

# THE PROMISE OF AMERICA<sup>†</sup>

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## INTRODUCTION

One of my favorite movies is *The Godfather*.<sup>1</sup> We all know that Marlon Brando earned an Oscar for his role as Don Vito Corleone.<sup>2</sup> But do you recall how the movie began? Totally black screen and silence. Then the audience hears a voice. The voice of an immigrant—Bonasera, the undertaker. He sternly and forcefully says “I believe in America.”<sup>3</sup> Nothing extraordinary, but he sets a tone. His statement made me wonder: Why do we believe in America? What is it that makes us believe in America? Is it the notion of Freedom? Opportunity? Justice? Equality? Each is important to our republic, but today, I choose to focus on equality because I believe it is the cornerstone principle of our democracy.

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<sup>1</sup> *THE GODFATHER* (Paramount Pictures 1972).

<sup>2</sup> *Marlon Brando*, OSCARS.ORG, [http://awardsdatabase.oscars.org/ampas\\_awards/DisplayMain.jsp?curTime=1457164150174](http://awardsdatabase.oscars.org/ampas_awards/DisplayMain.jsp?curTime=1457164150174) (last visited Mar. 5, 2016).

<sup>3</sup> *THE GODFATHER*, *supra* note 1.

In drafting the Declaration of Independence, our forefathers put forth the imperative requiring the colonies to revolt and to protest the tyranny of the monarch, George III.<sup>4</sup> The colonists had sincere and real complaints evidencing the inequity in His Majesty's rule in America.<sup>5</sup> Despite the ostensible purpose of the Declaration, it is vastly better known for its opening salvo—"We hold these truths to be self-evident, that all men are created equal."<sup>6</sup> The question I grapple with today is: What is the meaning of the word "equal" in the Declaration and as we contextualize the notion of equality in 1776. The simple question for consideration is: Does equal mean equal? Did it ever, and through the history of our country, has the notion of equal meaning equal ever been achieved? My goal today is to trace the notion of equality from the Declaration of Independence to the Supreme Court's treatment of the idea of equality from *Dred Scott*<sup>7</sup> to *Brown*.<sup>8</sup>

#### I. NOTIONS OF EQUALITY IN THE DECLARATION AND IN CONTEMPORANEOUS WRITINGS

Today, constitutional scholars battle over the meaning of the words in our Constitution.<sup>9</sup> Whether originalist, textualist, or one propounding the theorem of the Living Constitution, the quintessential question persists: What meaning shall we give to the words of the text? Should the plain meaning be ascribed to the words, such that all can understand? Should it be the meaning of the words, not as uttered in 1789, 1791, or 1868, but as understood in the intrinsic complexity of a society that no person from bygone days could fathom or contemplate? While my day job as a judge on the United States Court of Appeals for the Third Circuit requires me to cogitate and then opine on the issues of the day, my avocation allows me to ponder this astonishingly complex issue.

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<sup>4</sup> See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>5</sup> See *id.*; see also PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 105-23 (1997); cf. JOHN LIND, AN ANSWER TO THE DECLARATION OF THE AMERICAN CONGRESS (London, 1776) (providing a contemporaneous rebuttal to the colonists' complaints).

<sup>6</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>7</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>8</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>9</sup> See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009) (arguing that the ideas of originalism and living constitutionalism are compatible); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (analyzing originalist theory and arguing for an objective inquiry into intent, rather than for an inquiry into the subjective intent of Congress); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005) (analyzing textualism and distinguishing it from intentionalism).

Of course, the Declaration is not subject to modern day canons of construction.<sup>10</sup> It is a document no less critical to the formation of our republic than the Constitution, but more foundational to our country's aspirations than its laws. The Declaration of Independence is a document that breathed life into an ideal of freedom. Interestingly, historians, lawyers, philosophers, and academics seem to be in agreement that the men who signed this document forever enshrined in the halls of history surely could not have meant what they said regarding equality.<sup>11</sup> Am I accusing our founders of being disingenuous? No. It was beyond their collective ken to conceive that the breadth and scope of so plain and straightforward a statement could apply to all of humankind. But, did the signers of the Declaration believe that what had been written was true? Not as such apparently.<sup>12</sup> Equally true—based on the realities of colonial times—was the notion that women, slaves, freemen, people of color, and men of limited means or education surely could not have felt as though they were considered equal to our founders. Although I would dare say that Crispus Attucks and others similarly situated may have.<sup>13</sup>

As we now look back at the document with the benefit of history and hindsight, was equality—true equality—ever a principle our forefathers embraced? In truth, the signers of the Declaration did not.<sup>14</sup> Needless to say, and sadly, at the time, women were not within anyone's contemplation.<sup>15</sup> Slavery provided the line of demarcation that could not be overcome. Although the term "all men are created equal"<sup>16</sup> sang with an appealing universality, it was not intended to be so. For example, Jefferson and many of the signers of the Declaration were slaveholders.<sup>17</sup> As such, it was clearly understood regarding the Declaration that the notion of white supremacy had a solid foundation and support among its signers. It is evident from his writings that Jefferson, the father of liberty, thought Blacks to be inferior to Whites in

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<sup>10</sup> The Declaration of Independence does not hold the same position in our legal firmament as the Constitution. As such, it is not subject to the same interpretational rigor as the Constitution, and the canons of construction applicable to constitutional interpretation are not relevant in any discussion of the Declaration.

<sup>11</sup> See, e.g., MAIER, *supra* note 5, at 192 ("The equality mentioned, moreover, was generally between rich and poor white men, or those who lived in different geographical sections; its application to women or people of other races or persons with conflicting religious convictions would open whole new fields for conflict.").

<sup>12</sup> See *infra* text accompanying notes 17–19.

<sup>13</sup> AFRICAN AMERICAN LIVES 35–36 (Henry Louis Gates Jr. & Evelyn Brooks Higginbotham eds., 2004).

<sup>14</sup> See *infra* text accompanying notes 17–19.

<sup>15</sup> MAIER, *supra* note 5, at 192.

<sup>16</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>17</sup> See A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).

both body and mind.<sup>18</sup> In his *Notes on the State of Virginia*, Jefferson described Blacks in loathsome physical terms, as though they were incapable of exhibiting intellect at all.<sup>19</sup>

It is also apparent that equal did not mean equal by examining the other documents that were proclamations of freedom and independence penned contemporaneously with the Declaration of Independence. Some historians concede that the genesis of the Declaration of Independence arose from Hobbes's articulation of natural rights in the seventeenth century.<sup>20</sup> With Hobbes's notions of natural rights as background, the intellectuals of the Revolution were careful to articulate natural rights as to not liken it with equality. For example, the Sheffield Resolves (or Sheffield Declaration)<sup>21</sup> was approved in January of 1773 by a committee appointed by the people of Sheffield, Massachusetts, as a document airing grievances against the British and declaring the existence of certain individual rights several years prior to the Declaration of Independence.<sup>22</sup> The key language and the primary resolution was "[t]hat mankind in a state of nature are equal, free, and independent of each other, and have a right to the undisturbed enjoyment of their lives, their liberty and property."<sup>23</sup> Not quite four years later, George Mason, the drafter of the Virginia Declaration of Rights, put forth language in an earlier draft which noted "that all men are born equally free and independent, and have certain inherent natural rights, of which they cannot, by any compact, deprive or direct their posterity."<sup>24</sup> When debating the Declaration of Rights in 1777, the Virginia Convention changed the opening phrase to state "[t]hat all men

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<sup>18</sup> *Id.* at 9.

<sup>19</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 145–46 (Frank Shuffelton ed., Penguin Books 1999) (1785).

<sup>20</sup> ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY, AND THEOLOGY 115 (1998) ("Jefferson was familiar with writings from . . . [Hobbes] . . . when he wrote the Declaration . . ."). Hobbes believed that each human was endowed with the natural right to preserve one's own life—by any means necessary—but that men aspire to peace, and should lay down this right to form a mutually beneficial government—the social contract. THOMAS HOBBS, LEVIATHAN ch. XIV (Richard Tuck ed., Cambridge Univ. Press 1988) (1651) ("[T]he Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own . . . Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto. . . . 'That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.'").

<sup>21</sup> *Sheffield Declaration*, MASS. SPY OR, THOMAS'S BOS. J., Feb. 18, 1773, at 1.

<sup>22</sup> *Id.*; see also RICHARD E. WELCH, JR., THEODORE SEDGWICK, FEDERALIST: A POLITICAL PORTRAIT 13 (1965).

<sup>23</sup> *Sheffield Declaration*, *supra* note 21; see also AFRICAN AMERICAN LIVES, *supra* note 13, at 317.

<sup>24</sup> MAIER, *supra* note 5, at 126 (quoting an earlier draft of the Virginia Declaration of Rights).

are by nature equally free and independent and have certain inherent rights.”<sup>25</sup> Most of the colonies devised and adopted similar declarations with similar language.<sup>26</sup> Whatever we may think of the language forever immortalized, none of the Bills of Rights or Declaration of Rights of any of the revolutionary states used the words “all men are created equal.”<sup>27</sup>

The problem with the words of the Declaration of Independence was that the obvious clarity made plain the risk of the document. More important, the states knew the havoc to be wreaked by an unfettered adoption of these words. The Virginia Convention understood that any assertion or affirmation of equality would create problems for a slave society.

Interestingly, despite the contemporaneous attempt of the states to distance themselves from the plain language of the Declaration of Independence, the stature of the Declaration only grew over time. In fact, in the early nineteenth century, workers, farmers, women’s rights advocates, and other groups invoked the words of the Declaration to justify their quest for equality.<sup>28</sup> More strikingly, the words of the Declaration provided solace to the abolitionist movement because the same words used to combat King George’s tyranny could be equally effective against the tyranny of peonage.<sup>29</sup> After all, the essence of the Declaration was plain in its purpose and intent—no one man is born with a natural right to control any other man.<sup>30</sup>

Equality—what it meant and whether its achievement was a national imperative—dominated the social and political landscape of the first half of the nineteenth century.<sup>31</sup> As such, some men of politics tried to distance themselves from the reference to equality set forth in the Declaration. Perhaps John Tyler, Senior, a Virginia legislator and later governor, exemplified this view best when he said that “[s]urely [all men] were not created equal in Virginia . . . ; ‘no, sir, the principle, although lovely and beautiful, cannot obliterate those distinctions in society which society itself engenders and gives birth to.’”<sup>32</sup> Even Lincoln did not believe the Declaration spoke of equality in absolute terms. Lincoln denied that the signers of the Declaration of

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<sup>25</sup> *Id.* at 165.

<sup>26</sup> *Id.* States that adopted similar language in their constitutions include: Virginia, Delaware, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire. Philip F. Detweiler, *The Changing Reputation of the Declaration of Independence: The First Fifty Years*, 19 WM. & MARY Q. 557, 561 (1962).

<sup>27</sup> MAIER, *supra* note 5, at 167.

<sup>28</sup> *Id.* at 197.

<sup>29</sup> *Id.* at 197–98.

<sup>30</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>31</sup> See generally ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998).

<sup>32</sup> MAIER, *supra* note 5, at 199 (quoting Virginia legislator John Tyler, Senior).

Independence meant that men were “equal in all respects.”<sup>33</sup> He argued that “[t]hey did not mean to say all were equal in color, size, intellect, moral development, or social capacity.”<sup>34</sup> The drafters had no intention of affirming the “obvious untruth that all were then enjoying that equality.”<sup>35</sup>

## II. FROM *DRED SCOTT* TO *PLESSY*: THE JURISPRUDENCE OF “INEQUALITY”

In the internecine battle between North and South leading up to the Civil War, the Declaration played a prominent role in the Supreme Court case of *Dred Scott v. Sandford*.<sup>36</sup> The case sought to establish that a slave’s status as a freeman or as a slave is directly affected by whether the slave travels to a free territory or state.<sup>37</sup> *Dred Scott* is almost universally viewed as a calamitous decision that exhibited judicial activism at its worst, long before the emergence of judicial activism in American jurisprudence. I raise it here because of the opinion’s reference to the Declaration of Independence and its defense of the notion that “all men are created equal” could not have been a reference to Blacks.<sup>38</sup> Chief Justice Taney denounced on any level the notion of equality in any manner among the races.<sup>39</sup> He noted that Blacks had not been included in the “We the People of the United States”<sup>40</sup> because they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority.”<sup>41</sup> Blacks were “a class of beings whom [whites] had thus stigmatized . . . and upon whom they had impressed such deep and enduring marks of inferiority and degradation.”<sup>42</sup>

In the opinion of the Court, Chief Justice Taney stated that  
the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the

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<sup>33</sup> *Id.* at 205.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 60 U.S. (19 How.) 393 (1857).

<sup>37</sup> *Id.* at 394.

<sup>38</sup> *Id.* at 410.

<sup>39</sup> *Id.* at 404–05.

<sup>40</sup> U.S. CONST. pmb1.

<sup>41</sup> *Dred Scott*, 60 U.S. (19 How.) at 404–05.

<sup>42</sup> *Id.* at 416.

people, nor intended to be included in the general words used in that memorable instrument.<sup>43</sup>

Specifically, the opinion notes:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether 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. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>44</sup>

Chief Justice Taney's claim that there existed a universality of thought regarding Blacks at the time, his blithe dismissal of the rights of free Blacks, and his condemnation of the notion that any person of color—despite status—could be deemed equal, gave the Supreme Court's imprimatur to the notion that despite the plain language of the Declaration, equal did not and could never mean equal.

Although Chief Justice Taney thought that the *Dred Scott* opinion, written as he had conceived it, would stave off the seeming inevitability of the clash among the states,<sup>45</sup> reality would interfere. The Civil War forestalled any discussion of freedom and equality. Lincoln, among all the leaders to have commented on the Declaration of Independence, saw its statements on equality as setting a standard for the future, one that demanded the gradual extinction of conflicting practices as that

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<sup>43</sup> *Id.* at 407.

<sup>44</sup> *Id.*

<sup>45</sup> JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 127 (2006) ("He thought that he was performing a great service for his country by eliminating the divisive issues of African-American citizenship and the Missouri Compromise from the national debate. Like President Buchanan, he hoped that the Court's decision would silence abolitionist agitation and preserve the Union.").

became possible. Prior to the Civil War, during the Lincoln/Douglas debates, Lincoln noted that

[t]he authors of the Declaration of Independence . . . meant “simply to declare the *right* so that the *enforcement* of it might follow as fast as the circumstances should permit. They meant to set up a standard maxim for free men which should be familiar to all, and revered by all; constantly looked to, and constantly labored for, and even though never perfectly attained, constantly approximated and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”<sup>46</sup>

Indeed, to use our contemporary colloquialism, Lincoln “got it.” He clearly understood the enormity of the moment in history when Jefferson and others penned the Declaration of Independence. More important, he acknowledged, as if prescient, that the depth and application of those sacred words were timeless. This was a document for the ages, so powerful as to overcome whatever limitations insouciant politicians may try to place on its breadth. It is this very perspective that was a contributing factor to the conflict that would tear our nation apart.

After unimaginable loss of life,<sup>47</sup> the end of the war brought with it the hope that the principle of equality and its realization would become one. The Thirteenth, Fourteenth, and Fifteenth Amendments (the Civil War Amendments)<sup>48</sup> sought to provide Blacks greater access to the notion of equality. In the process of their passage, there had been some discussion and debate about true equality, which had been the mantra of the most extreme abolitionists in the 1840s and which became a more prevalent rallying cry of a majority of abolitionists as the nation drew closer to Civil War.<sup>49</sup> In the floor debates on the Thirteenth and Fourteenth Amendments, Representative Thaddeus Stevens, an outspoken opponent of slavery, attempted to put forth the notion of

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<sup>46</sup> MAIER, *supra* note 5, at 205–06 (quoting THE LINCOLN-DOUGLAS DEBATES: THE FIRST COMPLETE, UNEXPURGATED TEXT 344–45 (Harold Holzer ed., Fordham Univ. Press 2004) (1993)).

<sup>47</sup> An estimated 620,000 men lost their lives during the war—roughly 2% of the population at the time. *Civil War Casualties*, CIVIL WAR TRUST, <http://www.civilwar.org/education/civil-war-casualties.html> (last visited Mar. 2, 2016).

<sup>48</sup> U.S. CONST. amends. XIII, XIV, XV.

<sup>49</sup> MAIER, *supra* note 5, at 198–99 (“Later and more extreme opponents of slavery condemned the colonizers for their unwillingness to accept blacks into the society of free Americans, fought segregation practices in the North, and, above all, insisted on the ‘immediate’ emancipation of slaves, citing the Declaration of Independence on behalf of their cause. . . . [T]he most radical Abolitionists did not, however, cite the Declaration as a would-be bill of rights—the ‘unalienable rights’ it affirmed were universal, they said, and needed no documentary embodiment—but for what it originally was, a justification of revolution.”).



equality as between the races, but his voice on this matter drew little support.<sup>50</sup> The focus came to be equality under the law. Specifically, the Fourteenth Amendment provided for due process of law and equal protection of the laws.<sup>51</sup> As with most laws, the conundrum lies in enforcement. There was no governmental infrastructure to provide Blacks the ability to achieve any type of equality in those areas protected by the Fourteenth and Fifteenth Amendments.<sup>52</sup> To be sure, there was a respite during Reconstruction. Some historians would even argue that the Thirteenth Amendment was the critical predicate to the move towards equality under the law.<sup>53</sup> However, the inception of vagrancy laws, Black codes, and the ability of law enforcement, together with industry, to subjugate Blacks to involuntary servitude became slavery by another name.<sup>54</sup>

More important, it presented an almost insurmountable impediment to any move to achieve the focused and narrower equality sought to be provided by the Civil War Amendments. As such, Blacks found little solace post-Reconstruction in any of the three branches of government. Because state and local governments insured that—despite the Fourteenth and Fifteenth Amendments—Blacks would assuredly remain in a state of illiteracy and peonage, subject to the whims of all

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<sup>50</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 46 (1976) (“[Stevens] declared that America did not stand for ‘white man’s government’ and to say as much was ‘political blasphemy, for it violates the fundamental principles of our gospel of liberty. This is man’s government; the government of all men alike.’”); *id.* at 641 (“Stevens had said . . . that [the Fourteenth Amendment] plainly meant ‘where any state makes a distinction in the same law between different classes of individuals, Congress shall have the power to correct such discriminations and inequality’ and that under the amendment ‘ . . . no distinction would be tolerated in this purified Republic but what arose from merit and conduct.’”).

<sup>51</sup> U.S. CONST. amend. XIV, § 1 (“[N]or 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.”).

<sup>52</sup> The judiciary’s interpretations of the Amendments, combined with the absence of a government agency to enforce the law, prevented the Amendments from empowering Blacks. *See, e.g.*, Edieth Y. Wu, *Reparations to African-Americans: The Only Remedy for the U.S. Government’s Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 CONN. PUB. INT. L.J. 403, 409 (2004) (“During the early periods after the 13th and 14th Amendments were passed, courts offered little assistance; thus, oppression and violations of civil rights continued. These results were not part of the Amendments’ vision of the new order. This ‘spurious interpretation’ and disregard for the Amendments’ purposes continued up to, through, and beyond the passage of the 15th Amendment. As a result, the law was brought into disrepute, the Court was placed under extreme political pressure, and the personal element was highly visible in the judiciary.” (footnotes omitted)).

<sup>53</sup> *See, e.g.*, FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861–1867, at 55 (Ira Berlin et al. eds., 1985) (“The Emancipation Proclamation and the Thirteenth Amendment marked, respectively, a turning point and the successful conclusion of a hard-fought struggle.”).

<sup>54</sup> *See, e.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (First Anchor Books ed. 2009); KLUGER, *supra* note 50, at 118.

Whites, powerful or not, many Blacks dismissed the notion of true equality as a fairy tale that could never be attained.<sup>55</sup>

To be sure, our Supreme Court faced the challenge of numerous cases focusing on issues of equity, fairness, and equality. The Civil War and the subsequent passage of the Civil War Amendments placed in our law the firmament to create the constitutional notion that there is equality among humankind and our citizenry under the law. However, with one rare exception, the Supreme Court, at this time, limited the ability of the Equal Protection Clause to curtail the efforts of the states to impede progress towards equality.<sup>56</sup> The one and only exception was *Strauder v. West Virginia*.<sup>57</sup> In that case, the petitioner sought to challenge jury selection in his criminal trial because there were no Blacks in his venire.<sup>58</sup> In ruling for the petitioner, the Court ruled:

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?<sup>59</sup>

Despite the anomaly of *Strauder*, the question persisted post-Civil War: Did “equal under the law” really mean equal? Yes, the Civil War Amendments addressed the shortcomings of the Constitution and the pernicious effect of the *Dred Scott* decision on Blacks, all of whom found themselves to be free. Yet, despite becoming citizens of the republic with the constitutionally protected, but essentially unenforceable, right to vote, query whether we were at a point in history where equal meant

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<sup>55</sup> Former slaves recounted life during Reconstruction, and the struggles of attaining the equality promised to them in the Civil War Amendments. See, e.g., FED. WRITERS' PROJECT, WORKERS PROGRESS ADMIN., 2 BORN IN SLAVERY: SLAVE NARRATIVES FROM THE FEDERAL WRITERS' PROJECT, 1936-1938, pt. 1 at 154, [http://memory.loc.gov/cgi-bin/ampage?collId=mesn&fileName=021/mesn021.db&recNum=157&itemLink=r?ammem/mesnbib:@field\(DOCID+@lit\(mesn/021/158153\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mesn&fileName=021/mesn021.db&recNum=157&itemLink=r?ammem/mesnbib:@field(DOCID+@lit(mesn/021/158153))) (providing transcripts of interviews with former slaves, including with George Benson in Pine Bluff, Arkansas, who stated that “they won’t let you vote. I don’t think a person is free unless he can vote, do you? The way this thing is goin’, I don’t think the white man wants the colored man to have as much as the white man”). One former slave in Georgia remarked that “[i]t was heap worse in Georgia after freedom than it was fore.” *Id.* pt. 2 at 18, [http://memory.loc.gov/cgi-bin/ampage?collId=mesn&fileName=022/mesn022.db&recNum=18&itemLink=r?ammem/mesnbib:@field\(DOCID+@lit\(mesn/022/019015\)\)](http://memory.loc.gov/cgi-bin/ampage?collId=mesn&fileName=022/mesn022.db&recNum=18&itemLink=r?ammem/mesnbib:@field(DOCID+@lit(mesn/022/019015)))). See generally BLACKMON, *supra* note 54.

<sup>56</sup> See, e.g., *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908) (holding that an educational institution, chartered as a corporation, could prohibit teaching Black and White children in the same institution without violating equal protection); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding a congressional act requiring equal protection in public accommodations as unconstitutional).

<sup>57</sup> 100 U.S. 303 (1879).

<sup>58</sup> *Id.* at 305.

<sup>59</sup> *Id.* at 307.

equal and where the words of the Declaration rang true. I dare say no. Even the guarantees of due process, equal protection, and the right to pursue life, liberty, and property could not ensure newly free men, or those men of color already free, that equality had been reached. After all, the specter of inferiority would not lose the imprimatur of our highest Court for ninety-seven years after the pronouncement in *Dred Scott*.<sup>60</sup> In fact, it would take until Chief Justice Warren made his pronouncement in *Brown v. Board of Education*<sup>61</sup> that the recognition and acknowledgement of the notion of Blacks as inferior—and thus inherently unequal—reached its demise.

Ninety-seven years is indeed a long time to wait. During that time, Reconstruction legislation on the federal and state level seeking to support the idea of equality was ineffective and largely unenforced.<sup>62</sup> In a Special Message to the Congress on Civil Rights in 1948, President Truman lent his imprimatur to the notion of equality, stating that “[w]e believe that all men are created equal and that they have the right to equal justice under law.”<sup>63</sup>

In my view, the key period to examine in the movement towards the idea that equal could in fact mean equal was from the 1896 decision in *Plessy v. Ferguson*<sup>64</sup> until 1954 when *Brown* became law.<sup>65</sup> *Plessy* was a test case. A Black citizen’s group chose Homer Plessy to board a segregated railway car for an intrastate trip in Louisiana.<sup>66</sup> Upon Plessy’s refusal to move to a “colored” car, he was arrested and fined.<sup>67</sup> He brought an action testing the constitutionality of the segregation law

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<sup>60</sup> See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>61</sup> 347 U.S. 483 (1954).

<sup>62</sup> KLUGER, *supra* note 50, at 64 (proclaiming that *The Civil Rights Cases* of 1883 “would soon leave Reconstruction legislation an empty vessel”).

<sup>63</sup> Special Message on Civil Rights from Harry S. Truman, President, to the Congress of the United States (Feb. 2, 1948), <http://www.trumanlibrary.org/publicpapers/index.php?pid=1380&st=&st1=>; see also *President Truman’s Message to Congress, February 2, 1948*, in *CIVIL RIGHTS AND THE BLACK AMERICAN: A DOCUMENTARY HISTORY* 380 (Albert P. Blaustein & Robert L. Zangrando eds., 1968).

<sup>64</sup> 163 U.S. 537 (1896).

<sup>65</sup> See generally *Brown*, 347 U.S. 483.

<sup>66</sup> KLUGER, *supra* note 50, at 73 (“Railroad officials approached by the black protest group were found to be sympathetic. They had put separate ‘Colored’ cars on their passenger trains as the law prescribed, but they urged their conductors not to enforce the law with much vigor. The added cost of the separate cars was an obvious factor in the railroad’s lack of enthusiasm for the segregation statute. ‘They want to help us,’ one of the black leaders reported back, ‘but dread public opinion.’ And so on June 7, 1892, after two years of agitation and false starts, an exceedingly light-skinned Negro named Homer Adolph Plessy boarded an East Louisiana Railway train for a run from New Orleans to Covington, about thirty miles north of the city near the Mississippi border. Plessy took a seat in a car reserved for whites and was promptly asked by the conductor to move to the car for colored passengers—almost certainly a prearranged action in view of the railroad’s professed distaste for the segregation law and of Plessy’s ‘seven-eighths Caucasian’ coloration.”).

<sup>67</sup> *Plessy*, 163 U.S. at 538–39.

pursuant to the Thirteenth and Fourteenth Amendments.<sup>68</sup> Although the Supreme Court dispensed with the Thirteenth Amendment claims rather brusquely,<sup>69</sup> Justice Brown, writing for the Court, responded to the equal protection argument by professing emphatically that there was no issue of note regarding equality or inferiority.<sup>70</sup> The problem was that his rationale seemed grounded more in social science than law, which was disturbingly similar to Tyler's argument related to the Declaration of Independence in *Dred Scott*.<sup>71</sup> Justice Brown noted:

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other . . . .<sup>72</sup>

Later in the opinion, Justice Brown continued his analysis, espousing his views on inferiority and equality:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.<sup>73</sup>

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<sup>68</sup> *Id.* at 542.

<sup>69</sup> *Id.* at 542–43 (“That [the segregation law] does not conflict with the thirteenth amendment . . . is too clear for argument.”).

<sup>70</sup> *Id.* at 544.

<sup>71</sup> See *supra* text accompanying notes 38–45.

<sup>72</sup> *Plessy*, 163 U.S. at 544.

<sup>73</sup> *Id.* at 551.

Of course, one's first reaction when reading this quote nearly one hundred twenty years later is to ask whether Justice Brown could credibly have been so naïve. I choose to conclude that much of his dicta was in fact disingenuous. It is beyond peradventure that he, his colleagues, and almost all of White America at the time believed wholeheartedly in the inferiority of the Black race and the necessity for social separation.

The dissent in *Plessy* was steadfast and courageous for its time. Justice John Marshall Harlan spoke plainly by making clear that, if we are a nation of laws bound by a constitution, there cannot be artificial boundaries established to prevent equality under the law erected by the State of Louisiana with the Court's imprimatur:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.<sup>74</sup>

Justice Harlan's dissent provided the impetus for the most sustained legal battle conducted before the Supreme Court on the issue of equality.<sup>75</sup> Succinctly put, Justice Harlan added, "[t]he arbitrary separation of citizens, on the basis of race . . . [is] wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds."<sup>76</sup>

### III. TURNING THE TIDE: THE BATTLE TOWARDS *BROWN*

The establishment of *Plessy* as the law of the land was daunting for those interested in our country living up to its promise of equality.

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<sup>74</sup> *Id.* at 559 (Harlan, J., dissenting).

<sup>75</sup> See *infra* text accompanying notes 77–92.

<sup>76</sup> *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

Constitutional amendments, along with the then-current state of the Supreme Court's jurisprudence, were not enough to ensure that equal meant equal. The effort to achieve this objective took many years and a host of brilliant legal minds. The NAACP Legal Defense Fund, the most storied and prolific civil rights firm of its time, took on the seemingly impossible task of making our nation live up to its promise "that all men are created equal."<sup>77</sup>

The Legal Defense Fund was responsible for the legal strategy aimed at dismantling separate but equal, but, more importantly, for providing teeth to the Fourteenth Amendment by establishing that equal could in fact one day mean equal.<sup>78</sup> Charles Hamilton Houston, and later Thurgood Marshall, formed a formidable duo at the Legal Defense Fund as they headed up the effort to undo separate but equal.<sup>79</sup> Many more played critical roles—Constance Baker Motley, William Thaddeus Coleman, Jr., Spottswood William Robinson III, and Jack Greenberg, to name a few.<sup>80</sup>

The leader, Houston, was a Phi Beta Kappa graduate of Amherst College, and he was the first African American to serve as an editor of the Harvard Law Review at time when there was no blind grading and a misguided professor could sabotage a student's future.<sup>81</sup> A talent recognized by famed professor, and later Supreme Court Justice, Felix Frankfurter, Houston stayed on to receive an advanced degree at Harvard, and then studied abroad, before returning to his father's thriving legal practice in Washington, D.C.<sup>82</sup> At his core, Houston was a race man who eschewed a more lucrative private practice to first become a law professor, then Dean of the Howard Law School (the Harvard of historically Black universities), and, more important, to become the head of the Legal Defense Fund.<sup>83</sup> Houston chose Marshall and a small cadre of other Howard Law School graduates to work with him on a litigation strategy that would change our country.<sup>84</sup> Employing the theory of incrementalism to a tee, Houston devised a strategy to chip away at the separate but equal doctrine by carefully choosing cases in

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<sup>77</sup> See HIGGINBOTHAM, *supra* note 17, at 153–54 (“[C]ourageous civil rights lawyers, working in isolation or under the auspices of organizations such as the NAACP, confronted the Supreme Court with cases challenging racism in the courts and the electoral process, as well as challenging racial segregation in public schools, facilities, and transportation.”).

<sup>78</sup> See KLUGER, *supra* note 50, at 220–23.

<sup>79</sup> *Id.* at 198.

<sup>80</sup> *Id.* at 253, 272–74.

<sup>81</sup> *Id.* at 105, 115.

<sup>82</sup> *Id.* at 115–16.

<sup>83</sup> *Id.* at 116, 125, 139.

<sup>84</sup> *Id.* at 128 (“Howard Law School became a living laboratory where civil-rights law was invented by teamwork.”).

which the state entity failed to provide equal resources<sup>85</sup>—as required by *Plessy*.<sup>86</sup> The strategy worked. Over a nearly twenty year period, in case after case, the Supreme Court slowly eroded the separate but equal doctrine leading up to *Brown*.<sup>87</sup>

The purposefully slow and methodical approach addressed education on the graduate level as well as other life pursuits. The University of Oklahoma Law School<sup>88</sup> and the University of Missouri Law School<sup>89</sup> were each subject to successful suits by students seeking admission to each state's law school since the states did not provide separate but equal law schools exclusively for Blacks. Another victory came in the area of restrictive covenants, which were used to keep Blacks out of White areas by preventing sales of residential homes to Blacks.<sup>90</sup> Since the enforcement of the restrictive covenants would require judicial action, the Supreme Court voided the agreements because such enforcement could be deemed state action and thus violative of the Equal Protection Clause.<sup>91</sup>

Thurgood Marshall argued many of these cases along with Houston, and when Houston died in 1950, the brunt of the pressure of

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<sup>85</sup> *Id.* at 186 (“The goal would be . . . not to attack the constitutionality of segregation itself but to challenge its legality *as it was practiced* by showing that nothing remotely approaching equal educational opportunities was offered Negroes in segregating states—and *that* was unconstitutional.”).

<sup>86</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>87</sup> See, e.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that the segregation restrictions at the University of Oklahoma violated the Equal Protection Clause because “the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws”); *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (holding that educational opportunities for Black law students were not substantially equal, violating the Equal Protection Clause, and requiring Black students to be admitted at the University of Texas School of Law); *Shelley v. Kraemer*, 334 U.S. 1, 4, 20 (1948) (holding that judicial enforcement of racially restrictive covenants, “which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property,” violated the Fourteenth Amendment); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (holding that the exclusion of Blacks from primary elections violated the Fourteenth Amendment because “the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization [(a political party)] to practice racial discrimination in the election”); *Norris v. Alabama*, 294 U.S. 587, 597–98 (1935) (holding that exclusion of Blacks from the venire was unconstitutional under the Equal Protection Clause because the “long-continued, unvarying, and wholesale exclusion of [Blacks] from jury service [has] no justification consistent with the constitutional mandate”).

<sup>88</sup> *McLaurin*, 339 U.S. 637.

<sup>89</sup> *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (holding that segregation restrictions at the University of Missouri violated the Fourteenth Amendment because “the State was bound to furnish [Black students] within its borders facilities for legal education substantially equal to those which the State there afforded” White students).

<sup>90</sup> *Shelley*, 334 U.S. 1.

<sup>91</sup> *Id.* at 20.

*Brown* fell on Marshall's shoulders.<sup>92</sup> Some would say that divine intervention brought about the result in *Brown*. Initially, the case was heard with Chief Justice Fred Vinson at the helm.<sup>93</sup> During conference, Vinson had shared that he would vote to affirm separate but equal.<sup>94</sup> The Court was initially divided, but while the case was sub judice, Chief Justice Vinson died and newly elected President Eisenhower made his first selection to the Supreme Court—Earl Warren, the former governor of California.<sup>95</sup> Interestingly, Arthur Vanderbilt, then Chief Justice of the State of New Jersey, and the person for whom this lecture is named, was on the short list for this vacancy as well.<sup>96</sup> Newly minted Chief Justice Warren, along with his colleagues, heard the rehearing on *Brown* and took it upon himself to rally the Court to deliver a unanimous decision.<sup>97</sup> He implored, persuaded, and cajoled, even visiting one colleague while that colleague was convalescing in the hospital.<sup>98</sup>

As was the custom, Chief Justice Warren delivered the opinion of the Court in a packed courtroom,<sup>99</sup> stating that the Court “come[s] then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”<sup>100</sup>

In next discussing the issue of inferiority, Chief Justice Warren directly responded to Governor Tyler, Chief Justice Taney, and Justice Brown regarding the notion of inferiority:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children

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<sup>92</sup> KLUGER, *supra* note 50, at 278–79.

<sup>93</sup> *Id.* at 564–65.

<sup>94</sup> *Id.* at 589–91.

<sup>95</sup> *Id.* at 658, 666–67.

<sup>96</sup> *Id.* at 661.

<sup>97</sup> *Id.* at 694 (“Warren, of course, wished to avoid concurring opinions; the fewer voices with which the Court spoke, the better. And he did not give up his hope that Stanley Reed, in the end, would abandon his dissenting position.”).

<sup>98</sup> *Id.* at 701.

<sup>99</sup> *Id.* at 705.

<sup>100</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).



and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.<sup>101</sup>

It cannot be said that *Brown* was a panacea for the nation's ills on the issue of equality. Chief Justice Warren did not click his heels or snap his fingers, but the opinion, viewed by many as the most important in the Court's history,<sup>102</sup> including by Justices Marshall<sup>103</sup> and Souter,<sup>104</sup> led to a different perspective on the use and breadth of the Fourteenth Amendment and on its practical application to attempts to foster equality under the law.

#### CONCLUSION

1954 was a year of great changes in America. *Brown* was a portent of change on America's landscape. In my view, one could strongly support the notion that the Civil Rights Movement, the Women's Movement, war protest, and other movements seeking justice and equality found their impetus and voice from the dismantling of segregated schools in *Brown*—an event that most of the country thought would never happen. As we canvass the time from *Brown* to the present, it is difficult to determine and attempt to divine whether even today equal means equal. The vantage point from which we as a nation sit is more complex and nuanced than ever before. The number of isms that we must now confront reflects the broadening vista of our nation's makeup. We no longer conceive of ourselves in terms of Black and White only. Our expanded notion of our collective self requires more.

I now ask the question we asked of our founding fathers: Does equal mean equal? My family loved road trips, or at least I did, and they were a captive audience. My children cherished family time, but as we traveled at warp speed around the country, they would invariably ask: Are we there yet? I always had an answer for them—one hour, two

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<sup>101</sup> *Id.* at 494 (quoting a finding by the District Court in *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)). I note parenthetically that there was substantial evidence in the trial record regarding the psychological effects of segregation. See KLUGER, *supra* note 50, at 447–48.

<sup>102</sup> See, e.g., THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012, at 401 (Clare Cushman ed., CQ Press 3d ed. 2013) (“*Brown* was the Warren Court’s most important decision and in many ways the watershed case of the century.”).

<sup>103</sup> THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 223 (Mark V. Tushnet ed., 2001) (“[S]urely, though, all will acknowledge the importance of the decision. In holding segregated public education unconstitutional, the Court eliminated one of the two primary pillars of the caste system (the other being disenfranchisement).”).

<sup>104</sup> See generally David H. Souter, Justice, U.S. Supreme Court, Commencement Address at Harvard University (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech>.

hours—but that rarely placated them. The question put here is vastly more complex than the one our forefathers faced. The once seemingly straightforward question of does equal mean equal can no longer be answered with a simple yes or no. Are we closer today—undoubtedly. Are we there yet—time will tell.