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RACIAL REMEDIATION: AN HISTORICAL PERSPECTIVE ON CURRENT CONDITIONS*

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I. Introduction

Unquestioned belief in the eventual resolution of the country's racial conflicts is an accepted article of American faith. In political terms, there is a national assumption that in several more years (the conservatives), or after the enactment of still more civil rights laws (the liberals), remaining obstacles to liberty and justice for all will finally fade away.

Bipartisan optimism flourishing in the face of so much contrary history demands more scrutiny than it has received. Perhaps hope emanates from widespread feelings of national fatigue. Race and racial issues have for so long occupied our thoughts, influenced our actions, fed our fears and burdened our consciences, that many Americans strain for even straw-thin signs of resolution, if not redemption.

But blind predictions of racial remediation are neither novel nor necessarily productive. The Founding Fathers recognized and provided constitutional support for slavery in part because they hoped that the "peculiar institution" would soon expire of natural causes. And more recently, persons no less wise seriously suggested that amalgamation could (in a few centuries) solve the race problem.[1] This gratuitous insult to blacks was given in the face of facts showing interracial sex and marriage, even with legal barriers removed,[2] does not occur on anything like the random basis that disappearance of Negroid traits would require.[3]

Constitutional approval of racial segregation which was rendered obsolete by mid-twentieth century events is now officially condemned. But optimism for the future must be tempered by past experience and contemporary facts. Racial discrimination, stifled but not stilled by a generation's worth of civil rights laws and court decisions, continues to flourish wherever the spur of profit or the fear of loss is present. And contemporary forecasters who believe that serious racial discrimination will somehow fade on its own decrease that very remote possibility

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* These lectures were delivered at the Notre Dame Law School on April 8 and 9, 1976. My appreciation to Father Theodore Hesburgh, Dean David Link, Center for Civil Rights Director, Donald Kommers, and all those at the University of Notre Dame responsible for my presence is made obvious by recalling my illustrious predecessors in this lecture series. I hope that the content of my contribution will justify the honor of this invitation.

** Professor of Law, Harvard University. Susan Mentser and Margaret Stark-Roberts assisted in the research and preparation of these lectures.

1 *See* Stern, *The Biology of the Negro,* 191 SCIENTIFIC AM. 81 (1954). According to the author, "[i]n America the continuing amalgamation of Asians, Caucasians and Indians is forming a people of mixed genetic character. *Centuries hence* students may ask 'What became of the Negro?'" (emphasis added). *See also* R. GOLDSBY, RACE AND RACES 103-06 (1971); C. STERN, PRINCIPLES OF HUMAN GENETICS 445-51, 826-32 (3d ed. 1973).

2 Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

3 I. LERNER, HEREDITY, EVOLUTION AND SOCIETY 233-36 (1968). The 1960 Census figures indicated a total of 51,409 interracial marriages. The 1970 Census figures showed an increase to 64,799. D. BELL, RACE, RACISM AND AMERICAN LAW 290-91 (1973). While the U.S. Census Bureau issues periodic reports updating population data (Household and Family Characteristics, Vital Statistics, and Current Population Reports), none provide statistics on racial intermarriage.

as much as did those early prophets who probably extended slavery by predicting its eminent demise.

Measurable improvement in the status of some blacks, and predictions of further progress have not substantially altered the maxim: white self-interest will prevail over black rights. This unstated, but firmly followed principle has characterized racial policy decisions in this society for three centuries. Racial policies are still based on the sense—no less deeply held when it is unconscious—that America is a white nation, and that white dominance over blacks is natural, right and necessary as well as profitable and satisfying. This pervasive belief, the very essence of racism, remains a viable and valuable national resource. The commitment to white dominance is no less potent because it is usually unrecognized, frequently unintended, and virtually never acknowledged.

There is, I suggest, evidence in the past and indications in the present that the drive of whites to satisfy and justify feelings of racial superiority will result in policies, private and public, that have the effect of retaining dominance over nonwhites for many generations to come. In these lectures, I shall analyze historical developments that support this unhappy conclusion. Then, I shall suggest strategies and perhaps some solace for those who had hoped to change this country from what it never was to what it has never been.

II. Black Rights—White Benefits

The racial injustices visited upon blacks are so immense that the civil rights condition is often measured by simply assessing the status of blacks in education, employment, voting, public accommodations, and housing. Change is seldom made in any of these areas without great effort. And so, when a racial barrier is breached, the gain is eagerly accepted as proof of progress in the struggle to eliminate racial discrimination.

A. *Historical Perspective*[4]

But even a rather cursory look at American legal history suggests that in the past, the most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks; this conclusion

4 In reading the Notre Dame Civil Rights Lectures, one notes immediately that no bicentennial occasion was required to persuade earlier speakers to review the history of civil rights activity. The late Chief Justice Earl Warren surveyed the racial scene from the origins of slavery to the issuance of Brown v. Board of Education. Warren, *Notre Dame Law School Civil Rights Lectures,* 48 NOT. D. LAW. 14 (1972). Senator Philip A. Hart described the epic congressional struggles required to enact civil rights legislation. Hart, *Notre Dame Law School Civil Rights Lectures,* 49 NOT. D. LAW. 5 (1973). Reverend Jesse Jackson recalled vividly the movement of the 1960's. Jackson, *Being Black in an Uncivilized Society—The Need for Social Justice,* 51 NOT. D. LAW. 15 (1975). Sargent Shriver's philosophical hopes for the world's future were filled with illustrations of yesterday's civil rights battles, triumphs, and defeats. Shriver, *Notre Dame Law School Civil Rights Lectures,* 50 NOT. D. LAW. 17 (1974).

My references to the past will serve a different purpose. I am a lawyer, not an historian and yet to provide wise counsel on what the law will be requires the ability to accurately gauge what the law has been. Law professors no longer rely entirely on old cases to learn the real meaning of past legal precedents, and most now acknowledge that courts are not as removed from the influences of the world as some judges would have us believe.

is justified even though the actions also had a liberating effect. A few examples are in order.

1. Abolition of Slavery in the North

When the Northern states abolished slavery following the Revolutionary War, much was written about the moral evil of slavery and its inappropriateness in a country dedicated to the principle of human equality. But the major motivation for abolition of slavery in the North was the economic advantages emancipation promised white businessmen who could not efficiently use slaves, and laborers who did not wish to compete with slaves for jobs. In addition, abolition both lessened the ever-present fear of slave revolts, and the concern that blacks, slave or free, would reside in the "free" states in large numbers.[5]

Shortly after the Revolutionary War the major issue in the abolition debate was not the morality of slavery, but who should bear the costs of emancipation. In each of the states with substantial slave populations (Pennsylvania, Rhode Island, Connecticut, New York and New Jersey) the resolution took the form of "gradual emancipation" statutes.[6] The practical result of these laws according to some historians was to force the slaves to pay with their labor almost 100 percent of their market value.[7] The exclusion of emacipated blacks from the political process in all the Northern states and their consignment to menial jobs and an inferior social status reflect the distinction most whites drew between abolition of slavery and acceptance of the former slaves.[8]

2. Emancipation Proclamation

Similar self-interest factors provided key leverage for the Emancipation Proclamation of 1863.[9] President Lincoln was no friend of slavery, but his primary objective was to save the Union. To preserve the Union he wrote publisher Horace Greeley in August 1862, he would end slavery, see it maintained,

5 *See* A. ZILVERSMITH, THE FIRST EMANCIPATION, THE ABOLITION OF SLAVERY IN THE NORTH (1967). *See also* W. JORDAN, WHITE OVER BLACK, AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 345 (1968); L. LITWACK, NORTH OF SLAVERY 3-29 (1961).

6 L. LITWACK, *supra* note 5, at 3-20. The Pennsylvania law enacted in 1780 prohibited the enslavement of any person born in the state after its effective date, but children of slaves could be held by their parents' masters as "indentured servants" until age 28.

Earlier, mobilizing for their break with England, Americans, recognizing the embarrassing contradiction between their liberty based ideology and the presence of slavery, took pains to demonstrate their sincerity to Europe. D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823, at 280-81 (1975). National concern for international impressions of racial segregation were to play a significant role in the rejection of Jim Crow almost two centuries later. *See* notes 30, 31 *infra.*

7 *See* Fogel & Engerman, *Philanthropy at Bargain Prices: Notes on the Economics of Gradual Emancipation,* 3 J. LEGAL STUDIES 377 (1974). *See also* D. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820, at 30, 37 (1971).

8 L. GREENE, THE NEGRO IN COLONIAL NEW ENGLAND, 1620-1776 (1942). Chief Justice Roger Taney supported his finding that neither free nor enslaved blacks could have legal rights in this country by reviewing the self-interest motivants for Northern abolition, and noting the unequal treatment of freed blacks condoned in the North. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 412-17 (1857).

9 *Proclamation of January 1, 1863,* No. 17, 12 Stat. 1268 (1863).

or end part and keep part.[10] When signed into effect on January 1, 1863, the Emancipation Proclamation reflected Lincoln's statement to Greeley. By its terms, the order, justified as a necessary war measure to suppress the rebellion, covered only those areas still under the control of the Confederacy. It excluded slaveholding states, and portions of states and territories which had sided with the Union.[11] Even so, the document caused bitter anti-Negro riots in the North, and led to serious political reverses for Lincoln and the Republicans. But, the ending of slavery was hailed by many in Europe, and those countries which had considered recognition and support of the Confederacy found such action im-

10 SPEECHES AND LETTERS OF ABRAHAM LINCOLN, 1832-1865, at 194-95 (M. Roe, ed. 1907). Earlier, in his first inaugural speech, Lincoln had denied any purpose, legal right or inclination "to interfere with the institution of slavery in the States where it exists." SPEECHES AND LETTERS, *supra,* at 165. *See also* Dillard, *The Emancipation Proclamation in the Perspective of Time,* 23 LAW IN TRANSITION 95 (1963).

Lincoln's position, that the Civil War was intended to preserve the Union and not to end slavery, reflected the prevailing view in the North. Abolitionists and blacks continued to press the slavery issue, but the majority of whites were opposed to their position.

Predictably, historians have differed in their assessments of what caused the Civil War. *See,* K. STAMPP, THE CAUSES OF THE CIVIL WAR (rev. 1974). Since 1940 alone, there have been several distinct trends in Civil War analysis, extending from "revisionism" which minimized the importance of slavery or any other single variable as against the view that the conflict could and should have been averted to views that the morality components of the slavery issue (although not providing equality for blacks) was critical to the War. D. POTTER, THE SOUTH AND THE SECTIONAL CONFLICT (1968). But the clash of conflicting economic systems sounds through several of the causation theories. Both North and South believed slavery required expansion to survive, and that confinement to the states where it existed would be fatal. But the North was convinced that territorial expansion was essential to a free society, with its promise of social mobility for the laborer. The decades-long dispute over whether Western territories should be slave or free represented to Eric Foner "a contest between two expansive societies, only one of whose aspirations could prevail." E. FONER, FREE SOIL, FREE LABOR, FREE MEN, 311-12 (1970). Another writer agrees that "the ultimate causes of the war are to be found in the growth of different economic systems leading to different (but still capitalist) civilizations with incompatible stands on slavery." B. MOORE, SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY, 141 (1966). *See also* E. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY (1965); L. HACKER, THE TRIUMPH OF AMERICAN CAPITALISM, 339 (1940).

11 For the debate over the legality of the Emancipation Proclamation *see* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 342-70 (1951). *See also* D. DONALD, THE POLITICS OF RECONSTRUCTION, 1863-1867, at 14-17 (1965); H. TREFOUSSE, LINCOLN'S DECISION FOR EMANCIPATION (1975).

Lincoln announced in September, 1862, that he would proclaim the end of slavery in 100 days unless the Confederacy was ended. In the mid-term elections the following month, Lincoln supporters lost heavily in both state and congressional campaigns. His home state legislature in Illinois condemned the planned emancipation "as unwarrantable in military as in civil law" and as "a gigantic usurpation," at once converting the war, professedly commenced by the administration, for the vindication of the authority of the Constitution, into the crusade for the sudden, unconditional and violent liberation "of Negro slaves." J. RANDALL, *supra,* at 100.

An uglier reaction took place in July, 1863, when the drawing of the first draftees' names in New York sparked several days of bloody riots in which blacks were the special victims. Several were lynched, others beaten. The rioters first sacked, then burned the Colored Orphan Asylum. J. RANDALL & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION 316-17 (1961). As was so often the case, the draft riots combined the bitterness of whites over being sent off to fight a war to free blacks, and competition with free blacks over jobs in the city. Just prior to the riots, 3,000 longshoremen had gone on strike for higher wages, and been replaced by Negroes. When the government began drafting the unemployed whites, they resisted violently. The hostility to blacks persisted to the end of the war. J. FRANKLIN, FROM SLAVERY TO FREEDOM 279 (3d ed. 1969).

possible.[12] Emancipation also led to disruption of Southern work forces.[13] More importantly, it opened the way for the Union Army to enlist nearly 200,000 black soldiers.[14] Parenthetically, in every war from the War for Independence to World War II, blacks had to petition for permission to fight for this country. In each instance, an affirmative response came only when it became apparent that filling the ranks was more important than maintaining the color line.[15]

3. Post Civil War Amendments

The military expediency that so influenced the decision to issue the Emancipation Proclamation and recruit black soldiers during the Civil War posed a dilemma for federal policymakers at the close of the war. As one Republican Congressman bluntly put it, "[m]en who have handled muskets do not willingly become slaves."[16] Black leaders had urged the enlistment of blacks to give validity to Frederick Douglass' assertion: "He who fights the battles of America may claim America as his country and have that claim respected."[17]

Historians have cited humanitarian concerns, political realities and a desire to punish the South as factors explaining the enactment of the civil rights amendments.[18] But Dr. Mary Frances Berry suggests that necessity and self-interest in utilizing large numbers of black troops during the conflict largely determined the measures toward securing emancipation and granting citizenship and suffrage during the postwar years.[19]

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12 The Emancipation Proclamation gained popular support in England and other parts of Europe where there was substantial antislavery feeling. The working class in England particularly supported emancipation and held large public meetings in industrial cities to rally against slavery. The upper class looked less favorably upon the Union and some supported the Confederacy. However, among them were a few leaders such as John Bright who were ardent abolitionists. *See* C. BEARD & M. BEARD, THE RISE OF AMERICAN CIVILIZATION 82-85 (1937).

13 Lincoln's action did not result in overt slave revolts. Rather, there was increased disloyalty and running away, particularly when Union troops approached. *See* J. FRANKLIN, *supra* note 11, at 225-30 (1974); J. RANDALL & D. DONALD, *supra* note 11, at 385 (1961).

14 *See generally* J. FRANKLIN, THE EMANCIPATION PROCLAMATION (1963).

15 For a summary of the black experience in the military service and citations to more detailed works on the subject, *see* D. BELL, RACE, RACISM AND AMERICAN LAW 397-99 (1973).

16 Berry, Toward Freedom and Civil Rights for the Freedmen: Military Policy Origins of the Thirteenth Amendment and the Civil Rights Act of 1866, at 9 (1975) (Dept. of History, Howard University).

17 *Id.* at 19.

18 In the decades following Reconstruction, historians and much of the country viewed the era with regret and those responsible for it with contempt. Radical Republicans were condemned as self-seeking scoundrels. Blacks were dismissed as ignorant clowns, totally unfit for citizenship. In recent years, more moderate views of the period have gained general acceptance. Some historians now argue that principle was a major motivation of Radical Republican policies. *See, e.g.*, Cox & Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. SOUTHERN HIST. 303 (1967); Kincaid, *Victims of Circumstance: An Interpretation of Changing Attitudes Toward Republican Policy Makers and Reconstruction*, 57 J. AM. HIST. 48 (1970).

19 Berry, *supra* note 16, at 7-8. She reports that the campaign to enact the 13th amendment abolishing slavery began in 1864 while large numbers of black soldiers were engaged in combat. All black regiments were involved daily in the War's final battles when the 13th amendment was reconsidered by Congress early in 1865. In those debates, Republican Congressman Henry Wilson supported the measure with the statement: "[W]e owe it to the course of the country, to liberty, to justice, and to patriotism to offer every inducement to every black man who can fight the battle of the country to join our armies."

Arguments like Wilson's prevailed, and the 13th amendment was passed and signed by President Lincoln on February 1, 1865. At that point there were 200,000 blacks in the army, including the all-black XXI Army Corps of 32 black regiments. Black troops made up large contingents in almost every successful battle during the last year of the war. *Id.* at 11.

Enactment of the 13th amendment ended the Constitution's protection of slavery, but did not resolve the issue of the newly freed slaves' political status.[20] Opposition to black suffrage was great and its proponents settled on the Civil Rights Act of 1866 as a means of protecting black civil rights against state and private interference.[21] But before the year ended, a majority of Congress recognized that the right to a lawsuit offered scant protection against the newly enacted Black Codes, race riots, and widespread white terror and intimidation.

Even so, Dr. Berry reports that the federal government intensified its efforts to discharge black soldiers who during the early months of 1866 outnumbered white troops three to one in some parts of the South.[22] In addition to charges of incompetence and insubordination, Union generals charged that black troops were hostile and insulting to Southern whites, threatening to white women, and encouraged militancy and insolence among civilian blacks.[23] It was clear that

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20 The 13th amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

21 Section 1 of the Civil Rights Act of 1866 provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The 14th amendment enacted by Congress in June 1866 (and finally ratified in 1868) was designed to end doubt about the constitutionality of the Civil Rights Act of 1866. Primary responsibility for the protection of black rights, however, was left to the states. All persons born in the United States were made citizens, but deprivations of citizenship rights were negatively stated rather than in positive form as in the Civil Rights Act of 1866. Section 1 of the 14th amendment provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

22 Berry, *supra* note 16, at 15. Dr. Berry explains that after the Civil War ended, white troops were rapidly mustered out because they were anxious to go home, and any delay was questioned. Black troops, on the other hand, were more willing to remain in the service. Their terms had not expired and most had neither homes nor employment to which to return. *Id.* at 13.

As an example, Berry reports:

> The order to muster out numerous white volunteer regiments in August 1865, left General Stonemen in Tennessee, two batteries of white artillery, and thirteen black regiments of all arms. Five of these black regiments were ordered to Alabama, where at that moment white troops were in the majority, so that General Woods could muster out five white regiments. In December 1865, when the states formally ratified the Thirteenth Amendment, only one of twelve infantry regiments in Mississippi was white, and in the following month there were 6,550 white and 17,768 black volunteers in Texas and Louisiana. Not until November of 1866 was black military strength, after muster-out, at a low enough level to make black military presence in the South a nonthreatening issue, and even then the presence of black veterans remained threatening.

23 In September 1865, all black regiments raised in the North were ordered mustered out on the theory that because they were unfamiliar with Southern racial ways, they posed a greater source of difficulty. Union generals moved black troops from urban to remote areas. Those who could not soon be relieved of military duties were assigned to the west where they could be occupied with fighting Indians and defending the frontier. *Id.* at 16-17.

black troops invited to perform courageously during a time of national need were not expected to exhibit concern for black liberty when the crisis for the whites was over.

Even without Dr. Berry's theory, it is beyond dispute that the Republicans recognized that unless some action was taken to legitimate the freedmen's status, Southerners would utilize violence to force blacks into slavery, thereby renewing the economic dispute that had led to the Civil War. To avoid this result, the 14th and 15th amendments and Civil Rights Acts of 1870-75 were enacted.[24] They were the work of the Radical Reconstructionists, some of whom were deeply committed to securing the rights of citizenship for the freedmen. For most Republicans, however, a more general motivation was the desire to maintain Republican party control in the Southern states and in Congress.

Within a decade it became apparent that the 13th amendment abolishing slavery was obsolete. Southern planters could achieve the same benefits with less burden through the sharecropping system and simple violence. The 15th amendment, politically obsolete at its birth, was not effectively enforced for almost a century. The 14th amendment, unpassable as a specific protection for black rights, was enacted finally as a general guarantee of life, liberty and property of all "persons." Corporations, following a period of ambivalence,[25] were deemed persons under the 14th amendment[26] and for several generations received far more protection from the courts[27] than did blacks. Indeed, blacks became victims of judicial interpretations of the 14th amendment and legislation based on it so narrow as to render the promised protection meaningless in virtually all situations.[28]

4. The School Desegregation Cases[29]

Even a century after the events, historians have not fully sorted out the multiple motivations for the civil rights activities during the Reconstruction Era. So, it would be presumptuous to attempt almost contemporaneous conclusions about the *Brown* years. It would appear though that: (1) the Supreme Court's

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24 Adopted in 1870, the 15th amendment prohibited the denial of the right to vote to United States citizens because of "race, color, or previous condition of servitude." Congress was empowered to enforce the provision "by appropriate legislation."

The fate of post-Civil War laws is reviewed in Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

25 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

26 Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

27 *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

28 *See, e.g.*, United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); James v. Bowman, 190 U.S. 127 (1903).

The Court did recognize the post-Civil War Amendments' protection against exclusion of blacks from juries, Strauder v. West Virginia, 100 U.S. 303 (1880); *Ex parte* Virginia, 100 U.S. 339 (1880). Convictions under civil rights acts for blatant violation of federal rights usually including violence were upheld in a few cases. *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Waddell, 12 U.S. 76 (1884); Logan v. United States, 144 U.S. 263 (1892).

29 Brown v. Board of Educ., 347 U.S. 483 (1954); Brown v. Board of Educ., 349 U.S. 294 (1955).

decisions in the school desegregation cases are the most important legal milestone ever achieved by advocates of racial equality; and (2) it is highly unlikely that the white self-interest factors which so clearly motivated earlier, less significant civil rights breakthroughs were absent when the *Brown* decisions were formulated.

Civil rights advocates of both races hailed the advances made possible by the end of constitutionally sanctioned racial segregation. But the *Brown* decision also strengthened America's position during the cold war. Our efforts abroad to convince emerging third-world nations to opt for democratic rather than communist forms of government were aided greatly by the abandonment of apartheid policies at home. The foreign policy advantages of a pro-civil rights result in *Brown* were specifically argued to the Court in the federal government's amicus curiae briefs.[30] The Supreme Court's opinion in *Brown* did not acknowledge its impact on either foreign relations or domestic politics, but news media of the day did not miss the implications.[31]

Assessment of the factors responsible for *Brown* must include: (1) the northern migration caused by the Depression and the improved economic and political status wrought by New Deal policies; (2) the decades long legal campaign by civil rights lawyers;[32] (3) the "too close for comfort" lessons of Nazi Germany's policies of racial superiority;[33] (4) the general unrest and periodic incidents among returning black servicemen; and (5) a humane as well as politically aware Supreme Court.[34]

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30 It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed . . . [for] discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

Brief for the United States as Amicus Curiae at 6, Brown v. Board of Educ., 347 U.S. 483 (1954).

NAACP lawyers warned that "[s]urvival of our country in the present international situation is inevitably tied to resolution of this domestic issue." Brief for Appellants at 194, Brown v. Board of Educ., 347 U.S. 483 (1954). Both quotes are cited in A. BLAUSTEIN & C. FERGUSON, DESEGREGATION AND THE LAW 11-12 (1962).

31 *Id.* at 12-13. The authors summarized the coverage:

After summing up the effect of the decision on the children in the segregation states, *Time,* in typical *Time* style, observed: "The international effect may be scarcely less important. In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'" *Time's* companion publication, *Life,* supported this position with the assertion that the Supreme Court "at one stroke immeasurably raised the respect of other nations for the U.S." From *Newsweek* came these words: ". . . the psychological effect will be tremendous . . . segregation in the public schools has become a symbol of inequality, not only to Negroes in the United States but to colored peoples elsewhere in the world. It has also been a weapon of world Communism. Now that symbol lies shattered." More pointed is the statement from *Citizen's Guide to De-Segregation:* "The Voice of America carried the news around the world. Hundreds of national and international leaders wired congratulations. Only radio Moscow was silent."

32 *See* R. KLUGER, SIMPLE JUSTICE (1976); L. MILLER, THE PETITIONERS (1966).

33 Chief Justice Warren put it well:

The segregation and extermination of non-Aryans in Hitler's Germany were shocking for Americans, but they also served as a troublesome analogy. While proclaiming themselves inexorably opposed to Hitler's practices, many Americans were tolerating the segregation and humiliation of nonwhites within their own borders. The contradiction between the egalitarian rhetoric employed against the Nazis and the presence of racial segregation in America was a painful one.

Warren, *supra* note 4, at 41.

34 These factors are reviewed in Kelly, *The School Desegregation Case,* in QUARRELS

The litmus test of whether black or white Americans were to be the real and immediate beneficiaries of *Brown* came the following year when the Court departed from basic equitable and constitutional principles to rule that the entitlement of blacks to desegregated public schooling need not be immediately granted, but might be delayed until administrative problems were solved.[35] Loren Miller called *Brown I* "a great decision," but denounced the "all deliberate speed" decision in *Brown II* as a "great mistake."[36]

But mistake or not, *Brown II* traced a well-set pattern of racial policy-making. Spurred by the need to confront a political or economic danger to the nation as a whole, serious racial injustice is acknowledged and enjoined, but necessary remedies are not implemented once the economic or political irritant is removed. Thus, while civil rights groups and some federal courts continue well-intended efforts to effectuate the *Brown* decision, there is little evidence that black children are educationally advantaged in desegregated schools, and growing concern that "white flight" will resegregate many systems in the next few years.[37]

That the racial segregation voided in law by *Brown* was ended in fact in many public schools and most public facilities was due to the courage and persistence of those who mounted the freedom rides, marches and sit-ins during the early 1960's. The legislative skills of Senator Philip Hart[38] and Congressional civil rights proponents helped produce the Civil Rights Act of 1964[39] and the Voting Rights Act of 1965.[40] But the major leverage for both laws was provided by the protest movement which raised the nation's consciousness while threatening continued disruptions and turmoil. It may be coincidence, but the quick passage in 1968 of the Fair Housing Act[41] with at long last an anti-lynch law,[42] only a week after Martin Luther King's assassination, fits this pattern too well to be dismissed as fortuitous.[43]

THAT HAVE SHAPED THE CONSTITUTION 246-49, 268 (J. Garrity, ed. 1962).

35 349 U.S. 294 (1955).

36 L. MILLER, *supra* note 32, at 351.

37 A full recital of the rise and decline of school desegregation litigation can be found in Bell, *Waiting on the Promise of Brown,* 39 LAW & CONTEMP. PROB. 341 (1976). For an analysis of what went wrong, *see* Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976).

Author Howard Zinn said the total effect of Supreme Court decisions and civil-rights law "was to give the impression abroad, and to whites at home unaware of the day-to-day lives of black people, that tumultuous changes were taking place in America's race relations. The reality, however, . . . was different." H. ZINN, POSTWAR AMERICA 123 (1973).

38 Hart, *supra* note 4, at 12-16.

39 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1970).

40 42 U.S.C. §§ 1971-74 (1970).

41 42 U.S.C. §§ 3601-31 (1970).

42 18 U.S.C. §§ 241-43, 245 (1970).

43 Senator Hart disagrees. He feels the King tragedy occurred too late in the legislative process to have had much impact. Hart, *supra* note 4, at 18. And, of course, the record provides adequate support for either conclusion. On March 11, 1968, the Senate amended and passed H.R. 2516, an anti-intimidation measure which had been passed earlier by the House in August, 1967. 114 CONG. REC. 5983-85, 5986-92 (1968). It prohibited the use of force or threats against citizens seeking to vote, use public facilities, attend public school, serve on juries, find work, or a place to live. The Senate added *inter alia* an open housing provision, and provisions rendering interstate travel for the purpose of inciting a riot or violence a federal crime. Another "anti-riot" section established new federal offenses for teaching the use of firearms or explosives for use in civil disorders, carrying such weapons across state lines for this purpose, and interfering with firemen or law enforcement officers during a civil disorder. 114 CONG. REC. 5997-6002 (1968).

B. *A Perspective from Civil Rights Litigation*

The abolition of slavery, the post-Civil War Amendments and the school desegregation decisions are the major liberating events in black history. They were broad and complex developments with many actors and involved a multitude of social, political and economic forces; a more narrow focus on specific civil rights litigation reveals similar phenomena. Consider, as Professor Paul Freund has observed, that the quest by blacks for racial justice has resulted in dozens of major court decisions that led to social reforms of general significance.[44] These decisions are seldom society's gifts. The litigation is usually carefully planned and intelligently executed. Close study of these cases and the political-economic conditions that prevailed when they were decided reveals three other characteristics of importance to this review: (1) the judicial relief sought is to curb conduct or policies clearly harmful to blacks, but relief is more likely to be forthcoming if the complained of activities are also damaging and embarrassing to the country's stated ideals solidly embraced in the concepts of equal protection, free speech and due process; (2) the relief actually granted tends primarily to improve the country's democratic image and only secondarily or collaterally to repair the harm which initially prompted the litigation; (3) subsequent non-racial decisions relying on the initial civil rights precedent often bring greater substantive benefit to the community at large than was obtained by blacks.

Several instances can be cited quickly. The summary expulsion of several black college students for participating in a 1960 sit-in protest led to the landmark Fifth Circuit decision in *Dixon v. Alabama State College*,[45] which recognized the entitlement of college students to specific due process protections when faced with serious disciplinary action. Those guarantees, later extended by the

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The amended H.R. 2516 was returned to the House where, on April 10, 1968, the members debated whether to send it to a conference committee to resolve the differences in the House and Senate measures, or whether under H. Res. 1100, introduced a month before, the House would simply accept the Senate version, and forward it to the President for signing. 114 CONG. REC. 9553-9621 (1968). Dr. King's death was used to support both sides of this argument. Some members emphasized that the measure had been scheduled for action two weeks before King's death. *Id.* at 9557-58 (remarks of Mr. Anderson). Others urged that action be delayed to consider the Senate amendments, *Id.* at 9555-56 (remarks of Mr. Smith), or because it was unwise to act in haste during a tense period when troops were stationed around the Capitol Building as a result of riots following Dr. King's death. *Id.* at 9566 (remarks of Mr. Lotta).

But several members urged immediate passage fearing that any delay would be risky, *Id.* at 9558 (remarks of Mr. Conyers), and that they were ready to do what is right, regardless of current events. *Id.* at 9559 (remarks of Mr. Cellar). And Mr. Rosenthal apparently spoke for many in urging action without further delay "not as a final tribute to Dr. King but as the first step in a campaign, renewed and refreshed by his memory, to end racism in America." *Id.* at 9570. The vote to send H.R. 2516 directly to the White House passed 229 to 195. *Id.* at 9620-21.

As indicated above, the fair housing measure was attached to extremely broad legislation granting power to the federal government to prosecute persons involved in riots such as those that swept several urban areas in the wake of King's death. *See* 18 U.S.C. §§ 231-33, 2101-02 (1970).

Congress revealed the extent of its interest in fair housing when the following month it failed to appropriate a single penny of President Johnson's request for $11.1 million to administer the new law. N.Y. Times, May 25, 1968, at 17 col. 1.

44 Freund, *The Civil Rights Movement and The Frontiers of Law*, in T. PARSONS & K. CLARK, THE NEGRO AMERICAN 363 (1967).

45 294 F.2d 150 (5th Cir. 1961).

Supreme Court to public school students[46] unfortunately have provided little help to the thousands of black children suspended or expelled in the school desegregation process.[47]

The court challenge to Virginia's blatant effort to stifle desegregation litigation by altering the state's canons of professional conduct to bar procedures used by civil rights lawyers resulted in *NAACP v. Button*.[48] There the Supreme Court recognized civil rights litigation as a form of political association and expression protected by the Constitution. This important victory simply left civil rights forces where they were, able but still required to fight segregation through the courts. In a few years, however, unions and other associations had utilized *NAACP v. Button* to upset state bar restrictions against group legal practices with potential although still little realized benefits for millions of middle-class Americans.[49]

Another example can be found in jury discrimination decisions that protect black defendants against trials by juries from which blacks have been systematically excluded,[50] but refuse to condemn more sophisticated and no less effective means of barring blacks from juries, particularly in those cases where racial issues are important.[51] Even *voir dire* rights to ascertain racial bias are so narrow as to enable the inclusion of all but the most blatant and candid racists in cases where civil rights workers are charged with crimes.[52]

A final and classic example is *Gomillion v. Lightfoot*,[53] the Tuskegee voting rights case in which the Supreme Court departed from its earlier refusal to

46 Goss v. Lopez, 419 U.S. 565 (1975).

47 *See* Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974) ("white institutional racism" held the cause for disproportionately high suspension and punishment rates for black students). *See also* CHILDREN'S DEFENSE FUND, SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 12 (1975).

48 371 U.S. 415 (1963).

49 *See* United Transp. Union v. State Bar, 401 U.S. 576 (1971); UMWA, Dist. 12 v. Illinois State Bar Ass'n., 389 U.S. 217 (1967); Brotherhood of Ry. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964).

The precedent favoring political expression over traditional defamation rules established in New York Times v. Sullivan, 376 U.S. 254 (1964), can also be included in this list. The decision barred Alabama public officials from recovering damages for defamatory falsehoods relating to their official conduct in civil rights matters where such statements were not made with "actual malice." The New York Times rule was extended in Garrison v. Louisiana, 379 U.S. 364 (1964) (charges respecting district court judges); Rosenblatt v. Baer, 383 U.S. 75 (1966) (seditious libel suit based on impersonal criticism of governmental operations); Time, Inc. v. Hill, 385 U.S. 374 (1967) (invasion of privacy suit by private family barred); and Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (private libel action barred when defamatory statement concerned an event of public or general interest).

The Rosenbloom decision has been undermined by Time Inc. v. Firestone, 96 S. Ct. 958 (1976) and Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974), but the major thrust of protection provided by these precedents has provided little help to civil rights groups hard hit by damage suits by private businesses usually on state courts for libel, illegal boycotts, state antitrust law violations, etc. *See, e.g.*, NAACP v. Overstreet, 221 Ga. 16, 142 S.E. 2d 816, *cert. dismissed as improvidently granted*, 384 U.S. 118 (1966); Henry v. First Natl. Bank of Clarksdale, 444 F.2d 1300 (5th Cir. 1971); SCLC v. A.G. Corp., 241 So. 2d 619 (Miss. 1970). *See also* Johnson v. Mississippi, 95 S. Ct. 1591 (1975) (civil rights protestors charged with conspiracy unlawfully to boycott merchants and businesses).

50 Alexander v. Louisiana, 405 U.S. 625 (1972); Carter v. Jury Commn. of Greene Co., 396 U.S. 320 (1970).

51 Swain v. Alabama, 380 U.S. 202 (1965).

52 *Compare* Ham v. South Carolina, 409 U.S. 524 (1973) (black civil rights worker's conviction on drug charge reversed where court refused *voir dire* questions on possible racial prejudice), *with* Ristiano v. Ross, 96 S. Ct. 1017 (1976) (black murder defendant not entitled to *voir dire* questions on possible racial prejudice simply because victim was white).

53 364 U.S. 339 (1960).

enter the "political thicket" to review election districting processes.[54] The Alabama legislature had sought to frustrate black voters by re-drawing the town election district so as to exclude virtually all black voters. The decision provided the precedent that led eventually to the "one-man, one-vote" doctrine that ended gerrymandered legislative districts throughout the country.[55] Under these later cases, proof of representational disparity between districts of similar size is sufficient to trigger relief, but when blacks seek to show that election districts are drawn or policies such as at-large voting are followed that dilute seriously their political potential, they must prove that the lines or policies were intended to have a racially discriminatory effect.[56] This is not difficult in blatant situations like the Tuskegee case,[57] but it becomes almost impossible in many urban districts where there is no recent history of systematic exclusion and election officials are able to offer nonracial justifications for boundaries and procedures that have a discriminatory effect.[58]

Civil rights litigation based on the post-Civil War Amendments contains potential for general social reform because the badges of servitude borne by blacks have entitled such litigation to a special status in the courts.[59] Thus, allegations of racial discrimination in violation of specific constitutional guarantees, require strict scrutiny of the challenged activity.[60] Such cases thus have the potential of eliciting more sensitive judicial attention than if basically similar problems were presented on a non-racial basis.[61] But this acknowledgment fails to explain why so much racial discrimination remains beyond effective remediation and, more importantly, why some civil rights relief is transformed quickly into social reform that increases rather than narrows the gap between black and white rights.

C. *The Compromises of Civil Rights*

A different perspective provides another no less disturbing pattern. Many of the most tragic developments in the history of blacks in America are traceable to a conflict between segments of white society whose resolution of their differences was facilitated and often made possible by arrangements that seriously disadvantaged blacks.

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54 Colegrove v. Green, 328 U.S. 549 (1949).
55 Reynolds v. Sims, 377 U.S. 533 (1964).
56 *See* Whitcomb v. Chavis, 403 U.S. 124 (1971); Wright v. Rockefeller, 376 U.S. 52 (1964).
57 *See* White v. Regester, 412 U.S. 755 (1973); East Carroll Parish School Bd. v. Marshall, 96 S. Ct. 1083 (1976).
58 Beer v. United States, 96 S. Ct. 1357 (1976); City of Richmond v. United States, 422 U.S. 358 (1975). Federal court decisions are collected in 27 A.L.R. Fed. 29 (1976).
59 Strauder v. West Virginia, 100 U.S. 303 (1880).
60 Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).
61 *Compare* Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional provision barring fair housing laws violates equal protection guarantees by involving state action on behalf of private racial discrimination) *with* James v. Valtierra, 402 U.S. 137 (1971) (state constitutional provision requiring referendum approval only for low-rent housing project does not violate constitutional rights of poor persons eligible for such housing).

1. The Constitutional Compromise.

The most crucial of these compromises in which the black population served as catalyst and victim occurred in 1789 when pro- and anti-slavery delegates to the Constitutional Convention resolved their differences by recognizing slavery.[62] They provided for its protection,[63] representation[64] and supposed eventual elimination, the latter by limiting restrictions on slave importation only until 1808.[65]

2. The Origin of Slavery Compromise.

There was political precedent for even the Founding Fathers' decision to sublimate the rights of blacks to the interests of whites. Historians have debated for decades whether American slavery took root in the 17th century as an outgrowth of racism or economic necessity, but in a new book on the subject, Professor Edmund Morgan joins the growing group of his peers who find elements of both prejudice and profit in the slavery equation with the emphasis on the latter.[66] The coming of tobacco to Virginia in 1617 turned a struggling colony into a get rich quick society. To cultivate the labor-intense crop, servants, indentured to their masters for a period of years, were imported in great numbers. Most were young and male. Life was so hard that in the early years, few survived their years of servitude. Some blacks were brought to the colony, both as slaves and servants, and generally worked, ate and slept with the white servants.[67]

As the years passed, more and more servants lived to gain their freedom, despite the practice of extending terms for any offense, large or small.[68] They began farms of their own and increasingly resisted the policies of the larger, more established planters. For their part, the established growers began about 1660 to rely on black slaves for their labor needs. Slaves were more expensive initially, but their terms did not end and their owners gained the benefits of the slaves' offspring.[69]

The fear of slave revolts increased as reliance on slavery grew and racial antipathy became more apparent. Fear and racism tended to lessen the economic

62 *See generally* W. JORDAN, WHITE OVER BLACK 321-25 (1968); S. LYND, CLASS CONFLICT, SLAVERY, & THE UNITED STATES CONSTITUTION 153-213 (1967).

63 U.S. CONST., art. I, § 8, art. IV, § 4. The power to suppress insurrections, and upon application of a state, to provide federal assistance to suppress domestic violence is found in art. IV, § 2, the fugitive slave provision.

64 *Id.* art. I, § 2, the three-fifths clause, providing that slaves would count for purposes of representation and direct taxation as three-fifths of a person.

65 *Id.* art. I, § 9.

66 E. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM (1975).

67 *Id.* at 154-55. Records of the time reveal little evidence of the racial prejudice that was to develop later.

68 *Id.* at 216-18.

69 *Id.* at 295-315. Masters substituted the fear of pain and death for the extension of terms as an incentive to force the slaves to work. Murder and dismembering of slaves was condoned, if not as common as the frequently administered beatings. Blacks, Morgan writes, were thought of as "a brutish sort of people." He concludes:

> . . . whether or not race was a necessary ingredient of slavery, it *was* an ingredient. . . . The only slaves in Virginia belonged to alien races from the English. And the new social order that Virginians created after they changed to slave labor was determined as much by race as by slavery.

Id. at 315 (emphasis supplied).

and political differences between rich and poor whites. Both tended to look on royal officials and tax collectors as the source of their common oppressors. They joined forces to protest import taxes on tobacco, the profits from which sustained both. Thus, the rich began to look to their less wealthy neighbors for political support against the English government and in local elections.[70]

Wealthy whites retained all their former prerogatives, but the creation of a black subclass enabled poor whites to identify with and support the policies of the upper class. With the safe economic advantage provided by their slaves, large landowners were willing to grant poor whites a larger role in the political process. Thus, paradoxically, slavery for blacks led to greater freedom for poor whites.[71]

3. The Populist Party Compromise.

In the main, poor whites in the 17th century were ready to trade their economic demands for racism, and even 200 years later in the post-Civil War period, the efforts of some leaders of the Populist Party to unite poor Southern whites and blacks against the ruling Bourbons were shattered by the continued inability of poor whites to surrender racism even for responsive political power.[72] Their susceptibility had not lessened midway through the 20th century as Dr. Martin Luther King's Southern Christian Leadership Committee discovered

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70 *Id.* at 364-66.

71 In explaining the paradox of slaveowners espousing freedom and liberty, Morgan writes:

> Aristocrats could more safely preach equality in a slave society than in a free one. Slaves did not become leveling mobs, because their owners would see to it that they had no chance to. The apostrophes to equality were not addressed to them. And because Virginia's labor force was composed mainly of slaves, who had been isolated by race and removed from the political equation, the remaining free laborers and tenant farmers were too few in number to constitute a serious threat to the superiority of the men who assured them of their equality.
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> . . . .
>
> This is not to say that a belief in republican equality had to rest on slavery, but only that in Virginia (and probably in other southern colonies) it did. The most ardent American republicans were Virginians, and their ardor was not unrelated to their power over the men and women they held in bondage.

Id. at 380-81.

72 The parallels with Professor Morgan's origin of slavery compromise theory are striking. The Populists were unable to control the Negro vote and were appalled at Democratic Party tactics which included forcing blacks to vote repeatedly for Democratic candidates. The Populists joined the movement for complete disfranchisement of blacks in order to reunite the white South. Professor John Hope Franklin commented on the result:

> The poor, ignorant white farmers reverted to their old habits of thinking and acting, comforted in their poverty by Conservative assurances that Negro rule must be avoided at any cost. . . . The poor whites could say with one of their leaders that the Negro question was an everlasting, overshadowing problem that served to hamper the progress of poor whites and prevent them from becoming realistic in social, economic, and political matters.

J. FRANKLIN, FROM SLAVERY TO FREEDOM 272 (4th ed. 1974). *See also* C. WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913 (1951).

But the effect on poor whites is best described by Tom Watson, a Populist leader, who in 1892 as a staunch advocate of a union between Negro and white farmers wrote:

> You are kept apart that you may be separately fleeced of your earnings. You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars both.

Tom Watson, *The Negro Question in the South*, in S. CARMICHAEL & C. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 68 (1967).

during the 1968 Poor People's Campaign.[73]

4. The Hayes-Tilden Compromise.

A final example of black rights becoming grist in the mill of white interest occurred a century ago. During this bicentennial period, it is appropriate to remember the hotly disputed Hayes-Tilden presidential election of 1876. In the following year, a possible second Civil War was averted by a compromise that even conservative historians now concede was a shameful moment.[74]

By 1876, the demolition of Radical Reconstruction was already well advanced. The federal government had proven itself unwilling or unable to halt the violence and terrorism by which Southern whites regained political control in most Southern states. The Democrats had regained great strength both in the South and much of the North. They fully expected that their presidential candidate Samuel J. Tilden, the reform governor of New York, would be elected. Republicans were divided by scandal and disparate views on economic issues; but all had tired of their lengthy involvement in Southern affairs and were more than ready to bury the hatchet on terms that would insure continued development of business interests in the South.

When the election returns were counted, Tilden had a plurality of 250,000 votes in the nation, and appeared to have won the electoral count by one vote. But the returns from three Southern States, South Carolina, Florida and Louisiana (the last three states in which blacks still played a major political role) were challenged. Recounts of the votes did not resolve the challenge which then was submitted to a special electoral commission composed of five members from the Senate, five from the House, and five members of the Supreme Court. As it turned out, eight of the 15 were Republicans and each disputed issue was resolved in favor of the Republicans by a strictly party vote of eight to seven.

But the Democrats need not have accepted this resolution. They did so because of several understandings between Democratic and Republican leaders that if the Republican Hayes was elected, the national administration would withdraw the remaining federal troops from the South and would do nothing to prevent popularly elected Democratic governors from taking office in the three states (Florida, South Carolina and Louisiana) still controlled by Republicans. It was also agreed that Hayes would include Southern Democrats in his cabinet and would support efforts of Southern capitalists to obtain subsidies for railroad construction in the South. President Hayes willingly carried out these promises

73 *See* J. ARCHER, 1968 YEAR OF CRISIS 50-51 (1968); C. FAGER, UNCERTAIN RESURRECTION: THE POOR PEOPLE'S WASHINGTON CAMPAIGN (1969); M. HASTINGS, THE FIRE THIS TIME: AMERICA'S YEAR OF CRISIS 77-82 (1968).

74 In the mammoth Reconstruction literature with its many views on Radical Republican motivations, the accomplishments of the experiment, the reasons for its failures, a fair sample of these views with special focus on the myriad of factors contributing to the Hayes-Tilden Compromise, can be found in: L. BENNETT, BLACK POWER USA: THE HUMAN SIDE OF RECONSTRUCTION (1967); H. CARTER, THE ANGRY SCAR (1959); W. DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1955); J. FRANKLIN & D. DONALD, THE CIVIL WAR AND RECONSTRUCTION (1961); P. HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTAL ELECTION OF 1876 (1906); R. LOGAN, BETRAYAL OF THE NEGRO (1954); K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (1965); J. RANDALL, RECONSTRUCTION: AFTER THE CIVIL WAR (1961); C. WOODWARD, REUNION AND REACTION (1951).

to the Southerners. The demise of blacks as a political force proceeded rapidly thereafter.[75]

The loss of protection for their political rights presaged the destruction of economic and social gains which blacks in some areas had achieved. Blacks lost businesses and farms, progress in the public schools was halted, and the Jim Crow laws that would eventually segregate blacks in every aspect of public life began to emerge.[76] As Professor C. Vann Woodward put it:

> The determination of the Negro's "place" took shape gradually under the influence of economic and political conflicts among divided white people —conflicts that were eventually resolved in part at the expense of the Negro . . . . [Documenting the acquiescense of Northern liberals in the compromise which included the acceptance of the Southern view of racial superiority, Woodward concludes] Just as the Negro gained his emancipation and new rights through a falling out between white men, he now stood to lose his rights through the reconciliation of white men.[77]

D. *The Second Reconstruction*

The parallels between the political, economic and social events of 1876, and the erosion in all three areas blacks are experiencing in 1976 are too remote to enable prediction and too close to ignore. Certainly, the gains made by blacks during the Second Reconstruction are impressive and, one would hope, permanent. But we cannot forget the political promise and economic progress

75 Blacks made impressive gains in the post-bellum period. Personal and real property holdings, skilled jobs, businesses acquired and money saved by blacks are recorded in C. WESLEY, NEGRO LABOR IN THE UNITED STATES 1850-1925, at 138-47 (1927). Detailed information concerning the achievements by blacks in the crafts and the professions can be obtained from the many studies of reconstruction in particular states. *See, e.g.,* J. WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877, at 161-63 (1965).

In politics, blacks held many local and state offices throughout the South and between 1870 and 1901, sent 20 blacks to the House of Representatives and two blacks to the Senate. THE NEGRO IN CONGRESS 1870-1901, at 4-5 (1940).

In education, Southern state legislatures with sizeable black representation structured the first public school systems in much of the South. Dr. W. E. B. DuBois states, "[i]t is fair to say that the Negro carpetbag governments established the public schools of the South." W. E. B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 664 (1935). Dr. DuBois indicates that there were many germs of a Southern public school system before the Civil War, but that public schooling in its modern sense "was founded by the Freedmen's Bureau and missionary societies, and that the state public school system was formed mainly by Negro Reconstruction governments." *Id.* Dr. DuBois discusses these developments in some detail. *Id.* at 637-69. *See also* H. BOND, THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER (1970).

76 For example, at the end of the Civil War black artisans outnumbered whites by five to one, but by 1890 they made up only a small proportion of the labor force. C. WOODWARD, *supra* note 72, at 360.

77 C. WOODWARD, THE STRANGE CAREER OF JIM CROW 7, 53 (1955).

Southern leaders in the post-Reconstruction era enacted segregation laws mainly at the insistence of poor whites who needed these barriers to retain a sense of superiority over blacks. Professor Woodward writes, "[i]t took a lot of ritual and Jim Crow to bolster the creed of white supremacy in the bosom of a white man working for a black man's wages." C. WOODWARD, *supra* note 72, at 211.

The political phenomenon uncovered by Morgan at the country's birth remained viable two hundred years later. Professor Woodward observes that "[t]he barriers of racial discrimination mounted in direct ratio with the tide of political democracy among whites." He concludes: "It is one of the paradoxes of Southern history that political democracy for the white man and racial discrimination for the black were often products of the same dynamics." *Id.*

Another historian has accepted the Morgan thesis in a major study of slavery during the early years of the American Republic. D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823, at 260-264 (1975).

enterprising blacks had made during the First Reconstruction, all of which were so quickly lost and forgotten.[78]

The political physics operating here are powerful. If, as I have suggested, rights for blacks require for survival a climate permeated with white self-interest, those rights can be expected to wither in the far more hostile atmosphere that exists when the interests and priorities of whites change. The post-Civil War experience teaches us that minority rights are worth only as much as those in the majority responsible for their enforcement are willing to invest. When interests change, support fades. The rights may remain on the books, but they are evaded rather than obeyed, repealed rather than enforced.

Is it merely coincidence or a change in the Supreme Court's membership that explains why civil rights litigation has fared so poorly in recent years? Note the subtle distinctions in wealth and race the Supreme Court has drawn in cases involving welfare,[79] public housing,[80] and educational finance[81] even though the injustices sought to be remedied in each instance fall heavily on blacks and other nonwhites. During the early phases of the *Brown* era, the Court was far more willing to sweep aside spurious rationalizations for laws and policies that denied equal protection to non-white minorities.[82]

Procedural barriers now frustrate litigation designed to open up the suburbs to low-income housing.[83] White majority rule is maintained in the increasingly black urban areas by approving redistricting schemes such as in Richmond, Virginia, which annexed large white areas to the City for the expressed purpose of frustrating black control.[84] Acknowledging that the scheme was intended initially to dilute the black vote, the Court's majority said it could now be justified on nondiscriminatory grounds. The new system was said to fairly recognize black political potential by affording to blacks representation reasonably equivalent to their political strength in the enlarged community.[85]

As discussed earlier, direct action campaigns for better jobs through peaceful

78 The slow but steady post-World War II improvement in black employment and income rates, and their more precipitous decline in the recessions of the 1970's are traced in Edwards, *Race, Discrimination and Employment: What Price Equality?* 1976 U. ILL. L. F. —.

79 Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

80 Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971).

81 San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973). For an analysis of the transition in judicial concern for individual rights since the Warren Court, *see* Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments,* 27 ALA. L. REV. 479 (1975).

82 *See, e.g.,* NAACP v. Alabama, 357 U.S. 449 (1958); Cooper v. Aaron, 358 U.S. 1 (1958); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); NAACP v. Button, 371 U.S. 415 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); Bell v. Maryland, 378 U.S. 226 (1964).

83 Warth v. Seldin, 422 U.S. 490 (1975). In addition, even when housing suits are "won" after protracted litigation, the victory often leads simply to more litigation. The classic example is Gautreaux v. Chicago Housing Auth., 503 F.2d 930 (7th Cir. 1974), *affirmed* 96 S. Ct. 1538 (1976), a suit by public housing tenants initiated in 1966 to halt segregatory housing assignment and site selection policies. After the fifth appeal, the case went to the Supreme Court which affirmed the appellate court's order to consider the propriety of selecting new housing sites in the suburban areas as well as in the City of Chicago. The victory comes 10 years after the suit was filed. The district court reported that no public housing had been built in the City since an order in the case issued on July 1, 1969. Gautreaux v. Chicago Housing Auth., 363 F. Supp. 690, 691 (N.D. Ill. 1973).

84 City of Richmond v. United States, *supra* note 58.

85 *Id.* at 370-71.

picketing and boycotts have been ended effectively in the South by prosecuting civil rights leaders and their organizations on criminal conspiracy and state antitrust law violations.[86] The federal courts generally have refused to interfere with these prosecutions.[87] Based on a decision involving alleged police brutality charges against the mayor and police department of Philadelphia, the Supreme Court is apparently also adopting a hands-off policy as to this crucial area of civil rights.[88]

Gains continue to be made in the fight against employment discrimination.[89] But even in this area, long-term progress was jeopardized seriously by the Supreme Court's refusal to recognize the serious dimensions of the conflict between the interests of black and white union members.[90]

Finally, while the Court has not rejected outright its earlier support of school desegregation litigation,[91] the hope that racial balance remedies in urban school desegregation cases would be extended to encompass suburban school districts was shattered in the Detroit school case.[92]

The reactionary trend of these decisions, which show no indications of abating, illustrates again that while legal rights have strategic and tactical usefulness, black people cannot afford the luxury of viewing rights as more than they are. The Constitution, despite the benefits of the last two decades, could prove a very poor shelter if blacks rely entirely on it to save them from future political storms.

III. Reformulating Racial Strategies

Thus far, I have attempted to show that to date the progress blacks have made away from slavery and toward equality has depended on whether more or less freedom best served the interests and aims of white society. The components of this conclusion include:

> 1) The major liberating events in black history have, in fact, been motivated less by black suffering than by the pragmatic advantage they offered white society;

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86 *See,* note 49, *supra.*

87 Johnson v. Mississippi, 421 U.S. 213 (1975). In Henry v. First Nat'l. Bank, 444 F.2d 1300 (5th Cir. 1971), the court refused to enjoin state court suits by white merchants in Fort Gibson, Mississippi, charging the NAACP and other civil rights groups with violation of state antitrust laws. In August, 1976, the trial court awarded 12 of the Fort Gibson merchants $1,250,599 against the NAACP. State law requires the posting of a bond for the full amount of the judgment as a condition for appeal. The NAACP had posted a bond of $262,000 in another Mississippi case to appeal a libel award to a state policeman charged with police brutality. N.Y. Times, Aug. 12, 1976, at 39, col. 1.

88 *See* Rizzo v. Goode, 96 S. Ct. 598 (1976). *See also* Sponer v. Littleton, 414 U.S. 514 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974).

89 *See, e.g.,* Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976); Chandler v. Roudebush, 96 S. Ct. 1949 (1976); Franks v. Bowman Transportation Co., 96 S. Ct. 1251 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

90 *See* Emporium Capwell Co. v. Western Addition Common. Org., 420 U.S. 50 (1975). *See also* Washington v. Davis, 96 S. Ct. 2040 (1976).

91 Runyon v. McCrary, 96 S. Ct. 2586 (1976); Lau v. Nichols, 414 U.S. 563 (1974); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

92 *See* Milliken v. Bradley, 418 U.S. 717 (1974). *See also* Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976).

2) Viewed in retrospect, landmark civil rights precedents often result in far more benefit to the society as a whole than they bring to blacks;

3) Throughout American history major conflicts between opposing white groups have been resolved through compromises that victimized blacks (the colonial decision to legitimate slavery, the Founding Fathers' agreement to recognize and protect slavery in the Constitution, and the Hayes-Tilden Compromise of 1877). To the extent that resolutions of differences occur between poor and wealthy whites, the poor whites often achieve a larger voice in the political process through specific laws and policies that reduce the status of blacks.

The significance of these findings in planning strategies for racial remediation depends on the degree to which they will remain viable factors in future racial policymaking. It is hard to imagine that still unrevealed problems will not lend themselves to solutions that either improve or diminish the value of black rights. It is even more difficult to imagine a future time when the racial motivations which underlay so much past and present policymaking will disappear. The roots of those racial motivations seem too deep for anything short of miraculous eradication.[93]

A. *The Priority of Civil Rights*

In reviewing a book on pre-Civil War judges who, despite their moral opposition to slavery, handed down decisions that upheld slavery, I suggested that most whites view the racial plight of blacks as an injustice that should be corrected. But on a priority scale, the elimination of racism would rate only a step or two higher than the campaign to end the senseless slaughter of the oceans' great whales.[94] In other words, racial equality, like whale conservation, should be advocated, but with the understanding that there are clear and rather narrow limits as to the degree of sacrifice or the amount of effort that most white Americans are willing to commit to either crusade.

Indeed, the country is unlikely to be invaded by a school of great whales, but because many whites fear inroads by blacks in their schools, jobs and neighborhoods, a public opinion poll might even give a higher priority to whale conservation than to racial remediation. In a sense, this fear, not unlike the fear of slave revolts, has survived its ante-bellum origins. Mixed with guilt and that intangible aversion to color that Winthrop Jordan found in even the Elizabethan Englishmen,[95] the fear continues to evoke an irrational dread that inundation will follow if blacks are released from the subordinate position where, despite all the civil rights efforts, they remain.

93 Miracles are not likely according to experts in human behavior who have studied racism. *See e.g.*, G. ALLPORT, THE NATURE OF PREJUDICE (1954); K. CLARK, DARK GHETTO (1965); A. KARDINER & L. OVESEY, THE MARK OF OPPRESSION (1962); J. KOVEL, WHITE RACISM: A PSYCHO-HISTORY (1970); E. THORPE, THE OLD SOUTH: A PSYCHOHISTORY (1972).

94 R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS, (1975), *reviewed*, Bell, 76 COLUM. L. REV. 350, 357-58 (1976).

95 W. JORDAN, *supra* note 5, at 3-43.

Fear of inundation by blacks should be added to the two, already identified, components of racism: (1) the inherent sense that white people represent a higher and better order of humanity than do blacks; and (2) the feeling that while blacks are citizens, have made many contributions and should not be discriminated against, America is not simply a country consisting of white majority; it is a white country which means that flourishing black institutions of any kind are unnatural, suspect and not to be encouraged.

Consider the very definition of integration. Irrationally, an "integrated" school, work force or neighborhood is one with no more than a 25 percent black population. If the percentage is substantially greater, it is no longer a legitimately integrated setting for most white Americans, and is referred to as a "changing" school, a neighborhood in danger of "tipping," or a "racially imbalanced" job unit.

Consider also that racial integration is resisted until it occurs on a basis that insures white dominance and control. When blacks turn their energies from white dominated integration and toward the establishment of strong, viable black institutions, they incur opposition and hostility that increases in direct proportion to the success they are able to obtain. When the ventures fail, as so many do under this pressure, the society in general, including all too many blacks, breathe a sigh of relief. Once again the society can relax and indulge itself in the subtle satisfactions of black subordination.[96]

Thus, white dominance over blacks is not only profitable, it is also for the reasons just listed, comforting and because of the ancestral fears of inundation, essential. This is not to say that blacks as individuals cannot achieve and prosper in this country, and receive general acclaim for those achievements. Successful blacks serve white interests by providing the rationalizing link between the nation's espousal of racial equality and its practice of racial dominance. The unspoken and totally facetious maxim is that with self-improvement, the opportunity is available for all blacks to be successful. But success for individual blacks demands exceptional skills exercised diligently in settings where their efforts will further or, at least, not threaten white interests. Obviously, no more

96 Attempting to analyse why blacks tended to oppose all-black schools, W. E. B. DuBois suggested two reasons:

> (1) The fear that any movement which implies segregation even as a temporary, much less as a relatively permanent institution, in the United States, is a fatal surrender of principle, which in the end will rebound and bring more evils on the Negro than he suffers today. (2) The other reason is at bottom an utter lack of faith on the part of Negroes that their race can do anything really well.

DuBois argued that if blacks established quality schools and colleges, separation would be a passing incident and not a permanent evil, but he warned that ". . . as long as American Negroes believe that their race is constitutionally and permanently inferior to white people, they necessarily disbelieve in every possible Negro Institution." DuBois, *Does the Negro Need Separate Schools?* 4 J. NEGRO EDUC. 328, 329 (1935).

A quite similar situation may be seen in the current, rigid commitment of major civil rights group leadership to racial balance remedies in school desegregation cases despite: (1) the difficulty of achieving racially balanced schools, particularly in predominantly black, urban school districts where most black children live; (2) the difficulty of maintaining integrated schools in such areas because of the withdrawal of middle-class white (and black) children from the public schools; and (3) the social science studies that uniformly show little or no academic benefit for minority students who attend desegregated schools. I have discussed factors for this commitment in addition to those listed by Dr. DuBois in Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE L.J. 470 (1976).

than a small percentage of blacks is likely to be graced by so felicitous a set of circumstances.

Blacks as a group may also enjoy over time a relative improvement in their life situations. This occurred during the decade or so after the *Brown* decision. But despite the continuing pressures exerted by some whites and many blacks, progress will occur for the group as with individuals only if most whites perceive that their interests will benefit or not suffer any serious loss.[97]

These views are widely shared by social scientists. Public policy expert Tilden W. LeMelle raises the question whether a society such as the United States is really capable of legislating and enforcing effective public policy to combat racial discrimination in the political process and elsewhere. He says history presents no instances where a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society ever reforms, particularly a culture from whose inception racial discrimination has been a regulative force for maintaining stability and growth and for maximizing other cultural values. He doubts whether such a society of itself can even legislate (let alone enforce) public policy to combat racial discrimination. He sees the United States acting effectively against racism only when that racism is perceived as posing a serious threat to the country rather than serving as the useful regulator it has been.[98]

B. *Propositions for Racial Remediation*

What do these findings mean for those who plan and carry out racial remediation strategy? In my view, they require a reassessment of our usage of legal rights and voting, two time honored routes to full equality. Stated in the form of propositions, I would suggest the following.

97 *See* Glenn, *White Gains from Negro Subordination,* in BLACKS IN THE UNITED STATES (N. Glenn & C. Bonjean, eds. 1969). Norval Glenn observes:

> [W]hite resistance to Negro advancement is almost certainly reduced in periods of rapid economic growth and rapid upward shifts in the occupational structure, when Negroes can advance without whites incurring any absolute losses in income or occupational status. Even at such times, closing the Negro-white gap entails loss of a white competitive advantage, but whites who nevertheless are moving up are likely to be less aware of and less concerned about this loss.

Id. at 291, n.26.

Describing this situation in game theory terms, another writer distinguishes a "variable sum game" as one in which gains by one party do not necessarily entail losses by the other. Lunch counter desegregation in which blacks obtained access to such counters without denying access to whites is cited as an example. A "zero sum game," on the other hand, is one in which gains by one party entail losses by another. The admission of racial minorities and women to a limited number of law school positions will limit the number of white males who can secure admission. J. HOWARD, THE CUTTING EDGE 12 (1974).

98 LeMelle in R. BURKEY, RACIAL DISCRIMINATION AND PUBLIC POLICY IN THE UNITED STATES 38 (1971).

Jan Dizard sees economic growth as the basis for stability in a society which maintains inequality while at the same time acknowledging as legitimate subordinate groups' demands for more. He warns:

> When [economic] growth does not obtain, stability is threatened from two directions. Those at or near the bottom find their demands for more implicitly requiring a redistribution, thus challenging extant arrangements of power and privilege. At the same time, groups enjoying even a modicum of comfort respond to the squeeze in a typically defensive fashion, thus becoming available for the demagogic mobilization of nativism and racism.

Dizard, *Response to Aggression and the American Experience,* in W. WILSON, POWER, RACISM AND PRIVILEGE 142 (1973).

1) *Legal rights, whether based on legislative enactments or judicial decisions, should be pursued, but cannot be relied on to either improve or protect the black community.*

Lacking economic power and political leverage, blacks have sought racial equality through reliance on law. But Stuart Scheingold concludes that the role of lawyers and litigation in bringing about social change has been grossly exaggerated. He contends that the assumption that litigation can evoke a declaration of rights from courts which can further assure the realization of these rights and which realization is tantamount to meaningful change, constitutes the "myth of rights." He states, "[j]udges cannot necessarily be counted upon to formulate a right to fit all worthwhile social goals. Even when a right exists, it can hardly be taken for granted that a remedy is close behind."[99] Activist attorneys and those who chronicle their work are often unwilling to face up to these problems. They prefer to believe that persistence and legal ingenuity will ultimately be rewarded.

2) *Blacks must not depend on voting and the political process to protect their rights.*

This, of course, is the final heresy, but I think the caution can be justified. Voting (notwithstanding the elimination of property and most educational prerequisites) remains a relatively "in-group" activity. Motivation to participate in the process comes easily to the "haves" or those "have-nots" who have been promised an immediate benefit. While poor blacks, particularly in the South, have voted in great numbers in the last decade as a result of their own courage and organization by civil rights groups, this participation is easily discouraged by disappointment in elected representatives, the failure to realize tangible benefits from participation in the political process, continuing harassment and other antivoting pressures.

Thus, while the individual right to vote has been obtained the potential political effect for blacks can be undermined by low socio-economic status, short-term disappointment, apathy, bureaucratic discouragement, subtle harassment and intimidation. When blacks vote, dilution of black voting strength occurs through alteration of election procedures, gerrymandering of election districts, and consolidating and merging majority black districts to larger, predominantly white units as in Richmond, Virginia.[100]

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99 S. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974). The various factors that may impede actual social change as a result of a favorable judicial decision are discussed in Daynard, *Test Case Litigation As a Source of Significant Social Change,* 18 CATH. LAW. 37, 38 (1972).

Minority groups are attracted to litigation as a vehicle for social change because as one writer explained that "[w]ith their relative insulation from retaliation by antagonistic interests, courts may more easily propound new rules which depart from prevailing power relations." Galanter, *Why the "Halves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOCIETY REV. 94, 149-50 (1974). Effective implementation of those rules requires a reallocation of resources beyond the ability of courts to secure. Thus, Galanter states that "[l]itigation then is unlikely to shape decisively the distribution of power in society. It may serve to secure or solidify symbolic commitments." *Id.* And, he warns, while litigation may rally followers and stimulate organization, as well as directly redistribute symbolic rewards:

> . . . tangible rewards do not always follow symbolic ones. Indeed, provision of symbolic rewards to "have-nots" (or crucial groups of their supporters) may decrease capacity and drive to secure redistribution of tangible benefits.

Id. at 137.

100 See notes 84-85 *supra.*

For all of these reasons, government voting officials do not consider a district "safe" for the election of a black representative unless the black voting majority is about 60 percent. Creating districts with safe black voting majorities raises a host of legal problems. The effort to do so in redrawing a Brooklyn legislative district has resulted in litigation now pending review before the Supreme Court.[101]

I have not forgotten that more blacks are now registered to vote than ever before, and that as a result of steadily increasing voting activity, there are more black elected officials including black Congressmen than at anytime in our history. There are black mayors in several cities including Los Angeles, Detroit, Washington, D.C. and Gary, Indiana, and the number of blacks in elected positions of importance is likely to increase. But for the reasons just discussed, those blacks elected will likely find that black political power will be defused, diluted and discouraged before it can play more than a subsidiary role in the decisions that most affect blacks.

So voting and politics, as with other legal rights, can serve black interests, but to maximize their potential effectiveness we must remember their very real limitations. In this regard, more than one of my predecessors in this series has called on the nation to move beyond civil rights to what Reverend Jesse Jackson called "social justice."[102] Substantive programs have been urged to provide jobs for all who would work, decent housing and health care on a universal basis and educationally effective schools. All of these reforms would benefit far more whites than blacks. But because a disproportionately large percentage of the victims of social neglect are black, Robert Heilbroner believes race has played a "corrosive and pervasive role" in the rationalization of policies of inaction which have so characterized America's response to need at home. Heilbroner observes:

> Programs to improve slums are seen by many as programs to "subsidize" Negroes; proposals to improve conditions of prisons are seen as measures to coddle black criminals; and so on. In such cases, the fear and resentment of the Negro take precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct social evils whose ill effects refuse to obey the rules of segregation.[103]

If Edward Morgan (writing about poor whites in the 17th century) and Robert Heilbroner's contemporary observations are both correct, I see little likelihood that lower social class whites will unite with blacks to campaign for an end to what New Mexico's Governor, Jerry Apodaca called the "continuing economic suppression of people."[104] Indeed, unless history (and the resistance to school desegregation in South Boston) are misleading, we can predict that even

101 United Jewish Organization, Inc. v. Wilson, 510 F.2d 512 (2d Cir.), *cert. granted,* 423 U.S. 945 (1975).
102 Jackson, *supra* note 4.
103 Heilbroner, *The Roots of Social Neglect in the United States,* in Is Law Dead? 288, 296 (E. Rostow, ed. 1971).
104 Apodaca, *Bicentennial Reflections: A Call For State Leadership in Civil Rights,* 51 Not. D. Law. 7, 9 (1975).

if the current economic crisis worsens, few whites will be willing to challenge the system that benefits the privileged few so handsomely, while leaving so many blue-collar, hard-hat types in a status so precarious that they must assert their whiteness as the only feature distinguishing them from the blacks they despise and fear. And if a crisis comes, poor whites will not lay siege to city hall, but as has happened so many times before, they will head for the nearest black community seeking revenge. At this point, the historical script will call for privileged whites to decry the violence while privately sighing with relief that once again racism has proved so firm a friend of existing economic arrangements.

Even if blacks manage to avoid major white violence, I see no available exit from the class-buffer and compromise catalyst roles black people have performed, unwillingly and too often, unwittingly. Under the circumstances, there can be little satisfaction for blacks in the knowledge that they are absolutely essential to the functioning of the country's socio-economic structure. While the involuntarily designated role precludes equality, it guarantees survival until still unpredictable forces, perhaps strong, emerging third-world nations, help alter the prevailing sense that the world's destiny will be shaped always by white hands.

For the present, blacks (and those other minorities and whites who would join with them) simply cannot afford the American luxury of refusing to learn from history. The harsh and perhaps unsettling truths in those historically enlightened lessons should become essential elements in racial remediation plans and policies for they reveal clearly:

> 1) The nature, extent and probable permanence of racism in our society. Its pervasive influence in the improvement as well as regression in black status may be reduced by more careful consideration of how it works.
> 2) The necessity of remediation strategies that are pragmatic and flexible. Undue commitment to ideology, whether integration or separation, direct action or emigration, serve better individual actors rather than those for whom they claim to act.
> 3) The quest for racial equality cannot be delegated. Programs and policies should be structured to harmonize with the principle: "no one can free black people but themselves."
> 4) Legal rights are not synonymous with substantive racial progress. Dedication to the enactment and enforcement of rights should be based on their actual rather than symbolic value.
> 5) Racial equality will not be achieved by requiring blacks to sacrifice their integrity, dignity, and sense of pride in race and self.

IV. Conclusion

Blacks after 300 years in the New World have not obtained the degree of general acceptance available to the newly sworn white spouse of an American military service person. I have predicted here that this situation, founded in racism and perpetuated by advantage, will not change soon. This should be a very depressing statement, and in part it is. But history also shows that despite

racially based obstacles, blacks have both survived and advanced. Moreover, centuries of struggle and exclusion have granted to some blacks a view of life and sometimes of themselves that is valuable, unique, and highly humanistic. The vision contains much that is bitter for the exploitation of labor and lives that began in slavery and still continues. Today even the culturally related products of the black life-style: language, dance, music, dress and hairstyles are "borrowed" and unhesitatingly converted to serve whites as if blacks, among other services, had been born to provide these needs. If anything this further evidence that blacks are considered as a different and less valued level of mankind seems to spur many to greater efforts recognizing, perhaps, that the fight for equality, pursued with dignity, courage and persistence, may bring rewards and satisfactions more precious than the achievement of what remains a very elusive goal.