly from their representation in the applicant pool and varies yearly.¹⁵⁷

Not only must a race-conscious admissions program refrain from using a quota, it must also be flexible enough for individualized consideration to meet the narrow-tailoring requirement.¹⁵⁸ It follows from this that race cannot be the defining feature of an applicant.¹⁵⁹ Like the Harvard program, the law school's program looks at all pertinent elements of diversity in light of the individual characteristics of a particular applicant and does not necessarily accord them the same weight in each case. In contrast, the Michigan program in *Gratz* awarded "mechanical, predetermined diversity 'bonuses' based on race or ethnicity."¹⁶⁰ Also, the law school program ensures that all characteristics that could contribute to student body diversity are meaningfully considered and its policy makes clear that it looks at more than an applicant's race or ethnicity when considering diversity.¹⁶¹ Every applicant is given the opportunity to highlight her own diversity in her personal statement, letters of recommendation, and an essay describing how she will contribute to campus life and diversity. O'Connor argues that the meaningful consideration given by the law

153. *Id.* at 335–39.

154. *Id.* at 335–36.

155. *Id.* at 336.

156. *Id.*

157. *Id.*

158. *Id.* at 336–37.

159. *Id.* at 337.

160. *Id.*

161. *Id.* at 338.

school to all pertinent elements of diversity is shown by the fact that a number of nonminority applicants are admitted with lower grades and test scores than minority applicants.¹⁶² She does not believe that the program is harmed by the possibility that race is outcome-determinative for many minority applicants who do not have grades and test scores in the upper range, arguing that the same could be said of any race-conscious admissions program, including the Harvard program.¹⁶³ Every minority student that the law school admits has been deemed qualified. Because of our nation's history of racial inequality, minority applicants are likely to have personal experiences of particular benefit to the law school's mission and would likely not be admitted in meaningful numbers if no consideration was given to race.¹⁶⁴

O'Connor then addresses Grutter's argument that the law school's program is not narrowly tailored because a race-neutral means of obtaining the benefits of educational diversity sought by the law school exists.¹⁶⁵ In rejecting this argument, O'Connor states that "narrow tailoring does not require the exhaustion of every conceivable race-neutral alternative."¹⁶⁶ All it requires is "serious, good faith consideration of workable race-neutral alternatives that will achieve" the university's goal of educational diversity.¹⁶⁷

Next, O'Connor considers the reasons behind the District Court's finding that the law school did not give serious, good faith consideration to workable race-neutral alternatives.¹⁶⁸ The first, that the law school failed to consider a lottery system, ignores the fact that such a system would not allow the current program's nuanced consideration of race as one of many factors relevant in assembling a class "that is diverse in ways broader than race."¹⁶⁹ The second, that the law school did not consider decreasing its emphasis on LSAT scores and undergraduate grade point averages for all applicants, is rejected because such a program would sacrifice the academic quality of admitted students. Finally, O'Connor dismisses the percentage plan suggested by the petitioner for reasons similar to the lottery system.

Recognizing that there are "serious problems" involved in the idea of racial preferences, O'Connor laid out a final requirement for a narrowly-tailored race-conscious admissions program. To meet this requirement, the program's use of racial classifications must not unduly burden members of any racial group.¹⁷⁰ Finding that the law school's admissions program is not unduly burdensome, O'Connor concluded that the program meets the narrow-tailoring requirement, emphasizing that the law school

162. *Id.*

163. Grutter, 539 U.S. at 339.

164. *Id.* at 338.

165. *Id.* at 339.

166. *Id.*

167. *Id.*

168. *Id.* at 340.

169. *Id.*

170. *Id.* at 341.

accepts nonminority applicants with greater potential to contribute to class diversity over minority applicants.¹⁷¹

After concluding that the law school's admissions program survives under strict scrutiny, O'Connor indicated that race-conscious admissions programs cannot be used indefinitely given the Fourteenth Amendment's core purpose of eliminating "all governmentally imposed discrimination on the basis of race."¹⁷² Arguing that racial classifications are so dangerous that they must be used "no more broadly than the interest demands," she indicates that the need to use such classifications in admissions programs should be reevaluated periodically.¹⁷³ She also suggested that universities using race-conscious admissions programs look to institutions exploring alternatives, drawing upon the successful portions of those alternative programs to modify their own.¹⁷⁴

Perhaps the most salient aspect of O'Connor's opinion in the Michigan case was her concern, expressed differently but equally emphatically by Justice Blackmun in the *Bakke* case twenty-five years earlier, for a sunset provision for even the laudable goal of diversity. This durational requirement also necessitates that universities considering race in admissions programs incorporate sunset provisions into their policies.¹⁷⁵ O'Connor speculates that twenty-five years from now affirmative action "will no longer be necessary to further the interest approved today."¹⁷⁶ While the clock on the twenty-five year aspirational duration of diversity at places like the University of Michigan was viewed as an important victory, the *Grutter* decision's impact on affirmative action in Michigan began to see its impact eliminated after the 2006 elections, when state voters supported a ballot initiative banning the consideration of race in higher education.

Policies promoting racial diversity in schools and universities were dealt an even more serious blow when Justice O'Connor retired from the Supreme Court in 2005, and Chief Justice William Rehnquist passed away shortly thereafter. They were replaced by John Roberts as the Chief Justice and Samuel Alito as an Associate Justice. When the new Roberts Court was called upon to consider whether a voluntary integration program in the Seattle and Louisville public schools was constitutional, the new conservative majority ruled that it was not and found both programs illegal.¹⁷⁷ While both the plurality opinion finding the programs illegal and the dissenting justices invoked the *Brown* decision, their interpretations could not be more different, revealing a stark and bitter divide within the Court. Chief Justice Roberts went so far as to state his reasoning by noting: "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁷⁸

171. *Id.*

172. *Id.*

173. *Id.* at 342.

174. *Id.*

175. *Id.*

176. *Id.* at 343.

177. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

178. *Id.* at 2768.

The next momentous event in race relations in this country came a year and a half later, not with a court decision, but with a historic campaign and election of Senator Barack Obama as the 44th President of the United States. On November 4, 2008, America crossed a Rubicon of sorts. Just as the signing of the Declaration of Independence and the end of the Civil War are noted as watershed moments in our American experience, so shall the election of Barack Hussein Obama II as the 44th President of the United States.

Barack Obama's victory is a watershed moment in that it has debunked the myth that an African American cannot hold a national office as high as that of President of the United States. Barack Obama's victory has begun to transform the image of African Americans. The election of a black man as President of the United States is an extremely powerful statement in itself. The headlines of newspapers around the globe the morning after the election echoed this sentiment: all mentioned Obama's victory as particularly historic because he is an African American. One Virginia newspaper said it best; it read simply: "Rosa Parks sat. Martin Luther King marched. Obama ran."¹⁷⁹

There will not be meaningful change overnight but Obama's election as the most powerful man in the world will help the process of change occur in the foreseeable future. Now, with the proliferation of images of Obama and his family over time, black children can see that they can also be scientists, inventors, scholars, lawyers, doctors, business executives and, yes, Presidents of the United States of America.

Barack Obama rose from relative obscurity as a freshman senator, bested a field of candidates from his party, won the Democratic Party's nomination, ran the longest campaign in American history, and defeated a five-time U.S. Senator to become the 44th the President of the United States—all in less than three years. Regardless of what one might think of Obama's political career, however, the life story of the black kid with the funny name who would become the most powerful man on Earth is nothing short of phenomenal.

Instead of succumbing to the conflicts posed by a childhood of poverty, a biracial ancestry, and an absentee father, Obama made his stumbling blocks his stepping stones. From his childhood of poverty, he gained empathy for the oppressed and marginalized; from his biracial ancestry, he developed an ability to relate to different cultures and perspectives; and from his many years without a father, he nurtured a profound desire to provide a better future for our next generations.

King Solomon warns us in the Scriptures that "acceptable men [are forged] in the furnace of adversity" just as gold is tried in the fire.¹⁸⁰ The story of Barack Obama personifies this. Barack Obama's victory inspires us all to be better and do more. His example proves that we can succeed even in the face of adversity—or perhaps especially in the face of adversity. Too often we—both as humans and as a people—make excuses for

179. *Rosa Parks sat. Martin Luther King marched. Obama ran.*, DAILY PRESS (Hampton Roads, Va.), Nov. 5, 2008.

180. *Ecclesiastes* 2:5 (King James).

our failures and blame others for our own shortcomings. Obama's life story, however, encourages us to persevere through hardship.

What many of Obama's detractors did not realize was that this election was never simply about Barack Obama. Instead, many, particularly black Americans, saw Obama's life story and thought of their own struggles and hardships. Similarly, they looked at Obama's prospects and saw what they could be as well. In his victory, they saw their own. He won; so they felt they won too.

The inspiration felt by blacks in this nation and abroad as a result of Obama's success should not be trivialized. Inspiration may be intangible, but its effects are certainly concrete. People have found purpose in their lives, entire communities have risen from despair, and nations have won world wars all because they felt inspired. Justice O'Connor's twenty-five year timeline for considering race in school admissions may now be more realistic than idealistic; an entire generation of young African Americans may now attend school with the knowledge that their race is not an impediment to their success. Schoolchildren who see Barack Obama in the White House see a positive example of hard work and merit being rewarded, and this may give children the confidence and inspiration necessary to fulfill their potential.

Still, history compels us to remain vigilant about setbacks. Even as we dream about a post-racial society, two cases recently decided at the United States Supreme Court threaten to undo decades of civil rights progress. In *Ricci v. DeStefano*, 08-328, the Court was asked to decide whether cities may refuse to certify the results of employment test, even if to do so would be to invite conflict with the disparate impact provision of Title VII of the Civil Rights Act of 1964. Importing the "strong basis in evidence" standard from the analagous Equal Protection context, the *Ricci* Court found that the strength of the statistical disparity on exam performance was sufficient to create a prima facie case of disparate impact under Title VII (roughly half of the candidates that sat for the exam were black, but zero African Americans qualified for the eight Liutenant positions) but not persuasive enough to prevail on a Title VII claim. Specifically, the Court found that the plaintiff could not show that the exams were "not job related and consistent with business necessity, or if there existed an equally valid, less discriminatory alternative that served the City's needs but that the City refused to adopt".¹⁸¹ Because there was no possible Title VII claim to be had, the City could not refuse to certify the exam results on the basis of fear of being subjected to a successful Title VII claim. Though the Court did not invalidate Title VII, as many commentators had feared, Justice Scalia's concurring opinion issued the first attack on Title VII's constitutionality by any Justice on the Court.¹⁸² In another case, *Northwest Austin Municipal Utility District v. Holder*, 08-322, the constitu-

181. *Ricci v. DeStefano*, No. 07-1428 (June 29, 2009) at 3.

182. *Id.*, Ginsburg, J., dissenting at 21. *Id.*, Scalia, J., concurring at 2. ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on [because of] those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.")

tionality of Congress's twenty-five year extension of the Voting Rights Act was in question. Though the Court formally upheld the Voting Rights Act (while ultimately finding for the Utility District), leadings commentators immediately expressed the belief that the Court sent a clear message to Congress to substantially revise the statute or else be prepared to witness its invalidation.¹⁸³ Either a future finding that the Voting Rights Act is no longer constitutional or a gutting of the statute by Congress would subject minority votes around the country—and especially in the Deep South—to dilution. Thus, as we celebrate our gains in the struggle for racial equality, we have reason to be wary: both Title VII and The Voting Rights Act are under attack.

Racial politics have also infected the nomination of President Obama's first nominee for the United States Supreme Court: Second Circuit Court of Appeal Judge Sonia Sotomayor.¹⁸⁴ Judge Sotomayor, who would be the first Hispanic (and third woman) to serve on the Court, has been labeled a "judicial activist" by some conservatives after indicating that her Latino heritage informs her judicial style.¹⁸⁵ The President responded to such criticism immediately and persuasively: "When Sonia Sotomayor ascends those marble steps to assume her seat on the highest court of the land, "America will have taken another important step towards realizing the ideal that is etched above its entrance: Equal justice under the law."¹⁸⁶ Moreover, as Judge Sotomayor's nomination moves forward, it has become clear that she is the most qualified and experienced Supreme Court nominee since Thurgood Marshall.

Today, with a popular African American President and First Family inhabiting the White House, it is hard to remember that only 150 years ago, the Supreme Court denied the most basic human rights to Dred Scott and Homer Plessy. Given those sad and outrageous decisions, we should find encouragement in the Court's gradual acceptance of change with the unanimous *Brown* decision and the affirmation of the diversity principle in *Grutter*. At the same time, we must remember that the Court has also

183. See, e.g., Thomas Goldstein, *Supreme Court Invalidates Section 5's Coverage Scheme*, SCOTUS BLOG, June 22, 2009, <http://www.scotusblog.com/wp/analysis-supreme-court-invalidates-section-5%E2%80%99s-coverage-scheme-2/>.

184. Some commentators even suggest that Judge Sotomayor's handling of the *Ricci* case—she was part of the three-judge panel that affirmed the district court ruling in favor of the city—is suspect in light of the Supreme Court's 5-4 reversal of the case. However, the Title VII question is now a "different inquiry" after *Ricci*, as the Court imported the "strong basis in evidence" test not previously part of the analysis. Moreover, focusing on *Ricci* alone, regardless of the panel's handling of the case, is a mistake. Judge Sotomayor—who, by the way, did not write the summary order for the second circuit panel—has issued hundreds of opinions and her judicial modestly and competence is repeatedly displayed in those works for anyone who cares to look.

185. See Sonya Sotomayor, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation* (Oct. 21, 2001), available at http://berkeley.edu/news/media/releases/2009/05/26_sotomayor.shtml. ("I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.")

186. Peter Baker & Jeff Zeleny, *Obama Hails Judge as "Inspiring,"* N.Y. TIMES, May 27, 2009, at A1, available at <http://www.nytimes.com/2009/05/27/us/politics/27court.html>.

recently moved forcefully to restrict and limit civil rights and progress, and may continue to set us back in its next set of decisions. As we face these hurdles, we have reason to hope that the election of Barack Obama, following in the broad footsteps of Charles Hamilton Houston as a Harvard-educated black law student who shaped the world's thinking on race matters, will continue to energize not only Harvard law students but the nation as well to press for greater equality. While our progress ebbs and flows, our overall motion continues to propel us forward. I eagerly anticipate the 50th anniversary edition of BLJ in 2034, when our children and grandchildren will view the centuries of slavery, subjugation, and segregation as little more than distant memories of a nearly forgotten past.

