Civil Rights

"The right of every American to first-class citizenship is the most important issue of our time" an American icon, Jackie Robinson, spoke these words as he fought for civil rights in his own quiet, dignified, but forceful manner. The issue of civil rights is also one of the most interesting studies of how the Constitution has evolved over the life of that document. It also illustrates a critical feature of the Constitution: How it works depends on cooperation among the three branches of government at the national level, state governments, and the people. As we go through this essay, note how each of these elements of our society took stands on the issue only to be thwarted by one or more of the other elements. In the end, it took all of them pulling together to make meaningful progress.

While "civil rights" now applies to many minority groups and, to be sure, all citizens, this paper will focus on African Americans, primarily because the *original* purpose of the 14th Amendment and the ensuing civil rights legislation in the late 1800s were focused on extending constitutional rights to African Americans.

As we know, the original Constitution referred to African Americans as property, not citizens (it referred to "all others", but did not mention them by race). Slavery was recognized as a legitimate institution. African Americans enjoyed none of the rights guaranteed by the Constitution because they were not citizens as defined by the Constitution. All the rhetoric about "all men are created equal" in the Declaration of Independence and the lofty words in the Preamble to the Constitution about "Justice" "general Welfare", and Blessings of Liberty" did not apply to African Americans. Much has been written and speculated about the personal views of the Founding Fathers regarding the horrid institution of slavery. There is too much contradictory evidence for me to sort it out here. For example, many of the Founders were slave owners, e.g., Washington and Jefferson. And yet, Jefferson's original draft of the Declaration of Independence condemned the practice. In early 1787 Congress had passed the Northwest Ordinance, which banned slavery in the Northwest. Clearly, many at the Constitutional Convention in 1787 wanted to have slavery banned by the new Constitution, but as a practical matter, knew the Constitution would never be ratified if that provision was included. Such expediency in the "politics of the possible" is still an emotional and controversial issue and I will not address it further. The purpose of this essay is to trace how the original Constitution has evolved, sometimes by formal amendment and sometimes by judicial interpretation, to extend the benefits of the Constitution to all.

The quest for "liberty and justice for all" has not been easy and is still ongoing. It is easy to forget that the civil rights legislation of the **1960s** was designed to do basically what the civil rights legislation of the **1860s** tried to do. To understand this anomaly better, it is useful to go back to the first section of this paper, where we discuss the Constitution as a living document. In that section, we saw that it takes all three branches of the national government working together to effect real change to the Constitution. And, as stated above, the States and people must also cooperate if the changes are to affect everyday life. Let's take an historical journey and see how this occurred during the past two hundred years. In order to keep this reasonably short, many details will be omitted; this will run the risk of over simplification and perhaps distortion, but I will risk that. Additionally, the reader must keep in mind the highly controversial and emotional nature of this issue. This essay will endeavor to present a balanced account of the issue from a constitutional perspective, realizing that people have strong differences of opinion about what

the Constitution means, Supreme Court decisions, and how legislation has been applied in specific areas, e.g., affirmative action.

The matter of slavery was fundamentally an issue between the North and South, although slavery had many supporters in the northern states. At the 1787 Convention, the compromise included the provision that slaves would be counted as three fifths of a person for purpose of representation in the House of Representatives. This ensured that the more populous North (Whites only) would not dominate the South in congress. This "balance of power" was maintained as the first few states were added to the Union. As new states were added to the union, the Mason and Dixon Line and the Ohio River acted as boundaries to decide which states would be free or permit slavery. This worked quite well until 1818 when the territory of Missouri applied for statehood. At that time, there were 11 free states and 11 slave states, ensuring a balance in the senate even though the free states, by virtue of population, controlled the House. The Mason and Dixon Line, however, did not extend to the new territory acquired by the Louisiana Purchase. When the Missouri Territory applied for statehood, there were already about 10,000 slaves in the territory. Part of Missouri was north of the Ohio and part was south. The pro-slavery bloc wanted slavery to be allowed in the new territories; the anti-slavery bloc wanted it outlawed. They reached a compromise in what came to be known as the Missouri Compromise, which: 1) Authorized Missouri to choose in their State Constitution a position on slavery; 2) banned slavery from the Louisiana Purchase north of the southern boundary of Missouri (exempting Missouri from this restriction). The people of Missouri approved slavery in their new constitution and forbade any free African Americans from entering the state. Before Congress would admit the state, however, the legislation was amended to require Missouri not to deny **free** African Americans their constitutional rights.

The controversy over slavery in the Western territories continued and intensified as new territories were opened, e.g., the Northwest, California and annexation of territory from Mexico. In 1848, Congress passed the Oregon Territory Act, which prohibited slavery in that territory (it was north of the line specified in the Missouri Compromise). The debate continued until two new territories—Kansas and Nebraska were proposed. Senator Stephen Douglas introduced the bill to establish these two territories and included a provision to allow the two territories to decide for themselves whether they would have slavery (the theory of "popular sovereignty"). The anti-slavery bloc fiercely opposed the bill, but President Franklin Pierce supported it and it passed. The Kansas-Nebraska Act, passed in 1854, superseded the Missouri Compromise and opened the new territories to slavery. It also reopened the bitter quarrel over the expansion of slavery. However, the Act had provisos that indicated the Supreme Court should ultimately determine the constitutionality of slavery in these new states. This added fuel to the friction between the North and South over "States Rights", which had been a constant issue since the founding of the Republic.

The Executive and Legislative Branches had, in essence, spoken in favor of expanding slavery to the new states, but indicated that they would like for the Supreme Court to say if this was constitutional. The Supreme Court, led by Chief Justice Roger Taney, took the challenge in the historical case <u>Dred Scott v. Sanford</u> (1857). Scott had sued in the Missouri courts claiming that he should be freed because he had been in a free state (Illinois) with his master and therefore was emancipated. The Missouri Court denied his suit, but his lawyers took it to the Federal Courts. When it got to the Supreme Court, many on both sides of the issue, including Abraham Lincoln welcomed the opportunity to have the Court settle the slavery issue. Originally, the majority of the Court wanted to dodge the issue of slavery in the territories by declaring that the

Missouri courts had spoken on this specific case and let it go at that. Political pressure was building, however, for the Court to settle the slavery issue in the new Territories and States. In conference, five of the Justices (all from slave states) voted to have the Court address all issues related to the slavery question and, in the words of the spokesman for the group, Justice Wayne, "put an end to all further agitation on the subject of slavery in the territories". (As a judge in Georgia, Wayne had declared that there was no possibility that even free African Americans "can be made partakers of the political and civil institutions of the states, or the United States").

In a 7-2 decision, the court held, among other things that: 1) Negroes, even those who were free, were not and could not become citizens of the United States in the meaning of the Constitution; 2) The Missouri Compromise itself was unconstitutional because Congress did not have authority to exclude slavery from the new territories; and 3) the States could not confer citizenship on people excluded by the Constitution.

So much for the Judiciary settling the slavery issue! The gist of the decision: African Americans can never be citizens and Congress cannot interfere with slaveholding in the territories and States which choose to have it. The rationale for this decision left no doubt what African Americans could expect under the Constitution as interpreted by this court. Chief Justice Taney asserted that legislation as well as practice "shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted and long afterwards". Moreover, he said, Western countries had held such a position for over a hundred years before the Constitution was written. As an inferior class of beings, Negroes[*] had no claim to be citizens. He went on to say that it was difficult, for him personally, to understand how such an institution could be deemed moral. However, he said, it was not the Court's duty to second guess the founders, but to interpret and administer the Constitution according to its true intent and meaning when it was adopted. Some consider this "apology" to be nothing more than a politically expedient "Pontius Pilate" dodge.

Most scholars consider the Dred Scott decision to be the catalyst that made the Civil War inevitable. Lincoln, who had debated Senator Douglas since the Kansas-Nebraska Act opened slavery in the territories, was disappointed. The Judiciary had joined the Executive and Legislative Branches in validating slavery. Lincoln's debates with Douglas, much of it focusing on the slavery issue, earned him enough support to enable him to win the newly formed Republican Party's nomination for the presidency. He won, but with less than 40% of the vote. Sensing the vote to be somewhat less than a mandate, and given the views of Lincoln regarding slavery, South Carolina announced in December 1860 that it was leaving the Union. Ten other Southern States eventually joined South Carolina and formed the Confederate States of America.

The slavery issue was central to the Southern States' action, but there were other factors involved. South Carolina had threatened to secede in the early 1830s when its legislature had declared a Federal Act (having to do with tariffs) null and void and said if the President (Andrew Jackson, an erstwhile "states' righter") tried to enforce it they would leave the Union. With some rather strong language, Jackson told South Carolina through his famous Proclamation (1832) that they best not do that. In private, he told Vice President John C. Calhoun (a South Carolinian who supported the South Carolina nullification act) to tell his friends that if they tried to defy the national law he would "hang them from the nearest trees". Compromises were made on both sides and South Carolina backed off—for the time being.

The issue of States' Rights had been burning all along in the South, where the Anti-Federalist sentiment was strongest, but the Civil War was first and foremost about slavery. The

[*] I use the term used by the Court at that time.

Southern States were growing more concerned because the number of free states had increased faster than slave states and the Senate was now dominated by the free states. The evidence strongly supports the view that Lincoln did not intend to abolish slavery when he was elected. In fact, he stated that he would accept slavery if it would mean holding the Union together. Moreover, he said, the Constitution did not allow him as president to abolish it. Even during the first part of the war he indicated that southern states could retain slavery if they ceased their rebellion. As the war progressed, however, he was determined to end slavery as an outcome of that war. His Emancipation Proclamation in 1863 clearly signaled his intent, but it had no legal standing. Since the Supreme Court had maintained the Constitution did not allow Congress to outlaw slavery, then the Constitution needed amendment. It took the 13th Amendment (1865) to outlaw slavery. "**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."**

The 13th Amendment was followed by the 14th (1868), the 15th (1870), and a series of Civil Rights acts to implement those amendments. The story of how the Republican-dominated Congress got the Southern members (solidly Democratic) of Congress to go along with these amendments and secure ratification by the Southern States (a total of 11 of the 37 States) is too complex to cover here. Suffice it to say that they bent Article V of the Constitution to do it, because that article requires three fourths of the States to ratify an amendment and clearly the 11 Southern States opposed the amendment. Although President Andrew Johnson had supported the 13th Amendment, he objected to the 14th Amendment and urged the Southern states to oppose ratification. The Senate coerced him into supporting the amendment by threat of removal from office after the House had impeached him (on what amounted to a trumped-up charge).

The 14th Amendment is one of the most important parts of the Constitution—and one of the most controversial. What the authors of the amendment meant it to do has been hotly debated. In the end, it was left to the Supreme Court to interpret it over the years. On the face of it, Section 1 seems to be straightforward:

1. **All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.**
2. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;**
3. **nor shall any State deprive any person of life, liberty, or property, without due process of law;**
4. **nor deny to any person within its jurisdiction the equal protection of the laws.**

The 15th Amendment followed in 1870: **"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".**

Each of the amendments gave Congress the power to enforce the articles. One would think the three amendments and the numerous civil rights acts in the 1860s and 70s would settle the issue once and for all and give African Americans the full benefits of the Constitution. This was not the case. Let us see why.

Many interpreted the 14th Amendment to extend the Bill of Rights to apply to the States. (The Supreme Court, in <u>Baron v Baltimore</u>, 1833, said the Bill of rights did not apply to the

States). However, in spite of the several civil rights acts that were passed in the 1860s, 1870s, and 80s, "Jim Crow" was present throughout the South. When the Jim Crow practices were challenged in the Federal Courts, African Americans did not get a friendly response. In the landmark "Civil Rights Cases" in 1883, the Court invalidated the 1875 Civil Rights Act on the ground that the 14th Amendment's guaranty of equal protection applied only to state actions and did not prohibit discrimination by private hotel and restaurant owners. The nail in the coffin of the civil rights legislation was Plessey v Ferguson (1896), where the Court upheld segregation in public facilities (transportation). From the 1870s to the mid 1950s, other than Truman's 1948 executive order to desegregate the Armed Forces, little headway was made for advancing civil rights. Even that action took several years to implement, often over strong objections of military leaders, especially in the National Guard. This period of history illustrates another feature of our constitutional system of government: Not only does change require cooperation of the three branches of the Federal Government; it requires cooperation of the States and the people. The Southern States, backed by conservative courts, administrations, and congresses, refused to make significant changes in the condition of African Americans.

The Brown v the Topeka Board of Education decision* (1954) in effect overruled the 1896 Plessey decision. Some consider this decision to be one of the two or three most important decisions ever rendered. It is worthwhile to give a brief background to the decision. When the Court considered the case in 1953, all 9 Justices were Democrat-appointed and four were from the Deep South, including the Chief Justice, Fred Vinson. It appeared the decision might uphold Plessey. But some of the justices asked that the case be reargued in the next term. Vinson died in the fall of 1953 and was replaced by Earl Warren, former Governor of California. Warren is credited with creating a different climate on the court. In discussions before firming opinions, he asked the justices to consider social science research regarding the effects of segregated schools. Hugo Black, a former Ku Klux Klan member from Alabama, said one did not need to be a social scientist to know that segregation was wrong. Moreover, he said, the only justification for continued segregation would be to state flatly that the Negro race was inferior. That tossed the gauntlet! Chief Justice Warren personally wrote the decision. In his draft, he wrote this passage: "To separate them from others of their age in school solely because of their color puts the mark of inferiority not only upon their status in the community but also upon their little hearts and minds in a form that is unlikely ever to be erased". On the day the decision was read, Justice Robert Jackson, who was critically ill, left his hospital bed to attend in order to show solidarity. Some reporters noticed the unusual presence of several of the Justices' wives. When Warren announced the unanimous decision, visible emotion swept the room. One Justice had tears streaming down his face.

The 9-0 Brown decision said separate schools could not be equal under any circumstances. It ordered States to desegregate the public schools "with all deliberate speed". But the decision had little immediate impact in the South. Some school districts closed the public schools rather than desegregate them. Others simply ignored the court decision. Congress and the Executive branch in the 50s did very little to force States to heed the decision, although President Eisenhower sent the U.S. Army to integrate a Little Rock high school when Governor Faubus refused to enforce a court order. The situation changed in the 60s. All three branches cooperated

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* The Brown decision was followed by other decisions (e.g., Mapp v Ohio, 1961 and Griswold v Connecticut, 1965) that had the effect of changing the way the court interpreted the Constitution. Today the 14th amendment is interpreted to have extended the Bill of Rights to apply to the state and local laws (as well as to the private sector), not only for Blacks, but also for all citizens.

in telling the Southern States “enough is enough”. This time, the Court enforced their decision, stating that “it is no longer open to question that a State may not constitutionally require segregation of public facilities”. Another round of civil rights legislation was passed, the President sent federal troops to force integration, and the Supreme Court, tiring of the failure of States to act in “all deliberate speed”, ordered active measures to end segregation. In Green v County School Board (1968) it ordered school boards to develop plans that promise realistically to work now. When school officials still dragged their feet, in 1969 it ordered forced busing to end segregation.

The approach taken in the 1860s to advance civil rights can be contrasted with the evolution of government intervention in economic affairs, discussed in another essay. Roosevelt chose the route of judicial interpretation and eschewed formal constitutional amendments, largely because the amendment process takes so long and the outcome is uncertain. The sweeping changes in constitutional meaning regarding economic affairs, as interpreted by the courts, are no less profound than in the civil rights area, which was done by amendment *plus* court decisions. It is doubtful, however, that judicial activism, even with cooperation of the Legislative and Executive Branches, could have made significant changes in the status of African Americans. Thus, the three amendments, 13th, 14th, and 15th, were necessary. But even those amendments were not sufficient. Let us look at some of the other factors.

A combination of factors began working in tandem in the middle of the 20th century to break the inertia of the previous seventy years. The catalyst was perhaps WWII. This event changed the world in many profound ways, not least of which was the status of African Americans. Although segregation and Jim Crow existed in the Armed Forces during the war, neither Black nor White members came back with the same views toward racial matters. In essence, it broke the “cake of custom.” In the late 1940s, Truman ordered that the Armed Forces be integrated. The Korean War accelerated the process and while the U.S. military still has a way to go, it has led the nation in this area. Many African Americans took advantage of the “G.I. Bill” to get an education, buy homes, and start a new life.

The Brown decision came about the time activists in the civil rights movement were energized. Rosa Parks refused to take a back seat on a bus in Montgomery. Students demanded to be served in White Restaurants. Martin Luther King and other Black leaders, mostly by non-violent means, mobilized the Black community and gained more and more support from Whites. The forces came to convergence in the 1960s, culminating in a series of civil rights legislation that reiterated the principles in the 1800s legislation. The difference now was that the Courts, Congress, the President, and the public were ready to act together. Not all greeted this movement with enthusiasm. When LBJ signed the 1964 Civil Rights Act, he commented “this will cost the Democrats the South for a generation.” (Currently, the South is strongly Republican and moving further in that direction, while 90% of African Americans voted for Gore in 2000). The legislation was immediately tested when a hotel in Atlanta refused to accommodate African Americans, claiming that, at root, they were an intrastate business and thus not subject to the Civil Rights Act (in spite of the fact that the majority of their guests were interstate travelers). In Heart of Atlanta Hotel v United States (1964) the Supreme Court held that the hotel was subject to the Act.

Recent events.

A very controversial feature of the civil rights movement is what has come to be known as “affirmative action”. This refers to actions taken to actively promote equal opportunity and end discrimination. Based on solid evidence that many segments of society were discriminating against African Americans in spite of legislation and court orders, affirmative action policies required tangible evidence. Among other things, administrators looked at numbers as proof of equal opportunities. As with all efforts to use quantifiable data, this opened the policies to charges of “quotas”. Also, some felt that African Americans were being promoted, hired, or admitted to schools over more qualified whites, leading to “reverse discrimination”. Undoubtedly, some of this occurred, but there is much controversy about where the line should be drawn in achieving “justice” and “equality” versus reverse discrimination. Recently, there have been glaring instances where “racial profiling” has resulted in harassment of African Americans. While there may be justification to assume some imbalance of criminal behavior among races, some data leave little room for doubt about racial discrimination.

History shows that constitutional rights have not come easy for African Americans (and for that matter, women, Native Americans, homosexuals, and other groups). Most social analysts agree that there comes a time when pressure must be applied to show tangible results, not just “good intentions”, which are often no more than excuses for stalling. This more often than not leads to measurable indicators, which *can* imply quotas. While there must be flexibility for judgment, quantifiable measures have a place in the equation.

What can we say about where the nation stands regarding “establishing justice for all”? It depends, of course, on one’s perspective. Opinion polls consistently show that Whites see a much rosier picture than do African Americans. This is true even in the U.S. military, the institution often cited as the standard bearer for equal opportunity for African Americans and other minorities (except homosexuals, where it ranks near the bottom). Consider the stark contrast in the reaction of African Americans and Whites to the O.J. Simpson verdict. Only 13% of African Americans thought he was probably guilty compared to 65% of Whites. Similarly, only 9% of African Americans think there is equality in the criminal justice system compared to 52% of Whites. African Americans (73%), compared to Whites (16%), believe the CIA has imported cocaine for distribution in the Black community. These examples illustrate the wide discrepancy in the way those groups view justice and suggest how difficult it is to get a consensus on where we are on civil rights.

In the final analysis, we go to the Courts to judge what constitutes “justice”. Forced busing was used by the Courts to end segregation, but the Courts are now recognizing that such measures did not solve the problem and are now allowing a reversal of that policy. Many African Americans, Whites, and other groups support the reversal of policy on busing. But the problem of desegregated schools and substandard educational opportunities for African Americans still exists. Quotas for admission to higher educational institutions have found disfavor, but pressure to include race as a factor in selection is O.K. (Bakke v UC-Davis Medical School, 1978). Clearly, the Court will be the final arbiter on these matters, as it is on other matters. Thus, we will continue to have strong and emotional differences over what constitutes justice for African Americans.

Recent decisions of the Supreme Court on controversial issues, often sharply divided, indicate how the composition of the Supreme Court will be critical in the resolution of these issues. For example, affirmative action advocacy groups recently settled out of court a claim of reverse discrimination brought by a New Jersey teacher. They settled rather than take the case to the current Supreme Court, which they perceived as conservative and likely to throw out almost

all affirmative action policies. Many analysts believe that the most important issue in the 2008 presidential election was who would nominate new judges and Supreme Court Justices. McCain said his favorite Justices were Scalia and Thomas; Obama said he preferred the four liberal Justices. The Senate, of course, must consent, but given that the Democrats control the Senate, it is likely that Obama's nominees will be confirmed.

It is significant that Obama's first choice for the Supreme Court, Sonia Sotomayor, was a central figure in the latest affirmative decision by the Court. On 29 June 2009, the Court, in a 5-4 decision (Ricci v DeStefano), overruled a decision by the 2nd Circuit Court of appeals regarding reverse discrimination. A White new Haven Connecticut firefighter brought suit against city officials based on a claim that his civil rights were violated. He claimed that he was denied promotion because less-qualified Black candidates were selected. In brief, a written test was thrown out by the city based on a judgment that it had been culturally biased against Blacks; no Blacks had passed it. A three-panel decision by the 2nd Circuit upheld the city's action; Judge Sotomayor was on that panel.

As I write this, Senate Republicans are arguing that the fact that the Court has over turned the 2nd Court's decision means Sotomayor is unqualified to sit on the Court. This is absurd on the face of it. Other appeals courts have decided affirmative action cases similar to the 2nd Court's decision, based on previous Supreme Court decisions, which defined the law. Moreover, carried to its logical conclusion, the reasoning of the Republicans would mean the four dissenting Justices are also unqualified to sit. This is normal political posturing, practiced by both parties. This was not a simple case. As Justice Ginsberg noted, 40% of New Haven is Black, and yet only one of twenty one captains in the Fire Department is Black. This causes one to wonder if the need for affirmative action is ended.

Given the current Supreme Court's ideological makeup, the Ricci decision indicates affirmative action will be further curtailed. This trend will likely continue until one of the five Justices in the majority is replaced with someone with a social philosophy more akin to those in the minority in this decision.

The full promise of the American dream, however, will come only when there is a concept of justice internalized in the hearts and minds of the people. This is a work in progress that requires open and candid communication between all segments of the population. The welfare of the nation rests on how well we deal with this issue. Each of us has a responsibility to do our part.