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SPEECH: Remarks at the ThurgoodMarshall Commemorative Luncheon

Constance Baker Motley

FOREWORD: JUDGE CONSTANCE BAKER MOTLEY*

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Judge Constance Baker Motley was born in New Haven and attended New Haven's public schools. She received her Bachelor of Arts degree in 1943 from New York University and her LL.B. in 1946 from Columbia University School of Law. Judge Motley joined the legal staff of the NAACP Legal Defense and Educational Fund, Inc. in her third year at Columbia Law School and subsequently, as associate counsel, became its principal trial attorney. It was there that she began her long colleagueship with Thurgood Marshall, and she was one of the lawyers who, in 1954, helped write the briefs filed in the landmark school desegregation case of *Brown v. Board of Education*.[1]

In addition to appearing before state and federal courts throughout the United States in numerous civil rights matters, Judge Motley argued ten cases before the U.S. Supreme Court,[2] winning nine, which were of key importance in securing equal rights for black Americans and bringing about the legal death of discrimination. The litigation that resulted in the admission of James Meredith to the University of Mississippi,[3] Charlayne Hunter Gault and Hamilton Holmes

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[1] 347 U.S. 483 (1954).

[2] Swain v. Alabama, 380 U.S. 202 (1965); Hamm v. City of Rock Hill, 379 U.S. 306 (1964); Bouie v. City of Columbia, 378 U.S. 347 (1964); Barr v. City of Columbia, 378 U.S. 146 (1964); Calhoun v. Latimer, 377 U.S. 263 (1964); Watson v. City of Memphis, 373 U.S. 526 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963); Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963); Turner v. City of Memphis, 369 U.S. 350 (1962); Hamilton v. State of Alabama, 368 U.S. 52 (1961).

[3] Meredith v. Fair, 298 F.2d 696 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

to the University of Georgia,[4] Vivian Malone and James Hood to the University of Alabama[5] and Harvey Gantt to Clemson College[6] are some of her better known cases. She also participated as chief counsel in many other school desegregation cases supported by the Legal Defense Fund, as well as cases involving housing, transportation, recreation and public accommodations.

In 1964, Judge Motley became the first black woman to be elected to the New York State Senate. She immediately began a campaign for the extension of civil rights legislation and for additional low and middle income housing. In February 1965, she was elected by the Manhattan members of the New York City Council to fill a one-year vacancy in the office of President of the Borough of Manhattan and thus became the first woman to serve in that office and as a member of New York City's Board of Estimate. She was elected to a full four-year term in November 1965, when she became the first candidate for the Manhattan Presidency to win the endorsement of the Republican, Democratic and Liberal Parties. As Borough President, Judge Motley drew up a seven-point program for the revitalization of Harlem and East Harlem, and won a pioneering fight for $700,000 to plan for the renewal of those and other underprivileged areas of the city.

On January 25, 1966, President Johnson nominated Judge Motley for a seat on the United States District Court for the Southern District of New York. She was the first woman appointed to the Southern District bench and the first black woman appointed to the federal judiciary. She became Chief Judge of the Southern District on June 1, 1982, and served until October 1, 1986, when she assumed senior status.

It is entirely fitting that, on the occasion of the Association's Second Annual Justice Thurgood Marshall Commemorative Luncheon, Judge Motley should share her thoughts on the effects of *Plessy v. Ferguson*,[7] on this, the one hundredth anniversary of that ill-begotten decision.

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[4] Holmes v. Danner, 191 F. Supp. 394 (M.D. Ga. 1961).

[5] Adams v. Lucy, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

[6] Gantt v. Clemson Agricultural College of South Carolina, 320 F.2d 611 (4th Cir.), *cert. denied*, 375 U.S. 814 (1963).

[7] 163 U.S. 537 (1896).

REMARKS AT THE THURGOOD MARSHALL COMMEMORATIVE LUNCHEON*

Hon. Constance Baker Motley†

April 24, 1996
Association of the Bar of the City of New York

May 18, 1996, is the one hundredth anniversary of the Supreme Court's decision in *Plessy v. Ferguson*.[1] Of course, those of us who have been personally involved in the struggle of black Americans over the last fifty years are turning our attention not to a celebration of the infamous *Plessy* decision but to a historical assessment of how the country has evolved in the past century, notwithstanding the Supreme Court's affirmance of the doctrine of "separate but equal."[2] There are going to be, for example, several conferences during the next few weeks at which civil rights advocates, academics and intellectuals will gather and discuss the historical context of *Plessy*, its searing influence on American societal development and, of course, the revolutionary effect of *Plessy*'s reversal by the Supreme Court in *Brown v. Board of Education*.[3] *Plessy* was the Supreme Court's decision to uphold race-based classifications as consistent with the Thirteenth and Fourteenth Amendments to the U.S. Constitution, a decision that took almost sixty years to overturn and whose effects we still feel to this day.

These conferees will certainly be discussing their concern about the fact that at the end of the twentieth century, one hundred years after *Plessy*, we face the impending demise of affirmative action. This concern is obviously misplaced.

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† Senior Judge, United States District Court, Southern District of New York.

[1] 163 U.S. 537 (1896).

[2] *Id.* at 552.

[3] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

Affirmative action is already dead. The Supreme Court, by requiring any such government-based programs to withstand the "strict scrutiny" test under the Fifth and Fourteenth Amendments, has, in my opinion, effectively killed affirmative action, except as a remedy for proven past discrimination.[4] As Justice Marshall said in his concurring opinion in *Fullilove v. Klutznick*,[5] a case involving a federal affirmative action program, strict scrutiny is "strict in theory, but fatal in fact."[6]

The *Plessy* decision was rendered at a time that parallels the period in which we now find ourselves at the end of the twentieth century. The nineteenth century had witnessed an epic struggle in American society to bring about racial equality in its racially diverse community of free persons that came into being after the Civil War and a newly amended Constitution. The nineteenth century ended with the separate but equal compromise of the Fourteenth Amendment.[7] Today, we Americans find ourselves nearing the end of another epic struggle for racial equality whose auspicious rise with the decision in *Brown* may now decline with the demise of affirmative action. Just as *Plessy* signalled that "separate but equal" would be tolerated, the end of affirmative action in government programs will undoubtedly signal to many in the private sector an end to all affirmative action, leaving black Americans without effective legal redress for continuing racial discrimination in education, employment and housing.

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The nineteenth century, as you know, found us engaged in a struggle to end slavery, to confer citizenship on the former slaves and to enact laws designed to protect the former slaves

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[4] *See infra* notes 20-28 and accompanying text.

[5] 448 U.S. 448, 519 (1978) (Marshall, J., concurring).

[6] *Id.*

[7] U.S. CONST. amend. XIV, § 1 provides:

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. 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.

from discrimination by individuals as well as former hostile southern state governments. At the same time, it was a period of great uncertainty and dramatic change: politically, socially and economically.

Winning the emancipation of the slaves in this country was a long and divisive struggle. The South opposed the North's effort to free the slaves and correct the economic distortion caused by the North's paid labor. Civil war was visited upon this country when the South seceded from the Union in 1861 and fired upon Fort Sumter. The cause of human freedom was taken up by President Lincoln who, pursuant to his war powers, issued a proclamation on January 1, 1863, declaring slaves in states in rebellion against the United States free.

When the North finally claimed military victory on the battlefield, Congress was dominated by radical Republicans determined to make the South pay for the havoc caused by the war and to accept the end of slavery. Feeling that Lincoln's emancipation was not sufficient, the radical Republicans quickly passed in the Congress an amendment to the Constitution barring slavery on our shores.[8] The radical Republicans also shepherded through the Congress the Fourteenth Amendment, which was expressly designed to confer national citizenship on the former slaves by granting citizenship to everyone born in the United States, by conferring citizenship upon former slaves in the states wherein they may reside and by expressly prohibiting the states from denying citizenship rights to these new citizens. Despite these efforts in the former slave states, the new citizens were denied the right to vote. In response, another amendment was proposed by the radical Republicans in the Congress that protected the former slaves' right to vote.[9]

Five years after the end of the Civil War, the nation faced a grim reality: approximately four million newly emancipated

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[8] U.S. CONST. amend. XIII, § 1 provides: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or anyplace subject to their jurisdiction."

[9] US. CONST. amend. XV, § 1 provides: "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."

slaves were without jobs, training, family structure or political power. The Freedmen's Bureau was hastily set up by the Congress to aid the slaves in their transition from slavery to freedom, but resistance by former white plantation owners was fierce, and efforts to keep former slaves from voting became a major objective of these opponents. Congress began to enact laws to carry out the purposes of the new amendments to the Constitution and conferred upon federal district courts the power to enforce those laws.

Just the thought of freedom had, of course, energized the black population as they moved about the country—as white men before them had—seeking work and opportunity for economic development and expansion. Some blacks even left the South and tried to reach Kansas and other places so that they could become homesteaders with free government land.

By 1875, the radical Republicans and the Congress were satisfied that they had enacted into law all of the protections that the former slaves needed to enjoy the blessings of freedom. Resistance to the inclusion of former slaves in the body politic, however, continued. The former slaves were excluded from public schools and recreational facilities in the southern states. They were excluded from railroad cars set aside for whites and kept from places of accommodation, such as hotels, restaurants and theaters. Their newly conferred freedom was largely illusory.

To circumvent the Fourteenth Amendment, which guaranteed the equal protection of the laws, former slaveowners—who were basically racists who believed in the inferiority of blacks and feared the loss of white power and "superiority" that would come with the intermingling of the races—decided that in order to keep the white race "pure," separate public facilities for blacks had to be established. By 1896, most of the southern states actually had laws requiring racial segregation, as exemplified by the statute enacted by Louisiana making it a crime for a black person or a person with a very small amount of black blood to refuse to leave a railroad car designated for whites.[10] At the same time, certain groups, such as the former abolitionists, were moving ahead with programs to aid blacks. In addition, the era also saw

[10] 1890 LA. ACTS 111.

blacks gaining control of the state governments in South Carolina and Mississippi and a large measure of control in other places, like Louisiana, where there were large black populations. By 1896, however, with the withdrawal of federal troops, former slaveowners were back in full control of state governments again, and relations between the races were poor as black men sought to compete with white workers for whatever jobs were available off the plantation.

Consequently, after a century of agitation to free the slaves, a civil war, a new Constitution, new laws to protect the newly freed slaves and general social upheaval stemming from emancipation of four million people, by 1896, the white majority had become weary of the race question, which many people started to consider insoluble because of the white majority's refusal to accept blacks as political and social equals and because of the tremendous economic investment required to prepare blacks for industrial jobs. The Supreme Court justices were obviously aware of the turmoil that had engulfed the South, particularly after the Civil War, and felt that the issue of black equality had to be compromised if the country was to move ahead in its social and economic development.

When a black man with one eighth black blood challenged Louisiana's railroad segregation policy in the Supreme Court, the Supreme Court upheld racial segregation as meeting the equal protection clause requirement of the Fourteenth Amendment.[11] As a result of that Supreme Court pronouncement, the conflict between two movements—one toward, and one away from, greater inequality—was resolved for the time being: the issue of the constitutionality of racial segregation was settled and a new era of domination of our political and social institutions by racists was ushered in, with the imprimatur of the Supreme Court. The black community, of course, was demoralized, along with their white supporters. Policies that had been initiated by major public and private institutions to bring blacks into the family, so to speak, were soon abandoned and the public policy of the country became one of racial segregation of people of color: that is, blacks and people of mixed race.

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[11] Plessy v. Ferguson, 163 U.S. 537 (1896).

When we entered the twentieth century, racial segregation had become national policy. Blacks were segregated in the armed forces, and many blacks who had succeeded in getting elected to Congress in the last century lost their seats. Many blacks were denied employment in federal agencies in the District of Columbia where previously they had been employed. The fledgling National Association for the Advancement of Colored People struggled with the major issues facing blacks throughout the country. In particular, it fought for national legislation banning lynching that never got through Congress because of opposition from southern politicians.

Two world wars saw Americans fighting for democracy in segregated military units. During World War II, the membership of the NAACP doubled as a result of the thousands of black servicemen overseas who joined the organization realizing that it was the only agency fighting for their protection. One poignant incident, which occurred during World War II and proved particularly embarrassing, involved American soldiers transporting German prisoners of war on a bus to a prison camp in the South. Only the black American serviceman had to ride in the back of the bus while the German prisoners of war rode in the front.

After the war, ominous agitation for the equal rights of returning servicemen began to arise in the nation's major cities. In New York City, black servicemen were denied the right to rent apartments in Stuyvesant Town, a Metropolitan Life Insurance Company sponsored housing project to which New York City had just given a twenty-five year tax exemption. Levittown, a new community built on Long Island for returning GIs who had recently been granted low-cost mortgage insurance by Congress, was closed to black servicemen. When that new community was built, thousands of white families left New York City with government aid long before the Supreme Court's *Brown* decision. Black servicemen were similarly barred from Levittown in Pennsylvania.

In 1946, the NAACP and its legal arm decided to make a direct attack upon the constitutionality of racial segregation. It was determined that the American institution of segregation was so entrenched that it could be dismantled only in one area at a time and that the most important area in which segregation had to be eliminated was public education. The

American experience had demonstrated that people were able to rise out of poverty if they were able to receive basic education and training for jobs in the industrial economy. Racial discrimination thus had two immediate effects on black Americans: First, it prevented them from gaining the education and training required for economic advancement; second, it prevented them from gaining employment to enable them to rise out of poverty and into the working class.

The biggest obstacle to ending racial segregation in education was, therefore, the Supreme Court's decision of 1896 in *Plessy v. Ferguson*. The NAACP and its legal unit had been able to make some incremental progress prior to the war by attacking racial segregation in southern states where those states were most vulnerable: that is, at the graduate and professional school level where separate facilities for blacks had not been provided.[12] The NAACP decided to resurrect the campaign against racial segregation in education and broaden it to include a legal challenge to the authority of state governments to operate separate institutions for blacks and whites.

Thurgood Marshall was the chief counsel for the NAACP and its legal arm at that particular juncture. He succeeded in bringing together the best legal minds in the country at that time committed to equal rights for black Americans. Several suits were filed that eventually reached the Supreme Court at the same time and resulted, in 1954, in a decision holding racial segregation in public education unconstitutional.[13] The Court did not explicitly reverse *Plessy v. Ferguson*, but the effect of its decision was exactly that. And then, in a series of cases between 1954 and 1964, racial segregation in all other public facilities and services was barred by the Supreme Court pursuant to its decision in *Brown*.[14] As a result, legal enforcement of racial segregation came to an end.

Congress, as a result of Martin Luther King's March on Washington in August 1963, finally resumed its rightful role

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[12] *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[13] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[14] *E.g.*, New Orleans City Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

and re-enacted and strengthened every law enacted by the Reconstruction Congress between 1865 and 1875. In addition, Congress gave the federal government authority to bring actions against state-wide policies of racial segregation.[15] In 1965, Congress enacted a new voting rights law which superseded in its effectiveness any law previously enacted by it to enforce the Fifteenth Amendment.[16]

It is important to recall this history of the struggle for civil rights for blacks in this country because it must inform the current search for equality between whites and all people of color, a struggle which causes great anguish and which threatens our social fabric once again. It is now apparent that the economic, political and social parallels between the end of the last century and the era in which we currently live are numerous. As in the last century, the end of this century sees us struggling with the issue of the proper role of government in realizing the promise of equality in the face of great economic uncertainty. We should all look back but also forward with an eye to our accomplishments in the area of race relations and recognize our spectacular gains, made even more spectacular in the face of the many setbacks along the way that we have overcome.

The changes that have occurred in American society since 1954 relating to the status of black citizens have been so dramatic and extensive with respect to the ability of blacks to participate in this society that many feel that blacks have now attained all the rights possessed by whites. It is argued that any further legislation relating to government programs to improve the status of blacks would give them preferential status in society as opposed to equal opportunity. As a result, our society now debates the issue of whether government-initiated affirmative action programs that open opportunities, particularly for blacks, should now be ended.

Affirmative action is not a concept new to the United States. Affirmative action commenced almost immediately after the Civil War when the Congress set up the Freedmen's Bureau and private groups embarked upon programs to educate blacks. After the *Brown* decision, the issue of

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[15] Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000a(6) (1988).

[16] Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974e (1988).

affirmative action again came to the fore—as it had after the Civil War—as a necessary strategy for educating and training blacks and for bringing blacks into important societal institutions.

In the area of education, with the compulsory nature of elementary and secondary schooling, the terms and conditions of admission are relatively simple when applied to blacks and whites. Education beyond the high school level, however, is subject to both greater competition and modern economic forces that drive up its cost. It appears that it is this greater competition and expense—along with the modern economic forces that require more and more levels of education in order to achieve economic stability—that make admission to higher education such a vexing issue today.

During World War II, when men were drafted into the service and college and graduate school facilities began to lose their student populations, affirmative action programs arose in many such institutions to increase the admission of blacks and women. When I was admitted to Columbia Law School in February 1944, America had been fighting in the war for two whole years, and the law school had lost most of its student population to the various branches of our armed forces. At the same time, there were very few women and blacks seeking higher education at that level. At Columbia Law School, for example, more women and blacks were admitted. In addition, the law school initiated a program to bring to the law school those who would not normally be admitted because their educational backgrounds were not commensurate with those of regularly admitted students. Nobody complained then about affirmative action because of the dearth of students seeking legal education at the time. Most of the blacks who were admitted under the affirmative action program came from southern black colleges. Most of them did not survive, dropped with the lowest fifty percent of the class, as was the practice in those days. However, others were successful.

The moment the war was over, in August 1945, affirmative action ended, and virtually all the seats were filled by white males. There may have been two women in every class until the Women's Rights Revolution in the '70s. And there were never more than two blacks in a class—maybe at the most three—at any time until the early '80s.

When Martin Luther King was killed in 1968, many institutions of higher learning responded to that national tragedy by opening their institutions to more blacks and by establishing special programs to tutor blacks and then admit them. This affirmative action led to the Supreme Court's first encounter with voluntary affirmative action programs at the graduate and professional school level outside the South. In a suit by a white law applicant against the University of Washington, the Supreme Court refused to consider the issue because the plaintiff, Mr. DeFunis, was about to finish school and therefore the issue was moot.[17] Justice Douglas, who by then was in his last days on the Supreme Court, hastily dashed off his views on what everyone could see was probably the most divisive civil rights issue since the *Brown* case.[18] Reading Justice Douglas's dissent made us all realize that a lot of hard legal thinking was necessary before we could resolve that issue—which was not going away. Shortly thereafter, in a plurality opinion in *Bakke*,[19] a case involving the Medical School at the University of California, Justice Powell supplied an answer which is still the best answer: Race is a factor, among others, which a state institution may consider in designing its student body to increase minority presence in the medical profession.

As the struggle to compete in today's marketplace requires higher and higher levels of education and as the cost of education skyrockets, competition for slots in America's places of higher learning continues to increase. Institutions that may attempt to incorporate affirmative action considerations in their admissions policies are swamped with applications and must turn down many more candidates than they can accept. As a result, in some instances, rejected white candidates have sought to blame blacks and other minorities for their woes.

In a recent decision, *Hopwood v. Texas*,[20] a panel of the Fifth Circuit invalidated an affirmative action program in which the University of Texas Law School used race as a factor in its admission policies. The panel did so on the ground that

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[17] DeFunis v. Odegaard, 416 U.S. 312 (1974).

[18] *See id.* at 320.

[19] Regents of the Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

[20] 78 F.3d 932 (5th Cir. 1996).

race-based preferences must withstand strict scrutiny. The panel claimed to rely on the fact that Justice Powell, in his opinion in *Bakke*, was the only judge who actually upheld the use of race as a factor, among others, that a state supported institution could constitutionally use in selecting students for a graduate and professional school program promoting diversity in its admissions policies.

The Fifth Circuit's decision involving the University of Texas Law School, which comes forty-six years after the Supreme Court decision in *Sweatt v. Painter*[21] opened the University of Texas Law School to blacks, has caused great consternation in the civil rights community. Similarly, the Fourth Circuit's 1994 decision in *Podberesky v. Kirwan*[22] invalidated the University of Maryland's special scholarship for black students on the ground that the university had failed to show that it had engaged in past discrimination which would justify a race-based affirmative action program there. The Supreme Court refused to review that decision. It is pure, unadulterated irony that the University of Texas Law School, whose institutional segregation was felled by Marshall as a lawyer, and the University of Maryland, whose law school rejected Marshall as a college graduate-applicant on account of his race in 1930, should be the institutions involved in these anti-affirmative action decisions. Both circuit courts failed to note the special complexity of the problem before them. The Fifth Circuit failed to note that forty years after *Brown*, Texas is still maintaining a law school originally built for *Sweatt* in 1946, when he first applied to the University of Texas Law School. The Fourth Circuit made no comment about the fact that Maryland still operates Morgan State, a historically black college.

These two decisions have come down in the wake of recent Supreme Court decisions applying the strict scrutiny test to race-based governmental preferences, namely *City of Richmond v. J.A. Croson Co.*,[23] and *Adarand Contractors v. Peña*.[24] Both of these cases involved affirmative action programs

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[21] 339 U.S. 629 (1950).
[22] 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995).
[23] 488 U.S. 469 (1989).
[24] 115 S. Ct. 2097 (1995).

designed to insure that black construction companies and workers—along with other "disadvantaged groups" in *Adarand*—received a specific preference in bidding for government contracts.

It should be noted that the question raised by these recent suits involving affirmative action is how long must the American community afford special treatment to blacks who were once a special subject of state discrimination? This is the difficult question with which we wrestle today. The problem is that the issue of affirmative action is extremely complex because it appears in many different forms in many different contexts, and its continuing propriety in a certain area may be unjustified while clearly necessary in another. Indeed, for thirty years the Supreme Court has attempted to juggle not only the many questions raised but also the interests at stake in these cases, as exemplified by the line of cases starting with *Franks v. Bowman Transportation Co.*[25] and *United Steelworkers v. Weber*,[26] and ending with the *Croson* and *Adarand* cases described above.

There is obviously a continuing need to require affirmative action by southern states that still maintain dual school systems, including separate college and professional schools, as evidenced by the Supreme Court's decision in 1992 in the University of Mississippi case.[27] There the Supreme Court ruled that Mississippi has the burden of demonstrating that it has some educational justification for continuing to maintain and operate separate colleges in Mississippi for blacks and whites, notwithstanding the Supreme Court's decision forty-two years ago in the *Brown* case. So affirmative action has not yet run its course in education in the southern states.

In the area of employment discrimination, where blacks may have made the greatest progress through affirmative action programs, again, no single affirmative action program is applicable. Blacks who are seeking entry level jobs and jobs

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[25] 424 U.S. 747 (1975) (holding that equitable relief under the Civil Rights Act of 1964 could include the award of retroactive seniority to black employees, even if that affected the status of white co-workers).

[26] 443 U.S. 193 (1979) (holding voluntary, private affirmative action program to benefit black employees that affected the prospects of white co-workers was acceptable under the Civil Rights Act of 1964).

[27] United States v. Fordice, 505 U.S. 717 (1992).

requiring relatively little education and training probably made the greatest progress in securing employment in the American economy. As we proceed up the employment structure, where the higher level positions require greater and greater amounts of education, it has been more difficult to bring in blacks who have the requisite training and ability. This fact of American life can be traced to the former slave status of blacks and unequal educational opportunity in society as a whole. But societal discrimination as a justification for affirmative action has been ruled out by the Supreme Court in the *Croson* and *Adarand* cases. The Supreme Court's recent rejections of a societal justification for affirmative action is odd, however, given the fact that the Court in *Brown* denied the individual plaintiffs their personal and present right to attend previously all white schools in the face of administrative realities. The *Brown* Court, when trying to find an appropriate equitable remedy to deal with segregated schools in southern school districts, failed to afford the individual plaintiffs an individualized remedy precisely because segregation was a long tolerated societal ill involving a number of states and a problem which had existed for at least sixty years.

In short, the Supreme Court has recognized that there are times when individual and personal rights, such as those sought by the white plaintiffs who attack affirmative action programs, must give way to the greater societal needs of rectifying our society's unique experience with racial segregation, particularly in public education. Indeed, in one of the very first cases to reach the Supreme Court involving voluntary affirmative action in employment, Justice Brennan, in his opinion for the Court, remarked in response to the minority opinion in that case:

> The dissent criticizes the Court's result as not sufficiently cognizant that it will "directly implicate the rights and expectations of perfectly innocent employees." We are of the view, however, that the result which we reach today—which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that "[a]ttainment of a great national

> policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[28]

It is simply unjust to ask the black community to bear all of the sequelae of the transition from a segregated society to a nonsegregated society on the theory that the present day white majority has little connection to our historic segregated past and that the sins of their fathers should not be visited upon them today.

One of the reasons for establishing our Constitution after the Revolution was that the American people believed, as they proclaimed in the Preamble, that a constitution governing all of the people of the United States, who were mainly British subjects, was necessary, among other things, "to establish justice." The Constitution as originally drawn made no reference to the fact that, as proclaimed in the Declaration of Independence, all Americans were considered equal members of society. Such equality among Americans was simply assumed. In the case of newly freed slaves, there was no such automatic assumption. The issue had to be squarely met after emancipation because of widespread belief in the inherent inferiority of Africans; and that is why we have a clause in the Fourteenth Amendment to the Constitution dealing with the issue of equality. It was recognized by the white leadership class in 1868 that if blacks were to become citizens as a result of that amendment to the Constitution, justice required that they have the same status in the American community that white citizens had. It has taken more than one hundred years for us to see in the American community substantial numbers of black people who have succeeded in gaining equal social, political and economic status with white citizens.

Notwithstanding all of the social and economic turmoil in the country, the fact remains that blacks do have equal legal status in this society. All state laws, policies and regulations limiting the freedom of black persons in the society have been stricken as unconstitutional, and Congress has provided them with many effective remedies for curing any violations of their rights or privileges based solely on their race. Thus, the major

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[28] Franks v. Bowman Transp. Co., 424 U.S. 747, 777-78 (1976) (alterations in original) (citations and footnotes omitted).

challenge of this society in the twentieth century has been met: that is, to remove government support for former slave status. This is not to say that there is no longer any race discrimination on the part of certain individuals or that we need not be as vigilant as we once were about monitoring racial discrimination by government. It only says that our society in this century may well have accomplished as much, if not more, than was accomplished in the last century when slavery was eliminated.

I would suggest that the alarm in the civil rights community in the wake of recent court decisions overturning voluntary affirmative action remedies in employment and higher education is understandable. After all, it took sixty years to get the Supreme Court's decision in *Plessy v. Ferguson* overturned. It is truly cause for concern that we may have to wait another sixty years for another *Brown* decision to usher in a more just theory of equality under our Constitution. It is clear that some vestiges of slavery and *Plessy* still exist and must be remedied.

Thus history teaches us that the issue of racial equality has not been completely and finally resolved. The struggle for racial justice is like a prairie fire. You may succeed in stamping out the struggle for equality in one corner and, lo and behold, it appears soon thereafter somewhere else. We have had affirmative action, at least as far as the black community is concerned, since emancipation. Notwithstanding all of the opposition to equal status for blacks in the American community, blacks have never occupied a more equal status in society than we do today.

Our honoree today, Brian Stevenson, is a reminder, again, of the fact that you cannot stamp out forever the struggle for justice in this country. We have had a little more than 200 years of experience with our commitment to justice for all. That is a very short time in the life of a nation. And for every civil rights leader who passes on, like Thurgood Marshall, the torch is passed to the next generation of civil rights warriors that Mr. Stevenson represents.