

# 2013 Martin Luther King, Jr., Lecture

## CIVIL RIGHTS FOR THE TWENTY-FIRST CENTURY: LESSONS FROM JUSTICE THURGOOD MARSHALL'S RACE-TRANSCENDING JURISPRUDENCE

by  
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*This Essay pays tribute to Justice Thurgood Marshall's race-transcending vision of universal human dignity, and explores the importance of building cross-racial alliances to modern civil rights advocacy. Justice Marshall's role as a "Race Man" is evident in much of his jurisprudence, where he fought for years to promote equal opportunity and equal justice. As an advocate for all marginalized people, Justice Marshall viewed equal justice as transcending race, and this Essay suggests that the multi-racial coalition that supported President Obama aligns with Marshall's vision. The Essay evaluates the civil rights movement through the lens of Justice Marshall's equality analysis, and calls for a multiracial coalition that transcends identity boundaries.*

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## I. INTRODUCTION

Barack Obama's inauguration celebrations and recent commentary about what it means for America to elect a black president not once but twice, remind me of the generational transition that has taken place. A new generation of leadership has emerged, another has receded, and yet another has died. In contemplating the twentieth anniversary of Thurgood Marshall's death, I wish to pay homage to a passing breed of African-American leader, that commonly known among black elders as the "race man." I also want to speak forthrightly about whether and how their brand of civil rights remains relevant in the twenty-first century.

First, what is a race man and was Justice Marshall such a man? In common parlance, a race man or race woman is simply someone "whose identity [is] clearly defined as Black," and who acts to bring about the progression of black people.<sup>1</sup> Most African-Americans of my father's generation smile when you say, "Oh, he's a race man." They understand your meaning and, for them, this is a positive stereotype. Although I have not yet discovered who actually coined the term, often it is associated with W.E.B. DuBois, who was first among twentieth century race men in the minds of many.<sup>2</sup>

Whatever its origin, the term is clearly grounded in a race consciousness that, in turn, was born of racial oppression. In their seminal study of South Side Chicago, *Black Metropolis*, published in 1945, sociologist St. Clair Drake and researcher Horace Cayton describe respectable "Race Men" and "Race Heroes" of the Bronzeville community<sup>3</sup>—men who felt "impelled to prove to themselves continually that they [were] not the inferior creatures which their minority status implie[d]."<sup>4</sup>

Frederick Douglass, W.E.B. DuBois, Booker T. Washington. Later, Martin Luther King, Jr. and Malcolm X. Perhaps today, the Reverends Jesse Jackson, Sr. and Al Sharpton. These names have been associated

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<sup>1</sup> Richard McCulloch, *The Burden of the New "Race Man,"* BROWARD TIMES, Feb. 16, 2007. Clearly President Barack Obama is not a race man, nor should he be. He represents an emerging cadre of "post-civil rights" black politicians that necessarily must connect with and represent a wide range of racial, ethnic, and ideological groups in order to win state and national elections and govern effectively. See generally GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA* (2009).

<sup>2</sup> See 2 ENCYCLOPEDIA OF THE HARLEM RENAISSANCE 1010–11 (Cary D. Wintz & Paul Finkelman eds., 2004); Ayumu Kaneko, *A Strong Man to Run a Race: W.E.B. DuBois and the Politics of Black Masculinity at the Turn of the Century*, 14 JAPANESE J. AM. STUD. 105, 106 (2003); Monica L. Miller, *W.E.B. DuBois and the Dandy as Diasporic Race Man*, 26 CALLALOO 738, 739 (2003).

<sup>3</sup> See generally ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 12, 379–97 (Univ. of Chi. Press 1993) (1945). Bronzeville, alternatively known as "the Black Metropolis," is the neighborhood on the south side of Chicago where many of the great migrants of the 1910s and 1920s located. A black city within a city, Bronzeville was second only to Harlem in black population. *Id.*

<sup>4</sup> *Id.* at 390.

with the term “race man” and the connotation varies depending on the person being referenced. Thurgood Marshall’s name does not usually appear in any lists of prototypical race warriors. And yet, Marshall in his life, his insistent voice, and his clear achievements in liberating black people from the shackles of Jim Crow subordination, was the quintessential twentieth century race man. Certainly his jurisprudence was colored by his race-man tendencies, in the most positive sense of the term. But I am going to argue that he also brought a race transcending vision of universal human dignity to the law. First, let me explain the source of Thurgood Marshall’s race consciousness.

It began, or evolved, at Lincoln University. While at Lincoln, he befriended an older student who would become the poet laureate of the Negro community, Langston Hughes. Some of my fondest memories of clerking for the Justice are the stories he would tell me of going to Greenwich Village with Hughes to party with a “hip” literary crowd. I was surprised though, when one day, he told me forthrightly that it was Hughes who stimulated his race consciousness. When Marshall was an undergraduate, the Lincoln faculty was completely white, and he admitted to me that he had been doubtful about whether to integrate the faculty.

This was a part of Marshall’s past with which I was not familiar. It was stunning for me to contemplate that the chief oral advocate in *Brown v. Board of Education* had once voted with fellow students against integrating the Lincoln faculty. “Hughes convinced me to change my mind,” he told me. After an unpleasant encounter at a segregated movie theatre, Hughes had confronted Marshall about his lax attitude regarding race issues. Through several intense conversations with Hughes, he began to see Negro faculty not just as a positive but an imperative and he personally led a second successful referendum on the question.<sup>5</sup>

His consciousness was piqued even more when he entered Howard Law School under the tutelage of Charles Hamilton Houston, the epitome of a race man. Houston, the valedictorian of his class at Amherst, graduate of Harvard Law School, and a former member of the *Harvard Law Review*, became Dean of Howard Law and intentionally sought to remake it as an engine of social change. Marshall always said in his chambers that he did not “get serious” until he entered Howard. At the time, he was talking about his commitment to academics, but I also think he was talking about his commitment to “the race.”

Houston was clearly a seminal influence in his life. At Howard, Marshall embraced the twin values of Houston and earlier generations of race men. First, excellence. Houston, the valedictorian, demanded that his students excel and become thoroughly competent masters of the law. Marshall followed his example, worked harder than he ever had in his life, and ultimately graduated first in his class.<sup>6</sup> Second, agitation. “The

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<sup>5</sup> See JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 48–49 (1998).

<sup>6</sup> *Id.* at 59.

social justification for the Negro lawyer," Houston argued, "is the service he can render the race as an interpreter and proponent of its rights and aspiration[s]." <sup>7</sup> He hammered this idea into his students; as lawyers they would be social engineers or else they would be parasites. <sup>8</sup>

Marshall's early partnership with Houston and storied success as a civil rights lawyer clearly fulfilled Houston's vision. But this model of civil rights advocate they invented was not preordained and they sometimes encountered resistance within the black community. Since the first African landed involuntarily in this country in 1619, each generation has had to choose how and whether to take up the race's struggle. One of my diary entries underscores the choice involved:

Justice Marshall spoke of "old man Houston"—Charles Hamilton Houston's father. "Old man Houston used to say, 'You guys are trying to save all the colored folks, uplift the Negro race. We both believe in it, but I have a different method. I believe in saving one at a time and as soon as I get through with this one (pointing to self), I will work on somebody else.'" <sup>9</sup>

## II. RACE MAN'S JURISPRUDENCE

Much has been written about Marshall's career before ascending to the bench and his role as Race Hero, as "Mr. Civil Rights," has been burnished in our minds (or it should be). I want to turn now to Marshall's jurisprudence, much of which is embodied in the many passionate dissents he wrote during his 24 years on the Court. In those dissents, I discern the voice of a race man. When he ascended to the Supreme Court, he maintained the same insistent voice of controlled outrage that sometimes colored his oral arguments when he was standing *in front* of the bench. An example of this voice can be seen in his oral argument for *Brown v. Board of Education*. In his closing argument, he made a statement that encapsulated his core theory in *Brown*:

[W]e submit [that] the only way to arrive at [a] decision [adverse to the plaintiffs] is to find that for some reason Negroes are inferior to all other human beings. . . . [W]hy of all of the multitudinous groups of people in this country [do] you have to single out Negroes and give them this separate treatment[?]<sup>10</sup>

Reading the flat transcript, even without the benefit of his leathery voice, his anger is palpable. A race man looks at his people and sees the opposite of what society sees. He sees greatness, and sometimes superiori-

<sup>7</sup> Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49, 49 (1935).

<sup>8</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 128 (First Vintage Books 2004) (1975).

<sup>9</sup> Personal diary entry of Sheryll Cashin (Aug. 16, 1990) (on file with author).

<sup>10</sup> ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-55, at 239 (Leon Friedman ed., 1969).

ty—greatness in enduring virulent oppression with dignity; in the ability of many Negroes not just to survive but to *thrive* in the face of daily insults to their humanity. And this is a sentiment that usually transcends class. Most race men and women identify with the common man. And no Supreme Court Justice in American history was more empathetic to the plights of ordinary and poor Americans than Thurgood Marshall. He brought a first-hand experience with ordinary people to his jurisprudence over and over again.

At the onset of his long tenure on the Supreme Court, he explicitly stated a race man's judicial philosophy, one that mirrored the creed he had learned from Houston. In 1968, one year after he became an Associate Justice, in a speech he gave at University of Wisconsin Law School, he argued for "a new kind of activism, an activism in the pursuit of justice" in order to realize and maintain the promise of the Fourteenth Amendment.<sup>11</sup> He said in another speech he gave a year later at NYU: "True justice requires that the ideals expressed in [the Reconstruction Amendments] be translated into economic and social progress for all of our people."<sup>12</sup> He characterized his approach to judging more plainly a decade later when a law clerk from another chambers asked him to describe his judicial philosophy. According to Deborah Rhode, one of his clerks at the time, he said: "You do what you think is right and let the law catch up."<sup>13</sup>

Above all for Marshall, doing what was right meant trying to get his colleagues to face up to and redress America's tortured history of racial discrimination. Race men remember the history that others would like to forget. For them the hurts of past centuries are as fresh as if they occurred this morning. Historical memory was central to Marshall's jurisprudence and historical memory was the source of the anger that sometimes showed up in his opinions and speeches. He was a "Race Hero" to many when he brought the blithe celebrations of the Constitution's bicentennial to a pause with a pointed, widely publicized speech that reminded the nation of the framers' hypocrisy:

I do not . . . find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound.

. . . .

. . . Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for

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<sup>11</sup> Thurgood Marshall, *The Continuing Challenge of the 14th Amendment*, 1968 WIS. L. REV. 979, 980.

<sup>12</sup> Thurgood Marshall, *Group Action in Pursuit of Justice*, 44 N.Y.U. L. REV. 661, 662 (1969), reprinted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 227, 227 (Mark V. Tushnet ed., 2001).

<sup>13</sup> Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992).

which the American Revolutionary War had ostensibly been fought[.]<sup>14</sup>

Other times, Marshall used humor to bring home his historical point. When Chief Justice Burger proposed, as part of the bicentennial celebration, a “pageant in which members of the Court would reenact the original signing of the” Constitution, Marshall said he would participate only if the pageant was “faithful to the nation’s racial history; [meaning] he would appear in livery and kneebritches, carrying trays.”<sup>15</sup> Needless to say, the reenactment did not take place.<sup>16</sup>

In the major race cases in which Marshall opined, he always brought a race man’s historical perspective. If a case involved an issue affecting African-Americans, inevitably he viewed it through a lens of slavery and Jim Crow. Until all vestiges of America’s peculiar institutions were eradicated, he reasoned, the government had a duty to act affirmatively to help Negroes obtain opportunities equal to those enjoyed by other Americans.

This approach is most evident in his dissent in *Bakke*. He had no problem whatsoever with a rigid quota system that set aside 16 places for minority applicants to UC Davis School of Medicine and dissented from the Court’s declaration that such measures were unconstitutional. After treating his colleagues to an extended recitation on what he termed “the sorry history of discrimination” in the United States—from slavery to Reconstruction to Jim Crow segregation that endured through the mid-twentieth century—he followed with a careful explication of this history’s “devastating impact on the lives of Negroes.”<sup>17</sup> Given this history and its contemporary impact, he argued, “bringing the Negro into the mainstream of American life should be a state interest of the highest order.”<sup>18</sup>

Clearly this was a race man’s project. Thurgood Marshall intended through avowed judicial activism to create *genuine* equality rather than the kind of formal, abstract equality embraced by his more conservative brethren. He reasoned that the differences in the historical experience of African-Americans should entitle them to greater protection under the Fourteenth Amendment. This is consistent with the judicial philosophy he espoused in his NYU speech. There he said: “From the perspective of history, . . . the crucial task is not so much to define our rights and liberties, but to establish institutions which can make the principles embodied in our Constitution meaningful in the lives of ordinary citizens.”<sup>19</sup>

Obviously one of the institutions Marshall most cared about was public education. I had the privilege of working on a schools case, *Board of*

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<sup>14</sup> Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

<sup>15</sup> Rhode, *supra* note 13, at 1264.

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

<sup>17</sup> See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396 (1978) (Marshall, J., concurring in part and dissenting in part).

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

<sup>19</sup> Marshall, *supra* note 12, at 662.

*Education of Oklahoma City Public Schools v. Dowell*.<sup>20</sup> It was especially poignant to work with him, in the twilight of his career, on the issue for which he was best known. And it was also very painful. I did not know it then, but he was halfway through his last active year on the Court. And it was abundantly clear to him that his vision for a law and an equal protection clause that produces genuine equality had not come to pass. His brother, Brennan, had retired before the start of the term, and been replaced by Justice Souter, whom he liked to call “Junior.” He was 82 and feeble, despite his ample body and still very active mind. Not since his powerful dissent in *Milliken v. Bradley*,<sup>21</sup> when the Court’s consensus on enforcing the imperatives of *Brown* first disintegrated, had he had such a pointed opportunity to reflect publicly on his life’s work.

The *Dowell* case involved a school desegregation order that was entered against the Oklahoma City school district in 1972—18 years after the *Brown* decision—although the school district had maintained segregated schools since its inception in 1907.<sup>22</sup> The plan *had* produced integrated schools. But once the federal court retreated from supervising the desegregation order, not surprisingly, local autonomy resulted in a neighborhood schools plan that recreated several separate, racially identifiable “black” and “white” elementary schools.<sup>23</sup>

In helping Marshall craft his dissent, I spent a good deal of time with him talking about the history of school desegregation litigation and the major “race” cases. It was very interesting for me to contemplate why a “race man” who himself had benefited greatly from studying at two racially identifiable universities would care so much about the integration ideal. At the time, an effort to create schools for black boys had received considerable attention in the news media.

Marshall said [such a school] would only make black kids vulnerable. “When a budget cut is required, where would the ax fall first?” he argued. He offered an analogy to World War II. When the U.S. military was contemplating a very dangerous mission in which it expected two-thirds of the unit to suffer casualties, “what unit would get picked first?” he said.<sup>24</sup>

Clearly Marshall did not harbor any Jim Crow nostalgia. And it did not matter to him that racial segregation in schools now mirrored racial segregation in neighborhoods—especially since the school board’s prior manipulations in creating all-black schools had contributed to white parents’ preferences about where to live.<sup>25</sup> In his dissent, he stated: “I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain

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<sup>20</sup> 498 U.S. 237 (1991).

<sup>21</sup> 418 U.S. 717, 781 (1974) (Marshall, J., dissenting).

<sup>22</sup> *Dowell*, 498 U.S. at 251 (Marshall, J., dissenting).

<sup>23</sup> *See id.* at 242.

<sup>24</sup> Personal diary entry of Sheryll Cashin (Apr. 3, 1991) (on file with author).

<sup>25</sup> *See Dowell*, 498 U.S. at 265 (Marshall, J., dissenting).

feasible methods of eliminating such conditions.”<sup>26</sup> For Marshall, no condition perpetuated stigmatic injury more than racially identifiable schools. He knew all too well that “all-Afro-American schools” risked the “relative indifference of school boards.”<sup>27</sup> He cited empirical evidence that many black schools “suffer from high student-faculty ratios, lower quality teachers, inferior facilities and physical conditions, and lower quality course offerings and extracurricular programs.”<sup>28</sup>

In his chambers he was very upset. He had rehearsed with us, his clerks, the arguments he intended to use in the conference room with his colleagues. And they were a race man’s arguments, the kind of truth telling that makes some people uncomfortable. “Am I obliged to keep saying that things are going to get better?” He worried aloud about what he would say to a poor black kid about his life chances, given the schools and neighborhoods to which such kids were relegated. “They are now re-establishing on another basis the same [Jim Crow segregation that *Brown* was supposed to eradicate]. Before they used the law, now they are using residential segregation. Negroes are not that stupid,” he said in exasperation. Then he proceeded to tell us a heart-wrenching story about a black man he once encountered who told him he wanted to be reborn a white person because of all the privileges white folks enjoyed. “The only way to be superior is to have someone inferior and your subconscious prevents you from telling the truth,” he said aloud.<sup>29</sup>

This was my toughest day on the job. This normally humorous man, so full of joy, despite his gruff exterior, was at a loss as to how to stop the inevitable. He was partially effective, though. In *Dowell*, the Court merely hinted at what would be necessary to end a school desegregation order.<sup>30</sup> The Court waited until Justice Marshall had died before it declared, essentially, that it was time for federal courts to retreat altogether from policing school desegregation.<sup>31</sup>

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<sup>26</sup> *Id.* at 252.

<sup>27</sup> *Id.* at 260 n.5.

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

<sup>29</sup> All of the quotations in this paragraph are supported by: Personal diary entry of Sheryll Cashin (Apr. 3, 1991) (on file with author).

<sup>30</sup> *See Dowell*, 498 U.S. at 243–45.

<sup>31</sup> *See Missouri v. Jenkins*, 515 U.S. 70, 100–03 (1995) (holding that the district court exceeded its remedial authority when it required across-the-board salary increases and continued funding for remedial education as part of a desegregation decree); *Freeman v. Pitts*, 503 U.S. 467, 490–91 (1992) (holding that a district court may incrementally turn over supervision of a school district before total compliance had been reached); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007) (holding that certain voluntary, non-court-ordered school racial integration plans were unconstitutional).

## III. RACE-TRANSCENDING JURISPRUDENCE

Of course, Marshall's race-man perspective also compelled him to be an ardent advocate for other disadvantaged groups. For him, the Negro was a miner's canary for the nation. He spoke explicitly of the linkage between "minority" and "majority" rights in a speech he gave to the Second Circuit judicial conference in 1989:

History teaches that when the Supreme Court has been willing to shortchange the equality rights of minority groups, other basic personal civil liberties like the rights of free speech and to personal security against unreasonable searches and seizures are also threatened.

He continued, "We forget at our peril [the historical lesson that] . . . the fates of equal rights and liberty rights are inexorably intertwined."<sup>32</sup>

Thurgood Marshall's commitment to uplift his own people led him to espouse an equal opportunity vision for the Reconstruction Amendments, particularly in the realm of education. In his majestic dissent in *San Antonio Independent School District v. Rodriguez*, he spoke of "the right of every American to an equal start in life, so far as the provision of . . . education is concerned."<sup>33</sup> His experiences with racism and racial segregation also led him to reject *any* caste system.<sup>34</sup> Indeed, for him the central principle animating the Reconstruction Amendments was to eradicate any state actions that relegated human beings to second-class citizenship. For this reason, he was by far the most consistent advocate on the Court for the poor.

His brand of race-transcending equal justice can be seen in his dissent in *Kadrmas v. Dickinson Public Schools*,<sup>35</sup> a case in which the Court upheld a North Dakota statute that authorized some school districts to charge fees for school bus services. "The intent of the Fourteenth Amendment was to abolish caste legislation[,]” he argued.<sup>36</sup> "When state action has the predictable tendency to entrap the poor and create a

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<sup>32</sup> Thurgood Marshall, *Remarks at the Annual Conference of the Second Circuit [The Future of Civil Rights]* (Sept. 8, 1989), in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 12, at 216, 217–18. *Cf. Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting) (noting that while in that case railroad workers subjected to involuntary drug tests were the victims of the majority's ruling, "ultimately, today's decision will reduce the privacy all citizens may enjoy"); *Trans World Airlines v. Hardison*, 432 U.S. 63, 96–97 (1977) (Marshall, J., dissenting) (noting that "[a]ll Americans will be a little poorer" as a result of the Court's decision not to respect the religious freedoms of the respondent).

<sup>33</sup> 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

<sup>34</sup> See Cass R. Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267, 1270 (1992).

<sup>35</sup> 487 U.S. 450 (1988).

<sup>36</sup> *Id.* at 469 (Marshall, J., dissenting).

permanent underclass, that intent is frustrated.”<sup>37</sup> Once again, it took a race man’s realist perspective to comprehend how a bus fee could entrap poor folks. A man who had personally experienced impecuniosity and worked for and among poor people, understood how even a modest fee was a very real barrier to education for children like Sarita Kadmas.

In a series of opinions, Marshall argued for heightened scrutiny under the Equal Protection Clause of any conditions that suggested caste status. These opinions suggest a view that “no one should be deprived, without good reason, of adequate education, police protection, food, shelter, or medical care.”<sup>38</sup> “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, and education.”<sup>39</sup>

Marshall’s jurisprudence seems anachronistic in an era when displays of “empathy” by judges or judicial appointees are derided by conservatives as inappropriate. He believed that the courts were *supposed* to aggressively promote equal opportunity and equal justice. And a litany of non-black, non-poor litigants benefited from this vision, including “prisoners, minors, older people, . . . persons with disabilities, Native Americans, members of religious minorities, immigrants . . . , fathers, women, . . . students, . . . protestors, and members of racial minorities.”<sup>40</sup>

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

<sup>38</sup> Sunstein, *supra* note 34, at 1272 (citing *Harris v. McRae*, 448 U.S. 297, 337 (1980) (Marshall, J., dissenting); *Mem’l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 259–62 (1974); *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting)).

<sup>39</sup> Sunstein, *supra* note 34, at 1272 (footnote omitted) (citing *United States v. Kras*, 409 U.S. 434, 458 (1973) (Marshall, J., dissenting)). In *Kras*, Marshall expressed indignation at the majority’s minimizing of the impact of a \$2.00 filing fee, stating, “I cannot agree with the majority that it is so easy for the desperately poor to save \$1.92 *each week* over the course of six months. The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than \$1,000 or \$19.23 a week. I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy. It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as *Kras* must do. It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.” 409 U.S. at 459–60 (footnote and citation omitted).

<sup>40</sup> Martha Minow, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 66, 67 (1991) (footnotes omitted). Minow’s *A Tribute to Justice Thurgood Marshall* categorizes Marshall’s dissenting opinions as follows: prisoners: *see* *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 465 (1989) (Marshall, J., dissenting); minors: *see* *Schall v.*

While Marshall's activist vision of equal justice was not embraced by the Rehnquist Court and also has no traction with the Roberts Court, politics in America may be catching up with his vision. The multi-racial, multi-class coalition that supported President Obama is premised on the kind of optimistic, equal opportunity vision that Justice Marshall had for the law. As Obama suggested in his second inaugural address, "We the People" includes an array of folks, from striving immigrants to gays and lesbians seeking to marry to poor, huddled masses struggling to get into and stay in the middle class.<sup>41</sup> Obama also spoke of the need for this rainbow of humanity to engage in "collective action" for the greater good.<sup>42</sup>

African-Americans heartened by Obama's presidency seem to accept that Obama cannot and should not be a "race" man. They understand that winning elections necessitates finding common ground. After all, it is rather hard to be a voter, let alone a center-left black president, today. The political landscape is fraught with peril and obstructions. A majority of whites vote republican and even larger majorities of people of color vote democratic. Partisan gerrymandering renders the U.S. House of Representatives unrepresentative of popular vote counts. Senate rules or those who would abuse them enable ideological purity to subordinate the common good. What should a civil rights or progressive advocate do? The courts seem an even less propitious forum for advancing social justice than do legislatures.

Justice Marshall's race-transcending jurisprudence, like Obama's race-straddling politics, offers a vision for twenty-first century civil rights and progressive policy advocacy. In a bewilderingly diverse future, none of us can afford to be single-issue or single-constituency people. Justice Marshall ultimately seemed to understand that. His race-transcending ju-

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Martin, 467 U.S. 253, 281 (1984) (Marshall, J., dissenting); older people: *see* Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158, 182 (1989) (Marshall, J., dissenting); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); persons with disabilities: *see* U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 613 (1986) (Marshall, J., dissenting); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part); Native Americans: *see* Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 775 (1985) (Marshall, J., dissenting); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977) (Marshall, J., dissenting); members of religious minorities: *see* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986) (Marshall, J., concurring in part and dissenting in part); Trans World Airlines v. Hardison, 432 U.S. 63, 85 (1977) (Marshall, J., dissenting); immigrants: *see* Jean v. Nelson, 472 U.S. 846, 858 (1985) (Marshall, J., dissenting); INS v. Lopez-Mendoza, 468 U.S. 1032, 1060 (1984) (Marshall, J., dissenting); fathers: *see* Fiallo v. Bell, 430 U.S. 787, 800 (1977) (Marshall, J., dissenting); women: *see* Rostker v. Goldberg, 453 U.S. 57, 86 (1981) (Marshall, J., dissenting); Pers. Adm'r v. Feeney, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting); students: *see* Vill. of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting); protestors: *see* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 301 (1984) (Marshall, J., dissenting); members of racial minorities: *see* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 528 (1989) (Marshall, J., dissenting).

<sup>41</sup> *See* Inaugural Address, 2013 DAILY COMP. PRES. DOC. 1-2 (Jan. 21, 2013).

<sup>42</sup> *Id.* at 1.

risprudence displayed concern for the equality interests of all human beings who struggle. Advocates necessarily must pursue a justice that routes out all forms of caste or exclusion. As Dr. King famously wrote in his letter from Birmingham: "Injustice anywhere is a threat to justice everywhere."<sup>43</sup> In order to be relevant or successful in the twenty-first century, a civil rights agenda must resonate across many identity boundaries.

The new frontier in civil rights work in the twenty-first century will be strategies that overtly attempt to bring struggling whites into the civil rights tent. Thus far in civil rights discourse, the ticket to entry under that rubric was that you had to diverge somehow from the privileged position of white males. Centuries of civil rights struggle focused on affording to people who were not white males the same public and private goods that white men received. Admittedly, asking civil rights advocates to consider how to bring working class whites, including white males, into the civil rights tent may be discomfiting to progressives. It bears emphasis that Marshall's vision of equality under the Reconstruction Amendments was premised on economic and social progress "for all of our people." In opinion polls, ordinary whites express pessimism about their life chances that people of color, perhaps cheered by Obama's election, are less apt to harbor. Indeed, most whites perceive anti-white bias as a bigger social problem than anti-black bias.<sup>44</sup>

This poses a serious dilemma for advocates and political parties that need to get to 55% in order to govern. As Dr. King said in explaining his vision of a future Beloved Community, the end of the civil rights movement was reconciliation, the kind of racial transcendence that Marshall's equality analysis reflected.<sup>45</sup> The most enduring of civil rights victories were won because of the moral salience of the cry for universal human dignity. The positive corollary to the late Derrick Bell's influential interest-convergence critique is that when the interests of whites and people of color do converge, the country has witnessed great leaps forward in equality guarantees.<sup>46</sup> Because of demographic change and the common indignities of the Great Recession, I believe the country is ripe for another quantum leap forward. Elsewhere I have written about the language

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<sup>43</sup> MARTIN LUTHER KING, JR., *Letter from Birmingham Jail: April 16, 1963*, in MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 76, 77 (1963).

<sup>44</sup> See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 *PERSP. ON PSYCHOL. SCI.* 215, 215–17 (2011).

<sup>45</sup> See Martin Luther King, Jr., *The Power of Non-Violence* (June 4, 1957), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 12, 12 (James M. Washington ed., 1986). By "racial transcendence" I do not mean color blindness or post-racialism. On the contrary, Marshall saw race and racism in full historical context. His intimate, lived understanding of race and how it operates in American society informed his judgment about other forms of oppression.

<sup>46</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 522–28 (1980) (noting that abolition, the Reconstruction Amendments, and *Brown v. Board of Education* resulted only when the interests of blacks and the white majority converged).

and overt practice necessary for bringing more whites into the progressive fold.<sup>47</sup> In this work I have focused on the theory and practice of multiracial coalition building as a mechanism for achieving common ground and the common good. I call on civil rights advocates to pursue strategies that encourage, rather than discourage, multiracial alliances. In the realm of affirmative action, for example, that might mean seeking markers other than race to achieve diverse classrooms and work places.<sup>48</sup> Marshall's life-long commitment to the ideal of integration, like Dr. King's commitment to the creation of the Beloved Community, is premised on the idea that equality means real inclusion in American society. I could offer a laundry list of public policies necessary to achieving that, from fair-share affordable housing, to inclusionary zoning, to school integration, and dismantling our current system of mass incarceration. In that list, I would also include constitutional protection for same-sex marriage and the passage of comprehensive immigration reform. None of this will come to pass without powerful, multiracial alliances.

Fortunately, changing demographics and rising interracial intimacy are enhancing possibilities for culturally dexterous whites and progressive people of color to form such coalitions.<sup>49</sup> The peril with demographic and cultural change is that those who fear it inevitably mount resistance. Unfortunately it is often easier to exploit racial fears than to transcend them. Throughout American history, economic elites used racial categories and racism to drive a wedge between working class whites and people of color they might ally with. In the colonial era indentured servitude gave way to white freedom and black slavery so that white servants no longer had incentive to join blacks in revolt. In the late-nineteenth century, Jim Crow laws proliferated when a biracial farmers' alliance threatened to change unfair financial policies imposed by elites. And the GOP devised a cynical, race-coded southern strategy that broke up the multiracial alliance that made the New Deal possible. Given this history and its current manifestations, intentional efforts are sorely need-

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<sup>47</sup> See Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, in *AFFIRMATIVE ACTION: CONTEMPORARY PERSPECTIVES* (James Beckman ed., Greenwood Press) (forthcoming); Sheryll Cashin, *Shall We Overcome? "Post-Racialism" and Inclusion in the 21st Century*, 1 *ALA. C.R. & C.L. L. REV.* 31, 31-47 (2011); Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 *ST. JOHN'S L. REV.* 253, 281-90 (2005).

<sup>48</sup> See Cashin, *Place, Not Race*, *supra* note 47.

<sup>49</sup> Cultural dexterity, a phrase I coined, is the ability to walk into a room and be outnumbered by people of a different race or ethnicity and experience excitement rather than fright. If you have recently had a meal in the home of someone of a different race you are probably culturally dexterous. According to social psychology research, dexterous whites are more likely than other whites to support policies designed to promote diversity and reduce inequality. For a brief overview of trends in interracial intimacy and the potential positive impact on politics, see Sheryll Cashin, *Moving Toward a Culturally Dexterous Washington*, *WASH. POST BLOGS: THE ROOTDC* (Aug. 3, 2012, 7:00 AM), [http://www.washingtonpost.com/blogs/therootdc/post/moving-toward-a-culturally-dexterous-washington/2012/08/02/gJQAcQIkSX\\_blog.html](http://www.washingtonpost.com/blogs/therootdc/post/moving-toward-a-culturally-dexterous-washington/2012/08/02/gJQAcQIkSX_blog.html).

ed to begin to rebuild trust among “we the people” and to recapture a sense of collective will to protect the common good.

The good news for progressive advocates is that most Americans of every color believe in the ideals of racial and economic fairness. The bad news is that they never get to stop working to make these ideals real for ordinary people. Justice Marshall understood that the fight for justice is never over. When the City of Baltimore erected a statue of him in 1980, he said at the unveiling: “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.”<sup>50</sup>

I am sure that were he still with us he would have said the same thing at the naming of an airport after him. And were he here, he would have offered a similar observation about Obama’s Second Inaugural. Oh, he would have been tickled, I think, at this dramatic acceleration of the possibilities for his people. But after the celebrations Marshall would say “this is not the end of it. There’s [still] too much work to be done.”<sup>51</sup> And it is my hope that the next generation, those who currently suffer the challenges of law school, will heed his message and choose to engage in the justice issues of their time.

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<sup>50</sup> Dale Russakoff, *Tribute to Marshall: City of Baltimore Dedicates Statue to 1st Native Son on High Court*, WASH. POST, May 17, 1980, at C1, *quoted in* Sunstein, *supra* note 34, at 1275.

<sup>51</sup> *See id.*