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THE TYRRELL WILLIAMS MEMORIAL LECTURE

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913 to 1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's foremost legal scholars, judges, public servants, and practicing attorneys.

James O. Freedman is President of Dartmouth College. He was previously President of the University of Iowa and Dean of the University of Pennsylvania Law School. President Freedman received his A.B. from Harvard College and his LL.B. from Yale Law School. He clerked for Thurgood Marshall, then a Judge of the United States Court of Appeals for the Second Circuit, from 1962-1963. President Freedman delivered the 1994 Tyrrell Williams Memorial Lecture on the campus of Washington University in St. Louis on February 16, 1994.

THURGOOD MARSHALL: MAN OF CHARACTER

JAMES O. FREEDMAN

It is a pleasure to join you today to deliver this year's Tyrrell Williams Memorial Lecture. As a former law school dean, I have long admired Washington University's School of Law, and I have especially rejoiced in its fortunes since my good friend Dan Ellis became its dean.

I want to use this opportunity to talk of Thurgood Marshall. In the years ahead, significant volumes of biography and history will undoubtedly

enlarge our understanding of his skill as an advocate and his stature as a judge. I want, instead, to speak of Justice Marshall as a man of character.

In 1742, Henry Fielding, one of the first great English novelists, began *Joseph Andrews* with the sentence, "It is a trite but true observation, that examples work more forcibly on the mind than precepts: and if this be just in what is odious and blameable, it is more strongly so in what is amiable and praise-worthy."[1]

In calling attention to the power of example to shape our respect for human achievement, Fielding performs an important service. He reminds us that exemplary lives matter. For me—as for the thousands of people, young and old, white and black, from all walks of life, who filed through the Great Hall of the Supreme Court when the Justice's body lay in state in January 1993—the example of Thurgood Marshall as a person of character does truly matter and carries extraordinary power.

There are doubtless those who worked with Thurgood Marshall whose lives were not changed by that experience. But I have yet to meet one. All of us—his law clerks, his associates at the NAACP Legal Defense and Educational Fund, and his colleagues at the Justice Department, on the United States Court of Appeals for the Second Circuit, and on the United States Supreme Court—were marked indelibly by Justice Marshall's idealism and courage, his compassion and humanity, his craftsmanship and wit. The force of his moral example changed our lives utterly, and in ways that have made us better citizens and more reflective lawyers.

If this nation had an equivalent to Plutarch's *Lives*—a set of commentaries on men and women who had lived instructive and noble lives—an essay on Thurgood Marshall would surely be included. It would capture and memorialize the essential qualities of Marshall's character—his physical courage, his intellectual brilliance and professional expertise, his moral strength, and his utter disregard for fame and wealth. It would explore, above all, the beliefs that anchored his lifetime's commitment to racial and social justice.

In his own Tyrrell Williams Memorial Lecture in 1967, entitled *Law and the Quest for Equality*, Thurgood Marshall argued that the history of the litigation leading up to *Brown v. Board of Education*[2] indicated "that law can not only respond to social change but can initiate it, and that lawyers,

1. HENRY FIELDING, JOSEPH ANDREWS 39 (R.F. Brissenden ed., Penguin Books 1977) (1742).
2. 347 U.S. 483 (1954).

through their everyday work in the courts, may become social reformers."[3] Indeed, he went further in stating that "[l]awyers have a duty in addition to that of representing their clients; they have a duty to [re]present the public, to be social reformers in however small a way."[4] That lecture states the credo of a career.

Thurgood Marshall was the child of a pragmatic American liberalism. He was an idealist who believed deeply in the rule of the law, in the power of government to improve the social and economic conditions of its citizens, and in the promise of the Declaration of Independence. He knew that idealism was the most certain foundation of immortality. Idealists are not perfect, but their examples endure.

In *The Souls of Black Folk*, published in 1903, W.E.B. Du Bois argued, in an oft-quoted passage, that the central issue for American blacks was the "racial two-ness" that lies at the heart of their identity.[5] "One ever feels his two-ness," he wrote, "an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body . . . . The history of the American Negro is the history of this strife—this longing to attain self-conscious manhood, to merge his double self into a better and truer self."[6] Like Du Bois, Thurgood Marshall was fiercely proud to be an American and fiercely proud to be a Negro. And for Marshall, as for Du Bois, the complex fate of being an African-American was the overarching challenge of his life.

Marshall's life is one of the great American stories. It is emblematic of a heroic theme: a young man from modest circumstances, confronted by racial discrimination and social hostility, contributes mightily, by the power of his mind and the strength of his character, to the redemption of his nation's highest ideals.

Born in Baltimore in 1908, the grandson of a freed slave and Union soldier,[7] Thurgood Marshall became one of the most important public lawyers of the century (only Louis D. Brandeis belongs in his class) and the first African-American to serve as a Justice of the Supreme Court. Marshall was also the first Marylander appointed to the Court since Chief Justice Roger B. Taney, author of the *Dred Scott* decision, which held that

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3. Thurgood Marshall, Law and the Quest for Equality, Tyrrell Williams Memorial Lecture (1967), *in* 1967 WASH. U. L.Q. 1, 7.

4. *Id.* at 9.

5. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903).

6. *Id.* at 3-4.

7. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL 31 (1992).

Negroes were not "citizens" and had no rights under the Constitution.[8] Marshall's succession to the seat held by Justice Tom C. Clark, grandson of a Confederate soldier, symbolized the slow playing out of our national destiny.

Thurgood Marshall came from a proud and close-knit family; his was a privileged background, compared to many African-Americans at the beginning of the century. His mother, Norma Marshall, was a college-educated elementary-school teacher. His father, William Canfield Marshall, was a Pullman car porter and, later, a country-club steward at an all-white yacht club on Chesapeake Bay.[9]

From his parents he derived a sense of identity, of self-worth, of destiny. He learned from them not to be bitter in the face of racial discrimination and to judge people, white and black, by their character and their achievements. Marshall loved repeating his father's remark, "[Son, if a]nyone ever calls you [a] 'nigger,' you not only got my permission to fight him—you got my orders to fight him."[10] On a number of occasions, Marshall carried out those orders. A democratic American with a small "d," Marshall was not a respecter of rank. When he was introduced to Britain's Prince Philip, the Duke of Edinburgh asked, "Do you care to hear my opinion of lawyers?" Justice Marshall, mimicking the superior tones of the royal accent, replied with a disarming smile, "Only if you care to hear my opinion of princes."[11]

After Marshall was graduated from public high school in Baltimore, his mother pawned—and did not reclaim—her wedding and engagement rings so that he could go to college.[12] He followed his brother, Aubrey, to Lincoln University in Chester, Pennsylvania. Known as the "black Princeton" because many of its faculty were Princeton graduates, Lincoln was the nation's oldest all-black college. Among Marshall's classmates were the poet Langston Hughes, the musician Cab Calloway, and Kwame Nkrumah, the first president of Ghana.[13]

Having received his degree from Lincoln, Marshall was rebuffed in his efforts to attend the all-white University of Maryland Law School—a ten-

8. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
9. DAVIS & CLARK, *supra* note 7, at 35-36.
10. *Id.* at 40.
11. Elena Kagan, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1126-27 (1993).
12. DAVIS & CLARK, *supra* note 7, at 42.
13. *Id.* at 43.

minute trolley ride from his home.[14] Instead, he was forced to commute to Howard Law School in Washington, D.C., where he was graduated in 1933 as valedictorian of his class.[15]

It was at Howard that he met the most important mentor of his life, Charles Hamilton Houston, the law school's Harvard-educated dean. Houston impressed upon Marshall the obligation of eliminating segregation and taught him that lawyers are either "social engineers" or "parasites."[16] Many years later, Marshall conferred a high compliment upon Houston by describing him as "the engineer of it all."

Marshall declined a graduate fellowship at Harvard Law School in order to enter private practice in Baltimore.[17] At twenty-four, it was time to support himself and begin his life's work of fighting segregation. In one of his first cases after law school, working in collaboration with Houston and the National Association for the Advancement of Colored People (NAACP), he brought suit to compel the University of Maryland Law School to enroll its first African-American student.[18] Winning the case, Marshall said, was "sweet revenge."[19]

Despite this early success, Marshall's years at the Baltimore bar were difficult ones. The Depression made it virtually impossible for him to earn a living. With paying clients few and far between, he threw himself into community activities, including those of the NAACP, in order to establish his reputation as a lawyer.[20]

Houston cautioned Marshall not to neglect the development of his own private practice for the work he was doing for the NAACP on the side.[21] But the advice was to no avail. Marshall's attention and talents were increasingly captured by the cases he was handling for the NAACP. In 1935 Marshall told Houston, "Personally, I would not give up these cases here in Maryland for anything in the world, but at the same time there is no opportunity to get down to really hustling for business."[22]

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14. *Id.* at 47.

15. *Id.* at 48.

16. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 128 (1976).

17. DAVIS & CLARK, *supra* note 7, at 69.

18. *Id.* at 78.

19. *Id.* at 90.

20. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 45 (1987).

21. *Id.* at 46.

22. *Id.* at 45.

Marshall began to cast around for other sources of income. He applied to teach at Howard Law School, and in September 1936 he wrote to Houston, who by then had become the legal director of the NAACP, that "something must be done about money."[23] During the prior six months, Marshall had earned less than $200 from his NAACP work, and this was virtually his entire income for the period.[24] When Marshall asked that he be paid a monthly retainer of $150 for his NAACP work, Houston suggested that Marshall instead join him on the legal staff of the national NAACP in New York.[25] Thus, under circumstances that were hardly auspicious, Marshall moved to New York in October 1936 and began to work full-time with the NAACP[26]—an association from which history would be made. Marshall now had the momentous opportunity to ally his formidable talents with an idea whose time had come.

Houston and Marshall complemented each other in styles, strengths, and personalities. Two biographers of Marshall, Michael D. Davis and Hunter R. Clark, have written: "Houston was low-key, well organized, formal in his demeanor. . . . Thurgood was the gregarious extrovert, a backslapper who quickly won friends. Houston was smart. Marshall was shrewd. Houston was the better writer, Marshall the better speaker, lacing his conversations with humor, logic, [and] salty and streetwise language . . . ."[27] Two years after joining the NAACP staff full-time, in 1938, when Houston retired, Thurgood Marshall, at age thirty, became chief counsel of the NAACP,[28] which later would establish its legal division as a separate organization, the NAACP Legal Defense and Educational Fund, Inc.

When Houston had offered Marshall the job at the NAACP, he had warned that extensive traveling would be required and that some of the travel would be dangerous.[29] He was right on both counts. During those years—before jet planes or the interstate highway system—Marshall traveled an average of 60,000 miles a year, mostly across the South, trying cases and establishing a network of lawyers—white and black—who were willing to take civil rights cases.[30] Danger was always close at hand. He

23. *Id.*
24. TUSHNET, *supra* note 20, at 47.
25. *Id.* at 46.
26. *Id.* at 47.
27. DAVIS & CLARK, *supra* note 7, at 103.
28. *Id.* at 105.
29. *Id.* at 98.
30. *Id.* at 21, 103.

frequently was escorted by armed black guards.[31] In undertaking the defense of criminal cases throughout the South, Marshall demonstrated one of the significant components of his character: physical courage.

Marshall often told of the time when he was waiting for a train in a small Mississippi town where he had investigated a lynching. Hungry, he decided to "'put my civil rights in my back pocket and go to the back door of the kitchen [of a local restaurant] and see if I could buy a sandwich,' he recalled. 'And while I was kibitzing myself to do that, this white man came up beside me in plain clothes with a great big pistol on his hip. And he said, "Nigger boy, what are you doing here?" And I said, "Well, I'm waiting for the train to Shreveport." And he said, "There's only one more train that comes through here, and that's the four o'clock, and you'd better be on it because the sun is never going down on a live nigger in this town."'" Marshall concluded: "'Guess what? I was on that train.'"[32]

Another component of Marshall's character was his respect for intellect. He was a man who appreciated intellectuals. From the beginning of his career, he eagerly enlisted the talents of individuals more learned than practicing lawyers could hope to be. He said, "I never hesitated to pick other people's brains—brains I didn't have."[33]

The names of those members of the academic world who assisted him in the years leading up to *Brown v. Board of Education* is an honor roll of outstanding scholars, including Erwin N. Griswold, Walter Gellhorn, Charles L. Black, Jr., Louis H. Pollak, John Hope Franklin, C. Vann Woodward, Robert K. Carr, and Kenneth B. Clark. In addition, Marshall had an uncanny ability to recognize legal talent. The lawyers with whom he worked over the years included Robert L. Carter, Constance Baker Motley, and Spottswood W. Robinson, III, all of whom went on to distinguished careers as federal judges, as well as William T. Coleman, Jr. and Jack Greenberg.[34]

But Marshall's special genius lay in his ability to apply the learning of intellectuals from many fields in ways that advanced his cause dramatically. The most famous example of Marshall's practice of bringing the scholarship of others to bear upon legal argument was his use of Gunnar Myrdal's comprehensive study of the Negro in the United States, *An American*

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31. *Id.* at 107-08.

32. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1219 (1992).

33. DAVIS & CLARK, *supra* note 7, at 109.

34. *Id.* at 20-21, 28, 336.

Dilemma.[35]

Published in 1944, Myrdal's book made a stunning impression upon American policymakers. It demonstrated that segregation was not only devastating to the black minority, which lived in fear of harsh and arbitrary treatment, but was also deleterious to the white majority, which experienced a profound sense of moral guilt over the undeserved advantages and privileges that the accident of their race afforded them. By emphasizing the tension between the destructive impact of racial segregation upon black character and culture, and the nobility of America's professed ideals of liberty, justice, and equality, Myrdal's book provided essential tactical support for undermining the doctrine of "separate but equal."[36]

Marshall's reliance on Myrdal's work proved to be an inspired decision. Chief Justice Warren's unanimous opinion in *Brown v. Board of Education*[37] held that racial segregation in the public schools was unconstitutional. And the decision cited *An American Dilemma* for the proposition that separate schools are inherently unequal.[38] As Richard Kluger has written in *Simple Justice*, *Brown* was "nothing short of a reconsecration of American ideals."[39]

Surely *Brown v. Board of Education* was the crowning achievement of Marshall's career—either before his service on the Supreme Court or after. Had his legal career ended at that point, Marshall would have earned an important place in American history. Already he had done more than perhaps any other citizen—with the towering exception of Abraham Lincoln—to address the American dilemma of relations between the races. But Marshall went on to serve with distinction as a member of the United States Court of Appeals for the Second Circuit, as Solicitor General of the United States, and for twenty-four years as a Justice of the United States Supreme Court.[40]

Marshall came to prominence at a moment when the explosion of new media of communications had fueled American society's growing preoccupation with fame. Marshall's strength of character was such that he never confused fame —or, for that matter, money—with achievement. The

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35. *Id.* at 137-38. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

36. DAVIS & CLARK, *supra* note 7, at 138.

37. 347 U.S. 483 (1954).

38. *Id.* at 495 n.11.

39. KLUGER, *supra* note 16, at 710.

40. Marshall served on the Second Circuit Court of Appeals from 1961 to 1965, as Solicitor General from 1965 to 1967, and on the Supreme Court from 1967 to 1991.

desire "to live in the minds of others," as Samuel Johnson said, has always been intense, but it was most particularly television that confused celebrity with authority and made it possible for a person to become, in Daniel J. Boorstin's phrase, "known for his well-knownness," rather than for accomplishments that warrant enduring recognition.[41]

It is important to observe that Thurgood Marshall's remarkable achievements and professional eminence came, in large part, precisely *because* he had no desire to be famous for the sake of being famous. At one time, he was perhaps the most famous lawyer in the United States. His picture appeared on the cover of *Time* magazine.[42] The press called him "Mr. Civil Rights."[43] Yet Marshall's fame neither went to his head nor deflected his vision. He knew that neither fame nor fortune could provide nourishment sufficient to sustain his idealism.

Marshall's commitment was to the public profession of the law, not to the acquisition of wealth. When President Kennedy nominated him to the Court of Appeals in 1961, his salary at the Legal Defense Fund was $18,000. When President Johnson nominated him as Solicitor General in 1965, he accepted a reduction in salary, from $33,000 to $28,500, and, perhaps more importantly, relinquished the life tenure of a federal judge.[44] The financial risks he took were not insignificant ones for a man concerned with supporting properly a wife and two young sons.

If President Johnson regarded service as Solicitor General as preparation for an eventual appointment as the first black Justice of the Supreme Court, Marshall himself had no direct knowledge of Johnson's intentions. And he surely appreciated that the vagaries of history and politics might prevent Johnson from carrying through on any intention he may then have had to name him to the Court. Despite the loss of life tenure and a reduction in salary, Marshall accepted appointment as Solicitor General because his sense of responsibility to the President—and perhaps of historical destiny—outweighed his interest in personal security. Less than two years later, President Johnson, on June 13, 1967, nominated Marshall to the Supreme Court.[45] In making the historic announcement, Johnson said: "I believe it is the right thing to do, the right time to do it, the right man and

41. DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1964).
42. TIME, Sept. 19, 1955.
43. Janet Alexander Cooper, *TM*, 44 STAN. L. REV. 1229 (1992).
44. *Id.* at 244-45.
45. *Id.* at 265.

the right place."[46]

Justice Marshall brought unique qualifications to the Court. He was its only member who had specialized in the practice of criminal law, let alone defended dozens of men for murder and other capital crimes. He was its only member who had personally faced racial discrimination, let alone experienced the fear of being lynched when trying cases in small Southern towns. He was its only member who had successfully argued dozens of cases before the Court, let alone achieved landmark victories that expanded the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

These unique qualifications, which helped to define Marshall's character, often found compassionate expression in his constitutional views. As Professor Carol Steiker of Harvard Law School has said of Marshall, "He naturally understood the position of the outsider, the underdog, and the silenced, and he gave that position his powerful voice."[47] Justice Marshall carved out a special place on the Court as a resolute defender of the constitutional rights of minorities, women, criminal defendants, the poor, the disenfranchised, the powerless.

Thus, when the Court held, in *United States v. Kras*,[48] that pauper debtors had to pay a fifty-dollar fee to file for relief in bankruptcy, Marshall took angry exception to the assertion that such debtors could save up the fee by forgoing a weekly movie or giving up two packs of cigarettes each week.[49] "It may be easy for some people to think that weekly savings of less than $2 are no burden," Marshall wrote, "[b]ut no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."[50]

I do not breach a law clerk's obligation of confidentiality in recounting here a story, more than thirty years after the fact, that describes one of the most powerful lessons that Judge Marshall taught me. In drafting a factual statement in a case in which an injured longshoreman had sued the owner of a cargo ship for unseaworthiness, I quoted from the plaintiff's halting testimony at trial. Because the testimony was ungrammatical, I followed the law review practice of placing the diacritical word "[sic]" after several

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46. *Id.* at 266.

47. Carol Steiker, Speech at the Tribute to Thurgood Marshall at Faneuil Hall, Boston, Massachusetts (Feb. 22, 1993).

48. 409 U.S. 434 (1973).

49. *Id.* at 458-61 (Marshall, J., dissenting).

50. *Id.* at 460 (Marshall, J., dissenting).

sentences. Judge Marshall took me to task. The use of the word "[sic]," he said sternly, might seem a useful bit of scholarly apparatus to a precocious law clerk, but it was a refined form of insult to the unlettered plaintiff and served no decisional purpose whatsoever. What was the point of that gratuitous put-down? Of course, he was right.

Justice Marshall brought to the United States Supreme Court a special—indeed, a unique—perspective. He never forgot the mean realities of life at the street level. Alone among the Justices, as Paul Gerwirtz wrote, Justice Marshall "knew what police stations were like, what rural Southern life was like, what the streets of New York were like, what the trial courts were like, what death sentences were like, what being black in America was like—and he knew what it felt like to be at risk as a human being."[51] In the crucible of poverty, physical danger, injustice, and racial discrimination that taught him these mean realities, Marshall's character had been forged. The concerns of the outsider were the concerns of his lifetime. He was a public interest lawyer before that term came into popular use.

Conversely, Marshall understood the opportunities he could give to minority lawyers by virtue of his position as a Justice of the Supreme Court. True to his character, as he rose, he never failed to lift others. During his twenty-four years of service, Marshall chose more black and minority law clerks than any other Justice, and many of these men and women now serve on the faculties of the nation's leading law schools.

He also brought to the Court a special brand of sardonic, often ironic, wit. Marshall's humor was a serious manifestation of his personality and inseparable from his strength of character. His humor was, among other things, a coping strategy; rather than a means of denying the bleakness of reality, it was a way of dealing with it. Justice William J. Brennan, Jr., Marshall's closest friend on the Court, clearly recognized that Marshall's personal stories caused his colleagues to "confront walks of life we had never known."[52]

Thus, he would resist a law clerk's assertion that he *had* to agree to a particular position by responding, "[Boy, t]here are only two things I *have* to do: stay black and die."[53] Similarly, he delighted in telling and retelling the story of his response to a cantankerous Southern judge who asked him, "What do you want from this court?" Said Marshall, "Anything I can get, your honor."

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51. Paul Gerwitz, *Thurgood Marshall*, 101 YALE L.J. 13, 14 (1991).
52. ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 20 (1992).
53. Kagan, *supra* note 11, at 1128.

One of the most poignant aspects of Justice Marshall's character was the maturity with which he negotiated periods of profound disappointment as they alternated with periods of sublime satisfaction. For example, the years leading up to *Brown v. Board of Education* must have been ones of accelerating, if cautious, anticipation. Although he and his colleagues knew that the constitutional abolition of "separate but equal" was not inevitable, they also must have sensed that it was, at that time, more likely to occur than ever previously had been the case.

Marshall could look back on his days as head of the NAACP's legal effort and see a long string of landmark victories. In *Missouri ex rel. Gaines v. Canada*,[54] the Supreme Court ordered the integration of the University of Missouri Law School. In *Morgan v. Virginia*,[55] the Court outlawed segregation on interstate buses. In *Shelley v. Kraemer*,[56] the Court barred judicial enforcement of private restrictive covenants intended to prevent the sale of houses to blacks, Jews, or members of other minority groups. And in *Sweatt v. Painter*[57] and *McLaurin v. Oklahoma State Regents*,[58] the Court began the process of chipping away at the doctrine of "separate but equal."

Although Marshall appreciated that *Brown v. Board of Education* was a decision of surpassing historic significance, he often stated that the decision in *Smith v. Allwright*,[59] which held unconstitutional the Democratic white primary in Texas, addressed a related and perhaps equally important issue: the right to vote. Because of his deep commitment to the democratic process, Marshall placed a high value on securing for blacks the right to vote. Although the Fifteenth Amendment had given black males the right to vote in 1870,[60] no Southern blacks had in fact been permitted to vote before 1920, and as late as the 1940 presidential election, only 2.5 percent of eligible black voters voted in the South.[61] When poll taxes, literacy tests, and grandfather clauses did not stop blacks from voting, threats and other forms of intimidation usually did. "Without the ballot," Marshall said, "you have no citizenship, no status, no power in this country."

Marshall's efforts, and those of William H. Hastie (who would later

54. 305 U.S. 337 (1938).
55. 328 U.S. 373 (1946).
56. 334 U.S. 1 (1948).
57. 339 U.S. 629 (1950).
58. 339 U.S. 637 (1950).
59. 321 U.S. 649 (1944).
60. U.S. CONST. amend. XV.
61. DAVIS & CLARK, *supra* note 7, at 112.

become the first African-American appointed to a federal appeals court),[62] to secure the voting rights of blacks forever changed the profile of city halls, state capitols, and governors' mansions. By 1993, more than 8,000 African-Americans held elected positions in the United States—including those of Governor, United States Senator, and United States Representative—compared with approximately 1,500 in 1970.

On May 17, 1954, Marshall experienced the rare satisfaction of prevailing in perhaps the most momentous case of the century. However, the heady exhilaration of winning *Brown* was followed, during the next several years, by the discouraging necessity of litigating the meaning of the Court's pronouncement that its ruling be effectuated "with all deliberate speed."[63] The massive resistance mounted by large cities and rural communities alike, with the demagogic support of Southern governors, was tremendously dispiriting.[64]

A similar pattern occurred in Justice Marshall's tenure on the Supreme Court. The Court that Marshall joined, it seems clear in retrospect, was an especially distinguished one. During his early years, he served with colleagues who were his intellectual and professional equals. The Court's senior members were among the most respected justices in American history—Earl Warren, Hugo L. Black, William O. Douglas, John Marshall Harlan, and William J. Brennan, Jr. Those were the years in which Marshall was able to take gratification from his unparalleled capacity for craftsmanship. Like another great judge, Learned Hand, he had long ago learned that "it is as craftsmen that we get our satisfactions and our pay."[65] Those were also the years in which many of the views he had long held became the law of the land. Those were his halcyon days.

That sense of professional gratification changed with the election of President Nixon in 1968 and the appointment in the years that followed of a number of Justices—including two Chief Justices, Warren E. Burger and William H. Rehnquist—whose views were opposed to Marshall's in virtually every area that mattered to him most. As the membership of the Court became more conservative, he found himself increasingly in dissent, especially on issues such as a woman's right to privacy, which he supported, and capital punishment, which he opposed.

Still, with the steady purpose of a man of character devoted to causes he

62. *Id.* at 224.
63. Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955).
64. KLUGER, *supra* note 16, at 710-11.
65. LEARNED HAND, THE BILL OF RIGHTS 77 (1958).

regarded as proper in principle, he persevered. Following the appointments of Antonin Scalia in 1986 and Anthony Kennedy in 1988, Marshall's despair at the direction the Court was taking deepened. It became more painful with the retirement in 1990 of Justice Brennan, Marshall's closest ally and dearest friend.

Gradually, Marshall had become accustomed to—but not contented with—writing dissents.[66] He often said that the first question he asked prospective law clerks was whether they would be satisfied with writing dissents. "I agree with that old saying," he said, "that 'I love peace but I adore a riot.' You've got to be angry to write a dissent."

Marshall saw the unanimous and resounding decisions such as *Brown* give way to innumerable five-to-four and six-to-three decisions, in which he often was in the minority. For example, the Court's consensus on school integration broke down in *Milliken v. Bradley*,[67] which rejected, by a vote of five-to-four, a multidistrict integration plan that covered not only Detroit but its predominantly white suburban communities as well. In a compelling dissent, Marshall argued that "the Court today takes a giant step backwards. . . . Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together."[68] He continued:

> Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law.[69]

In *City of Mobile v. Bolton*,[70] the Court upheld, by a vote of six-to-three, an at-large system for electing city commissioners—a system that diluted black voting strength and had the practical result of electing only whites. Marshall dissented, arguing that the discriminatory impact alone of

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66. DAVIS & CLARK, *supra* note 7, at 7.
67. 418 U.S. 717 (1974).
68. *Id.* at 782, 783 (Marshall, J., dissenting).
69. *Id.* at 814 (Marshall, J., dissenting).
70. 446 U.S. 55 (1980).

the new voting system was sufficient to violate the Constitution.[71] He warned: "If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination,' . . . it cannot expect the victims of discrimination to respect political channels of seeking redress."[72]

Marshall's deepest convictions were aroused in cases involving the constitutionality of capital punishment. In *Gregg v. Georgia*,[73] the Court held, by a vote of seven-to-two, that the death penalty did not constitute cruel and unusual punishment under the Eighth Amendment. Only Justice Brennan shared Marshall's view that the death penalty was cruel and unusual punishment per se and, therefore, always unconstitutional.[74] In opinion after opinion, Marshall noted that death is irrevocable[75] and makes rehabilitation impossible.[76] The question, he said, "is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment."[77] He could find no such evidence. He wrote, "At times a cry is heard that morality requires vengeance to evidence society's abhorrence of [a criminal] act. But the Eighth Amendment is our insulation from our baser selves."[78]

The rise of "reverse discrimination" cases was hardly less frustrating. When the Court issued its decision in *Regents of the University of California v. Bakke*,[79] permitting a state university to consider race among other factors in making admissions decisions, Marshall concurred in the result; but he did not accept that part of the Court's reasoning that held unconstitutional a separate admissions program for disadvantaged minorities.[80] He wrote:

> [I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.[81]

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71. *Id.* at 103-41 (Marshall, J., dissenting).
72. *Id.* at 141 (citation omitted).
73. 428 U.S. 153 (1976).
74. *Id.* at 231 (Marshall, J., dissenting); *id.* at 230-31 (Brennan, J., dissenting).
75. Furman v. Georgia, 408 U.S. 238, 346 (1972) (Marshall, J., concurring); Holtzman v. Schlesinger, 414 U.S. 1316, 1319 (1973).
76. *Furman*, 408 U.S. at 346 (Marshall, J., concurring).
77. *Id.* at 346-47 (Marshall, J., concurring).
78. *Id.* at 344-45 (Marshall, J., concurring).
79. 438 U.S. 265 (1978).
80. *Id.* at 387 (Marshall, J., concurring in part and dissenting in part).
81. *Id.*

The acuteness of Marshall's pain and frustration comes through poignantly in his opinion in *Bakke*. Marshall continued:

> The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.[82]

More than sixty years after Marshall had begun his legal career, that statement remains, alas, painfully true.

One notes with aching sadness how large a proportion of Justice Marshall's twenty-four years on the Supreme Court was devoted to dissenting on the issues of greatest moment to him. Only the support of Justice Brennan consistently provided him ideological comfort—and the hopeful glimmer of eventual vindication by history—against the wrong-headed direction he believed the Court was taking.

In a moving tribute to Justice Marshall upon his retirement, Justice Sandra Day O'Connor described once asking him how he avoided being despondent, given all the injustices he had witnessed during his lifetime.[83] He told her the story of how he and Charles Houston had traveled to Loudon County, Virginia, to represent a black man accused of murdering a wealthy white woman and her white maid.[84] After Marshall and Houston unsuccessfully challenged the exclusion of blacks from the jury, the man was convicted of murder by the all-white jury and sentenced to life in prison.[85] "'You know something is wrong with the government's case,'" Justice Marshall told O'Connor, "'when a Negro only gets life for murdering a white woman.'"[86] Marshall added, "'I just don't believe that guy got a fair shake. But what are you going to do? . . . There are only two choices in life: stop and go on. You tell me, what would you pick?'"[87]

He once told a reunion of his law clerks, in a moment I will remember for the rest of my life,

> [T]he goal of a true democracy such as ours, explained simply, is that any baby born in these United States, even if he is born to the blackest, most

82. *Bakke*, 438 U.S. at 400-01 (Marshall, J., concurring in part and dissenting in part).
83. O'Connor, *supra* note 32, at 1219.
84. *Id.* at 1219-20.
85. *Id.* at 1220.
86. *Id.*
87. *Id.*

> illiterate, most unprivileged Negro in Mississippi, is, merely by being born and drawing his first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller.
>
> Of course it's not true. Of course it never will be true. But I challenge anybody to tell me that it isn't the type of goal we should try to get to as fast as we can.[88]

His remarks reflected his sober skepticism, held until the very end of his life, about whether American society was yet prepared to grant equal rights and equal opportunity to minorities. While he retained a deep faith in the guarantees of the Constitution and in the ideals of the Declaration of Independence, he also held serious doubts about the nation's commitment to attaining those guarantees and ideals.

In 1987, as the nation was celebrating the bicentennial of the United States Constitution, Justice Marshall spoke to the annual seminar of the San Francisco Patent and Trademark Law Association.[89] He reminded his audience that the Constitution "was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today."[90] He bluntly addressed the hypocrisy of the first three words of the preamble, "We the People."[91] The compromise in Philadelphia, he said, created an unprincipled "contradiction between guaranteeing liberty and justice to all, and denying both to Negroes."[92] Moreover, "[w]omen did not gain the right to vote for over a hundred and thirty years."[93]

Although he refused to celebrate the wisdom and sense of justice of the Framers, Justice Marshall praised the evolutionary manner in which the Constitution has remained a living document, especially by virtue of the adoption of the Fourteenth Amendment.[94] He pointed out the striking role that legal principles have played in "determining the condition of Negroes" who "were enslaved by law, emancipated by law, disenfranchised and

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88. Thurgood Marshall, Address at the Annual Second Circuit Judicial Conference (Sept. 5, 1986), *in* 115 F.R.D. 349, 354 (1987).

89. Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, Address at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *in* 101 HARV. L. REV. 1 (1987) [hereinafter Reflections].

90. *Id.* at 2.

91. *Id.* at 4-5.

92. *Id.* at 4.

93. *Id.* at 2.

94. *Id.* at 2, 5.

segregated by law; and, finally, they have begun to win equality by law."[95] The progress that blacks have achieved was not the result of the Founding Fathers, Marshall said, but of those men and women who came later. "'We the People' no longer enslave, but the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."[96] For himself, Marshall said, "I plan to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights."[97]

These sober reflections were doubtless not what his audience had expected, but Marshall's candor reflected the experience of a lifetime, as well as his unyielding faith that the Constitution could be made into a better document than the one framed by the Founding Fathers. By calling attention to the Constitution's defects at a time of often uncritical celebration of its virtues, Marshall made a case that virtually no contemporary had thought to make—perhaps because none possessed the strength of character that he did, and none had reflected upon it so profoundly as he had.

As the end of his life drew near, Justice Marshall's faith in the power of the Court to achieve racial and economic justice continued to falter. On July 4, 1992, six months before his death, Justice Marshall was given the Philadelphia Liberty Medal, which carried a prize of $100,000, in recognition of his contributions in the pursuit of liberty of conscience and freedom from oppression and deprivation.[98] His speech that day, delivered at Independence Hall, was a ringing assertion and reaffirmation of the views of a lifetime:

> I wish I could say that racism and prejudice were only distant memories . . . and that liberty and equality were just around the bend. I wish I could say that America has come to appreciate diversity and to see and accept similarity.
>
> But as I look around, I see not a nation of unity but of division—Afro and white, indigenous and immigrant, rich and poor, educated and illiterate. Even many educated whites and successful Negroes have given up on integration and lost hope in equality. . . .
>
> We cannot play ostrich. Democracy cannot flourish amid fear. Liberty

95. Reflections, *supra* note 89, at 5.

96. *Id.*

97. *Id.*

98. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 452 (1993).

> cannot bloom amid hate. Justice cannot take root amid rage. . . . We must go against the prevailing wind. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred and the mistrust. We must dissent from a government that has left its young without jobs, education, or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.[99]

With his health failing, Justice Marshall's last days were sad ones. Yet Marshall's tenacity and his determination to defend his view of the Constitution—especially on such issues as capital punishment, privacy and abortion, and the rights of minorities and the poor—did not falter. He frequently told friends, "I was appointed for life, and I intend to serve out my term."[100] But advancing age finally caused him to step down in June of 1991. When asked how he wanted to be remembered, Marshall said, "He did the best he could with what he had."[101]

Justice Marshall died on January 24, 1993. He was eighty-four. The public response to his death—measured most dramatically by the eighteen thousand persons, of all races and all backgrounds, who paid their final respects to him in the Great Hall of the Supreme Court—is testimony to the depth of his impact on the lives of ordinary Americans. At Justice Marshall's funeral, held in Washington's National Cathedral, it was, to my mind, William T. Coleman, Jr. who best captured Marshall's legacy. "History will ultimately record," Coleman said, "that Mr. Justice Marshall gave the cloth and linen to the work that Lincoln's untimely death left undone."[102]

As a result of his historic achievements, Thurgood Marshall changed the face of America. Although the changes have not been so swift in recent years as they were at the height of Marshall's career, progress will continue and the direction is certain. In the end, that progress toward the achievement of equality for all will be Thurgood Marshall's greatest legacy.

Thurgood Marshall's life was a unique conjunction of person and place, of talent and destiny. He was an American original, a man of character whose contributions to the Republic redeemed its most cherished values.

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99. *Id.* at 453-54.

100. *See* DAVIS & CLARK, *supra* note 7, at 3.

101. ROWAN, *supra* note 98, at 392.

102. Stephen Labalon, *Thousands Fill Cathedral to Pay Tribute to Marshall*, N.Y. TIMES, Jan. 29, 1993, at A16.