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"Here Come de Judge": The Role of Faith in Progressive Decision-Making

by DERRICK BELL*

The memorable teachers in our lives hold that status even though we do not recall a single thing they taught us. Rather, we remember them as enviable individuals who spurred us to learn on our own, both the subject matter and ourselves. Our finest judges, like great teachers, are revered and remembered less for the decisions they made and the opinions they wrote than for the courageous commitment to justice adhered to even when that commitment was not popular, not wanted, and likely to subject the judge to calumny rather than commendation.

Justice Matthew O. Tobriner exhibited that character of courageous commitment on the bench and in his writings. Unlike those who boast of their conservatism while seeking in every imaginable way to advance the lot of the already well-off at the expense of the powerless, he advocated use of law as an instrument to protect the rights of the weak and the traditionally disadvantaged during times of great change. In a lone and lengthy dissent in *Bakke v. Regents of the University of California*, Justice Tobriner recalled...
the nation's racial history that so many want to wash away in a blizzard of color-blind rhetoric:

Two centuries of slavery and racial discrimination have left our nation an awful legacy, a largely separated society in which wealth, educational resources, employment opportunities—indeed all of society's benefits—remain largely the preserve of the white-Anglo majority. Until recently, most attempts to overcome the effects of this heritage of racial discrimination have proven unavailing. In the past decade, however, the implementation of numerous "affirmative action" programs, much like the program challenged in this case, have resulted in at least some degree of integration in many of our institutions.

The Supreme Court's complex decision in Bakke\(^2\) enabled schools to continue to use race as a factor in promoting diversity, but public opposition to affirmative action continued to grow. One would have thought that affirmative action was a policy forced on American institutions by black revolutionaries. And it is true that the urban uprisings following Martin Luther King's assassination in 1968 served as a spur to move corporations, government agencies, and educational institutions to a rather tardy and mostly modest compliance with the desegregation mandate of Brown v. Board of Education\(^3\) and the civil rights acts of the mid-1960s.

Without really altering patterns of hiring, admitting, and promoting that privileged well-off or well-connected whites, minority admission or hiring policies were designed to bring some blacks, Hispanics, and women (not too many you understand) into previously all-white and mostly male domains. Some of these programs worked better than others, and they all served the interests of the sponsoring institutions as much and usually more than they did those previously excluded who were let in the door.

But as the job market tightened and anxiety about their future well-being increased, more and more whites opposed these programs—whatever their effectiveness. This opposition was encouraged by politicians at every level who were quite willing to win elections by blaming the nation's malaise on affirmative action programs. Given the nation's history of blaming serious economic problems on blacks and other minority groups, it is appalling but alas, not surprising, that a great many whites are rather easily convinced that their well-being is eroding, not because of policy decisions by corporate heads and their elected representatives, but by blacks who, they believe, use racial discrimination as an ever-ready excuse for

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demanding preferences while disdaining performance.

In California the opposition, led by a governor who viewed the issue as a magic carpet that would ride him right into the Senate and perhaps the White House, took the form of an amendment to the state constitution that was adopted by a referendum vote.4

The amendment was challenged in federal district court where Chief District Judge Thelton Henderson entered a stay5 and, following a hearing, a preliminary injunction barring implementation of the measure.6

Basically, his opinion found that Proposition 209 violates the equal protection guarantee because it restructures the political process in a nonneutral manner.7 Specifically, it erects unique political hurdles only for those seeking legislation intended to benefit women and minorities—who must now obtain a constitutional amendment to achieve this goal—while allowing those seeking preferential legislation on any other ground unimpeded access to the political process at all levels.8

Judge Henderson's opinion relies heavily on two precedents: Hunter v. Erickson9 and Washington v. Seattle School District No. 1.10 In Hunter, the Supreme Court struck down the results of a referendum both repealing a fair housing ordinance and requiring a citywide vote for the adoption of any future such law.11 Proposition

4. Proposition 209, the California Civil Rights Initiative, amended the California Constitution to provide that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a). Proposition 209 was approved by a slim majority of the voters in a controversial referendum on November 5, 1996.


7. See id. at 1509-10.

8. See id.


11. Hunter 393 U.S. at 387. As Judge Henderson saw it, "[t]he Supreme Court's analysis of [section] 137 [of the Akron ordinance] turned on two particular features of the measure. First, [section] 137 raised equal protection concerns because it singled out an issue of particular interest to racial minorities—racial discrimination in housing. Had the measure imposed a new political burden on all legislation, the Supreme Court was quick to point out, it would not have run afoot of the 14th Amendment. Second, [section] 137 was suspect because it imposed a novel political burden on all future efforts to enact fair housing legislation. Had citizens of Akron used the referendum process simply to repeal the fair housing ordinance previously adopted by the Akron City Council, this action alone would have raised no equal protection difficulty." Coalition for Econ. Equity v. Wilson, 946 F. Supp. at 1500. Judge Henderson felt that "[a]lthough neither of these two features of [section] 137, standing alone, would have offended the 14th Amendment, the
209, Judge Henderson concluded, failed to meet constitutional standards for the same reasons as the referenda in *Hunter* and *Seattle.* State officials argued that these cases are distinguishable because Proposition 209 does not create, but specifically bars, classifications based on race. But Judge Henderson said that one must look beyond Proposition 209's neutral language and inquire whether, "in reality, the burden imposed by [the] arrangement necessarily falls on the minority." He then made a fairly detailed survey of the Proposition 209 campaign and the issues in the debate prior to its passage. Rather clearly, he concluded, the goal as viewed by both sides was to eliminate affirmative action from all state activities.

For his part, Judge Henderson refused to divorce the legal issue from the "raging controversy" out of which it arose. California insisted that *Hunter* and *Seattle* burdened minorities and was unlike Proposition 209, which outlaws preferences injuring nonminorities. Judge Henderson responded that *Seattle* and *Hunter* were not cases about the limits on state-sponsored remedies for past discrimination, but "are more appropriately understood as cases about access to the political process."

Judge Henderson’s encompassing of both history and the "real world" is precisely what the Supreme Court majorities have not done in recent racial cases. His action was certain to be controversial and he likely expected criticism. He probably expected, as well, the highly personal and quite insulting tone of the criticism, much of which ignored the carefully prepared reasoning in his opinion and took on a "who do you think you are" character.

Describing the decision as "surreal," Governor Pete Wilson said he was not surprised that a judge who served on the Board of the American Civil Liberties Union twenty years ago would "endorse the ACLU’s Orwellian argument." Ward Connerly, an U.C. Regent and one of Proposition 209’s sponsors, opined that Judge

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Supreme Court held that the confluence of the two factors—the targeting of a racial issue and the reordering of the political process—constituted a racial classification that required the most exacting judicial scrutiny." *Id.*

13. *See id.* at 1502.
16. *See id.*
17. *Id.* at 1503.
Henderson's decision "will be recorded in the history of American jurisprudence as one of the most perverse." Stuart Taylor, the widely syndicated writer on legal affairs, wrote that finding that Proposition 209 "violates the Fourteenth Amendment's ban on almost all racial discrimination when it prohibits such discrimination is absurd on its face." Not satisfied with criticism, supporters of Proposition 209 filed a motion asking that Judge Henderson should be removed from the case as biased because he is a liberal with past affiliations with liberal groups. U.S. District Judge Fern Smith refused to grant the order, finding that the judge's membership on the ACLU's board twenty years earlier did not impugn his ability to fairly judge the issue before him. Recusal charges, she added, go toward bias favoring parties, not attorneys, and disagreement with a judge's decision is not a basis for removal.

The bias charge was quite like that contained in a motion to recuse himself filed against the late Judge A. Leon Higginbotham, Jr. Following a major address to black historians in the early 1970s, officials of a white union defending an employment discrimination case before Judge Higginbotham filed a motion asking him to recuse himself from their case. The motion referred to the speech to support a charge that Judge Higginbotham was a black civil rights advocate and thus could not objectively preside over their case. Judge Higginbotham, far from intimidated by the allegations, responded at length and in the strongest terms both by refusing to recuse himself and condemning the subconscious but widely held view that only white judges could decide racial issues fairly.

In the case of Judge Henderson, even recusal was not sufficient for House Republican Whip Tom Delay of Texas, who led a group of House conservatives urging that activist judges like Judge Henderson be impeached. Undeterred by Article II, Sec. 4 of the Constitution limiting the impeachment of federal judges to those charged with "high crimes and misdemeanors," DeLay believed that impeachment

20. Id.
23. See id.
24. See id.
26. See id. at 157-58.
27. See id.
28. See id. at 181-82.
was not as drastic as some of the decisions Federal judges were making. 29

Those filing the bias motion and making the impeachment threat against Judge Henderson were, evidently convinced he would hear the case when it returned for trial from the Ninth Circuit’s ruling on the refusal to stay Judge Henderson’s issuance of the preliminary injunction. But the case was not returned. The plaintiffs and Judge Henderson endured months of criticism because he had taken the case under a settled rule of his court that a judge already hearing one case should be assigned a related case. There was almost no media criticism when a conservative panel of the Ninth Circuit, assigned for a month to hear legal motions, deferred a decision on the stay and took control of the case to hear an appeal of Judge Henderson’s preliminary injunction. Even during the stay hearing, one member of the panel, Judge Kleinfeld, was quite critical of Judge Henderson, reportedly observing that this is not Serbia or Algeria “where first they have the elections, and then decide whether to honor them.” 30

When the motions panel reversed Judge Henderson on the preliminary injunction and then proceeded to rule on the merits of the case without a hearing, the decision was viewed as both a victory for Proposition 209 supporters and a personal reprimand of Judge Henderson. One writer’s story, headlined “Too Big for His Benches,” expressed the view that Judge Henderson’s action “seemed so personal and autocratic that voters, even those who opposed 209, had cause to believe that Judge Henderson was abusing the bench by turning himself into the ultimate legislator.” 31 And Senator Orrin Hatch, Chair of the Senate’s Judiciary Committee, weighed in with a press release hailing the Ninth Circuit’s reversal of Judge Henderson’s “lawless decision,” which he said could only be described as “an example of pure judicial fiat.” 32 This is the same official who has jeopardized the proper functioning of the federal courts by holding President Clinton’s judicial appointments for months, even years, despite the need of the courts for more judges and personal pleas for action from Chief Justice William Rehnquist.

One commentator, though, thought it was the Ninth Circuit panel that had committed a serious abuse of the law. Calling their action “astoundingly activist,” USC Law Professor Erwin

Chemerinsky pointed out that there was no authority for the motions panel to keep the case rather than remand it, decide that facts and proof evinced at trial would not affect the outcome of the case, and determine that Proposition 209 was constitutional as a matter of law.\textsuperscript{33} The practice of the panel keeping a case and deciding it on the merits would set a dangerous precedent by allowing attorneys to time the filing of motions based on who is sitting on the panel in the hopes that the panel will decide the case on the merits.\textsuperscript{34} Additionally, Chemerinsky argues, the Ninth Circuit's decision was flawed because it assumed that a federal judge was without authority to strike down a law created by popular vote, precisely what the Supreme Court had done in \textit{Hunter, Seattle}, and again in \textit{Romer v. Evans}.\textsuperscript{35}

In retrospect, the criticism Judge Henderson endured went far beyond disagreement with his decision and seemed intended to reduce his stature from that of a highly qualified and experienced member of the federal bench to a character in an old-time minstrel show whose woebegone appearance on the stage would be greeted with "Here come de judge."

I have no doubt that any judge enjoining the operation of Proposition 209 would have been criticized, but the character of the attacks launched against Judge Henderson were more than partisan. It was this aspect of the attack he received that Judge Higginbotham addressed at the close of his opinion in the employment discrimination case:

If America is going to have a total rendezvous with justice so that there can be full equality for blacks, other minorities, and women, it is essential that the 'instinct' for double standards be completely exposed and hopefully, through analysis, those elements of irrationality can be ultimately eradicated.... [I]n some respects the motions [to disqualify myself] merely highlight the duality of burdens which blacks have in public life. Blacks must meet not only the normal obligations which confront their [white] colleagues, but often they must spend extraordinary amounts of time in answering irrational positions and assertions before they can fulfill their primary public responsibilities.\textsuperscript{36}

A fine statement that looked, when written in the 1970s, toward a time which has not yet come. Judge Henderson is certainly aware that what Judge Higginbotham called "the instinct for double standards," when it comes to blacks, has not been eradicated and, in


\textsuperscript{34} See id.

\textsuperscript{35} Romer v. Evans, 517 U.S. 620 (1996) (invalidating the Colorado anti-gay and -lesbian amendment that had been adopted by referendum).

\textsuperscript{36} Commonwealth v. Local 542, International Union of Operating Eng'rs, 388 F. Supp. at 181-82.
fact, may never be eradicated. And yet he accepted the case and ruled against a politically popular measure knowing that, while welcome, his decision might prove only a temporary rest stop on the road to the elimination of all affirmative action programs—one phase of a general retreat on civil rights that leaves anti-discrimination laws on the books, but politically unenforceable, like the Equal Protection Clause on which many of these laws are based.

In deciding to stand in the face of this retreat, Judge Henderson certainly knew the unhappy history of the Fourteenth Amendment he was relying on. For in its first century of existence, the Equal Protection Clause proved of far greater value to majority interests, corporations, railroads, and trusts, which used it to insulate their exploitation of land, labor, and resources against legislative efforts by states to rein in these ravishes, than to protect the citizenship rights of blacks. Now, in affirmative action litigation, we see the strict scrutiny standard intended originally to protect "discrete and insular" minorities against majority exploitation turned on its head and protecting white majorities from the modest efforts by majority legislatures to remedy some of the worst deprivations of generations of racial discrimination—discrimination that is continuing and growing more open, more blatant. As a result:

1. Blacks can no longer invoke the strict scrutiny shield in the absence of proof of intentional discrimination—at which point, strict scrutiny is hardly needed. On the other hand,

2. Whites challenging racial remedies are entitled to strict scrutiny automatically if the remedy has a racial classification. Thus, for Equal Protection purposes, whites become the protected "discrete and insular" minority.

The manipulation of doctrine in order to deny constitutional validity to affirmative action policies serves as further (and unwanted) proof of the two-part, Derrick Bell Pre-Memorial Formula of Racial Policy Making.

Part One: the society is always willing to sacrifice the rights of black people in order to protect important economic or political interests of whites. The Framers' decision to protect slavery in the Constitution to insure the support of slave owners was an early instance of this involuntary (for blacks) racial sacrifice. The Hayes-Tilden Compromise of 1877 that sacrificed the rights of blacks in the South to forestall renewal of the Civil War was perhaps the most infamous example. And then there was Plessy v. Ferguson which

38. See, e.g., Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
gave segregation the status of constitutional law in order to gain the support of whites for business-oriented economic policies that toward the end of the Nineteenth Century were harming a great many white people.

Part Two: the law—as well as society—recognizes the rights of blacks and other people of color only when such recognition serves some economic or political interest of greater importance to whites. Lincoln’s reluctant issuance of the Emancipation Proclamation to help the faltering effort to save the Union was an example of Part Two in action. Similarly, after World War II, the United States, now the world leader in efforts to win the allegiance of mostly non-white, third-world nations, discovered that practicing Jim Crow at home made it tough to advocate democracy abroad.

The Brown decision, by promising to close the gap between the country’s ideals and its practices, provided an immediate boost to America’s foreign policy efforts. Here was Part Two of the racial policy principle at work. But while the Jim Crow signs came down after prolonged battles in the courts and on the streets, the society quickly devised means to limit the substantive value of the pro-civil rights-decisions and the new civil rights laws enacted during the 1960s.

As they did in the latter part of the Nineteenth Century, Supreme Court decisions in the area of civil rights in general and affirmative action in particular have swung into line with public opposition—so much so that, as I indicated earlier, strict scrutiny has become useless to deal with continuing racial discrimination and is now a tool for undoing modest efforts to counteract that discrimination. As a former student, now a member of the Hastings faculty, Professor Radhika Rao, described the Court’s action in finding a Richmond, Virginia set-aside ordinance unconstitutional:

In City of Richmond v. Croson, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court’s decision to treat all racial classifications identically possesses the same superficial symmetry of the “separate but equal” analysis in Plessy v. Ferguson, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign racial classifications warrant the same standard of review as invidious acts.40

The obvious similarity of approach in an end-of-the-Nineteenth-Century decision, Plessy, when compared with an end-of-the

40. Racial Reflections: Dialogues in the Direction of Liberation, 37 UCLA L. REV. 1037, 1040-41 (Derrick Bell et al. eds., 1990) (Professor Rao’s comment comes from a reflective paper she wrote as a third year law student at Harvard for Professor Bell’s Fall 1989 seminar, “Civil Rights at the Crossroads”).
Twentieth Century decision, *Croson*, sends a clear message. A slender, but seemingly firm Supreme Court majority, views programs to remedy long-established patterns of discrimination as a greater evil than the more subtle, but not less pernicious, patterns of racial bias that continue to be practiced widely and without challenge. A color-blind Constitution has become the battle cry for those on the Court who, in the very face of its devastation, maintain that discrimination is a thing of the past. The spirit of *Plessy*'s "separate but equal" standard is revived in the Court's willingness to employ disingenuous terms to disguise its continued willingness to sacrifice black rights to further white interests.

Judge Henderson refused to acknowledge the far from subtle pressures in these recurring patterns of involuntary sacrifice of minority interests to allay or deflect other concerns. It was precisely this refusal that gave his Proposition 209 opinion its cut-flower quality: beautiful to look at, but of likely limited longevity. That he accepted the case and ruled on it in accord with existing precedent showed more than grit in the face of almost certain adversity. It reflected a character of faith in a system that has not often justified such faith.

He subjected himself to a particularly hostile reversal by the court of appeals and undue attacks by public officials because he assumed that civil rights law and the Court have not changed since 1969 or even 1982, that precedent really means something, and that the Court and the country are as supportive of civil rights' remedies as they were then. He was not ready to believe that now, unlike its decisions in *Hunter, Seattle*, and yes, *Romer*, a majority of the Court is now willing to allow the referendum process to serve as a vehicle for providing permanent form to present bigotry.

People of color will survive the loss of special consideration in admissions or government hiring even though the benefits of these programs have been substantial. Without affirmative action, I would not have a 30-year career in law teaching. Of course, the hostility is not to any philosophical opposition to preference—this society seems to both survive and flourish on all manner of preferences. One attuned to word usage in the area of race, as black people of necessity must be attuned, understands that opposition to affirmative action is not at base about merit or fairness or equal opportunity. It is about the determination to maintain this country's status quo.

Proposition 209 is a forewarning that as we move into a new century black people are still at risk in a society where any perceived threat to privileges and preferences of whiteness can bring retaliation. I say "perceived" because, in fact, affirmative action—like virtually every measure intended to address racial injustice—has proven of more value to whites than to blacks. This little recognized
phenomenon holds true with affirmative action, which has been of principal benefit to white women.

The Proposition 209 litigation makes clear, though, that the law, far from an insulation protecting us from this retaliatory heat, can rationalize the destruction—pushing aside long-standing precedent, well-settled procedures, and even members of the bench who dare stand in the way. As Professor Chemerinsky observed in his critique of the Ninth Circuit's summary approval of Proposition 209, "we all like to pretend that judges decide cases based on the law and that their ideology should be irrelevant to the outcome of the case. Yesterday's Ninth Circuit U.S. Court of Appeals decision upholding the constitutionality of Proposition 209 is a striking example of how sometimes the ideology of the judges is everything in the American legal system."41

I, of course, have not forgotten and applaud the fact that not all federal judges are committed to ideological decision-making. I applaud, for example, the great increase in the number of black and other minority persons who now preside over courts, federal and state, at every level across this land. But it is much too soon to know whether these judges are truly pioneers of racial progress, or—as has happened in so many other areas of civil rights—they represent a temporary phenomenon fueled by factors and agents unconnected with and little mindful of their courageous efforts.

When the winds of perceived self-interest change, numbers may again be counted on the fingers of a single hand. Even now, Senator Orrin Hatch's Senate Judiciary Committee, while holding up the nomination of progressive judicial appointments in general, is particularly obstructive with the names of minority candidates.42

President Clinton, for his part, ever the politician, has not made the Senate's abridgment of the constitutional process a major issue, preferring to work with Senator Hatch, a negotiating process that Hatch used recently to win approval to a federal judgeship of a longtime and likely super conservative friend from Utah.43 Nor has the country and its media, whose radar seems tuned only to scandal involving extramarital sex and unearned wealth, raised an appropriate hue and cry over the transforming of our federal court system into the judiciary equivalent of a foreign sweat shop where the standard is

41. Chemerinsky, supra note 33, at 4.
42. See, e.g., Anthony Lewis, Abroad at Home; Hypocrites in Power, N.Y. TIMES, Nov. 9, 1999, at A25 (discussing Senate vote rejecting the nomination of Justice Ronnie White of the Missouri Supreme Court to a federal district judgeship because he was "pro-criminal," a charge that, as it turns out, was false). See id.
more and more work performed by fewer and fewer workers. One can only imagine the storm of protest were Senator Hatch a black man holding up the nomination of all whites unless they passed a progressive litmus test. Talk about impeachment!

These developments do not augur well for those judges sensitive to injustice and striving diligently in their work to, as the old folks would put it, “make a way out of no way.” The fears I raise are based on more than the over-active racial paranoia of one senior veteran of the civil rights wars. I am reminded that at his funeral several years ago, the speakers transformed Supreme Court Justice Thurgood Marshall’s requiem into a celebration of a life committed to the eradication of racism. Borne on rhetorical wings, the eulogies lifted him to a place along side Dr. Martin Luther King, Jr. in that uniquely American racial pantheon where each person is accorded in death a distinction usually reserved for those who in life have achieved, rather than failed, to accomplish the goals for which they committed their lives.

Then, as now, I marvel at how readily this society assimilates the myriad manifestations of black protest and achievement. In that process, the continuing devastation wrought by racial discrimination is minimized, even ignored, while those who gained some renown as they worked to end those injustices are transformed into cultural reinforcements of the racial status quo. They become walking proof that even minorities can make it in America through work and sacrifice. For some, it is easy then to conclude that those minorities who do not make it have only themselves to blame.

Though he denied it, many felt that Justice Marshall left the Court an embittered man as he witnessed the dismantling of so many liberal precedents he had helped to establish. Justice Marshall surely was not pleased as he witnessed conservative Court majorities dismantling decades of hard-won doctrine. But a likely larger source of bitterness was a tardy recognition that the reliance he and other civil rights advocates had placed in the law all too often served eventually as a betrayal of our clients and the masses of black people who relied on our counsel and willingly placed their hopes on our professional skill and commitment.

In retrospect, it is apparent that we who worked for racial justice placed our civil rights advocacy in the service of our integrationist ideals, ignoring in the process our experience with the resiliency of racism. We viewed segregation as the prime barrier to black advancement, realizing too late that once segregation was vanquished by our sustained efforts it would be replaced by the use of race-neutral standards, a more sophisticated and even more invidious vehicle for maintaining white dominance.

These reversals in legal doctrine, combined with the devastating
statistics of black poverty, unemployment, crime, and family and community destruction, are occurring despite, and not because of, the committed efforts of civil rights lawyers and progressive lawyers. And yet, we urged the use of law and litigation as the major means to end racial discrimination. We did so in good faith but with an inadequate understanding of both the limits of law and the pervasive role of racism in this society.

If Justice Marshall was bitter at the close of his Supreme Court tenure, the source of that bitterness was not a group of conservative whites appointed to the Court during a conservative, political era. Instead, I think he recognized that, despite a lifetime of struggle and accomplishments that insure him a major place in American history, he—like many of us who tried to emulate him—had relied on the law to effect racial reform, only to discover that the system had distorted our commitment into coaptation, and transformed our advocacy of rights into doctrines of neutrally-imposed oppression.

Justice Marshall relied on the power of telling stories to change minds and events. In remarking what Justice Marshall added to the court, Justice O’Connor recalled his ability to use personal examples to convey the human realities behind the cold legal principles the Court debated.⁴⁴ Evidently, though, the members of the Court—and particularly Justice O’Connor—were incapable either of understanding or being moved by Justice Marshall’s words. Even at his lofty level, Justice Marshall—like many black people—are readily viewed as humorous by whites who find it far more difficult to take us seriously.

We who honor Justice Marshall continue to labor in the legal vineyards, hoping our efforts—whether in the courtroom or in the classroom—can relieve the pressures that racism exerts on all those in the society who are not white. In those labors, it is difficult not to be distracted by the fact that Justice Marshall’s successor on the Supreme Court seems to personify a well-traveled road to success for minorities. Namely, if we ignore the continuing perversity of racism and act as though the law is fair and color-blind, those with favors to grant will reward our conformance with their rose-colored assumptions. I do not share Judge Higginbotham’s bitterness about the appointment of Justice Clarence Thomas or his subsequent performance. I regret it but I know the Lord works in mysterious ways Her wonders to perform. Perhaps Justice Thomas’s true value to people of color—particularly legal professionals—is that his presence on the Court provides us with a constant reminder that what many of us condemn as a serious infirmity in him is, as well, a

⁴⁴ Remarks of Justice O’Connor at Justice Marshall’s funeral as recounted by the author.
constant temptation to us all.

The temptation to extol the system while blaming the victims of that system is neither a new nor fortuitous phenomenon. Robert L. Allen in his 1969 book, *Black Awakening in Capitalist America*, reminds us that what we deem as progress measured by the number of blacks who have moved into management-level positions, is actually quite similar to developments in colonial Africa and India. The colonizing countries maintained their control by establishing class divisions within the ranks of the indigenous peoples. A few able (and safe) individuals were permitted to move up in the ranks where they served as false symbols of what was possible for the subordinated masses. In this, and less enviable ways, these individuals serve to give legitimacy to the colonial rule that it clearly did not deserve.

In his gruff, plainspoken way, Justice Marshall recognized and resented this role. He once told an audience at his alma mater, Howard University:

"[People tell me] ‘You ought to go around the country and show yourself to Negroes; and give them inspiration.’ For what? Negro kids are not fools. They know when you tell them there is a possibility that someday you’ll have a chance to be the o-n-l-y Negro on the Supreme Court, those odds aren’t too good."^45

Robert Allen explains the limits of the club. He views black America as a domestic colony of white America. Colonial rule, Allen claims, is predicated upon an alliance between the occupying power and indigenous forces of conservatism and tradition. Allen finds aspects of this policy in American slavery where divisions were created between field hands and house hands. "Uncle Tom," is the term used to describe the collaborator torn, with conflicting loyalties, between his people and the foreign rulers.

We cannot escape the burden of Allen’s analysis, nor should we wish to. The oppression that challenges people of color and those of us with the status as law professionals is less violent and dominating than that our parents experienced, but it is no less potentially destructive. Justice Marshall understood the dilemma in Allen’s analysis. He, like many of us, relish our positions because they give us an opportunity to push the legal system, and maybe even the larger society, in the direction of racial justice. Our involvement, though, may be having a very different effect than we hope or even recognize. Rather than being given access to real influence, it is more likely that we are legitimizing a system that really relegates us to an ineffectual and decorative fringe.

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And what of those minorities less fortunate than ourselves? In ways that none of us are prepared to recognize, we make things worse instead of better for minorities who have been excluded from the programs that have benefited those of us who have gained skills and acceptable credentials. Enjoying our positions and the occasional opportunity to do good, the society is ever ready to point us out to the majority of blacks who are in poverty or trapped in low wage, dead-end jobs where, as the Rev. Jesse Jackson put it, "they take the early bus." We serve not only as scholars, judges, and practitioners, but as living proof that there is no color bar.

There is, I am convinced, no cure to racism in America. There is only conduct based on a commitment to challenge it at every turn, at every new variation. In what was to be almost his last major speech, Justice Marshall said: "[t]he battle for racial and economic justice is not yet won; indeed, it has barely begun."46

In that speech, Marshall gave vent to yearnings that we all share. He said:

I wish I could say that racism and prejudice were only distant memories... and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity.

But as I look around, I see not a nation of unity but of division—afro and white, indigenous and immigrant, rich and poor, educated and illiterate.47

Justice Marshall warned that there is no sanctuary in the suburbs. "We cannot play ostrich. Democracy cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage."48 Rather, Marshall urged continued confrontation with the evils he had fought all of his professional life. No promise of victory here, no guarantee of success. He called us to the need and to the sense of salvation inherent in struggle for struggle's sake.

We must go against the prevailing wind. We must dissent from indifference. We must dissent from apathy. We must dissent from the fear, the hatred, and the mistrust. We must dissent from a government that has left its young without jobs, education, or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.49

One of our responsibilities is to cultivate our awareness of what

47. Id. at 453-54.
48. Id.
49. See id.
our roles are and what our histories have been. Like the handmaid, we must struggle to preserve our memories of the “time before.” Our not so distant recollections of the overt barriers to black success and dignity are equally important. Not because, as in the handmaid’s case, they show us who we can be, but because they remind us what we will not allow ourselves to be and wake us from the complacency many regard as a well deserved rest. The history of race in America teaches us, warns us really, that even those gains that we consider rock-solid can be taken away in a moment. The last few decades have shown us all that we cannot rely on the pleasant but naive belief that, having been set in motion, our society will continue forward.

Justice Marshall is right about the absence of choice facing our nation. But most of the nation, including many of its economic victims who are not black, do not see it that way. The transformation of our economy has brought windfall rewards to some and real fears of joblessness, decreasing opportunity, and increasing disparities in income and wealth to many. The willingness to blame the resulting anxieties on blacks or to use the code words “affirmative action” more than likely points to future calamities that people of color must suffer but that we did not cause.

And yet, Justice Marshall’s admonition to continue the struggle is no less appropriate because there are so many signs that struggle is hopeless. Surely, it is no more hopeless for us than it was for our slave ancestors. And yet they persevered, survived, and left as a legacy the spirituals, virtually a theology in song.

“Hold On!”, the slave singers urged through their pain, “Hold On! Keep your hand on the plow, hold on.”

And in a quieter vein, they manifested their faith in their God and in themselves as they promised:

“Done gave my vow to the Lord, and I never will turn back. Oh, I will go, I shall go, to see what the end will be.”