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# JUSTICE IN BLACK: WILLIAM HASTIE AND THURGOOD MARSHALL'S FIGHT FOR AN EQUALITARIAN LEGAL ORDER

IAN L. COURTS

## INTRODUCTION

> Throughout the first third of this [Twentieth] century, the effective institutionalization of racism was the common experience of most Negroes. Settled American law required and sanctioned such rigid and comprehensive segregation and subordination of [B]lacks that, to most people, even talk of any significant movement toward an equalitarian legal order seemed visionary, or even foolish. [1]
>
> Racism separates, but it never liberates. Hatred generates fear, and fear once given a foothold; binds, consumes and imprisons. Nothing is gained from prejudice. No one benefits from racism. "We must dissent."[2]

Fueled by their belief in the "equality [of all men] under the law," some Black intellectuals challenged the racist practices of America's legal structure though it seemed an insurmountable task in the early twentieth century. Two of those persons were William Henry Hastie, Jr. and Thurgood Marshall. Hastie and Marshall entered the legal profession and fought for an "equalitarian legal order," as referenced in the epigraphs above. Many similarities exist between Hastie and Marshall such as both were attorneys and later judges. They each also served as legal counsel for the National Association of Colored People (NAACP) and argued civil rights cases before the United States Supreme Court.[3] Notably, Hastie and Marshall made history in their judicial appointments. In 1937, William H. Hastie became the first Black American federal judge.[4] Moreover, in 1967, Thurgood Marshall became the first Black United States Supreme Court Justice.[5]

1. William H. Hastie, *Toward an Equalitarian Legal Order*, The Annals of the American Academy of Political and Social Science, Vol. 407, Blacks and the Law 18 (1973).
2. Thurgood Marshall, *Supreme Justice: Speeches and Writings* (2003)
3. William H. Hastie, *Toward an Equalitarian Legal Order*, The Annals of the American Academy of Political and Social Science, Vol. 407, Blacks and the Law 18 (1973).
4. Gilbert Ware, *Grace Under Pressure*, 86 (1984).
5. Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 Harv. Blackletter J. 27 (1989)



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In my limited research on Hastie's and Marshall's contributions to African American communities, to American society, and to the legal profession, I found several articles that examined them individually; however, I did not find a single article that compared Hastie's and Marshall's accomplishments. Thus, my discussion of these two legal titans primarily focuses on their advocacy as attorneys and examines their jurisprudence as jurists. Hastie's and Marshall's advocacy and jurisprudence affirms their belief in the establishment of an "equalitarian legal order" that protects individual rights.

## I. WHO ARE THEY?

### *William H. Hastie*

William Henry Hastie, Jr. was born in Knoxville, Tennessee on November 17, 1904, to William Henry Hastie, Sr and Roberta Childs. [6] According to Hastie, he was raised in Knoxville and his family moved to Washington, D.C. when he was ten years old.[7] Hastie excelled academically and enrolled in Amherst College in Massachusetts.[8] Hastie's academic success continued while at Amherst where he graduated valedictorian and was initiated into Phi Beta Kappa honor society in 1925.[9] Following his success at Amherst College, Hastie enrolled in law school at Harvard University and graduated with a Bachelor of Laws (LLB) in 1930,[10] and later achieved a Doctor of Judicial Science (SJD) also from Harvard.[11] According to Hastie, he began practicing law in the early 1930s in Washington D.C.[12]

Hastie's first legal position within the government was as an assistant solicitor in the Department of Interior.[13] During his tenure in the solicitor's office Hastie stated that "[among other legal issues], I was assigned problems of the Virgin Island, one of them being to work with some other lawyers on the matter of setting up a corporate structure for the purpose of rehabilitating the [island's] sugar and rum industr[ies]."[14] Hastie's legal work pertaining to the United States' Virgin Islands was important because he would subsequently be appointed to the federal district court of the Virgin

6. Vile, John R. Great American lawyers: an encyclopedia. 1, (2001).
7. Truman Library, Oral Histories: William Hastie Transcript, 2 (1972).
8. Gilbert Ware supra at 6, 12
9. *Id* at 19.
10. *Id* at 30.
11. *Id.*
12. *Truman Library, Oral Histories: William Hastie Transcript, 2 (1972).*
13. *Id.*
14. *Id* at 3

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Islands in 1937.[15] Hastie served on the Virgin Island federal district court from 1937 until late 1939.[16] After stepping down from the district court bench, Hastie returned to Washington, D.C. and began serving as the Dean of the historic Howard Law School. Hastie served as dean of Howard Law School from 1939 until 1946. It was during Hastie's tenure as Dean that his relationship with Thurgood Marshall, another young Black attorney and Howard Law alumnus, began. Hastie and Marshall would argue many of the NAACP's early civil rights cases together notably, *Smith v. Allwright*,[17] and *Morgan v. Virginia*.[18] Hastie would later serve as an assistant to the U.S. Secretary of War and later Governor of the U.S. Virgin Islands.

Hastie was an early advocate for civil rights and equality under the law. One of Hastie's first significant cases in the establishment of an equalitarian legal order was *Hocutt v. Wilson*.[19] Thomas R. Hocutt was a Black man living in North Carolina who had aspirations to attend the University of North Carolina's School of Pharmacy.[20] UNC School of Pharmacy's policy excluded Black Americans from admission. Thomas Hocutt applied for admission to UNC School of Pharmacy and was denied.[21] Moreover, Dr. James E. Shepard, president of the North Carolina Colored College (now North Carolina Central University) refused to approve the release of Hocutt's academic transcript because he desired that a department of law, a department of pharmacy and a department of medicine be established at his institution.[22] Hastie argued before the Durham County Superior Court that UNC's refusal to admit Hocutt on the basis of race was an unconstitutional violation of the Equal Protection Clause of the 14th Amendment.[23] Although Hocutt was denied relief, Hastie's advocacy in *Hocutt* laid the framework for Thurgood Marshall's victory in *Brown v. Board of Education*. [24]

*Thurgood Marshall*

Thurgood Marshall was born in Baltimore, Maryland on July 2, 1908, to William Canfield Marshall and Norma Arica. Marshall graduated high school in 1925 and enrolled in Lincoln University in Oxford, Pennsylva-

15. *Id.*
16. *Id.*
17. Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757; 88 L. Ed. 987 (1944).
18. Morgan v. Virginia, 328 U.S. 373, 66 S. Ct. 1050; 90 L. Ed. 1317 (1946).
19. Hocutt v. Wilson, N.C. Super. Ct. (1933).
20. Gilbert Ware supra 46.
21. *Id* at 47.
22. *Id.*
23. *Id.*
24. *Id* at 54.

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nia.[25] Lincoln University is a historically Black university and was known as the "Black Princeton."[26] Upon graduating in 1930, Marshall had married, made life-long friends, expanded his social network and established a strong academic record.[27]

After graduating from Lincoln University, Marshall applied to law school at the University of Maryland.[28] The University of Maryland's law school was one of the prominent law schools in Maryland and close to home for Marshall. Marshall, unfortunately, was denied admission to the law school because he was Black.[29] After his rejection from the University of Maryland, Marshall enrolled in another historically Black university, Howard law school.[30] While at Howard, Marshall met Charles Hamilton Houston who would later have a profound impact on his life and ideology concerning civil rights and the Constitution.[31] Charles Hamilton Houston was an established and well-respected attorney and legal scholar who impressed upon Marshall the importance of professionalism and viewing the Constitution as a document that ensured the protection of individual rights.[32] Mr. Houston believed that the duty of a lawyer, especially a Black lawyer, was to use his training to bring about positive and impactful change in society.[33] Mr. Houston was quoted as saying: "a lawyer's either a social engineer or … a parasite on society." This idea of legal activism was evidenced in Marshall's life through his civil rights cases with the NAACP, his judicial philosophy as a federal appellate judge, and later his philosophy as an associate justice on the United States Supreme Court.

Marshall began his legal career by hanging out his own shingle in solo-practice. Marshall's skill as an advocate and his willingness to help any client that came to him began to catch the attention of major organizations such as the NAACP. Marshall joined the NAACP and began working in their legal department with Charles Hamilton Houston and later William Henry Hastie, Jr. Marshall later became the director and senior counsel of the NAACP's Legal Defense Fund and through his work there he started his

25. Williams, Juan. "*The Higher Education of Thurgood Marshall.*" The Journal of Blacks in Higher Education, no. 22 (1998): 82-88

26. *Id.*

27. *Id.*

28. "[*Dedications: Thurgood Marshall 1908-1993*]." The Journal of Blacks in Higher Education, no. 6 (1994): 2-3

29. Juan Williams supra at 86.

30. *Id.*

31. *Id.*

32. Hastie, William H. "*Charles Hamilton Houston 1895-1950.*" The Journal of Negro History 35, no. 3 (1950): 355-58.

33. Tushnet, Mark. *"The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston."* The Journal of American History 74, no. 3 (1987): 884-903.

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now-famous civil rights advocacy.[34] Marshall's crowning advocacy achievement was the *Brown v. Topeka Board of Education* decision. Although the results were not readily apparent in 1954 when the Supreme Court heralded the words "separate educational facilities are inherently unequal," no one could deny the monumentality of the court's decision and Marshall's advocacy.[35] Marshall's experiences would pave a way for him to serve on the federal bench with the power to interpret and administer the law and precedent he advocated for.

## II. WORKING TOGETHER: EARLY CIVIL RIGHTS CASES

In the 1940s, Hastie and Marshall began arguing civil rights cases together for the NAACP. This section will examine two significant cases, *Smith v. Allwright* and *Morgan v. Virginia*, which were among the NAACP's earliest cases and were argued by Hastie and Thurgood together. These early lawsuits "arouse[d] public interest and support as well as . . . w[on] significant peripheral changes in the segregated legal order."[36] I will glean from these cases the legal philosophy and understanding Hastie and Marshall had surrounding the Constitution and civil rights. These revelations into their Constitutional philosophy surrounding civil rights further support their mission to establish an "equalitarian legal order" through advocating for individual rights.

### Smith v. Allwright

Lonnie Smith was a Black dentist who lived in Houston, Texas. Mr. Smith was denied the opportunity to vote in the Democratic party's primary. Mr. Smith was denied the opportunity to vote because of a 1923 Texas Statute that allowed political parties to establish their own internal rules governing primary ballots and elections. The Harris County Democratic party prohibited Black Americans from voting in their primary, requiring voters to be white in order to participate. Disenfranchisement statutes such as the 1923 Texas statute were prevalent throughout the American South in the early part of the 20th century. Federal courts had largely deferred voting rights challenges by Black Americans to the states. However, Smith brought suit against S.S. Allwright, a Harris County election official, arguing that the Texas statute allowed the Democratic party to effectively utilize state power to disenfranchise Black Americans from voting.

34. Floyd Delon supra at 279.

35. Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan., 347 U.S. 483, 495, 74 S. Ct. 686, 692, 98 L. Ed. 873 (1954), supplemented sub nom. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

36. Hastie, *supra* note 1, at 18.

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Hastie and Marshall argued on behalf of Smith in the United States Supreme Court. In their brief Hastie and Marshall wrote,

> Petitioner asserts a right to participate in the choice of Senators and Representatives in Congress founded upon and guaranteed by Article I and the 17th Amendment of the Constitution of the United States. He asserts further that his privilege of voting as guaranteed by the 15th Amendment of the Constitution has been abridged. It follows from the decision of this court in *United States v. Classic*, *supra*, that an elector's constitutional right to vote for and to participate in the choice of federal officers extends to voting in primary elections which a state has made an integral part of its machinery of choice, or which in fact are decisive of the choice.[37]

Hastie and Marshall asserted that the right to vote was fundamental regardless of race because of the language of the 15th Amendment and the precedent established by the Supreme Court in *United States v. Classic.*[38] In *Classic*, the Supreme Court upheld a federal statute that made it illegal for state party officials to alter and misappropriate votes in party primaries. [39] The Court reasoned that the primary process was fundamental to elections. Further, the Court asserted that voting in a primary election was one of the few instances the people had an opportunity to choose a candidate without ballot-access requirements.[40] Hastie and Marshall crafted Smith's disenfranchisement as a violation of the 15th Amendment's guarantee of a citizen's right to vote and the 17th Amendment's provisions for the election of representatives. Hastie and Marshall proffered an understanding of the provisions of the Constitution that extended protection to all people regardless of race in the political primary process. They asserted in their brief, "[w]hatever power local law or local political theory may confer upon a political party with reference to the determination of its membership, that power cannot be exercised in such manner as to infringe the constitutional privilege of voting for federal officers."[41]

Hastie and Marshall placed the Supreme Court in a conundrum. The Court previously determined just a few years earlier in *Classic* that the primary process was an essential part of democratic elections. Additionally, the Court held that Congress had the power under Article I, Section 4 to indict state officials found to be violating a citizen's voting rights in primary elections. Moreover, if the Court decided that the Texas statute and the Harris County Democratic party's practice of prohibiting a person from voting in the primary based on their race, then the Court's decision in *Clas-*

37. Smith v. Allwright, 1944 WL 42272, *6 (U.S., 2006).
38. United States v. Classic, 313 U.S. 299, 325, 61 S. Ct. 1031, 1042 (1941).
39. *Id.*
40. *Id*.
41. *Id*.

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*sic* would be in jeopardy. Furthermore, the Court's decision could potentially signal to states that they could circumvent *Classic* by imposing other bans and requirements for the primary process; thus, virtually nullifying the protections of the 15th and 17th Amendments. The Court understood the Constitutional conundrum placed before them by Hastie and Marshall's advocacy and determined that the Texas statute was unconstitutional because it violated the 15th Amendment's voting rights protections. The Court stated in its opinion:

> It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be **denied a man by the State because of his color.** [42]

The Supreme Court's decision in *Smith,* was a major win for Black Americans. The Court declared that the 15th Amendment protected Black Americans from being excluded from primary elections based on race. Moreover, *Smith* reveals the unwavering commitment Hastie and Marshall had to extending the protections of the Constitution and her amendments to all people, as well as and the federal courts' role in protecting those rights from state infringement. Hastie and Marshall were laying the legal framework for the establishment of an "equalitarian legal order." Hastie, in examining early civil rights cases such as Smith, wrote "high priority in the. . . national campaign to make the legal order equalitarian had to be accorded to persuading the Court to reverse its sanction of the white primary. For without political power, the black community had no effective means of self-help."[43] *Smith* was not the only case that Hastie and Thurgood's dynamic teamwork was demonstrated; one of the other cases was *Morgan v. Virginia*.

*Morgan v. Virginia*

Irene Morgan, a Black assembly line worker, was returning to Baltimore from traveling to visit her mother in Virginia, via a Greyhound bus, when she was asked to move from the "white" section to the "colored" section. A Virginia statute required commercial-passenger travel buses to have separate colored and white sections for interstate and intrastate travelers. Moreover, conductors were required to extend or modify the allotment of colored

42. *Smith v. Allwright*, 321 U.S. at 661–62, 64 S. Ct. at 764 (citation omitted).
43. Hastie, *supra* note 1, at 23.

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and white seats depending on the need. Any violation of the Virginia statute was a misdemeanor offense.[44] Morgan refused to move to a Black seat on the bus, when asked by the conductor, in order for white passengers to sit in her seat. As a result of her refusal, Morgan was arrested for violating the statute. Throughout the country many of these segregation laws were passed after the Supreme Court's decision in *Plessy v. Ferguson*, which upheld the apartheid system of division between the races. Black men and women were regulated to second class citizenry and this wall of separation became the de jure law of the country.[45] To many observers, the segregated system was a reality of their time and any challenge to that seemed unlikely. Nevertheless, Hastie and Marshall challenged this *Plessy* system and through an ingenious argument and prevailed in the Supreme Court.

Hastie and Marshall argued Ms. Morgan's case from an innovative point of view. Instead of challenging the Virginia law under the 14th amendment's Equal Protection Clause, they challenged the constitutionality of the statute under Congress' interstate commerce power.[46] Hastie and Marshall argued that Virginia's statute placed an "undue burden on interstate commerce."[47] In addition, Hastie and Marshall argued that the statute unduly burdened interstate commerce because of the provision that allowed conductors to ask a passenger to move to a different seat at any point during travel. Moreover, the effect of the Virginia statute extended its regulatory reach into jurisdictions such as the District of Columbia where "the appellant would have had [the] freedom to occupy any available seat and so to the end of her journey."[48] Hastie and Marshall's interstate commerce challenge was an innovative use of the power that Congress has to regulate. Furthermore, it gave federal courts the authority to strike down state statutes that encumbered Congress' interstate commerce power for the reason of race. Notably, the Supreme Court agreed with Hastie and Marshall's argument and reversed Ms. Morgan's conviction. The Court's reasoning behind its decision is articulated in the opinion below:

> [N]o state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity

44. The sections are derived from an act of General Assembly of Virginia of 1930. Acts of Assembly, Va. 1930, p. 343.

45. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138; 41 L. Ed. 256 (1896).

46. U.S. Const. art. I, § 8, cl. 3. (Congress has the authority to "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes")

47. Morgan v. Virginia, 328 U.S. 373, 380, 66 S. Ct. 1050, 1055 (1946).

48. *Id.* at 381, 66 S. Ct. at 1056.

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> of this Virginia statute on the challenge that it interferes with commerce. . .[49]

The *Morgan* decision is significant because the Court ruled that segregated public travel was a violation of the Constitution. Hastie and Marshall's advocacy was triumphant once again over the apartheid system in the United States. States could no longer deny Black Americans the right to vote in primary elections. Additionally, state laws that interfered with Congress' ability to regulate interstate commerce on the basis of race would be struck down by federal courts. Although winning this case was monumental, Hastie and Marshall's work toward an "equalitarian legal order" was far from over and their destinies would take them from the advocate's podium to the judge's bench.

## III. PATHWAYS TO THE BENCH

> Everywhere I looked for success, in almost every book I read, in almost every description of the giants in the legal profession, in every picture of the Supreme Court I saw, there was always one common quality, an absence of Black faces. . . .It is in the context of this background that Charles Hamilton Houston, Thurgood Marshall, and especially William Hastie, were so important to me, to every black student in my class at Yale, and I truly believe every black law student in America. [50]

The preceding quote highlights the importance of Hastie and Marshall's legacy to a generation of Black intellectuals. "Could a Black man serve as a federal judge?" Hastie was the first Black man to be appointed to the federal bench in 1937, by President Roosevelt, when he was appointed to the District Court of the Virgin Islands. [51] Moreover, in 1949 President Truman appointed Hastie to the Third Circuit Court of Appeals.[52] Furthermore, Marshall was appointed by President Lyndon B. Johnson to the United States Supreme Court in 1967. This section will reflect on the pathways Hastie and Marshall took to the federal appellate bench.

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49. *Id.* at 386, 66 S. Ct. at 1058.

50. A. Leon Higginbotham Jr., *Judge William Hastie- One Who Changed the Immutable*, 24 How. L.J. 259, 263 (1981).

51. Ware, *supra* note 4, at 86.

52. Higginbotham Jr., *supra* note 50, at 263 ("I shall never forget October 21, 1949, when by the stroke of his pen, the thirty-third President of the United States, Harry Truman, answered my Philadelphia barber and reversed the trend of centuries of exclusion by nominating William Henry Hastie for appointment to the United States Court of Appeals for the Third Circuit.").

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*Judge William Hastie's historic appointment to the Third Circuit.*

Hastie worked under the Truman administration as Governor of the Virgin Islands and also campaigned for Truman in the 1948 election.[53] Despite the collegiate relationship between Truman and Hastie, Hastie's nomination to the Third Circuit was not set in stone. Hastie, in discussing his 1949 nomination to the Third Circuit, stated "[m]y nomination. . . almost did not come out for eight months. It was very doubtful whether it would ever come out of the Senate committee."[54] Congressional obstructionism toward Presidential actions, specifically in regards to judicial nominations, was common during the time. Opposition to the first "negro" man to hold a life-tenured judicial post was prevalent and intense. Constitutional law professor, April Dawson, examines the congressional obstructionism at play in Hastie's judicial nomination: Hastie was nominated by Truman on October 15, 1949, and after no Senate action or any indication that the Senate would act, Hastie received a recess appointment from Truman on October 21, 1949.[55] Hastie was re-nominated to the Third Circuit on January 5, 1950, but was not finally confirmed by the Senate until July 19, 1950.[56] Hastie's nomination was delayed for more than six-months which was unprecedented for the time.[57] Despite the obstruction by the Senate, no one could deny the symbolic importance of Hastie's appointment to Black Americans. Hastie would go on to serve twenty-six years and place his mark on the jurisprudence of the country. Furthermore, Hastie was the first Black American considered for the United States Supreme Court.[58] Hastie's consideration for the Supreme Court was an important footnote in President Kennedy's short presidency. A Black man would be appointed to the Court, but it wouldn't be Hastie. Moreover, Kennedy, unfortunately would not be able to appoint Hastie due to his assassination in 1963.

*Thurgood Marshall's confirmation to the Supreme Court*

For many in 2020, the appointment of Thurgood Marshall to the Supreme Court is reflected upon as a time of racial progress and liberal momentum. However, the reality at the time of Marshall's appointment was that of divi-

53. Transcript of Oral History Interview with William H. Hastie, Judge, in Philadelphia, Pa. at 68 (Jan. 5, 1972).

54. *Id.* at 80.

55. April G. Dawson, *Laying the Foundation: How President Obama's Judicial Nominations Have Paved The Way For A More Diverse Supreme Court*, 60 Howard L.J. 685, 690-91 (2017).

56. *Id.* at 691.

57. *Id.*

58. *Just One More Vote for Frankfurter: Rethinking the Jurisprudence of Judge William Hastie*, 117 Harv. L. Rev. 1639, 1640 (2004). ("When the time comes Judge William Hastie of the Third Circuit Court of Appeals should get [the] most serious consideration for appointment to the Supreme Court.").

sion, partisanship, and disruption.[59] Racial tensions were high, police brutality was rampant and a general feeling of distrust for the government was common among the oppressed in society.[60] Despite the heated climate, Marshall's Supreme Court appointment confirmation provided some hope.[61] During Marshall's confirmation many Senators, including southern senators, aired their respect for Marshall and the legacy he had acquired thus far.[62] Marshall was confirmed by the US Senate in a vote of 69-11 on August 30, 1967.[63] Marshall's appointment to the Highest Court served as a pinnacle point for the man who had effectively crafted and created the law applied by the Warren Court in its administration of civil rights law.[64] It was long overdue for Marshall to serve on the Court that he argued before so many times. The mandate was clear; Marshall had to continue the work he started, but this time from the judge's bench. Justice was finally in Black.

## IV. JUSTICE IN BLACK

Judge Hastie and Justice Marshall were committed to establishing an equalitarian legal order and their commitment was evident through their First and Fourth Amendment jurisprudence. Hastie and Marshall were both early advocates for civil rights and agreed that the Constitution and her amendments should protect all Americans especially Black Americans.[65] Further, they both agreed that the federal courts were one of the few places individuals could seek remedy if their rights were violated by the government. This discussion focuses on jurists Hastie and Marshall's First Amendment jurisprudence in regard to free speech and the Fourth amendment's protection against governmental searches and seizures. Hastie and Marshall's jurisprudence in free speech, and searches and seizures affirms their commitment to establishing an equalitarian legal order through the Constitution.

### *The First Amendment*

Hastie's commitment to establishing an equalitarian legal order guaranteed by the First Amendment is evidenced in *U.S. v. Mesarosh*. In

59. Linda S. Greene, *The Confirmation of Thurgood Marshall to the United States Supreme Court*, 6 HARV. BLACKLETTER J. 27 (1989).
60. *Id.*
61. *Id.*
62. *Id.* at 28.
63. Dawson, *supra* note 55, at 691.
64. Greene, *supra* note 59, at 28.
65. *Id.* at 34.

*Mesarosh*, Hastie opined that the First Amendment protects all speech including speech considered unpopular and dangerous. Mesarosh was a member of the communist party and was accused, along with a group of other men, of violating the Smith Act.[66] The Smith Act made it a crime for a person to teach, advocate or distribute information concerning overthrowing of the U.S. government.[67] Mesarosh was convicted under the Smith Act even though the prosecution did not have any direct evidence that (1) Mesarosh had the means "to accomplish the overthrow of the government of the United States by force and violence as speedily as circumstances would permit; or (2) that Mesarosh acted with the intent to conspire to overthrow the government."[68] The majority opinion in the Third Circuit found that the prosecution had sufficient evidence to support Mesorash's convictions and that the evidence of Mesarosh's conspiracy could be proven from the surrounding evidence and circumstances.[69] Hastie dissented from the majority and argued that the prosecution failed to prove that Mesarosh and his fellow defendants had the requisite intent to advocate overthrowing the government, nor did they have the ability to do so. Hastie penned in his dissent:

> It has already been pointed out but will bear restatement, that this distinction is of basic importance in all constitutional theory of restrictions on utterance permissible under the First Amendment. The line which the courts try to draw distinguishes punishable incitation to insurrectionary action from permissible teaching that at some time in the future violence is inevitable and the 'proletariat' must be ready for it. If their present tactic is a waiting game, characterized by the teaching of revolutionary theory while incitation to action is left for the indefinite future, the First Amendment prevents the government from proscribing their teaching.[70]

Moreover, Hastie argued that the First Amendment required more than just intent and words to incite violent action, but that violent action should be readily apparent and achievable when the words are spoken in order for a person's speech to be censored by the government. Hastie adopted Justice Holmes's approach to speech, wherein speech that is deemed dangerous or inciteful requires that there be a showing of clear and present danger in order for the speaker's speech to be deemed punishable by the government.[71] Hastie's judicial philosophy placed the burden on the government to

66. United States v. Mesarosh, 223 F.2d 449, 466 (3d Cir. 1955), *rev'd* 352 U.S. 1, 77 S. C.t 1, 1 L. Ed. 2d 1 (1956).

67. *Id.*

68. *Id.*

69. *Id.* at 459.

70. *Id.* at 463-64 (Hastie, J. dissenting).

71. *Just One More Vote for Frankfurter: Rethinking the Jurisprudence of Judge William Hastie*, 117 HARV. L. REV. 1639 (2004).

prove that its actions in censoring and punishing even the most hated form of speech comported with the First Amendment's protection of speech. On appeal, the Supreme Court reversed the majority's decision on the basis that the government's evidence did not support Mesarosh's conviction that he or his associates were advocating and conspiring a violent overthrow of the government. [72]

Furthermore, Marshall's view concerning the protections of the First Amendment is articulated in *Stanley v. Georgia*; one of his first majority opinions on the Supreme Court. In *Stanley*, Robert Eli Stanley, the defendant, was previously charged with illegal bookkeeping activities which resulted in federal officers obtaining a warrant to search Stanley's home for betting paraphernalia.[73] The officers found little evidence in Stanley's home concerning illegal bookmaking activity; however, officers discovered a ream of film that contained obscene material in a desk drawer in Stanley's bedroom. Stanley was convicted of violating a Georgia statute which made it illegal to possess obscene material. Stanley appealed his conviction arguing that the Georgia obscenity statute violated the First Amendment by punishing possession of obscene material.[74] Marshall and the Supreme Court ruled that the Georgia obscenity statute violated the First Amendment because "mere private possession of obscene matter cannot constitutionally be made a crime."[75]

Marshall reasoned in his opinion that the Constitution, through the First Amendment, protected the right of an individual to receive "information and ideas."[76] Moreover, Marshall opined that the First Amendment's protections cover an individual's right to "satisfy his intellectual and emotional needs in the privacy of his own home [and] the contents of his library."[77] Marshall explained that the First Amendment protects an individual and "that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving the government the power to control men's minds."[78] Marshall's commitment to individual rights and his expansive view of the First Amendment is evident in his decision in *Stanley*. Additionally, Marshall determined that the First Amendment protected

72. Mesarosh v. United States, 352 U.S. 1, 13-14 (1956).
73. Stanley v. Georgia, 394 U.S. 557, 558 (1969).
74. *Id.* at 559.
75. *Id*.
76. *Id.* at 564.
77. *Id.* at 565.
78. *Id*.

private possession of obscene material, where there was no evidence of the intent to distribute.[79]

Both Hastie and Marshall shared a commitment to the belief that the First Amendment's right to freedom of speech protected individuals in addition to speech that is controversial and unpopular. Hastie and Marshall's First Amendment jurisprudence reflects their desire to establish an equalitarian legal order that protects individuals, especially those in marginalized communities, from overly restrictive government censors on speech and self-expression.

*The Fourth Amendment*

Moreover, Hastie and Marshall's belief in an equalitarian legal order influenced their decisions in Fourth Amendment search and seizure cases. In *Florida v. Bostick*, in response to alleged rampant drug trafficking in the state of Florida, the Sheriff's Department in Broward County instituted a drug problem that allowed officers to board public transportation and search persons they suspected were engaged in drug activity.[80] Bostick was on a bus heading from Miami to Atlanta when two officers entered the bus and asked Bostick if they could search his luggage for drugs.[81] Bostick consented to the search and the officers found cocaine in Bostick's luggage.[82] The officers did not reveal to Bostick that he had the option to reject their search.[83] The majority reasoned that the officers' practice was constitutional because the officers boarding a passenger bus and asking individuals to search their luggage was not in itself coercive.[84] Moreover, the majority reasoned that the officer's request did not create a situation where a reasonable person would not feel free to terminate their encounter with the officer and refuse the officer's request.[85] Marshall rejected the view of the majority and wrote a vigorous dissent that reflects his view on the protections of the Fourth Amendment in response to police conduct.

Marshall begins his dissent with a fiery exclamation against the political atmosphere of the time surrounding increased police officer brutality in alleged drug activity. Marshall wrote:

> Our Nation, we are told, is engaged in a "war on drugs." No one disputes that it is the job of law-enforcement officials to devise effective weapons

79. *Id.* at 567-68.
80. Florida v. Bostick, 501 U.S. 429, 431 (1991).
81. *Id*. at 431-32.
82. *Id*. at 432.
83. *Id*.
84. *Id*. at 435-36.
85. *Id.* at 437.

> for fighting this war. *But the effectiveness of a law-enforcement technique is not proof of its constitutionality*.[86]

Marshall continues his dissent arguing that one of the primary aims of the Fourth Amendment was to protect citizens from being searched by the government without particularized suspicion.[87] Marshall's dissent asserts his view that the Fourth Amendment of the Constitution limits the authority of police officers in regards to coercive searches of a person without either their consent or a valid warrant. Furthermore, Marshall's dissent critiqued the methods used by police officers in conducting searches of individuals on commercial passenger vehicles without a "clear articulable suspicion."[88] In addition, Marshall condemned the searches "as inconvenient, intrusive, and intimidating."[89] Marshall admonishes the Court to review the facts of the case and come to a conclusion that an officers entrance onto a public transportation vehicle, while in uniform, and singling out an individual or individuals to search is coercive and is a seizure for the purpose of the Fourth Amendment.[90] Moreover, Marshall argued that the majority's affirmation of the police search in *Bostick* would allow police officers to search individuals without having the requite reasonable suspicion.[91] Marshall concludes his dissent by writing:

> The majority attempts to gloss over the violence that today's decision does to the Fourth Amendment with empty admonitions. "If th[e] [war on drugs] is to be fought," the majority intones, "those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime." The majority's actions, however, speak louder than its words.[92]

Marshall's dissent sheds light on his view on the importance of the Fourth Amendment's protections for individuals in response to coercive actions taken by law enforcement. Marshall believed that the court's job was to ensure that police conduct comported with Fourth Amendment protections regardless of the law enforcement's success in deterring crime.[93] Marshall's commitment to the establishment of an equalitarian legal order ensured that individuals were protected from excessive governmental searches and seizures that were outside of the Fourth Amendment's requirements.

86. *Id.* at 440 (Marshall, J., dissenting) (emphasis added).
87. *Id*.
88. *Id.* at 441-42.
89. *Id*. at 442.
90. *Id.* at 450.
91. *Id*.
92. *Id.* at 450–51.
93. *Id*. at 450.

Moreover, Hastie adopted a similar view on the limits of police authority in regard to the provisions of the Fourth Amendment in *Hanna v. United States*.[94] In *Hanna*, the defendant was convicted of housebreaking and robbery. The defendant requested that the district court suppress the evidence obtained by police because the search of the defendant's motel room was warrantless.[95] Hastie's opinion outlined the precedent set out by the Supreme Court in determining the admissibility of evidence obtained without a warrant by state vs. federal officials.[96] Hastie reasoned:

> [W]e think all evidence obtained [in] violation of the Constitution should be excluded. [A] decision 'whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'[97]

Additionally, Hastie believed that the Fourth Amendment prohibits state and federal government officials from obtaining evidence through illegal means and having it admitted at trial.[98] Hastie's interpretation of the Fourth Amendment required that judicial restraints be placed upon government officials (i.e. exclusion of evidence at trial) in order to ensure that they comply with the requirements of the Constitution in regards to searches and seizures.[99] Hastie sharply rebuked what he regarded as the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures should find no sanction in the judgments of the courts."[100] Hastie reprimands federal courts for "play[ing] the 'ignoble part' by themselves permitting the use of unconstitutionally obtained evidence."[101] It is clear that Hastie believed the failure of federal courts in allowing illegal evidence obtained through unlawful means to be admitted at trial was a violation of their constitutional duty and mandate to enforce and protect the freedoms of the Fourth Amendment.

Hastie's and Marshall's jurisprudence in the areas of the First and Fourth Amendments demonstrated their commitment to protecting individuals' rights from government violation and intrusion. Hastie's and Marshall's legal philosophies embody the importance of human dignity and equality under the law. Of Hastie's jurisprudence, it can be said, "throughout his

94. Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958).
95. *Id*. at 723-24.
96. *Id.* at 725-27.
97. *Id.* at 728.
98. *Id*.
99. *Id*.
100. *Id.* (quoting Weeks v. United States, 232 U.S. 383, 391 (1914)), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961), *and* Elkins v. United States, 364 U.S. 206 (1960).
101. *Id*.

judicial career Hastie was determined that his opinions should reflect not only a principled method of inquiry but a systemic one as well."[102] Hastie was a pragmatic progressive, believing in the importance of "stare decisis" while honoring the role federal court's played in protecting individual rights from state overreach.[103] Concerning Marshall's judicial philosophy it can be stated that Marshall believed wholeheartedly in the power of the Constitution and the judge's ability to adapt, modify and shape the document to fit within the interests of justice and equality for all people.[104] Marshall believed in the idea that lawyers and judges were social engineers, who utilized the law and the Constitution to shape working solutions for society's problems.[105] Hastie and Marshall's judicial vision of an equalitarian legal order were important to the development of 20th-century jurisprudence surrounding the application of the First and Fourth Amendments and the protection of individual rights from governmental intrusion.

## CONCLUSION

> By 1950, the Black community, a substantial part of the white community, and the government of the United States had join[ed] in support of . . . an equalitarian legal order, that had been set twenty years earlier.[106]

William Hastie and Thurgood Marshall helped usher in an era of civil rights litigation that challenged the prevailing norms of the twentieth century and embodied the innovative spirit of the age. Hastie and Marshall's advocacy in *Smith v. Allwright* and *Morgan v. Virginia* challenged the segregationist legal order of the United States and laid the foundation for a more equitable legal system. Moreover, Hastie and Marshall broke the stained-glass ceiling for Black Americans by being the first two Black men appointed to federal appellate courts, Hastie to the Third Circuit Court of Appeals, and Marshall to the United States Supreme Court. These men dedicated their life and careers to the administration of justice and the evolution of the rule of law. Furthermore, Hastie and Marshall were colleagues that established themselves as distinct men and distinguished jurists while embodying "Justice in Black;" the establishment of an equalitarian legal order.

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102. Jonathan J. Rusch, *William H. Hastie and the Vindication of Civil Rights*, 21 HOW. L.J. 749, 806 (1978).

103. *Id.* at 809.

104. Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, 7 HARV. L. & POL'Y. REV. 113 (2013).

105. Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 UNIV. ILL. L. REV. 1129, 1141 (1996).

106. Hastie, *supra* note 1, at 30.