

THURGOOD MARSHALL, THE RACE MAN, AND GENDER  
EQUALITY IN THE COURTS

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ABSTRACT

*Renowned civil rights advocate and race man Thurgood Marshall came of age as a lawyer during the black protest movement in the 1930s. He represented civil rights protesters, albeit reluctantly, but was ambivalent about post-Brown mass protests. Although Marshall recognized law's limitations, he felt more comfortable using litigation as a tool for social change. His experiences as a legal advocate for racial equality influenced his thinking as a judge.*

*Marshall joined the United States Supreme Court in 1967, as dramatic advancement of black civil rights through litigation waned. Other social movements, notably the women's rights movement, took its place. The push for women's equality had garnered some success in Congress, but the enforcement and scope of these protections became a focus of litigation in the 1970s and 1980s. While on the Court, Marshall played an important role in the advancement of women's equality, yet a few cases suggest he struggled when the interests of race and gender equality seemed to directly clash. This paper considers the ways in which Marshall's role as a participant and lawyer in the black civil rights movement influenced his thinking about gender equality. While his record on women's equality is very strong, Marshall's position in three cases indicates that he believed institution concerns sometimes trumped otherwise valid gender equality claims.*

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## I. INTRODUCTION

Thurgood Marshall, the renowned civil rights lawyer, came of age as a lawyer during the black protest movement in the 1930s.<sup>1</sup> He was an important force during the twentieth century black civil rights movement (the Movement) and was appointed to the United States Supreme Court as the Movement was ending.<sup>2</sup> For more than half of the twentieth century, black lawyers like Marshall and his mentor, Charles Hamilton Houston, used the federal courts as the primary vehicle to pursue equal rights for black Americans.<sup>3</sup> The Movement is remarkable because “a relatively powerless group” challenged, and successfully thwarted, a system of laws and practices that condoned unequal treatment based solely on race.<sup>4</sup>

Not only did the Supreme Court’s seminal decision in *Brown v. Board of Education* signal the end of legally sanctioned racial segregation,<sup>5</sup> it also triggered a shift in the Movement as young black Americans increasingly employed nonviolent public protests in their push for the legal and social changes *Brown* seemed to promise.<sup>6</sup> This

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<sup>1</sup> Marshall was involved in NAACP-sponsored social protests in his hometown of Baltimore—economic boycotts and picketing—including Baltimore’s Buy Where You Work Campaign. See legal historian Kenneth Mack’s discussion of the involvement of black lawyers, including Marshall, in the black boycott movements of the early 1930s, including the “Don’t Buy” boycotts. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 318–28 (2005). While still practicing in Baltimore, he and his wife marched and attended meetings between local NAACP representatives and business people. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 72–73 (1998). Later Marshall remarked that economic boycotts were “a ‘double-edged’ sword—not a good tool to protest segregation—because segregationists could also boycott black businesses.” *Id.* at 241.

<sup>2</sup> See *infra* notes 15–16 and accompanying text.

<sup>3</sup> See generally Mack, *supra* note 1.

<sup>4</sup> Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOCIOLOGY 517, 523 (1999).

<sup>5</sup> 347 U.S. 483 (1954).

<sup>6</sup> BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 251 (Joanne Grant ed., 2d ed. 1968). (“The style of the Negro protest movement changed . . . with the large-scale use of the technique of non-violent resistance. Other methods of protest were by no means abandoned, but a qualitative change took place when the youth shifted the emphasis from the slow process of court suits to direct confrontations.”) Following the success of the 1955 Montgomery Bus Boycott, civil rights leaders like the Rev. Martin Luther King, Jr. asked Americans to engage in non-violent public protests. See generally FRED D. GRAY, BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM (1995). The courts played a role in the boycott’s success by declaring racial segregation on public buses unconstitutional. *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (per curiam), *aff’d* 142 F. Supp. 707 (M.D. Ala. 1956). “The Montgomery bus boycott

shift in protest methods changed the role of civil rights lawyers from leading strategists to secondary advisers and reactive counsels. As the Movement transitioned from courtroom to street protest, Marshall represented the early civil rights protesters, albeit reluctantly.<sup>7</sup> He was ambivalent about the post-*Brown* public protests,<sup>8</sup> fearing that protests in the Deep South would trigger white violence—which they did.<sup>9</sup>

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revealed that large numbers of Blacks—indeed an entire community—could be mobilized to protest racial segregation. . . . [And] that protest could be sustained indefinitely . . . .” Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 23 ANN. REV. SOC. 517, 524 (1999). Television also played an important role, providing Americans, and the world, with an unparalleled window through which to watch, in real time, America’s waging of the war in Vietnam, Southern governments’ mistreatment of peaceful protesters challenging unjust racial segregation laws, and mass public protests highlighting inequalities in almost every aspect of American life. See, e.g., JAMES L. BAUGHMAN, *THE REPUBLIC OF MASS CULTURE: JOURNALISM, FILMMAKING, AND BROADCASTING IN AMERICA SINCE 1941*, at 109–10 (2d ed. 1997); ROBERT J. DONOVAN & RAY SCHERER, *UNSILENT REVOLUTION: TELEVISION NEWS AND AMERICAN PUBLIC LIFE* (1992); SASHA TORRES, *BLACK, WHITE AND IN COLOR: TELEVISION AND BLACK CIVIL RIGHTS* (2003).

<sup>7</sup> HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 155 (1998) (“Even though Thurgood disagreed with our techniques, . . . he would make available the legal expertise and the legal resources of the [NAACP LDF] . . . .” (quoting John Lewis)); see *Garner v. Louisiana*, 368 U.S. 157 (1961) (upholding the right of sit-in demonstrators; *Garner* was the last case Marshall litigated before joining the judiciary).

<sup>8</sup> CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 434 (1993) (describing Marshall’s reaction to the effect of the bus boycott, “Marshall noted to me that it finally took a Supreme Court decision to get blacks to the front of the bus. ‘All that walking for nothing . . . . They might as well have waited for the Court decision.’”).

<sup>9</sup> Commenting on the protests over the murder of Emmett Till, a young Chicago teenager killed in Mississippi for allegedly whistling at a white woman, Marshall said that “marching to protest racism in Mississippi . . . created a situation where angry segregationist mobs would attack marchers, who would then fight back, and ‘violence has never been an answer to violence.’ ” WILLIAMS, *supra* note 1, at 241. For examples of violence triggered by non-violent protests by civil rights activists, see Cynthia McKinley, *Birmingham Children’s Crusade*, APPLESEEDS, Feb. 2008, at 18, 18 (“As more students continued marching, tense police met the protestors with force. They turned fire hoses on young people with enough power to roll girls down the street and strip bark from trees. Police dogs attacked demonstrators and ripped clothing from children’s backs. Some adults who hadn’t been trained in nonviolence shouted at the officers. Some threw rocks and bottles. The police showed no mercy and continued to cart children off to jail. Some were only 6 years old.”); Wayne A. Santoro, *The Civil Rights Movement and the Right to Vote: Black Protest, Segregationist Violence and the Audience*, 86 SOC. FORCES 1391, 1394 (2008) (“Segregationists murdered individuals active in protest, . . . . [A]ctivists were

Moreover, Marshall respected the rule of law and thus abhorred civil disobedience as a tactic to bring about social change.<sup>10</sup>

The second phase of the Movement was relatively short.<sup>11</sup> The mass protests of the early 1960s triggered congressional action, notably the 1964 Civil Rights Act<sup>12</sup> and the 1965 Voting Rights Act.<sup>13</sup> By the late 1960s black Americans had greater political clout and did not need the courts as much. Although its heyday was past, the Movement had become “a model for other protest movements” in the United States and the world.<sup>14</sup>

President Lyndon Johnson announced Marshall’s nomination to the Court on June 13, 1967,<sup>15</sup> the day after the Court in *Loving v. Virginia*, struck down Virginia’s anti-miscegenation law, the last major vestige of

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more concerned with how to endure, respond to and publicize [violence]. Referring to the Selma campaign, Andrew Young’s comment is informative: ‘Sheriff Clark has been beating black heads in the back of the jail on Saturday night for years, and we’re only saying to him that if he still wants to beat heads he’ll have to do it on Main Street at noon in front of CBS, NBC and ABC television cameras.’ ” (citation omitted).

<sup>10</sup> BALL, *supra* note 7, at 154. (“Although he believed that King ‘came at the right time,’ Marshall had ‘lots of fights with Martin about his theory about disobeying the law’: ‘I didn’t believe in that. I thought you did have a right to disobey a law, and you also had a right to go to jail for it.’ ”). Marshall probably believed the rhetoric articulated by black lawyers of an earlier period that blacks must act “respectably” to prove that they are worthy of equal citizenship. Kenneth Mack writes that pre-*Brown* black lawyers looked for “respectable plaintiffs”—individuals, professionals, or others who bore a “cultural resemblance to the most educated whites”—when bringing civil rights lawsuits. Mack, *supra* note 1, at 295. In the mid 1920s Raymond Pace Alexander, a prominent black Philadelphia lawyer, spelled out this philosophy: “ ‘we must study and train up to that standard . . . we must—of necessity ape the white man—or consider him our preceptor, if only for the selfish purpose of gaining what he has to give us or teach us . . . .’ Before both audiences, in short, Alexander framed desegregation in terms of the internal cultural work that African-Americans needed to do, and were doing, as the centerpiece for claims to equal citizenship.” *Id.* at 283 (citing Raymond Pace Alexander, *A Challenge to North Philadelphia Men*, Address Before the A.M.E. Church, at add. 6 (Feb. 7, 1926) (on file with RPAP, Box 95)).

<sup>11</sup> The assassinations of Martin Luther King and Robert Kennedy in 1968 probably signaled the end of the Movement. Any questions about the demise of black civil rights political currency ended when the Court decided *Palmer v. Thompson*, 403 U.S. 217 (1971), permitting the City of Jackson, Mississippi, to close its public swimming pools rather than integrate them, fearing loss of revenue.

<sup>12</sup> 42 U.S.C. §§ 2000a–2000a-6 (2006).

<sup>13</sup> 42 U.S.C. §§ 1973a–q (2006).

<sup>14</sup> Morris, *supra* note 6, at 523–24.

<sup>15</sup> Williams, *supra* note 1, at 334.

the racial apartheid era.<sup>16</sup> That same year, President Johnson issued Executive Order 11,375, which extended affirmative action to women and outlawed sex discrimination in federal employment and in companies with federal contracts.<sup>17</sup> Three years earlier, Congress had enacted a comprehensive civil rights bill that, among other things, prohibited discrimination in employment based on race, color, religion, national origin, or *sex* and created the Equal Employment Opportunity Commission (EEOC).<sup>18</sup> Equal rights for women—the elimination of gender apartheid—rather than racial equality would soon occupy the Supreme Court’s agenda.

As a result of his experiences, Marshall, like other Movement lawyers, formed strong ideas about the rule of law and equality under the law. He brought those ideas with him to the Supreme Court.<sup>19</sup> According to one study, between 1971, when the Court in *Reed v. Reed* invalidated

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<sup>16</sup> 388 U.S. 1 (1967) (decided June 12, 1967).

<sup>17</sup> Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967). This formal recognition of women’s inequality in the workplace was a direct outgrowth of the 1963 *Report of the President’s Commission on the Status of American Women* commissioned by President John F. Kennedy. See Exec. Order No. 10,980, 26 Fed. Reg. 12,059 (Dec. 14, 1961) (creating the President’s Commission on the Status of Women and instructing it to “make recommendations as needed for constructive action in . . . [e]mployment policies and practices, including those on wages, under Federal contracts.”). The documented pay inequality between women and men contained in that report prompted enactment of the Equal Pay Act of 1963, which promised equal pay to women doing substantially the same jobs as men. Pub. L. No. 88-38, § 2(a), 77 Stat. 56. Most women in the workplace, however, were consigned to sex segregated jobs as nurses, secretaries, or domestic workers, and would not benefit from the measure. RORY DICKER, *A HISTORY OF U.S. FEMINISMS* 68–69 (2008). In 1966, the National Organization for Women (NOW), an advocacy group for women’s equality, was founded. National Organization for Women, *The Founding of NOW*, [http://www.now.org/history/the\\_founding.html](http://www.now.org/history/the_founding.html) (last visited Jan. 20, 2010).

<sup>18</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253; *id.* at § 705, 78 Stat. 258 (creating the EEOC). Ironically, the addition of sex to Title VII was intended to defeat the measure. Representative Howard Smith (D-Va.), a segregationist, introduced this addition to the bill, thinking that equal employment for women was so “laughable” it would result in the measure’s defeat, but Congresswoman Martha Griffiths (D-Mich.) “organized a coalition that [fought] for the passage of Title VII” and the Civil Rights Act of 1964 as a whole. DICKER, *supra* note 17, at 69. But to some extent Representative Smith was right, for “even though the commission received thousands of complaints about sex discrimination in its first year, the EEOC did not take these cases seriously, concentrating instead on race-based grievances.” *Id.* The EEOC’s hostility to sex discrimination claims is exemplified by the Commission’s ruling upholding “the legality of sex-segregated want ads in 1966.” *Id.*

<sup>19</sup> MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991*, at 99–101 (1997).

on equal protection grounds a state law preferring men over women as administrators for estates,<sup>20</sup> and 2002, the Supreme Court decided forty-one cases involving gender employment discrimination claims.<sup>21</sup> Most of these cases were decided while Marshall was on the bench. Yet when scholars discuss Marshall's jurisprudence on the Court, gender equality outside the context of racial equality is seldom, if ever, mentioned.

At first glance Marshall seems to have treated gender and race discrimination claims similarly because most early gender discrimination claims mirrored race discrimination claims—a point he often made in his opinions.<sup>22</sup> When Marshall announced his retirement from the bench in 1991, he had voted “favorably” on ninety-two percent of the employment sex discrimination cases before the Court during his tenure—one percent more than Justice Brennan.<sup>23</sup> Still, gender and race claims are sometimes in tension with each other. This article explores how Justice Marshall responded when faced with situations in which the goal of racial equality seemed to conflict with the goal of gender equality.

While the Movement championed equal rights, it focused on the advancement of black Americans as a racialized group. Although civil rights organizations relied heavily on the work of women, black and white, they denied them meaningful leadership power.<sup>24</sup> Further, many black churches that supported the Movement, especially those in the Deep South, saw equality between the sexes as inconsistent with biblical teachings.<sup>25</sup> Thus, while the Movement's success might have inspired

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<sup>20</sup> 404 U.S. 71 (1971).

<sup>21</sup> Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971–2002*, 10 *CARDOZO WOMEN'S L.J.* 501, 523 (2004).

<sup>22</sup> *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 74 (1986) (Marshall, J., concurring in the judgment). Marshall agreed with the majority's analogizing sexual harassment to racial harassment in the workplace, but he was troubled because the Court refused to impute the supervisor's actions to the employee as it had in Title VII race discrimination cases. He “would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave ‘notice’ of the offense.” *Id.* at 78.

<sup>23</sup> Lens, *supra* note 21, at 525. It is ironic that “[t]he two female justices on the Court, Sandra Day O'Connor and Ruth Bader Ginsberg, voted the pro-feminist position 71% and 85% of the time.” *Id.* Lens never defines what she means by “pro-feminist” position.

<sup>24</sup> *See* DEAR SISTERS: DISPATCHES FROM THE WOMEN'S LIBERATION MOVEMENT 21 (Rosalyn Baxandall & Linda Gordon eds., 2000) [hereinafter DEAR SISTERS].

<sup>25</sup> *See* DAPHNE C. WIGGINS, *RIGHTEOUS CONTENT: BLACK WOMEN'S PERSPECTIVES OF CHURCH AND FAITH* 68 (2005); DELORES S. WILLIAMS,

advocates for women's rights, its articulated goals were not necessarily consistent with demands for gender equality.

Given this reality, Marshall's position on gender equality while on the Court is worth exploring to determine whether the great race man was able to reconcile some of the inherent tensions created when gender claims seemed to conflict with racial interests.<sup>26</sup> This article looks at Marshall's judicial record in three cases in which the Court rejected gender discrimination claims when the interests of a racialized group seemed to conflict with aims of gender equality. Marshall wrote the majority opinion in two of these cases, *Santa Clara Pueblo v. Martinez*<sup>27</sup> and *Florida Star v. B.J.F.*,<sup>28</sup> and failed to join a concurring opinion in the third, *Alexander v. Louisiana*.<sup>29</sup> The next section briefly discusses Marshall's general attitudes toward gender equality before examining the potentially troubling inferences these cases raise about whether his stand on the issue was consistent with his equalitarian principles.

## II. MARSHALL AND GENDER EQUALITY

Philosophically Marshall was an equalitarian and assimilationist whose notion of a *transformed America* was a society where everyone, without regard to prior legal disabilities such as race and gender, has equal opportunity to education, employment, housing, and government benefits. In many ways Marshall was a conventional New Deal liberal lawyer-jurist who embraced American middle class norms. Yet his experiences as a black American male growing up in the Jim Crow South and as a Movement lawyer undoubtedly influenced his attitudes about the meaning of equality under the Constitution. Since his jurisprudence was shaped by these experiences, it is unsurprising that he was "particularly devoted to advancing the interests of [black] Americans."<sup>30</sup> Nevertheless, there is evidence to suggest that his vision of "equal protection of the laws" transcended race.

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SISTERS IN THE WILDERNESS: THE CHALLENGE OF WOMANIST GOD-TALK 242 (1993).

<sup>26</sup> See Sheryll D. Cashin, *Justice Thurgood Marshall: A Race Man's Race-Transcending Jurisprudence*, 52 HOW. L.J. 507, 507 (2009) ("In common parlance, a race man or race woman is simply someone 'whose identity [is] clearly defined as [b]lack,' and who acts to bring about the progression of black people." (quoting Richard McCulloch, *The Burden of the New "Race Man,"* THE BROWARD TIMES, Feb. 16, 2007) (alterations in original)). See generally HAZEL V. CARBY, RACE MEN (1998) (exploring black male archetypes of the past century).

<sup>27</sup> 436 U.S. 49 (1978).

<sup>28</sup> 491 U.S. 524 (1989).

<sup>29</sup> 405 U.S. 625 (1972).

<sup>30</sup> TUSHNET, MAKING CONSTITUTIONAL LAW, *supra* note 19, at 180–81.

In 1960 Kenyans working toward their forthcoming independence from Britain invited Marshall to advise them during negotiations on their new country's constitution.<sup>31</sup> Mary Dudziak, writing about this experience, argues that Marshall considered equality, as opposed to liberty, the foundation upon which all other rights are grounded.<sup>32</sup> Equality was so important to Marshall that his draft preamble to the bill of rights read, "All persons are equal before the law . . . and are entitled without any discrimination [sic] or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to equal protection of the law."<sup>33</sup> But no reaffirming prohibition of sex discrimination appeared in the body of the bill of rights.<sup>34</sup>

Marshall seemed to practice what he preached. In 1945 as General Counsel at the Legal Defense Fund (LDF), he hired Marian Wynn Perry, a white woman, as a staff attorney.<sup>35</sup> He hired Constance Baker Motley, a black third-year law student at Columbia Law School, later that year as a law clerk, and upon her graduation as an LDF lawyer.<sup>36</sup> These hires

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<sup>31</sup> Mary L. Dudziak, *Thurgood Marshall's Bill of Rights for Kenya*, 11 GREEN BAG 2D 307, 309–10 (2008). See generally MARY L. DUDZIAK, EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY (2008).

<sup>32</sup> Dudziak, *supra* note 31, at 311.

<sup>33</sup> *Id.* at 310–11.

<sup>34</sup> The draft bill of rights prohibits discrimination based solely on

"religion, race, descent or place of birth in any law or in the appointment to any office of employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

*Id.* at 312. Unfortunately, most of Marshall's suggestions were absent from the final document. *Id.* at 315.

<sup>35</sup> ROBERT L. CARTER, A MATTER OF LAW 59 (2005). Perry resigned in 1949 when her husband got a new job in upstate New York. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 35 (1994).

<sup>36</sup> CARTER, *supra* note 35, at 59. Upon her graduation in June 1946, Motley joined LDF full-time as a "Legal Research Assistant." *Id.* Carter writes only that Marshall hired Motley full time when she graduated, but Motley in a later memorandum to Marshall indicates that she was hired as a Legal Research Assistant. Memorandum from Constance Baker Motley to Thurgood Marshall, May 25, 1949, NAACP Papers, Library of Congress, Box H-B-101, file: Motley, Constance Baker, 1949055; see also GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 200 (1985) ("Motley . . . recall[ed] that she came in 1945 to the Inc. Fund to work as a clerk but found the work and the cause so much to her liking that she stayed on as a staff lawyer."). When Motley was admitted to the New



were extraordinary statements at a time when women comprised less than two percent of all lawyers and found it difficult to obtain employment as lawyers.<sup>37</sup> Marshall's employment practices continued when he was elevated to the Supreme Court: during his tenure on the Court, roughly one-quarter of his clerks were women.<sup>38</sup>

Marshall came to the Court with a fully developed notion of equality that, at a general level, included women. Before he joined it in 1967, the Court upheld laws that relied on biological distinctions to discriminate against women, especially in the workplace and other sectors of public life.<sup>39</sup> Starting with *Reed v. Reed* in 1971, however, the Court began to more closely scrutinize laws that treated women differently.<sup>40</sup> When gender discrimination claims came before the Court, Marshall was the only member of the Court who argued for a coherent approach to gender and other equal protection claims.<sup>41</sup>

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York Bar, Marshall promoted her to "Legal Assistant," and later the same year to "Assistant Special Counsel." CARTER, *supra* note 35, at 58–59.

<sup>37</sup> See CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 4 tbl. I.2 (2d ed. 1993) (listing the percentage of practicing women lawyers in the United States as 1.8% in 1948 and 2.5% in 1951).

<sup>38</sup> Between 1967 and 1991, 22 of Marshall's 85 law clerks were women. During the same period only 8 of Brennan's clerks were women. While Brennan hired his first female clerk in 1974, Marshall hired his first in 1971. *Law Clerk Report by Term, 1967–1991*. Justice O'Connor hired at least one female law clerk every year between her appointment in 1981 and Marshall's retirement in 1991. Eighteen of her 44 clerks during this period were women. During the same period 13 of Marshall's 44 clerks were women. In only one year during this period—1982—did Marshall not hire a woman law clerk. Data supplied by the U.S. Supreme Court Library, July 1, 2008 (copy on file with the author).

<sup>39</sup> See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state law limiting the number of hours women could work based on biological differences between women and men); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a law prohibiting women from working as bartenders unless employed by father or husband); *Hoyt v. Florida*, 368 U.S. 57 (1961) (holding that excluding women from jury service unless they volunteer is not unconstitutional).

<sup>40</sup> See *Reed v. Reed*, 404 U.S. 71 (1971) (striking down state law that preferred males over females as administrators of intestate estates).

<sup>41</sup> Cass Sunstein writes that "Marshall thought . . . 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." Cass Sunstein, *On Marshall's Conception of Equality*, 44 *STAN. L. REV.* 1267, 1270 (1992) (citing Marshall's dissents in *Rostker v. Goldberg*, 453 U.S. 57, 86 (1981) and *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 281 (1979)). Sunstein writes that "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 1270 n.18 (citing Marshall's dissent in

With the exception of unequal treatment based on pregnancy, the Court was generally receptive toward gender-based employment discrimination claims.<sup>42</sup> The Court's deafness regarding employment practices that discriminated against pregnant women<sup>43</sup> prompted Congress in 1978 to enact the Pregnancy Discrimination Act (PDA), which required employers to treat pregnancy like any other temporary disability.<sup>44</sup> Marshall, writing the majority opinion in *California Federal Savings & Loan v. Guerra*, a case testing the limits of the PDA, emphasized that the real interest at stake was the economic security of women who became pregnant.<sup>45</sup> Employer-provided health benefits that

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*Feeney*, 442 U.S. at 285). The courts' role must be to thwart government-sponsored disabilities whose purpose or effect creates a caste system through a "careful scrutiny under the Equal Protection Clause." *Id.* at 1271-73.

<sup>42</sup> See generally *Lens*, *supra* note 21.

<sup>43</sup> In 1974 a majority of the Court in *Geduldig v. Aiello*, an equal protection case, upheld an employee health plan that denied pregnant women compensation when they lost time at work due to normal pregnancy while providing compensation to male employees for gender-related procedures like prostatectomies and circumcision. *Geduldig v. Aiello*, 417 U.S. 484, 501 (1974) (Brennan, J., dissenting, joined by Douglas, J., and Marshall, J.) (describing the majority opinion's result). The Court justified the exclusion of normal pregnancy, saying that there was no equal protection question because "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97. The majority added in a footnote:

[T]he lack of identity between the excluded disability and gender . . . becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

*Id.* at 497 note 20. Two years later, in *General Electric Co. v. Gilbert*, a majority of the Court ruled that an employer who refused to provide health benefits to women for disabilities arising from pregnancy did not violate Title VII because the benefits plan was "facially nondiscriminatory," citing the Court's equal protection language in *Geduldig*. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138 (1976). *Geduldig* and *Gilbert* illustrate the limitations of sameness feminism in addressing gender inequality in the workplace, because women are biologically different from men.

<sup>44</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, tit. 7, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

<sup>45</sup> See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). A provision of the California Fair Employment and Housing Act (FEHA) provided that employees temporarily disabled by pregnancy could obtain an unpaid leave of up to four months, with guaranteed reinstatement in their original job or its equivalent. See CAL. GOV'T CODE § 12945(b)(2) (2005). This law was

excluded pregnancy coverage made it harder for pregnant women to avoid financial impoverishment and might have permanently consigned some to an economic underclass and second-class status based solely on an aspect of gender.

Marshall's appreciation of gender-based employment discrimination probably stemmed from his childhood experiences. He saw his mother struggle to obtain a full-time position as a public school teacher in Baltimore, Maryland, when she became the primary breadwinner for his family.<sup>46</sup> Historically, more black women than white worked outside the home.<sup>47</sup> As was the case with Marshall's mother, their income was necessary to the survival of black families because of black males' chronic unemployment and low wages.<sup>48</sup> These women were beneficiaries of the *California Federal* decision.

Marshall's personal experiences as an employer also helped him appreciate the connection between a woman's ability to control reproduction and maintain employment. When Constance Baker Motley was pregnant during the 1950s, Marshall ignored an NAACP policy requiring pregnant women to take a leave of absence starting with the sixth month of pregnancy; Motley worked until the week before she gave

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challenged before the Court as "special treatment" not required by the more general language of the PDA. Marshall, writing for the majority, refused to strike down the provision, reasoning that the California law did not require employers to give pregnant women "special treatment," but rather required employers only to provide pregnant women employees with equal opportunities and this included providing minimum health benefits for pregnancy. *Guerra*, 479 U.S. at 284, 291.

<sup>46</sup> When Marshall left Baltimore to work in the NAACP's legal office in New York, his mother, Norma, a public school teacher in Baltimore, became the primary source of income for herself; Marshall's father, Willie; and Marshall's sick brother, Aubrey. Baltimore, like other Maryland school districts, paid black teachers up to forty percent less than white teachers. According to his biographer, Juan Williams, Marshall "took it personally that his mother's work was valued less than a white teacher's," and successfully challenged this policy in court. WILLIAMS, *supra* note 1, at 89–90. Marshall brought equal pay suits in other states, including a case in Norfolk, Virginia, that the Supreme Court let stand. This victory in Virginia, which "the NAACP used . . . as a precedent . . . around the country" was "a personal one . . . [I]t was a victory for his mother and for the regular paycheck his family needed so badly." *Id.* at 90–91.

<sup>47</sup> Charlotte Rutherford, *African American Women and "Typically Female," Low-Wage Jobs: Is Litigation the Answer?*, 17 YALE J. INT'L L. 211, 213–17 (1992) ("In 1890, nearly thirty years after the end of slavery, 40% of all African American females worked outside the home, compared to only 12.5% of all white females.").

<sup>48</sup> JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* 160–61 (1985) (studying the changes in the patterns of black women's work as slaves and wage earners).

birth.<sup>49</sup> No doubt this was a pragmatic move, given LDF's small staff and heavy caseload, but Motley saw a connection. She later wrote:

All the other women were clerical or semi-professionals and, if pregnant, had left long before the ninth month. I set a new standard for women with Marshall's tacit approval. Thus, there was a big smile on my face when I read Marshall's opinion for the court on pregnancy leaves and Title VII in *California Federal Savings and Loan v. Guerra*.<sup>50</sup>

In gender-based employment discrimination cases, Marshall may have been thinking of how the Court's decisions would impact the lives of black working women and their families. The three sex discrimination cases discussed in the next section do not involve employment discrimination. Marshall's troublesome position in these cases is attributable to other experiences living and working under racial apartheid laws.

### III. THREE TROUBLESOME CASES

#### A. ALEXANDER V. LOUISIANA: *JURY EXCLUSION*

When Marshall joined the Court, women were routinely excluded from jury service.<sup>51</sup> Courts advanced sexist reasons for "shielding" white women from jury service, such as men's desire to protect white women from the dirtiness of the outside world, and consigned them to home and hearth.<sup>52</sup> In contrast, starting in 1880 the Supreme Court condemned race-based jury exclusion, a problem for black men dating back to the Reconstruction Era,<sup>53</sup> but states persisted in denying black men access to jury panels.<sup>54</sup> On the surface, sex-based jury exclusion laws and practices, like employment discrimination practices, often mimicked race discrimination practices. Yet the underlying reasons for race and gender exclusions differed. While the exclusion of white women suggests a distrust of their rationality and decision-making ability, the exclusion of

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<sup>49</sup> See Constance Baker Motley, Tribute, *My Personal Debt to Thurgood Marshall*, 101 YALE L.J. 19, 22 (1991).

<sup>50</sup> *Id.*

<sup>51</sup> See Shirley S. Sagawa, *Batson v. Kentucky: Will It Keep Women on the Jury?*, 3 BERKELEY WOMEN'S L.J. 14, 24–26 (1987–1988).

<sup>52</sup> See *id.* at 31–32.

<sup>53</sup> See *Strauder v. West Virginia*, 100 U.S. 303 (1880).

<sup>54</sup> See, e.g., *Sims v. Georgia*, 389 U.S. 404 (1967); *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Norris v. Alabama*, 294 U.S. 587 (1935).

black women is consistent with past and ongoing practices aimed at denying all black Americans full citizenship rights.

From his years as a litigator in the South, Marshall understood the jury exclusion problem, at least in terms of race. Thus, unsurprisingly, he joined the majority in *Alexander v. Louisiana*, which found the conviction of a black man for rape by an all-white jury constitutionally suspect because the jury questionnaires indicated potential jurors' races.<sup>55</sup> The plaintiff in the case also challenged the absence of women from his jury as unconstitutional.<sup>56</sup> Though Louisiana law contained no express racial limitations on jury service, it automatically excluded women from the jury unless they affirmatively submitted a written declaration of their desire to serve.<sup>57</sup> The Court ignored that issue, however, and focused only on the race discrimination claim.<sup>58</sup> In response, Justice William Douglas filed a separate concurring opinion chastising the majority for not ruling that the exclusion of women from the jury also rendered *Alexander's* rape conviction unconstitutional.<sup>59</sup>

Marshall did not join Douglas's opinion. In that same year, however, he wrote in a plurality opinion that excluding a particular class of citizens (in that case black Americans) harms not only the defendant but society as a whole, because the excluded class is denied the right to equal participation in the administration of justice and is thus stigmatized.<sup>60</sup> Marshall's reasoning in the racial exclusion case seems to apply equally to the systematic exclusion of women from jury panels. Thus, at first blush Marshall's failure to join Justice Douglas's concurrence in *Alexander* seems puzzling.

Three years later, in *Taylor v. Louisiana*, Marshall voted with the majority to strike down the same Louisiana law discouraging women's

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<sup>55</sup> *Alexander v. Louisiana*, 405 U.S. 625, 625 (1972).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 635 (Douglas, J., concurring).

<sup>58</sup> *Id.* at 634–35 (Douglas, J., concurring).

<sup>59</sup> *Id.* at 635–44 (Douglas, J., concurring).

<sup>60</sup> *Peters v. Kiff*, 407 U.S. 493, 499 (1972) (sustaining a white defendant's challenge of his indictment and conviction by an all-white Georgia jury because of the systematic exclusion of potential black jurors). Marshall rejected the majority's reasoning that *Peters* did not apply because black men and women served on the grand jury, just not in leadership positions, because a federal district judge who "is supposed to be the very embodiment of evenhanded justice" was responsible for the discriminatory actions. *Hobby v. United States*, 468 U.S. 339, 353 (1984) (Marshall, J., dissenting). Thus "the judge who assumably [sic] discriminated against Negroes and women helped to perpetuate well-known and vicious stereotypes that our society has been struggling to erase." *Id.* at 354.

jury service.<sup>61</sup> In later votes and opinions, Marshall supported jury service for women, writing that the wholesale exclusion of certain citizens might affect the jury's perspective of events<sup>62</sup> and that women comprise a "distinctive" group: to exclude one sex is to lose a viewpoint from a community.<sup>63</sup> According to Marshall, the

truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.

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<sup>61</sup> *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that state law requiring women to affirmatively request jury service was a denial of the right to a fair trial).

<sup>62</sup> *Ford v. Kentucky*, 469 U.S. 984, 987 (1984) (Marshall, J., dissenting from denial of certiorari). Ford, a black male, brought suit alleging that the pool from which the grand jury was selected did not represent a fair cross-section of the community, which is required by the Equal Protection Clause of the Fourteenth Amendment. He claimed that women, young adults, and college students were underrepresented on the panel. He also claimed that blacks were underrepresented on the grand jury. For all groups, he claimed they were underrepresented on the petit jury as well. *Ford v. Kentucky*, 665 S.W.2d 304 (Ky. 1983).

<sup>63</sup> *Duren v. Missouri*, 439 U.S. 357, 359–60 (1979) (White, J.) (noting that the Sixth and Fourteenth Amendments give criminal defendants a right to a jury that is a fair cross-section of the community). Marshall's first written statement about the exclusion of women from the jury came in a case that also included a claim of racial exclusion. In *Hobby v. United States* the majority affirmed the conviction of a white man, despite statistical evidence that blacks and women were underrepresented among federal grand jury forepersons and deputy forepersons. 468 U.S. 339 (1984). According to the Court, since blacks and women served on the grand jury and were only excluded from leadership positions, the impact of their exclusion was "minimal and incidental at best." *Id.* at 345. In a dissenting opinion, Marshall repeats themes he raised in *Peters*: that bias in the selection of jury members injures not only the defendant's cause but the public's confidence in the judicial process as well. *Id.* at 352 (Marshall, J., dissenting). He writes:

This diminution of confidence largely stems from a recognition that the institutions of criminal justice serve purposes independent of accurate fact finding. [They] also serve to exemplify, by the manner in which they operate, our fundamental notions of fairness and our central faith in democratic norms. They reflect what we demand of ourselves as a Nation committed to fairness and equality in the enforcement of the law. That is why discrimination "is especially pernicious in the administration of justice," why its effects constitute an injury "to the law as an institution," why its presence must be eradicated root and branch by the most effective means available.

*Id.* (footnote omitted).

To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.<sup>64</sup>

Marshall, the pragmatist, also used favorable language from the gender jury discrimination cases to address the continuing problem of de facto exclusion of blacks from juries.<sup>65</sup>

Several plausible explanations can be offered for Marshall's failure to join Douglas's concurrence in *Alexander*. The most obvious is his respect for precedent.<sup>66</sup> Marshall understood that the Court's respect for its own precedent was essential to that institution's legitimacy, a position consistent with his philosophy as both a litigator and judge.<sup>67</sup>

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<sup>64</sup> 469 U.S. at 988 (quoting *Ballard v. United States*, 329 U.S. 187, 193–94 (1946)). He continues: “‘Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.’” *Id.* (quoting *Rose v. Mitchell*, 443 U.S. 545, 555–56 (1979) (quoting *Ballard*, 329 U.S. at 195)) (alterations in original). He added that “[g]iven the potential power of the grand jury over the criminal defendant, there can be no question that due process requires state grand juries to be unbiased and impartial.” *Id.* at 987.

<sup>65</sup> When the Court in *Holland v. Illinois* rules that a white criminal defendant convicted of murder cannot contest the use of peremptory challenges to strike blacks from the jury as a violation of his right to trial by jury, Marshall dissents. 493 U.S. 474, 490 (1990) (Marshall, J., dissenting). Citing *Taylor* and *Duren*, which guaranteed defendants a fair jury trial, he argues that no groups should be excluded from the jury. *Id.* at 494.

<sup>66</sup> Dissenting in *Payne v. Tennessee*, Marshall objected to the majority's overruling two recent death penalty decisions. 501 U.S. 808 (1991). The majority upheld a state law permitting victim impact statements in capital murder cases, effectively overruling *South Carolina v. Gathers*, 490 U.S. 805, 812 (1989) (holding inadmissible statements from the prosecutor at closing argument about murder victim's possessions strewn at murder scene that were not “directly related to the circumstances of the crime”) and *Booth v. Maryland*, 482 U.S. 496, 501–02 (1987) (holding that the “Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence”). He writes, “[F]idelity to precedent is part and parcel of a conception of ‘the judiciary as a source of impersonal and reasoned judgments.’” *Payne*, 501 U.S. at 852 (Marshall, J., dissenting). He continues, “If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind.” *Id.* at 853.

<sup>67</sup> Jack Greenberg, writing about Marshall as a litigator at LDF, cites as an example the LDF brief in *Sweatt v. Painter*, which while attacking the

In the jury exclusion cases, the interests of white women and black Americans, male and female, were arguably not fully compatible. Marshall's considerable experience as a lawyer with juries in the Deep South may have made him leery of extending jury service to white women in the South, who he probably believed were likely to be as biased as their male counterparts. More importantly, extending jury service to women would not guarantee that black women would serve on juries in communities where black men were routinely excluded. Somewhat tellingly, as Shirley Sagawa points out, legal scholarship on gender discrimination in the use of peremptory challenges focuses almost exclusively on white women.<sup>68</sup> The exclusion of black and other non-white women from the discussion supports the black feminist critique that mainstream white feminism ignores the impact of dual discrimination non-white women experience as a result of their gender and race.<sup>69</sup>

Marshall's failure to join Douglas's concurrence also could be seen as a pragmatic move. The *Alexander* ruling reinforced the Court's jurisprudence on the exclusion of blacks from the jury but did so without adding racially biased white women to the jury pool. Marshall may have opted to protect black American litigants, male and female, because he saw their interests in this case as separate and distinct in this instance from the interests of white women. Still, when a majority of the Court was willing to squarely address the gender issue, Marshall joined them. His post-*Taylor* opinions express strong support for the elimination of both race and gender discrimination. Thus, while Marshall was not ahead of the curve with respect to gender jury exclusion, he eventually began to

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constitutionality of de jure segregation directly, fell short of arguing that *Plessy v. Ferguson* ought to be overruled. JACK GREENBERG, CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT 71 (50th anniversary ed. 2004). The brief argued that *Plessy* should only be overruled if the Court decides it applies to education. *Id.* Mark Tushnet writes that Marshall's Supreme Court clerks "had a special responsibility in dealing with [Marshall's] traditionalist streak. Marshall knew that his deepest views were sometimes different from the more traditional ones he initially expressed, and he relied on his clerks to remind him when he went astray." TUSHNET, MAKING CONSTITUTIONAL LAW, *supra* note 19, at 59. This situation led to difficulties if "the clerk responsible for a case agreed with Marshall's initial impulses and began working on an opinion that, in the end, Marshall rejected . . . [because it] supported an opinion that Marshall knew in his heart he should not have taken." *Id.* at 59–60.

<sup>68</sup> Sagawa, *supra* note 51, at 36 n.162.

<sup>69</sup> *Id.* Yet another explanation is that there was a distinction between black exclusion and an exemption for women, even though the impact of the opt-in provision was almost the same. If exclusion from the jury denied black men citizenship rights, then surely *presumptive exemption* for women operated the same way.



equate gender with race discrimination in this area. His position in the next problematic case can be similarly rationalized.

B. SANTA CLARA PUEBLO V. MARTINEZ: *TRIBAL MEMBERSHIP*

The Supreme Court's ruling in *Santa Clara Pueblo v. Martinez* triggered a flood of law review articles by feminists who criticized the opinion and Indian law legal scholars who approved it.<sup>70</sup> Most articles do not focus on Thurgood Marshall's role in the case. Marshall, who authored more Indian law opinions than any other Justice on the Court at the time,<sup>71</sup> wrote the opinion.

The conflict in *Martinez* was intra-tribal, pitting a Pueblo woman against the power of her tribe to determine its members. Mrs. Julia Martinez, a tribal member, and her daughter, Audrey Martinez,

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<sup>70</sup> See, e.g., Ann E. Tweedy, *Indian Law: Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392 (2010); Shefali Milczarek-Desai, *(Re)Locating Other/Third World Women: An Alternative Approach to Santa Clara Pueblo v. Martinez's Construction of Gender, Culture and Identity*, 13 UCLA WOMEN'S L.J. 235 (2005); Stacy L. Leeds, *Decision and Order of the American Indian Nations Supreme Court for Santa Clara Pueblo v. Martinez*, 14 KAN. J.L. & PUB. POL'Y 91 (2004); Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004); Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103 (2004); Francine R. Skenandore, Comment, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347 (2002); Lucy A. Curry, *A Closer Look at Santa Clara Pueblo v. Martinez: Membership by Sex, by Race, and by Tribal Tradition*, 16 WIS. WOMEN'S L.J. 161 (2001); Christina D. Ferguson, Comment, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275 (1993); Carla Christofferson, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 592-96 (1990); Robert C. Jeffrey, *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Catharine A. MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63 (1987); Alison Bernstein, *A Mixed Record: The Political Enfranchisement of American Indian Women During the Indian New Deal*, 23 J. OF THE WEST 13 (1984); Dennis R. Holmes, *Political Rights Under the Indian Civil Rights Act*, 24 S.D. L. REV. 419 (1979); Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Governments*, 12 U.C. DAVIS L. REV. 1 (1979).

<sup>71</sup> N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47, 65 (1996). The Court's inability or unwillingness to develop a "principled theory of tribal sovereignty," coupled with shifting federal policies toward Native Americans, resulted in the increased number and importance of Indian law cases in the 1970s and 1980s. *Id.* at 62-64.

challenged a tribal ordinance as discriminatory because it denied tribal membership to the children of female, but not male, members who married outside the tribe.<sup>72</sup> On the surface, the case asked whether respect for tribal self-governance and sovereignty, even if grounded in a patriarchal culture, trumps equal treatment of women members. Like black Americans, who for almost a century fought to fully participate in their country as citizens, Mrs. Martinez wanted her children to be full participants in the Pueblo community.<sup>73</sup>

The trial judge, in refusing to strike down the ordinance on equal protection grounds, wrote that “[t]o abrogate tribal decisions, particularly in the *delicate area of membership*, for whatever ‘good’ reasons, is to destroy cultural identity under the guise of saving it.”<sup>74</sup> The Court of Appeals for the Tenth Circuit reversed, reasoning that the Pueblo failed to articulate a compelling tribal interest to justify a sex-based tribal ordinance that treated women differently from male members of the tribe.<sup>75</sup> While there is evidence that the Supreme Court Justices seriously considered the Tenth Circuit’s argument,<sup>76</sup> in the end the Court reaffirmed the trial judge’s reliance on principles of tribal self-government.<sup>77</sup>

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<sup>72</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978). See *Martinez v. Romney*, 402 F. Supp. 5, 15–16 (D.N.M. 1975) (explaining that the interests of the tribal ordinance were “social, and to an extent, psychological and cultural self-definition” and “economic survival of the tribal unit”). *Martinez* sued the Santa Clara Pueblo government and its governor, claiming that the tribal ordinance discriminated against women in violation of Title I the Indian Civil Rights Act of 1968 (ICRA). 25 U.S.C. §§ 1301–1303 (2006). The ICRA provides that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws . . . .” 25 U.S.C. § 1302(8) (2006). The federal district court ruled it had jurisdiction to hear the suit but dismissed the equal protection claim, reasoning that the clause did not reach tribal law. *Martinez*, 402 F. Supp. at 18 (D.N.M. 1975).

<sup>73</sup> Among the rights conferred by tribal membership were the right to vote in tribal elections and reside in the Pueblo, along with land use rights, including hunting, fishing, and water rights. *Martinez*, 436 U.S. at 52–53. These were civic rights. *Martinez* also claimed that the ordinance discriminated against individuals based on ancestry. She married a Navajo Indian two years after the ordinance was passed. *Id.* at 52.

<sup>74</sup> *Martinez*, 402 F. Supp. at 19 (emphasis added). The judge also determined that the ordinance, enacted two years before Mrs. Martinez married, “reflect[ed] traditional values of patriarchy still significant in tribal life . . . and . . . basic to the tribe’s survival as a cultural and economic entity.” *Martinez*, 436 U.S. at 54 (citing *Martinez*, 402 F. Supp. at 15). Preservation of culture was important since the Santa Clara Pueblo was a small tribe consisting of fewer than 1,500 members. *Martinez*, 402 F. Supp. at 12.

<sup>75</sup> *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1047–48 (10th Cir. 1976). When the tribe appealed to the U.S. Supreme Court, the federal government and

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the American Civil Liberties Union filed amicus briefs with the Court on behalf of Mrs. Martinez. Brief for the United States as Amicus Curiae, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 189113; Brief for Amicus Curiae American Civil Liberties Union, *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 189112.

In its amicus brief, the United States argued that federal courts have jurisdiction over tribal officials under the ICRA, and this jurisdiction extends to controversies over tribal membership, because without this remedy few rights could be protected, leaving plaintiffs to seek relief from the same officials against whom they filed a complaint. Brief for the United States as Amicus Curiae, *supra*, at 24–25, 14–16. The government cited other instances where the Court implied a private right of action even though federal statutes did not expressly authorize their protected classes to sue, arguing *Martinez* included many of the factors required in order to imply a private right of action. *Id.* at 16–19. The government also argued that the tribe’s membership ordinance violated ICRA’s equal protection clause. *Id.* at 25. The government, distinguishing private civil rights actions from criminal trials, asserted that the tribe’s discriminatory membership ordinance was not justified by the tribe’s interest in preserving tribal culture and tradition. *Id.* at 20, 28. This was in agreement with the appellate court, which had concluded that it had jurisdiction to hear the claim because “[o]therwise, [the ICRA] would constitute a mere unenforceable declaration of principles.” *Martinez*, 540 F.2d at 1042.

The ACLU brief argued that the ordinance should be invalidated on grounds of gender discrimination. “[M]ost obviously, the ordinance is sexually discriminatory and applies only to female Santa Clara members; male Santa Clara members may marry anyone they choose, and their children will be tribal members.” Brief for the American Civil Liberties Union, *supra*, at 23.

Several tribes and Indian organizations filed amicus briefs on behalf of the Santa Clara Pueblo. *See, e.g.*, Briefs of Amicus Curiae Confederated Tribes of the Colville Indian Reservation in Support of Petitioners, *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 204929; Motion to File Brief Amici Curiae and Brief of Amici Curiae of the Pueblo de Cochiti, the Pueblo of Isleta, the Pueblo of Jemez, the Pueblo of Laguna, the Pueblo of Sandia, the Pueblo of San Felipe, the Pueblo of San Ildefonso, the Pueblo of Taos, the Hualapai Tribe, the Salt River Pima-Maricopa Indian Community, the Confederated Tribes of the Umatilla Indian Reservation and the All-Indian Pueblo Council, Inc., *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1976 WL 181159; Briefs of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, and the National Congress of American Indians as Amici Curiae, *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 189109; Briefs of the National Tribal Chairmen’s Ass’n as Amicus Curiae in Support of Petitioners, *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 189110; Motion for Leave to File Brief as Amici Curiae and Brief Amici Curiae of the Seneca Nation of Indians of New York and the Ass’n on American Indian Affairs, Inc. in Support of the Petition for Writ of Certiorari, *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1976 WL 181158.

<sup>76</sup> A handful of Justices had some reservations about the need to address the question of tribal immunity in section III of Marshall’s draft opinion, since in section IV of Marshall’s opinion squarely addresses the question of whether the Indian Civil Rights Act authorizes suits in federal court. *Martinez*, 436 U.S. at 59. Justices Rehnquist, Powell, and Stevens stated their preference for omitting

In ruling against Mrs. Martinez, the Court fully understood the ramifications of its decision. Marshall wrote:

Although the children were raised on the reservation and continue to reside there now that they are adults, as a result of their exclusion from membership they may not vote in tribal elections or hold secular office in the tribe; moreover, they have no right to remain on the reservation in the event of their mother's death, or to inherit their mother's home or her possessory interests in the communal lands.<sup>78</sup>

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Part III, to which Marshall responded that he was "moderately inclined" to leave in Part III, but he was willing to remove it. Letter from Justice Thurgood Marshall to Justices Lewis Powell and John Paul Stevens (Mar. 31, 1978) (on file with the Library of Congress, Washington D.C., Harry A. Blackmun Papers, Manuscript Division, Box 259, 76-682). Another letter from Justice Stewart to Marshall referred to a conference in which Stewart advanced a different reason for reversing the lower court's decision, but does not explain this theory in more detail. Letter from Justice Potter Stewart to Justice Thurgood Marshall (Apr. 10, 1978) (on file with the Library of Congress, Washington D.C., Thurgood Marshall Papers, Manuscript Division, Box 202, 76-682). But Marshall did not remove Part III from the Court's final opinion, and Rehnquist refused to join that part of the opinion. *Martinez*, 436 U.S. at 51. Justices Powell, Stevens, Stewart, and Chief Justice Burger did join Marshall's opinion (Justice Blackmun did not participate in the decision). *Id.*

<sup>77</sup> Marshall justifies the Court's ruling, saying that Title I of the ICRA does not waive Indian tribes' absolute immunity from suit in federal court. He writes:

Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief. . . . In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit.

*Martinez*, 436 U.S. at 59.

<sup>78</sup> *Id.* at 52-53. Martinez's brief spelled out in even more detail some ramifications of denying tribal rights to Julia Martinez:

Denial of membership has caused hardship to the Martinez family, especially in obtaining federal medical care available to Indians. In 1968 Julia Martinez's now-deceased daughter Natalie, suffering from strokes associated with her terminal illness, was refused emergency medical treatment by the Indian Health Service. This was solely because her mother had previously been unable to obtain tribal recognition for her. Only after meeting with Interior Department solicitors did Mrs. Martinez obtain Bureau of Indian Affairs census numbers for her children. At the time of trial the Martinez children

Nevertheless, he concluded that protection and respect for tribal sovereignty is so important that it justifies “occasionally . . . denying an Indian plaintiff a forum to which a non-Indian has access, . . . because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”<sup>79</sup> Reasoning that Mrs. Martinez could pursue her claim in tribal courts, Marshall seemingly ignored her prior unsuccessful efforts for relief within the Pueblo.<sup>80</sup>

Marshall’s position in *Martinez* was consistent with his general stance on Indian Law. A memorandum found in Marshall’s papers written around the same time in another case, *United States v. Wheeler*,<sup>81</sup> contains his evolving views on tribal sovereignty.<sup>82</sup> This memorandum states that tribes possess the power of self-government as a result of “residual sovereignty”; tribes exercise some powers, such as criminal

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were encountering no difficulties in receiving medical care, . . . [but s]ince then . . . Martinez grandchildren have had problems in obtaining medical care from the Indian Health Service. Those of the Martinez children who are grown are unable to obtain Pueblo land assignments upon which to make homes of their own. To stay on the Pueblo, they must reside with their mother or other member relatives.

Brief of Respondent at 3, *Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 189106.

<sup>79</sup> *Martinez*, 436 U.S. at 59–60 n.9 (1978) (quoting *Fisher v. District Court*, 424 U.S. 382, 390–91 (1976)).

<sup>80</sup> *Martinez* attempted to resolve the matter internally, but the Pueblo government refused to change its ordinance. *Id.* at 53. Marshall argues more persuasively, however, that “the structure of the statutory scheme and the legislative history of Title I suggest that Congress’ failure to provide remedies other than habeas corpus was a deliberate one.” *Id.* at 61. He also notes that Congress rejected proposals to provide for federal review in civil cases for violations of the ICRA. According to Marshall the ICRA had the twin objectives of “strengthening the position of individual tribal members vis-à-vis the tribe, . . . [and] ‘furthering Indian self-government.’” *Id.* at 62.

<sup>81</sup> 435 U.S. 313 (1978).

<sup>82</sup> Duthu, *supra* note 68, at 95–96. Duthu also describes a bench memorandum written by Marshall’s law clerk, Vicki Jackson, in which she discussed the need to defer to tribal tradition. *Id.* at 100–02. Jackson, now a professor at Georgetown University Law Center, has written several articles on Federal Indian Law. See, e.g., Vicki C. Jackson, *Coeur D’Alene, Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMMENT. 301 (1998) (discussing a few Indian law cases in the context of the Eleventh Amendment); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 500 (1997) (arguing that the Court’s holding regarding state sovereign immunity in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), should be abandoned).

jurisdiction, solely at the “sufferance of the federal government.”<sup>83</sup> According to the Court’s Indian law jurisprudence, the relationship of the tribes to the federal government is that of dependent sovereign to sovereign,<sup>84</sup> and the legal relationship of the tribes to the states is that of “quasi co-sovereigns.”<sup>85</sup> Marshall’s opinions reflect this approach to Indian Law.

A cursory review of these cases indicates that Marshall strongly endorsed tribal sovereignty as against state encroachment.<sup>86</sup> Because of

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<sup>83</sup> Duthu, *supra* note 68, at 95–96.

<sup>84</sup> *United States v. Lara*, 541 U.S. 193, 203 (2004) (describing tribal sovereignty as “the degree of autonomy enjoyed by a dependent sovereign that is not a State”).

<sup>85</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 186 (1979) (Rehnquist, J., concurring and dissenting in part) (“If Indians are to function as quasi co-sovereigns with the States, they like the States, must adjust to the economic realities of that status . . . .”); *see, e.g., Nevada v. Hicks*, 533 U.S. 353, 362 (2001). *But see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2726 (2008) (“The sovereign authority of Indian tribes is limited in ways state and federal authority is not.”). Thus Congress can exercise its plenary power over Indian affairs to give some of that power to the states. Unless Congress empowers the states, they have no independent power over the tribes. Duthu, *supra* note 68, at 95–96. For a discussion of Indian sovereignty, see the three Supreme Court cases known as the (John) Marshall Trilogy: *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (holding that European conquest and the establishment of the United States diminished the complete sovereignty of Indian tribes, leaving them legally incapable of conveying land to private parties without the consent of the federal government); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (Indian tribes are “domestic dependent nations” existing “in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”); and *Worcester v. Georgia*, 31 U.S. 515 (1832) (Indian tribes are “distinct nations” over which states have no authority). In 1953 Congress terminated hundreds of tribes and gave extensive jurisdiction over tribal affairs to several western states. Pub. L. No. 83-280, 67 Stat. 588. This was the largest extension of federal powers to the states. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 811–15 (2006) (describing the 1940s and 1950s as the “Era of Termination,” with the 1953 Act as its “hallmark”).

<sup>86</sup> Marshall generally favored tribal ownership and regulation of land claims. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (upholding tribal ownership claims to a portion of the Arkansas River as against the state and corporations to which the state had leased the riverbed’s oil, gas, and mineral rights); *Cent. Mach. Co. v. Ariz. State Tax Comm’n*, 448 U.S. 160 (1980) (upholding federal regulations regarding trading with Native Americans that preempted the state taxation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding the right of tribes to impose a severance tax on all oil and gas taking from the tribal land); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (holding that the state’s hunting and fishing regulations are not applicable to non-tribal members licensed to hunt and fish on an Indian reservation); *United States v. Mitchell*, 463 U.S. 206 (1983) (clearly establishing

Marshall's strong views, a few commentators claim that he was too "Indian-oriented."<sup>87</sup> But in *Martinez*, Marshall's protection of tribal sovereignty impinged on the rights of some women tribal members.

Jurist and legal scholar John T. Noonan Jr. argues that in law individual claimants often get lost because of legal masks imposed by courts.<sup>88</sup> He writes about two types of masks: those imposed on individuals and those imposed on the Court, both with societal approval.<sup>89</sup> Building on Noonan's analysis, David Wilkins argues that most Indian Law cases involve situations where the Supreme Court "has manufactured or refined other 'masks' to justify intrusions on tribal sovereignty at the federal, state, and . . . county level . . . ." <sup>90</sup> Included in the legal masks Wilkins lists is "the theory of congressional and even federal plenary power over tribes."<sup>91</sup> Arguably, Marshall in *Martinez*

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that the federal government has a fiduciary relationship with Native Americans when statutes give the federal government a pervasive role in managing their properties). Marshall also joined the majority in *United States v. Wheeler*, 435 U.S. 313 (1978), the first decision since 1896 explicitly based on inherent tribal sovereignty and which clarified the principle that tribal powers trace back to inherent sovereignty and not any grant of power from the federal government. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 61–62 (1987). Marshall also supported tribal taxing power as against state encroachment. See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973) (holding that Indians and Indian property on reservations are not subject to state taxation unless authorized by Congress); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (holding that the state cannot tax a logging business owned by non-Native Americans operated only on a reservation). Marshall joined Blackmun's dissent in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 193 (1989), where the Court held that federal law did not prevent New Mexico from imposing severance taxes on non-Indian lessees' oil and gas production from tribal reservation. He also opposed state regulations that infringed on Native Americans' spiritual practices. Marshall joined in dissenting opinions by Justices Brennan and Blackmun in two key Native American religion cases, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 458 (1988) (Brennan, J., dissenting) (upholding the right of the U.S. Forest Service to build a road on land considered sacred by the tribe as not violating the Free Exercise Clause of the First Amendment) and *Employment Division v. Smith*, 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting) (upholding a state's right to refuse unemployment benefits to Native Americans who used peyote as part of their spiritual practices as not violating the Free Exercise Clause of the First Amendment).

<sup>87</sup> See, e.g., Daniel L. Rotenberg, *American States and Indian Tribes: Power Conflicts in the Supreme Court*, 92 DICK. L. REV. 81, 96 (1987).

<sup>88</sup> JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 19–20 (1976).

<sup>89</sup> *Id.* at 22–23.

<sup>90</sup> DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 9 (1997).

<sup>91</sup> *Id.*

unconsciously engages in a kind of simultaneous subordination, endorsing Congress's power over Indian tribes while simultaneously using this mask to, in Noonan's words, "reduce the 'person' [in this case Mrs. Martinez] to a congerie of 'rights.'"<sup>92</sup> The tribe succeeds in subordinating the autonomy of its female members while losing the battle for its own greater autonomy.

From another perspective one might argue that *Martinez* was a race case, an instance when Marshall preferred race over gender.<sup>93</sup> But, arguably, Marshall did not see himself as choosing between race and gender; rather, he voted to preserve tribal autonomy. In his mind, preservation of the tribal community might have seemed analogous to preserving the Union; and Mrs. Martinez's challenge might have seemed similar to black Americans' challenges to unequal treatment at the hands of their government. Perhaps Marshall honestly believed that Mrs. Martinez had to resort to her community's legal system for relief, just as black Americans had to resort to American courts (and the public) for relief from racial discrimination, even when those arenas initially might have been hostile.

Without understanding the context, Marshall's position in *Martinez* is troubling. Given his consistent voting record in other gender discrimination cases, though, Marshall probably would have supported Mrs. Martinez's claim had it not involved tribal self-governance. Arguably, the issue in *Martinez* was unique, different from conventional race or gender discrimination claims. For Marshall, *Martinez* was not a race case but rather a case involving conflicting sovereigns. His seemingly anti-woman position in the next case, however, cannot be as easily reconciled.

C. FLORIDA STAR V. B.J.F.: WOMEN'S PRIVACY VS. THE FIRST  
AMENDMENT

Marshall also wrote the majority opinion in the last troubling case, *Florida Star v. B.J.F.*, which pitted freedom of the press against a

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<sup>92</sup> NOONAN, *supra* note 84, at xi–xii.

<sup>93</sup> Sometimes discussions about American Indians are framed in race terms. *See, e.g.,* Carla D. Pratt, *Contemporary Racial Realities: Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005); Bethany R. Berger, "Power over this Unfortunate Race": *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004); Luis Angel Toro, *A People Distinct from Others: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995); Carol Goldberg-Ambrose, *Not 'Strictly' Racial: A Response to "Indians as Peoples"*, 39 UCLA L. REV. 169 (1991).



woman's privacy interest.<sup>94</sup> The *Florida Star*, a weekly newspaper, reported that B.J.F. was robbed and raped by "an unknown black man" while walking to a bus stop.<sup>95</sup> The victim sued the newspaper because it published her full name in its "Police Reports" section in violation of both the newspaper's internal policy and a state law prohibiting publishing the name of sexual offense victims.<sup>96</sup>

According to the trial record, although B.J.F.'s name was "inadvertently included" in the crime report posted in the Sheriff's pressroom, the pressroom "contained signs making it clear that the names of rape victims were not matters of public record, and were not to be published."<sup>97</sup> Further, the "Star's reporter . . . understood that she '[was not] allowed to take down that information' . . . and that she '[was] not supposed to take the information from the police department.'"<sup>98</sup> B.J.F. prevailed at trial and was awarded compensatory and punitive damages, and the paper appealed on First Amendment grounds.<sup>99</sup>

A majority of the Supreme Court sided with the newspaper.<sup>100</sup> Marshall, writing for the majority, conceded that the State had a substantial interest in protecting the privacy of a sexual assault victim. Nevertheless, he continued, imposing civil liability on a newspaper for publishing truthful information obtained lawfully from a public source was not sufficiently narrowly tailored to accomplish the state's interest.<sup>101</sup> He downplayed the paper's actions, characterizing the *Florida Star* reporter who drafted the newspaper's police report as a "reporter-trainee."<sup>102</sup> The dissenters (Justice White, joined by Chief Justice Rehnquist and Justice O'Connor) accused Marshall of ignoring the record.<sup>103</sup>

Marshall's opinion focused on the fact that information about the crime was "publicly available."<sup>104</sup> Once the information was publicly

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<sup>94</sup> *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

<sup>95</sup> *Id.* at 526–27. The article stated that the man approached B.J.F. from behind, placed a knife to her neck, undressed her, and sexually assaulted her "before fleeing the scene with her 60 cents, Timex watch and gold necklace." *Id.* at 527.

<sup>96</sup> *Id.* at 528. B.J.F. also sued the Duval County, Florida, Sheriff's Department, which settled the claim before trial. *Id.*

<sup>97</sup> *Id.* at 546 (White, J., dissenting).

<sup>98</sup> *Id.* (alterations in original) (citation omitted).

<sup>99</sup> *Id.* at 529. The Florida Supreme Court refused to review the Florida appellate court decision. *Florida Star v. B.J.F.*, 509 So. 2d 1117 (Fla. 1987); *Florida Star*, 491 U.S. at 529.

<sup>100</sup> 491 U.S. at 526.

<sup>101</sup> *Id.* at 537, 541. Marshall notes that access to the pressroom of the Duval County, Florida, Sheriff's Department was unrestricted. *Id.* at 527.

<sup>102</sup> *Id.* at 527.

<sup>103</sup> *Id.* at 546 (White, J., dissenting).

<sup>104</sup> *Id.* at 535.

available, he reasoned, the state's interest in protecting the rape victim was likely not served by prohibiting publication of her name.<sup>105</sup> What Marshall does not mention, but surely knew from the record, was that the victim suffered additional injury as a result of the publication. The victim, a nurse's assistant, learned that her name had been published in the newspaper from her fellow employees as she lay in the hospital recovering from the assault.<sup>106</sup> Further, the day after the story appeared in the *Florida Star*, the victim's home received a telephone call "from a man threatening to rape [her] again."<sup>107</sup> The calls and publicity ultimately caused her to change her telephone number and residence and seek mental health counseling.<sup>108</sup> These are the very consequences that Florida law sought to prevent by barring publication of victims' names.<sup>109</sup>

Marshall's chief concern, however, seems to be that imposing liability on the press for disclosures of truthful information might foster press "timidity and self-censorship."<sup>110</sup> Once more, Marshall's position seems consistent with his general philosophy about freedom of the press. In First Amendment press cases, Marshall wanted newspapers to be able to determine, with some degree of reliability, their potential liability when publishing materials.<sup>111</sup>

Marshall emphasized general public access to information as a First Amendment interest in other opinions, notably in his dissent in *San Antonio Independent School District v. Rodriguez*.<sup>112</sup> One legal scholar theorizes that in freedom of the press cases Marshall believed that the importance of this interest required clear line-drawing: "[t]he specter of self-censorship [by the press] posed a threat to realization of . . . [an informed citizenry], and therefore required sacrifice of the flexibility afforded in balancing."<sup>113</sup> Thus, as in *Martinez*, Marshall was willing in *Florida Star* to "sacrifice" the individual interests of a woman for what

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

<sup>106</sup> Brief for the Appellee at 10–11, *Florida Star*, 491 U.S. 524 (1989) (No. 87-329).

<sup>107</sup> 491 U.S. at 547 n.2 (White, J. dissenting). According to the appellee's brief, after the victim's name was published in the *Florida Star* her home received several threatening telephone calls. Brief for the Appellee, *supra* note 106, at 11.

<sup>108</sup> Brief for the Appellee, *supra* note 106, at 11.

<sup>109</sup> 491 U.S. at 457–58.

<sup>110</sup> 491 U.S. at 535.

<sup>111</sup> Peter Krug, *Justice Thurgood Marshall and News Media Law: Rules Over Standards?*, 47 OKLA. L. REV. 13, 17–18 (1994).

<sup>112</sup> Marshall wrote, "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 . . ." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting). Peter Krug cites other examples of Marshall's concern about ensuring an informed public. Krug, *supra* note 111, at 32–34.

<sup>113</sup> *Id.* at 33.

he saw as the greater societal good, an informed citizenry that would, if truly representative, make the right decisions.<sup>114</sup>

A more cynical view is that Marshall surely knew that the *Florida Star*, founded in 1951, claims to be the oldest black-owned newspaper in Northeast Florida.<sup>115</sup> Marshall was born and raised in Baltimore where the *Afro-American*, an established black weekly, was an important vehicle by which that community pressed for racial equality.<sup>116</sup> Thus, he would have understood that a substantial judgment against the paper might end its existence and leave black residents of that Northeast Florida community without a public voice. Arguably, then, race was tangentially involved and may have further influenced his thinking in the case.

Finally, Marshall's respect for precedent also may explain his vote and opinion in *Florida Star*. (The dissenters in *Florida Star*, however, argue that Marshall misuses the precedents he cites.)<sup>117</sup> On the other hand, Marshall's position in *Florida Star* may be more analogous to his position in *Martinez*, which privileged concerns for the larger community over those of an individual community member. Unfortunately, Marshall's files in *Martinez* and *Florida Star* do not provide any clues about whether pragmatism, *stare decisis*, or race loyalty, consciously or unconsciously, influenced his vote.

#### IV. CONCLUSION

Around the time Marshall stepped down from the bench, Constance Baker Motley publicly acknowledged his "unique contributions to the advancement of women in the law," noting that he "had no qualms about women being given equal employment opportunities. . . . If it had not been for Thurgood Marshall, no one would ever have heard of Constance Baker Motley."<sup>118</sup> In her tribute to Marshall, Motley writes, "[N]obody had to tell him that African-American males were on the bottom rung of

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<sup>114</sup> Cf. NOONAN, *supra* note 84, at xi–xii (discussing the scholarly and judicial masking of individuals in order to accomplish "the highest ideal . . . to do 'justice' by enforcing . . . rights").

<sup>115</sup> The Florida Star, About, [http://www.thefloridastar.com/?page\\_id=444](http://www.thefloridastar.com/?page_id=444) (last visited June 30, 2010).

<sup>116</sup> Hayward Farrar, in chronicling the *Baltimore Afro-American* during the first half of the twentieth century, "recounts the newspaper's coverage of struggles for political power, opposition to lynching, many fights against legal segregation, continuing attempts to improve education for the black community, African American participation in World Wars I and II, and the efforts of both local and national leaders." Suzanne Ellery Chappelle, 66 J. S. HIST. 148 (2000) (reviewing HAYWARD FARRAR, *THE BALTIMORE AFRO-AMERICAN, 1892–1950* (1998)).

<sup>117</sup> See 491 U.S. at 543–46 (White, J., dissenting).

<sup>118</sup> Motley, *My Personal Debt*, *supra* note 47, at 19, 20, 24.

the ladder in every conceivable professional endeavor and that *African-American women were not even on the ladder.*<sup>119</sup> Her comments suggest that Marshall, perhaps intuitively, recognized the intersection of race and gender, especially in the workplace. Nevertheless, during the years that Marshall and Motley overlapped at LDF, it was, like most legal organizations of the time, a “boys’ club.” Robert Carter, reflecting on those early years, writes, “[T]he absence of women from that inner circle of cooperating lawyers and law professors is evident to me, but it never crossed my mind then.”<sup>120</sup>

When Marshall left LDF he selected Jack Greenberg, a white male, rather than Constance Baker Motley, a black woman, as his successor.<sup>121</sup> One can only speculate as to his reasons for preferring a white man over a black woman to lead a civil rights organization primarily devoted to black civil rights.<sup>122</sup> Motley once described Marshall as a “complex person” who did not think it strange that a woman was a lawyer.<sup>123</sup> But he might have thought it strange to have a woman lawyer *lead* the premier civil rights legal arm in the years immediately following *Brown v. Board of Education*.

Marshall’s record on gender equality while on the Court is stronger than the record of its then sole female member, Sandra Day O’Connor.<sup>124</sup> He consistently supported women’s employment and reproductive rights, but he also seemed willing in cases like *Martinez* and *Florida Star* to sacrifice individual rights for larger community goals. Arguably, his failure to join Justice Douglas’s concurrence in *Alexander* can also be explained this way: Marshall sacrificed the rights of black and white women to serve on juries to protect black defendants from racially biased jury pools.

If there were any inconsistencies in his approach to gender discrimination claims, they probably never crossed his mind. He was,

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<sup>119</sup> *Id.* at 20 (emphasis added).

<sup>120</sup> CARTER, *supra* note 35, at 99. Carter continues, “[O]f the staff [which included Marian Perry and Motley] only Thurgood and I actively engaged in the conceptual analysis with the committee members in deciding on a proposal.” *Id.*

<sup>121</sup> See CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 150–51 (1998).

<sup>122</sup> *Cf. id.* at 151 (“Not only would it have been difficult to place a woman in his position, . . . [but] Thurgood also had difficulty with the idea of a woman in a leadership role in a male world.”).

<sup>123</sup> Video: Constance Baker Motley: Working for Thurgood Marshall (National Visionary Leadership Project), [http://www.youtube.com/watch?v=Prn nT\\_iuuEQ&feature=player\\_embedded](http://www.youtube.com/watch?v=Prn nT_iuuEQ&feature=player_embedded) (last visited Apr. 5, 2009).

<sup>124</sup> See Lens, *supra* note 21, at 523–25 (noting that in a study of the Justices’ votes in gender discrimination in employment cases from 1971 to 2002, Marshall “cast pro-feminist votes 92% . . . of the time . . . and Sandra Day O’Connor . . . voted the pro-feminist position 71% . . . of the time.”).

after all, a man who had grown up in a time when women were generally absent from the public sphere. While not antagonistic to the idea of gender equality, Marshall seemed most concerned about racial equality, perhaps because it encompasses both women and men, during an era when an ideology of white male supremacy reigned in the country.

Without question, Thurgood Marshall was a race man, but he was also a friend to women, even though many might not classify him as a feminist. Perhaps he is better described as a “pragmatic feminist,” informed by his experience in the South and cognizant that meaningful equality for black Americans required equality for black men *and* black women. Thurgood Marshall, although a progressive man for his times on gender issues, was still a product of those times. Nevertheless, women in the United States are better off today because he sat on the Supreme Court at a crucial time in women’s twentieth century social and legal history.