

LAWYERS, CIVIL DISOBEDIENCE, AND EQUALITY  
IN THE TWENTY-FIRST CENTURY: LESSONS  
FROM TWO AMERICAN HEROES

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I. PROLOGUE: A PAGE OF AMERICAN HISTORY .....	960
<i>A. Beating Back the Evil of the World</i> .....	960
<i>B. Losing Battles, Winning Wars</i> .....	962
II. CITIZENS OF GOODWILL: THE SEDUCTION OF FORGETTING .....	963
<i>A. Lessons from Our Past</i> .....	965
<i>B. The Character of Color</i> .....	967
III. MARSHALL’S LAW: WHERE DO WE GO FROM HERE? .....	970
<i>A. Making a Difference</i> .....	970
<i>1. Doing What You Can with What You Have</i> .....	971
<i>2. We Must See that Our Children Gain Equal Educational Opportunities</i> .....	972
<i>3. The End We Seek Is Not an Empty Idea</i> .....	974
<i>B. Strategies for the Future</i> .....	978
IV. CONCLUSION .....	981

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## I. PROLOGUE: A PAGE OF AMERICAN HISTORY

*A. Beating Back the Evil of the World*

Nearly a century ago, in a 1906 address to honor John Brown, W.E.B. DuBois reminded his listeners that we must “sacrifice our work, our money, and our positions in order to beat back the evil of the world.”<sup>1</sup> DuBois, a slavery scholar, understood that peculiar institution’s evil and he anticipated its potential legacy throughout the twentieth century.<sup>2</sup> He and other guests praised Brown’s efforts to halt slavery, noting the noble sacrifice Brown and the twenty-one other men made to liberate slaves.<sup>3</sup> Reverdy C. Ransom explained how Brown had made the supreme sacrifice and how his soul went marching on in those who continued the fight for equality despite strident opposition.<sup>4</sup> Modern champions of equality are heirs to John Brown’s spirit and it falls to each of us to beat back inequality, racial hegemony, and other modern forms of American caste. By caste, we mean the systemic status inequality in the United States, resulting from longstanding discriminatory practices endorsed by federal, state, and local government.

Thus, it is fitting and timely that lawyers and scholars remember John Brown’s legacy and those who have sought substantive reforms for certain Americans treated as outcasts. Although many men and women have given their lives in this worthy cause, we have chosen former Supreme Court Associate Justice Thurgood Marshall as our subject because, like John Brown, Marshall is also an American hero who sacrificed his life to liberate all Americans from the stains of state-sponsored discrimination.

Old Captain John Brown was an American who loved his family and his country, but he despised human bondage.<sup>5</sup> A deeply religious man, Brown found in the Bible an unequivocal, uncompromising opposition to slavery.<sup>6</sup> Human inequality, especially slavery, was an abomination to God.<sup>7</sup> Brown believed it was the duty of every Christian to oppose slavery at all costs.<sup>8</sup> This calling would take Brown on a journey away from his family in Connecticut to Massachusetts, New York, Kansas, Canada, Maryland, and finally to Harpers Ferry, Virginia, in 1859.<sup>9</sup>

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1. BENJAMIN QUARLES, *ALLIES FOR FREEDOM* 7 (1974); *see also* ELIJAH AVEY, *THE CAPTURE AND EXECUTION OF JOHN BROWN* (1971); *BLACKS ON JOHN BROWN* (Benjamin Quarles ed., 1972); W.E.B. DUBOIS, *JOHN BROWN: A BIOGRAPHY* (John David Smith ed., 1997); TRUMAN NELSON, *THE OLD MAN: JOHN BROWN AT HARPER’S FERRY* (1973).

2. *See* QUARLES, *supra* note 1, at 7.

3. *Id.* at 8.

4. *Id.* at 7-9.

5. *Id.* at 11-12.

6. *Id.* at 11-13.

7. QUARLES, *supra* note 1, at 11-13.

8. *Id.*

9. *Id.* at 1-92. We have followed Quarles in omitting the possessive form of “Harpers Ferry” throughout this Article.

John Brown was a visionary leader who had the temerity to challenge slave power in the United States. "To [Brown,] the color of a man's skin was no measure of his worth."<sup>10</sup> Brown acted toward African-Americans as social equals; he appeared completely void of color prejudice.<sup>11</sup> Rather than accept a service denied African-Americans, Brown's egalitarianism caused him to eschew white privilege.<sup>12</sup> Instead, he would help organize the League of Gileadites to rescue and protect runaway slaves from their pursuers.<sup>13</sup>

Born in 1800, Brown came of age during the infancy of the new nation when slave interests sought to expand west as the nation's size doubled through the Louisiana Purchase and American aggression in Texas and Mexico.<sup>14</sup> Abolitionist societies opposed any additional slavery compromises and campaigned against slavery throughout the United States, the British Isles, and the West Indies.<sup>15</sup> Brown was persuaded that slavery lacked any legitimacy and could be opposed by any means necessary.<sup>16</sup> He and his family committed themselves to help in the sectional fight that had swept the nation.<sup>17</sup> Brown employed the same revolutionary zeal that was used to liberate white men from England, to demand the liberation of African-Americans. Brown put, "humanity above race, right above law, and freedom above everything."<sup>18</sup>

Brown studied the lives of Toussaint L'Ouverture, Denmark Vesey, and Nat Turner.<sup>19</sup> He met with Harriet Tubman, Frederick Douglass, and others to discuss their rescue work as conductors on the Underground Railroad.<sup>20</sup> Brown himself made one incursion into Missouri to liberate a dozen slaves and escort them to freedom in Canada.<sup>21</sup>

Unlike many abolitionists, Brown had most of his primary relationships with African-Americans.<sup>22</sup> He was a guest in their homes; he ate at the same table as they did.<sup>23</sup> He often directed that his correspondence be delivered to the home of an African-American friend.<sup>24</sup> John and Mary Brown did not conduct themselves as superior to the poorest African-Americans and they raised their children the same way. The Browns did not embrace white privilege. They were ardent champions of freedom for all humans.

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10. *Id.* at 14.

11. *Id.* at 13.

12. QUARLES, *supra* note 1, at 13-14.

13. *Id.* at 25-27, 81-82.

14. *Id.* at 14-15.

15. *Id.* at 17-22.

16. *Id.* at 11-14.

17. QUARLES, *supra* note 1, at 17-18.

18. J. Max Barber, *John Brown in Bronze, 1800-1859, Containing Program and Addresses of the Dedicatory Ceremony and Unveiling of the Monument of John Brown, May 9, 1935* (1935), reprinted in BLACKS ON JOHN BROWN, *supra* note 1, at 115.

19. QUARLES, *supra* note 1, at 64-65.

20. *Id.* at 19-22, 41-42.

21. *Id.* at 54-60.

22. *Id.* at 65.

23. *Id.* at 38-39.

24. QUARLES, *supra* note 1, at 39.

As the sectional divide over slavery expanded with the enactment of the Fugitive Slave Act of 1850,<sup>25</sup> the Kansas-Nebraska Act of 1854,<sup>26</sup> and the *Dred Scott*<sup>27</sup> decision in 1857, Brown became convinced that slave liberation would not occur without force and a little bloodshed.<sup>28</sup> Brown convened a conference across the border in Chatham, Canada, a refugee haven for runaway slaves.<sup>29</sup> He revealed there a draft of a new provisional government with himself as the commander in chief.<sup>30</sup> His goal was to identify other patriots opposed to slavery who were willing to join him in arming slaves against their masters. He believed that if slaves had weapons they would join in a campaign for their freedom.<sup>31</sup>

Details of Brown's specific plan were known only to participants and none of them broke rank to reveal anything about the scheme.<sup>32</sup> Brown led twenty-one freedom fighters to capture the small federal arsenal at Harpers Ferry in 1859. Brown hoped that other opponents of slavery, like Tubman and Douglass, and slaves would join his crusade and that there would be little, if any bloodshed.

The whole affair went differently. Several local people were killed as Brown's raiders took control of small buildings near the armory. As rumors of a slave insurrection and mass killings of whites spread throughout the area, locals and state militia converged on the arsenal, trapping Brown. Within a day, Brown had been captured and most of his aides were dead, had fled to the mountains, or were captured with him.<sup>33</sup> Two of his sons lay dead beside him. All those captured were tried, convicted, and hanged.

### *B. Losing Battles, Winning Wars*

The Harpers Ferry incident began and ended quickly, but Brown's legacy has lived on in prose, poetry, and song. African-Americans would praise Brown for sacrificing his life for their freedom. They would hold conventions in his honor and his execution day, December 2, 1859, would be a day of mourning and an annual day of remembrance.<sup>34</sup> They would raise funds to support Mary Brown and her children.<sup>35</sup> They would also dedicate monuments to their liberators in North Elba, New York.<sup>36</sup> In Brown, many African-Americans saw a modern Moses, standing against

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25. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, *repealed by* Act of June 28, 1864, ch. 166, 13 Stat. 200.

26. Ch. 59, 10 Stat. 277 (1854).

27. 60 U.S. (19 How.) 393 (1856).

28. QUARLES, *supra* note 1, at 70-84.

29. *Id.* at 43-51.

30. *Id.* at 46-51.

31. *Id.*

32. *Id.* at 80-82.

33. QUARLES, *supra* note 1, at 92-102.

34. *Id.* at 176-82, 192-98.

35. *Id.* at 144-48.

36. *Id.* at 188-91.

slavery declaring, "Let my people go!"<sup>37</sup> John Brown was their people. Their fight was his fight. Brown saw slavery and its extension as evil and he thought it was his duty to help slaves gain freedom and improve their lives. He put aside his own comfort and security to help others.<sup>38</sup>

Southerners labeled Brown a race traitor and sought to prove that government agents in the North were really behind the attack. Many in the North, on the other hand, especially African-Americans, hailed Brown a national hero. The battle over slavery had reached its zenith. Brown's raid was the proverbial match that ignited the American Civil War, the deadliest conflict in United States history. In its wake, the Union would end slavery and restrict state power. Constitutional revisions would reshape legal sanction of colored caste. The Harpers Ferry raiders did not die in vain. They lost their battle but won the war for justice for four million Americans of African ancestry. Their work has been continued to this day as other American heroes have sought restorative justice for the nation's dispossessed. As long as freedom rings in this world, John Brown and his Harpers Ferry comrades will be members of the Freedom Honor Court.

## II. CITIZENS OF GOODWILL: THE SEDUCTION OF FORGETTING

Frederick Douglass taught many Americans,

*Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them . . . . The limits of tyrants are prescribed by the endurance of those whom they oppress.*<sup>39</sup>

Surely, Douglass's philosophy galvanized Brown to arm slaves. It also exhorted Marshall to hone his voice and demand an end to American apartheid. Marshall allowed no one to ignore the nation's record of inequality. He asserted the restorative theory of equality, one that could mend the legacy of discrimination. No American can excuse complicity in maintaining caste anymore.

It is true that the nation has made progress with modest anti-discrimination laws, but those laws only address future, isolated discriminatory acts. They fail to remedy the present, cumulative effects of past discrimination. They also shield cumulative privilege from legal redress. Anti-discrimination policies need reinforcement through policies aimed at eliminating accumulated caste caused by centuries of preferences for whites,

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37. *Exodus* 5:1 (King James).

38. *Id.* at 184-98.

39. Frederick Douglass, West India Emancipation, Speech Delivered at Canandaigua, New York (Aug. 4, 1857), in FREDERICK DOUGLASS, SELECTED SPEECHES AND WRITINGS 358, 367 (Philip S. Foner ed., 1999) (emphasis added).

especially white men. Even if Americans cannot dismantle white privilege because Americans will not reject whiteness, we can dismantle the caste that centuries of white privilege have caused.<sup>40</sup>

We have been disappointed by much of the recent debate over equality because it largely misses the importance of modern caste. Americans will never accomplish equality of opportunity until we interpret our laws so that no one has the right to maintain another's caste. Those who are trapped by caste must renew their public protests and boycotts, in Washington, D.C., and at home, explaining to the world the injustice of American caste. Such demonstrations and litigations must be as precise and well-planned as those from the past. And those of us who seek to end injustice must reexamine our opposition, mine the past, and design new judicial and legislative civil rights strategies that will move the nation further towards eliminating caste, root and branch. If we want equal justice under law, we must define it and establish it. It is our right to define equality contextually, taking account of historic interpretations that privileged a few and disadvantaged most. It is our duty to defeat equality theories that reify white hegemony or other axes of caste. We agree with former Associate Justice Harry Blackmun, "We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."<sup>41</sup>

Caste and privilege are ubiquitous in the United States. Both are present in our public schools, our neighborhoods, our commercial and public places, our churches, and our social clubs. They are so extant in our society that they are invisible, making current conditions in American life seem normative and neutral. But history reveals what A. Leon Higginbotham called American precepts of inferiority and inequality, which operate as presumptions in American law.<sup>42</sup> Nothing prevents Americans from eliminating caste and unfair privilege. The late Associate Justice Thurgood Marshall put it best: "Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of . . . unchecked power. . . . But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves."<sup>43</sup>

Many of us are weary from the rising opposition to recent civil rights gains in voting, education, and employment, among other areas, especially the misguided attack on remedial affirmative action. Just when it seemed under-represented groups were making limited progress, our opponents began to prevail in courts and legislative councils, turning back the clock on equal opportunity. The forces of privilege have organized to halt our march toward equality.<sup>44</sup>

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40. See STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7-24 (1966).

41. *Bd. of Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J.).

42. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 195-204 (1996).

43. *United States v. Salerno*, 481 U.S. 739, 767 (1987) (Marshall, J., dissenting).

44. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002); *Johnson v. Bd. of Regents of Univ. of*

Yet, this is no time for equality champions to rest. We have traveled farther than many ever thought we could. And we have made progress without ever becoming tyrants ourselves. We have not sought to turn the tables. We have not advanced theories of white inferiority. We have not dehumanized others through gross caricature or disfigurement. American legal and political history have made whiteness an immutable plus factor, a mark of privilege, which, to some extent, assists every person who is perceived as a member of that club. And those who are deemed without the mark just as certainly, to some extent, are diminished. Any equality jurisprudence that fails to reform this inequality is not worth expounding.

The road ahead will also be difficult, but the moral arc of justice bends towards equality of opportunity and we shall overcome these recent setbacks. We must remember the quiet humility and dignity of the octogenarian activist who, during the Montgomery bus boycott, eschewed admonitions from the Reverend Dr. Martin Luther King, Jr. that she should start riding the bus again because of her age. Her response was that she was going to walk until the boycott ended. When King insisted that she must be tired, she replied, "Yes, my feet is tired, but my soul is rested."<sup>45</sup>

Similarly, Charles Hamilton Houston, Thurgood Marshall's mentor, demonstrated that it is better to die on one's feet than to live on one's knees.<sup>46</sup> Marshall lived Houston's credo, serving this nation across six turbulent decades until he was too ill and tired to continue. Like so many honorable predecessors who overcame more formidable obstacles to equality, civil rights advocates cannot pause now no matter how bleak the times.

### *A. Lessons from Our Past*

Because many persons in the United States rarely celebrate the significant historical contributions of African-Americans, in this Article, we note several observations about future challenges to realizing equality of opportunity by referencing the life and work of a great American: the late Associate Justice Thurgood Marshall, Mr. Civil Rights. Marshall's biographers have been at work now for over two decades putting in context his extraordinary, courageous life.<sup>47</sup> John Hope Franklin correctly praises Marshall's

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Ga., 263 F.3d 1234 (11th Cir. 2001); *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000); *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996).

45. HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 61 (1978).

46. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 105-280 (1976).

47. Professor Mark V. Tushnet has done the best, most comprehensive work on Marshall to date. See generally MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961* (1994) [hereinafter TUSHNET, *MAKING CIVIL RIGHTS LAW*]; MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1961-1991* (1997); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950* (1987); *THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES* (Mark V. Tushnet ed., 2001). Tushnet's work goes far toward preserving Marshall's place in history. Tushnet summarizes key legal arguments by Marshall in over one hundred important

contribution to society by writing that he spoke not only “for black Americans but for Americans of all times.”<sup>48</sup>

Marshall is one of our heroes, not because he was African-American or that he rose to the top of the legal profession, but because, like John Brown, he was a visionary leader, placing service to others above self-aggrandizement. Like Brown, he eschewed personal wealth, championing the causes of the powerless. He is our role model because he redirected the sordid history of the United States. In fact, through his work he changed the lives of all Americans. Marshall was “our people.”

Marshall’s constitutional vision for the United States was neither monochromatic nor formalistic; equality was not an empty idea. It was broad and majestic, permitting that charter to do for the elimination of caste what it has done so effectively in its maintenance. Judge A. Leon Higginbotham, Jr. elegantly explained, “Thurgood Marshall saved the soul of America.”<sup>49</sup>

Another reason for our admiration of Marshall is that he rose from modest, segregated beginnings to make a positive difference in the lives of millions of Americans. His life teaches that each of us has an important and powerful voice within our control that we must lift. As one of Marshall’s colleagues on the Court reminds us, “His life as a private lawyer belies the suggestion that individual attorneys working in the private sector cannot make a profound difference in the direction of the law.”<sup>50</sup> We have decided to use our voices to fight against policies that promote caste and unfair privilege, hoping in some small way to continue the work so gallantly performed by Marshall and many others. We intend to do all that we can to see that our children and grandchildren do not live lives confined by caste.<sup>51</sup>

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cases spanning his time on the Court. Because Marshall wrote some eight hundred opinions, there remains more work to be done. For other recent biographical studies of Marshall’s life, see RANDALL W. BLAND, *PRIVATE PRESSURE ON PUBLIC LAW* (1973); MICHAEL D. DAVIS & HUNTER CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* (1992); ROGER GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* (1992); CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998).

48. A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 56 (1991) (quoting Juan Williams, *Marshall’s Law*, WASH. POST MAG., Jan. 7, 1990, at 12, 15).

49. *Id.* at 62.

50. Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1215 (1992).

51. See generally BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION (1997); Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV. 343 (1994) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)); Bryan K. Fair, *America’s Equality Promise: Can You Tell Me Where It’s Gone?*, 18 J. OF AM. ETHNIC HIST. 167 (1999) (reviewing CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II (John Higham ed., 1997)); Bryan K. Fair, *America’s Equality Promise: Where Do We Go From Here?*, 19 J. OF AM. ETHNIC HIST. 90 (1999) (reviewing STEPHAN & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997)); Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381 (1999); Bryan K. Fair, *Been in the Storm Too Long, Without Redemption: What We Must Do Next*, 25 S.U. L. REV. 121 (1997) [hereinafter Fair, *Been in the Storm*]; Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT’L BLACK L.J. 1 (1993); Bryan K. Fair, *How Far We Have to Go*, 10 NAT’L BLACK L.J. 318 (1988) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)); Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403 (1994); U.W. Clemon & Bryan K. Fair, *Making Bricks*



We also admire Marshall because he dealt with the law as it operates in the real world, with a keen view of those forced to the bottom of society. Marshall knew firsthand America's underclass, its outsiders. To them, he was their lawyer, Mr. Civil Rights. He, like few other Justices, wrote about the law's impact on the lives of real people, those who were poor, illiterate, and defenseless. His greatest aspiration and achievement was to eliminate the public color disability, no small achievement in a land built on a policy of white racial privilege. Marshall knew that this nation's policy of racial supremacy was a disease, preventing it from realizing its potential and hindering its nationhood.<sup>52</sup> His genius was an advocacy that made the sickness of racial superiority apparent to an all-white Supreme Court.

### *B. The Character of Color*

Tragically, Marshall's color shades the ability of many Americans to celebrate his life and honor his dedication to the rule of law and the elimination of caste. It still appears nearly impossible for many whites to see African-Americans as American heroes, rather than more narrowly as black heroes or leaders. But who can deny that Marshall's life merits as much praise and tribute as George Washington's, Thomas Jefferson's, or Abraham Lincoln's? Why do Americans honor former slaveowners and racial supremacists, yet marginalize great civil rights/public interest lawyers in our history through simple obscurity? Commentators must not allow what happened to Charles Houston to happen to Marshall and other modern legal giants.<sup>53</sup>

Civil rights strategists can learn much from Marshall's courageous example as we carry on his cause to make equality of opportunity a reality for all Americans. One important lesson is that one does not have to be rich or famous to contribute to the fight against caste. Marshall had neither fame nor wealth when he began his remarkable journey. Marshall was significantly unknown when he argued in the school desegregation cases that officials in those cases had enacted irrational legislation, policies with only one possible meaning—blacks, because of their race, were unfit to associate with whites. Marshall became famous because he had the temerity to imag-

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*Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940-1980*, 52 ALA. L. REV. 1121 (2001).

52. Thurgood Marshall, *Reflections on the Bicentennial of the U.S. Constitution*, 101 HARV. L. REV. 1, 2, 5 (1987). Marshall, on his reluctance to celebrate the Constitution's bicentennial, said:

I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today.

*Id.* at 2.

53. For a fascinating study of black lawyers in the United States, see J. CLAY SMITH, *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* (1993).

ine that he could make a difference in the lives of many Americans through the legal system. He became famous because he tenaciously attacked both sophisticated and simple-minded discriminatory policies.<sup>54</sup>

A second lesson is that our struggle to eliminate caste will take time, perhaps several generations. Marshall's life demonstrates what can be accomplished over time. DuBois's color line did not fall without resistance. It was a long, slow road to victory. It took John Brown, Frederick Douglass, Harriett Tubman, Charles Sumner, Susan Anthony, W.E.B. DuBois, Elizabeth Stanton, Charles Houston, William Hastie, and many others to prepare a road for Thurgood Marshall. Marshall and others had to prove separate was not equal. They had to prove that states would not equalize separate facilities because the costs were too great. Then, they had to prove that state-sponsored segregation was itself unconstitutional because of the stigma it imposed on black children and because of the unfair privilege it conferred on white children.

While we eschew gradualism, we realize that this fight will require more time. Our fight to eliminate systemic inequality will present similar obstacles and it necessitates an assault on caste and privilege. Both must be undone.<sup>55</sup> To eliminate caste and privilege, we must demonstrate the existence of each and how they were created; then, we must prove that caste and privilege violate the Constitution; finally, we must prove that government can eliminate caste and unfair privilege without violating anyone's constitutional rights.

Another lesson Marshall taught civil rights advocates is that we must accomplish relief through changes in the law (both through the legislatures and the courts) and that division weakens us. Marshall was a fierce defender of the rule of law. For him, change was possible through legislation and judicial decisions. Whatever else we do, we must continue to use the rules to accomplish our goals and seek to change rules that impede us. Moreover, Marshall believed that one must use the best help one could find to prepare legal challenges. Collaboration between lawyers, educators, historians, sociologists, and others won the segregation cases. Those who fight against caste must use strength in numbers and resources, bridging traditional divides, to remake this country, town by town, child by child. Marshall never refused the assistance of others supporting his cause; our progress depends on persuading others that eliminating caste is in their best interest.

One of our greatest obstacles is explaining to those most ensconced in privilege that they, too, would be better off if we eliminated caste. How so? We must explain that caste necessitates social welfare. Caste causes societal harm through secondary effects such as crime, violence, drug abuse, and

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54. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 47, at 69. Marshall documents the tortuous schemes adopted in Oklahoma, Maryland, Texas, and other states to prevent African-Americans from voting, registering, or participating in primaries. *Id. passim*.

55. WILDMAN, *supra* note 40, at 12-24.

poverty. Therefore, eliminating caste can help people to better fend for themselves.

Yet another lesson from Marshall's work is that we must appeal for support to all who experience caste and not focus solely on one form. Through our active, combined civil disobedience, we must make it clear that we will no longer accept caste or unfair privilege for anyone. We cannot go back to "separate but [un]equal."

Marshall's life also teaches that conviction to one's cause is an indispensable element for success. Equality advocates need to be more committed than ever if we are to eliminate caste. As Cass Sunstein reminds us,

In Marshall's constitutional vision, this commitment entailed, first and foremost, a right to equal prospects in education. But it also required more generally an opposition to all caste systems—understood as second-class citizenship, in which one group is systematically below others on the basis of a morally irrelevant factor such as race, sex, or disability.<sup>56</sup>

Many suggest that they support the elimination of caste, but they are not willing to endure any personal loss. That is not possible. We cannot eliminate caste and maintain unfair privilege. To accomplish the former, we must diminish the latter.

Another important lesson is that snakes come in all sizes, shapes, and colors. W.E.B. DuBois used to say that blacks do not need black schools or white schools—they need educationally effective schools.<sup>57</sup> Similarly, when future nominations are presented for the Court, we must remind the president and the Senate that we do not need black justices or women justices, we need only justices who believe that the Constitution neither knows nor tolerates caste.<sup>58</sup> This generation of civil rights advocates must persuade the Court to adopt an anti-caste meaning of the Equal Protection Clause.<sup>59</sup>

Finally, Marshall taught us that the United States does not have a race or gender problem. It does not need a conversation on race or gender. Rather, it needs a conversation on its romance with white, male supremacy. Anything short of a conversation on unfair privilege and caste largely misses the point. Americans must be taught the fallacy of race and gender supremacy, no matter who espouses them, and we must have a conversation on the constitutional difference between policies promoting supremacy and policies eliminating caste. Equality champions must ensure that our courts

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56. Cass R. Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267, 1270 (1992).

57. W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935) (quoted in DERRICK BELL, *AND WE ARE NOT SAVED* 120-21 (1987)).

58. See *Plessy v. Ferguson*, 163 U.S. 537, 558-59 (1896) (Harlan, J., dissenting).

59. Cf. Rhonda V. Magee Andrews, 54 ALA. L. REV. 483, 503-27 (2003) (asserting the Privileges or Immunities Clause might provide a more likely source for reinterpretation of the Fourteenth Amendment under the vision of the abolitionists).

interpret equality so that laws can be used to eliminate subordination and unfair privilege.

We comment on these lessons more fully below in the context of Marshall's life.

### III. MARSHALL'S LAW: WHERE DO WE GO FROM HERE?

#### *A. Making a Difference*

Marshall was eighty-four years old when he died on January 24, 1993.<sup>60</sup> He was simply worn out from a life and legal career that spanned most of the twentieth century. He held several of this country's highest legal positions, including federal Circuit Court judge, solicitor general, and Justice of the Supreme Court for twenty-four terms, retiring in June 1991.

But Marshall was a giant in law long before his appointment to the Court, having served for approximately a quarter century as the top lawyer of the National Association for the Advancement of Colored People (NAACP). In that role, Marshall became Howard University Law School's most successful graduate, using the law and legal system to force the United States to repudiate its endorsement of white, male supremacy. He learned well at the knee of Charles Houston, William Hastie, and other outstanding Howard faculty.<sup>61</sup>

We have chosen Marshall's life for discussion because it is a model for all of us about living a life that matters in this new century.<sup>62</sup> As much as any other lawyer or Supreme Court Justice in our history, Marshall understood the generative power of the Constitution. He believed that as an advocate, statesman, or jurist one could use constitutional principles, especially the Fourteenth Amendment, to end American apartheid. But Marshall saw in the Constitution a cure for more than Jim Crow caste. It was a source of hope for other minorities, women, the poor, the criminally accused, and others relegated by caste. Marshall used law to serve the underdog. Thus, Marshall's life is a window on the best and worst of our nation's history. It is also a portrait of an American hero. He fought for sixty years to eliminate America's color line and rigid, systemic caste. He accomplished the first goal; the second remains for us to complete.

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60. Joan Biskupic, *Thurgood Marshall, Retired Justice, Dies*, WASH. POST, Jan. 25, 1993, at A1.

61. KLUGER, *supra* note 46, at 179-238.

62. For a sample of the numerous tributes to Justice Marshall, see Memorials, 68 N.Y.U. L. REV. 205 (1993); Special Issue Honoring Justice Thurgood Marshall, 44 STAN. L. REV. 1213 (1992); Symposium, *Brown v. Board of Education and its Legacy: A Tribute to Justice Thurgood Marshall*, 61 FORDHAM L. REV. 1 (1992); Symposium, *The Life and Jurisprudence of Justice Thurgood Marshall*, 47 OKLA. L. REV. 1 (1994); Thurgood Marshall Commemorative Issue, *A Tribute from Friends and Colleagues*, 35 HOW. L.J. 1 (1991); Tributes, 2 TEMPLE POL. & CIV. RTS. L. REV. 1 (1993); Tributes, 105 HARV. L. REV. 23 (1991); Tributes, 101 YALE L.J. 1 (1991).

*1. Doing What You Can with What You Have*

One challenge to civil rights advancements in the future is fostering a belief that we individually can do something that matters. Many Americans live as if we cannot make a difference. We recognize caste, the huge disparities in the lives of different Americans, but see ourselves as powerless to effect change. More than simply weary, equality advocates appear hopeless, perceiving caste as permanent or intractable. Our inaction worsens the caste system we aim to eliminate, while deepening the despair endured by so many persons.

Americans are so fortunate that Marshall did not think or live that way. Although he was born in 1908 in segregated Baltimore, Maryland, and even though both sides of his family knew slavery firsthand, Marshall dreamed that he could make a difference—and so he did. Marshall's father was a Pullman porter and then a steward at an exclusive, all white yacht club; his mother was an elementary school teacher who stressed education.<sup>63</sup> Marshall described his childhood as comfortable, but limited by a rigid color line.<sup>64</sup>

Too often we forget how segregated this nation was only a few years ago. To be an American with darker skin during most of the twentieth century meant that by law and custom one was not a full citizen. It meant one could not vote, attend most public schools and colleges without reference to race, lease or purchase property on the same terms or in the same areas as whites, use interstate transportation without the degradation of taking a rear seat or giving up your seat to a white traveler.<sup>65</sup> Regarding employment, only a few occupations or industries were open to many Americans, and even then, there was no guarantee that the employee of color would earn the same pay as his or her white male counterpart.<sup>66</sup>

For African-Americans and other second-class citizens the United States was a cruel paradox: the nation's written principles of fairness, equality, and due process were antithetical to the reality of privilege and caste. Equality of opportunity was a lie. Thus, Marshall and others matured in the face of sharp occupational segregation, poll taxes, literacy tests, all white primaries, segregated public accommodations, racially-restrictive residential covenants, race riots, and lynching.<sup>67</sup> Those who did not keep their place risked public and private reprisals from the big mules and their lackeys.<sup>68</sup>

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63. See BLAND, *supra* note 47, at 3-4; ROWAN, *supra* note 47, at 33-34.

64. See BLAND, *supra* note 47, at 4; ROWAN, *supra* note 47, at 3-21.

65. See FAIR, *supra* note 51, at 103-20.

66. See *id.*; see also JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 192-228 (1991); DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 114-47 (1991).

67. FAIR, *supra* note 51, at 105; see also ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921, RACE, REPARATIONS, AND RECONCILIATION (2002) (examining the Tulsa race riot of 1921).

68. Diane McWhorter has elegantly described this lethal combination in her Pulitzer Prize winning book on the bombing of the Sixteenth Street Baptist Church in which four young girls were murdered.

Marshall, of course, had the last laugh as he directed a diverse team of legal experts between the 1930s and 1960s to halt most of these longstanding white preferences.<sup>69</sup> Civil rights strategists today do not have to overcome *Dred Scott* and a denial of citizenship.<sup>70</sup> We do not have *Plessy* and the doctrine of separate but equal to surmount.<sup>71</sup> We do not face the violence, the lynching, the intimidation, and humiliation confronted daily by those on whose shoulders we stand. But many Americans do face much prejudice and discrimination and deepening caste. So no one who seeks change can rest. Even if you mentor one person out of caste or if you make one person aware of unfair privilege, you make an important contribution.

Marshall and other equality champions demonstrated extraordinary courage, putting their lives on the line every day to lessen the obstacles that we now face. Their example is clear. We must do what we can with what we have, never forgetting that the challenges we face pale in comparison to those faced by Marshall's generation. If we prepare and dedicate ourselves the way they did, no group can prevent our elimination of caste and unfair privilege.

## *2. We Must See that Our Children Gain Equal Educational Opportunities*

For most Americans, it remains true that the only way up from caste is through education. And if America is disuniting or slouching towards ruin, it is not because of a crisis in traditional family values or the loss of government-led school prayer. Rather, the decline of this nation is the result of its persistent neglect of most of its citizens. We have done a poor job of training many Americans to become productive, independent citizens. Enormous privileges for a few have meant significant deprivations for most.

One core value of the early desegregation cases was that the denial of education was tantamount to relegating those so denied to civil and legal inferiority. Thurgood Marshall's public education occurred in segregated, inferior schools; because of his color, he was presumed unfit to attend schools with white children in Baltimore and white students at the University of Maryland School of Law. Sarah Roberts had suffered this same indignity in Boston in 1850,<sup>72</sup> as did Linda Brown a century later in Topeka.<sup>73</sup> This was the lot of millions of American children born into the disfavored racial classification and deemed unfit for full citizenship and effective educational opportunity. Marshall convinced the Supreme Court that the prob-

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*See generally* DIANE MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA, THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* (2001).

69. For a summary of cases Marshall argued before the Supreme Court, see BLAND, *supra* note 47, at 183-84. *See also* TUSHNET, *MAKING CIVIL RIGHTS LAW*, *supra* note 47.

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

71. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

72. *Roberts v. City of Boston*, 59 Mass. (1 Cush.) 198 (1850).

73. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

lem was not with the colored students. They had done nothing wrong, nor were they *innately* deficient. Their inadequacy was not of their creation, but the result of state-sanctioned preferences for whites.

Marshall reported that he first read sections of the United States Constitution as punishment for misbehaving in school.<sup>74</sup> By the time he finished Frederick Douglass High School, he had memorized the entire Constitution.<sup>75</sup> Marshall attended college at Lincoln University, a prestigious, all-male, all-black college near Chester, Pennsylvania.<sup>76</sup> He was a member of the debate team, various athletic teams, and Alpha Phi Alpha fraternity.<sup>77</sup> In his sophomore year, Marshall was expelled along with twenty-two other students for hazing.<sup>78</sup> He returned to Lincoln a more serious student and graduated with honors in 1930.<sup>79</sup>

In the fall of 1930, Marshall was denied admission at the University of Maryland School of Law solely because of his race.<sup>80</sup> Maryland did not admit any African-Americans. The distinctions between such policies and modern diversity policies are apparent. No university in the United States has policies excluding all whites or any individual solely because of that racial classification. American institutions simply are not anti-white. They never have been.

Marshall could do nothing about Maryland's policy. The Court's decisions were against him. Instead, he attended Howard University School of Law where he began his association with Charles Houston, William Hastie, and George Hayes, all members of the Howard Law Faculty at that time. Houston was also the Vice-Dean and he insisted that Howard law graduates use the law as social engineers. He believed that the principal mission of Howard was to train outstanding black lawyers who would lead the legal attack against segregation and inequality in America. Marshall was Houston's most successful protégé. He was diligent, graduating first in his class in 1933.<sup>81</sup>

Marshall's educational story is important for several reasons. First, imagine if Marshall had not been educated at all. Would it not have been an extraordinary waste of talent? Is it not counterproductive to undereducate any person, unless, of course, you want to keep them in caste? How much does undereducation cost the nation? In a passage that Marshall particularly liked to quote, the Court said:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the

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74. ROWAN, *supra* note 47, at 35.

75. *See id.* at 42-44.

76. *Id.* at 42.

77. *See* BLAND, *supra* note 47, at 5.

78. *Id.*

79. *See* ROWAN, *supra* note 47, at 45.

80. *Id.* at 45-46.

81. BLAND, *supra* note 47, at 7.

great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>82</sup>

Marshall's education also speaks volumes about the important role of historically black schools and colleges in this nation's rhetoric of equal opportunity. The fact is that but for historically black colleges, many blacks would have had no educational opportunity because so many schools were for whites only. Fortunately, Marshall attended two educationally-effective historically black schools, where he learned how to fight caste. The significant role of such schools in this society cannot be gainsaid.

Yet, the work is not complete. After five decades of lively litigation, equal educational opportunities and educationally effective schools remain elusive for many Americans. While advocates must be vigilant that green no longer follows white, we must go a further step: We must establish a constitutional right to adequate and equitable education.<sup>83</sup> Is not education an indispensable right without which all others are diminished? Without it, can one truly realize other constitutional rights?<sup>84</sup> If we are to eliminate caste, our best staffed, best equipped schools must become the baseline for all American children. And we must supplement improved schools with community- and home-based resources that will make it possible for more of our children to pursue advanced education.

### *3. The End We Seek Is Not an Empty Idea*

While many great figures participated in the American struggle for civil rights and civil liberties, none was more important than Thurgood Marshall. Solicitor General Drew Days is right when he says,

His dedication to the living Constitution and legal institutions of America kept him focused on the importance of individual rights and liberties, not only for African-Americans, but also for women, the poor, and other under-represented people. During his lifetime Thurgood Marshall dominated the legal landscape, tenaciously

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82. Sunstein, *supra* note 56, at 1267-68 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

83. See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70-71 (1973) (Marshall, J., dissenting).

84. *Rodriguez*, 411 U.S. at 111-17.



pushing race relations along the path of equality in courtrooms, classrooms, and corporate boardrooms.<sup>85</sup>

After graduating from law school, Marshall joined the Maryland Bar Association and opened a small law office in Baltimore.<sup>86</sup> He quickly earned an excellent reputation as a civil rights advocate, but too much of his work was for no fee.<sup>87</sup> Marshall became counsel for the Baltimore NAACP in 1934, and in that capacity he persuaded a Maryland appellate court that the University of Maryland's exclusion of Donald Murray from the law school was unconstitutional.<sup>88</sup> In 1936, Charles Houston recruited Marshall to join the legal staff of the NAACP in New York.<sup>89</sup> Two years later, Marshall succeeded Houston as chief counsel.<sup>90</sup> Mark Tushnet, a former Marshall clerk, has properly described his former boss as one of the nation's first and most prominent public interest lawyers.<sup>91</sup>

For a quarter-century, between 1938 and 1961, Marshall was the principal architect of the legal strategy to end official, state-sponsored segregation in the United States.<sup>92</sup> Marshall guided some of the greatest legal talent ever assembled, including Constance Baker Motley, James Nabrit, Jr., Arthur Davis Shores, Juanita Mitchell, Oliver Hill, Robert L. Carter, Jack Greenberg, Wiley Branton, Roy Wilkins, Charles L. Black, Jr., and George Hayes, among many others, and accomplished what many thought was impossible.<sup>93</sup>

Under Marshall's leadership, the NAACP, and after 1940, the NAACP Legal Defense and Educational Fund (LDF), the nonprofit agency created by Marshall to finance desegregation litigation, attacked every form of segregation in the United States.<sup>94</sup> For example, in *Smith v. Allright*<sup>95</sup> they attacked the all white Democratic primaries throughout the South that denied blacks their right to vote; in *Shelley v. Kramer*<sup>96</sup> and *Hurd v. Hodge*<sup>97</sup> they challenged the enforcement of racially-restrictive covenants in real estate transactions which prevented blacks from living in certain communities; they also challenged segregation in interstate transportation.<sup>98</sup> Donald

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85. Resolution Presented by the Solicitor General, Proceedings in the Supreme Court of the United States in Memory of Justice Marshall, 510 U.S. v, vi (Nov. 15, 1993).

86. See ROWAN, *supra* note 47, at 47-49.

87. *Id.*

88. *Pearson v. Murray*, 182 A. 590 (Md. 1936).

89. ROWAN, *supra* note 47, at 70.

90. See BLAND, *supra* note 47, at 181-82, for tables of cases argued by the lawyers of the NAACP Legal Defense and Educational Fund, Inc. before the Supreme Court.

91. See sources cited *supra* note 47; see also Mark V. Tushnet, *A Tribute to Justice Thurgood Marshall: Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277 (1992).

92. See BLAND, *supra* note 47, at 116.

93. See ROWAN, *supra* note 47, at 182-219.

94. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950).

95. 321 U.S. 649 (1944).

96. 334 U.S. 1 (1948).

97. 334 U.S. 24 (1948).

98. *Boynton v. Virginia*, 364 U.S. 454 (1960).

Gaines, Ada Sipuel, and Heman Sweatt were all aided by Marshall and LDF when Missouri, Oklahoma, and Texas denied them equal protection of the law.<sup>99</sup>

Marshall was the lawyer for Autherine Lucy and Polly Anne Myers in their challenge against The University of Alabama's policy of segregation.<sup>100</sup> He was also instrumental in persuading the Supreme Court that segregation in bus transportation in Montgomery was unconstitutional.<sup>101</sup> The significance of these hard-won legal victories cannot be overstated. Marshall and LDF staff lawyers and volunteers used public education and litigation to demonstrate the embarrassment, shame, and unfairness of Jim Crow laws in a country which had recently fought a war over and ridiculed theories of racial supremacy abroad.

Marshall's greatest court victory came on May 17, 1954, when the United States Supreme Court agreed that segregated public schools were unconstitutional notwithstanding the separate but equal doctrine of *Plessy v. Ferguson*.<sup>102</sup> In *Brown v. Board of Education*,<sup>103</sup> Marshall convinced the Court that *de jure* segregated schools were inherently unequal and therefore unconstitutional.<sup>104</sup> Here, Marshall displayed his brilliance as a legal strategist. Having spent nearly twenty-five years showing the Court that separate but equal was folly, Marshall took on segregation itself. He reiterated arguments from *Sipuel*, *Gaines*, and *Sweatt* that in segregated schools neither the tangibles nor the intangibles were equal.<sup>105</sup> He added that segregation caused substantial harm to all children, especially black children who were stamped with a badge of inferiority.<sup>106</sup> Thus, Marshall linked state-sponsored segregation with the maintenance of racial caste.

In a unanimous opinion written by Chief Justice Earl Warren, the Court gave notice that segregation in public affairs would end.<sup>107</sup> Warren wrote that racial separation generated a feeling of inferiority as to the black children's status in the community and therefore violated the Equal Protection Clause.<sup>108</sup> Our inference from Warren's stated premise is that he also real-

99. *Pearson v. Murray*, 182 A. 590, 590 (Md. 1936).

100. *Lucy v. Adams*, 350 U.S. 1 (1955). For an insider's view of the events leading to the desegregation of The University of Alabama, see E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA* (1993).

101. See *Gayle v. Browder*, 352 U.S. 903, *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956) (ending segregation in municipal transportation); see also *Schiro v. Bynum*, 375 U.S. 395 (1964) (ending segregation in municipal auditoriums); *Johnson v. Virginia*, 373 U.S. 61 (1963) (ending segregation in courtrooms); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (ending segregation in athletic contests); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (ending segregation at public golf courses and parks); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (ending segregation at municipal golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (ending segregation at public beaches and bathhouses).

102. 163 U.S. 537 (1896).

103. 347 U.S. 483 (1954).

104. *Brown*, 347 U.S. at 495.

105. *Id.* at 491-92.

106. *Id.* at 493-94.

107. *Id.* at 483.

108. *Id.* at 495.

ized that such separation generated in white children a feeling of superiority as to their status in the community. That should have been another constitutional basis for invalidating the segregation statutes.<sup>109</sup>

*Brown* was severely criticized in part because the Court accepted sociological data as proof of the harm of segregation on black children.<sup>110</sup> For Herbert Wechsler, the question before the Court was essentially a freedom of association conflict between those seeking to maintain segregation and those seeking to compel desegregation.<sup>111</sup> This criticism seems misguided, for the opinion clearly sets forth that segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment.<sup>112</sup> Also, it would seem that private associational rights would not allow the state to approve discrimination in public schools.

Our chief criticism of the Court in *Brown* is that it did not identify an obvious racial privilege to whites for what it was. Whites have no constitutional right to use the power of the state to maintain racial caste of others. The Court should have spelled this out more directly. Had it been more explicit about *Brown*'s anti-caste meaning, its legacy would be far more secure than it appears today.

We have Marshall's parents and his teachers/mentors to thank for his many talents, and we have him to thank for giving his life to the cause of equality. Paul Gewirtz has written of Marshall,

He was the country's greatest civil rights lawyer during the greatest period for civil rights advances in our history, and in that role he lived a life of relentless intensity and danger, and one of transforming achievement. . . .

. . . Thurgood Marshall had the capacity to imagine a radically different world, the imaginative capacity to believe that such a world was possible, the strength to sustain that image in the mind's eye and the heart's longing, and the courage and ability to make the imagined world real. The predicate for the great achievement of *Brown* was to imagine something better than the present—to resist the acquiescence, passivity, fear, and accommodation that over-

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109. *Loving v. Virginia*, 388 U.S. 1 (1967). To our knowledge, *Loving* is the only Supreme Court decision in which the Court's rationale makes clear that state laws cannot endorse white supremacy.

110. Perhaps the most famous criticism came from Herbert Wechsler. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Professor Wechsler, implying that the reasoning of the *Brown* decision was not principled, wrote,

A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of the this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.

*Id.* at 19.

111. *Id.* at 34.

112. *See Brown*, 347 U.S. at 495.

come so many, to defy an insistent reality with imagination and then to fight for what was imagined.<sup>113</sup>

*Brown's* legacy is barely a shadow of the opinion and the hope it engendered for better educational opportunities, especially for colored children. For nearly two decades the school cases were actively resisted and nullified. And by the mid-1970s, a new Court majority had lost its will to command compliance with a policy it did not support.<sup>114</sup> The Constitution did not change, only the Court's interpretation of equal protection. For the new Court equality means little for America's second classes. Lost through this process was another two generations of children without effective educational opportunity, without real prospects for their lives. As we revise civil rights strategies, we must reclaim the anti-caste meaning of *Brown* and related cases. We must see that the Court defines equality of opportunity in a substantive way, one that will allow government to eliminate caste, in all its forms.

### *B. Strategies for the Future*

Although Marshall has left us, he did not depart without leaving a wealth of thought from which we can draw direction and inspiration. Marshall had two exceptional careers and we must mine each for his wise counsel. After Marshall's brilliant career with the LDF, President John F. Kennedy nominated Marshall to serve on the distinguished United States Court of Appeals for the Second Circuit (1962-1965). He then served two years as the United States Solicitor General, before President Lyndon B. Johnson nominated him to the U.S. Supreme Court in 1967.<sup>115</sup>

Marshall was not on the Court long before his views on constitutional questions were relegated significantly to dissenting opinions. Yet scholars have yet to study Marshall's writing comprehensively, especially his dissents. Few, if any, former Justices have the legacy of Thurgood Marshall. We hope that more scholars will join us as we begin mining his opinions, seeking to re-center the generative power of the modern Constitution.

Although we cannot treat Marshall's complete jurisprudence in this Article, there is much to assess. In cases in which it appeared the police abused their power to extract a confession from an accused murderer, Marshall held firm to the principle that involuntary confessions should not be admissible.<sup>116</sup> Even in capital murder cases, Marshall did not shirk his duty. He simply would not countenance police misconduct, such as coercively questioning a fifteen-year-old boy over the course of several days, for long peri-

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113. Paul Gewirtz, *Thurgood Marshall*, 101 YALE L.J. 13, 13-14 (1991).

114. Fair, *Been in the Storm*, *supra* note 51, at 131-37.

115. For a discussion of Johnson's appointment of Marshall to serve as solicitor general, see ROWAN, *supra* note 47, at 289-92; to the Supreme Court, ROWAN, *supra* note 47, at 286-89, 296.

116. See *Johnson v. Massachusetts*, 390 U.S. 511, 512-15 (1968) (Marshall, J., dissenting).

ods of time.<sup>117</sup> Marshall was a selective incorporationist who insisted that rights deemed fundamental under the Constitution should serve as limits on state and federal government.<sup>118</sup>

Marshall broke with others on the Court to oppose police misconduct or poor lawyering that had disadvantaged a criminal defendant. He supported the rights of all criminally accused persons to full constitutional rights. For Marshall, every person “is entitled to a trial in which he is fully accorded his constitutional guarantee of the right to confront and cross-examine all the witnesses against him.”<sup>119</sup> Marshall also resisted efforts within the Court to weaken the scope of protections embraced by the Fifth Amendment privilege against self-incrimination. For Marshall, the Fifth Amendment provided a witness an absolute right to resist interrogation if the testimony sought would tend to incriminate him. Marshall championed a broad guarantee that before the government would compel a witness to testify, it must give the witness immunity from prosecution for crimes to which his testimony relates.<sup>120</sup>

Marshall’s constitutional vision was usually broader than most of his Court colleagues. For example, Marshall believed the Constitution guaranteed criminal defendants an impartial jury. Thus, in cases where his colleagues agreed that a trial judge was constitutionally required to inquire during voir dire about racial prejudice among potential jurors, Marshall dissented in part, explaining why the trial judge could not totally foreclose other reasonable and relevant avenues of inquiry as to possible prejudice.<sup>121</sup> In Marshall’s view, the right to impartiality and fairness did not protect against only certain classes of prejudice.<sup>122</sup>

Marshall battled an increasingly conservative Court to retain minimum constitutional standards before the government violated the due process rights of the criminally accused. No matter how heinous the crime, Marshall was fastidious in his requirement that government agents conduct themselves consistent with constitutional safeguards.<sup>123</sup> He was unwilling to endorse Court opinions that deferred to broad governmental discretion.<sup>124</sup>

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117. *Monks v. New Jersey*, 398 U.S. 71, 72 (1970) (Marshall, J., dissenting).

118. *Dutton v. Evans*, 400 U.S. 74, 100-11 (1970).

119. *Dutton*, 400 U.S. at 111; *see also* *Dukes v. Connecticut*, 406 U.S. 250, 259-71 (1972) (Marshall, J., dissenting) (explaining the serious consequences of guilty pleas and his inclination to permit criminally accused persons to withdraw such pleas).

120. *Kastigar v. United States*, 406 U.S. 441, 467-71 (Marshall, J., dissenting).

121. *Ham v. South Carolina*, 409 U.S. 524, 530-34 (1973) (Marshall, J., concurring in part and dissenting in part).

122. *Ham*, 409 U.S. at 531.

123. *See, e.g.,* *Batson v. Kentucky*, 476 U.S. 79, 102-08 (1986) (Marshall, J., separate concurrence) (expressing the view that preemptory strikes of jurors should be eliminated because of substantial risk of racial bias); *Barefoot v. Estelle*, 463 U.S. 880, 906-16 (1983) (Marshall, J., dissenting) (criticizing colleagues for endorsing summary procedures in capital punishment cases); *Adams v. Williams*, 407 U.S. 143, 153-62 (1972) (Marshall, J., dissenting) (protesting arbitrary police conduct against citizens).

124. *See, e.g.,* *Berkemer v. McCarthy*, 468 U.S. 420, 429-34 (1984) (Marshall, J., opposing exception to *Miranda* requirements as sending an unclear message to police); *Brewer v. Williams*, 430 U.S. 387, 406-14 (1977) (Marshall, J., concurring) (rejecting a good faith exception to *Miranda*).

Therefore, Marshall could not join the Court's opinion endorsing nighttime searches in narcotics cases.<sup>125</sup> For Marshall, there was "no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night."<sup>126</sup> He concluded that nighttime searches require an additional showing of justification over and above probable cause.<sup>127</sup>

Marshall opposed government policies that stripped the criminally accused of all constitutional rights. Thus, when states sought to enforce voting restrictions on ex-felons, Marshall would have no part in it.<sup>128</sup> Marshall pointed out that almost half the states provided for the restoration of ex-felons' voting rights upon completion of sentence or release from parole or probation.<sup>129</sup>

In addition, Marshall was there to protect privacy rights, especially of women seeking to determine whether to bear a child.<sup>130</sup> He was there to explain why Allan Bakke was not a victim of invidious, reverse discrimination.<sup>131</sup> Marshall was a voice for the grandmother who was threatened with jail for allowing her grandsons to live with her in public housing.<sup>132</sup> He was present to defend the right to marry against a state policy that few, if any, persons could satisfy.<sup>133</sup> Furthermore, Marshall explained to his colleagues the difference between special preferences for whites and remedial affirmative action.<sup>134</sup> He supported federal and state laws designed to ameliorate American apartheid. He endorsed broad equitable powers of judges seeking to remedy constitutional violations by school districts, including imposing interdistrict remedies where appropriate.<sup>135</sup> His constitutional vision was trenchant, having been shaped by years of battle.

Few, if any, of the members of the Court, before or since, could boast Marshall's relevant experience. Indeed, President Johnson said of Marshall, "I believe he has already earned his place in history, . . . but I think it will be greatly enhanced by his service on the Court."<sup>136</sup> Nonetheless, as had been the case with his nomination to the Second Circuit, Marshall's qualifications were questioned, primarily by southern white senators.<sup>137</sup> Marshall suffered

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125. *Gooding v. United States*, 416 U.S. 430, 462 (1974).

126. *Gooding*, 416 U.S. at 462.

127. *Id.* at 464.

128. *Richardson v. Ramirez*, 418 U.S. 24, 84-85 (1974).

129. *Richardson*, 418 U.S. at 84-85.

130. *Roe v. Wade*, 410 U.S. 113 (1973).

131. *Bd. of Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

132. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

133. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

135. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

136. Roy Reed, *Marshall Named for High Court, Its First Negro*, N.Y. TIMES, June 14, 1967, at A1.

137. See ROWAN, *supra* note 47, at 298-308. For an insightful discussion of the year-long ordeal Marshall faced when nominated for the Second Circuit, see Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237 (1993).

this humiliation with grace. He knew that he was amply qualified and he proved his naysayers wrong.

As an Associate Justice of the Supreme Court between 1967 and 1991, Marshall used the Constitution as a sword and the rule of law as a shield to change our society. Justice Marshall's constitutional vision was broad. He was an advocate for the poor, the criminally accused, minorities, and always opposed the death penalty. Marshall supported reproductive freedom and equal pay for women. He believed the Constitution protected broad privacy interests including familial privacy, the right to read and see materials that might be objectionable to others, and the right to choose a partner of the same sex without discrimination. His opinions brought constitutional ideal and reality together. We must see that Marshall's work is not lost to obscurity.

#### IV. CONCLUSION

We salute Marshall as we mark the tenth anniversary of his death. Like John Brown, Marshall's spirit goes marching on. Judge Robert L. Carter, a friend and colleague of Marshall's, aptly reminds us of Marshall's significance:

The pride and dignity that Thurgood Marshall has inspired in the black community over his long career is paralleled only by the very real, enormous contribution he has made in ensuring that black Americans enjoy equality of citizenship. But the most lasting imprint he leaves is more far-reaching. Marshall's steadfast belief in the Constitution as the pillar of democratic and egalitarian principles and in law generally as the protector of the poor and powerless—and his efforts toward the realization of these ideals—reminds the American people as a whole of their vast potential for social progress.<sup>138</sup>

Martha Minow, a former Marshall clerk, deftly recalls how Marshall continuously reminded other members of the Court about the context of the lives of litigants, especially through compelling dissenting opinions.<sup>139</sup> Marshall knew firsthand the status of the outsider, and we must carefully examine each of his nearly four hundred dissents for arguments against caste. Those dissents contain rare jewels for civil rights lawyers that we must harvest.

Similarly, the late Associate Justice William Brennan, Marshall's closest friend on the Court, wrote,

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138. Robert L. Carter, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 33, 42 (1991).

139. Martha Minow, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 66 (1991); see also Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093 (1992).

What made Thurgood Marshall unique as a Justice? Above all, it was the special voice that he added to the Court's deliberations and decisions. His was a voice of authority: he spoke from first-hand knowledge of the law's failure to fulfill its promised protections for so many Americans. It was also the voice of reason, for Justice Marshall had spent half a lifetime using the tools of legal argument to close the gap between constitutional ideal and reality.<sup>140</sup>

Owen Fiss has recalled one story about Marshall's knowing when to move on:

[Marshall was in a small Mississippi town] out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip came up. "Nigguh," he said, "I thought you oughta know the sun ain't nevah set on a live nigguh in this town." So [Marshall] wrapped [his] constitutional rights in cellophane, tucked them in [his] hip pocket—and caught the next train.<sup>141</sup>

Justice Marshall often used stories from his life to explain the law's failure to fulfill the Constitution's promised protections for so many Americans. For twenty-four years Marshall was the conscience of the Supreme Court.

Justice Marshall's legacy is a challenge to each of us. It is a challenge to envision a better social order free of caste. It is also a challenge to live lives of service. Marshall's life is an example of what we too might do to improve our society for the better. Marshall was an inspiration to judges, lawyers, and law teachers such as Damon Keith, Thomas McMillian, A. Leon Higginbotham, Jr., Nathaniel Jones, William Coleman, Jr., Juanita Jackson Mitchell, Wade McCree, Spottswood Robinson, and Constance Baker Motley, among many other accomplished citizens. Marshall's legacy is an inspiration to us personally to live greatly in the law or fail in our attempt.<sup>142</sup>

William Coleman, Jr. has asserted that Marshall is among the very few Americans who have made a significant difference in the quality of life for all people in our nation. Writing to Marshall, he states:<sup>143</sup>

You have performed your task with great style and in a way that has made the law a grander calling. Thanks so much for greatly improving the quality of our laws, the vision of our country, and the hope that the youth may yet enjoy the blessings of liberty without the

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140. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 23 (1991).

141. Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 53 (1991).

142. See Wechsler, *supra* note 110, at 35.

143. William T. Coleman, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 42, 42 (1991).



burdens of unfair restrictions imposed by the color of their skin, their gender, or their poverty.<sup>144</sup>

No truer words have been spoken. And we agree with Fiss, another Marshall clerk, who wrote in tribute that as long as there is law, Justice Thurgood Marshall's name will be remembered as one of its giants.<sup>145</sup> Finally, A. Leon Higginbotham, Jr. was correct when he wrote that "the greatest tribute to Thurgood Marshall would be to live as he lived"—fighting caste.<sup>146</sup>

On his retirement in 1991, Justice Marshall was asked how he wished to be remembered. He replied, "That he did what he could with what he had."<sup>147</sup> We owe Justice Marshall an enormous debt. Without Marshall, we doubt that many Americans of color and white women could have progressed to become judges, lawyers, or law teachers. But for his work, our lives too, might still be defined officially by color or gender, as was the case for so many generations of Americans. We, as grateful Americans of color, do not have to drink at colored water fountains, or use colored toilets, or colored waiting rooms. We do not have to attend dilapidated, segregated schools. We do not have to ride in the back of the bus or sit in special sections of theaters or other public accommodations. We are not turned away from lunch counters. We do not have to endure the same level of violent attacks, racial epithets, or other forms of humiliation because Marshall changed our society.

If Marshall could speak to us today we think he would warn us not to be complacent and to "do what you think is right and let the law catch up."<sup>148</sup> Equality champions must bear his challenge. Eliminating caste is our cross to bear.

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144. *Id.* at 49.

145. Fiss, *supra* note 141, at 55.

146. Higginbotham, *supra* note 48, at 66.

147. Ruth Marcus, *Plain-Spoken Marshall Spars With Reporters*, WASH. POST, June 29, 1991, at A1; see also Randall Kennedy, *Doing What You Can With What You Have: The Greatness of Justice Marshall*, 80 GEO. L.J. 2081 (1992).

148. Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992).

