

ESSAYS

BEFORE *BROWN*: REFLECTIONS ON HISTORICAL CONTEXT AND VISION*

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I am . . . concerned . . . that the Negro shall not be content simply with demanding a share in the existing system. [H]is fundamental responsibility and historical challenge is . . . to make sure that the system which shall survive in the United States of America . . . shall be a system which guarantees justice and freedom for everyone.

Charles Hamilton Houston¹

* This Essay is dedicated to the Honorable Damon J. Keith (Senior Judge, Sixth Circuit Court of Appeals), a conscientious, consistent, and courageous advocate of freedom, equality, racial justice, and human rights. His brilliant and instructive opinions call this nation to the highest standards of a just society. This essay is also dedicated to Pearl Lee Walker McNeil (Ph.D., 1979, *American University*), whose exemplary life of integrity, distinguished teaching, human rights advocacy, practical ecumenism, sacrifice, and love remains an inspiration.

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1. Audio tape: Untitled (Dec. 1949) (on file with Charles Houston, Jr. and Mykola Kulish of Kinocraft, Inc.) [hereinafter Audio tape].

I want to put myself out of business. I want to get things to a point where there won't be a National Association for the Advancement of Colored People—just a National Association for the Advancement of People, period.

Thurgood Marshall²

On May 17, 1954 the Supreme Court declared racial segregation of public schools unconstitutional in *Brown v. Board of Education*³ and *Bolling v. Sharpe*.⁴ Responses, varying from jubilation to cautious optimism, arose throughout the land. In New York, after processing the shock of a unanimous decision, the staff of the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense and Educational Fund (LDF) were at first awe-stricken; then, they celebrated. In the midst of the party at the LDF offices, Thurgood Marshall, the Director-Counsel and lead attorney for *Brown*, warned, “[Y]ou fools go ahead and have your fun . . . we ain't begun to work yet.”⁵

In Nashville, Tennessee, a black girl walked down the street with a teacher from her segregated school. That girl, Mary Frances Berry,⁶ later recalled reading newspaper headlines announcing the Supreme Court ban on segregation and saying, “Look at this! This is going to be great! Starting next year the kids will all be going to school together!”⁷ Her teacher responded, “I'm not sure it's going to happen quite next year.”⁸

African Americans hoped that the 1954 school desegregation decisions would usher in a new era of integration and equal citizenship rights for black people in the United States. As historian

2. John Geiger, *Mr. Civil Rights . . .*, PITTSBURGH COURIER, May 29, 1954, at 13.

3. 347 U.S. 483 (1954). *Brown* consolidated four cases from Kansas, South Carolina, Virginia, and Delaware. See *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951); *Briggs v. Elliot*, 103 F. Supp. 920 (E.D.S.C. 1952); *Davis v. County Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952); *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952).

4. 347 U.S. 497 (1954). *Bolling* was a companion case to *Brown* that ruled on the constitutionality of racially segregated schools in the District of Columbia.

5. JAMES T. PATERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 71 (2001).

6. Mary Frances Berry is a Professor of History at the University of Pennsylvania and a former chairperson of the United States Civil Rights Commission. She is the author of numerous books on history, race and law, including *BLACK RESISTANCE-WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* (1994) [hereinafter *BERRY, BLACK RESISTANCE-WHITE LAW*] and *THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* (1999).

7. BRIAN LANKER, *I DREAM A WORLD: PORTRAITS OF BLACK WOMEN WHO CHANGED AMERICA* 84 (1989).

8. *Id.*

John Semonche explained, the nation sought to distinguish itself from others—nearly two centuries before *Brown*—with charter documents that proclaimed an egalitarian “creed.”⁹ By the twentieth century, the language of the charter documents could be construed as a “civil theology,” or “a common faith” on which “American nationhood rests . . . [and which] promises fair, equal, and just treatment to all.”¹⁰ After framing their arguments for equality as “internal criticism of American society [that] is premised upon . . . calling attention to a discrepancy between belief and action,”¹¹ African Americans and their advocates hoped *Brown* would be the signal to close the gap between white and African American rights. The ruling seemed to affirm that the Constitution sided with those who believed that Thomas Jefferson’s words in the Declaration of Independence meant that “all human beings are created with equal rights that their fellow creatures should respect and that the government should protect.”¹²

However, *Brown* initiated a new era of struggle in this nation’s history. The era was marked by an expansion of activities pressing for greater civil rights for African Americans throughout the country.¹³ Yet the massive resistance to desegregation disclosed an underlying truth. Although both *Brown* and *Bolling* had far-reaching implications and consequences for race relations, they were silent on the deeper roots of the problems facing African Americans. As Robert Carter, the NAACP’s First Assistant Special Counsel at the time, later recalled, “[f]ew in the country, black or white, understood in 1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority.”¹⁴

9. See JOHN SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 5 (1998) (arguing that the Court, in interpreting the Constitution and furthering the rule of law, has helped promote and shape both American identity and American unity).

10. *Id.* at 6.

11. *Id.* at 10.

12. See *id.* at 9 (interpreting the tenets of the Declaration of Independence).

13. See generally BETTYE COLLIER-THOMAS & V.P. FRANKLIN, MY SOUL IS A WITNESS (1999) (chronicling the era following the *Brown* decision and the expanded struggle for equal rights in education, public accommodations, athletics, voting, employment, and other areas).

14. Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968). I concur with my esteemed colleague, Erwin Chemerinsky, who noted that a unanimous opinion in *Brown* would have been impossible if Justice Warren had insisted on acknowledging the immorality of segregation, as was declared in *Loving v. Virginia*. In *Loving*, the Court held that the racially discriminatory statutes at issue had an “overriding purpose . . . [or] justification as measures designed to maintain White Supremacy.” 388 U.S. 1, 11 (1967).

The inescapable context of *Brown* and *Bolling* can be briefly summarized in four historical facts: (1) the several decades of the Black Freedom Movement; (2) the emergence and articulation of an African-American jurisprudence within one period of that struggle in the first third of the twentieth century; (3) the persistent and prevailing Post-Reconstruction practice and ideology of white superiority, supported by violence and law; and (4) competing visions of a just, democratic society offered by dissenters active during the first half of the twentieth century. Each fact had its advocates and adversaries and, over time, each shaped struggles and raised the stakes for the population. Additionally, each significantly determined the meaning of *Brown* and *Bolling* for the United States of America and its diverse people.

The history of the litigation campaign that led to the 1954 decisions begins with the “active black struggle for freedom and justice.”¹⁵ That struggle began when Africans resisted at the point of capture, and continued as millions of Africans were forcibly removed from their homeland and shipped as cargo to the Americas. Their struggle was ongoing and characterized by an oppressive/subordinate status in their relationship with white, European settlers.¹⁶ This ongoing movement of black struggle developed into, in the words of author Vincent Harding, “the most fundamental challenge to the social, economic, political, spiritual, or intellectual domination of white people and their power over black lives.”¹⁷ First and foremost, *Brown* and *Bolling* were, and are, part of the larger freedom struggle of people of African descent.

The Black Freedom Movement, including the legal campaign culminating in the 1954 decisions, grew and continued because its participants were individuals, groups, and communities that believed in freedom, self-determination, equal entitlement to human rights

15. See VINCENT HARDING, *THERE IS A RIVER: THE BLACK FREEDOM STRUGGLE IN AMERICA* xx (1981) (identifying struggle as the central theme of the black community in America).

16. See generally *id.* (documenting the history of the trade in Africans and the ongoing struggles of African Americans to overcome oppression). For further reading on the slave trade and its aftermath in the United States, see MARY FRANCES BERRY & JOHN W. BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* (1982); JOHN HOPE FRANKLIN & ALFRED MOSS, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (7th ed. 2000); V.P. FRANKLIN, *BLACK SELF-DETERMINATION: A CULTURAL HISTORY OF AFRICAN AMERICAN RESISTANCE* (2d ed. 1992); DARLENE CLARK HINE ET AL., *THE AFRICAN AMERICAN ODYSSEY* (2000); JACQUELINE JONES ET AL., *CREATED EQUAL: A SOCIAL AND POLITICAL HISTORY OF THE UNITED STATES* (2003); COLIN PALMER, *PASSAGEWAYS: AN INTERPRETIVE HISTORY OF BLACK AMERICA, VOLUME I: 1619-1863* (1998); HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES 171-211* (20th Anniversary ed. 1999).

17. HARDING, *supra* note 15, at xx.

and justice, and a struggle to change an oppressive nation. Particularly after World War II, the Black Freedom Movement became part of a global context. Increasingly, people of color and others oppressed throughout the world advocated self-determination and opposed both colonialism and imperialism. Among leaders and participants of the Black Freedom Movement were dissenters and visionaries. As dissenters in American society, they did not simply react when confronted with racial oppression, but committed themselves to substantive change and transformation that fostered liberation. They were persons with a vision of a society in which people could be free to fulfill their potential and realize their dreams, irrespective of race. To make this vision a reality, some developed processes and strategies, while others articulated philosophies and worked to produce quality scholarship. Edwin Gaustad aptly observed that “restraint and oppression frequently give dissent its cohesion and therefore its strength as a mass movement . . . [t]he dissenter is a powerful . . . engine in the service of a cause.”¹⁸

In the second decade of the twentieth century, African Americans became more insistent in their demands for justice, while embracing and affirming a long-revered tradition of black protest. Yet, as Colin Palmer argues, a new generation of African Americans engaged in a new style of protest that was “more vigorous, sustained, and multifaceted.”¹⁹ Under this new style of protest, James Weldon Johnson, the NAACP’s first executive secretary, transformed the NAACP into an unapologetic black rights organization.²⁰

At the dawn of the new century, the brilliant, Harvard-trained W.E.B. Du Bois presciently declared that, “the problem of the twentieth century is the problem of the color-line.”²¹ Du Bois’s prediction proved painfully true after World War I. Many referred to the summer of 1919 as the “Red Summer,”²² which resulted in

18. EDWIN GAUSTAD, *DISSENT IN AMERICAN RELIGION* 4 (1973).

19. COLIN PALMER, *PASSAGEWAYS: AN INTERPRETIVE HISTORY OF BLACK AMERICA, VOLUME II: 1863-1965* 107 (1998).

20. Under Johnson’s leadership, the NAACP sponsored the dramatic “Silent Protest Parade” on July 28, 1917. To the sound of muffled drums, ten thousand people marched down Fifth Avenue to protest racially-motivated violence by whites against black people. The marchers carried banners that shouted beyond the drum beats: “Your hands are full of blood,” and “Give me a chance to live.” *Id.* at 106.

21. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK I* (Gramercy Books 1994) (1903).

22. Following World War I, the United States was gripped by a perceived communist threat. This coincided with severe repression of African Americans who increasingly asserted their calls for equal rights. *See generally* WILLIAM M. TUTTLE, JR., *RACE RIOT: CHICAGO IN THE RED SUMMER OF 1919* (1970).

approximately twenty-five anti-black riots.²³ Mob violence in the form of anti-black riots began early in the century throughout the country, not merely in the deep South. There were riots in 1900 and 1905 in New York, 1906 in Brownsville, Texas, and 1908 in Springfield, Illinois.²⁴ Some of the most violent clashes occurred between 1917 and 1923, when black fatalities reached into the hundreds, and injuries possibly into the thousands, as a result of rioting in Houston; East St. Louis; Washington, D.C.; Chicago; Omaha; Elaine, Arkansas; Tulsa; and elsewhere.²⁵ In the face of continuing white violence, African Americans organized nationalist or radical collectives and unions, and armed for self-defense.²⁶ Individuals and organizations pressed for anti-lynching legislation, and litigation through the courts increased and intensified.²⁷ Ida B. Wells-Barnett, anti-lynching activist and author,²⁸ joined members of the NAACP and the Equal Rights League in denunciation of riots, lynchings, and "legal lynchings."²⁹ In

23. FRANKLIN & MOSS, *supra* note 16, at 349; PALMER, *supra* note 19, at 120.

24. PALMER, *supra* note 19, at 118.

25. See FRANKLIN & MOSS, *supra* note 16, at 329-30, 344-52; see BERRY, BLACK RESISTANCE-WHITE LAW, *supra* note 6, at 108-25 (discussing white violence against blacks between 1917-1921 and the response of police, state authorities, and the federal government); see also C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 506-07 (1994) (discussing the 1923 annihilation of the predominantly black town of Rosewood, Florida, by a white mob from a neighboring village following a white woman's accusation that an unidentified black male assaulted her). In addition to deaths from rioting, there were 364 lynchings during the years 1917-1923. AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE 1212 (Kwame Anthony Appiah & Henry Louis Gates eds., 1999).

26. See FRANKLIN & MOSS, *supra* note 16, at 341 (describing the development of black unions in reaction to the racism commonplace in white-controlled unions). See generally GEORGE M. FREDRICKSON, BLACK LIBERATION: A COMPARATIVE HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA 137-79 (1995) (observing the rise in black populism, nationalism, and Pan-Africanism in the United States during the years 1918-1930, and outlining the drift toward Marxism that began in the 1920s and continued in earnest in the 1930s). Whether from radicalism or a mere desire to survive, African Americans increasingly responded to violent aggression with firearms. See generally FRANKLIN & MOSS, *supra* note 16, at 346-52 (describing casualties in the riots that including white deaths from gunfire).

27. See FRANKLIN & MOSS, *supra* note 16, at 354-56 (documenting the NAACP's post-World War I campaign against lynching and racial violence through the courts and through Congress).

28. See IDA B. WELLS-BARNETT, SELECTED WORKS OF IDA B. WELLS-BARNETT (1991) (compiling important late nineteenth-century works by Wells-Barnett, including SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892); A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892-1893-1894 (1895) [hereinafter A RED RECORD]).

29. See PATRICIA A. SCHECHTER, IDA B. WELLS-BARNETT AND AMERICAN REFORM, 1880-1930 149-68 (documenting the influence that widespread violence against African Americans had in uniting the outspoken Wells-Barnett and more reserved groups like the NAACP). See generally UNDER SENTENCE OF DEATH: LYNCHING IN THE SOUTH (W. Fitzhugh Brundage ed., 1997); DONALD GRANT, THE ANTI-LYNCHING MOVEMENT: 1883-1932 (1975); NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED

Moore v. Dempsey,³⁰ the NAACP won a new trial for a poor black man convicted in the aftermath of the Elaine riots and secured a favorable ruling from the U.S. Supreme Court on the exclusion of African Americans from juries.³¹ The militant black nationalists and Marxists of the African Blood Brotherhood, through their publication, *The Crusader*, boldly demanded social change and called for black self-defense.³² Black people, from poor urban dwellers and sharecroppers to politicians and poets, refused to sit idly by while attacked on multiple fronts. They insisted on the value of black lives and pushed for freedom, inclusion, and recognition of equal rights. However, they would not be rewarded with anti-lynching legislation, federal denunciation of second-class citizenship, an end to racial segregation, or legal protection against race-based economic discrimination in that decade, the 1920s, or the 1930s. Racism, with a fierce intensity, exacerbated all the problems common to human relations and society; nevertheless the new generation was not deterred.³³

The images of people of color advocating for bold equal rights initiatives, promoting black nationalism, espousing Pan-Africanism, and fighting imperialism and colonialism in international arenas filled minds and fueled hearts of African Americans who began to see themselves culturally as a separate people and a nation within a nation. W.E.B. Du Bois and more than a dozen other African Americans joined peoples of African descent in 1919 for a Pan-African Congress, which met in Paris to consider Black self-determination.³⁴ Marcus Garvey sparked the imagination and commanded the loyalty of millions with his Universal Negro Improvement Association (UNIA). The federal government used surveillance and repressive tactics against Garvey and the UNIA as well as labor organizations, socialists, communists, and other black groups denouncing persistent inequity and challenging the racist status quo.³⁵

STATES: 1889-1918 (Negro Univ. Press 1969) (1919).

30. 261 U.S. 86 (1923).

31. *Id.* at 91-92.

32. ROBIN D.G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION 45-46 (2002) (discussing the African Blood Brotherhood and its influence on the development of black radicalism).

33. For materials discussing the experiences of African Americans during World War I and through the 1920s, see sources cited *supra* note 16.

34. Nathaniel Berman, *Shadows: Du Bois and the Colonial Prospect, 1925*, 45 VILL. L. REV. 959, 961-62 (2000). See generally DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE, 1868-1919 535-80 (1993) (recounting the disheartening atmosphere for Du Bois and African Americans during and after World War I).

35. See generally JUDITH STEIN, THE WORLD OF MARCUS GARVEY: RACE AND CLASS IN MODERN SOCIETY 186-208 (1991) (documenting the concerted efforts of the Justice

During the Great Depression and the New Deal era, the Black Freedom Movement continued unabated. At the time, racial segregation and “Jim Crow” were firmly entrenched in the United States. Segregation did not simply separate blacks and whites physically or legally; it encouraged whites to “assert and reiterate black inferiority with every word and gesture, in every aspect of both public and private life.”³⁶ The African American community and national leaders in equal rights groups, women’s clubs, the Urban League, and other interracial formations assisted black people in handling both economic deprivation and the defense of their rights and humanity. Vocal African American opponents of racism and injustice from across the ideological spectrum and across the nation worked with the masses, spoke to federal officials, challenged President Franklin Delano Roosevelt, and experimented with radical alternatives in the struggle for equal rights and justice.³⁷ Among African American voices for change, empowerment, and enlarging democracy were William Patterson; Paul Robeson; Angelo Herndon; Harry Haywood; clergymen Father Divine and Reverdy Ransom; Franklin Roosevelt’s “Black Cabinet” members William Hastie and Mary McLeod Bethune; Congressman Arthur Mitchell; John P. Davis of the National Negro Congress; the coalition to defend the Scottsboro Boys (nine youths falsely accused of raping two white women in Alabama); gifted community organizers Ella Baker, Daisy

Department to harass and persecute Garvey and the UNIA). Federal government concern over organized black protest was at its greatest where black organizations were thought to have collaborated with radical political or labor movements. *Id.* at 188; see TONY MARTIN, RACE FIRST: THE IDEOLOGICAL AND ORGANIZATIONAL STRUGGLES OF MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION (1976). Several texts provide enlightening discussions on the experiences of African Americans as well as the general citizenry in the post-World War I era before the Great Depression and New Deal. See, e.g., sources cited *supra* note 16.

36. REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT THE SEGREGATED SOUTH I (William H. Chafe et al. eds., 2001); see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955) (reviewing the origins of “Jim Crow” and the development of racial segregation before and after the Supreme Court sanctioned such segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896)). The term, “Jim Crow,” originated with the antebellum minstrelsy of Thomas Rice, who in black face mimicked black people as part of a performance entitled “Jump Jim Crow.” Ronald L.F. Davis, *Creating Jim Crow*, available at <http://www.jimcrowhistory.org/history/creating2.htm> (last visited Sept. 6, 2003) (on file with the American University Law Review).

37. See KELLEY, *supra* note 32, at 47-53 (recounting the growth of black radicalism and the rising interest of black intellectuals and celebrities—including Claude McKay, Langston Hughes, Richard Wright, and Paul Robeson—in the anti-racist stances of the Communist party). The Communist Party of the United States addressed the plight of African Americans in several ways, including founding a League of Struggle for Negro Rights and producing publications on black self-determination. *Id.* at 49-50.

Lampkin, and Juanita Jackson; club and church women's leaders Mary Church Terrell and Nannie Helen Burroughs; union organizers A. Philip Randolph, Milton Webster, and Rosina Tucker; as well as Walter White and W.E.B. Du Bois.³⁸

The NAACP continued to work in the 1930s for anti-lynching legislation and litigate cases for black victims of the nation's judicial system and laws. Additionally, the NAACP actively opposed President Herbert Hoover's nomination of a white supremacist judge, John Parker, to the federal bench.³⁹ The Black Freedom Movement grew even as World War II intervened. Not only did African Americans serve in the U.S. military, but they also criticized the nation that sent them to fight a war of liberation while failing to secure equal rights for its own citizens.⁴⁰ During this time of war and Jim Crow, African Americans were creative, self-reliant, and ingenious in building their own lives and communities while struggling to survive in a hostile land. They understood, as Gordon Blaine Hancock observed, that "the Negro had to do more than pull at his own bootstraps . . . minority groups should predicate their survival on strategy even as majorities based theirs on strength."⁴¹ Grass-roots community organizer Ella Baker joined the NAACP in 1940, and through it infused the Black Freedom Movement with her philosophy of participatory democracy and her passion for black people's empowerment in their local conditions.⁴² Interracial formations

38. For profiles and narratives of other leading voices in the struggle during the 1930s, see JERVIS ANDERSON, *A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT* (1973); M. MELINDA CHATEAUVERT, *MARCHING TOGETHER: WOMEN OF THE BROTHERHOOD OF SLEEPING CAR PORTERS* (1998) (documenting the history of the Brotherhood's Ladies Auxiliary); DARLENE CLARK HINE & KATHLEEN THOMPSON, *A SHINING THREAD OF HOPE: THE HISTORY OF BLACK WOMEN IN AMERICA 177-91, 261-62* (1998) (discussing the contributions of African American women through the women's club movement, church movements, and the NAACP, including such individuals as Daisy Lampkin, Juanita Jackson, and Nannie Helen Burroughs); BARBARA RANSBY, *ELLA BAKER & THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION 64-104* (2003) (tracing Baker's radical development during the 1930s in Harlem).

39. See Jonathan L. Entin, *Judicial Selection & Political Culture*, 30 *CAP. U. L. REV.* 523, 541 (2002) (stating that the NAACP attacked Parker for the racist campaign speeches he made as the unsuccessful Republican candidate for governor of North Carolina in 1918).

40. See FRANKLIN & MOSS, *supra* note 16, at 438 (placing the number of African Americans serving in the military in World War II at approximately one million). Despite such service, the African American community was increasingly vocal about its inability to gain greater equality or share in the benefits of the war effort. *Id.* at 452-55. Rising racial tension erupted into riots, with thirty-four deaths resulting from the 1943 Detroit riots. *Id.* at 453.

41. RAYMOND GAVINS, *THE PERILS AND PROSPECTS OF SOUTHERN BLACK LEADERSHIP* 71 (1993) (internal quotations omitted).

42. See RANSBY, *supra* note 38, at 105-47 (noting Baker's tireless activities during the 1940s throughout the South on behalf of the NAACP). Baker promoted broader inclusion of the African American community in political activity. *Id.*

across the political spectrum—from communists and socialists to the Congress of Racial Equality, and from the March on Washington Movement to the NAACP's LDF—offered strategies to achieve freedom and equality.⁴³

During the Cold War, the dominant focus of the era was neither President Harry Truman's desegregation of the military in 1948, nor the establishment of a national committee to study civil rights.⁴⁴ Rather, it centered on a domestic Cold War and the hysteria of McCarthyism that claimed both black and white victims. Among those targets of repression were the gifted actor-singer-activist, Paul Robeson, and W.E.B. Du Bois, co-founder of the NAACP. Although many African Americans—including Walter White, the Executive Secretary of the NAACP—distanced themselves from the Left, some Democrats and Independents—such as Congressman Adam Clayton Powell, Jr., attorney George Crockett of the National Lawyers Guild, and Charles Houston—openly connected civil liberties with the anti-racism work of the American Left.⁴⁵ Going beyond protest and writing in the black press, African Americans litigated cases and even petitioned the United Nations to direct the nation's and the world's attention to the injustices of racial segregation in the United States.⁴⁶

43. See generally KELLEY, *supra* note 32 (surveying the intersection of the Black Freedom Movement, its organizations and leaders, with socialist and communist organizations and individuals). Many African American leaders embraced—or at least came to terms with—socialist and communist ideologies from the 1930s onward. See *infra* note 69; see also MANNING MARABLE, RACE, REFORM AND REBELLION 20-32 (2d ed. 1991) (contrasting the African American community's attraction to communism's equality and anti-imperialism with its rejection of communism's atheism and its policies during World War II).

44. See FRANKLIN & MOSS, *supra* note 16, at 461-62.

45. See MARABLE, *supra* note 43, at 27-31 (discussing problems experienced by Paul Robeson and W.E.B. Du Bois because of their political affiliations). When Du Bois was indicted as an "agent of a foreign principal" in 1951, an international committee formed to defend the eighty-two year-old scholar-activist. *Id.* at 27. However, Walter White asserted the government had proof of the charge, and the NAACP refused to assist Du Bois and others. *Id.* at 28; see *id.* at 21 (describing the initial attraction communism held for A. Philip Randolph and Adam Clayton Powell, Jr., both vocal anti-communists after World War II); see also PALMER, *supra* note 19, at 214-16 (summarizing the complicated position of Powell and others regarding World War II—fighting fascism abroad while denied equal rights at home—and communism, with its appealing egalitarian underpinnings). See generally GERALD HORNE, BLACK AND RED: W.E.B. DU BOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963 (1985); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 204-06, 214-15 (1983) [hereinafter MCNEIL, GROUNDWORK] (discussing Charles Houston's defense of leftist and communist sympathies as natural reactions to racism in the United States). But see generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (placing NAACP opposition to communism in the context of its role in fighting for desegregation, a role which required maintaining anti-communist allies).

46. See PALMER, *supra* note 19, at 216 (describing several petitions presented to the UN, including one presented by Charles Houston for the National Negro

These activities placed desegregation on the national agenda. For many outside of the South, both inside and outside of the national government, desegregation was becoming an “imperative” of the Cold War.⁴⁷

In the first half of the twentieth century, black and white lawyers representing African Americans began to pursue their rights more aggressively through the judicial system. The work of the national legal committee of the NAACP seemed to confirm the propriety of using the courts as a weapon in the Black Freedom Movement.⁴⁸ African Americans seemed able to use this public space to require whites to listen, especially when represented by white attorneys.⁴⁹

However, by the early 1930s, a gradual shift away from dependence on white attorneys for advocating blacks’ rights occurred as a result of the training of larger numbers of African American lawyers.⁵⁰ Despite the prejudice that black attorneys understood they would face, Charles Houston and others were convinced that African American attorneys would most effectively represent black clients. Discussing the need for Negro lawyers, Houston explained that “the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes. He has too many conflicting interests, and usually profit[ed] as an individual from the exploitation of the Negro, which he would be called upon to attack and destroy.”⁵¹ In contrast, black attorneys, facing the same

Congress and one by the NAACP). Justice Marshall, along with NAACP leaders, feared that direct action or civil disobedience would lead to violence without achieving benefits. MARABLE, *supra* note 43, at 25.

47. See Dudziak, *supra* note 45 (arguing that U.S. foreign policy concerns instigated integration to highlight the benefits of democracy over Soviet communism).

48. See generally CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, VOLUME I: 1909-1920 (1967) (characterizing legal action as one of the central activities of the NAACP from its founding). A “legal redress department” was created less than two years after the organization began. *Id.* at 60. Selected litigation was coordinated with lobbying for favorable legislation to remedy discrimination in education and public accommodations during the NAACP’s first decade. *Id.* at 183-208.

49. See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HISTORY REV. 97, 104-05 (2002) (describing the preference of the early NAACP for white attorneys because most elite schools were closed to blacks and because black attorneys faced more in-court obstacles as a result of their race).

50. See generally AUGUST MEIER & ELLIOTT RUDWICK, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, in ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 128 (1976) (describing the NAACP’s declining use of white attorneys, which began in the 1930s and continued as the organization grew in strength and achieved victories).

51. See Charles Houston, *The Need for Negro Lawyers*, 4 J. OF NEGRO EDUC. 49, 49 (1935) (writing that white attorneys were unreliable because structural inequity meant that whites gained from racial discrimination).

discrimination as their clients, had an inevitable interest in, and a sustained commitment to, equal rights.⁵²

Thus, by the mid-1930s, a cadre of African American lawyers, at times joined by progressive whites, litigated to establish and enlarge freedoms while working within a framework that utilized the law to create social change. This jurisprudence, later identified by J. Clay Smith, Jr. as "Houstonian Jurisprudence," was grounded in an anti-racist view of justice as fairness.⁵³ While emphasizing fairness was not unique to philosophies of law in the United States, other frameworks did not necessarily entail the repudiation of white superiority or privilege. Houston insisted that to ask "is it fair?" was to ask a question that required scrutiny of whether or not a person was able to function "without prejudice or bias operating against him . . ."⁵⁴

Taught inside and outside of the classrooms at Howard University Law School, Houstonian Jurisprudence affirmed three jurisprudential principles, variously articulated throughout Houston's life: (1) "law and constituted authority are supreme only as they cover the most humble and forgotten citizen",⁵⁵ (2) human beings are "equally entitled to life, liberty, and the pursuit of happiness," irrespective of differences in race, sex, national origin, or creed,⁵⁶ and (3) that in a good society, the government "guarantees justice and freedom for everyone" while providing more opportunities and freedoms for succeeding generations without being hindered by prejudice.⁵⁷ Integral to the implementation of Houstonian Jurisprudence was the idea of "Social Engineering," which is a non-traditional use of the law for social change rather than for strict

52. See *id.* at 49, 51 (explaining that black lawyers were needed to serve the African American community as "interpreter[s] and proponent[s] of its rights and aspirations" and also as "social engineers").

53. See J. Clay Smith, Jr., *In Memoriam: Professor Frank D. Reeves: Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence*, 18 *HOW. L.J.* 1 (1973). In his article, Smith called on legal scholars to "fortify . . . the Houstonian thought process into a school of jurisprudence." *Id.* at 6 n.22. See generally *A Symposium on Charles Hamilton Houston*, 27 *NEW ENG. L. REV.* 589 (1993) [hereinafter *Houston Symposium*] (collecting memoirs of those who knew Houston and including discussions of the development of Houstonian Jurisprudence).

54. These words were inscribed by Charles Houston to his son, Charles, Jr., in a copy of Joshua Liebman's *Peace of Mind*. See *William D. Bryant: Oral History*, in *Houston Symposium*, *supra* note 53, at 677, 682-85 (discussing the importance of impartial application of American law to Houstonian Jurisprudence).

55. Letter from Charles Houston to Stephen Early, White House Aide (Aug. 16, 1933), quoted in *MCNEIL, GROUNDWORK*, *supra* note 45, at 89.

56. Charles Houston, *An Approach to Better Race Relations*, Address at National YWCA Convention in New York, New York (May 5, 1934), available at www.law.cornell.edu/houston/ywcatxt.htm (on file with the American University Law Review).

57. Audio tape, *supra* note 1; see *supra* note 54 and accompanying text.

reinforcement of the status quo.⁵⁸ Social Engineering's essential purpose was to use the law, particularly the Constitution, to advance the nation toward the realization of a society Houston envisioned as good for all, namely, one that provided justice and freedom for all its members.⁵⁹ Social engineering required lawyers to advocate for the powerless and downtrodden as well as foster positive social change.⁶⁰ This required African American lawyers of the highest professional competence to work in the service of "group advancement" through experimentation with the law and constitutional interpretation, as well as carefully planned programs of litigation.⁶¹ Fundamental to Houston's strategic thinking as a lawyer was his belief that Supreme Court justices and the majority of the American people viewed the written Constitution as the legal embodiment of the nation's highest law and, as such, was a body of law to be interpreted more often than changed. The consequence of this was, according to Houston, "inertia . . . against amendment."⁶² Therefore lawyers were free to experiment in ways to force reforms that could not be accomplished through the political process.⁶³

In addition to the Black Freedom Movement and Houstonian Jurisprudence, race-based oppression—persistent, pernicious, and powerful—constituted a major shaping force in the lives and history of African Americans. The ideology and practice of white supremacy played a key role in the birth not only of *Brown* and *Bolling*, but also the campaign of litigation of which they were the culmination. The little girl in Nashville grew up and, as a mature scholar, stated this

58. See Houston, *supra* note 51, at 51; see also Smith, *supra* note 53, at 6 n.22 (stating that Houstonian use of the law was intended to procure "a pure legal existence" for African Americans); Herbert O. Reid, *Introduction to Charles Hamilton Houston Commemorative Issue*, 32 *How L.J.* 461, 461 (1989) (describing Houston's development of a jurisprudence emphasizing use of the law in furthering social justice); Spotswood Robinson, III, *No Tea for the Feeble: Two Perspectives on Charles Hamilton Houston*, 20 *How. L.J.* 1, 3-4 (1977) (describing Houston's role as teacher and mentor in transforming Howard Law School in six years from an unaccredited night school to an accredited training ground for lawyers fighting racism). See generally J. Clay Smith, Jr., *Charles Hamilton Houston*, 111 *HARV. L. REV.* 2173 (1998).

59. Audio tape, *supra* note 1.

60. Charles Houston, *Personal Observations on the Summary of Studies in Legal Education*, Houston & Gardner Firm Papers (May 29, 1929) (quoted and discussed in MCNEIL, *GROUNDWORK*, *supra* note 45, at 70).

61. See, e.g., Memorandum from Charles Houston, to the Joint Committee of the N.A.A.C.P. and the American Fund for Public Service ["AFPS"], Inc. (Oct. 26, 1934) [hereinafter Joint Committee Memorandum 1934] (detailing a proposal to spend all NAACP funds on litigation related to equal education and prioritizing the choices for litigation based upon anticipated success and subsequent benefits derived) (on file with the American University Law Review).

62. Letter from Charles Houston to Monroe Berger (Feb. 10, 1948) (on file at Howard University, Moorland Spingarn Research Center).

63. *Id.*

clear and telling articulation of the third aspect of historical context for *Brown* and *Bolling*:

Though the Bill of Rights, the Civil Rights Act of 1866, and the Fourteenth Amendment purport to protect individuals in their lives, liberties, and property, these ringing phrases have in fact afforded little protection to black people as a group. *Law and the Constitution in the United States have been a reflection of the will of the white majority that white people have, and shall keep, superior economic, political, social, and military power, while black people shall be the permanent mudsills of American society.*⁶⁴

Seeing racial segregation and discrimination as fundamental challenges to freedom, justice, and equality, African Americans made the litigation campaign to abolish racial segregation in public education a priority. The campaign became a priority despite the fact that African Americans lived under a national government that could not be depended upon for either the protection of its black citizens or affirmation of their equality under the law.

What sustained African Americans, however, were “freedom dreams” of an infinite variety.⁶⁵ In the case of those who had the talent to galvanize and organize communities, courage to commit their lives to social change, and stamina to support lives of struggle, the dream was a radical vision of a transformed society. The architect of the litigation campaign that led to *Brown* and *Bolling*, Charles Hamilton Houston, maintained a similar vision. Houston believed that African Americans should not strive only to achieve equality in the existing system, but to make the system one in which all people were guaranteed justice and freedom.⁶⁶ Thurgood Marshall, Houston’s most famous student and his successor, envisioned a new United States of America in his own way. “I want to get things to a point where there won’t be [an NAACP]—just a National Association for the Advancement of People,” he told a reporter from the *Pittsburgh Courier*.⁶⁷ Marshall’s vision was of a society where individual merit and personal qualities mattered, not race.⁶⁸ Others

64. BERRY, BLACK RESISTANCE-WHITE LAW, *supra* note 6, at xii (emphasis added).

65. See generally ROBERT MICHAEL FRANKLIN, LIBERATING VISIONS: HUMAN FULFILLMENT AND SOCIAL JUSTICE IN AFRICAN-AMERICAN THOUGHT (1990) (surveying the alternately religious and agnostic liberation theologies of Booker T. Washington, W.E.B. Du Bois, Malcolm X, and Martin Luther King).

66. Audio tape, *supra* note 1.

67. Geiger, *supra* note 2.

68. See JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 232 (1998) (discussing Marshall’s desire for an integrated and color-blind society, even if historically black institutions were sacrificed in the process).

who struggled during the same era and after Houston's death in 1950 had different visions.⁶⁹

Financing for the first major litigation campaign against racial discrimination in education began during the Great Depression. During the Depression's years of economic hardship, many blacks and a few whites committed themselves to the struggle for freedom and equal justice.⁷⁰ This was a costly decision, but those who embarked upon this course of action believed the sacrifices worthwhile. African Americans made financial contributions to the NAACP and to their own cases. Collections from churches, NAACP memberships, donations, contributions from sororities and fraternities, and offers of meals or a place to sleep for the lawyers sustained the protracted campaign.

The first major infusion of capital for an organized series of cases came in 1930 from Charles Garland, a white philanthropist concerned about workers, poor people, and the problem of racial discrimination against the American Negro. Garland offered the NAACP funds to support a legal approach to the alleviation of racial oppression from his American Fund for Public Service; otherwise known as the Garland Fund.⁷¹ Initially Garland offered the NAACP

69. See W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE IN ITS FIRST CENTURY* 421-22 (1968) ("I believe in socialism. I seek a world where the ideals of communism will triumph—to each according to his need, from each according to his ability."); see also PAUL ROBESON, *HERE I STAND* 108 (1958) ("To be free—to walk the good American earth as equal citizens, to live without fear, to enjoy the fruits of our toil, to give our children every opportunity in life . . ."); RANSBY, *supra* note 38, at 372 ("The only society that can serve the needs of large masses of poor people is a Socialist society."). See generally A TESTAMENT OF HOPE: *THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* (James Melvin Washington ed., 1986) (presenting King's egalitarian and radical democratic views through his writings and speeches). King's vision of society rejected the idea that the needs of the individual and the needs of the community were inevitably in conflict, noting "[t]he good and just society is neither the thesis of capitalism nor the antithesis of Communism, but a socially conscious democracy which reconciles the truths of individualism and collectivism." FRANKLIN, *supra* note 65, at 124. For more recent articulations of the Black Freedom vision, see the writings of Mary Frances Berry, Angela Y. Davis, Manning Marable, Leith Mullings, and Cornel West.

70. The stock market crash of 1929 and the Great Depression revealed the paucity of concern for those victimized by racism in addition to poverty and joblessness. Conditions of life for African Americans almost invariably included race-based economic inequity. This was exacerbated by the Depression, when the government tolerated discriminatory administration of relief and continued racially-motivated violence. See JOHN EGERTON, *SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH* 19 (1994) (describing the Depression's harsher impact on the lowest rungs of society, which were also more deeply divided by race and class).

71. See Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 *MERCER L. REV.* 631, 638 (2001) (stating that Garland, scion of a wealthy Boston family, donated \$800,000 to endow a fund to support radical causes); see also MCNEIL, *GROUNDWORK*,

\$100,000 to execute a planned attack on racial discrimination, though he later substantially reduced this amount.⁷² The NAACP and the Garland Fund formed a joint committee and used grant money to hire attorney Nathan Margold.⁷³ Margold prepared a report for the joint committee proposing how best to use the funds. Margold argued for a direct attack on segregation when irremediably accompanied by inequality and discrimination.⁷⁴ In 1933, Margold resigned to accept the position of Solicitor for the U.S. Department of the Interior and was succeeded by Charles Hamilton Houston.⁷⁵

When the NAACP asked Houston to direct a litigation campaign against racial discrimination, he had already formulated specific views about the NAACP and the law—its authority, its uses, and its limitations. Houston believed legal changes alone would have only a limited effect because these changes would not affect societal mores.⁷⁶ Another critical limitation of the law was the courts' function as an extension of the status quo, particularly when the status quo in the United States subordinated black people.⁷⁷ For Houston, this fully justified African American lawyers working as social engineers rather than as traditional practicing attorneys.⁷⁸ However, by viewing the struggle as larger than the litigation, Houston emphasized the danger of heavy reliance on judges or other elected officials. Houston reasoned that the nature of these positions meant that the officials deferred to the dominant classes who put them in power.⁷⁹

supra note 45, at 113 (noting the public suspicion that Garland's communist sympathies motivated his offer of funds).

72. See MCNEIL, GROUNDWORK, *supra* note 45, at 115 (delineating the importance of strategy after Garland reduced the appropriation to ten thousand dollars as a result of the Depression).

73. See *id.* at 114-15.

74. See Nathan Margold, *Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the N.A.A.C.P.* 93 (1930) [hereinafter *Margold Report*] (arguing that the best use of resources was not attempts to force equal funding of racially segregated schools but to challenge segregation itself) (on file with the American University Law Review).

75. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 67 (1992).

76. See MCNEIL, GROUNDWORK, *supra* note 45, at 117 (discussing Houston's belief that isolated legal victories were unimportant if not part of a larger strategic campaign with both legal and moral impact).

77. Audio tape, *supra* note 1; see *Negro and Poor Whites Should Unite*, clipping, ca. June 1934 (noting that blacks and poor whites should be allies but "have been poisoned against each other"), quoted in MCNEIL, GROUNDWORK, *supra* note 45, at 102.

78. See DONALD NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 115-16 (1991) (noting that under Houston's direction, Howard University School of Law became the first public interest law program and offered the first civil rights law classes). Former Houston student Oliver Hill explained: "He kept hammering at us all those years that, as lawyers, we had to be social engineers or else we were parasites." *Id.*

79. *Summary of Speech by Charles H. Houston to National Bar Association Convention*,

Although aware that white violence made some hesitant to take direct action against racial oppression,⁸⁰ Houston recognized that the struggle for equal rights in the United States required extra-legal means, such as demonstrations.⁸¹ Concerned about class and ideological issues that divided African Americans and the NAACP's position, Houston argued that the NAACP must represent all African Americans and be committed to "[i]ntelligent leadership plus intelligent mass action."⁸² Houston proposed not only "legal hand[i]work" but more public involvement.⁸³ Beyond this, Houston brought to the campaign a particular understanding of the nature and pervasiveness of racial discrimination in the United States. Houston stated:

[D]iscrimination in education is symbolic of all the . . . discriminations which Negroes suffer in American life. And these apparent senseless discriminations in education against Negroes have a very definite objective on the part of the ruling whites to curb the young [blacks] and prepare them to accept an inferior position in American life without protest or struggle.⁸⁴

Houston was the architect of the strategy that guided the litigation campaign of the NAACP to culmination in *Brown* and *Bolling*. Several

Nashville, Tennessee, August 1, 1935: Proposed Legal Attacks on Educational Discrimination 8 (Aug. 1, 1935) [hereinafter *Legal Attacks*] ("It is too much to expect the court to go against the established and crystallized social customs, when to do so would mean professional and political suicide.") (on file with Administrative Files, NAACP Records at Library of Congress). Persuaded by elements of radical thought and his own research, Houston was beginning to develop a class analysis and also joined those who called for the unity of blacks with poor, working-class whites. *Id.*; see also KELLEY, *supra* note 32, at 36-59; MARABLE, *supra* note 43, at 10-11 & 21 (describing racial violence after World War I as influenced in part by the desire to preserve the socio-economic order and maintain an African American underclass).

80. See MCNEIL, *GROUNDWORK*, *supra* note 45, at 96-97 (discussing Houston's view that the failure of the United States to prevent lynchings had international implications). Houston asserted that the prevailing mood of "disillusionment and distress" among African Americans as a result of such violence could lead to widespread defections and disloyalty. *Id.*

81. See *Legal Attacks*, *supra* note 79, at 8 (suggesting that "strikes, picketing, protests, demonstrations, and public appeals" must necessarily augment the legal battles in order for the struggle for equal rights to succeed); Charles Houston, Extracts From the Statement of Charles H. Houston in Debate with Bernard Ades, Before the Liberal Club of Howard University, on The Scottsboro Case (Mar. 28, 1935) (announcing the rising African American awareness of "the possibilities and tactics of mass pressure"), *quoted in* MCNEIL, *GROUNDWORK*, *supra* note 45, at 120.

82. Charles Houston, Address at NAACP Annual Conference (July 2, 1933) (transcript available at 1933 folder, Annual Conference Files, NAACP Records, Library of Congress) (on file with the American University Law Review).

83. Memorandum from Charles Houston to the Joint Committee of the American Fund for Public Service, Inc. and the NAACP (Nov. 14, 1935) [hereinafter Joint Committee Memorandum 1935] (on file with the American University Law Review).

84. *Legal Attacks*, *supra* note 79, at 2.

scholars, however, have challenged the historical significance of Houston's role as an architect-strategist of the NAACP's litigation campaign. Some argue that before the late 1940s, LDF attorneys followed the text of "the Margold Bible."⁸⁵ Others contend that the NAACP employed an indirect approach as a way of biding time until its lawyers could implement the direct approach originally proposed by Margold.⁸⁶ Still others suggest that Houston's strategic gradualism and use of an indirect approach became the *modus operandi* as a second choice to a more ambitious strategy because the organization lacked the necessary resources.⁸⁷

Legal scholar Mark Tushnet's work denies that Houston was the architect of a strategically planned campaign of litigation, arguing that Houston was "responsive more to the demands of the moment than to those of the plan."⁸⁸ According to this argument, after responding to particular situations as they arose, Houston would construct a plan in hindsight.⁸⁹ Such an interpretation, however, is not only at variance with the recollections and assessments of Houston's contemporaries, but is also an analysis that rests upon an inappropriately narrow conception of strategy.⁹⁰ This interpretation underestimates not only Houston's confidence in Marshall's comprehension and commitment to the strategy, but also the

85. See, e.g., ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* 11 (1990) (suggesting a transition directly from the Margold plan to a strategy designed by Thurgood Marshall, without mention of Houston).

86. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 136-37 (1977) (arguing that Houston believed white attorneys would not have the requisite drive to maintain a litigation campaign, thus requiring the training of black attorneys).

87. See NIEMAN, *supra* note 78, at 136 (arguing that a lack of funds led to a decision to attack segregation more peripherally by initially focusing on the requirement of equality in "separate but equal").

88. MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* 35 (1987).

89. *Id.* But see Mark Tushnet, *Brown v. Board of Education*, in *RACE ON TRIAL* 160, 164 (Annette Gordon-Reed ed., 2002) (presenting a more generous account of Houston's strategic role without acknowledging any modification of previously held views based on new sources). The statements regarding Houston's *ex post facto* identification of strategy would seem to represent Tushnet's most detailed discussion of NAACP strategy during the Houston period.

90. See William Henry Hastie, *Charles Hamilton Houston, 1895-1950*, 35 J. OF NEGRO HISTORY 355, 356 (1950) ("[Houston] was the architect and the dominant force of the legal program of [the NAACP]."); Thurgood Marshall, *College Honors Charles Houston '15*, AMHERST MAGAZINE (1978), reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 272, 272 (Mark V. Tushnet ed., 2001) ("[Houston] was the engineer of all of it."); *Oliver Hill, Sr.: Oral History*, in *Houston Symposium*, *supra* note 53, at 659, 669 ("Charles Hamilton Houston was the architect of the legal strategy."). See generally Robinson, note 58.

regularity with which the two communicated regarding the litigation campaign as a protracted struggle.⁹¹

LDF lawyers and others spoke of the general design for the litigation campaign and discussed the various adaptations executed prior to 1952. Marshall, Robert Carter, and others engaged in discussions and debates concerning the appropriate timing and approach. All of this occurred within the context of a litigation campaign conceived as part of a movement.⁹² Accordingly, as long as the campaign sustained an over-arching objective of dismantling *Plessy v. Ferguson*,⁹³ broad flexibility and responsiveness to the concerns of communities were not counter-strategic. Houston relied upon his legal expertise to establish not only model procedures, but also criteria for cases chosen by the national office to litigate and challenge elements of inequality. In light of limited resources, the cases had to have sufficiently strong records and clients to secure certification for argument before the Supreme Court.⁹⁴ Houston, Marshall, and other staff members understood that each case must materially contribute to the dismantling of *Plessy*. Houston, however, understood that both variations in community involvement and lively discourse about tactics, as well as timing, signaled vitality in social movements. Documentary evidence confirms that in 1934 and 1935 Houston mapped out a litigation campaign characterized by a broad strategy with the ultimate aim of ending segregation.⁹⁵

Houston's leadership and administrative style simultaneously demanded excellence in case preparation and accountability to clients, the larger communities in which they lived, and to African Americans as a group. Houston never considered the task as anything less than the collective struggle of both African American communities and committed African American attorneys serving as

91. See WILLIAMS, *supra* note 68, at 181-84 (discussing Marshall and Houston's shared ideas about strategy, a collaboration that continued from the time Marshall succeeded his mentor until Houston's death in 1950).

92. See *id.* at 94, 100 (observing Houston's desire that the movement be self-perpetuating and not dependent on any one person, such that Marshall and his colleagues could successfully take over and lead).

93. 163 U.S. 537 (1896) (upholding a Louisiana law that permitted segregated accommodations on passenger trains). This ruling served as the precedent supporting segregation for the first half of the twentieth century.

94. See *Oliver Hill, Sr.: Oral History, in Houston Symposium, supra* note 53, at 659, 670-71 (discussing the preparation of cases and concerns regarding the strength of the merits).

95. See MCNEIL, *GROUNDWORK, supra* note 45, at 116 (outlining Houston's strategy of attacking unequal apportionment without conceding to segregation, a strategy at odds with Margold's full assault on segregation). See generally *Legal Attacks, supra* note 79 (presenting Houston's multifaceted plan of attack seeking maximum results from the NAACP's limited resources).

social engineers.⁹⁶ Community leaders—editors, journalists, teachers, clergy, entrepreneurs, politicians, attorneys, impatient youth—brought cases dealing with educational inequality to the attention of the NAACP. They identified concerns that ranged from the absence of tax-supported graduate or professional educational opportunities, to unequal appropriations and facilities, to differentials in teachers' salaries. Scores of lawyers of national reputation, such as William Henry Hastie and Robert Ming, cooperated or formally affiliated themselves with the NAACP's National Lawyers Committee and staff, as did local lawyers, who took great risks to wage battle in their own localities. Although the staff grew in the 1940s, Houston, Marshall, and Carter provided essential leadership.⁹⁷ A cadre of dedicated and courageous lawyers associated with the NAACP and its Legal Defense Fund, some trained by Houston, such as Marshall—who succeeded Houston as Special Counsel⁹⁸—Oliver Hill, William Bryant, and many others skillfully argued racial discrimination cases over several years before the Supreme Court handed down its rulings in *Brown* and *Bolling*.⁹⁹

In 1935, when Houston moved to New York, he became the NAACP's first full-time salaried Special Counsel, with particular responsibility for the campaign against discrimination in education.¹⁰⁰ Houston envisioned the campaign as one to abolish racial segregation in public education gradually. Houston planned the campaign as a protracted struggle that incorporated both a series of cases and an expression of the will of communities to fight for their

96. See MCNEIL, *GROUNDWORK*, *supra* note 45, at 133 (noting the direction Houston provided to other lawyers and the inspiration his efforts offered to those litigating against discrimination in other arenas).

97. See Darlene Clark Hine, *Black Lawyers and the Struggle for Constitutional Change*, in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 33, 45 (John Hope Franklin & Genna Rae McNeil eds., 1995) (noting Houston's de-emphasis of himself as lead counsel to neutralize efforts to discredit the NAACP by bringing disbarment proceedings against him). See generally Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP [Part II]*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 296-99 (2001) (discussing Houston's awareness and concern that those hostile to the NAACP would use the rules of legal ethics to attack the organization, necessitating a high level of client care).

98. See DAVIS & CLARK, *supra* note 75, at 103 (describing Marshall and Houston's complementary strengths and their ability to work as a team); see also WILLIAMS, *supra* note 68, at 100 (describing Marshall's apprehension in taking over Houston's position at the NAACP).

99. See generally MCNEIL, *GROUNDWORK*, *supra* note 45, at chs. 10, 12, 13 (stating that others involved in the litigation who benefited from Houston's consultation and advice included Spottswood Robinson III, Louis Redding, Edward Lovett, Sidney Redmond, Robert Carter, James Nabrit, Jr., George E.C. Hayes, Z. Alexander Looby, Constance Baker Motley, and Jack Greenberg).

100. See *id.* at 132.

own freedom, justice, and equality. The strategy's aim, the total elimination of segregation, was to gradually dismantle the *Plessy* precedent through the establishment of new decisions on the definition of equality in education.¹⁰¹ The dismantling of the *Plessy* precedent took priority over all else, despite Houston's concerns over education in mixed as well as segregated school settings. Houston argued that "education is preparation for the competition of life" and a poor education handicaps an individual in that competition.¹⁰² Houston's plan could hardly have differed more from Margold's.

Charles Houston was nonetheless unwavering in his belief that *stare decisis*,¹⁰³ judicial self-restraint, the step-by-step process of the Court, the practical absence of a tradition for racial equality in the United States, and the pervasiveness of white superiority demanded this strategy.¹⁰⁴ Houston's research and strategic interest in presenting judges with cases concerning the inequality of law school education confirmed the necessity of making professional and graduate education a priority.¹⁰⁵ Taxing blacks "to educate the future white leaders who are supposed to rule over [blacks]" was unacceptable, Houston argued, adding "[w]e must break this up or perish."¹⁰⁶

101. See *id.* at 134 (describing Houston's belief that if inequality in education was not remedied, African Americans would be perpetually economically disadvantaged).

102. Charles H. Houston, "Tentative Statement Concerning Policy of N.A.A.C.P. in its Program of Attacks on Educational Discrimination," (July 12, 1935), *quoted in* MCNEIL, *GROUNDWORK*, *supra* note 45, at 132.

103. See BLACK'S LAW DICTIONARY 1414 (7th ed. 1999) (defining *stare decisis* as the process by which the court is committed to following its precedents unless compelled—by new facts, issues of law, or arguments—to a reinterpretation more consistent with constitutional requirements); see also SEMONCHE, *supra* note 9, at 10-11 (noting that final decisions of law are resolved by a Supreme Court that judges in light of the standard of a "holy writ," the Constitution). The Supreme Court is reserved the role of "supreme priestly interpreter of the Constitution," and its Justices "must enter into dialogue with the past . . . as they rationalize their decisions." *Id.* at 11.

104. Houston initially proposed beginning with elementary schools and the unequal apportionment of funds in *de jure* racially segregated systems of the Deep South. See Joint Committee Memorandum 1934, *supra* note 61. He proposed consideration of discrimination in transportation as it affected rural students' attendance of public schools, differentials in teachers' salaries and programs of state universities. The reduction in funds, however, prompted his rethinking of these multiple priorities. *Id.*

105. In 1935, only two out of nineteen *de jure* segregated states had state-supported institutions of higher learning accessible to blacks. *Legal Attacks*, *supra* note 79, at 5. Included in the segregated states was Maryland, which offered out-of-state scholarships. Thurgood Marshall, later joined by Houston, successfully challenged the segregated University of Maryland Law School on behalf of black applicant Donald G. Murray. See *Pearson v. Murray*, 182 A. 590 (Md. 1936) (ruling that Murray had a right to be admitted to University of Maryland Law School).

106. *Legal Attacks*, *supra* note 79, at 5.

During 1935 and most of 1936, the Special Counsel set policies, refined the plan, addressed the wider public, and litigated.¹⁰⁷ In the autumn of 1936, Houston added one of his most talented students, Thurgood Marshall, to the legal staff. Together, until Houston's retirement in 1940, with Marshall as Assistant Special Counsel and Houston as Special Counsel, these lawyers collaborated with local attorneys and communities to inaugurate the legal campaign.¹⁰⁸ Even after retirement, Houston would remain a consistent and accessible adviser and consulting attorney until his death in 1950.¹⁰⁹ After Houston's death, Marshall became Special Counsel for the LDF. Marshall modified Houston's basic strategy and long-range plan.¹¹⁰ In 1950, after establishing new precedents to reverse *Plessy*,¹¹¹ LDF proceeded with its direct attack on segregation.¹¹² In 1952 and 1953, the Supreme Court heard the arguments of the NAACP and the LDF which led, four years after Houston's death, to its decision in *Brown*.¹¹³

The litigation journey to *Brown* can be tracked from 1938 to 1950 in the following cases: *Missouri ex rel. Gaines v. Canada*,¹¹⁴ *Sipuel v. Oklahoma State Board of Regents*,¹¹⁵ *Sweatt v. Painter*,¹¹⁶ and *McLaurin v. Oklahoma State Regents of Higher Education*.¹¹⁷ The 1938 decision of the Supreme Court in *Gaines* marked the first successful attack on the *Plessy* precedent. Houston, Marshall and Sidney Redmond of St.

107. The plan included developing strategy, "positionary tactics," criteria for test case litigants, and model procedures for test cases. See *id.* at 3-4 (acknowledging that limited resources dictated employing such devices for maximum effect).

108. Houston moved his base of operations to Washington, D.C. in 1938, thus shifting a greater number of tasks to Marshall even before Houston's formal resignation in 1940. WILLIAMS, *supra* note 68, at 99-105.

109. See generally MCNEIL, GROUNDWORK, *supra* note 45, at 176-212 (documenting Houston's career years in private practice, during which he remained heavily involved in the NAACP's fight for equal rights for African Americans).

110. *Thurgood Marshall: Oral History, in Houston Symposium*, *supra* note 53, at 625, 634.

111. See, e.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Okla. State Bd. of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

112. See *Thurgood Marshall: Oral History, in Houston Symposium*, *supra* note 53, at 625, 635-38 (outlining the effort by the LDF to make direct attacks on segregated housing, transportation, public facilities, employment, and education); see also RANDALL BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL 70 (1973) (recalling that Marshall decided to continue the direct attack against segregation with *Brown* because recent desegregation in higher education cases suggested that schools adjusted to desegregation somewhat easily).

113. See PATTERSON, *supra* note 5, at 38-40 (detailing the history of oral arguments that led to the *Brown* decision and noting that the Supreme Court delayed the process by calling for a rehearing in December 1952).

114. 305 U.S. 337 (1938).

115. 332 U.S. 631 (1948).

116. 339 U.S. 629 (1950).

117. 339 U.S. 637 (1950).

Louis, Missouri, prepared the suit of Lloyd Gaines, who sought admission to the law school of the University of Missouri. On appeal, the NAACP attorneys won a new interpretation of *Plessy*, with the Supreme Court ruling that Gaines had a right to a legal education in Missouri equivalent to that afforded white citizens.¹¹⁸ This ruling became an essential precedent on which the NAACP relied as it struggled to achieve the ultimate goal of eliminating segregated public education.

Following the decision, the LDF intensified its casework on racial discrimination and higher education. Increasingly, advocates of freedom and opponents of oppression were linking their struggles to one another. African Americans found it logical and strategic to portray the Black Freedom Movement as inextricably bound to other freedom movements; while also emphasizing its goals as consistent with those promoted by the United States in its Cold War foreign policy. Civil rights advocates inside and outside the NAACP and the LDF took advantage of the concern of some Americans, including a few policymakers and politicians, about the nation's image as a racist, repressive government in the midst of the Cold War. In the 1948 *Sipuel* decision regarding state-supported legal education for Ada L. Sipuel and the 1950 rulings in *Sweatt* and *McLaurin*, the Supreme Court further outlined its post-war interpretations of equal protection under the Fourteenth Amendment. In *Sipuel*, the justices declared that legal education provided by the state must be made available to blacks as well as "applicants of any other group."¹¹⁹ This meant, however, that establishing a segregated state-supported law school for blacks in Oklahoma was constitutionally permissible.

In 1950, NAACP and LDF lawyers were already in consultation with local lawyers, teachers, parents, and children who were anxious to press public grade school cases in their states. The LDF assured itself of additional precedents establishing tangible and intangible requirements for equality in education through the litigation of *Sweatt* and *McLaurin*.¹²⁰ The Court agreed with the LDF that state-supported education should employ equal protection beyond facilities, resources, or even restrictive admission to programs of higher education established for whites.¹²¹ The justices found that the separate law school for Negroes established by Texas was inferior to

118. *Gaines*, 305 U.S. at 352.

119. *Sipuel*, 332 U.S. at 633.

120. See KLUGER, *supra* note 86, at 260-69. See generally JACK GREENBERG, CRUSADERS IN THE COURTS 64-86 (1994) (recounting the legal victories in *Sweatt* and *McLaurin* and the subsequently changed atmosphere for bringing school segregation cases).

121. *Sweatt*, 339 U.S. at 634-35.

the University of Texas Law School not only with respect to faculty, library, accreditation, and alumnae, but also with respect to qualities that cannot be measured objectively, but are nonetheless important.¹²² The justices felt compelled to admit that a law school was ineffective “in isolation from the individuals and institutions with which the law interacts.”¹²³ Following the reasoning of *Sweatt*, the Court decided in favor of the plaintiff, G.W. McLaurin, a doctoral candidate at the University of Oklahoma. The Court ruled that it was constitutionally impermissible to admit McLaurin and then segregate him from other students in the graduate school of education.¹²⁴ The Court clarified that “such restrictions impair and inhibit his ability to study, to engage in discussions, exchange views with other students, and, in general, learn his profession.”¹²⁵ In *Sweatt* and *McLaurin*, the Court held that inequality and racial discrimination, as either separate and unequal treatment, facilities, and conditions, or as unequal treatment within the majority’s state institution, violated standards set in *Plessy*.¹²⁶

By 1950, the groundwork for a direct attack on segregated public education had been laid. Primary and secondary education, long recognized as critically important, became the focus and the initiative of lawyers and black communities in Kansas, Delaware, Virginia, and South Carolina.¹²⁷ After hearing oral arguments in 1952 and re-arguments in 1953, the Supreme Court handed down its decision in *Brown* on May 17, 1954. In *Brown*, the nine Justices unanimously held that dual systems in Kansas, Delaware, Virginia, and South Carolina deprived the plaintiffs, and those similarly situated, of equal

122. *Id.* at 634. The Justices discussed specifically other measures of inequality. They noted faculty reputation and experience, alumni status and standing, and tradition. Just as Marshall—and Houston before him—had hoped, the Justices easily saw intangibles of equality as related to professional training in their own field. *Id.*

123. *Id.*

124. *McLaurin v. Okla. St. Regents for Higher Educ.*, 339 U.S. 637, 641 (1950).

125. *Id.* The Justices added that removal of restrictions imposed by the state of Oklahoma “will not necessarily abate individual and group predilections, prejudices and choices. But at the very least that state will not be depriving the appellant of the opportunity to secure acceptance by his fellow students on his own merits.” *Id.* at 641-42.

126. See *Sweatt*, 339 U.S. at 635-36 (ruling that when the state failed to provide an African American resident with a separate education equal to that provided to white residents, it was required to provide that education in the facility formerly reserved for whites); *McLaurin*, 339 U.S. 642 (ruling that a black student admitted to a previously segregated school “must receive the same treatment at the hands of the state as students of other races”).

127. See Joint Committee Memorandum 1934, *supra* note 61 (identifying unequal apportionment of funds to schools and the need to address flagrant cases of discrimination).

protection under the 14th Amendment.¹²⁸ The Court clearly stated that the separate but equal doctrine should not exist in education because separate facilities are “inherently unequal.”¹²⁹ Additionally, in *Bolling*, the Court stated that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”¹³⁰ The unanimous Court then held that the racial segregation imposed on children in the public schools of Washington, D.C. was an arbitrary deprivation of liberty in violation of the due process clause of the Fifth Amendment.¹³¹

The decision in *Brown* initiated massive resistance—from mob violence to the Southern Manifesto.¹³² The resistance was undoubtedly a consideration when the Court decided to delay the implementation of desegregation in the remedy phase of *Brown v. Board of Education (Brown II)*.¹³³ Thus, in light of the irrepressible anti-colonial and anti-imperialist struggles of people of color throughout the world, which were intensifying while lawyers were developing *Brown* and *Bolling*, these 1954 decisions could be seen as modest responses to the struggle of blacks in the United States.¹³⁴ Furthermore, it is important to note that while the Supreme Court upheld the plaintiff’s right to equal protection in *Gaines*, it also affirmed a principal that would later become problematic for African Americans victimized as a group by systemic institutionalized racism. Specifically, Chief Justice Charles Evans Hughes stressed the personal and individual nature of the constitutional right to equal protection.¹³⁵ Although African Americans suffered, and continue to suffer, as a group from institutionalized racism and white supremacy, the Supreme Court did not choose to comment on the societal

128. 347 U.S. 483, 495 (1954).

129. *Id.*

130. 347 U.S. 497, 500 (1954).

131. *Id.*

132. See PATTERSON, *supra* note 5, at 98-99 (defining the Southern Manifesto as the South’s unified statement of resistance to desegregation, one of several steps taken by segregationists to oppose reform). The Manifesto, signed by most southern members of Congress, accused the Court of abusing its power and made its stated goal the reversal of *Brown* and the prevention of desegregation. *Id.*

133. 349 U.S. 294 (1955).

134. See, e.g., *Charles Houston’s Defense*, AFRO-AMERICAN, Feb. 1, 1947, at 8 (“[The] disenfranchisement of colored people in the South is just as much an international issue as the question of free elections in Poland, or the denial of democratic rights in Franco Spain”), quoted in MCNEIL, GROUNDWORK, *supra* note 45, at 198; see also generally A Statement on the Denial of Human Rights to minorities in the case of Citizens of Negro descent in the United States of America and an appeal to the United Nations for redress prepared for the National Association for the Advancement of Colored People under the Editorial Supervision of W. E. Burghardt Du Bois (1947) (copy on file with the American University Law Review).

135. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

implications because the Court interpreted the Constitution as a document fundamentally concerned with individual rights.¹³⁶ Despite the progress created by the *Brown* decision, the Court slowed the pace of reform by sanctioning delays in righting the wrongs against individual African Americans who had been injured by racial segregation in education.

By the time of *Regents of University of California v. Bakke*,¹³⁷ some Supreme Court justices began to give short shrift to the historic context and origin of the Equal Protection Clause by applying the individual rights interpretation to dismantle affirmative action remedies and uphold white privilege. In *Bakke*, the Court affirmed a California Supreme Court ruling that the special admissions program at the University of California-Davis Medical School was unlawful and the white petitioner should be admitted.¹³⁸ In dissent, Justice Thurgood Marshall asserted that affirmative action programs are a necessary component of bringing blacks into mainstream America after 200 years of suffering.¹³⁹

Subsequent to *Bakke*, the Court in *Richmond v. J.A. Croson* ruled on Richmond's plan requiring city contractors to award certain contracts to minorities.¹⁴⁰ The Court held that the city failed to demonstrate a compelling governmental interest justifying the plan, and that plan was not narrowly tailored to remedy effects of prior discrimination.¹⁴¹ In *Shaw v. Reno*, the Court struck down a North Carolina voter redistricting plan intended to strengthen minority representation.¹⁴² The Court believed the resulting irregular districts were designed solely as "an effort to separate voters into different districts on the basis of race."¹⁴³

Significantly, the color-blind theory as articulated by O'Connor in *Croson* and *Reno*—created to oppose race-conscious remedies to centuries of institutionalized racism and white supremacy—has wide currency.¹⁴⁴ See Criticisms of race-conscious remedies have centered

136. *Id.*; see SEMONCHE, *supra* note 9, at 10 (noting that the Supreme Court is the governmental body assigned the duty to respond to the claims of individuals whose constitutional rights have been abridged).

137. 438 U.S. 265 (1978).

138. *Id.* at 320.

139. *Id.* at 387.

140. 488 U.S. 476 (1989).

141. *Id.* at 505-07.

142. 509 U.S. 630 (1993).

143. *Id.* at 649.

144. See *Croson*, 488 U.S. at 510 ("[Richmond], has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.") (O'Connor, J.); *Reno*, 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society") (O'Connor, J.).

on the rhetoric of egalitarian ideals, but can also be understood as an extension of Justice Harlan's dissent in *Plessy*, in which he argued that the Constitution was color-blind even as he affirmed the concept of white superiority.¹⁴⁵ Those arguments refusing to distinguish between remedial uses of race and uses that subordinate or stigmatize are particularly problematic.

The combination of the Supreme Court's rulings and conservatives' use of egalitarian rhetoric to protect white privilege has resulted in a variety of so-called "reverse discrimination" cases. The complaints and dissatisfaction of white students denied admission to their colleges, universities, or law schools of choice are afforded judicial cognizance largely in relation to the rhetoric of equal protection. Likewise, the programs receiving the complaints have been developed on equal protection grounds to stem the tide of privileging whites over concerns for diversity and racial justice.

*Defunis v. Odegaard*¹⁴⁶ and *Bakke* are among the early "white backlash" cases, but such challenges have continued virtually unabated. Among other cases are suits against the University of Maryland at College Park, the Law School of the University of Texas, and the University of Michigan.¹⁴⁷ It is striking that by upholding an affirmative action program of the University of Michigan Law School, O'Connor draws a distinction between education and other arenas, such as employment.¹⁴⁸ This distinction affirms the benign use of race-conscious remedies to create diversity. No opinion of the Court, however, has granted judicial solicitude to "societal discrimination" experienced by African Americans, which Powell discounted in *Bakke*.

Undoubtedly, historians must stress the importance of the protection of individual rights, as emphasized in the decisions leading to *Brown*.¹⁴⁹ Further, the LDF attorneys understood that within the judicial system there was a duty to seek remedies for those individuals deprived of constitutional rights. Such an emphasis on individual rights, however, addressed neither the significance and legitimacy of group rights, as Morton Horwitz has argued, nor the rationale for white superiority, such as the Supreme Court would

145. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

146. 416 U.S. 312 (1974).

147. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

148. *Bollinger*, 123 S. Ct. at 2338-39.

149. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (stressing the personal and individual nature of constitutional rights). In 1950, ruling for Heman Sweatt, the Court reiterated that equal protection under the Fourteenth Amendment was Sweatt's "full constitutional right," a right that was "personal and present." *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

later provide in *Loving v. Virginia*.¹⁵⁰ The LDF attorneys and allies shared the litigation campaign's ultimate goal of eliminating racial segregation. Yet the argument with which Houston began—the fundamental problem of white supremacy—became a negligible factor in the strategic equation. The struggle to achieve desegregation was so consuming that neither time, energy, resources, or personnel could be devoted to strategic anticipation of the use of a subverted individual rights rationale. While the *Brown* opinion emphasized psychology, individual harm, and individual rights, space remained for new rationales to buttress white privilege. It took only a few more steps for some to discover how to simultaneously give lip-service to principles of equality while sustaining white superiority.¹⁵¹

The meaning of the struggle of African Americans is not diminished by some nefarious consequences growing out of the systemic nature of white supremacy. Before adults and children faced fire hoses, freedom fighters faced COINTELPRO,¹⁵² and leaders faced assassinations, those enslaved risked all for freedom. After 1965, a newly-emancipated people continued to confront lynching, riots, and other unspeakable horrors. In the context of a collective struggle, they demanded respect for their humanity, recognition of their equality, the right to full freedom, and the realization of a good and just society. This had intrinsic value.

As we approach the fiftieth anniversary of *Brown*, we ignore at our own peril *Brown's* organic connection with the Black Freedom Movement intent upon achieving not only the liberation of African Americans, but also the transformation of society. Neither can we

150. Compare note 14 (observing in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) a failure to condemn white racism against African Americans), with *Loving v. Virginia*, 388 U.S. 1, 11-12 & n.11 (characterizing Virginia's anti-miscegenation laws not as measures promoting or restricting individual rights but rather as measures promoting White Supremacy by creating racially restrictive classifications), and Morton J. Horowitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, in *HAVE WE OVERCOME: RACE RELATIONS SINCE BROWN* 173, 184-86 (Michael V. Namorato ed., 1979) (noting the U.S. legal system's failure to examine discrimination against African Americans as a group). Forced to litigate as individuals, African Americans are prohibited from introducing evidence of successive generations of oppression and the resulting economic and social disparities between blacks and whites. *Id.* at 185-86. Litigants must instead overcome a far more difficult evidentiary hurdle: proving present governmental discriminatory intent. *Id.*

151. See SEMONCHE, *supra* note 9, at 277; see also *BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH DOCUMENTS* 34 (Waldo Martin ed., 1998) (noting the failure of the courts to acknowledge the correlation between racial and economic inequality); Carter, *supra* note 14, at 247.

152. See KENNETH O'REILLY, *RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972* (1989) (discussing the Federal Bureau of Investigation (FBI) and its "COINTELPRO" Counter Intelligence Program against African Americans in the Civil Rights and Black Power Movements).

fully comprehend the historical significance of *Brown* apart from the shaping forces of Houstonian Jurisprudence, pervasive white racism, and visions of a just, free, and democratic society. Between 1934 and 1954, struggles against racial discrimination and segregation intensified on many fronts, and local battles seemed to multiply exponentially. Between 1950 and 1954, certain assumptions, with which Charles Hamilton Houston began and upon which Houston and non-NAACP activists relied for organizing the masses, either diminished in significance for the NAACP and the NAACP-LDF lawyers or were not deemed fundamental. Among these, several assumptions about racial oppression, class relations, and the legal system's limitations are particularly salient for those who seek to learn from history and continue the struggle for a free, just, and democratic society.

The historical context of *Brown* highlights the movement towards direct action against segregation. The first step was the initial articulation of group oppression and white supremacy as the rationale for racial segregation. This was a part of Houston's thinking in the 1930s, and Black nationalists and some political radicals recognized this reality. Next, Houston, the political left, and community organizers urged that class loyalties and commitments of judges and other public officers—elected or appointed—be taken into account. Houston, however, also stressed that action through the judicial system had its limitations. Although he focused primarily on dismantling *Plessy* and attacking racial discrimination through litigation, Houston concurred in the assessment of activists that direct action must also be employed as a strategy in the struggle for freedom, equality, and justice. While Thurgood Marshall led the LDF staff and NAACP-affiliated attorneys in initiatives limited to the judicial system, African Americans and interracial coalitions advocated and utilized direct action more widely after World War II. Concurrently with the development of case law leading to *Brown* and *Bolling*, the radical left was outspoken in identifying and condemning the use of both white supremacy and race-based economic discrimination to divide blacks and poor whites and prevent interracial class struggle.

The Black Freedom Movement also expanded and garnered strength in the period leading up to *Brown* through grass-roots organizing within communities. Organizers and leaders within communities prioritized needs and addressed economic well-being, an end to lynching, equal rights, a voice in the electoral process, and education. Some black nationalists and non-nationalists promulgated

black self-determination by relating it to the struggles of oppressed peoples throughout the world. As cases leading to *Brown* developed, youth as well as adults, whether leaders or followers, participated in the struggle for rights with a clear commitment to freedom and equality. Their visions and dreams of the ideal American society differed. These differences marked a wide range of hopes held by African Americans regarding democracy in the United States and radical social democracies. Leading African American freedom fighters and organizers grappled with these and other competing ideologies. Both the government and the public victimized far too many civil rights advocates for their public engagement in critiquing the existing system in the United States. Nonetheless, throughout the years preceding *Brown* and *Bolling*, African Americans and progressive white allies committed themselves to the physical and intellectual work of the struggle so that they might eventually offer a clear liberating vision.

The political, social, cultural, and economic movements behind *Brown* and *Bolling* were dynamic and evolutionary, and throughout, the Black Freedom Movement continued. Increasing numbers of Americans were willing to struggle in opposition to racial injustice. They envisioned a changed society—free, just, democratic, egalitarian—and they sought and fought for it, regardless of risks, threats, or fear. I am reminded of Audre Lorde’s wise words, for fearlessness was never the issue or a requirement: “When I dare to be powerful, to use my strength in the service of my vision, then it becomes less important whether or not I am unafraid.”¹⁵³ Finally, the context for *Brown* and *Bolling* was the Black Freedom Movement “at its deepest levels . . . mov[ing] toward a freedom that liberates the whole person and humanizes the entire society.”¹⁵⁴

153. AUDRE LORDE, *THE CANCER JOURNALS* 15 (1980).

154. HARDING, *supra* note 15, at xxiv.