

# The Glorious Jurisprudence of Thurgood Marshall

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*Judge Lynn Adelman\**

It was only slightly surprising that during the Senate confirmation hearing on the nomination of Elena Kagan to the Supreme Court, Republican senators attacked the jurisprudence of the nation's first African American Supreme Court Justice, Thurgood Marshall, for whom Kagan clerked. Senator Jon Kyl said that Marshall's philosophy was "not what I would consider to be mainstream," Senator Jeff Sessions called Marshall a "well-known activist," and Senator John Cornyn expressed "concerns" about Marshall's views.<sup>1</sup> The Republicans criticized Marshall because he possessed traits that they regarded as undesirable in a judge, including a strong commitment to the concept of equal citizenship embodied in the Reconstruction Amendments, a belief that the judiciary should play an important role in implementing that concept and the temerity to point out that the Constitution "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."<sup>2</sup> Marshall was also an unacknowledged presence at Sonia Sotomayor's confirmation hearing, at which the Republicans objected intensely to the notion that Supreme Court justices should have empathy. Empathy is a quality for which Marshall's jurisprudence was well known.<sup>3</sup>

While it might have seemed impolitic to attack Marshall, who was probably the greatest lawyer of the twentieth century and who argued its most important case, *Brown v. Board of Education*,<sup>4</sup> the Republicans had little to worry about. Politically, the country has become much more conservative since 1967 when Lyndon Johnson appointed Marshall to the Court, a shift that began soon after Marshall's appointment and that made his work on the Court less satisfying than it might have been. The senators who attacked Marshall knew that while he was a hero to African Americans and aging veterans of the civil rights movement, his view of the Constitution was definitely out of fashion. Years of conservative attacks on the idea that the Constitution imposed an obligation on the federal judiciary to advance the

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<sup>1</sup> Ken Rudin, *Will They Confirm Thurgood Marshall?*, NPR (June 29, 2010), <http://m.npr.org/story/128194604> (quoting Senators Kyl, Sessions, and Cornyn).

<sup>2</sup> Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

<sup>3</sup> See John Rollert, *Thurgood Marshall's Return*, BALTIMORE SUN (July 12, 2010), [http://articles.baltimoresun.com/2010-07-12/news/bs-ed-kagan-marshall-20100712\\_1\\_thurgood-marshall-supreme-court-justices-sotomayor-hearings](http://articles.baltimoresun.com/2010-07-12/news/bs-ed-kagan-marshall-20100712_1_thurgood-marshall-supreme-court-justices-sotomayor-hearings).

<sup>4</sup> 347 U.S. 483 (1954).

project of equal citizenship enabled the Republicans to attack even an iconic figure like Marshall.

And Democrats made little effort to defend Marshall. To her credit, Kagan made no attempt to disavow her previously expressed admiration for Marshall, but at the same time, she declared, “If you confirm me, you’ll get Justice Kagan, you won’t get Justice Marshall.”<sup>5</sup> And while another Marshall clerk, Harvard Law School dean Martha Minow, praised Marshall in an op-ed, she focused primarily on his role as the lawyer in *Brown*.<sup>6</sup> Law professor Jonathan H. Adler responded that one can celebrate Marshall’s work as an advocate without embracing his work as a Justice and went on to criticize Marshall’s jurisprudence.<sup>7</sup> Responses to Adler’s blog post were similarly critical.<sup>8</sup> The truth, however, is that Marshall’s work as a Justice not only deserves a strong defense but should be enthusiastically celebrated, for the notion that Marshall was a less than stellar Supreme Court Justice is grossly mistaken. Although his influence as a Justice was naturally diminished by being in the minority, his jurisprudence is, in Kagan’s words, “a thing of glory.”<sup>9</sup> This is largely because Marshall consistently expressed the view that the Constitution in substantial part represents a promise to eradicate entrenched inequalities and that “the role of the courts, in interpreting the Constitution [is] to protect the people who [go] unprotected by every other organ of government.”<sup>10</sup>

In this article, I explore some of Marshall’s jurisprudence and particularly his understanding of the idea of equal citizenship. Marshall believed that the Reconstruction Amendments altered the Constitution in ways that, even now, have not been fully recognized. As he saw it, the Reconstruction Amendments transformed the Constitution into a document concerned as much with equality as with liberty, and conferred on the national government “the power to make certain that the fundamental rights of all persons were respected.”<sup>11</sup> I contend that Marshall’s jurisprudence is highly relevant to our present situation and that the legal community, including the progressive legal community, has erred gravely by distancing itself from it. More than the jurisprudence of any other Justice, Marshall’s opinions speak directly to the most serious threat to America’s hopes for a democratic future:

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<sup>5</sup> Ari Shapiro, *Kagan Quizzed About Thurgood Marshall’s Record*, NPR (June 29, 2010), <http://m.npr.org/news/Politics/128195737> (quoting Kagan).

<sup>6</sup> See Martha Minow, *Also Confirmed: Marshall’s Legacy*, BOS. GLOBE (Aug. 8, 2010), [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2010/08/08/also\\_confirmed\\_marshall\\_legacy/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/08/08/also_confirmed_marshall_legacy/).

<sup>7</sup> See Jonathan H. Adler, *Forgetting Justice Marshall*, THE VOLOKH CONSPIRACY (Aug. 16, 2010, 5:51 AM), <http://www.volokh.com/2010/08/16/forgetting-justice-marshall/>.

<sup>8</sup> See, e.g., Steve, Comment to *Forgetting Justice Marshall*, THE VOLOKH CONSPIRACY (Aug. 17, 2010, 3:42 AM), <http://www.volokh.com/2010/08/16/forgetting-justice-marshall/> (“[O]ne can appreciate Marshall’s work as an advocate in front of the bench and be appalled by his work as an advocate behind it.”).

<sup>9</sup> Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1130 (1993).

<sup>10</sup> *Id.* at 1129.

<sup>11</sup> Thurgood Marshall, *Group Action in the Pursuit of Justice*, 44 N.Y.U. L. REV. 661, 663 (1969).

the enormous economic and political inequality that has developed over the last three decades.

For over forty years, partly through the use of evocative words and phrases such as “law and order,” “strict construction,” and “judicial activism,” conservatives have portrayed themselves as reliable interpreters of the Constitution, while progressives have failed to articulate an emotionally resonant constitutional vision. I suggest that Marshall’s view that the Constitution establishes the principle of equal citizenship—a principle that holds that all individuals are entitled to be treated as “respected, responsible and participating member[s]” of society<sup>12</sup>—is such a vision. Progressives could do worse than to champion a jurisprudence based on this principle.

In Section I of this article, I discuss some of Marshall’s early experiences and work as a lawyer that are particularly relevant to his jurisprudence. In Section II, I briefly discuss Marshall’s perspective on the development of the idea of equality in American legal history. In Section III, I focus on Marshall’s conception of equal citizenship and some illustrative opinions, and in Section IV, I comment on the present-day relevance of Marshall’s jurisprudence.

### I. EARLY EXPERIENCES

Marshall was born in 1908, and he grew up in Baltimore, a strictly segregated city. His parents were mulattoes, his father a waiter and his mother a public school teacher.<sup>13</sup> Although Marshall grew up in the oppressive environment of Jim Crow, his parents taught him to be proud of his ancestry.<sup>14</sup> Marshall attended Lincoln University, an African-American institution in Pennsylvania whose students knew that they “constituted a potential black elite” and were zealous about racial equality.<sup>15</sup> Marshall studied the humanities, was a debater, and ultimately decided to go to law school.<sup>16</sup> Had he applied to the University of Maryland Law School, he would have been rejected because the school did not admit blacks.<sup>17</sup> Rather, he attended Howard, an all-black school.<sup>18</sup>

Howard’s first black president, Mordecai Johnson, wanted to make the school more socially conscious, and he brought like-minded instructors, including Harvard Law graduate and civil rights activist Charles Houston, to the law faculty.<sup>19</sup> Houston believed that black lawyers “should be social

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<sup>12</sup> Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

<sup>13</sup> Randall W. Bland, *The Making of an Advocate*, reprinted in THURGOOD MARSHALL: JUSTICE FOR ALL 22, 23 (Roger Goldman & David Gallen eds., 1992).

<sup>14</sup> *Id.* at 22.

<sup>15</sup> *Id.* at 24.

<sup>16</sup> *Id.* at 25.

<sup>17</sup> LARRY S. GIBSON, *YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE* 355 n.3 (2012).

<sup>18</sup> Bland, *supra* note 13, at 25.

<sup>19</sup> *Id.*

engineers” and use the law to defeat racial discrimination.<sup>20</sup> Marshall became Houston’s protégée and graduated as the class valedictorian.<sup>21</sup> After graduation, Houston took Marshall on a trip through the South to “impress on [him] the devastation of segregation,” after which Marshall assisted Houston in representing a black defendant in a murder case in Virginia.<sup>22</sup> The defendant was convicted and sentenced to life imprisonment, but as Marshall later explained: “We won it. If you got a Negro charged with killing a white person in Virginia and you got life imprisonment, then you’ve won. Normally, they were hanging them in those days.”<sup>23</sup> Marshall “internalized” Houston’s teachings and “developed an undying faith in the Constitution and ‘the rule of law.’”<sup>24</sup>

After the trial, Marshall returned to Baltimore and set up a solo law practice, representing mostly poor people, defendants in criminal cases, personal injury plaintiffs, and tenants. He learned firsthand the importance of the constitutional rights of the accused, such as the right not to be questioned by police officers without a lawyer present.<sup>25</sup> He also realized that committed lawyers could make a difference in the lives of poor people—debtors, tenants, consumers, job seekers, and others—by asserting their rights under the law and thereby mitigating inequalities in wealth and power. He later argued in a speech that lawyers had a duty to help reduce inequality:

The lawyer has often been seen by minorities, including the poor, as part of the oppressors in society. Landlords, loan sharks, businessmen specializing in shady installment credit schemes—all are represented by counsel on a fairly permanent basis. But who represents and speaks for tenants, borrowers, and consumers? Many special-interest groups have permanent associations with retained counsel. Who speaks for the substantial segment of the populace that such legislation might disadvantage? Outside of the political processes, I think the answer is clear. Lawyers have a duty in addition to that of representing their clients; they have a duty to represent the public, to be social reformers in however small a way.<sup>26</sup>

While practicing law in Baltimore, Marshall also became active in the National Association for the Advancement of Colored People (NAACP), a tie that was to prove enormously important both to him and to the Association. In the early years of the twentieth century, the NAACP spearheaded

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

<sup>21</sup> *Id.* at 26.

<sup>22</sup> Juan Williams, *Marshall's Law*, WASH. POST MAG., Jan. 7, 1990, at 12, reprinted in THURGOOD MARSHALL: JUSTICE FOR ALL, *supra* note 13, at 140, 146.

<sup>23</sup> *Id.*

<sup>24</sup> Robert L. Carter, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 33 (1991), reprinted in THURGOOD MARSHALL: JUSTICE FOR ALL, *supra* note 13, at 187, 191.

<sup>25</sup> See generally Bland, *supra* note 13, at 22–31.

<sup>26</sup> *Id.* at 29 (quoting Marshall).

African Americans' effort to eliminate segregation in part by bringing lawsuits. According to Marshall, the organization chose a court strategy

partially because other avenues of redress appeared to be closed, and partially because of the deep and abiding faith the planners had in the rule of law, and the efficacy and feasibility of instigating social reform through reliance upon the Constitution—which after all was designed to insure protection of the basic values of our society.<sup>27</sup>

On behalf of the NAACP, Marshall successfully sued the State of Maryland, forcing it to desegregate the law school.<sup>28</sup> He also negotiated with white store owners who sold to blacks but would not hire them, and, along with John L. Lewis, tried to unionize black and white steel workers.<sup>29</sup> Marshall's work as a solo practitioner in Baltimore, both in his own practice and in the cases he brought on behalf of the NAACP, brought him into daily contact with the massive injustice of Jim Crow, a legal system that was just beginning to display some fissures. At the same time, however, it solidified his conviction that a committed and skillful lawyer could accomplish a considerable amount in the struggle to create a more just and equal society.<sup>30</sup>

In 1936, Houston hired Marshall to assist him in the NAACP's national office in New York City.<sup>31</sup> Two years later, Marshall became the NAACP's chief lawyer, a position he held until 1961 when he became a judge on the Second Circuit Court of Appeals. During his years as the NAACP's chief counsel, Marshall "traveled the country using the Constitution to compel courts to protect the rights of black Americans."<sup>32</sup> The work was dangerous, and at times, Marshall could have ended up dead or in the same jail as those he was defending.<sup>33</sup> Working in small white-supremacist towns, Marshall lived the segregated life he was challenging.<sup>34</sup> Though many of his innocent clients were sent to prison, Marshall's work paid off with important legal precedents.<sup>35</sup> In addition to his trial work, Marshall argued thirty-two cases before the Supreme Court, winning twenty-nine.<sup>36</sup> Among these were some of the most important cases of the twentieth century, including *Brown v.*

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<sup>27</sup> Thurgood Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L.Q. 1, reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 220, 222 (Mark V. Tushnet ed., 2001).

<sup>28</sup> Bland, *supra* note 13, at 30.

<sup>29</sup> Williams, *supra* note 22, at 147.

<sup>30</sup> See generally Bland, *supra* note 13, at 22–31.

<sup>31</sup> Williams, *supra* note 22, at 148.

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.* at 149.

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

<sup>36</sup> Kagan, *supra* note 9, at 1127.

*Board of Education*,<sup>37</sup> *Sweatt v. Painter*,<sup>38</sup> *McLaurin v. Oklahoma State Regents*,<sup>39</sup> and *Shelley v. Kraemer*.<sup>40</sup>

Thus, when Marshall joined the Supreme Court, he brought to it an atypical background and a distinctive perspective, a perspective that the Court had not seen before and has not seen since. It “was not simply that he was the first black to sit on the Court, but that he had spent much of his professional life working among the oppressed and the insurgent.”<sup>41</sup> Like the other Justices, Marshall knew the world of power, privilege, and achievement, but he “also knew the other side of the tracks, not simply as an observer but as one who had called it home.”<sup>42</sup> He knew

how the world worked, and how it worked against those at the bottom. He knew what police stations were like, what rural Southern life was like, what the New York streets were like, what trial courts were like, what hard-nosed local political campaigns were like, what death sentences were like, what being black in America was like . . . and he knew what it felt like to be at risk as a human being. And he knew the difference that law could make in all those places.<sup>43</sup>

## II. THE DEVELOPMENT OF THE IDEA OF EQUALITY AS MARSHALL SAW IT

From his study of law and work as a lawyer, Marshall well understood the constitutional history of the concept of equality. Although the Declaration of Independence declared that “all men are created equal,”<sup>44</sup> the original Constitution did not mention equality and, in fact, sanctioned the continuation of slavery. Its purpose was to establish a national government and to ensure that government could not interfere with the liberty of individuals who were not slaves. Some seventy years later, the idea of equality memorably resurfaced in the Gettysburg Address, in which Lincoln declared that the new nation being formed by the Civil War was “dedicated to the proposition that all men are created equal.”<sup>45</sup> Lincoln’s speech served as a kind of “preamble of the second American constitution,” which resulted from the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>46</sup> To Marshall, the Fourteenth Amendment “enshrined into national law the principles of freedom

<sup>37</sup> 347 U.S. 483 (1954).

<sup>38</sup> 339 U.S. 629 (1950).

<sup>39</sup> 339 U.S. 637 (1950).

<sup>40</sup> 334 U.S. 1 (1948).

<sup>41</sup> Paul Gewirtz, *Thurgood Marshall*, 101 YALE L.J. 13 (1991), reprinted in THURGOOD MARSHALL: JUSTICE FOR ALL, *supra* note 13, at 167, 169.

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

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

<sup>44</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>45</sup> Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), available at <http://www.loc.gov/exhibits/gadd/4403.html>.

<sup>46</sup> GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY 4 (2001).

and equality which an earlier generation had announced in more abstract form in the Declaration of Independence."<sup>47</sup>

The purpose of the Reconstruction Amendments was to establish freedom and equality for African Americans.<sup>48</sup> The Fourteenth Amendment "repudiat[ed] the racialist vision of American identity that had animated Chief Justice Taney's infamous *Dred Scott* decision."<sup>49</sup> "Henceforth, there was to be no 'dominant race' and no 'subordinate and inferior class of beings,' but only citizens."<sup>50</sup> As Marshall explained, the Amendments, particularly the Fourteenth, conferred on the national government the power to ensure "that the fundamental rights of all individuals were respected."<sup>51</sup> The guiding premise of the second constitution was "not freedom from government but equality under law. The state would have to do more than leave [people] alone."<sup>52</sup> Its new task was to guarantee equal citizenship.<sup>53</sup> The Thirteenth Amendment as well as the Fourteenth "betoken[ed]" a new way of conceiving the national government, envisioning it not as an enemy but as a "partner in the building of a society free of interpersonal exploitation."<sup>54</sup> By decreeing that "[n]either slavery nor involuntary servitude shall exist," the Amendment recognized that without government some people would inevitably dominate others and, therefore, required that government prevent certain "relationships of exploitation [from] com[ing] into being."<sup>55</sup>

The drafters of the Reconstruction Amendments cast them in general terms rather than limiting their scope to racial justice and thereby gave the idea of equal citizenship the capacity to grow and to protect other groups. As Marshall put it:

The spirit of justice was not limited to racial discrimination. The germ planted was infectious and has spread. It is certainly not an exaggeration to say that concern for the rights of the criminally accused and for the economically disadvantaged has come in part from the lessons learned in the fight against discrimination.<sup>56</sup>

The inspiring language of the Amendments, of course, did not guarantee that they would be enforced. And within fifteen years of the ratification of the Fourteenth Amendment, "a hostile judiciary" had largely "suppressed" the idea of equal citizenship.<sup>57</sup> In the *Slaughter-House Cases*,<sup>58</sup> the

<sup>47</sup> Marshall, *supra* note 11, at 663.

<sup>48</sup> Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 *RUTGERS L. REV.* 387, 389 (1967).

<sup>49</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 380 (2005).

<sup>50</sup> Karst, *supra* note 12, at 13 (quoting JACOBUS TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 192–95 (1951)).

<sup>51</sup> Marshall, *supra* note 11, at 663.

<sup>52</sup> FLETCHER, *supra* note 46, at 3.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 214.

<sup>55</sup> *Id.*

<sup>56</sup> Marshall, *supra* note 11, at 667.

<sup>57</sup> Karst, *supra* note 12, at 17.

Supreme Court interpreted the Privileges or Immunities Clause of the Fourteenth Amendment so narrowly as to “consign[ ] it to a constitutional limbo where it [remains] to this day.”<sup>59</sup> And as the nation lost interest in the African American’s struggle for freedom, the Court continued to limit the reach of the Reconstruction Amendments, leaving blacks with no meaningful protections against the suppression of their vote and, in the *Civil Rights Cases*,<sup>60</sup> striking down the Civil Rights Act of 1875, which provided equal access to restaurants, hotels, theaters, and the like. The latter decision opened the door to Jim Crow, which Marshall characterized as a “pervasive, official system of segregation which carries from cradle to grave.”<sup>61</sup> In 1896, in *Plessy v. Ferguson*,<sup>62</sup> the Court stated that “[l]egislation is powerless to eradicate racial instincts” and announced the “separate but equal” rule.<sup>63</sup> To Marshall, *Plessy* “mark[ed] the nadir of constitutional protection for minorities.”<sup>64</sup> He noted that Justice Harlan, who dissented, as he had in the *Civil Rights Cases*, “correctly prophesied . . . that the decision would, ‘in time, prove to be quite as pernicious as the decision . . . in the *Dred Scott* case.’”<sup>65</sup>

Reconstruction’s demise did not entirely submerge the idea of equal citizenship. In his dissents in the *Civil Rights Cases* and *Plessy*, Harlan expressed the view that the Thirteenth and Fourteenth Amendments “conferred . . . a right of equal citizenship . . . capable of enforcement by Congress.”<sup>66</sup> And the Supreme Court occasionally recognized the idea of equal citizenship, either implicitly as in *Yick Wo v. Hopkins*,<sup>67</sup> in which it struck down a San Francisco ordinance requiring a special permit for laundries constructed of wood because the ordinance had been discriminatorily applied against Chinese immigrants, or explicitly as in *Strauder v. West Virginia*,<sup>68</sup> in which it held that a state could not exclude blacks from jury service.

Moreover, the long contest over slavery stimulated the development of a rights-conscious interpretation of the Constitution and brought the idea of equal citizenship to the forefront of many debates. The arguments of union activists and advocates for women, for example, took on a constitutional cast.<sup>69</sup> Populists argued that the equality principle meant that wealth, political power, and other advantages should be widely distributed.<sup>70</sup> Progressives like Louis Brandeis also advocated a broad and democratic concept of citi-

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<sup>58</sup> 83 U.S. (16 Wall.) 36 (1872).

<sup>59</sup> Karst, *supra* note 12, at 18.

<sup>60</sup> 109 U.S. 3 (1883).

<sup>61</sup> Marshall, *supra* note 27, at 221.

<sup>62</sup> 163 U.S. 537 (1896).

<sup>63</sup> *Id.* at 551.

<sup>64</sup> Marshall, *supra* note 27, at 221.

<sup>65</sup> *Id.*

<sup>66</sup> Karst, *supra* note 12, at 19.

<sup>67</sup> 118 U.S. 356 (1886).

<sup>68</sup> 100 U.S. 303 (1879).

<sup>69</sup> See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 29–30 (1999).

<sup>70</sup> *Id.* at 43.



zenship.<sup>71</sup> Whether the Progressives were “championing collective bargaining . . . or other reform visions” such as “government ownership, producers’ cooperatives, [or] labor copartnership,” they contended that “workers’ citizenship [must be] acknowledged, and industry ‘constitutionalized.’”<sup>72</sup>

The activities and arguments of advocates for subordinated groups clearly influenced Marshall and provide a link between the Reconstruction Amendments and his work as a Supreme Court Justice. As a Justice, Marshall was deeply sympathetic to the efforts of subordinated groups to claim the benefits of the Reconstruction Amendments and, as we will see, his broad vision of equal citizenship was at the heart of many of his opinions. Recognizing that the Fourteenth Amendment was not only about blacks but about other disadvantaged groups as well, Marshall rejected its “racial exclusivity . . . without ignoring the importance of its racial specificity.”<sup>73</sup>

### III. MARSHALL’S UNDERSTANDING OF EQUAL CITIZENSHIP

Marshall looked forward to serving on the Warren Court, the Court that in *Brown* and other cases had revived the equal citizenship project. Sadly, it was not to be. In 1968, Richard Nixon was elected President and, as the result of retirements and resignations, was able to appoint four Justices including Warren Burger and William Rehnquist. Thus, within a few years of joining the Court, Marshall was in the minority. Further, his service on the Court coincided with a period in which progressives became increasingly disillusioned. Michael Harrington characterized the 1970s as a period of “collective sadness,” a period in which the dreams of the two great periods of social reform in twentieth century America, the 1960s and more distantly the 1930s, seemed to end.<sup>74</sup> The dreams were not entirely defeated and did not disappear, but the forward movement stopped, and hope was replaced by a new conservatism, which only became more pronounced during the 1980s.<sup>75</sup>

Although serving during such a period undoubtedly dampened Marshall’s enthusiasm for his work, its most tangible effect was that instead of writing majority opinions, he wrote dissents. And Marshall became one of the Court’s great dissenters. Many of his dissents, like some of those of the first Justice Harlan, offer a path to a more generous future. Marshall wrote wonderful opinions on many legal subjects. Scholars have praised his opinions in such diverse areas as administrative law,<sup>76</sup> antitrust law,<sup>77</sup> bankruptcy

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<sup>71</sup> *Id.* at 51.

<sup>72</sup> *Id.* at 57 n.253.

<sup>73</sup> Lisa A. Crooms, *A Stone’s Throw to Justice: Liberty, Equality, and Women’s Rights in the Supreme Court Opinions of Justice Thurgood Marshall*, 52 *How. L.J.* 559, 575 (2009).

<sup>74</sup> Kim Phillips Fein, *Decisive Decade: Re-evaluating the Seventies*, *DISSENT*, Winter 2011, at 94.

<sup>75</sup> *Id.*

<sup>76</sup> See Jonathan Weinberg, *Thurgood Marshall and the Administrative State*, 38 *WAYNE L. REV.* 115 (1991).

law,<sup>78</sup> disability law,<sup>79</sup> environmental protection,<sup>80</sup> federal alienage law,<sup>81</sup> Indian law,<sup>82</sup> prison law,<sup>83</sup> and women's rights,<sup>84</sup> as well as his better-known work in constitutional law.<sup>85</sup> As discussed, my focus here is on Marshall's understanding of the equal citizenship principle. I first discuss his ideas generally and then turn to some opinions in which he applied these ideas in different areas of the law.

### A. *Marshall's Ideas Generally*

After the Reconstruction Amendments were enacted, the Supreme Court construed the concept of equal citizenship very narrowly. The Court considered it sufficient that blacks could enter into contracts and own property even though they had to live under a system of segregation and were prevented from voting.<sup>86</sup> After *Brown*, however, the Court moved toward a new understanding of equal citizenship, utilizing the concepts of fundamental rights and suspect classifications. Under this approach, the Court interprets the Equal Protection Clause as protecting citizens from abridgements of fundamental rights such as the right to free speech and barring different treatment on the basis of suspect grounds such as race.<sup>87</sup>

Although this understanding of equal citizenship represented a significant advance, it obviously does not address many inequalities. For example, while *Brown* makes clear that equal educational opportunity is essential to establishing equal citizenship, the fundamental rights/suspect classification approach has not produced anything resembling equal educational opportunity.<sup>88</sup> Because the United States has long been in a process of resegregation, “[l]argely white suburban and exurban school districts ring central city school districts” that are composed almost entirely of minorities and provide far less educational opportunity.<sup>89</sup> Thus, while legal segregation no longer

<sup>77</sup> See Victor H. Kramer, *The Road to City of Berkeley: The Antitrust Positions of Justice Thurgood Marshall*, 32 ANTITRUST BULL. 335 (1987).

<sup>78</sup> See Karen Gross, *Thurgood Marshall's Bankruptcy Jurisprudence: A Tribute*, 67 AM. BANKR. L.J. 447 (1993).

<sup>79</sup> See Edward H. Haas, *Associate Justice Thurgood Marshall: An Indispensable Voice in the Struggle for the Civil Rights of People with Disabilities*, 12 SETON HALL CONST. L.J. 371 (2002).

<sup>80</sup> See Philip Weinberg, *This Land Belongs to You and Me: Thurgood Marshall as Environmental Champion*, 15 ST. JOHN'S J. LEGAL COMMENT. 1 (2000).

<sup>81</sup> See Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 8 GEO. IMMIGR. L.J. 1 (1994).

<sup>82</sup> See Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOW. L.J. 3 (1984).

<sup>83</sup> See Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 MD. L. REV. 149 (1997).

<sup>84</sup> See Crooms, *supra* note 73.

<sup>85</sup> E.g., Owen M. Fiss, *A Vision of the Constitution*, 40 MD. L. REV. 401 (1981).

<sup>86</sup> See Jack M. Balkin, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 156–65 (2011).

<sup>87</sup> See *id.* at 171–73.

<sup>88</sup> See *id.* at 171.

<sup>89</sup> *Id.* at 172.

exists, it has been replaced by a new world of inequality, a world that the Supreme Court regards as being entirely consistent with equal citizenship.<sup>90</sup>

Marshall's vision of equal citizenship was broader and more inspired. He believed that all citizens are entitled to the dignity of full membership in society and the opportunity to realize their full potential as human beings. In Marshall's words:

[T]he goal of a true democracy such as ours, explained simply, is that any baby born in these United States, even if he is born to the blackest, most illiterate, most unprivileged Negro in Mississippi, is, merely by being born and drawing his first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller.

Of course it's not true. Of course it never will be true. But I challenge anybody to tell me that it isn't the type of goal we should try to get to as fast as we can.<sup>91</sup>

To Marshall, the equal citizenship principle represented a commitment, expressed primarily in the Equal Protection Clause of the Fourteenth Amendment but also permeating the entire post-Reconstruction Constitution, that every individual is entitled "to be treated by organized society as a respected, responsible, and participating member."<sup>92</sup> The equal citizenship principle involved equality of legal status, a relatively narrow concept, but it also required the repudiation of all inequalities that, like racial inequality, imposed the stigma of caste and thus belied the understanding that "people are of equal ultimate worth."<sup>93</sup> And, for Marshall, equal citizenship values extended to persons other than citizens. This was so both because the Equal Protection and Due Process Clauses spoke of "persons" and because the United States was a community in much more than a political sense, and aliens were members of that community.<sup>94</sup>

Because the chief target of the equal citizenship principle was the stigma of caste, the question in most equal protection cases was whether a particular governmental action reinforced such stigma and to what extent. If it did so only remotely or indirectly, the governmental interest justifying the action did not have to be as compelling as if the action involved the purposeful infliction of discriminatory harm.<sup>95</sup> In either case, however, in Marshall's view, the government had to justify the action by providing persuasive reasons for it.<sup>96</sup>

<sup>90</sup> See *id.* at 171–73.

<sup>91</sup> Thurgood Marshall, Remarks at the Second Circuit Judicial Conference (Sept. 8, 1978), reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 27, at 205, 222.

<sup>92</sup> Karst, *supra* note 12, at 4.

<sup>93</sup> *Id.* at 6 (quoting ROBERT E. RODES, JR., THE LEGAL ENTERPRISE 163 (1976)).

<sup>94</sup> See *id.* at 45–46. See generally Scaperlanda, *supra* note 81, at 13.

<sup>95</sup> See Karst, *supra* note 12, at 52.

<sup>96</sup> Rebecca Brown, *Deep and Wide: Justice Marshall's Contributions to Constitutional Law*, 52 How. L.J. 637, 638–39 (2009).

“[Marshall] developed a sophisticated conception of the Constitution as . . . powered by an engine of equality which led him to a holistic set of views on all aspects of the post-Reconstruction Constitution.”<sup>97</sup> Among these views was Marshall’s strong belief that the equal citizenship principle required government to provide reasons for its acts.<sup>98</sup> “More than perhaps any other justice, Marshall insisted that government actions be supported by public reasons, to assure” that government acts in the interest of *all* citizens or, in other words, in “conformity with [its] obligation to promote the common . . . good.”<sup>99</sup> Marshall “would not have articulated [the equal citizenship principle] as requiring government to act in the common good. Rather, he would have said that the principle required that government have valid, non-discriminatory reasons for everything that it did.”<sup>100</sup> Regardless of how the obligation of government was framed, Marshall believed that the constitutional guarantee of equality entitled people to know the reasons for government action. Conversely, he believed that requiring government to provide reasons for its actions promoted equality.<sup>101</sup> As he put it, “the government may only act fairly and reasonably,” and therefore it “must say why [it acted] for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary . . . action.”<sup>102</sup>

Marshall’s belief in the necessity of reasons was at the heart of his disagreement with the Court as to how it should review governmental actions under the Equal Protection Clause.<sup>103</sup> As discussed, after it decided *Brown*, the Court developed a so-called two-tier mode of review in which it strictly scrutinized suspect classifications and distinctions involving fundamental rights but allowed all other classifications and distinctions to be justified on almost any ground. Marshall came to see this approach as a means by which the Court avoided meaningful scrutiny of government decisions.<sup>104</sup> Review of actions that did not involve what the Court had previously categorized as a fundamental right or suspect classification was overly deferential. Thus, a law that treated people unequally with respect to an important interest that the Court had not said was a fundamental right, such as access to education, or a law that burdened a group that the Court had not designated a suspect class—such as the poor—was almost always upheld.<sup>105</sup>

Marshall persistently called for a different method of determining when the Equal Protection Clause was violated, one that would better effectuate the Clause’s core purpose of promoting equality. His “realist point” was that describing interests as fundamental or not fundamental and classes as suspect or not suspect fails to capture important differences among

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<sup>97</sup> *Id.* at 640.

<sup>98</sup> *See id.*

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

<sup>100</sup> *Id.* at 639–40.

<sup>101</sup> *See id.* at 639.

<sup>102</sup> *Bd. of Regents v. Roth*, 408 U.S. 564, 588–89 (1972) (Marshall, J., dissenting).

<sup>103</sup> *See Brown*, *supra* note 96, at 640.

<sup>104</sup> *Id.* at 641–47.

<sup>105</sup> *Id.*

nonfundamental interests and nonsuspect classes.<sup>106</sup> He advocated a more finely tuned approach according to which the degree of judicial scrutiny would vary depending on the significance of the interest affected, the character of the classification at issue, and the nature of the asserted government interest in support of the classification.<sup>107</sup> Marshall argued that his approach would enable the Court to develop a body of precedent that, unlike its rigid categories, would create “a ‘principled foundation for determining when more searching inquiry is to be invoked’” in an equal protection case.<sup>108</sup>

### B. *Marshall's Ideas Applied*

#### 1. *Government Action Affecting Access to Education*

Access to education was not considered by the Court to be a fundamental right.<sup>109</sup> For Marshall, however, access to education was an important component of equal citizenship. This was so because “education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas,” and because education enables individuals to participate in government and to overcome disadvantages.<sup>110</sup> *Milliken v. Bradley* provides a good example of how Marshall's understanding of the equal citizenship principle, his more nuanced approach to equal protection analysis, and his belief in the importance of education led him to a different result than the Court's majority.<sup>111</sup> *Milliken* dealt with the fact that, because of the movement of white families to the suburbs, desegregation could not succeed without interdistrict remedies. Nevertheless, the Supreme Court declined to permit federal courts to include suburban school districts in their desegregation plans. This decision largely brought school desegregation to an end.

In dissent, Marshall called the decision an “emasculat[i]on of our constitutional guarantee of equal protection” stating that “where, as here, state-imposed segregation has been demonstrated, it becomes the duty of the State to eliminate root and branch all vestiges of racial discrimination.”<sup>112</sup> Mar-

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<sup>106</sup> Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429, 436 (1994).

<sup>107</sup> See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 467–68 (1988) (Marshall, J., dissenting).

<sup>108</sup> Gellhorn, *supra* note 106, at 438 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part)).

<sup>109</sup> See, e.g., *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>110</sup> See Cass R. Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267, 1269–70 (1992).

<sup>111</sup> See 418 U.S. 717, 782 (1974) (Marshall, J., dissenting) (“[T]he Court's answer is to provide no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past. I cannot subscribe to this emasculat[i]on of our constitutional guarantee of equal protection of the laws and must respectfully dissent.”).

<sup>112</sup> *Id.* at 782.

shall's opinion expressed clearly his understanding of the equal citizenship principle. At issue was "the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens."<sup>113</sup> In Marshall's view, the State's refusal to extend desegregation to suburban school districts directly reinforced the stigma of caste without a compelling justification. As he saw it, the decision was based on nothing more than "a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice."<sup>114</sup>

## 2. *Legislative Classifications Based on Wealth*

The equal citizenship principle did not, in Marshall's view, require that capitalism be dismantled. On the other hand, it did require "judicial intervention when economic inequalities make it impossible for a person to have 'a fully human existence' and the political branches of government turn a blind eye" to that person's plight.<sup>115</sup> Further, unlike the Court's majority, Marshall saw no reason why legislative classifications based on wealth should not be reviewable under the Equal Protection Clause.<sup>116</sup> Strangely, the requirement of equal protection does not generally apply to the state's raising and spending money. It is as if the Court believes that government decisions that affect wealth distribution are unrelated to equality under the law.<sup>117</sup> Marshall argued that some government decisions involving a classification based on wealth should be rigorously scrutinized and that his method of analyzing equal protection cases provided a reasoned basis for determining which ones. He noted that the Court had previously reviewed wealth classifications, as in *Harper v. Virginia Board of Elections*, in which it struck down a state poll tax on equal protection grounds, stating that "lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."<sup>118</sup>

*Dandridge v. Williams*<sup>119</sup> provides an example of how Marshall determined whether a law that discriminated based on wealth violated the equality requirement. *Dandridge* involved a cap on welfare benefits that had the effect of penalizing beneficiaries based on the number of children they had. Hemmed in by its rigid equal protection analytic framework and not wishing to treat the poor as a suspect class, the Court upheld the law. The majority demanded almost no justification from the State despite the fact that the law denied many children a benefit that the State itself had found to be the minimum needed for their subsistence. In dissent, Marshall applied his less formulaic approach and concluded that the legislation punished poor children in

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<sup>113</sup> *Id.* at 783.

<sup>114</sup> *Id.* at 814.

<sup>115</sup> Karst, *supra* note 12, at 62.

<sup>116</sup> See Gellhorn, *supra* note 106, at 430.

<sup>117</sup> See Fletcher, *supra* note 46, at 152-53.

<sup>118</sup> 383 U.S. 663, 668 (1966).

<sup>119</sup> 397 U.S. 471 (1970).

large families, that the benefit was of great importance to these children, and that the State's reasons for the classification were meager.<sup>120</sup> As Marshall saw it, *Dandridge* was a case involving a classification based on wealth that made it impossible for the children who were affected to live a fully human existence.

Sometimes, government action could offend the equal citizenship principle in more than one respect. One of Marshall's great dissents came in a case that involved both equal educational opportunity and the discriminatory expenditure of government funds, *San Antonio School District v. Rodriguez*.<sup>121</sup> In *Rodriguez*, the Court upheld a school-financing system in Texas that resulted in significant disparities in per-pupil expenditures.<sup>122</sup> The Court decided that the right to an equal public education was not fundamental and that poor students were not a suspect class. As a result, it applied a low level of scrutiny to Texas's policy and upheld it even though the State's justifications for it were so thin as to be virtually nonexistent.<sup>123</sup>

Marshall's dissent illustrated his belief that in some cases, the Equal Protection Clause should extend to class-based as well as race-based discrimination. In his opinion, Marshall questioned how the judiciary in a democracy committed to equality could reach the result endorsed by the majority. He explained that the discriminatory expenditures at issue seriously impaired the ability of the disadvantaged to participate as effective members of society and insisted that more searching scrutiny was required because of the close connection between education and political participation, which is at the heart of citizenship.<sup>124</sup> After citing statistics that showed that educational levels affect voter participation, he said, "[A]s the nexus between the specific constitutional guarantee and the nonconstitutional guarantee draws closer, the nonconstitutional interest becomes more fundamental."<sup>125</sup> The majority responded that Marshall's approach to equal protection would require the Court to create "substantive constitutional rights" and turn itself into a "super-legislature."<sup>126</sup> But by advocating a less constrained approach to equal protection analysis, Marshall sought only to enforce the rule that he believed the Fourteenth Amendment had established: that in the absence of a legitimate, public-regarding, and noninvidious reason, the government had to treat all citizens equally.<sup>127</sup>

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<sup>120</sup> *Id.* at 530 (Marshall, J., dissenting); see also Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020* 93, 103 (Jack M. Balkin & Reva B. Siegel eds., 2009).

<sup>121</sup> 411 U.S. 1 (1973).

<sup>122</sup> Sunstein, *supra* note 110, at 1269.

<sup>123</sup> 411 U.S. 1, 71 (1973). The Texas Supreme Court later struck down the financing law on state constitutional grounds. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

<sup>124</sup> Karst, *supra* note 12, at 60 n.337.

<sup>125</sup> *Rodriguez*, 411 U.S. at 102–03 (Marshall, J., dissenting).

<sup>126</sup> Gellhorn, *supra* note 106, at 438.

<sup>127</sup> *Id.*

3. *Distinctions Based on Ascriptive Characteristics Such as Disability, Gender, and Age*

For Marshall, the equal citizenship principle did not automatically supply an answer to the questions raised in equal protection cases. Rather, it constituted a guide to the exercise of judgment, and Marshall was confident that courts could make such judgments without having to rely on rigid categories. He understood that unfair hierarchies could be maintained on many bases and looked askance when government treated some people differently from others. He was particularly skeptical of distinctions based on ascriptive characteristics such as disability, gender, and age because he understood that such distinctions were often based on stereotypes, served no useful purpose, and undermined the principle that people are ultimately of equal worth. Consider *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>128</sup> which involved the denial of a permit for a group home for the mentally disabled. Although the denial was almost certainly motivated by distaste for close association with mentally disabled people, the City argued that an emergency evacuation would be difficult because of the nature of the residents' disabilities. The Court properly rejected this justification as weak and disingenuous. Marshall agreed with the result but not with the Court's refusal to subject statutes discriminating against people with mental disabilities to "searching scrutiny."<sup>129</sup> Marshall believed that, in the absence of a very good reason, people should be treated as equals and that the risks of evacuating people with and without mental disabilities were not different enough to justify the City's action.<sup>130</sup>

Applying the same approach in *Rostker v. Goldberg*,<sup>131</sup> Marshall dissented from a decision upholding a statute requiring men but not women to register for the draft. The majority's rationale was that the primary reason for a draft was to satisfy the military's need to fill combat positions and that women were disqualified by statute from doing so.<sup>132</sup> Marshall objected to this "categorical" exclusion of women "from a fundamental civic obligation."<sup>133</sup> Relying on statements from members of the military that females could perform many jobs in the military as well as males, Marshall opined that there was no good reason for excluding women from registration and the draft. As he saw it, performance, not ascriptive characteristics, should be the basis for awarding social benefits and imposing civic obligations.<sup>134</sup>

In *Massachusetts Board of Retirement v. Murgia*,<sup>135</sup> in which the Court upheld a statute requiring state troopers to retire at fifty years old, Marshall

<sup>128</sup> 473 U.S. 432 (1985).

<sup>129</sup> *Id.* at 455–56 (Marshall, J., concurring in the judgment and dissenting in part).

<sup>130</sup> Mark Tushnet, *The Meritocratic Egalitarianism of Thurgood Marshall*, 52 *How. L.J.* 691, 696–98 (2009).

<sup>131</sup> 453 U.S. 57 (1981) (Marshall, J., dissenting).

<sup>132</sup> Tushnet, *supra* note 130, at 694–95.

<sup>133</sup> *Id.* at 695.

<sup>134</sup> *Id.*

<sup>135</sup> 427 U.S. 307 (1976).



expressed the same idea in the age discrimination context. The majority accepted the state's justification that the physical abilities of people decline with age, but Marshall stated that it was unreasonable to assume that a fifty-year-old trooper was not physically able to perform his duties. In his view the statute told "able-bodied police officers, ready and willing to work that they no longer have the right to earn a living in their chosen profession."<sup>136</sup>

#### 4. *Equal Citizenship in "Liberty" Cases*

As previously mentioned, for Marshall, the constitutional guarantee of equality transcended the Equal Protection Clause. He believed that the equal citizenship principle contained in the Reconstruction Amendments infused the entire Constitution with a commitment to equality.<sup>137</sup> As one of the great civil libertarians in the Court's history, he believed that constitutional liberties contained a strong equality component and that liberty and equality, properly understood, complemented each other. Guarantees of individual liberty promoted the equality of subordinated groups, as did guarantees of fair procedure.<sup>138</sup>

The complementary nature of liberty and equality can be seen in Marshall's First Amendment jurisprudence. Marshall regarded expression as a means to self-realization and personal dignity.<sup>139</sup> The First Amendment promoted these values both by protecting a speaker's right to express a view on any aspect of life and a listener's right to hear other people's views. The First Amendment also promoted equality and social justice because it afforded members of subordinated groups, whose voices are most likely to be suppressed, an opportunity to give voice to their concerns.<sup>140</sup> On the Supreme Court, Marshall almost always voted with the free speech claimant, and his opinions in public forum, freedom of association, press, commercial speech, and obscenity cases bear witness to his determination to accord broad protection to expression. At the same time, he was highly attentive to the equality component of the First Amendment.<sup>141</sup>

Take, for example, *Clark v. Community for Creative Non-Violence*,<sup>142</sup> which involved a request to protest the plight of the homeless by creating a sleeping camp in Lafayette Park, across the street from the White House, and in other national parks. The problem that the protesters encountered was a regulation prohibiting sleeping in certain national parks. The Supreme Court displayed little tolerance for the protesters' First Amendment argument that in the context of a protest by the homeless, sleeping could be regarded

<sup>136</sup> *Id.* at 321 (Marshall, J., dissenting).

<sup>137</sup> Brown, *supra* note 96, at 650.

<sup>138</sup> Balkin & Siegel, *supra* note 120, at 100–01.

<sup>139</sup> Douglas Wells, *Thurgood Marshall and "Individual Self-Realization" in First Amendment Jurisprudence*, 61 TENN. L. REV. 237, 240 (1993).

<sup>140</sup> J. Clay Smith, Jr. & Scott Burrell, *Justice Thurgood Marshall and the First Amendment*, 26 ARIZ. ST. L.J. 461, 462 (1994).

<sup>141</sup> Wells, *supra* note 139, at 250.

<sup>142</sup> 468 U.S. 288 (1984).

as speech. The Court also held that the regulation satisfied the applicable First Amendment standard; namely, it was content neutral, advanced the substantial government interest of keeping the parks clean, was narrowly tailored, and left the demonstrators with adequate alternative methods of communication.<sup>143</sup>

Marshall was dismayed both by the majority's attitude toward the plaintiffs and by its application of the First Amendment standard.<sup>144</sup> He argued that while the government might have a substantial interest in keeping the parks clean, the majority failed to require that the government show how the demonstrators actually impaired that interest.<sup>145</sup> In Marshall's view, the majority merely assumed that the ban on sleeping advanced the government's interest and satisfied the remaining elements of the standard.<sup>146</sup> Marshall's own approach was much more speech protective. He insisted that the government produce evidence that the ban on sleeping advanced its substantial interest.<sup>147</sup>

He also criticized the two-tier approach that the Court was developing in First Amendment cases whereby content-neutral regulations were subject to a lower level of scrutiny than content-based regulations.<sup>148</sup> In his view, the content-neutral label could easily mask discrimination toward low-income protestors.<sup>149</sup> For example, by characterizing the ban on sleeping as content neutral, the Court avoided having to consider whether the ban itself was motivated by hostility toward groups such as the homeless who might express themselves in this manner.<sup>150</sup> The content-neutral label also enabled the Court to ignore that sleeping in the park was essential to the advocates' message.<sup>151</sup> As in the equal protection context, Marshall criticized the Court's heavy reliance on rigid categories when engaging in constitutional analysis. To Marshall, such reliance prevented the Court from examining the possibility that the government accepted inequality and engaged in actions that entrenched it.

### 5. *Equal Citizenship in Criminal Law*

Marshall also expressed his egalitarianism in his criminal law opinions. His opposition to the death penalty was based on an equality concern, the fact that racial prejudice caused the death penalty to fall disproportionately on African Americans.<sup>152</sup> And his insistence on procedural fairness was based in part on his sensitivity to the fact that outcomes in the criminal

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<sup>143</sup> *Id.* at 293–94.

<sup>144</sup> *See generally* 468 U.S. at 301–16. (Marshall, J., dissenting).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Smith & Burrell, *supra* note 140, at 466–68.

<sup>148</sup> *Id.* at 468–69.

<sup>149</sup> *See Brown*, *supra* note 96, at 652 n.76.

<sup>150</sup> *See id.*

<sup>151</sup> Wells, *supra* note 139, at 257.

<sup>152</sup> Brown, *supra* note 96, at 650.

justice system are hugely affected by the defendant's resources. In his criminal law opinions, Marshall continually sought to narrow the gap between the ideal of justice and the reality of social inequality. Occasionally, he persuaded his colleagues but more often saw them turn away from reality to uphold police conduct. *Florida v. Bostick*<sup>153</sup> is a good example.

*Bostick* arose out of the police practice of boarding interstate buses at intermediate stops in the hopes of finding a passenger who might be carrying drugs.<sup>154</sup> The police boarded a bus, woke Bostick, a young black man, and although they had no reason to suspect him of unlawful activity, stood over him, blocked his exit, and asked for his identification and ticket. When he complied with their request, the police asked to search his bag. Bostick also complied with this request, and the police found cocaine in the bag. Bostick was charged with possession of drugs, but the Florida Supreme Court suppressed the cocaine, holding that the encounter between the police and Bostick was coercive. The Supreme Court reversed and remanded, stating that a reasonable person in Bostick's position could have felt free to terminate the encounter with the police.<sup>155</sup>

In his dissent, Marshall pointed out the utter unreality and out-of-touch quality underlying the Court's holding that a reasonable person in Bostick's position would have felt free to refuse to answer the officers' questions. For Marshall, Bostick faced the Hobson's choice of cooperating or leaving the bus and possibly being stranded. As Marshall put it, it is exactly because this choice is no choice at all that police engage in this technique.<sup>156</sup> Marshall also noted that passengers on interstate buses tend to be poor and members of minority groups and that, although the police purported to act randomly when approaching passengers, they conceded that they targeted young black males.<sup>157</sup> As Marshall stated, "[T]he basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable."<sup>158</sup> In Marshall's view, the Court created a "reasonable person" standard that was totally fictional and that encouraged the police to exploit social inequality.

As the dissents discussed above indicate, not only did Marshall consistently insist on the importance of the equal citizenship requirement, he also strongly objected when other Justices avoided the equality issue by refusing to recognize the actual circumstances in which ordinary Americans lived. Marshall was a realist and a truth teller, and he was impatient with judging that failed to see the world as it is.<sup>159</sup> He also displayed this quality in *United States v. Kras*,<sup>160</sup> which involved a challenge by an unemployed, indigent, and seriously ill debtor to the fifty-dollar fee that was a condition of

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<sup>153</sup> 501 U.S. 429 (1991).

<sup>154</sup> DAVID COLE, *NO EQUAL JUSTICE* 16–17 (1999).

<sup>155</sup> 501 U.S. at 437–38.

<sup>156</sup> *Id.* at 450 (Marshall, J., dissenting).

<sup>157</sup> *Id.* at 441 n.1.

<sup>158</sup> *Id.* (emphasis omitted).

<sup>159</sup> See Gross, *supra* note 78, at 451.

<sup>160</sup> 409 U.S. 434 (1973).

filing for bankruptcy. The Court rejected the challenge in part on the ground that the fee was not onerous. Dissenting, Marshall stated that constitutional interpretation should not “be premised upon unfounded assumptions about how people live.”<sup>161</sup>

Marshall’s dissents in *Bostick* and *Kras* make clear his sensitivity to the challenges that people with limited power and few resources face. He had the ability to put himself in others’ shoes. Another word for this quality is empathy, and insofar as empathy is a characteristic of Marshall’s jurisprudence, it is understandable why the word so riled up conservatives at the Sotomayor hearing. It is only a short distance from a capacity for empathy to a deep concern about inequality.

#### IV. MARSHALL’S RELEVANCE TODAY

Marshall’s jurisprudence speaks directly to our present problems. The most serious threat to the viability of American democracy is the substantial economic and political inequality that has developed over the last several decades.<sup>162</sup> The problem is twofold: runaway incomes at the top of the earnings scale and widespread income stagnation. Between 1973 and 2007, the top 20% of families increased their share of total income from 41.1% to 47.3%, while the bottom 80% lost share.<sup>163</sup> And the problem is getting worse. In 2010, 93% of the additional income created during the year went to the top 1%, and “37 percent of these additional earnings went to just the top 0.01 percent, a teaspoon-size collection of about 15,000 households with average incomes of \$23.8 million.”<sup>164</sup> Moreover, increased inequality has been accompanied by declining social mobility. Americans born to humble origins no longer rise to a higher level more easily than people living elsewhere.<sup>165</sup> Further, our government once enacted policies such as Social Security that broadened prosperity, but, with the notable exception of the Affordable Care Act, rarely does so any more. Political power has followed money to the top, and our present policies, particularly tax policies, exacerbate inequality.<sup>166</sup>

While the judiciary may not have as great an obligation to respond to the problem of inequality as the other branches of government, it nevertheless has an important role to play. This is so because hyper-inequality raises significant legal issues. In addition to requiring equal protection of the law, the Constitution guarantees “a Republican Form of Government” (i.e., a government that, in Lincoln’s words, is “of the people, by the people, and

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<sup>161</sup> *Id.* at 460 (Marshall, J., dissenting).

<sup>162</sup> Eduardo Porter, *Inequality Undermines Democracy*, N.Y. TIMES, Mar. 20, 2012, at B1.

<sup>163</sup> Jeff Madrick, *Inequality in America and What to Do About It*, NATION, July 19, 2010, at 21.

<sup>164</sup> Steven Rattner, *The Rich Get Even Richer*, N.Y. TIMES, Mar. 26, 2012, at A27.

<sup>165</sup> See Paul Krugman, Op-Ed., *How Fares the Dream?*, N.Y. TIMES, Jan. 16, 2012, at A23.

<sup>166</sup> See Timothy Noah, *Brooks Brothers Bolshevism*, NEW REPUBLIC, Oct. 6, 2011, at 2.

for the people," not a wealthy few).<sup>167</sup> Arguably, if more Justices shared Marshall's inequality concerns, the problems we face today would be less acute. In any case, Marshall's broad view of equal citizenship and his more generous approach to equal protection analysis, including his willingness to scrutinize some legislative classifications based on wealth, would surely be responsive to our present predicament.

In addition, many of Marshall's opinions speak directly to aspects of today's inequality problem. Take, for example, campaign finance and the Supreme Court's decision in *Citizens United v. Federal Election Commission*<sup>168</sup> that corporations have a First Amendment right to make political expenditures. The Court's campaign finance jurisprudence contributes substantially to inequality by increasing the political power of the wealthy and depressing voter turnout by low-income citizens. It increases the power of the wealthy by promoting a system in which candidates are dependent on the support of the wealthy and near wealthy. As a result, candidates never mention low-income people, who presently number some forty-six million,<sup>169</sup> and oppose redistributionist policies that might benefit them. Instead, they refer almost robotically to the middle class. The effect of this is to discourage the poor from voting.<sup>170</sup> When people are given no reason to vote, they tend not to do so. *Citizens United* made this problem worse, but it is merely the latest in a series of campaign finance decisions that tragically reject Marshall's view that the First Amendment includes an equality component. Had the Court paid attention to Marshall's campaign finance jurisprudence, one of the principal sources of our present inequality, the excessive importance of money in politics, would be far less potent.

Although, as discussed, Marshall believed deeply in the First Amendment, he also was greatly concerned about the potentially corrosive effect on our democracy of the infusion of large amounts of money into the political system. Thus, he thought that government could reasonably regulate political spending for the purpose of ensuring fairness and integrity in the electoral process. When in the seminal campaign finance case, *Buckley v. Valeo*,<sup>171</sup> the Court held that government could limit the amount that a supporter could contribute to a candidate's political committee, Marshall was willing to go further and limit the amount that a candidate could contribute. And, in *FEC v. National Conservative Political Action Committee*,<sup>172</sup> Marshall rejected the majority's position that the government could regulate contributions to candidates but not expenditures on behalf of candidates. Ever the realist, Marshall concluded that the distinction between contributions and expendi-

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<sup>167</sup> Jack Balkin, *Occupy the Constitution*, BALKINIZATION (Oct. 19, 2011, 8:31 AM), <http://balkin.blogspot.com>.

<sup>168</sup> 558 U.S. 310 (2010).

<sup>169</sup> Katha Pollitt, *Debate This*, NATION, Oct. 29, 2012, at 9.

<sup>170</sup> See Elizabeth Gudrais, *Unequal America*, HARVARD MAG., July–Aug. 2008, at 27–29.

<sup>171</sup> 424 U.S. 109 (1976).

<sup>172</sup> 470 U.S. 480 (1984).

tures was formalistic and that the political process could be corroded as easily through expenditures as through contributions. Recent election cycles—in which expenditures by outside interests, whose identities and funding sources are usually hidden from the public, often dwarf those of candidate committees—have, of course, proven that Marshall was right.

The *Citizens United* majority overruled Marshall's opinion in *Austin v. Michigan State Chamber of Commerce*,<sup>173</sup> in which he wrote that the state had a strong interest in prohibiting “the corrosive and distorting effects of the immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”<sup>174</sup> Marshall's *Austin* opinion and his campaign finance jurisprudence generally reflect his deep commitment to the equal citizenship principle. As such, they provide a compelling alternative to the approach of the Roberts Court, in which hostility to legislative and judicial efforts to reduce inequality is almost palpable. For example, during the oral argument in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>175</sup> which involved a campaign finance reform measure adopted by the people of Arizona pursuant to a referendum, the conservative Justices repeatedly declared that the law was unconstitutional because it was intended to make the resources available to candidates more equal. Chief Justice Roberts said that the infirmity in the law was that its purpose was to “‘level the playing field’ when it comes to running for office.”<sup>176</sup> It seems that, to some Justices, “equality is just in itself a forbidden goal.”<sup>177</sup>

Another Marshall dissent that, had it commanded a majority, would have resulted in greater political participation by the poor and thus somewhat ameliorated the inequality we face today, came in a case addressing felon disenfranchisement, *Richardson v. Ramirez*.<sup>178</sup> Most states prohibit felons who are in prison from voting, and many states apply the bar to felons who are on parole or probation. Fourteen states go so far as to disenfranchise felons for life.<sup>179</sup> The dramatic expansion of the criminal justice system in recent decades has led to five million Americans being ineligible to vote because of a felony conviction.<sup>180</sup> Fourteen percent of African Amer-

<sup>173</sup> 494 U.S. 652 (1990).

<sup>174</sup> *Id.* at 660.

<sup>175</sup> 131 S. Ct. 2806 (2011).

<sup>176</sup> Ronald Dworkin, *The Court's Embarrassingly Bad Decisions*, N.Y. REV. BOOKS (May 26, 2011), <http://www.nybooks.com/articles/archives/2011/may/26/courts-embarrassingly-bad-decisions/?pagination=false>.

<sup>177</sup> *Id.*

<sup>178</sup> 418 U.S. 24 (1974) (Marshall, J., dissenting).

<sup>179</sup> FLETCHER, *supra* note 46, at 147.

<sup>180</sup> THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT, AN ANNOTATED BIBLIOGRAPHY 1 (2012), available at [http://sentencingproject.org/doc/publications/vr\\_Felony\\_Disenfranchisement\\_Annotated\\_Bibliography.pdf](http://sentencingproject.org/doc/publications/vr_Felony_Disenfranchisement_Annotated_Bibliography.pdf).

ican men are ineligible to vote, and in seven states, one black man in four is permanently barred from voting.<sup>181</sup>

Notwithstanding that the goal of the Reconstruction Amendments was to eliminate caste, the *Richardson* majority found that felon disenfranchisement does not violate the Equal Protection Clause.<sup>182</sup> In his dissent, Marshall pointed to the majority's failure to identify any public interest served by barring felons from voting. He noted that the plaintiffs had "fully paid their debt to society," that citizens with criminal records are "as much affected by the actions of government as any other citizens," that disenfranchising felons hinders "the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens," and that all Americans benefit by ex-offenders becoming equal citizens.<sup>183</sup> Whatever the reasons for the unforgiving disdain for people who have paid their debt to society, it is difficult to see how Marshall's view that their disenfranchisement deprives them of equal protection of the law is mistaken.

Of course, our inequality problem has a racial dimension to which many of Marshall's opinions speak. The unemployment rate is 7.4% among whites but 13.6% among blacks.<sup>184</sup> The median wealth of a white household is twenty times that of a black household, the largest difference since 1984.<sup>185</sup> One in four black households has no assets other than a car, worth about three thousand dollars,<sup>186</sup> and there are more African American adults under correctional control today than were enslaved in 1850, a decade before the Civil War began.<sup>187</sup> As Marshall understood the equal citizenship principle, the state could not use race to subordinate or demean. He saw nothing wrong in using race for a benign purpose such as to assist a minority group in its effort to eliminate the vestiges of caste.<sup>188</sup>

Today, however, attempts by government to assist minorities run up against the Roberts Court's perversion of the equal citizenship principle, which largely prohibits remedial efforts based on race.<sup>189</sup> Beginning in the 1970s, the political Right concocted a version of colorblindness according to which the explicit use of race is immoral and unjust. Thus, according to Justice Thomas, affirmative action, designed to overcome a legacy of racial oppression, is "just as noxious" as segregated schools and criminal bans on interracial marriage.<sup>190</sup> Reactionary colorblindness also severely limits what

<sup>181</sup> FLETCHER, *supra* note 46, at 148.

<sup>182</sup> See *Richardson*, 418 U.S. at 54–55.

<sup>183</sup> *Id.* at 78–79.

<sup>184</sup> Isabel Wilkerson, *Race to the Bottom*, NEW REPUBLIC (Mar. 1, 2012), <http://www.tnr.com/article/politics/magazine/100555/african-americans-wealth-recession>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 9 (2011).

<sup>188</sup> Sunstein, *supra* note 110, at 1271.

<sup>189</sup> See generally Ian Haney-Lopez, *Blind Spot*, AM. PROSPECT (Apr. 2011), <http://prospect.org/article/blind-spot-0>.

<sup>190</sup> *Id.*

counts as racism. In the absence of evidence of a racially derogatory statement, which a plaintiff seeking to establish discrimination will usually be unable to find, it is virtually impossible to show that race affected government action.<sup>191</sup> Consider *McCleskey v. Kemp*,<sup>192</sup> in which McCleskey, a black man charged with killing a white police officer, established that in Georgia, blacks who murdered whites were sentenced to death at twenty-two times the rate of blacks who killed blacks. With Marshall dissenting, the Court held that these statistics proved nothing.<sup>193</sup> By 2007, when the Court held in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>194</sup> that school districts could not engage in voluntary school integration, it had come full circle, wielding the power it once used to strike down laws requiring segregation to strike down laws promoting integration.<sup>195</sup> In *Parents Involved*, Chief Justice Roberts misread *Brown* as a case requiring strict scrutiny for all racial classifications, even those designed to promote integration. In fact, *Brown* did not involve strict scrutiny; it held that racial segregation stigmatized minority school children.<sup>196</sup>

Thus, Marshall's jurisprudence is extraordinarily relevant to the problem of inequality that plagues us today in many forms. However relevant it may be, it unfortunately is quite unfashionable. As the Kagan hearing indicated, Republicans have little regard for Marshall's approach to judging. Since 1980, Republican presidents have filled the federal courts with judges who couldn't be less like Marshall. And until the emergence of Occupy Wall Street, Democrats expressed little interest in the equality issue, which preoccupied Marshall, much less in appointing judges who think like Marshall. In fact, Barack Obama went so far as to say that while the approach of Marshall and other Warren Court Justices was justified during the Jim Crow era, he "would be troubled if you had that same kind of activism in circumstances today."<sup>197</sup> It is hard to know whether Obama actually believes that Marshall's approach to judging is no longer applicable or whether his comment was only designed to show that he is a moderate. In either case, the remark was misguided. As discussed, of the problems we face today, the increasing economic and political inequality is probably the most serious, and a judiciary committed to the equal citizenship principle would be an enormous benefit.

Possibly, Obama shares the view of some Democrats, including his mentor and former Marshall clerk, Cass Sunstein, that progressives should

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<sup>191</sup> *Id.*

<sup>192</sup> 418 U.S. 279 (1987) (Marshall, J., dissenting).

<sup>193</sup> *Id.* at 297–99.

<sup>194</sup> 551 U.S. 701 (2007).

<sup>195</sup> See Balkin & Siegel, *supra* note 120, at 97.

<sup>196</sup> *Id.*

<sup>197</sup> Justin Driver, *Obama's Law*, NEW REPUBLIC, June 30, 2011, at 10, 13, available at <http://www.tnr.com/article/politics/magazine/89647/obama-legal-philosophy-laurence-tribe?page=0,3>.



redirect their constitutional energy from the courts into democratic arenas.<sup>198</sup> However, Sunstein and others overemphasize the legislative branch and underemphasize the judiciary. Legislatures reflect existing arrangements of economic and political power and, when it comes to equal citizenship, often falter. It was judges who successfully addressed previously intractable equal citizenship issues such as racial segregation, gerrymandered legislatures, and the rights of criminal defendants. What's more, recent research suggests that the public does not react differently to important decisions made by courts than to those made by legislatures, and that progressives have been excessively fearful about using courts to advance their goals.<sup>199</sup> In fact, Democrats might want to consider a bolder approach to judicial appointments. A federal judiciary consisting only of conservatives and moderates and bereft of judges who think like Marshall will not attempt to halt or reverse many years of conservative decisions and will constrain rather than expand our notions of constitutional justice.<sup>200</sup>

Marshall, of course, was not without flaws. He sometimes found himself on the margins of the Court's work, although this was largely because he was in the minority. He was proud and had strong opinions.<sup>201</sup> He understood that he would be unable to change the outcome of many cases and, as a result, sometimes made little effort to do so. Instead, he tried to reach the public through his dissents, many of which are visionary and compelling. Kagan was correct when she referred to his jurisprudence as a thing of glory. For those who are interested, Marshall's work offers a guide as to how, through sound interpretation of the Constitution, courts can contribute to the creation of a fairer and more equal society.

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<sup>198</sup> *Id.* at 11; see also Sunstein, *supra* note 110, at 1272–75.

<sup>199</sup> See David Fontana & Donald Braman, *Supreme Anxiety*, *NEW REPUBLIC*, Feb. 2, 2012, at 8–9, available at <http://www.tnr.com/article/politics/magazine/99528/supreme-court-voter-reactions?page=0,1>.

<sup>200</sup> Driver, *supra* note 197, at 14.

<sup>201</sup> See generally Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 *GEO. L.J.* 2109 (1992) (arguing that despite being marginalized as a member of the Court's minority, Marshall focused on producing dissents that articulated his views).

