6-18-1987

Toward Pure Legal Existence: Blacks and the Constitution

J. Clay Smith Jr.

TOWARD PURE LEGAL EXISTENCE: BLACKS AND THE CONSTITUTION*

By

J. Clay Smith, Jr.**

> Although the Constitution was at best imperfect ... If interpreted justly, in full awareness of today's conditions, and if applied in a consistent fashion, the Constitution can be converted into a document of liberation for black America.1/

The Negro was brought to America as a slave in 1619. Since the day Blacks landed on the shores at Jamestown, law and custom have significantly influenced their lives. The constitutions of the various states of the Union and the U.S. Constitution have been interpreted in many ways in years past to limit the progress of Blacks in the American society. Constitutional interpretations by the courts and legislative enactments by men and women of good will have also advanced the position of Blacks in the American society. The question today is: How is the Constitution of the United States to be interpreted as relates to the interest of Black Americans? This is a most compelling question as Americans celebrate the bicentennial anniversary of the United States Constitution.

---

* This paper was presented on June 18, 1987, at the Distinguished Lecture Series of the Schomburg Center for Research in Black Culture, The New York Public Library, commemorating the Bicentennial of the United States Constitution.

** Dean of the Howard University School of Law. He received the A.B. degree from Creighton University in 1964; the J.D. degree from Howard Univiersity School of Law in 1967; the LL.M. and S.J.D. degrees from the George Washington National Law Center in 1970 and 1977, respectively.

1/ F. McKissick, 3/5 of a Man 55 (1969).

In Colonial America, the American Negro landed at Jamestown in the Fall of 1619. During the next three hundred years, the American Negro was systematically separated from the white population by both law and custom. In fact, the law was used as a tool for social engineering to reduce the Negro from the metaphysical classification of human to that of chattel, from an original classification of freedom to the status of slavery.

A.

Toward Pure Legal Existence

The bicentennial of the Constitution is an important celebration for this nation. Its celebration is for all Americans. During this celebration, people from all regions, age and ethnic groups, and political persuasions, will provide greater insight and historical perspective on the meaning of the Constitution. The discussions, indeed the debates, that will ensue regarding its interpretation, will no doubt strengthen our collective judgment, renew our faith in what the Constitution represents to the world, and strengthen our determination to have it live up to its tenets for all Americans.

Black Americans join the nation in celebrating the bicentennial of our instrument of rule. However, this year will cause Black Americans to speak the truth about the agony, and violence, the human disregard, the ignorance, and the economic and human despair resulting from the exclusion of Blacks from the definition of legal existence. The fact that Blacks were excluded from the definition and the panoply of causal effects can be easily documented.

While many Americans will dwell on the writings and political activities of Jefferson, Madison, Jay, and leading contemporary constitutional law scholars, many Black Americans will use this bicentennial year to honor the

unsung national heroes and heroines, the men and women of color who were deprived of their liberty by the phantom whims of segregated systems whose doors closed to other than white faces.

Professor William Robert Ming appropriately reminds us that "The legal status of Negroes ... cannot be determined solely by reference to the written sources of law [such as the Constitution because] they do not entirely disclose the real legal status of Negroes."2/ Professor Ming chides us to remember that the words of the Constitution are no more than words. Professor Ming asserts that "it is the law in operation which determines the real legal status of Negroes."3/ One can hardly disagree with Ming's assessment that no discussion of change in the legal status of Blacks can occur without evaluation of the law in operation.

I wish to assert a belief that urges, if not compels, acceptance among constitutional scholars of America. It is this: The decision by the Framers to allow slavery after the ratification of the United States Constitution was a moral flaw in the Constitution. It was morally wrong, and further,

> To the extent that the uneven and disparate application of the law has left any notion of the lack of the worth and human dignity of black people, or has interfered in any way with their natural right to freely participate in a republic born on a philosophical base that all men are created equal under law -- to that extent, black people have been denied a pure legal existence. Pure legal existence looks to the future but studies the present and the past of the law that touches black

---

2/ Ming, "Legal Status," The Integration of the Negro Into American Society 197 (1951).

3/ Id. at 201 (emphasis added).

> people and those similarly situated, in order to trace, to ascertain, and to analytically assess the growth of how near they are to an existence which is free from racial discrimination. Pure legal existence, then, is an existence, under law, which is barren of racial discrimination in law and in its application; it encompasses being in a society in which the accouterments of slavery are no more.4/

B.

The Mauri Doctrine

On May 6, 1987, Mr. Justice Thurgood Marshall delivered a speech commemorating the bicentennial in Mauri, Hawaii. In this speech, now referred to as "The Mauri Doctrine," Mr. Justice Marshall reminded the world that the Constitution, when adopted as our instrument of rule, was defective.

What was the defect? When adopted, the United States Constitution contained three provisions regarding Black people. One provision, Article 4, Section 2c, provided that fugitive slaves were to be returned to their masters. The second provision, Article 1, Section 2C, concerning Congressional representation, stated that in determining Congressional representation, three-fifths of the slave population was to be added to the free population. Some have argued that the three-fifths rule constitutionally defined Black people as property, as subordinate to the more exclusive definition of a person afforded to all others whose skin was white. The third provision, Article 1, Section 9, a compromise between the Southern and Northern interest, sanctioned the African slave trade for twenty years.

As Mr. Justice Thurgood Marshall said:

> No doubt it will be said when the unpleasant truth of the history of slavery in America is mentioned during this

---

4/ Smith, Memoriam to Frank D. Reeves, Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence, 18 How. L.J. 1, 5 (1973).

> bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances would not have been made. But the effects of the Framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.5/

As Americans celebrate the bicentennial of the United States Constitution and the significant acts that took place in Philadelphia two hundred years ago, Mr. Justice Marshall reminds America that it cannot lose sight of the reality of the conditions which gave rise to the enslavement of Black human beings. Americans cannot and must not be allowed to celebrate the two hundredth birthdate of our instrument of rule, without remembering that it denied constitutionally ordered liberty to Black people. If we forget, and if the nation forgets the effects the denial of liberty caused in the misery, the suffering, and the inhuman brutality on Black people, then, the national celebration of the two hundredth anniversary of the United States Constitution may well be a disingenuous celebration.6/

The ink on Mr. Justice Marshall's speech had not dried before it was criticized as an unfair and narrow portrayal of the Framers of the Constitution. However, as hard as it is for some Americans to swallow,7/ Mr.

5/ Remarks of Justice Thurgood Marshall, At the Annual Seminar of the San Francisco Patent and Trademark Law Association In Mauri, Hawaii, May 6, 1987 at 5-6. (Hereafter Mauri Doctrine).

6/ Id. at 8. See Marshall, An Evaluation Of Recent Efforts To Achieve Racial Integration In Education Through Resort To The Courts, 21 J. Negro Ed. 316-327, 335-336 (1952). (Denial in area of education discussed by Thurgood Marshall.)

7/ See, e.g., Thurgood Marshall's Constitution, The Detroit News, May 10, 1987, at A22, col. 1; Yoder, That 'Defective' Constitution, Wash. Post, May 14, 1987, at A25, col. 1; Francis, Wisdom Marshall could have used, Wash. Times, May 15, 1987, at 3D, col. 1; Goldwin, Why Blacks, Women and Jews are not Mentioned in the Constitution, Commentary, May, 1987 at 28; Hodel, In Defense of Constitution, N.Y. Times, May 13, 1987, at A20, col. 1; Constitution Defended From Marshall Criticism, Los Angeles Sentinel, May 28, 1987, at A16, col. 4; July, Constitution Wasn't About Justice, but Order, N.Y. Times, May 31, 1987, at E28, col. 4; Waite, People's Slavery, N.Y. Times, June 12, 1987, at A30, col. 4. See also, D. Bell, Race, Racism and American Law 49-50 (1973) (quoting S. Lynd, Slavery And The Founding Fathers 119-131 (M. Drimmer, ed. 1968)) for a different view on why the word "slave" was not used in the Constitution.

Justice Thurgood Marshall is correct in his assertion that the Framers of the Constitution intentionally excluded Blacks from the reaches of constitutional guarantees, thereby rendering the document flawed.8/ The views of Justice Marshall are important to any national debate on the original intent of the Constitution. As the first and only Black American to sit on the United States Supreme Court his views should cause Americans to face the fact that our Constitution, for whatever reason, made slavery a legally permissible status.

How could Justice Marshall, trained at Howard University School of Law,9/ allow this year to pass without reminding the nation of the truth? If Justice Marshall had remained silent, if he had allowed the apologists to bury the truth, he would have betrayed the teachings of his mentor Dr. Charles Hamilton Houston,10/ the efforts of his life's work and that of other Black lawyers, and

---

8/ See, e.g., Mauro, Burger on Constitution: 'It isn't perfect.' USA Today, at 1, col. 2; Justice Marshall's Critique, Wash. Post, May 9, 1987, at A22, col. 1; Gilliam, Constitutional Outrage, Wash. Post, May 18, 1987, at C3, col. 5; Payne, A Flawed Constitution, Wash. Afro-American, May 19, 1987, at 5, col. 1; Molotsky, Slavery Issue Adds Vigor to Debate, N.Y. Times, May 21, 1987, at A22, col. 4; Jacob, Celebrating the Bicentennial, Wash. Afro-American, May 26, 1987, at 4, col. 1; Cohen, The Constitution Through Marshall's Eyes, Wash. Post, May 12, 1987, at A19, col. 1; Fleming, The Constitution, Wash. Afro-American, May 30, 1987, at 5 col. 1; Kamen, Marshall Blasts Celebration of Constitution Bicentennial, Wash. Post, May 7, 1987, at 1, col. 1; Observing the Constitution, Wash. Afro-American, June 2, 1987, at 4, col. 1; Keith, The Celebration of a Living Document, The Detroit News, June 2, 1987, at 8A, col. 1.

9/ Thurgood Marshall was graduated from Howard University School of Law in 1933.

10/ See G. R. McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights 77-79 (1983); reviewed by Smith, Forgotten Hero, 98 Harv. L. Rev. 482, 487, n. 27 (1984); R. Kluger, Simple Justice 131 (1976). See also, J. M. Langston, "The Intellectual, Moral, and Spiritual Condition of the Slave," Autographs Of Freedom 147 (J. Griffith, ed., 1854). (Marshall's principles draw on those of John Mercer Langston, who, in 1854 stated, "The American slave is a human being." In 1868, Langston became the first dean of Howard University School of Law.)

laymen alike, who contributed so significantly to cure an inchoate document.11/

C.

Constitutional Fear and Bifurcation of Blacks

The Framers of the Constitution attempted the impossible: they attempted to deny the human existence of Black people. However, the existence of the slave could not be denied, even though he could assert no rights under his status as property. The Framers of the Constitution bifurcated the slave and granted a limited existence for the commercial and political benefit of persons other than himself. Legal existence being denied, Black people were rendered powerless to defend their person, their property or to stake out a claim in a nation that considered them legally invisible.

D.

Reversion to Originally Free Status Created Fear

It was the original intent of the Framers of the Constitution that slavery would end in 1808. However, once slavery was legalized in the nation it was not to be easily dislodged -- not even on moral grounds. If one were white, rights to life, liberty and property in the State were claimed to be naturally endowed by God. However, if one were Black, rights were not natural. Black people were not considered originally free.12/ If slaves were to revert to their

---

11/ See Hastie, The Proposition of the Negro in the American Social Order, 8 J. Negro Ed. 595 (1939); A. L. Higginbotham, Jr., In the Matter of Color (1978); P. Finkelman, Slavery In The Courtroom 3-15 (1985).

12/ See e.g. The Jewish Record, January 23, 1863, quoted in B.W. Korn, American Jewry and the Civil War 27 (1951) (contending that Blacks were not originally free); But see, M. Willis, "The Bible Versus Slavery," Autographs of Freedom 151 (J. Griffiths, ed., 1854); J. H. Cone, A Black Theology of Liberation, 90-94 (1986) (Cone writes, "The being of the human person as freedom is expressed in the Bible in terms of the image of God."); Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 Harv. L. Rev. 513, 525-536 (1974) (arguing that the moral and political elements of antislavery thought merged into a single antislavery jurisprudence).

originally free status, a belief always held by Blacks, this would have vested them with the same rights and privileges as whites. The thought of such reversionary rights created fears against Blacks. Some believed that Blacks posed dangers to the State and such discourse was used to prolong the institution of slavery.

According to some documentation in Albert J. Beveridge's Life of John Marshall, Marshall himself might have believed that Blacks threatened the State. In a letter Marshall wrote to Reverend R. R. Gurley in 1831, he said,

> The removal of our colored population is, I think, a common object, by no means confined to the slave states although they are more immediately interested in it. The whole Union would be strengthened by it, and relieved from a danger whose extent can hardly be estimated.13/

One author has asked: "What was this terrible danger which ... threatened the country through the colored population?"14/ She concludes "that amalgamation was one probable fear, and the other ... was social commingling."15/ Hence, white people feared integration of Blacks into American life as a matter of social, political and economic principle which provided the legal basis for the classification of Blacks as legally impotent.

The expansion of social status of many in the South was predicated on

---

13/ A.J. Beveridge, Life of John Marshall, Vol. IV, at 475 (1919), quoted by Thelma D. Ackiss, "The Negro and The Supreme Court To 1900," Masters Thesis, Howard University, 1936, at 36 (hereafter Ackiss). Ms. Ackiss was graduated from The Howard University School of Law in 1931.

14/ Id. at 36.

15/ Ibid.

the possessory interest, protected by law, of Black people. As J. E. Caines wrote, 16/

> [S]lavery in the South is something more than a moral and political principle; it has become a fashionable taste, a social passion. The possession of a slave in the South carries with it the same sort of prestige as the possession of land in this country, as the possession of a horse among Arabs; it brings the owner into connection with the privileged class and forms a presumption that he has attained a certain social position.

It is my belief that it was this very presumption that worked its way into the framing of the Constitution in the bifurcation of slaves as property and as persons for reasons unrelated to their legal existence. This was an act that defied reason and nullified the very words of the Declaration of Independence: "We hold these Truths that all Men are created equal..."17/

16/ J. E. Caines, The Slave Power 90 (1862) (quoted by Ackiss, supra note 13, at 37). Some Blacks were freed by their masters or otherwise gained their freedom before the Emancipation Proclamation in 1863. However, the operation of the law and custom did not advance their status or the fullness of their legal existence. See Free Blacks In America, 1800-1860, at 24, (B.M. Rudwick, ed., 1970). See also, C.G.Woodson, A Century of Negro Migration 37-38 (1918) (statistics of the free colored population of the United States 1850 and 1860). Id. at 39-60 (regarding the passage of Black Codes in the North to limit the legal existence of free Blacks.)

17/ D. Bell, Race, Racism and American Law 45-47 (1973). M.F. Berry, Black Resistance to White Law 7-18 (1971), reviewed by Higginbotham, Race, Racism and American Law, 122 U. of Pa. L. Rev. 1044 (1974).

E.

Legal Existence Slowed Under Early Supreme Court Developments

There came a time that states such as Virginia and Kentucky drew up resolutions drafted by Jefferson and Madison in 1798, to limit Congress' authority to exercise its powers. It was believed that such resolutions were designed to protect the institution of slavery. Even Chief Justice John Marshall himself is thought to have shared the beliefs that the authority of the federal government should be limited. However, Chief Justice Marshall "soon brought the country around to the position of thinking that although the federal government is one of enumerated powers, that government and not that of the states is the judge of the extent of its powers and, 'though limited in its powers, is supreme' within its sphere of action."18/ Justice Marshall in redemptive fashion went on to write that "there is no phrase in the instrument ... which excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."19/

Marshall's decisions are important to the crusade of Black Americans because, though not immediate, his view that the Constitution was the Supreme Law of the Land, and not subordinate to dictates of the States 20/ would sanction legislative acts passed to secure and to protect the civil rights of Black Americans.21/

18/ C. G. Woodson, Fifty Years of Negro Citizenship As Qualified By The United States Supreme Court, 6 J. of Negro History 1, 2 (1921) (quoting McCulloch v. Maryland 17 U.S. (4 Wheat.) 316, 404, (1819). The page referred to by Woodson (416) is an error.

19/ Id. at 2, at 404.

20/ Cooper v. Aaron, 358 U.S. 1,4, 18-19 (1958).

21/ See e.g., United States v. Raines, 362 U.S. 17 (1960); United States v. Thomas, 362 U.S. 58 (1960); United States v. Alabama, 362 U.S. 602 (1960).

It was not "until after John Marshall of Virginia became Chief Justice, are to be found cases involving Negro rights." 22/ A careful review of the cases involving Blacks during the period that Chief Justice Marshall was on the U.S. Supreme Court did not disclose a chronology of cases which gave meaning to the legal existence of Black people. The death of Justice Marshall in 1835 would usher in Joseph Story as Chief Justice and, to some extent the abandonment of Marshall's view of a strong central government. The nation drifted towards the supremacy of local governments and Black people drifted toward an extended period of legal non-existence.23/

In 1836, Roger Taney was confirmed as Chief Justice of the United States Supreme Court. He served in that capacity until his death in 1864. While Taney may be credited with developing certain aspects of American jurisprudence, scholars who support his work, his opinion, and that of the majority of the Court in Dred Scott v. Sandford,24/ did little to advance the legal existence of Black people.

In the Dred Scott decision, Chief Judge Taney posed a question touching the metaphysical intent of the Framers of the Constitution. It was this: "Can a negro, whose ancestors were imported into the country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges, and immunities guaranteed by that instrument to the citizen?" 25/ The answer to the ques-

---

22/ Ackiss, supra note 13, at 1-106. (These cases are discussed in some detail in this excellent thesis.)

23/ C.G. Woodson, supra note 18, at 10.

24/ 60 U.S. (19 How.) 393 1857.

25/ Id. at 403.

tion posed was "No." The answer to this question by the court is ample evidence that Black people were viewed as non-beings as a matter of jurisprudential thought. To be a person under the Constitution, one had to be a citizen; to be a citizen, one had to be a person. Since both the words citizen and person were described by Mr. Justice Taney to be "synonomous terms,"26/ Black people did not fall within the legal definition of constitutional metaphysics. Then, what rights, duties or obligations were granted to the creatures of the African race under the moral imperatives stated in the Constitution? The answer from the pen of Mr. Chief Justice Taney would forever cast a cloud over the most revered branch of our nation's government. Even as Taney tried to further debase Blacks, he could not write about them without admitting that Blacks were "regarded as beings [although] of an inferior order..."27/ Taney sealed the fate of Blacks under the Constitution with words that rang out across the land. His words were as follows:

> [Blacks] had for more than a century before been regarded as beings of an inferior order, and although unfit to associate with the white race either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.28/

26/ Id. at 404.

27/ Id. at 407.

28/ Ibid.

F.

Legal Existence Granted Blacks

On January 1, 1863, President Abraham Lincoln emancipated the slaves by Proclamation. However, according to Constance Baker Motley, this Proclamation was "a nullity."29/ In 1963, she wrote that the Proclamation "was intended to free only those slaves in states or parts of states which, on January 1, 1863, were still in rebellion against the United States."30/ Slavery in non-rebellious states retained its previous legal status causing the need for a Constitutional Amendment.

In 1865, the Thirteenth Amendment was ratified and made part of the Constitution. The Thirteenth Amendment, the first "Negro Amendment", breathed legal life into a newly freed Black American. It made involuntary servitude a federal crime.

On July 28, 1868, the Fourteenth Amendment granted the status of citizenship to Blacks and cured the metaphysical flaw that denied legal existence and federal protection to Blacks in the states in which they resided.

Passage of the Fourteenth Amendment has been described as "the Negro's charter of liberty." 31/ However, it and the other Negro Amendments were more than a charter of liberty. The Negro Amendments provided grants of legal existence heretofore denied to Blacks by the Framers of the Constitution. These Amendments would gradually move Blacks towards pure legal existence in our constitutional democracy.

29/ Motley, The Constitution -- Key to Freedom, 28 Ebony 221 (Sept. 1963).

30/ Ibid.

31/ B. H. Nelson, "The Fourteenth Amendment And The Negro Since 1920," Ph.D. Dissertation, Catholic University, at 1 (1946). See also, J.A. Cobb, "The Constitutional Rights of the Negro or Race Distinctions in American Law," in F. Styles, Negroes and the Law 63-87 (1937).

The grant of legal being to Black people was an act that would not immediately end the legitimacy of slavery in the minds of whites in many southern states. For, after all, it remained their view that the white man was not required to treat Blacks as equals or to protect them as such. Whites feared Blacks -- as Chief Justice Marshall had written. They feared the exercise of the very political freedoms claimed when the nation was formed and the Constitution was written. This was especially true in the exercise of the franchise. For example, on December 16, 1868, the Houston Telegraph gave the following advice to Negro freedmen in Texas:

> You are aware that a very large majority of the white people of Texas are opposed to allowing all of you to vote, because they do not think you are qualified to exercise this high privilege. If the Convention should confer suffrage upon you it will be the very cause of its being taken away from you after awhile, and we believe that it would deprive you of it forever.32/

Shortly thereafter, one C.W. Bryant, a Black member of the Texas Legislature, responded thusly,

> Now Sir, I ask one thing: Why is it that the white people are crying daily, 'Let us vote?'
> If a free man can live so well in a free country without a voice in the Government, why not try it yourself for awhile?

32/ J. Mason Brewer, Negro Legislators of Texas 23-24 (1935).

> No Sir; give us the ballot and give it to us for all time, and then if you can outrun us in the race of life, all is well.33/

By 1905 the Black voter in Texas was disfranchised. Again the fear that Blacks would rise up and claim their original legal existence caused political alarm. As one author described the disfranchisement of Blacks in Texas:

> As the Negro became more informed and better educated, and more accustomed to contending for his rights and getting some of them, and as he became more conscious of his power with the ballot, the white Texan became more and more alarmed and disturbed over the Negro vote, and its power in the hands of the colored man.34/

In 1869, one of the most significant important decisions of the Post-Reconstruction period was decided by the Supreme Court of Georgia, White v. Clements.35/ The bare facts are these: a black man was elected Clerk of the Court in Chatham County, Georgia, in 1868. He beat a white contender. The "real vital question at issue" was whether a "person of color [was competent under the law] to hold office in [Georgia]...."36/ The trial court had ruled for the white plaintiff holding that a Black person was not competent under law to hold public office.

33/ Ibid. H.L. Moon, Balance of Power: The Negro Vote 215 (1948); Kousser, "The Undermining of the First Reconstruction," Minority Vote Dilution 27-46 (D. Chandler, ed., 1984).

34/ Id. at 113.

35/ 39 Ga. 232 (1869).

36/ Id. at 241.

In one of the most unusual cases in the South during this period, the Georgia Supreme Court, speaking through Justice McCay, held for the Black incumbent. Why do I draw attention to this decision? First of all, White v. Clements laid the foundation for the right of Black Americans to hold public office in the State of Georgia. Secondly, the decision casts light on the state of mind, perhaps even the minds of the drafters of the Federal Constitution, that Black people, though persons, had no legal existence, and that the distinction between white and Black rights was derived from Divine Right. In short, God did not grant to persons of color any legal status; therefore, white people owed Blacks only such rights as were specifically granted to them by the legislature. This notion was explained in Justice McCay's opinion. There Justice McCay says,

> ... it is still that the case of the Negro stand upon a different footing, and that however it may be true, that the rights of a white American citizen came from God, yet a black American citizen cannot claim this presumption; that the rights of the Negro have a different derivation, they, come from the State, and they can have none, except such as he can show chapter and verse for.37/

Justice McCay, while rejecting this viewpoint, considered the historical argument raised by the white plaintiff attempting to disqualify the Black incumbent who beat him in the election. Justice McCay wrote:38/

37/ Id. at 247.

38/ Ibid.

> The Negro, they say, was, as all admit, a slave, without any rights, save as were specially pointed out by law, and that having none, became free by special grant, he does not stand like a white man, with every right, that is not expressly denied, but with only such as are specially granted.

McCay continued,39/

> ... in this State [so it was argued] we are to have two classes of citizens, one holding their rights by divine gift from the God of nature, in favor of whom there always exists the presumption that any particular right contended for, whether it be legal or political, and in reference to whom, the burden of proof is always against the party denying the right; and another class, whose rights come not from God, but from society, and who in every contest respecting a right, must be able to show by special enactment, that the right has been granted.

Ironically, even though Justice McCay rejected the Divine Right of people based on race, he held that the Reconstruction statutes by the national government "recognized [the black incumbent] as a part of the sovereign people of the State ... [and therefore Blacks were] entitled to the same presumption as are other fellow citizens..."40/ His decision is bottomed, not only on the practical liberty of man, but on the statutory recognition or grant of the equality of Blacks by authority derived from the national Constitution.

39/ Ibid.

40/ Id. at 255 (original emphasis).

Hence, thirty-eight years after Chief Justice Marshall raised the fear of the liberation of black people in America, a Justice of the Georgia Supreme Court, interpreting that same Constitution, held that to fear the freedom of Black people was to reject the peace and good order of the State.41/

G.

Attainment of Color-Blind Society via Legal Wars

Despite the refusal of the United States Supreme Court to grant social equality to Blacks in Plessy v. Ferguson,42/ the decision did produce a dissent by Mr. Justice Harlan that would prospectively cause Americans to wonder whether the Constitution was color-blind.43/

The history of the legal wars fought by Blacks and whites to secure a social, economic and political color-blind society in America are well known. These wars waged on several legal fronts concerned the existence of Black people. While there is no longer doubt that Blacks are both "citizens and persons" within the public legal definition of those terms, some constitutional scholars have refused to accept, actively tried to contain, or to rewrite the definition using the same arguments that

---

41/ Id. at 269.

42/ 163 U.S. 537 (1896).

43/ Id. at 556.

perfected it.44/

Much of the resistence to change was due to the refusal of whites to accept the fact that Blacks were human. Some clung to the notion of Divine Right, which gave whites absolute power over Blacks as their subjects. Others were afraid that Blacks would come to know, understand and collectively assert the very constitutional rights so long denied them, and ultimately lead to a restructuring of the whole society. Many feared this possibility.

To the credit of America, the institution of slavery was outlawed. However, race remained the badge of slavery which, for most Blacks, could not be hidden. Slavery and what it meant to white men remained in the minds of Blacks and compelled them to systematically turn to the Courts to seek a pure legal existence.

Politically, Blacks have had to seek judicial relief to thwart the efforts of those who sought to deny them the right to vote,45/ the right to serve on juries,46/ and the dignity of even sitting in the courtrooms of this nation.47/ The effects of slavery kept Black children from obtain-

---

44/ See Smith, Edwin Meese on the Supreme Court, Wash. Post, Oct. 31, 1986, at A26, col. 4; Taylor, Meese and the Supreme Court: He Deals with Critics by Softening His Remarks, N. Y. Times, Nov. 19, 1986, at A16, col. 1; Glasser, Cooper v. Aaron [358 U.S. 1 (1958)]: What Did Meese Mean? Wash. Post, Nov. 24, 1986, at A14, col. 5; Kurtz, Meese's View on Court Rulings Assailed, Defended, Wash. Post, Oct. 24, 1986, at A12, col. 1; Meese, The Lawman, Calls for Anarchy, N.Y. Times, Nov. 2, 1986, at E23, col. 1; Meese, The Tulane Speech: What I Meant, Wash. Post, Nov. 13, 1986, at A21, col. 4; Mr. Meese Replies, Wash. Post, Nov. 14, 1986, at A26, col. 1; Abrams, So Much for Meese's 'Original Intention,' N.Y. Times, June 4, 1987, at A27, col. 1.

45/ Lane v. Wilson, 307 U.S. 268 (1939).

46/ Strauder v. West Virginia, 100 U.S. 303 (1879).

47/ Johnson v. Virginia, 373 U.S. 61 (1963).

ing a competitive education in the South,48/ and relegated them to inferior educations in other sections of the nation.49/ Race restricted Blacks from gaining an education in public, graduate, and professional schools,50/ to purchase homes in white communities,51/ and exposed them to prosecution for marrying a non-Black person.52/ The effects of slavery have caused labor unions to refuse to represent Blacks in labor disputes,53/ and cities to refuse Blacks the use of public recreational facilities,54 / even libraries.55/

If one should doubt that there existed a national effort to limit the legal existence of Blacks, one need only refer to the exhaustive compilation of States' Laws on Race and Color by Dr. Pauli Murray for support of this assertion.56/ This denial to Blacks of full participation in the moral, political, social, and economic offering argued for years as derived from the text of the Constitution is regrettable, in light of the extent to which

---

48/ H. A. Bullock, A History of Negro Education in the South (1967); J.G. Van Deusen, The Black Man in White America 159-177 (1938).

49/ Brown v. Board of Education, 347 U.S. 483 (1954).

50/ Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

51/ Shelly v. Kraemer, 334 U.S. 1 (1948). See also, Weaver, Race Restrictive Housing Covenants, 20 J. Land and Public Utility Economics 183 (1944).

52/ Loving v. Virgnia, 338 U.S. 1 (1967).

53/ Steel v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

54/ Lombard v. Louisiana, 373 U.S. 267 (1963).

55/ Brown v. Louisiana, 383 U.S. 131 (1966).

56/ P. Murray, States Laws on Race and Color (1950); P. Murray, Song in a Weary Throat 284-290 (1987) (describes how states laws on race and color came about.) See also, P. Murray, "Constitutional Law and Black Women," American Law and the Black Community Viewed by Black Women Lawyer, Afro-American Studies Program, Boston University, Occasional Paper No. 1, at 33 (1973). Smith, Black Bar Associations and Civil Rights, 15 Creighton L. Rev. 651, 667 (1982).

Blacks have defended this nation on the battlefields of the world.57/

H.

Toward the Twenty-First Century

The bicentennial of the United States Constitution is here. All Americans can and should reflect upon the values embodied in this instrument of rule. The Constitution deserves the support of American citizens. The bicentennial will present an excellent opportunity for Black Americans to review the pages of constitutional history that has denied them the right of full citizenship in their country, as well as those pages of constitutional history that they have written, corrected and re-written.

The question facing Blacks in Colonial America remains unanswered today: What direction will the interpretation of the United States Constitution take in order to obtain, secure and protect the rights of Black Americans?

As we focus our sights on the Twenty-First Century, hopefully, this nation will forever revere and never retreat from the intrinsic worth, embodied in the principle that all persons are created equal, and the principle that all of humankind is originally and legally free.

57/ Houston, Critical Summary: The Negro In the U.S. Armed Forces In World Wars I and II, 12 J. Negro Ed. 364 (1943); Hastie, Negro Officers In Two World Wars, 12 J. Negro Ed. 316 (1943); K. Miller, History of the World War for Human Rights, 439 (1919). I. H. Lee, Negro Medal of Honor Men 139-142 (1969).