

1993

Remembering 'TM'

Cass R. Sunstein

Elena Kagan

Follow this and additional works at: http://chicagounbound.uchicago.edu/occasional_papers



Part of the [Law Commons](#)

Recommended Citation

Cass R. Sunstein & Elena Kagan, "Remembering 'TM'," University of Chicago Law Occasional Paper, No. 30 (1993).

This Working Paper is brought to you for free and open access by the Law School Publications at Chicago Unbound. It has been accepted for inclusion in Occasional Papers by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Occasional Papers from
The Law School
The University of Chicago

Number 30
Remembering 'TM'
Elena Kagan
Cass R. Sunstein

"For Justice Marshall," published originally in 71 Texas Law Review 1125 (1993). © 1993 by the Texas Law Review Association. Reprinted by permission.

"On Marshall's Legal Legacy," published originally as "On Marshall's Conception of Equality" in 44 Stanford Law Review 1267 (1992). © 1992 by the Board of Trustees of the Leland Stanford Junior University.

Copies of *Occasional Papers* from the Law School are available from William S. Hein & Company, Inc., 1285 Main Street, Buffalo, New York 14209, to whom inquiries should be addressed. Current numbers are also available on subscription from William S. Hein & Company, Inc.

This Occasional Paper is devoted to reflections on Justice Thurgood Marshall, who died on January 24, 1993. The following articles were written by University of Chicago Law School faculty who served as law clerks to Justice Marshall—Assistant Professor Elena Kagan, during the 1987 Term, and Karl N. Llewellyn Professor of Jurisprudence Cass R. Sunstein, who clerked for him during the 1979 Term.

For Justice Marshall

Elena Kagan*

A few days after Thurgood Marshall's death, I stood for a time at his flag-draped casket, then lying in state at the Supreme Court, and watched the people of Washington celebrate his life and mourn his passing. There would be, the next day, a memorial service for the Justice in the National Cathedral, a grand affair complete with a Bible reading by the Vice President and eulogies by the Chief Justice and other notables. That service would have its moments, but it would not honor Justice Marshall as the ordinary people of Washington did. On the day the Justice's casket lay in state, some 20,000 of them came to the Court and stood in bitter cold for upwards of an hour in a line that snaked down the Supreme Court steps, down the block, around the corner, and down the block again. The Justice's former clerks took turns standing at the casket, acting as a kind of honor guard, as these thousands of people filed by. Passing before me were people of all races, of all classes, of all ages. Many came with children and spoke, as they circuted the casket, of the significance of Justice Marshall's life. Some offered tangible tributes—flowers or letters addressed to Justice Marshall or his family. One left at the side of the casket a yellowed slip opinion of *Brown v. Board of Education*.¹ There never before has been such an outpouring of love and respect for a Supreme Court Justice, and there never will be again. As I stood and watched, I felt (as I will always feel) proud and honored and

* Assistant Professor, University of Chicago Law School; law clerk to Justice Marshall, 1987 Term.

¹ 347 U.S. 483 (1954).

grateful beyond all measure to have had the chance to work for this hero of American law and this extraordinary man.

I first spoke with Justice Marshall in the summer of 1986, a few months after I had applied to him for a clerkship position. (It seems odd to call him Justice Marshall in these pages. My co-clerks and I called him “Judge” or “Boss” to his face, “TM” behind his back; he called me, to my face and I imagine also behind my back, “Shorty.”) He called me one day and, with little in the way of preliminaries, asked me whether I still wanted a job in his chambers. I responded that I would love a job. “What’s that?” he said, “you already have a job?” I tried, in every way I could, to correct his apparent misperception. I yelled, I shouted, I screamed that I did not have a job, that I wanted a job, that I would be honored to work for him. To all of which he responded: “Well, I don’t know, if you already have a job” Finally, he took pity on me, assured me that he had been in jest, and confirmed that I would have a job in his chambers. He asked me, as I recall, only one further question: whether I thought I would enjoy working on dissents.

So went my introduction to Justice Marshall’s (sometimes wicked) sense of humor. He took constant delight in baffling and confusing his clerks, often by saying the utterly ridiculous with an air of such sobriety that he half-convincing us of his sincerity. (There was the time, for example, when he announced sadly that he would have to recuse himself from *Gwaltney of Smithfield v. Chesapeake Bay Foundation*.² When we pressed him for a reason, he hemmed and hawed for many minutes, only finally to say: “Because I l-o-o-o-v-e their ham.” When we laughed, he assumed an attitude of great indignation and began instructing us on proper recusal policy. It was early in the Term; perhaps we may be forgiven for thinking for a moment that, after all, this was not a joke.) He had an endless supply of jokes, not all of them, I must admit, appropriate to print in the pages of a law review. And he was the greatest comic storyteller I have ever heard, or ever expect to hear. This talent, I think, may be impossible to communicate to those never exposed to it. It was a matter of timing (the drawn-out lead-up, the pregnant pause), of vocal intonations and inflections,

² 484 U.S. 49 (1987).

and most of all of facial expressions (the raised brow, the sparkling eyes, the sidelong glance). Suffice it to say that at least once in the course of every meeting we had with him (and those were frequent), my co-clerks and I would find ourselves holding our sides and gasping for breath, as we struggled to regain our composure.

Thinking back, I'm not sure why we laughed so hard—or rather, I'm not sure why Justice Marshall told his stories so as to make us laugh—because most of the stories really weren't funny. To be sure, some were pure camp. (When Justice Marshall was investigating racial discrimination in the military in Korea, a soldier demanded that he provide a password; the hulking [and, of course, black] Marshall looked down at the soldier and asked, "Do you really think I'm North Korean?" And when assisting in the drafting of the Kenyan Constitution, the Justice was introduced to Prince Philip. "Do you care to hear my opinion of lawyers?" Prince Philip asked in posh British tones, mimicked to great comic effect by Justice Marshall. "Only," Justice Marshall replied—before the two discovered mutual ground in a taste for bourbon—"if you care to hear my opinion of princes.") But most of the stories, if told by someone else, would have expressed only sorrow and grimness. They were stories of growing up black in segregated Baltimore, subject to daily humiliation and abuse. They were stories of representing African-American defendants in criminal cases—often capital cases—in which a fair trial was not to be hoped for, let alone expected. (He knew he had an innocent client, Justice Marshall said, when the jury returned a sentence of life imprisonment, rather than execution.) They were stories of the physical danger (the lynch mobs, the bomb-throwers, the police themselves) that the Justice frequently encountered as he traversed the South battling state-imposed segregation. They were stories of prejudice, violence, hatred, fear; only as told by Justice Marshall could they ever have become stories of humor and transcending humanity.

The stories were something more than diversions (though, of course, they were that too). They were a way of showing us that, bright young legal whipper-snappers though we were, we did not know everything; indeed, we knew, when it came to matters of real importance, nothing. They were a way of showing us foreign experiences and worlds, and in doing so, of

reorienting our perspectives on even what had seemed most familiar. And they served another function as well: they reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories—stories of people’s lives as shaped by law, stories of people’s lives as might be changed by law. Justice Marshall had little use for law as abstraction, divorced from social reality (he muttered under his breath for days about Judge Bork’s remark that he wished to serve on the Court because the experience would be “an intellectual feast”); his stories kept us focused on law as a source of human well-being.

That this focus made the Justice no less a “lawyer’s lawyer” should be obvious; indeed, I think, quite the opposite. I knew, of course, before I became his clerk that Justice Marshall had been the most important—and probably the greatest—lawyer of the twentieth century. I knew that he had shaped the strategy that led to *Brown v. Board of Education* and other landmark civil rights cases; that he had achieved great renown (indeed, legendary status) as a trial lawyer; that he had won twenty-nine of the thirty-two cases he argued before the Supreme Court. But in my year of clerking, I think I saw what had made him great. Even at the age of eighty, his mind was active and acute, and he was an almost instant study. Above all, though, he had the great lawyer’s talent (a talent many judges do not possess) for pinpointing a case’s critical fact or core issue. That trait, I think, resulted from his understanding of the pragmatic—of the way in which law worked in practice as well as on the books, of the way in which law acted on people’s lives. If a clerk wished for a year of spinning ever more refined (and ever less plausible) law-school hypotheticals, she might wish for a clerkship other than Justice Marshall’s. If she thought it more important for a Justice to understand what was truly going on in a case and to respond to those realities, she belonged in Justice Marshall’s chambers.

None of this meant that notions of equity governed Justice Marshall’s vote in every case; indeed, he could become quite the formalist at times. During the Term I clerked, the Court heard argument in *Torres v. Oakland Scavenger Co.*³ There, a number of Hispanic employees had brought suit alleging employ-

³ 487 U.S. 312 (1988).

ment discrimination. The district court dismissed the suit, and the employees' lawyer filed a notice of appeal. The lawyer's secretary, however, inadvertently omitted the name of one plaintiff from the notice. The question for the Court was whether the appellate court had jurisdiction over the party whose name had been omitted; on this question rode the continued existence of the employee's discrimination claim. My co-clerks and I pleaded with Justice Marshall to vote (as Justice Brennan eventually did) that the appellate court could exercise jurisdiction. Justice Marshall refused. As always when he disagreed with us, he pointed to the framed judicial commission hanging on his office wall and asked whose name was on it. (Whenever we told Justice Marshall that he "had to" do something—join an opinion, say—the Justice would look at us coldly and announce: "There are only two things I *have* to do—stay black and die." A smarter group of clerks might have learned to avoid this unfortunate grammatical construction.) The Justice referred in our conversation to his own years of trying civil rights claims. All you could hope for, he remarked, was that a court didn't rule against you for illegitimate reasons; you couldn't hope, and you had no right to expect, that a court would bend the rules in your favor. Indeed, the Justice continued, it was the very existence of rules—along with the judiciary's felt obligation to adhere to them—that best protected unpopular parties. Contrary to some conservative critiques, Justice Marshall believed devoutly—believed in a near-mystical sense—in the rule of law. He had no trouble writing the *Torres* opinion.

Always, though, Justice Marshall believed that one kind of law—the Constitution—was special, and that the courts must interpret it in a special manner. Here, more than anywhere else, Justice Marshall allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him. Justice Marshall used to tell of a black railroad porter who noted that he had been in every state and every city in the country, but that he had never been anyplace where he had to put his hand in front of his face to know that he was black. Justice Marshall's deepest commitment was to ensuring that the Constitution fulfilled its promise of eradicating such entrenched inequalities—not only for African-Americans, but for all Americans alike.

The case I think Justice Marshall cared about most during the term I clerked for him was *Kadrmas v. Dickinson Public Schools*.⁴ The question in *Kadrmas* was whether a school district had violated the Equal Protection Clause by imposing a fee for school bus service and then refusing to waive the fee for an indigent child who lived sixteen miles from the nearest school. I remember, in our initial discussion of the case, opining to Justice Marshall that it would be difficult to find in favor of the child, Sarita Kadrmas, under equal protection law. After all, I said, indigency was not a suspect class; education was not a fundamental right; thus, a rational basis test should apply, and the school district had a rational basis for the contested action. Justice Marshall (I must digress here) didn't always call me "Shorty"; when I said or did something particularly foolish, he called me (as, I hasten to add, he called all his clerks in such situations) "Knucklehead." The day I first spoke to him about *Kadrmas* was definitely a "Knucklehead" day. (As I recall, my handling of *Kadrmas* earned me that appellation several more times, as Justice Marshall returned to me successive drafts of the dissenting opinion for failing to express—or for failing to express in a properly pungent tone—his understanding of the case.) To Justice Marshall, the notion that government would act so as to deprive poor children of an education—of "an opportunity to improve their status and better their lives"⁵—was anathema. And the notion that the Court would allow such action was even more so; to do this would be to abdicate the judiciary's most important responsibility and its most precious function.

For in Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government—to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission. (Indeed, I think if Justice Marshall had had his way, cases like *Kadrmas* would have been the only cases the Supreme Court heard. He once came back

⁴ 487 U.S. 450 (1988).

⁵ *Id.* at 468-69 (Marshall, J., dissenting).

from conference and told us sadly that the other Justices had rejected his proposal for a new Supreme Court rule. "What was the rule, Judge?" we asked. "When one corporate fat cat sues another corporate fat cat," he replied, "this Court shall have no jurisdiction.") The nine Justices sat, to put the matter baldly, to ensure that Sarita Kadrmas could go to school each morning. At any rate, this was why they sat in Justice Marshall's vision of the Court and Constitution. And however much some recent Justices have sniped at that vision, it remains a thing of glory.

During the year that marked the bicentennial of the Constitution, Justice Marshall gave a characteristically candid speech. He declared that the Constitution, as originally drafted and conceived, was "defective"; only over the course of 200 years had the nation "attain[ed] the system of constitutional government, and its respect for . . . individual freedoms and human rights, we hold as fundamental today."⁶ The Constitution today, the Justice continued, contains a great deal to be proud of. "[B]ut the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."⁷ The credit, in other words, belongs to people like Justice Marshall. As the many thousands who waited on the Supreme Court steps well knew, our modern Constitution is his.

⁶ Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 Vand. L. Rev. 1337, 1338 (1987).

⁷ *Id.* at 1341.

On Marshall's Legal Legacy

Cass R. Sunstein*

Was Justice Thurgood Marshall an egalitarian? Did he believe that the Constitution should be used to produce "equality of result" for those he happened to favor?

I write at a time when many people, especially those in the federal judiciary, believe that both questions should be answered with an emphatic "Yes." But it isn't so.

Above all, Thurgood Marshall will be remembered for his role in *Brown v. Board of Education*,¹ and indeed it is in that case that one can find many of the central elements of Marshall's conception of the Constitution. *Brown* is commonly thought to have been a case about racial discrimination. It is even said to have established a constitutional norm of "color-blindness." But to the participants in the case, and to the Court at the time, the case was fundamentally about education.² The briefs and oral argument stressed not color-blindness, but the need for equal educational opportunity. And the Court listened. In the passage that Justice Marshall particularly liked to quote, the Court said:

* Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. The author was law clerk to Justice Marshall during the 1979 Term.

¹ 347 U.S. 483 (1954).

² *Brown* was followed by *Bolling v. Sharpe*, 347 U.S. 497 (1954). According to Professor Hutchinson, an early draft of the *Bolling* opinion stated explicitly that education is a fundamental interest for constitutional purposes. The draft read:

This Court has applied similar reasoning to analogous situations in the field of education, the very subject now before us. Thus children and parents are deprived of the liberty protected by the Due Process Clause when the children are prohibited from pursuing certain courses, or from attending private schools and foreign-language schools. Such prohibitions were found to be unreasonable, and unrelated to any legitimate governmental objective. Just as a government may not impose arbitrary restrictions on the parent's right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides. . . . We have no hesitation in concluding that segregation of children in the public schools is a far greater restriction on their liberty than were the restrictions in the school cases discussed above.

Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 Geo. L.J. 1, 45 (1979) (citation omitted). Professor Hutchinson reports that Justice Marshall was genuinely delighted to see that early draft, responding, "That's it! That's what the case was about!" Personal Communication from Dennis Hutchinson (Dec. 7, 1991).

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the 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.³

Brown was a case about education. In this, I believe, lies the clue to understanding the well-springs of Marshall's life, work, and vision of the Constitution.

The long struggle by the NAACP—a struggle within and against the “separate but equal” doctrine—was undertaken, first and foremost, with an eye toward the achievement of equal educational opportunity. Above all, Marshall and others objected to a practice that would engrain second-class citizenship in children, and do so with respect to the social service most indispensable for an equal chance in life. Hence what seems to me the most revealing moment in Justice Marshall's argument in *Brown*. In response to a question from Justice Reed about whether the state should consider desegregation's potential negative impact on “law and order,” Marshall said:

[Whites and blacks] are fighting together and living together. For example, today they are working together in other places. . . . I know in the South where I spend most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and play together. I do not see why there would necessarily be any trouble if they went to school together.⁴

³ *Brown*, 347 U.S. at 493.

⁴ Oral Argument, *Briggs v. Elliot* (Dec. 10, 1952) (companion case to *Brown*), in 49 Landmark Briefs and Arguments 345-46 (Philip B. Kurland & Gerhard Casper eds., 1975).

Marshall's early commitment to equal educational opportunity carried over to his work on the Court. It helps explain many of his votes and writings; it unites a number of seemingly disparate ideas.⁵ A conspicuous example is Marshall's greatest opinion, dissenting in *San Antonio School District v. Rodriguez*,⁶ a case that has emerged as one of the most important since *Brown* itself. In that case, the Supreme Court upheld significant disparities in per-pupil expenditures in school financing in Texas. Marshall's dissenting opinion rested above all on the centrality of education to constitutionally protected liberties. First, Marshall said, education is connected with freedom of speech: "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, whatever interests he may pursue in life."⁷

Second, education is central to the system of self-government: "Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation."⁸

Third, Marshall argued that education is a crucial mechanism for allowing people to overcome disadvantaged conditions. It ensures, not equality of resources or outcomes, but a fair chance. "[T]he right of every American to an equal start in life, so far as the provision . . . of education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record."⁹ This is

⁵ In 1986, at the Judicial Conference of the Second Circuit, Justice Marshall repeated words I heard at the end of a clerks' reunion:

[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.

Thurgood Marshall, Address Before the Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 5, 1986), in 115 F.R.D. 349, 354 (1987).

⁶ 411 U.S. 1 (1973).

⁷ *Id.* at 112 (Marshall, J., dissenting).

⁸ *Id.* at 113 (footnote omitted).

⁹ *Id.* at 71; see also *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 471 (1988) (Marshall, J., dissenting) ("For the poor, education is often the only route by which to become full participants in our society. In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope.").

not an egalitarian theme. It is about prospects from the start, not results in the middle.

The same themes appear throughout Marshall's work. For him, education supplies "the basic tools and opportunities that might enable [people] to rise."¹⁰ Thus the Constitution should be seen to reflect "a deep distrust of policies that specially burden the access of disadvantaged persons to the governmental institutions and processes that offer members of our society an opportunity to improve their status and better their lives."¹¹ Such distrust is justified because

[a] statute that erects special obstacles to education in the path of the poor naturally tends to consign such persons to their current disadvantaged status. By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance herself or himself, but also increases the likelihood of the creation of a discrete and permanent underclass.¹²

Marshall was not an egalitarian. His conception of equality was extremely old-fashioned. An outgrowth of his experiences with segregation, that conception involved, as its defining feature, a commitment to equality of opportunity. 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. In his view, rejection of caste was the central lesson of the Civil War Amendments: "The intent of the Fourteenth Amendment was to abolish caste legislation. When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated."¹³

Thus the equal protection principle did not ban all racial differentiation. It did not require color-blindness. For Marshall, this precept was ahistorical;

¹⁰ *Kadmas*, 487 U.S. at 469 (Marshall, J., dissenting).

¹¹ *Id.* at 468-69.

¹² *Id.* at 470; see also *Martinez v. Bynum*, 461 U.S. 321, 345-51 (1983) (Marshall, J., dissenting) (reiterating his view that a child's education is a fundamental interest).

¹³ *Kadmas*, 487 U.S. at 469 (Marshall, J., dissenting) (citations omitted).

it was insufficiently attuned to the particular history behind the Civil War Amendments. The principal point of those Amendments was not to require that people who were similarly situated be treated “the same.” Instead, Marshall thought that the core meaning of the Equal Protection Clause was that the government could not translate morally irrelevant differences into a form of second-class citizenship. It could not take skin color, or gender, and turn these into social disadvantages for blacks or women.¹⁴ It is highly misleading to say that this is a vision of the Fourteenth Amendment that favored the “rights of groups” over “the rights of individuals.” In any effort to dismantle a caste system, caste membership is highly relevant to remedial policies, and precisely in the interest of “the rights of individuals.” At least Marshall thought that government could reasonably so believe.

It was on this ground that Marshall argued that discrimination on the basis of disability should be subject to special scrutiny under the Fourteenth Amendment.¹⁵ And most notably, it was on this ground that he rejected the constitutional assault on affirmative action.¹⁶ For him, that assault was filled with bitter ironies. There was no basis, he thought, for the view that affirmative action offended the vision of the framers of the Civil War Amendments, who had themselves engaged in affirmative action.¹⁷

Nor was invalidation of affirmative action compelled by principle. In Marshall’s view, most racial discrimination was objectionable because of its particular purposes and its particular effects—that is, because it served to create a system of caste. When

¹⁴ See *Rostker v. Goldberg*, 453 U.S. 57, 86 (1981) (Marshall, J., dissenting) (arguing that the exclusion of women from registration for the draft is unconstitutional); *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting) (arguing that veterans’ preference statute constitutes impermissible gender discrimination). It is notable that Justice Marshall was the most vigorous voice of opposition, under the Equal Protection Clause, to official practices connected to the exclusion of women from the military; he insisted that this exclusion was part and parcel of women’s second-class citizenship. *Id.* at 285.

¹⁵ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part).

¹⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Marshall, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 517 (1980) (Marshall, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

¹⁷ *Bakke*, 438 U.S. at 396-98.

the use of race has quite different purposes and effects, it should be evaluated more leniently.

To Marshall, the deepest irony of the modern attack on affirmative action was that it ripped the hard-won victories against racial discrimination entirely out of their particular historical context, when it was precisely that context that made the words ones of opprobrium. Thus for Marshall, the constitutional assault on affirmative action “pervert[ed] the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.”¹⁸

By “genuine equality,” Marshall did not mean equality of result. Instead, he referred to a system in which the caste-like features of American society had been dismantled—a dismantling that was part and parcel of the attack, decades earlier, on Jim Crow. Hence his unusually personal last paragraph in *Bakke*:

I fear that we have come full circle. After the Civil War our Government started several “affirmative action” programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.¹⁹

Thus far I have suggested that Marshall’s constitutional vision included a commitment to equality of opportunity, particularly in education, and a rejection of caste. Of all Justices to serve on the Supreme Court, Marshall was also by far the most insistently protective of poor people. Indeed, he moved very close to a belief in a constitutional right to freedom from desperate conditions. This right is the third and final cornerstone in Marshall’s conception of equality. It was also connected, though less directly, with the original wellsprings of *Brown*.

At the very least, Marshall believed that any system that left an identifiable class of Americans in

¹⁸ *Bakke*, 438 U.S. at 398.

¹⁹ *Id.* at 402 (citations omitted).

conditions of this kind should be subject to careful scrutiny under the Equal Protection Clause. Under this view, no one should be deprived, without good reason, of adequate education, police protection, food, shelter, or medical care.²⁰

This principle is hardly egalitarian. It merely affords a basic minimum. It allows enormous variations in living standards. There is no evidence that Marshall objected to such variations. But it would not permit people to fall below a specified floor. Certainly Marshall believed that poor people could not be deprived of access to the basic institutions of a democratic society, including the political process, the judicial process,²¹ and education. In an appropriate case, I think that he would also have held that the government could not constitutionally deprive people of the basic means of subsistence—that it could not allow them to fall beneath a decent minimum.²²

Marshall was not an egalitarian. But in his conception of the Constitution, courts were to assume an aggressive role in promoting equality of opportunity. At a minimum, that role entailed vigilance over discrimination with respect to education, probably even a right to education; an attack on caste systems; and a willingness to look skeptically at any state action that allowed people to be subject to desperate conditions.

The Supreme Court has rejected this vision of the Constitution in all of its fundamentals. It is by no means clear that the Court has been wrong to do this. A serious commitment to Marshall's vision would entail an extraordinary judicial role, one for which the courts are quite ill-suited. There is good evidence that courts are generally ineffective in bringing about systematic, stable social change.²³

²⁰ See *Harris v. McRae*, 448 U.S. 297, 337 (1980) (Marshall, J., dissenting); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259-62 (1974); *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

²¹ See *United States v. Kras*, 409 U.S. 434, 458 (1973) (Marshall, J., dissenting).

²² See *Dandridge v. Williams*, 397 U.S. 471, 508, 522 (1970) (Marshall, J., dissenting) (noting that the Supreme Court "has already recognized that when a benefit, even a 'gratuitous' benefit, is necessary to sustain life, stricter constitutional standards, both procedural and substantive, are applied to the deprivation of that benefit"). (citations omitted).

²³ See Gerald N. Rosenberg, *The Hollow Hope* 72-106 (1991). Like Rosenberg, I am referring to broad social change through the courts—large-scale institutional shifts, not "negative" decrees that do not involve such shifts.

Implementation is always required, and implementation will sometimes encounter unexpected obstacles. Courts are ill-equipped to understand the complex systemic effects of ad hoc intervention.

Even when courts are effective, there are serious problems in judge-led reform from the standpoint of democratic legitimacy. Reform through the courts may dampen the practice of citizenship, an individual and collective good. And if reform does not have a democratic pedigree, it may run into severe resistance. Such resistance may in turn undermine the very causes that the Court purports to favor. The judicial struggle with abortion may well be an example. It is at least plausible to think that *Roe v. Wade*²⁴ demobilized the women's movement, contributed to the defeat of the Equal Rights Amendment, and helped create the moral majority, in a way having quite adverse effects for the cause of equality on the basis of sex.²⁵

In any case, the era of *Brown*—an era that produced so many extraordinary developments in American law, many of them engineered by Marshall—was an exceptional one in American history. It had no real predecessors. It is doubtful whether it will have any real successors.

* * *

The capacities of the courts are one thing; the relationship of the Constitution to American life is another. Many Americans continue to live in desperate conditions. They are without hope, food, or shelter. They are subject to both random and systemic criminal violence—usually from the private sector, sometimes from the police. Blacks and women are disproportionately victims. Many children are without decent life prospects. A system with caste-like features currently exists with respect to race, sex, and disability. Many Americans never receive a decent education. In educational opportunities there are persistent, extraordinary, and unnecessary disparities, and these are correlated with race and other moral irrelevancies.

Even if the Supreme Court of the United States lacks the willingness, the tools, or the competence to respond to the situation, it remains plausible to think that the Constitution of the United States is not an

²⁴ 410 U.S. 113 (1973).

²⁵ See G. Rosenberg, *supra* note 29, at 336-43.

irrelevance. Other institutions, most notably Congress, the President, and state governments, have duties of fidelity to the founding document. Those institutions are not burdened with the limits that face the judiciary.

It is fully plausible to think that Marshall's vision of the Constitution will continue to have a conspicuous place in American constitutional thought. But increasingly, its place may be the halls of the legislatures and the bureaucracies, rather than the judiciary. This is an extraordinary irony: More than anyone else, Marshall is responsible for the idea that social reform, through the courts in the name of the Constitution, was both possible and desirable.

* * *

The last words come from Marshall himself. In 1980, the city of Baltimore erected a statue of Thurgood Marshall. It was able to persuade him to attend the ceremony—a real accomplishment in light of his storied reluctance to receive public tribute. But this was a remarkable event. Baltimore had been a segregated city, and one of Marshall's first endeavors after graduating from law school was to desegregate Maryland's all-white law school. The dedication of a statue honoring a black civil rights lawyer who had abolished American apartheid would have been unfathomable fifty or sixty years before.

Surely this was an occasion for celebration—of an extraordinary life of accomplishment, and of the remarkable achievements of the civil rights revolution. But Marshall would have nothing of it:

Some . . . feel we have arrived. Others feel there is nothing more to do. I just want to be sure that when you see this statue, you won't think that's the end of it. I won't have it that way. There's too much work to be done.²⁶

²⁶ Dale Russakoff, *Tribute to Marshall; City of Baltimore Dedicates Statue to 1st Native Son on High Court*, Wash. Post, May 17, 1980, at C1.

Occasional Papers
from
The Law School
The University of Chicago
1111 East 60th Street
Chicago, Illinois 60637

- No.1. "A Comment on Separation of Power"
Philip B. Kurland, November 1, 1971.
- No. 2. "The Shortage of Natural Gas"
Edmund W. Kitch, February 1, 1972.
- No. 3. "The Prosaic Sources of Prison Violence"
Hans W. Mattick, March 15, 1972.
- No. 4. "Conflicts of Interest in Corporate Law Practice"
Stanley A. Kaplan, January 10, 1973.
- No. 5. "Six Man Juries, Majority Verdicts—
What Difference Do They Make?"
Hans Zeisel, March 15, 1973.
- No. 6. "On Emergency Powers of the President:
Every Inch a King?"
Gerhard Casper, May 31, 1973.
- No. 7. "The Anatomy of Justice in Taxation"
Walter J. Blum and Harry Kalven Jr.,
October 1, 1973.
- No. 8. "An Approach to Law"
Edward H. Levi, October 15, 1974.
- No. 9. "The New Consumerism and the Law School"
Walter J. Blum, February 15, 1975.
- No. 10. "Congress and the Courts"
Carl McGowan, April 17, 1975.
- No. 11. "The Uneasy Case for Progressive Taxation
in 1976"
Walter J. Blum, November 19, 1976.
- No. 12. "Making the Punishment Fit the Crime:
A Consumers' Guide to Sentencing Reform"
Franklin E. Zimring, January 24, 1977.
- No. 13. "Talk to Entering Students"
James B. White, August 15, 1977.
- No. 14. "The Death Penalty and the Insanity Defense"
Hans Zeisel, April 15, 1978.

- No. 15. "Group Defamation"
Geoffrey R. Stone, August 10, 1978.
- No. 16. "The University Law School and Practical Education"
Carl McGowan, December 20, 1978.
- No. 17. "The Sovereignty of the Courts"
Edward H. Levi, July 15, 1981.
- No. 18. "The Brothel Boy"
Norval Morris, March 15, 1982.
- No. 19. "The Economists and the Problem of Monopoly"
George J. Stigler, July 1, 1983.
- No. 20. "The Future of Gold"
Kenneth W. Dam, July 15, 1984.
- No. 21. "The Limits of Antitrust"
Frank H. Easterbrook, April 15, 1985.
- No. 22. "Constitutionalism"
Gerhard Casper, April 6, 1987.
- No. 23. "Reconsidering Miranda"
Stephen J. Schulhofer, December 15, 1987.
- No. 24. "Blackmail"
Ronald H. Coase, November 14, 1988.
- No. 25. "The Twentieth-Century Revolution in Family Wealth Transmission"
John H. Langbein, December 8, 1989.
- No. 26. "The State of the Modern Presidency: Can It Meet Our Expectations?"
Stuart E. Eizenstat, March 10, 1990.
- No. 27. "Flag Burning and the Constitution"
Geoffrey R. Stone, May 1, 1990.
- No. 28. "The Institutional Structure of Production"
Ronald H. Coase, May 15, 1992.
- No. 29. "The Bill of Rights: A Century of Progress"
John Paul Stevens, December 1, 1992.
- No. 30. "Remembering 'TM'"
Elena Kagan and Cass R. Sunstein, June 8, 1993.