

FOREWORD

In the early years of the last century, Dr. W.E.B Dubois prophetically predicted: “The problem of the twentieth century is the problem of the color line.” He spoke at a time when the mood of the country had changed in a revolutionary way, a time characterized by some historians as the nadir of the black American experience since slavery. The national politics of reconstruction and progress for black Americans had given way to the Northern doctrine of “*laissez-faire*” (i.e., governmental abstention or non-interference), and the Southern doctrine of “redemption” (i.e., restoration of the doctrine of white supremacy). The United States Supreme Court had facilitated this revolution in its landmark “separate but equal doctrine” enshrined in the 1896 case of *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138 (1896).

In Alabama, for example, the leading white Alabama politicians convened a constitutional convention in Montgomery in 1901 for the avowed purpose of removing its black citizens from the political life of the state. It was of no moment to these racists that the United States Constitution’s Fourteenth Amendment guarantees to all citizens the equal protection of the laws; and that the Fifteenth Amendment specifically prohibits race as a criterion for a denial of the right to vote. Alabama was not alone among the Southern states. By 1915, racial oppression and repressions had reached a peak in American history; and to the extent that these horrendous practices were not sanctioned by *Plessy*, they were maintained by terrorist mobs and outlaw organizations such as the Ku Klux Klan.

Responding to the national abandonment of civil rights and the redoubled determination of Southern states to fortify white supremacy, new black organizations sprang into existence. The most prominent of these was the brainchild of Dr. Dubois: the National Association for the Advancement of Colored People (“NAACP”). Over three decades, the NAACP and its offspring, the Legal Defense Fund, pursued a carefully crafted strategy for the dismantlement of the constitutional mantle under which white supremacy flourished. Much of the credit for that strategy belongs to Dean Charles H. Houston, other professors at Howard University Law School, and their premier student, Thurgood Marshall - the most accomplished lawyer of the twentieth century. The strategy was vindicated in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686 (1954).

By the 1960s, inspired by *Brown* and its extension to other facets of American life, “the problem of the color line” was on the forefront. Dr. Martin Luther King, Jr.’s 1955 bus boycott in Montgomery, his 1964 demonstrations in Birmingham, as well as his 1965 Selma voting rights demonstrations, led directly to the enactment of the most comprehensive scheme of civil rights legislation in the nation’s history. The Supreme Court under Chief Justices Warren and Burger and the lower courts - particularly the Fifth Circuit Court of Appeals - generally interpreted that legislation in the liberal spirit in which it was enacted. By 1980, the new civil rights laws and their judicial interpretation had moved the nation substantially forward in the direction of a colorblind society. That noble goal was, of course, then and now, a long ways away.

One may legitimately ask, “What has all this history to do with the inauguration of a law journal by the Southern Regional Black Law Students Association?”

The appropriate response is that history gives us the framework and setting from which this vital new undertaking emerges. History is important because, as the philosopher George Santayana observed, “those ignorant of the past are condemned to repeat it.”

Indeed, the founding of the Black American Law Students Association (“BALSA”) was an *ipso facto* indication that “the problem of the color line” was alive and well in 1968. As of that date, although the South was home to the majority of black Americans, there were only token numbers of black law students at the traditionally white Southern law schools. While a law student at New York University, BALSA founder Algernon J. (“Jay”) Cooper, of Mobile, Alabama, perceived the need for law students to effect change in the legal system by first bonding with each other and then seeking to address color line problems both in law school and in the larger world. The wisdom of that perception, actualized in the formation and expansion of the National Black Law Students Association, is self-evident.¹

Even as this new law journal goes to press, “the problem of the color line” has crossed century lines and continues into the twenty-first century.

The Rehnquist Supreme Court ushered in a conservative revolution in judicial interpretation and enforcement *vel non* of the Fourteenth Amendment and the nation’s civil rights laws.² While its initial effort was ultimately rebuffed by Congress,³ the

¹In 1983, the Black American Law Students Association revised its name by deleting the word “American.” The word “National” was added later to reflect the organization’s expansion.

²It is not without significance that, as a law clerk to Justice Robert Jackson, William Rehnquist argued against overturning the separate but equal doctrine. *See, generally*, Richard Kluger, *SIMPLE JUSTICE: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (1976); John Dean, *THE REHNQUIST CHOICE: The Untold Story of the Nixon Appointment that Redefined the Supreme Court* (2001).

Supreme Court's subsequent retrogressive civil rights decisions are today the law of the land. Government agencies are now prohibited from implementing affirmative action programs and minority set-asides, under the teachings of *Croson* and *Adarand*.⁴ Several years ago, the Rehnquist Court decided the *Gratz* and *Grutter* cases,⁵ which overturned the quarter-century constitutional jurisprudence that a university's effort to promote racial diversity in its student body is a compelling state interest.⁶ The "states' rights" doctrine of John C. Calhoun and Chief Justice Taney in the *Dred Scott* case⁷ has now been embraced by the Rehnquist Court under the euphemistic concept now known as "federalism."⁸ To the extent that the Civil War was prompted by considerations of states' rights versus federal authority, the Rehnquist Supreme Court has nullified that war.

Presently, black Americans still lag substantially behind their white counterparts in various key indices of equality. According to the National Urban League,⁹ for example,

- over two times as many blacks live below the poverty line as whites;
- the unemployment rate for black Americans is more than twice that of white Americans;

³See *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989) and *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989), which were overturned by Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991)(codified as amended at 42 U.S.C. § 1981 (2005)).

⁴*City of Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 469 (1989); *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 115 S. Ct. 2097 (1995).

⁵*Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003).

⁶See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978).

⁷*Scott v. Sandford*, 60 U.S. 393, 19 How. 393 (1856).

⁸See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996); *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999); *Bd. of Trustees of UAB v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001).

⁹See NAT'L URBAN LEAGUE, 2005 EQUALITY INDEX (2005).

- over seventy percent of white Americans own their own home, while less than fifty percent of black Americans own their own home;
- there are twice as many cases of diabetes amongst blacks than whites; the number of deaths due to homicide is five times greater amongst blacks than whites; and there are ten times as many cases of AIDS amongst blacks than whites;
- white Americans, on average, receive shorter jail and prison sentences than their black counterparts; whites, on average, are more likely to receive probation.

In these times when “liberal” is a dirty word, it is essential that ongoing concerns over inequalities be kept on the agenda and that, in the spirit of Frederick Douglass and Thurgood Marshall, promising long-term ideas and strategies be developed and strong voices heard.

The Southern Regional Black Law Student Association Law Journal hopefully will be one of those voices. The dedication of its first edition to the examination of regional penal systems is certainly a giant step in the right direction.

Warm congratulations and best wishes to the Southern Regional Black Law Student Association as it embarks on this most noble endeavor.

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