A NEW BIRTH OF LIBERTY
The Role of Thurgood Marshall's Civil Rights Contribution

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THURGOOD MARSHALL now sits as an Associate Justice of the Supreme Court of the United States. He is the first person of African descent to sit on the highest court of the land.

This article seeks to examine the career of Mr. Justice Marshall before he ascended to the Bench. It will be directed to those years he spent as advocate under the auspices of the National Association for the Advancement of Colored People (NAACP).

The pursuit of liberty by black people in America presents an interesting study of American jurisprudence. It is an unfinished saga, for attaining true liberty in the American context means "equal access to economic opportunity based upon equal access to educational opportunity based upon equal access to decent housing and health services."[1] This pursuit of the American dream has been historically elusive for black Americans, because these opportunities have not been, and are not today, equally accessible.

Thurgood Marshall and the NAACP have, however, a unique place in the historic development of the concept of liberty.

In analyzing the role of Thurgood Marshall's civil rights contributions to American jurisprudence—the concept of liberty will be examined.

First, the ideal of liberty will be scrutinized as defined and incorporated in the principles of American law by historians, social scientists and writers of political philosophy.

Second, in the practical application of the law, the contradictions between the practice and principle of the ideal of liberty will be noted.

Third, a case study will be made of Thurgood Marshall's contributions as an attorney in the field of civil and human rights, and his attempt to forge a way from theory to practice of a 'new birth of liberty'—that would assure all citizens full participation in American Society. A final comment will examine the threads which today pose a threat to American liberty.

I. WHAT IS LIBERTY? AN HISTORICAL PERSPECTIVE

The concept of liberty as it has been defined has taken several meanings

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1. F. HERCULES, AMERICAN SOCIETY AND BLACK REVOLUTION, 36 (1972). An eloquent statement about the Black revolution in America and the problem of white racism.

depending upon what aspect of the concept is thought to be most important to emphasize. In order to understand the ideals of American jurisprudence, it is necessary to examine the political ideas and meanings given to the concept of 'individual liberty'.

Today, the concept of 'individual liberty' is a perplexing and critical problem related to how world leaders must seek to bring into harmony the elements authority, human rights and freedom. A multitude of questions arise. Who has the authority to tell another person what one may or may not do in society? Does the government have the right to override the wishes of a citizen? Is a law, as a command of the government, just or right simply because that law has been officially promulgated? Or, must a law, in order to be just, conform to some higher standard of justice? And finally, what should a person do when and if one concludes that a law is unjust—should one obey it or does one have a right to disobey? These are the classical questions which arise in any discourse on 'liberty'. In addressing these questions, an historical discussion about the law will be presented first, emphasizing the writings of the ancients. This will be followed by comments on the writings of the authors of today's modern liberalism.

A. *The Ancients—What is Law?*

The central question posed by all political philosophers is 'What is Law'? The normative answer is that it is a system of rules established by authority. But, query, what is the origin of this authority? It may be safe to posit that the ancients—Sophocles and Aristotle—emphasized that the authority of the law originates from the moral tenets in man and in society.

For example, Sophocles, in his work *Antigone*,[2] posits a question of authority—what law shall a person obey—the law of man or the law of Zeus? Antigone, the heroine, is faced with the fact that an edict has been decreed by Creon, the king, forbidding the sacred burial of her brother, Polyneices. To disobey—the penalty is death by immurement: Does the law, as a neutral principle, present a problem of authority? Is it not the purpose of the law to have 'a cause and an effect'—ergo—'choice'? However, to Antigone, there is not choice—to her, it is her duty to bury her beloved brother. Thus, she appeals to a law higher than man's, and seeks to act upon it.

But how then would society maintain order without regulating the behavior of its citizens? Aristotle in answering this question sought to define the basis of society itself.

For example, Aristotle in *Politics*, stated that "the state is a creation of nature, and that man is by nature a political animal."[3] The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing: and therefore a person is like a part—in relation to the whole. Aristotle's theories emphasize the conceptual truth that persons are capable of free choice. As a result of this choice he suggests that people and society exist for the sake of the highest good and not for the sake of life only. However, the question as to how all are to be affected, and what way will each receive his or her respective share in the government, rests with the "dimension of law" as some have argued.

2. J. OATES & E. O'NEILL, JR., SOPHOCLES, ANTIGONE, THE COMPLETE GREEK DRAMA (2d ed. 1966).

3. H. W. C. DAVIS, ARISTOTLE, POLITICS (B. Jowett transl. 1905).

Saint Thomas Aquinas, in discussing the nature of law emphasized the moral dimension of law, law was more than an expression of power or an arbitrary command. He stated that "law is a dictate of reason . . . which is identical with God's reason."[4] Therefore, it followed in theory, that if a law of a government is contrary to the natural law known to human reason, then such a civil law does not even have the character of law and presumably does not have to be obeyed. For Aquinas, obedience was not the central concern. More importantly, the question was—what is law, is it necessary and is it moral?

Plato's answer was that the law is moral if it is based upon the principle of "justice" which is the highest order in the individual and the state.[5]

Thus, the term law is ambiguous. It may refer to a higher or lower order. In American jurisprudence, the law is based upon the idea of the higher law emanating from the sovereign. The idea of a "higher law" transferred sovereign authority, in theory, to the individual.[6]

B. *The Classical Authors of Modern Liberalism*

The classical writers on the question of "liberty" began to differentiate between "liberty" as a value neutral term and the "conditions of liberty", the results of psychological, physical, social and economic causes. The problem of conceptualizing "liberty" is the concern of balancing, on the one hand, "obedience" to the laws to protect order in society, and on the other hand, "coercion" to a moral standard of justice to prevent tyranny. What about the passage of bad laws—must a person or a group obey such laws? Or, what happens when the social, economic and psychological conditions become oppressive—must a person or group submit to these circumstances?

Hobbes' writings on the basis of sovereign authority present a dissertation on obedience.[7] Hobbes' answer is that one must obey even a bad law for the sake of order, for the horror is anarchy. He described what it would be like if each person were completely free to decide what it would take to preserve his or her own life. Each person would have a right to do anything and everything she or he considered necessary for this end. However, all people essentially want the same thing—but, the laws of supply and demand create natural limitations—in addition, people have inconsistent ideas of what is just and right or even what religion requires. Life becomes a continuous struggle and conflict—or war of all against all. For Hobbes, in order to overcome the threat of anarchy—individuals must agree upon one lawgiver, the sovereign, whose laws everyone must obey. In Hobbes' analysis, obedience to the laws—or absolute authority—is what creates and preserves a civil society.

Theoretically, to insure safeguards to society and to keep people in their places—society must increase the area of centralized control and decrease that of the individual. However, the crux of this doctrine negates moral responsibility for the social and economic conditions of persons or groups. To what extent is "liberty" contingent upon the conditions and changes in the structure of society?

4. A. PEGIS, INTRODUCTION TO SAINT THOMAS AQUINAS (1948).

5. F. CORNFORD, THE REPUBLIC OF PLATO (1962).

6. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365, 409 (1928). This article is an extensive historical analysis of the theoretical foundations of American law. But see, Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366 (1911).

7. S. LAMPRECHT, HOBBES, DE CIVE (1949).

A study of the European civil wars of the eighteenth century indicates that the social and economic system of land ownership was transformed. Formerly, the economic system was essentially agrarian and based upon the political system of feudalism dominated by aristocratic control.[8] Under feudalism there had been private property in land. But in all parts of the world where feudalism developed, the ownership of land was always burdened and hedged with a great variety of obligations to other persons.

As a result of the economic and social transformations—land became an aspect of individual rights—something that could be bought and sold, used and abused, in a word, like modern private property under the American enterprise system. The new accoutrements of "free title and enjoyment" equally protected by the sovereign became the basis of "individual liberty".

Significantly, John Locke's analysis of "property rights" laid the cornerstone of "individual liberty" and "authority" in modern liberalism.[9] Conceptually then, "individual liberty" could be described as that area reserved for private life over which neither the state nor any other authority could trespass. The authority of the state could be based upon the principle that individuals enter into a social contract for the equal benefit of the common good.[10] It is this doctrine of "individual liberty" and "sovereign authority" that is comparatively modern—for this political ideal was absent from ancient legal conceptions.[11]

However, the major criticism of the classical libertian theories is the failure to deal with diversity in society and the lack of tolerance by the majority of minority interests. Alexis de Tocqueville called it the "tyranny of the majority". Tyrannical power, as developed under the British system of federalism, was a division of power and responsibility between the central and local governments. As it developed in America, federalism became a handy philosophical tool for maintaining white supremacy. Federalism as a policy has been advanced to explain national non-interference when state agencies refused to protect nonconforming blacks from white violence intended to maintain the status quo.[12]

It is indisputable that in America, oppression of black people through the system of slavery survived the Declaration of Independence and the American Revolution, and thus became an integral part of the American system. The development of American law emerged without incorporating moral responsibility to certain groups in society.

Therefore, in order to better analyze the dimension of majority and minority rights—the concepts of "negative" and "positive" liberty will be reviewed to interpret the legal applications and the effect of the law.

C. *Isiah Berlin's Two Concepts of Liberty*

Theoretically, the contention is that in any society the sense of liberty is not a unitary principle. Isiah Berlin posits that there are two systems of ideas which

8. B. MOORE, JR., SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY, 3-29 (1970). This book presents a comparative analysis of the revolutionary origins of capitalist democracy from its social and economic bases.

9. C. SHERMAN, LOCKE, TREATISE OF CIVIL GOVERNMENT (1937). The presentation of Locke's political writings from the Second Treatise.

10. COLE, THE SOCIAL CONTRACT AND DISCOURSES, 3, 12-15, 20-23, 26, 53, 55-56, 85 (1913). From *The Social Contract* by Jean-Jacques Rousseau, 1762.

11. B. MOORE, JR., *supra*, note 8.

12. M. BERRY, BLACK RESISTANCE/WHITE LAW, 1-17 (1971).

return different and conflicting answers to what have long been the central questions of politics—the question of obedience and coercion.[13]

In the normative sense "liberty" is the degree to which man or a body of men interferes with individual activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. In the negative sense of the word "liberty", if a person is prevented by others from doing what he or she could otherwise do, to that degree the person is unfree; and if this area is contracted by other men beyond a certain minimum, a person can be described as being coerced, or, it may be enslaved.

Coercion is not, however, a term that covers every form of inability. Coercion implies the deliberate interference of other human beings within the area in which a person could otherwise act. A person lacks political liberty or freedom only if she or he is prevented from attaining a goal by other human beings. Mere incapacity to attain a goal is not lack of political freedom. It is argued, very plausibly, that if a person is too poor to afford something on which there is no legal ban—a loaf of bread, a journey around the world, recourse to the law courts—he or she is as little free to have it, as if he or she would be if it were forbidden by law. If poverty were a kind of disease, which prevented a person from buying bread, or paying for the journey around the world or getting a case heard, as lameness prevents one from running, this inability would not be naturally described as a lack of freedom, least of all political freedom. It is only because a person believes that his or her inability to get a given thing, unlike others, is due to the fact human beings have prevented such person from having enough money with which to pay for it, that the person is a victim of coercion. In other words, this use of the term depends on a particular social and economic theory about the causes of poverty or weakness.

The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be one's own master. One wishes his or her life and decisions to depend on oneself, not on external forces of whatever kind. One wishes to be the instrument of one's own will, not of others' acts. One wishes to be a subject, not an object, to be moved by reason, by conscious purposes which are one's own, not by causes which affect a person from outside. This is at least part of what a person means when he or she says that "I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world". A person wishes, above all, to be conscious of oneself as a thinking, willing, active being, bearing responsibility for his or her choices and able to explain them by reference to one's own ideas and purposes. A person is free—to the degree that he or she believes this to be true, and enslaved—to the degree that he or she is made to realize that it is not so.

Berlin's thesis, considered a minor classic of modern liberalism, diverts from the traditional analysis of "liberty" which is primarily concerned with relations among persons, and not with the isolated self-sufficient individual. His critics argue that his theory of absolute rights, that is rules of non-interference

13. I. BERLIN, FOUR ESSAYS ON LIBERTY, 118-173 (1971). This presentation is based upon Isiah Berlin's discourse on Two Concepts of Liberty which was delivered before the University of Oxford, on October 31, 1958, and published by the Clarendon Press in the same year. The book includes an introductory discussion of the philosophical origins of liberty, and essays regarding Political Ideas in the Twentieth Century, the Historical Inevitably of false ideologies and a critique of John Stuart Mill and the Ends of Life.

accepted into the very conception of what it is to be a normal human being—lends itself to an acceptance of the legitimacy of any form of interference outside of the defined area.[14] It is argued that he treats the question of liberty as simply one of fact. The presumption being that liberty is a good thing itself, and therefore, the loss of liberty is in itself a bad thing. This analysis, it is argued, viewing interference with liberty as bad in itself, leads Berlin in effect into the position of defending the status quo, i.e., of defending the existing distribution of liberties. Thus, it is argued that he approves of "a minimum degree of non-interference compatible with the minimum demands of society."

However, Berlin's theory does not present a clash between "positive" and "negative" liberty, but a method of analyzing two particular views of these concepts. He does acknowledge that this unattractive construction presents two profoundly divergent and irreconcilable attitudes to the ends of life. More significantly, Berlin's thesis considers the demands for recognition advocated by minority groups—a search for status—which assume the rejection of alien rule.[15] To this extent, these two concepts are useful in analyzing our basic statutory structure which in fact sets up two worlds within the same democracy—majority and minority rights.

Beginning with the Declaration of Independence, Thomas Jefferson sought to have slavery condemned in this basic document.[16] Secondly, the Constitution of the United States indirectly recognized the existence of chattle slavery and gave legal support to it. Thus, by the time the status of black people was crystallized in the eighteenth century, that status had fallen far short of the libertarian ideals of equality.[17] A closer examination of the contradictions in the application of American law will now be reviewed.

14. MacFarlane, *On Two Concepts of Liberty*, 14 POLITICAL STUDIES 77 (1966). MacFarlane criticizes Berlin's human rights argument that the real cause of oppression is the accumulation of power in some groups as opposed to other groups. See also, MacCullum, Jr., *Negative and Positive Freedom*, 76 PHILOSOPHICAL REV. 312 (1967) Mac Cullum attacks Berlin's analysis from the traditional conceptualization of 'positive freedom' akin to T. H. Green, in arguing that the basis of freedom is a triadic relationship of how the sovereign authority interprets variables such as 'positive or negative' and enforces these concepts among individuals. MacCullum's analysis assumes that the struggle is between the concepts. To a certain extent Berlin, indicates that enforcement of positive freedoms can become more repressive than negative ones if the theoretical concept of liberty negates social realities of majoritarian versus minority rights.

15. BERLIN, *supra*, note 13, at 154-166.

16. F. HERCULES, *supra*, note 1, at 92. Thomas Jefferson's expression against George III in his original draft of the Declaration of Independence:

> He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating them and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian King of Great Britain. Determined to keep open a market where MEN should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce; and that this assemblage of horrors might want no fact of distinguished die, he is now exciting these very people to rise in arms among us, and to purchase that liberty of which he deprived them, by murdering the people on whom he also obtruded them; thus paying off the former crimes committed against the liberties of one people, with crimes he urges them to commit against the lives of another.

17. C. SHERMAN, LOCKE, TREATISE OF CIVIL GOVERNMENT, (1937), Of The State of Nature:

> A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the Lord and Master of them all should by any manifest declaration of His will set one above another, and confer on him by an evident and dear appointment an undoubted right to dominion and sovereignty.

II. 'NEGATIVE' LIBERTY IMPOSED—CONTRADICTIONS IN THE APPLICATION OF THE LAW

Ultimately, in dealing with the two concepts of liberty, Berlin's thesis rests upon the extent to which the state imposes or declares a social, economic or political mandate through its laws. To what extent does the cause and effect of the law create social and economic patterns which can be described as creating 'negative liberty'.

This analysis is not intended to explain every legal recognition of equality or of every lapse or legitimization of inequality—but to concentrate on significant aspects in which historical contradictions are evident in the application of the law.

A. *The Application of the Law Before the Civil War*

Following the introduction of slavery in 1619, the law was used to suppress black resistance. By the time the Declaration of Independence was drafted, slavery was officially recognized in the body of custom, judicial sanctions and statutory law. Moreover, Article IV, sections two and four of the Constitution giving the state or the president authority to use military support in case of domestic violence were aimed at the suppression of slave insurrections.[18]

Tyranny, terror and mob violence were used to coerce abolitionists and anti-slavery supporters in the struggle against slavery. For example, in 1827, anti-abolitionists and anti-black mobs roamed through Cincinnati's black area wrecking havoc and destruction.[19] In July 1834, rioting against abolitionists in New York City resulted in mass destruction of the black section.[20] A defenseless black community suffered this misdirected violence. Some northerners feared that all freedom of expression might ultimately be endangered.

It was the contenancing of violence by abolitionists that won them the enmity of many law-abiding citizens, and rendered utterly hopeless their hopes of

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P. FORD, THE WRITINGS OF THOMAS JEFFERSON (10 volumes, collected and ed. 1899) from, "To P. S. Dupont de Nemours," April 24, 1886); Popular Sovereignty, Equality and Majority Rule:

> . . . . (t)hat the majority oppressing an individual, is guilty of a crime, abuses its strength, and by acting on the law of the strongest breaks up the foundations of society.

J. MILL, REPRESENTATIVE GOVERNMENT, 1861 (1951). See passages from Utilitarianism, Liberty, and Representative Government, 257-259, 261-262, 278, 282, 291-292, 305, 307-308, 321, 344-345, 381. Democracy and Liberty:

> Two very different ideas are usually confounded under the name democracy. The purest idea of democracy, according to its definition, is the government of the whole people by the whole people, equally represented. Democracy commonly conceived and hitherto practiced is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter . . . is a government of privilege, in favor of the numerical majority.
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> That the minority must yield to the majority . . . is a familiar idea. In a representative body actually deliberating, the minority must of course be overruled; and in any equal democracy . . . The majority of the people, through their representatives will outvote and prevail over the minority and their representatives. But does it follow that the minority should have no representatives at all? In a really equal democracy, every or any section would be represented proportionately.

See also, J. MILL, ON LIBERTY, 1859 (1956).

18. M. BERRY, *supra*, note 12, at 7-19.
19. *Id.* at 70-71.
20. *Id.* at 71.

obtaining government support. Convinced that slaveholders had the law of the land on their side, the abolitionists resorted to the principle of a "higher law" which they felt justified them in circumventing or breaking the law.[21]

Civil liberties were also denied anti-slavery spokesmen attempting to exercise freedom of the press. Indignant mobs often vandalized the presses and ran abolitionist editors out of town. Northerners who generally professed a belief in editorial freedom recanted when it came to the publication of literature attacking slavery. Mesmerized by fears of disunion, they were reluctant to impinge, judge or interfere with the South's "peculiar institution."

The contradictions in public sentiment were expressed in a violent episode involving Elijah Lovejoy, an anti-slavery publisher, who founded a press in Alton, Illinois in November, 1837.[22] The attorney general of Illinois called public meetings in an effort to find a way to shut down Lovejoy's press. When the meetings became volatile, the mayor of the city attempted to pacify the aroused citizens, but he admitted that civil authority could not disperse them. As a result, Lovejoy was killed and twelve of his supporters were tried in January 1838 on the strange charge of oganizing to use force in an effort to protect Lovejoy's press, an action which was described as an "unlawful defense of property". They were acquitted, but so were several mob members who had been charged with inciting to riot. The initiative of the attorney general and the absence of adequate police protection for the abolitionists in Alton lend credence to the contradictions in the application of the law that bound the country at this time.

The Fugitive Slave Act of 1850 also generated a wave of violence inundating those who persisted in helping slaves to gain freedom.[23] The distinctive authority of this new act made government responsible for the capture and return of runaway slaves. The act further stipulated that those who harbored or aided runaways or interfered with the legal processes were subject to imprisonment or fines. Marshals could summon bystanders and citizens as a "posse Comitatus" and even regular troops and the militia to enforce the act. Since the Fugitive Slave Act of 1793 had no such stringent provisions, the new act was obviously designed to close the legal loopholes which had allowed citizens who aided fugitives to evade punishment.

The pro-slavery forces in the national government gathered momentum in the 1840s and 1850s. Along with a more effective fugitive slave law, the Compromise of 1850 promised no interference with slaves in the territories.

The United States Supreme Court, in the critical *Dred Scott v. Sanford*[24] decision, affirmed the southern claim that slave property was guaranteed in all the territories and that the federal government lacked the power to prevent its extension.

The issue was whether Scott was a "citizen" of a state within the meaning of Article III of the Federal Constitution. The Court held that he was not, and that Congress had no power to deprive slaveowners of "property rights" by prohibiting slavery in certain territories.

Significantly, in answering the question of citizenship status within the

21. J. FRANKLIN, FROM SLAVERY TO FREEDOM, 249 (1969)
22. M. BERRY, *supra*, note 12, at 71-72.
23. Id. at 71-78.
24. Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

meaning of the constitutional enactments, the court stated "it was the intent of the forefathers to subject blacks to absolute and despotic power. Moreover, the Declaration of Independence although addressed to humankind did not specifically intend to include blacks within the same class."[25]

It had been hoped that the Supreme Court's ruling in the Dred Scott case would settle much of the controversy about the status of the vast territory which prohibited slavery. Instead the decision contributed to further conflict, and ultimately the bloody war between the states.

B. *Civil Liberties After the Civil War*

After a costly civil war, the Thirteenth, Fourteenth and Fifteenth Amendments were enacted affording former slaves the guarantees of all libertarian rights and privileges—to pursue life, liberty and property.[26] However, during the reconstruction period which followed, the aspirations of the nation concerning black people were partially realized in law, but not in fact. Before the promises made to blacks could become a reality, a weariness and malaise beset the nation, cynical compromise emerged between the North and South which became the means of reviving the white power base below the Mason-Dixon line.

Specifically the Hayes-Tilden presidential election, and the compromise of 1877 resulting in the withdrawal of federal troops from the South left free blacks in the custody of conservative southern Democrats, commonly known as the Redeemers, who pledged to protect the blacks in the exercise of constitutional rights.[27] Initially, southern whites attempted to manipulate the black vote to their purposes;[28] failing, they turned to repression and disfranchisement, using a multitude of theoretically legal tactics. As segregation and violence became commonplace, the national government expressed no willingness to enforce a new racial order. Between 1877 and 1900, the Constitution and statutes drafted by the Republicans were circumvented or manipulated to maintain the status quo.

The year 1883 became an infamous watershed in the black struggle. The Supreme Court in the *Civil Rights Cases*[29] struck down the Civil Rights Act of 1875, which provided for equal access to public accommodations. Relying on the federalist dichotomy of separation of powers, the principle of noninterference in states rights, the Court declared the Act unconstitutional. As a result this principle became the basic legal method of preserving the status quo. Although the Act had practically become ineffective by reinstitution of the Black Codes[30], it was clear from the decision that they tyranny of the majority would prevail.

It was, however, the 1896 case of *Plessy v. Ferguson*[31] which marked the official end of effective constitutional protection of former slaves. Homer Adolph

25. Id. at 409-10.

26. Constitutional interpretation of the Civil War Amendments was rendered in the *Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1872). The Court held that the Thirteenth Amendment, abolished slavery and involuntary servitude including Mexican peonage and Chinese coolie trade; the Fourteenth Amendment's main purpose was to establish the citizenship of free blacks, to give definition of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of the United States, as distinguished from those of citizens of the State. The main object of the amendment was to enforce the absolute equality of the races. The Fifteenth Amendment extended the rights of suffrage.

27. M. BERRY, *supra*, note 12, at 119.

28. Id. at 103-119.

29. 109 U.S. 3 (1883).

30. FRANKLIN, *supra*, note 21, at 303, 327.

31. 163 U.S. 537 (1896).

Plessy challenged the constitutionality of a Louisiana statute requiring passengers to be separated by race on the railroad. The United States Supreme Court upheld the statute, stating that establishing "separate but equal" facilities did not violate the Fourteenth Amendment. Thus the Court gave constitutional momentum to the growth of an entire way of life, the racially divided pattern known as "Jim Crow".

The majesty of the law had become the primary means of perpetuating white supremacy by systematically depriving blacks of their civil rights and heaping upon them indignities designed to undermine their self-esteem and sense of worth. In the "negative sense", blacks were coerced and restricted by segregative laws and policies. Thus, as W. E. B. Dubois was to prophesy, the thrust for social change in the twentieth century began as the struggle against the "color line".[32]

III. THE QUEST FOR POSITIVE LIBERTY

A. *Marshall, as Catalytic Agent for Social Change*

After *Plessy*, there was need for blacks to develop collective action. In response to this need, the first interracial, national organization to have an enduring quality was the National Association for the Advancement of Colored People (NAACP) founded in 1909. The NAACP has mainly employed two basic American methods in its protest movement—the legal approach and relentless public pressure through all the legal means available to inform and educate the public on the evils of racial discrimination and segregation.

However, when the NAACP first began its legal quest for equality there had been no overall litigation strategy developed or followed. Although early test cases had been successful in having declared unconstitutional racially restrictive zoning ordinances,[33] state laws barring blacks from elections[34] and the mob-dominated trial of a black man,[35] the organization was dissatisfied with this limited success.[36]

Thus, in the mid-1930's, there was a marked change, and the organization decided it would press on every possible front for the elimination of inequality and racial discrimination. The primary focus would be through the courts, partially because other avenues of redress appeared to be closed, and partially because the planners were committed to the "rule of law". They truly believed in the efficacy and feasibility of instigating social change through reliance upon the Constitution which after all was written to insure the protection of the basic values of American society.

32. W. E. B. DU BOIS, SOULS OF BLACK FOLK (1903) the term coined by Du Bois in this famous work.

33. Buchanan v. Warley, 245 U.S. 60 (1917), Harmon v. Tyler, 273 U.S. 668 (1927), City of Richmond v. Deans, 281 U.S. 704 (1930).

34. Guinn v. United States, 238 U.S. 347 (1915), amicus curiae, Nixon v. Herndon, 273 U.S. 536, Nixon v. Condon, 286 U.S. 73 (1932).

35. Moore v. Dempsey, 261 U.S. 86 (1923), see, early cases involving favorable decisions affording procedural rights in criminal cases, Hollins v. Oklahoma, 295 U.S. 394 (1935), Brown v. Mississippi, 297 U.S. 278 (1936).

36. In 1934 W. E. B. Du Bois, editor of *The Crisis*, maintained that efforts had thus far been futile. He added, that there was more discrimination and actual segregation at this time than had existed when the Association was formed. In defense of the NAACP policies, bitter attacks were directed against Du Bois, until he was forced to resign and return to his teaching career at Atlanta University. R. BLAND, PRIVATE PRESSURE ON PUBLIC LAW, 19 (1973).

A law school for blacks became a living laboratory, where civil rights law was invented by teamwork under the disciplined leadership of the Dean whose name was Charles Houston. To Howard University, this living laboratory, came a lanky, cheerful and plainly ambitious man in 1930 named Thurgood Marshall. Three years later he was graduated first in his class.[37]

In 1934, Thurgood Marshall became counsel for the local branch for the NAACP in Baltimore, Maryland, his home city. He won his first case as counsel for the organization in the *University of Maryland v. Murray*.[38] Donald G. Murray, a state resident, who met the University of Maryland's law school admission requirements in all respects except race, was denied admission. He requested that a writ of mandamus be issued in his behalf ordering the University to admit him for legal studies. The State of Maryland adhered to the "separate but equal" doctrine, and since the State only maintained one law school for whites only, Murray was refused admission. For Marshall, this case must have come close to his heart—since he, too, had been rejected by the University of Maryland Law School!

In Murray, Marshall argued that "what's at stake here is more than the rights of my client—it's the moral commitment stated in our country's creed." Saunders Redding noted that Marshall had come to realize, if not yet articulate, that the "test of democracy, no less than the moral power of justice, lay in the people's will to accept the equal protection of the laws, and he was beginning to see the role of black people as "catalyst in the slow-working moral chemistry of America."[39]

Donald Murray was admitted as the University's first black law student. The Court held that the state's refusal to admit a student solely on the basis of racial classification was a denial of equal protection of the laws as it applies to state action under the Fourteenth Amendment.

In 1936, Marshall joined his mentor, Charles Houston, then Dean of the Law School at Howard University, as Special Counsel and Assistant Special Counsel respectively on the national NAACP legal staff. Marshall's first brief was prepared in the first case involving education brought before the U.S. Supreme Court by the Association—*Missouri ex rel Gaines v. Canada*.[40] In 1936, Lloyd Gaines, a qualified black student, applied for admission to the law school at the University of Missouri. He was rejected on the grounds that Missouri, having no separate law school, provided financial assistance in the graduate and professional levels *outside the state* as was consistent with the "separate but equal" doctrine.

Marshall's brief emphasized Section One of the Fourteenth Amendment, which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws." Since Missouri had no separate and equal law school for blacks, and having admitted that Gaines was qualified for admission, acceptance was required by force of the Constitution.

For Marshall, the *Gaines* decision was the Court's first clear commentary on the question of equal opportunity for black students. The court ordered the State of Missouri to admit Gaines or provide substantially equal facilities for him within

37. R. KLUGER, *Simple Justice*, 127-28 (1976).
38. 169 Md. 478, 182 A. 590 (1936).
39. S. REDDING, LONESOME ROAD, 326-329 (1958).
40. 305 U.S. 337 (1938).

the State. Marshall regarded as most significant the following passage in the majority opinion:

> The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training which it does supply, but its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right.[41]

One of the ironies and unexplained mysteries to this day is the fate of Lloyd Gaines, who "disappeared" shortly after the decision was rendered and has not been seen since. His disappearance gave the State of Missouri the time it needed to create in whole cloth a separate law school for blacks—Lincoln University School of Law—which operated until after the ***Brown*** decision when it was merged with the University of Missouri School of Law.

To fully appreciate Marshall's contribution to American jurisprudence, it is necessary to understand his philosophy as a lawyer. Primarily, it was Marshall's view that by favorable decisions the "law can not only respond to social change but can initiate it, and that lawyers, through their every day work in the courts, may become social reformers."[42] Marshall knew the attitudes held by minorities of lawyers, as part of the oppressors in society, but he believed that lawyers had a duty, in addition to that of representing their clients, to represent the public, to be social reformers in however small a way.[43]

It is his understanding that "the force of law—in its capacity to initiate change and its flexibility to accept and mold change—is a major force in society," a force which lawyers are most often called upon to shape. "From the early days in this country's history, it has been the traditional task of lawyers to mediate between principle and practice, between man's heritage and his hopes—that is the message," he said, "of Law and the Quest for Equality—and that task and message must never be forgotten."[44]

Much of Marshall's greatness must be attributed to his ability to perceive the changes in the social climate and the resultant changes of judicial attitudes in the struggle, since legal experience and skill are not sufficient to win decisions in controversial areas in an unchanged climate or in a closed society. He also developed a broad definition of civil rights to guide his legal strategies. "The term civil rights includes those rights which are the outgrowth of civilization, the existence and exercise of which necessarily follow from the rights that repose in the subjects of a country exercising self-government."[45] He emphasized that the rights will be preserved against interference *only* if blacks avail themselves of the protection afforded by the U.S. Constitution and statutes!! For in every phase of living the United States must demonstrate that the American way of life exemplifies true democracy by eliminating majority-minority divisions and distinctions, thus having the same citizenship privileges and obligations for all.

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41. Marshall, "Equal Justice Under Law", THE CRISIS (July 1939) 201.
42. Marshall, "Law and the Quest for Equality", U. S. Department of Justice, March 8, 1967.
43. Id. at 6.
44. Id. at 6.
45. A. MEIER, E. RUDWICK, AND F. BRODERICK, BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY, (1971) from "Thurgood Marshall Explains the NAACP's Legal Strategy, (Speech at the NAACP Wartime Conference in 1944).

Shortly after the decision in *Gaines*, Charles Houston, who had argued the case, resigned his position because of ill health. Marshall succeeded him as the NAACP's Special Counsel. He urged that the organization expand its staff in order "to pry open the doors of white institutions." However, this required more revenue than the Association's treasury could provide. Moreover, the NAACP was increasingly confronted with problems in fund-raising and with the Internal Revenue Service because it had no tax exempt status.

Thus, it was agreed that the organization would establish a Legal Defense and Educational Fund, separate from the other resources of the NAACP. On October 11, 1939, the NAACP Legal Defense and Educational Fund, Inc. was formed. In 1940 the position of Director-Counsel was created and Marshall selected for the job. As the top legal officer, he was responsible for planning the strategy to be used in the courts and for coordinating the entire legal program.

Marshall served in this capacity for twenty-one years. Most major cases in the field of civil rights during this period were handled by the "Inc. Fund" as it was popularly called, and to a large degree Marshall was responsible for its successes and failures.

Marshall argued thirty-two cases and assisted in preparing the briefs in eleven others brought before the United States Supreme Court.[46] Of the cases he argued, four were lost, one was dismissed for a lack of a substantial federal question, and twenty-seven were substantive victories.

Obviously, these accomplishments were not the result of a singular effort on Marshall's part—he argued only six cases without the support of his staff. Success was based on teamwork and the support of many.

Due to the great number of cases between 1938 and 1968, the case analysis here will discuss two successful legal strategies which demonstrate Marshall's and the NAACP's revolutionary approach to law—the restrictive covenant cases and the school desegregation cases.

B. *The Restrictive Covenant Cases*

Around 1910, residential segregation laws based on race swept the country.

46. BLAND, supra note 36, Appendixes 3 and 4. Cases argued: Adams v. United States, 319 U.S. 312 (1943), Smith v. Allwright, 321 U.S. 649 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944) Morgan v. Virginia, 328 U.S. 373 (1946), Patton v. Mississippi, 332 U.S. 463 (1947), Sipuel v. University of Oklahoma, 332 U.S. 631 (1948), Fisher v. Hurst, 333 U.S. 147 (1948); Rice v. Elmore, 333 U.S. 875 (1948), Shelley v. Kraemer (McGhee v. Sipes), 334 U.S. 1 (1948), Taylor v. Alabama, 335 U.S. 252 (1948), Watts v. Indiana, 338 U.S. 49 (1949), Sweatt v. Painter, 339 U.S. 629 (1950), Brown v. Board of Education (Briggs v. Elliott/Gebhart v. Belton), 347 U.S. 483 (1954), Florida *ex rel.* Hawkins v. Board of Control, 347 U.S. 971 (1954), Brown v. Board of Education, 349 U.S. 294 (1955), Lucy v. Adams, 350 U.S. 1 (1955), Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955), Florida *ex rel.* Hawkins v. Board of Control, 350 U.S. 413 (1956), Frasier v. University of North Carolina, 335 U.S. 979 (1956), South Carolina Electric & Gas Co. v. Flemming, 351 U.S. 901 (1956), Gayle v. Browder (Owen v. Alambama Public Service Commission, 352 U.S. 903 (1956), Bryan v. Austin, 354 U.S. 933 (1957), Florida *ex rel.* Hawkins v. Board of Control, 355 U.S. 839 (1957), Cooper v. Aaron, 358 U.S. 1 (1958), State Athletic Commission v. Dorsey, 359 U.S. 533 (1959), Harrison v. NAACP et al, 360 U.S. 240 (1959), NAACP v. Alabama ex rel. Patterson, 360 U.S. 240 (1959), Faubus v. Aaron, 361 U.S. 197 (1959), Boynton v. Virginia, 364 U.S. 454 (1960), United States v. Louisiana (Bush v. Orleans Parish School Board), 364 U.S. 500 (1960), Tinsley v. City of Richmond, 368 U.S. 18 (1961). Cases in which only a brief was written: Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), Chambers v. Florida, 309 U.S. 227 (1940), McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950), Gray v. University of Tennessee, 342 U.S. 517 (1952), Burns v. Wilson, 346 U.S. 137 (1953), Barrows v. Jackson, 346 U.S. 249 (1953), Reeves v. Alabama, 348 U.S. 891 (1954), NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), Anderson v. Alabama, 366 U.S. 208 (1961), Hamilton v. Alabama, 368 U.S. 52 (1961), Garner v. Louisiana, 368 U.S. 157 (1961).

Cities in the southern and border states passed ordinances, the purpose and effect of which were to keep black people restricted from white areas. These statutes created the beginning of today's black ghettos. The intense overcrowding of families in Harlem, the Chicago black belt, Detroit's black bottom and Paradise Valley resulted in health problems, inflated living costs, crime and second-rate citizenship.

Constitutionally tested, many of the ordinances were upheld by state courts. These restrictive residency laws were the first obstacles frustrating black families from decent living conditions.

In the early years of the NAACP, an important victory had been won against zoning ordinances limiting occupancy of residential property according to race. In *Buchanan v. Warley*,[47] a Kentucky municipal zoning law in Louisville was declared invalid. The ordinance had prohibited whites from living in black areas and vice versa. Violation of the ordinance was made a criminal offense.

Buchanan brought an action for specific performance of a contract for the sale of certain real estate in the City of Louisville. The defendant by way of answer set forth that he was black and by virtue of the Louisville ordinance would be unable to occupy the property in a white block. The plaintiff alleged that the ordinance was in conflict with the Fourteenth Amendment. The Court of Appeals of Kentucky held the ordinance valid. The United States Supreme Court reversed the decision and held the ordinance unconstitutional. This case clearly established the principle that segregation ordinances by municipalities were "state action" within the meaning of the Fourteenth Amendment and therefore a denial of the equal protection of the laws and unconstitutional and void.

Denied local police power to enforce statutory, residential segregation, realtors resorted to private agreements among property owners—racial restrictive covenants. For two decades, the Supreme Court upheld these restrictive covenants under *Corrigan v. Buckley*,[48] which held that neither the Thirteenth Amendment and the Fourteenth Amendment "prohibited private individuals from entering into contracts respecting the control and disposition of their own property." The court held that judicial enforcement of restrictive covenants was not state action.

It was in attacking restrictive covenants that the NAACP developed its three-pronged legal strategy based upon sociology, the amicus brief and the tying of state action to the equal protection clause of the Fourteenth Amendment.

The evolution of this strategy was heavily related to a host of complex developments, among which were the black migration to northern and mid-western states—unleashing new pressures for better housing and schools, and the greater understanding of the meaning of democracy. Recalling this period, Marshall said that "toward the end of the war, NAACP leaders began to face the failure concealed in the success of its separate-but-equal victories. So the decision was made to make segregation the target."[49]

To draw on the experiences of the best minds, Marshall organized a conference on restrictive covenants in Chicago on July 9-10, 1945.[50] Thirty-five persons

47. 245 U.S. 60 (1917).
48. 271 U.S. 323 (1926).
49. TIME, September 19, 1955, at 27.
50. Conference on Racial Restrictive Covenants, Chicago, Illinois, July 9, 10, 1945. Typed minutes, Library of Congress (Data supplied by NAACP national staff).

attended, among whom were Governor Hastie, who presided, Charles Houston and Robert C. Weaver. The purpose of the conference, Marshall explained, was to determine and develop cases that would lead to the successful questioning of the constitutionality of enforcing restrictive covenants in the Supreme Court.[51] This effort involved looking not only at covenants on private property but on public housing projects as well.[52]

Hastie argued that, quite apart from the equal protection issue, the public policy issue was crucial: "It seems to be that the highest sources for determining the public policy are the Constitution and the statutes of the State. If the Constitution of the United States provides as it does, as interpreted by the courts, that the Legislature may not impose racial restrictions on occupancy of property, that seems to me to be a very signicant and authoritative determination that racial restrictions are invidious, hurtful and anti-social things. If they were not so considered, there would be no reason for prohibiting the Legislature from imposing them."

Hastie noted further that the United States Code, Title 8, Section 42, explicitly states that, "All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." Houston strongly urged that the courts be used as public forums to educate the public and thus mold national opinion.

Marshall tied in the restrictive covenant strategy to that on publicly financed housing by noting that several housing authorities had taken the position that they were bound to follow restrictive covenants on properties. Marshall recommended that the national NAACP office begin a nation-wide publicity campaign against the evils of segregation and racial restrictive covenants and assign a staff member to work on housing. It was also his view that an effort should be made to extend a line to *Buchanan v. Warley*[53] in petitions for certiorari to the Supreme Court.

Following repeated failures to have state courts rule against restrictive covenants, a smaller group of NAACP lawyers met at Howard University on January 27, 1947.[54] The Supreme Court had denied a petition for certiorari in *Mays v. Burgess*.[55] So Marshall advised that "the next reocrd on which we apply for certiorari would have to contain something substantially different and stronger than the record in the *Mays* case." The cases on which the fate of restrictive covenants would ultimately rest turned out to be *Shelley v. Kraemer* from St. Louis and *McGhee v. Sipes* from Detroit.[56]

The history of the Shelley case is revealing. The J. D. Shelleys, a black

51. Ibid.

52. Throughout the conference, the principal points about which discussion centered:

1. Whether courts could enforce racial restrictive covenants when it already was accepted that state legislatures were prohibited by the equal protection clause of the Fourteenth Amendment from doing so.

2. The sources of public policy for the state.

3. Whether the concept of denial of due process protected a person's right to acquire and dispose of property.

53. 245 U.S. 60 (1917) at 82.

54. Conference on Racial Restrictive Covenants, Howard University, Washington, D. C., January 26, 1947. Mimeographed minutes, Library of Congress. (Data Supplied by NAACP national staff.)

55. 147 F.2d 869, 152 F.2d, 123 (D. C. Cir. 1945) certiorari denied, 395 U.S. 858, rehearing denied, 325 U.S. 896 (1945).

56. Shelley v. Kraemer, 355 Mo. 814, 198 S.W.2d 679 (1947), certiorari granted 331 U.S. 803 (1947), McGhee v. Sipes, 316 Mich. 614, 25 N.W.2d 638 (1947) certiorari granted, 331 U.S. 804 (1947).

family, bought a piece of property on Labadie Avenue in a white neighborhood which was covered by a restrictive covenant. They purchased the property through a pioneer black real estate company founded and owned by James T. Bush, Sr. The Shelleys moved in and were promptly sued by the surrounding property owners. In the St. Louis Circuit Court, the Shelleys won, an appeal was taken and the Missouri Supreme Court reversed the decision.

During this period, Bush sought support unsuccessfully from the local St. Louis Branch of the NAACP whose president was David M. Grant, and the Dean of the Lincoln University School of Law, Scovel Richardson, now judge of the Court of Customs in New York. It was clear that past history of these matters in the courts had made these leaders skeptical of real success.

Undaunted, Bush then turned to the black real estate brokers in St. Louis. They met, organized and incorporated themselves as the Real Estate Brokers Association of St. Louis and elected Bush as their first president. This group then raised the money, retained George L. Vaughn as Chief Counsel and financed the Shelley case to the Supreme Court. NAACP support for the Shelley case did not come until after the high court indicated that it would hear argument on the issues by granting certiorari. McGhee was wholly an NAACP case and was handled by Marshall.

Preparation for presenting these cases before the Court was intense. A wealth of independent work had been done on amassing sociological material for these cases. As Vose notes, never before had so much factual data been presented to the Court in civil rights cases.[57] To coordinate the job of data gathering, a committee was appointed that included James T. Bush, Sr. of St. Louis, mentioned above, Dr. Robert Weaver of New York and Robert Ming, Esq. a Chicago attorney.

An adjunct to this strategy of preparing sociological data was that of *amici curiae* briefs. The use of *amici* was a fairly new and undeveloped practice. Consequently, much effort went into defining and explaining their purposes. At a meeting in September, 1947, 14 organizations announced that they planned to file amici. Especially welcome was a subsequent announcement by the U.S. Justice Department that it would also file an amicus brief.[58]

The participation by the federal government was no accident. The NAACP, under the leadership of Walter White, had aggressively pressed the Truman administration to become actively involved in civil rights. In 1946, the National Emergency Committee Against Mob Violence, which was formed by the NAACP, met with President Truman under the leadership of White.[59] As a result of this meeting, President Truman issued an executive order creating the President's Committee on Civil Rights.

This was a great victory for the NAACP. Three of the Committee's forty recommendations the following year in the report, "To Secure These Rights," dealt with racial covenants. A day after the report was issued on October 29, 1947, the Department of Justice filed its *amicus curiae* brief in the *Restrictive Covenant Cases*.

This massive effort was climaxed on May 3, 1948, when the United States

57. C. VOSE, CAUCASIANS ONLY, 163 (1959), *see* Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949), compare, Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

58. VOSE, id. at 169.

59. Id. at 168.

Supreme Court ruled 6 to 0 in *Shelley, McGhee* and another case, *Uriciolo v. Hodge* that although the covenants were valid contracts, State courts could not be used to enforce them.[60] In reversing the Missouri Supreme Court, Chief Justice Fred R. Vinson said, referring to the Fourteenth Amendment: "Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of these rights from discrimination on the part of the States based on consideration of race or color."[61]

Having consolidated their position on all principal fronts, the NAACP lawyers were now well positioned to launch the final drive against the "separate but equal" doctrine. No prospect seemed more overwhelming. Yet, the fact that they finally triumphed on May 17, 1954 was the best indication of the rightness of their strategy, which was again centered on immense preparation and an innate concern for social justice.

C. *The School Desegregation Cases*

Marshall's opportunity to test the social analysis that the NAACP was now speedily developing, came in *Sipuel v. University of Oklahoma*.[62] Similar to *Gaines*, Ada Sipuel, a qualified applicant was denied admission to the University of Oklahoma's law school because of racial restrictions. The Supreme Court ordered admission, finding that the State of Oklahoma had violated the equal protection clause of the Fourteenth Amendment and mandated that the State provide "such education as it does the applicants of any other group."

Marshall's strategy was to make an attack on the "separate but equal" doctrine. The theory was that any syllogism that might be used by the state to infer that one could equally conclude that separation of the races suggested inferiority of the *white* group. It was an historical fact that blacks were denied equality of educational opportunities. To prove that the "separate but equal" doctrine lacked any social justification, the NAACP lawyers cited eighteen "authoritive" sources throughout much of their argument, including government reports, articles in law journals, sociological publications and other statistical information.

Subsequently, the Oklahoma legislature amended state law to allow the admission of Negroes to the University's law school, but only on a segregated basis. Ms. Sipuel, now Mrs. Fisher refused to enroll under the segregated basis. The NAACP brought suit in *Fisher v. Hurst*[63] raising the question of equal facilities. The Supreme Court was unwilling to address the issue and held that the State's creation of a separate law school for blacks complied with the equal protection clause of the Fourteenth Amendment. Fisher was only a temporary setback on the issue of equal facilities. The opportunity for this attack came in *Sweatt v. Painter*.[64]

While the previous cases were concerned with admission standards, *Sweatt* attacked the inequities of the "separate but equal" doctrine in educational

60. Shelley v. Kraemer, 334 U.S. 1 (1948), McGhee v. Sipes, 334 U.S. 1 (1948), Hurd v. Hodge, Uriciolo v. Hodge, 334 U.S. 24 (1948).
61. Shelley v. Kraemer, 334 U.S. 1 (1948) at 23.
62. 332 U.S. 631 (1948).
63. 333 U.S. 147 (1948).
64. 339 U.S. 629 (1950).

facilities. The Court held that the legal education offered the petitioner at an established black law school was not comparable to the quality of education received at the University of Texas, therefore, admission was ordered to the University of Texas under the equal protection clause. However, the Court restricted its decision on the "separate but equal" doctrine, stating that the Court need not reach petitioner's contention that *Plessy v. Ferguson*[65] should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. However, the Court stressed "those qualities which are incapable of objective measurement but which make for greatness in a law school.

A companion case decided the same day, *McLaurin v. Oklahoma State Regents*,[66] challenged a state statute requiring segregated facilities. McLaurin, a black teacher, applied for admission to graduate school at the University of Oklahoma in order to pursue studies for a doctorate in education since an equivalent degree was not offered by Langston University, Oklahoma's black college. He was denied admission under state laws prohibiting integrated state schools. His suit for injunctive relief resulted in a three judge district court ordering his admission. Although the state legislature quickly amended its laws to permit admission of black students, it still maintained, however, that such should be given on a segregated basis. The Court held that a black student having been admitted to the state school might receive separate but equal treatment, but that McLaurin "must receive the *same* treatment at the hands of the state as students of other races."[67]

It was these series of rulings in the higher education cases, that Marshall felt the Court seriously undermined the rationale of the *Plessy* case, at least with respect to public education.[68] In addition to this line of cases, favorable decisions had been reached covering due process for criminals, discrimination in teacher salaries, the Armed services and disfranchisement of black voters.

Thus, after more than two decades of well-planned and executed strategy by the NAACP, the "test of equality" emerged in ***Brown v. Board of Education***.[69] The test against the legal sanction for racial segregation under which Blacks had lived since 1896, when the "separate but equal" doctrine was laid down in *Plessy v. Ferguson*.

IV. BROWN V. BOARD OF EDUCATION: "A NEW BIRTH OF LIBERTY"

In American jurisprudence, the historical significance of the decision in ***Brown*** makes it a landmark case. For the decision in ***Brown*** ended an historical period in which black people were restricted by a whole series of state-imposed and state-fostered laws and regulations designed to foreclose black participation in the political process and any sort of attainment of social or economic equality.

After the Civil War, the Thirteenth, Fourteenth and Fifteenth Amendments had been ratified to extend civil rights liberties to the newly freed blacks. However, judicial interpretation denuded the Fourteenth Amendment into its nineteenth century moorings as a set of abstract and socially-unrelated commands

65. *Supra*, note 31.
66. 339 U.S. 637 (1950).
67. Id. at 642.
68. MARSHALL, *supra*, note 42, at 4.
69. Brown v. Board of Education, 347 U.S. 483 (1954) reargued 349 U.S. 294 (1955).

of sovereign authority. In sustaining the arguments of experts in education, sociology, psychology, psychiatry and anthropology, the Court in *Brown* transformed the Fourteenth Amendment and American law into an effective instrument of social policy. The Court concluded that state-imposed segregation was a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The significance of *Brown*, is the example, par excellence, of the law's involvement in the process of living and social change. In effect, the *Brown* decision, broadened the conceptualization of civil rights and human rights of blacks, in particular and of all Americans.

To be sure, the critics, argued that the decision was sociology rather than legal decision-making.[70] The extent to which it created a revolution in American law, and the human rights struggle—is related to the level in which issues have arisen concerning what kind of government, what ends of government, what forms of government, and what consequences of government will advance the interests in pursuit of life, liberty, and human happiness for all Americans.

The romantic myth of American history, stresses that "liberty" is a neutral principle and that such neutral principles should be the basis of judicial decision-making. Moreover, to protect American justice from corruption, it was necessary that the democratic system divide the political power from the economic power.[71] The whole emphasis of the law and the tradition of the political system is designed to invite the widest possible participation in the process. On the other hand, the economic system is exclusive, it fosters a high degree of inequality and invites concentration of power. The bias of the two systems is profoundly different. However, splitting the two power systems is the great American legal mythology. For in the long history of western civilization, the union of economic and political power has been the rule, not the exception, i.e., the owners of economic power were also the owners of the government.

Why have Americans failed to understand the importance of this development. To a certain extent, history has been distorted by myths about "liberty". However, a government does not serve the interests of the people if in a given practical situation it uses concepts and categories which, if taken seriously would prevent a person from adjusting "self" at an historical stage. To determine whether the "self" is free—one must strip away the "myth" and "ideals" and deal with the elementary facts of human existence. Brown, in constitutionally condemning segregation, stripped the pseudo-morality of the restrictive sanctions and thereby created a basis for achieving racial equality in the society. In socio-political terms, *Brown* represents "a new birth of liberty," as a hybrid formulation which attempted to reconcile the traditional political concepts of liberty with social reality. At least in principle, a person was everywhere and in every condition, able if one willed it, to discover and apply rational solutions to one's problems. And these solutions, because they are rational, cannot clash with one another, and will ultimately form a harmonious system in which the truth will prevail, and freedom, happiness and unlimited opportunity for untrammelled self-

70. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), Horowitz, *The Misleading Search for 'State Action' Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957).

71. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE, 114-142 (1960), T. LOWI, THE END OF LIBERALISM, 29-54, 125-156, 287-314 (1969).

development will be open to all. However, the extent of this self-development is limited without an economic analysis. Therefore, the struggle for freedom is a dynamic to be measured as a synthesis of politics and economics. This is the next stage in the pursuit of liberty by black people.

V. THE THREAT TO AMERICAN LIBERTY

Today, many problems involving civil rights are not so much overt discrimination, but rather the lack of certain access to opportunities. Hence, the emphasis has shifted to the principle of affirmative action, the exhortation to initiate action by legislative act. The difference is that if a statute is patently unconstitutional, it can be challenged in the courts. But what if a claim relates to some lack of opportunity, a denial not of access to facilities but rather of the refusal to take needed affirmative action?

After more than a quarter of a century since ***Brown***, the legacy of slavery is still apparent among blacks. Artificial and historical limitations and constraints continue economic deprivation and powerlessness. Historically, denied access to the prerequisites and benefits of American society, blacks are categorically at the lower rungs of the economic and social strata, confined by inferior education and substandard housing, and discriminated against and victimized in every aspect of American society. Despite, a decade of activity and gains made during the civil rights era of the 50's and 60's to alleviate the wretched effects of racism in education and employment—these minimal changes have now been challenged by reactionary forces advocating an ideology to the majority that minority groups have gained too much and have gone too far in their quest for equality. The code term is "reverse discrimination." Yet without first achieving parity, how can there be a reverse of it?

The focal point of the current debate about this misnomer "reverse discrimination" is the case of ***The Regents of the University of California v. Bakke***.[72] The University appealed to the United States Supreme Court in which arguments were heard October 13, 1977.

Bakke claims that Davis' minority admissions program, using special criteria, selected 16 applicants (in a freshman class of 100) whose qualifications were lower than his. When filling out his application, Bakke had chosen not to be considered in the program, which was described on the application form as being for "applicants from economically and educationally disadvantaged" backgrounds. Bakke charges that the minority admission program is unconstitutional since it deprived him of equal protection under the 14th Amendment. However, in 1973 and again in 1974, Allan Bakke, a white civil engineer, applied for admission and was rejected both times. (He was also turned down at 10 other medical schools.)

The central issue is whether the Fourteenth Amendment guarantee of "equal protection of the laws" permits race to influence or determine criteria in professional school admission—and by implication to other areas. The problem is the limited number of seats accessible in professional schools.

The proponents of Bakke, essentially argue that innocent whites who are allegedly not responsible for past discriminatory practices should not be injured in

72. 18 Cal. 2d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976) rehearing, 18 Cal. 3d 252, certiorari granted, February 22, 1977, 97 S. Ct. 1098.

fashioning a remedy. It is the position of the NAACP, that the use of racial criteria is valid in an admission program to overcome the past effects of de jure educational segregation.[73]

Whatever the legalisms used in fashioning a remedy, the decision must dispel the myth of the "exploiting minority by the exploited majority." It is a malicious distortion and the manipulation of racial fears among whites. If the decision is formulated on neutral principles, it will ignore the social and economic history that blacks have been denied opportunities, not as individuals, but as a class—no matter what their personal merits or qualifications. Ultimately, the matter comes down to the same issue re-iterated time and time again—racism—the monopolization of resources for the benefit of whites only.

The goal is full participation in American society without constraints of class or race. Compromises only postpone the day of victory and prolong the period of slavery! Until victory is won, the struggle will continue.

73. Amicus curiae brief submitted by NAACP, ***The Regents of the University of California v. Bakke***, in behalf of the University, at 4, Summary of the Case.