

January 1, 2011

Thurgood Marshall: The Writer

Anna Hemingway

Starla J. Williams

Jennifer Lear

Ann Fruth

THURGOOD MARSHALL: THE WRITER

ANNA HEMINGWAY, STARLA WILLIAMS, JENNIFER LEAR, ANN FRUTH*

I. INTRODUCTION

Thurgood Marshall took on many roles as a servant of the law. He worked as an advocate, a social activist, a legal scholar, and a Supreme Court Justice.¹ Although his duties and obligations changed as each post dictated, one professional commitment remained constant throughout his legal career: Marshall was a writer. He wrote to educate, persuade and provoke readers, and it is through his writings that all Americans' lives have been affected.² This article examines Marshall's writings as a practitioner, a scholar, and a jurist.³

Part II reviews Marshall's legal career, focusing on his

*Anna Hemingway is an Associate Professor of Law and Director of Legal Methods, Starla Williams is an Assistant Professor of Legal Methods, Jennifer Lear is a Visiting Professor of Legal Methods, and Ann Fruth is an Associate Professor of Legal Methods and Director of Academic Support. All the authors teach at Widener University School of Law. Many thanks to Professors Robert Power, Michael Dimino, Christopher Robinette, and Dionne Anthon for their insightful and invaluable comments. We also thank our research assistants, Maria Anastasopoulos, Joseph Holaska, and Jennifer Smith for their preliminary help, and Tricia Lontz and Casey Johnson-Welsh, for the vital contributions they made throughout the writing of this paper.

1. Marshall graduated from Howard Law School in 1933 and then returned to his native Baltimore to open his own law firm. After three years of private practice, Marshall joined the NAACP's national office in New York as assistant special counsel and later became the chief of the NAACP Legal Defense Fund. Juan Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990, available at http://www.thurgoodmarshall.com/speeches/tmlaw_article.htm. Some of Marshall's earliest scholarly work includes: *Negro Discrimination and the Need for Federal Action*, 2 LAW GUILD REV. 21 (1942), co-authored with William H. Hastie, *Mr. Justice Murphy and Civil Rights*, 48 MICH. L. REV. 745 (1950). In addition, in 1960 Marshall traveled to Kenya and England, where he worked for three months to draft a constitution for the soon-to-be independent republic of Kenya. Williams, *Marshall's Law*, WASH. POST, Jan. 7, 1990. Marshall was ultimately nominated to the Supreme Court in 1967. *Id.*

2. See generally CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 3-21 (1993).

3. This article was inspired by a presentation by the authors at Widener University School of Law. The presentation celebrated the fifty-fifth anniversary of Thurgood Marshall's oral argument in *Brown v. Board of Education (Brown II)*.

upbringing and education. It considers Marshall's early writings, examining a memo he wrote from Texas in 1941 while searching for the right plaintiff to challenge the state's all-white primary elections.⁴ Marshall's zealous search for a plaintiff resulted in *Smith v. Allwright*, the U.S. Supreme Court case declaring all-white primaries unconstitutional.⁵ Part II also examines two letters he wrote during the trial of *Lyons v. Oklahoma*, where Marshall represented an African-American who was beaten until he confessed to a murder that he did not commit.⁶

Part III takes an in-depth look at the appellate brief Marshall filed in *Brown v. Board of Education II*,⁷ the case in which the Court ordered public schools to desegregate "with all deliberate speed."⁸ He used classic legal writing techniques, such as leading with his strongest argument and using favorable empirical evidence, to sway the Court on the proper process for desegregation. This Part of the Article explains his use of persuasive writing techniques.

Part IV considers Marshall's work as a scholar and examines his 1987 Harvard Law Review article "*Commentary: Reflections on the Bicentennial of the United States Constitution*,"⁹ which transcribed a speech he delivered at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii.¹⁰ In the article, Marshall was highly critical of the overly celebratory tone of the bicentennial of the U.S. Constitution—a

4. Memorandum from Thurgood Marshall on Saving the Race to A.P. Tureaud Law Office (Nov. 17, 1947) (on file with the Library of Congress), <http://www.loc.gov/exhibits/odyssey/archive/08/0816001r.jpg> [hereinafter *Memorandum*]; JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 108–10 (Random House 1998); see also Donald K. Hill, *Social Separation in America: Thurgood Marshall and the Texas Connections*, 28 T. MARSHALL L. REV. 177, 190 (2003).

5. *Smith v. Allwright*, 321 U.S. 649, 662 (1944); see also WILLIAMS, *supra* note 4, at 111.

6. *Lyons v. Oklahoma*, 322 U.S. 596 (1944); Stephen Smith & Kate Ellis, *Thurgood Marshall: Before the Court*, AMERICAN RADIO WORKS, (May 2004), <http://americanradioworks.publicradio.org/features/marshall/>; WILLIAMS, *supra* note 4, at 114–15.

7. Brief for Appellants in Nos. 1, 2 and 3 and for Respondents in No. 5 on Further Reargument *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), 1954 WL 72725.

8. *Brown*, 349 U.S. at 301. Marshall was actually disappointed in the ruling because it did not set a definite deadline. WILLIAMS, *supra* note 4, at 237–39.

9. Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

10. *Id.* at 5.

document he believed was flawed from the start because of its commitment to preserve slavery.¹¹ Through this writing, Marshall's legacy as a moral activist is examined.

Part V reviews Marshall's final opinion as a Supreme Court Justice—the dissent penned in *Payne v. Tennessee*.¹² That case overruled two Supreme Court opinions and held that victim-impact statements were admissible in the sentencing phase of death-penalty cases.¹³ In a scathing dissent, Marshall criticized the Court's disregard for *stare decisis*.¹⁴ His dissent solidified his commitment to fairness and equality for all in the courts. By examining Marshall's legal, scholarly, and judicial writings, lawyers, academics, and students can increase their knowledge of how the written word so profoundly impacts society—from changing the make-up of our schools to shaping discourse about Supreme Court nominations.

II. PROFILE ONE: CAREER AND EARLY WRITINGS

A. *Marshall's Early Years*

Thurgood Marshall was born in West Baltimore, Maryland, on July 2, 1908, to Norma Arica Williams and William Canifield Marshall.¹⁵ He was named after his uncle, Thoroughgood.¹⁶ The name Thoroughgood was a variation of the name held by his paternal grandfather, Thorney Good, a former slave.¹⁷ At age six, Marshall had his mother change his name on his birth certificate from Thoroughgood to Thurgood because, Marshall said, "[i]t was too damn long."¹⁸ Even at that early age, it appears he had a sense of the importance of writing concisely, a characteristic that would

11. *Id.* at 1–2.

12. *Payne v. Tennessee*, 501 U.S. 808, 844–56 (1991).

13. *Payne*, 501 U.S. at 827.

14. *Id.* at 845.

15. WILLIAMS, *supra* note 4, at 19–22; CHARLES J. OGLETREE, JR., REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION: ALL DELIBERATE SPEED 135 (2004); *see also* Michael J. Friedman, *Justice For All: The Legacy of Thurgood Marshall*, U.S. DEP'T OF STATE, BUREAU OF INT'L INFO. PROGRAMS 1 (Jan. 2007), <http://www.america.gov/media/pdf/books/marshall.pdf>.

16. WILLIAMS, *supra* note 4, at 22.

17. *Id.* at 18, 22. Marshall's other grandfather, Isaiah Williams, joined the U.S. military during the civil war to fight for the Union. *Id.* at 17.

18. *Id.* at 26.

serve him well in his future career choice.

Marshall attended Frederick Douglass High School in Baltimore, Maryland.¹⁹ His road to graduation was not a simple one. The picture often drawn of Marshall as a youth is that of a boy walking with comic books shoved in his backpack, noisily chewing gum.²⁰ In school, he was often loud, creating disturbances.²¹ Marshall's grade-school principal would punish him by sending him down to the basement with a copy of the U.S. Constitution.²² He would not be permitted to return to class until he memorized a section of it.²³ Marshall later said that he knew the whole Constitution before he left school.²⁴ Ironically, it was the punishment for his trouble-making ways that laid the groundwork for his life's work.

After Marshall finished high school in 1925, he was determined to go to college, but at that time there were not many post-secondary opportunities for Black men.²⁵ In the South, Black men were not accepted in white colleges, and in other parts of the country, traditionally white colleges accepted only a few Black students.²⁶ Although his choices were limited in the North, Marshall ended up attending and graduating from Lincoln University in Pennsylvania, the nation's oldest all-Black college.²⁷

His choice of law schools in Maryland was similarly limited by segregation policies. With restricted options available to Black men, Marshall attended Howard Law School in Washington,

19. WILLIAMS, *supra* note 4, at 34; *see also* Lucius J. Barker, *Thurgood Marshall, the Law, and the System: Tenets of an Enduring Legacy*, 44 STAN. L. REV. 1237, 1238 (1992); Friedman, *supra* note 15, at 19.

20. WILLIAMS, *supra* note 4, at 28–29, 34–35 (describing recollections of Marshall's classmates regarding his behavior in school).

21. *Id.*; *see also* ROWAN, *supra* note 2, at 35.

22. WILLIAMS, *supra* note 4, at 35; *see also* ROWAN, *supra* note 2, at 35; Barker, *supra* note 19, at 1238.

23. WILLIAMS, *supra* note 4, at 35; *see also* ROWAN, *supra* note 2, at 35.

24. WILLIAMS, *supra* note 4, at 35; *see also* Barker, *supra* note 19, at 1239.

25. WILLIAMS, *supra* note 4, at 39–40; *see also* ROWAN, *supra* note 2, at 42; Friedman, *supra* note 15, at 1, 19.

26. Friedman, *supra* note 15, at 1; Smith & Ellis, *supra* note 6; *see also* WILLIAMS, *supra* note 4, at 52.

27. WILLIAMS, *supra* note 4, at 40–41, 51; *see also* James O. Freedman, *The Tyrrell Williams Memorial Lecture: Thurgood Marshall: Man of Character*, 72 WASH. U. L.Q. 1487, 1490 (1994). Lincoln University was considered the Black Princeton at that time. WILLIAMS, *supra* note 4, at 41.

D.C.²⁸ In 1933, he graduated at the top of his class and returned to Baltimore, Maryland, to start his own law practice.²⁹ Within a very short time practicing law, he became known as the “freebie lawyer,” because he would take on cases to help people who were not financially secure.³⁰ Although he ended up in debt, his reputation grew and the NAACP became interested in working with him.³¹

B. Marshall's Early Cases and Writings

One of the first cases he took working for the NAACP was the case of Donald Gaines Murray, an African-American student seeking admission to the University of Maryland School of Law.³² On January 24, 1933, Mr. Murray filed his application to attend the school, but it was rejected on account of his race.³³ The rejection letter stated, “the University does not accept Negro students.”³⁴ In correspondence with Murray, the University referred him to Howard University School of Law, noting its duty to assist him in studying elsewhere—even at an out-of-state law school.³⁵ Murray appealed his rejection to the Board of Regents, but was still refused admittance.³⁶

At age twenty-seven, Marshall and Charles Hamilton Houston, the dean of Howard University School of Law and Marshall's mentor, represented Murray in the lawsuit against the University of Maryland.³⁷ This case went to the Supreme Court

28. WILLIAMS, *supra* note 4, at 52–53.

29. WILLIAMS, *supra* note 4, at 59, 61–62; Freedman, *supra* note 27, at 1491. Marshall was so discouraged by the segregationist policy of the University of Maryland School of Law that he never applied. WILLIAMS, *supra* note 4, at 52–53.

30. WILLIAMS, *supra* note 4, at 62–63; *see also* Alfred A. Slocum, “I Dissent”: A Tribute to Justice Thurgood Marshall, 45 RUTGERS L. REV. 889, 894 (1993).

31. WILLIAMS, *supra* note 4, at 69, 82–84.

32. *Id.* at 76; *see also* Freedman, *supra* note 27, at 1491.

33. WILLIAMS, *supra* note 4, at 76; *see also* Donald Gaines Murray and the Integration of the University of Maryland School of Law, UNIV. OF MD. SCH. OF LAW, <http://www.law.umaryland.edu/marshall/specialcollections/murray/> (last visited Aug. 22, 2010) [hereinafter *Murray*].

34. Transcript of Record at 32, *Pearson v. Murray*, 182 A. 590 (1936) (No. 53), available at <http://mdarchives.us/megafile/msa/speccol/sc2200/sc2221/000024/000004/000005/pdf/t2088-1935no53.pdf>.

35. *Id.*; WILLIAMS, *supra* note 4, at 76–77.

36. WILLIAMS, *supra* note 4, at 76; *see also* *Murray*, *supra* note 33.

37. WILLIAMS, *supra* note 4, at 56, 77; Friedman, *supra* note 15, at 19; *see also* *Murray*, *supra* note 33.

and successfully challenged Maryland's failure to provide Blacks an educational opportunity that was provided to whites.³⁸ Marshall argued that Maryland failed to provide a separate but equal education for Murray because it did not have a law school for Blacks in the state.³⁹ The Court agreed.⁴⁰ During the case, Marshall stated "since the state of Maryland had not provided a comparable law school for blacks . . . Murray should be allowed to attend the white university. What's at stake here is more than the rights of my client. It's the moral commitment stated in our country's creed."⁴¹ Appealing to those morals and to the Constitution he knew so well, Marshall's arguments in this early case helped set him on his path toward ensuring equality for all.

This was the first major civil rights case Marshall won, and it helped him earn the nickname of Mr. Civil Rights.⁴² A few years earlier, Marshall himself was unable to attend law school in his state because of Maryland's policy, so this was an especially sweet victory for him.⁴³ Of course this case was just the beginning of his pioneering and crusading work as an attorney. He went on to win twenty-nine of the thirty-two Supreme Court cases he argued.⁴⁴

In 1941, Marshall was working on *Smith v. Allwright*,⁴⁵ a case involving Texas convening all-white primaries to prevent Blacks from voting.⁴⁶ Marshall worked on this case from its inception until its end when the Supreme Court ruled that all-white primaries were unconstitutional.⁴⁷ Early on in the case, Marshall wrote a letter chronicling some of the challenges he was encountering to A.P. Tureaud, an attorney also working on Texas voting cases. In this letter, dated November 17, 1941, Marshall wrote, "left New

38. WILLIAMS, *supra* note 4, at 77.

39. WILLIAMS, *supra* note 4, at 77; *see also* Friedman, *supra* note 15, at 4.

40. WILLIAMS, *supra* note 4, at 77; *see also* Friedman, *supra* note 15, at 4. Murray did attend and graduate from the University of Maryland School of Law. *Murray*, *supra* note 33.

41. *Murray*, *supra* note 33.

42. WILLIAMS, *supra* note 4, at 78, 272; Freedman, *supra* note 27, at 1495.

43. WILLIAMS, *supra* note 4, at 52, 76, 78; *see also* Freedman, *supra* note 27, at 1491 (Winning the case, Marshall said was "sweet revenge.").

44. Mark Tushnet, *A Tribute to Justice Thurgood Marshall: Lawyer Thurgood Marshall*, 44 STAN. L. REV. 1277, 1277 (1992); *see also* Slocum, *supra* note 30, at 898; Friedman, *supra* note 15, at 4.

45. *Smith v. Allwright*, 321 U.S. 649 (1944).

46. WILLIAMS, *supra* note 4, at 108.

47. *Smith*, 321 U.S. at 664 (The Court concluded, "it endorses, adopts and enforces the discrimination against Negroes"); *see also* WILLIAMS, *supra* note 4, at 111.

York October 31 for two days in Washington with enough clothes for one day and a tooth brush - still on the road.”⁴⁸ He was on the road looking for a plaintiff, someone to bring the voting restriction to court, and he was having considerable difficulty finding the right person.⁴⁹ Marshall continued:

In Houston talked with Dr. L.E. Smith who is alleged to have attempted to vote at the right time. Checked his story as best I could. Started drafting complaint. Davis’ stenographer can’t type worth a dime. Tried for a day to get a stenographer who specialized in typing – no such animal available. Called Carter Wesley and drafted his secretary who really can type.⁵⁰

This memo evokes a very powerful image of young Marshall. In it, he does not sound like the distinguished orator speaking at a podium or the illustrious Justice sitting on the bench. Rather, this memo shows Marshall as an attorney, facing all of the frustrations so many attorneys face on a day-to-day basis when doing their jobs. This memo also displays his personality. Marshall was clearly quite funny. With all the strife and all the frustrations he was facing, he still kept a good sense of humor about traveling and being unable to find a stenographer who could type.

In addition to writing memos, he was also a prolific letter writer during the 1940s. Throughout the *Lyons v. Oklahoma* trial, a case involving a Black man accused of killing a couple and their young child and then burning down their house, he wrote several letters to the NAACP updating them on his progress.⁵¹ In *Lyons*, a convict in a state prison confessed to the crime soon after it occurred.⁵² Regardless of this confession, for political reasons, the Governor started an investigation in search of a suspect.⁵³ Police found and questioned Lyons about the crime and beat him until he made a confession.⁵⁴ The jury found Lyons guilty, but imposed

48. *Memorandum*, *supra* note 4.

49. WILLIAMS, *supra* note 4, at 110; Hill, *supra* note 4, at 190.

50. *Memorandum*, *supra* note 4.

51. WILLIAMS, *supra* note 4, at 113–118; Smith & Ellis, *supra* note 6; *see* Tushnet, *supra* note 44, at 1278–81.

52. WILLIAMS, *supra* note 4, at 114; *see also* Tushnet, *supra* note 44, at 1279.

53. WILLIAMS, *supra* note 4, at 114–15, 118–19.

54. *Id.* at 114–15.

only a life sentence on him instead of the death penalty.⁵⁵ For an innocent Black man being tried in a Southern court for killing white people, a life sentence was a victory.⁵⁶

In one of his letters to the NAACP, Marshall wrote:

Reached Oklahoma City at 8:10 A.M. and caught 12:30 bus for Hugo. Arrived here at 6:30 Sunday night. Worked on preparation of the case Sunday night. Started trial yesterday morning.

At least a thousand white and Negro people in Court House. Court room jammed. Everyone here to see trial and also to see a certain Negro lawyer-first time in this court-so sayeth the bailiff.

Jury is lousy. State investigator and County prosecutor busy around town stirring up prejudice, etc. No chance of winning here. Will keep record straight for appeal.

Only point we will have in our favor is use of confession secured after force and violence was used.

Trial will last at least four days. Went over to Idabell last night with Dunjee who has been with us at the counsel table. Raised \$120 for the case last night in Idabell from that town and others in this section. If nothing happens-will write in detail later in time for press release.⁵⁷

That letter provides insight into Marshall's reputation as an attorney. When people of different races heard he was coming to town, they wanted to see him.⁵⁸ Although in the early 1940s his name was not established enough that the public would recognize it in Oklahoma, what citizens did know was that Marshall was a lawyer from New York and he was a Black-American.⁵⁹ That was a combination the community was simply not accustomed to.⁶⁰

He also wrote several other letters to the NAACP during the trial.⁶¹ In those letters he recounted what was happening during

55. *Id.* at 117-18; *see also* Tushnet, *supra* note 44, at 1280.

56. WILLIAMS, *supra* note 4, at 59, 118; *see* Tushnet, *supra* note 44, at 1277-78.

57. Smith & Ellis, *supra* note 6.

58. WILLIAMS, *supra* note 4, at 116; *see* Tushnet, *supra* note 44, at 1279-80.

59. WILLIAMS, *supra* note 4, at 116; *see* Tushnet, *supra* note 44, at 1279-80.

60. WILLIAMS, *supra* note 4, at 116; *see* Tushnet, *supra* note 44, at 1280.

61. WILLIAMS, *supra* note 4, at 116-18; Smith & Ellis, *supra* note 6.

the case. In one, Marshall wrote:

One thing this trial accomplished – the good citizens of that area have been given a lesson in Constitutional Law and the rights of Negroes which they won't forget for some time. Law enforcement officers now know that when they beat a Negro up they might have to answer for it on the witness stand. All of the white people in the Court room passed some mighty nasty comments after the officers lied on the stand. Several told the officers what they thought of them out on the halls. I did all of the cross-examining of the officers because we figured they would resent being questioned by a Negro and would get angry and this would help us. It worked perfect.⁶²

That passage provides a sense of what a strategist Marshall was in court. One of the reasons he did the cross-examinations was to anger the officers and to provoke them into saying things they would not have said if they were calm.⁶³ His plan worked. Not only did it upset the officers, but what the officers said upset the audience and upset the jury. That is exactly what Marshall wanted to accomplish.⁶⁴ The strategy not only helped his client's case, which was his primary obligation as an attorney, but it also set him up to do some real fund-raising for the NAACP.⁶⁵ For Marshall, the case gave the NAACP some needed funds to continue fighting for equal rights.

C. *Marshall's Career Path*

Throughout the 1940s and 1950s, Marshall was acting as chief legal counsel for NAACP.⁶⁶ During this time as an advocate, his personal life was not without its challenges.⁶⁷ He was married twice. First, to Vivian Burey from 1929 until her death in 1955.⁶⁸ Unfortunately, she suffered several miscarriages and they had no

62. Smith & Ellis, *supra* note 6.

63. Tushnet, *supra* note 44, at 1280.

64. *Id.* at 1280–81; WILLIAMS, *supra* note 4, at 117.

65. WILLIAMS, *supra* note 4, at 115, 118. The Lyons case made it to the U.S. Supreme Court and the conviction was affirmed. *Id.* at 118. In 1965, the Governor pardoned Lyons. ROWAN, *supra* note 2, at 97.

66. Barker, *supra* note 19, at 1240; *see also* Friedman, *supra* note 15, at 19.

67. WILLIAMS, *supra* note 4, at 163.

68. *Id.* at 50, 236; Friedman, *supra* note 15, at 19.

children.⁶⁹ She died at age forty-four from lung cancer.⁷⁰ Shortly after her death, he was remarried to a woman from Hawaii named Cissy Suyat.⁷¹

He was married to her until his death in 1993.⁷² They had two children, Thurgood Marshall, Jr. and John W. Marshall.⁷³ On child raising, Cissy quoted Marshall as saying, "I am not ever going to punish them for something that I did in my lifetime."⁷⁴ According to Cissy, "he never punished them because he had done everything."⁷⁵

In 1961, Marshall traded his lawyer's briefs for the judge's gavel.⁷⁶ From 1961 to 1965, Marshall served as a judge on the U.S. Court of Appeals for the Second Circuit.⁷⁷ He was appointed by President Kennedy, but not without first facing opposition.⁷⁸ His confirmation process went on for almost a year, during which time his credentials and his knowledge of non-civil rights law were questioned.⁷⁹

Even so, as a Second Circuit judge, he wrote over one hundred opinions and rulings,⁸⁰ including cases concerning the rights of immigrants, limiting government intrusion in illegal search and seizure cases, right to privacy issues, and on many other issues concerning individual's rights.⁸¹ None of his majority opinions was ever reversed by the Supreme Court.⁸²

69. WILLIAMS, *supra* note 4, at 212.

70. *Id.* at 235; Smith & Ellis, *supra* note 6.

71. WILLIAMS, *supra* note 4, at 242; Smith & Ellis, *supra* note 6. Cecelia Suyat, nicknamed "Cissy," was a secretary he met working for the NAACP. WILLIAMS, *supra* note 4, at 242.

72. WILLIAMS, *supra* note 4, at 395–96; *see also* Friedman, *supra* note 15, at 19.

73. WILLIAMS, *supra* note 4, at 243, 272. Thurgood Jr. is an attorney in Washington, D.C. He formerly served as Assistant to the President and as a Cabinet Secretary under Bill Clinton. *Thurgood Marshall Jr.*, BINGHAM, <http://www.bingham.com/Lawyer.aspx?LawyerID=752> (last visited Aug. 22, 2010).

74. WILLIAMS, *supra* note 4, at 345.

75. *Id.*

76. *Id.* at 296.

77. *Id.*; *see also* Freedman, *supra* note 27, at 1494–95; Friedman, *supra* note 15, at 19.

78. WILLIAMS, *supra* note 4, at 294; Hill, *supra* note 4, at 197.

79. WILLIAMS, *supra* note 4, at 297, 300–303.

80. *Id.* at 311; *see also* Friedman, *supra* note 15, at 9, 19.

81. *About Thurgood Marshall*, THURGOOD MARSHALL COLLEGE, <http://marshall.ucsd.edu/about/thurgood-marshall.html> (last visited Aug. 22, 2010); *see* WILLIAMS, *supra* note 4, at 309.

82. WILLIAMS, *supra* note 4, at 317; *see also* Friedman, *supra* note 15, at 9, 19.

In 1965, at age fifty-seven, he became the Solicitor General of the United States.⁸³ As the Solicitor General he won fourteen of the nineteen cases he argued before the U.S. Supreme Court.⁸⁴ This is a job he did not keep for long, however, because President Lyndon B. Johnson asked him to take on another role in 1967.⁸⁵

In the summer of 1967, Johnson nominated Marshall to the U.S. Supreme Court.⁸⁶ His nomination was not unopposed. A group of Southern senators tried to block his nomination for two reasons: 1) because he was a Black-American and 2) because he was a liberal.⁸⁷ Nonetheless, his qualifications could not be denied and his nomination was confirmed in a 69-11 vote.⁸⁸

Johnson was tremendously proud of the nomination and was focused on what the achievement would say to all Black-American children and what that achievement meant they could aspire to in their own lives.⁸⁹ Johnson was not the only one who felt this pride. Martin Luther King, Jr. sent a telegram to Marshall congratulating him on his appointment, writing, "May I congratulate you for being appointed to the United States Supreme Court. Your appointment represents a momentous step toward a color blind society. You have proved to be a giant of your profession and your career has been one of the significant epochs of our time."⁹⁰ That landmark nomination was something that would have been impossible even a decade earlier if it were not for the work of both Marshall and King.

On October 2, 1967, Marshall began his tenure on the Supreme Court.⁹¹ During his twenty-four years as a Supreme Court Justice, he became known as a liberal voice on a Court dominated by conservatives.⁹² Although he wrote many majority

83. WILLIAMS, *supra* note 4, at 313–16; Freedman, *supra* note 27, at 1495.

84. Friedman, *supra* note 15, at 19; *see* WILLIAMS, *supra* note 4, at 6, 11.

85. WILLIAMS, *supra* note 4, at 11, 330–33; Freedman, *supra* note 27, at 1495.

86. WILLIAMS, *supra* note 4, at 330–31.

87. *Id.* at 334–37.

88. *Id.* at 337.

89. Rudolph Lewis, *Blacks, Unions, & Organizing in the South, 1956-1996*, CHICKENBONES: A JOURNAL <http://www.nathanielturner.com/thurgoodmarshall.htm> (last visited Oct. 11, 2010) (quoting Mary L. Dudziak).

90. Telegram from Martin Luther King, Jr. to The Honorable Thurgood Marshall (June 13, 1967), STANFORD UNIV., http://mlkpp01.stanford.edu/index.php/encyclopedia/documents/entry/doc_telegram_from_king_to_thurgood_marshall/ (last visited Aug. 21, 2010).

91. WILLIAMS, *supra* note 4, at 338; *see also* Friedman, *supra* note 15, at 11.

92. Donna F. Coltharp, *Writing in the Margins: Brennan, Marshall, and the Inherent*

opinions for the Court, it is his dissents for which he is most often remembered.⁹³ Among those dissents, many involved sentencing, the death penalty, and equal protection of the law.⁹⁴ Because of his belief that capital punishment violated the Constitution, he dissented in every single death penalty case in which the Justices affirmed a death sentence.⁹⁵

As Marshall got older, he was known for saying that he would serve out his term on the Supreme Court,⁹⁶ which was a lifetime, and that he would only leave the Court when he was “shot by a jealous husband.”⁹⁷ In 1991, however, because of poor health Justice Marshall retired from the bench.⁹⁸ Upon receiving his resignation, President George Bush wrote:

Our nation is deeply indebted to you for your long and distinguished public service. Your courageous leadership in the fight for equal opportunity, exemplified by your brief and oral argument in the landmark case of *Brown v. Board of Education*, is a powerful example of how one person's commitment to his convictions can shape a nation's attitude on such a fundamental issue.

Your distinguished service to our country, first on the U.S. Court of Appeals for the Second Circuit, as our Nation's 33rd Solicitor General, and capped by a great career on the Supreme Court will also be long remembered.⁹⁹

Interestingly, although Bush mentioned Marshall's service as a Justice, he focused more on Marshall's accomplishments in the school desegregation cases, and mentioned the *Brown* decision. He has truly done much more than the *Brown* decision. Justice

Weakness of Liberal Judicial Decision-Making, 29 ST. MARY'S L.J. 1, 2–4; see WILLIAMS, *supra* note 4, at 360; Freedman, *supra* note 27, at 1499–1500.

93. Slocum, *supra* note 30, at 900; see generally WILLIAMS, *supra* note 4, at 360–61, 366–67, 380–81, 389 (discussing Marshall's many dissents); Freedman, *supra* note 27, at 1500.

94. WILLIAMS, *supra* note 4, at 357, 360.

95. *Id.* at 359–60, 391; see also Friedman, *supra* note 15, at 11.

96. WILLIAMS, *supra* note 4, at 373.

97. *Id.* at 387.

98. *Id.* at 391.

99. Letter from President George H.W. Bush to The Honorable Thurgood Marshall (June 28, 1991), THE PRESIDENTIAL TIMELINE OF THE TWENTIETH CENTURY, <http://presidentialtimeline.org/html/record.php?id=1350> (last visited Aug. 22, 2010).

Marshall's professional career included his work and writings not only as a practitioner, but also as a scholar and as a Justice.

III. PROFILE TWO: A PERSUASIVE PRACTITIONER'S APPELLANT BRIEF IN *BROWN II*

Marshall's personal experience with the civil rights movement and the highly charged social atmosphere of the late 1940s and early 1950s helped to shape the writings that formed the cornerstone of his victory in the United States Supreme Court case *Brown v. Board of Education (Brown II)*.¹⁰⁰ Marshall emerged as a persuasive practitioner following his success in *Brown v. Board of Education (Brown I)*,¹⁰¹ which many scholars consider the most significant ruling on American public education.¹⁰² The Appellants' Brief in *Brown II*, in which Marshall addressed remedies to halt racial segregation of schools, reveals both the rhetoric and the reality of relief available during an era of national racial unrest.¹⁰³ Marshall's tactical eloquence in the face of delay, resistance, and hostility from Southern authorities, effectively persuaded the Justices to issue an unprecedented decision that set a timetable for achieving racial equality in education.¹⁰⁴

This profile first explores the historical context that shaped Marshall's role as a persuasive practitioner in the aftermath of *Brown I*'s dismantling of the "separate but equal" doctrine.¹⁰⁵

100. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

101. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) [hereinafter *Brown I*].

102. See, e.g., Derrick Darby, *Educational Inequality and the Science of Diversity in Grutter: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 762 (2009) (asserting that *Brown* represents "the most important judicial intervention concerning education" in American legal history).

103. Brief for Appellants, *supra* note 7.

104. Mark Tushnet, *Thurgood Marshall and the Rule of Law*, 35 HOW. L.J. 7, 17 (1991) [hereinafter *Rule of Law*] (noting the efficacy of Marshall's "rhetorical strategy" in proposing immediate integration of public schools in *Brown II*).

105. *Brown I*, 347 U.S. at 488 (explaining the "separate but equal" doctrine articulated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), according to which, racially segregated public facilities qualified as equal treatment of the races under the Fourteenth Amendment when those facilities were "substantially equal"). The "separate but equal" doctrine of *Plessy* justified decades of segregation in America based on the fiction that separation on the basis of race was only a mark of racial inferiority because African Americans chose to perceive it as degrading. *Plessy*, 163 U.S. at 551; see also Mario L. Barnes *et al.*, *A Post-Racial Equal Protection?*, 98 GEO. L.J. 967, 976 (2010) (examining Fourteenth Amendment jurisprudence in light of perspectives on racial equality). Marshall did not attack the "separate but equal" doctrine during his early career as a litigator for the NAACP, but adopted a legal strategy

Next, this section presents the specific methods of persuasion that enabled Marshall to resolve the ethical dilemma implicit in arguing for desegregation without delay when he believed that the Court would embrace a gradual approach to desegregation. This section then unveils the advocacy approach that Marshall employed to address relief for the aggrieved school children. Finally, this section reviews the core components of Marshall's practical persuasive techniques, which led the Court to order racial desegregation "with all deliberate speed."¹⁰⁶

A. Historic Context Shaping Marshall as a Persuasive Practitioner

The Supreme Court's composition,¹⁰⁷ the racial climate, and Marshall's personal experience with segregation set the stage for his use of persuasive litigation strategies in *Brown II*. Specifically, Marshall perceived that sociological studies confirming limited aspirations for students of color could convince the Court that segregated public schools were unconstitutional.¹⁰⁸ The irony that Marshall used empirical evidence of an inferiority complex among segregated Black youth to vindicate individual rights for these youths illustrates the innovation of his advocacy.¹⁰⁹ Despite this paradox, Marshall resolved to use the sociological data and NAACP field reports documenting the intangible ills plaguing

challenging the principle directly after 1945. See *Rule of Law*, *supra* note 104 at 12 (describing Marshall's respect for legal precedent in desegregation litigation).

106. *Brown II*, 349 U.S. at 301.

107. According to several accounts, the Court was sharply divided on the issue of segregation. Justice Frankfurter reportedly speculated in private that Justices Vinson, Reed, Jackson, and Clark would have dissented from a decision in favor of desegregation if *Brown I* had been decided in the previous Term. Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1871 (1991) (detailing the initial division among the Justices in *Brown I*). The Court could not reach a decision in *Brown I* before the end of its 1952–1953 Term and ordered reargument set for December 1953. In the interim, the death of Chief Justice Vinson resulted in his replacement by Chief Justice Earl Warren, who eventually announced the unanimous decision in 1954. *History of Brown v. Board of Education*, UNITED STATE SCOURTS, <http://www.uscourts.gov/EducationalResources/ConstitutionResources/LegalLandmarks/HistoryOfBrownVBoardOfEducation.aspx> (last visited Aug. 22, 2010).

108. WILLIAMS, *supra* note 4, at 210.

109. See generally *Rule of Law*, *supra* note 104, at 16 (observing the "rhetorical tension" in advancing "personal and present" rights that impacted the social construction of segregation).

children of color as the foundation for his arguments.¹¹⁰

The background surrounding *Brown I* provides compelling insight into the unique picture framing the persuasive practitioner used. Although *Brown I* was unanimous, members of the Court grappled with the prospect of issuing a decision in favor of educational equality for Blacks.¹¹¹ Arguably, that reluctance to resist racial separatism reflected national sentiment.¹¹² Challenging segregated schools during the 1950s meant assaulting a practice deeply entrenched in the fabric of American society: namely, racial norms that relegated Blacks to second class citizenship.¹¹³ Furthermore, the public atmosphere surrounding *Brown I* was strained by reports of lynching mobs, cross burnings, and other violent acts of vigilante terrorism against civil rights activists.¹¹⁴

The successful use of empirical data in *Brown I*, and the heightened race conflict after the Court's ruling, pressured Marshall to devise equally persuasive techniques in *Brown II*.¹¹⁵ Marshall's motivation to develop a convincing line of reasoning in *Brown II* was further fueled by the sheer credibility of arguments

110. Admittedly, sub-standard facilities, poorly trained teachers, and inadequate supplies in Black schools were tangible effects of segregation. *Brown I*, 347 U.S. at 486 n.1.

111. See Tushnet & Lezin, *supra* note 107, at 1869 (presenting the personalities and politics underlying judicial decision-making in *Brown I*); see also BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY 95 (1983) (noting that Chief Justice Vinson was inclined to uphold the constitutionality of school segregation in *Brown I*).

112. History records Vinson expressing anxiety concerning the social costs of ruling racial segregation in public education unconstitutional. Tushnet & Lezin, *supra* note 107, at 1871.

113. Although racial segregation is often perceived as a matter of “custom,” many states passed legislation that required racially segregated public facilities. See Cheryl Brown Wattley, *Ada Lois Sipuel Fisher: How a “Skinny Little Girl” Took on the University of Oklahoma and Helped Pave the Road to Brown v. Board of Education*, 62 OKLA. L. REV. 449, 453 (2010) (citing Oklahoma state laws and local ordinances prohibiting racial integration in both private and public accommodations).

114. See *Virginia v. Black*, 538 U.S. 343, 355–56 (2003) (declaring unconstitutional a statute treating cross burning as *prima facie* evidence of intent to intimidate after recounting Klan violence sparked by *Brown I*).

115. In *Brown I*, Marshall cited numerous sociological and psychological studies documenting the adverse impact of racial segregation on the early childhood and adolescent development of students in racial minority and majority groups. Among the reports cited are Margaret Brenman, *The Relationship Between Minority Group Identification in A Group of Urban Middle Class Negro Girls*, J. SOC. PSYCHOL., 1940, 11; Allison Davis, *The Socialization of the American Negro Child and Adolescent*, J. NEGRO EDUC., Brief for Appellants at app. 5–6 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), 1952 WL 82041.

in favor of desegregation. Thurgood Marshall believed in educational equality because the school desegregation cases resonated personally with him. His father was a bright, yet uneducated man,¹¹⁶ and Marshall himself confronted a policy of segregation when considering his own admission to law school.¹¹⁷ Amidst a celebrated victory in *Brown I* and antagonistic attitudes toward racial justice,¹¹⁸ Marshall adopted several strategies that would instill hope and promise for “equal participation in our system of education.”¹¹⁹

B. An Ethical Dilemma

While *Brown I* represents an historic legal decision in favor of social change, integrating schools proved problematic.¹²⁰ Under the guise of gradualism, Southern states introduced stall tactics to avoid racially balanced public schools.¹²¹ The Justices called on appellate counsel to address the sole issue of remedies that would enable the Court to dispose of “a variety of local problems” in implementation plans.¹²² The Justices turned their attention to remedies at the close of *Brown I* by ordering further argument addressing specific questions on the desegregation decrees.¹²³ Marshall faced an awkward ethical dilemma. An argument consistent with legal theories advanced in *Brown I* compelled a position advocating immediate desegregation; yet he feared that position would fail in the face of the segregationists’ argument for a gradualist approach.¹²⁴

116. WILLIAMS, *supra* note 4, at 210.

117. See WILLIAMS, *supra* note 29 and accompanying text.

118. See, e.g., Tushnet & Lezin, *supra* note 107, at 1896 (quoting correspondence from Justice Jackson, who questioned the impact of “deeply held attitudes whether of the South or of the colored peoples” on *Brown I*).

119. WILLIAMS, *supra* note 4, at 237 (discussing re-argument in *Brown II*, April 12, 1955).

120. *Rule of Law*, *supra* note 104, at 14 (confirming that the Court anticipated Southern resistance to *Brown I*, which required a separate decision on remedies for prevailing parties in the consolidated desegregation cases).

121. WILLIAMS, *supra* note 4, at 236–38.

122. *Brown II*, 349 U.S. at 298.

123. Questions propounded by the Court inquired into, *inter alia*, whether it should direct immediate desegregation, whether it could order gradual desegregation within its equity powers, and whether it should appoint a special fact finder to recommend relief. *Brown I*, 347 U.S. at 495.

124. *Rule of Law*, *supra* note 104, at 14–15 (explaining that Marshall was aware that the reluctance of Southern states to integrate schools could influence the Court to temper a firm

Marshall needed to find a way to advocate a favorable remedy the Court would adopt even though the remedy appeared to conflict with the reality of the social order.¹²⁵ Marshall knew the high stakes in advocating swift relief, particularly in Southern states.¹²⁶ Marshall believed that integration would only occur throughout the South if courageous African-American parents enrolled their children into integrated schools surrounded by the hostility of segregationists.¹²⁷ Racial realism never eluded Marshall, nor did he ever hide his passionate plea for equal rights.¹²⁸ Instead of shying away from the difficulty, as a persuasive practitioner he used the ethical quandary to leverage a legal advantage.

Marshall began the Appellants' Brief in *Brown II* by reminding the Court of the difficulty of ordering remedies consistent with its ban on "separate but equal" education.¹²⁹ He first quoted *Brown I*, admitting that "because these are class actions, because of the wide applicability of this decision and because of the great variety of local conditions,"¹³⁰ the task of fashioning relief for students racially restricted from schools was daunting.¹³¹ In essence, Marshall used candor to expose the racial realities that presented a seemingly insurmountable obstacle to implement *Brown I*'s clear mandate.¹³²

By capitalizing on his victory in *Brown I*, Marshall further resolved his dilemma of advocating immediate desegregation when faced with the likelihood of gradualism. Marshall remained committed to the constitutionality of equal educational opportunity

endorsement of immediate desegregation).

125. See Elizabeth Fajans & Mary R. Falk, *Shooting From the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 14 (2000) (discussing truthful premises as a basis for "an ethic of legal reason" in effective advocacy).

126. *Rule of Law*, *supra* note 104, at 15.

127. Marshall recognized that the courage of these parents required mobilization of African American communities to undertake these daring steps toward integration. *Id.*

128. WILLIAMS, *supra* note 4, at 236–37 (characterizing Marshall as an emotional advocate during oral argument when responding to arguments for gradual desegregation to assuage disruption to Southern traditions); see also *Rule of Law*, *supra* note 104, at 21 (describing Marshall as "scornful" during April 15, 1955 oral argument).

129. Brief for Appellants, *supra* note 7, at 2.

130. *Brown I*, 347 U.S. at 495.

131. Brief for Appellants, *supra* note 7, at 2.

132. Fajans & Falk, *supra* note 125, at 15 (citing the "veracity principle" as essential to ethical advocacy).

announced by the Court, while accepting the reality of prevailing opposition to desegregation.¹³³ Some observers describe the NAACP's final legal position as a compromise in accepting two years as the timeline for school desegregation.¹³⁴ Marshall, however, argued vehemently at the outset for immediate relief.¹³⁵ After a clear statement of the issues,¹³⁶ Marshall invoked favorable images of integration efforts in a section entitled, "Developments in These Cases Since the Last Argument."¹³⁷ Using the enrollment statistics of schools that were complying with *Brown I*, Marshall disarmed opponents with irrefutable proof that immediate desegregation was feasible.¹³⁸

Notwithstanding the realities of race in America, evidence documenting successful desegregation settled Marshall's ethical dilemma by illustrating that there was no retreat in the battle for educational equality.¹³⁹ Marshall crafted a remedies argument consistent with the legal theory of *Brown I* by emphasizing the constitutional imperative of immediate relief, despite the unfavorable attitudes of segregationists.¹⁴⁰ Marshall, thereby, defused the gradualist argument and convinced skeptical Justices that immediate integration was a foregone conclusion.¹⁴¹ Dismissing prospects for gradual desegregation, Marshall used the

133. WILLIAMS, *supra* note 4, at 230–32.

134. See, e.g., WILLIAMS, *supra* note 4, at 236 (depicting Marshall as conceding "the gradualist approach"); *Rule of Law*, *supra* note 104, at 18 (noting that Marshall was cognizant of "administrative details" germane to delays in integration).

135. Marshall asserted that September 1955 was sufficient time for school districts to complete transition to desegregated schools. Brief for Appellants, *supra* note 7, at 10.

136. See generally Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASS'N LEGAL WRITING DIR. 1 (2009) (reviewing skillful techniques in framing issues in appellate litigation).

137. Brief for Appellants, *supra* note 7, at 3.

138. Marshall highlighted progress underway in Kansas and Delaware, while admitting that some districts in those states were awaiting the Court's decree in *Brown II* to implement desegregation plans. *Id.* at 3–6.

139. See Stephen J. Dwyer *et al.*, *How To Write, Edit, and Review Persuasive Briefs: Seven Guidelines From One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 418 (2007) (describing persuasive use of facts to support a theory of the case and to advance legal arguments by "telling your story" in an appellate brief).

140. Marshall confronted resistance to desegregation on the Court that resembled the stance of opposing counsel. Tushnet & Lezin, *supra* note 107, at 1926 (revealing Frankfurter's opposition to a decision that specified a date to achieve desegregation).

141. *Rule of Law*, *supra* note 104, at 21–22 (disclosing a gradualist approach presented in Chief Justice Warren's draft of *Brown II* before Justice Frankfurter influenced him to adopt the "all deliberate speed" language).

opening sections of the Appellants' Brief to create compelling arguments that launched him on a persuasive path to propose a specific timetable for school districts to integrate.

C. Marshall's Advocacy Approach

In the argument section of the *Brown II* brief, Marshall first urged the Court to grant immediate relief because it was practical.¹⁴² According to Marshall, the constitutional rights protected in *Brown I* entitled students to enter desegregated schools in the next academic year.¹⁴³ Alternatively, he argued, school districts bore an affirmative burden of justifying delay.¹⁴⁴ Marshall asserted that denial of relief each school day heightened the burden.¹⁴⁵

He portrayed immediate relief as tantamount to the rights vindicated in *Brown I*.¹⁴⁶ Marshall explained that there was no legal precedent that "postponed" equal rights guaranteed by the Constitution because of local attitudes and customs.¹⁴⁷ Marshall, thereby, dispelled the gradualism rooted in Southern tradition by arguing that the Fourteenth Amendment protects against the same attitudes and customs that created and perpetuated segregated schools.¹⁴⁸ Marshall's legal reasoning emphasized that the pace of enforcing civil rights was just as important as the rights themselves.¹⁴⁹

Marshall then returned to the winning strategy in *Brown I* to prove that gradual desegregation would adversely affect children of color in the same negative way that segregated schools affected them.¹⁵⁰ He used empirical evidence of discrimination's harmful

142. Brief for Appellants, *supra* note 7, at 10.

143. *Id.* (Marshall later conceded that September 1, 1956 would be an acceptable deadline for desegregation). Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and Brown*, 90 VA. L. REV. 1667, 1682 n.65 (2004).

144. Brief for Appellants, *supra* note 7, at 11. See generally Leonardo J. Raznovich, *A Comparative Review of the Socio-Legal Implications of Burden of Proof and Presumptions to Deal With Factual Uncertainty*, 32 AM. J. TRIAL ADVOC. 57, 69–75 (2008) (reviewing distinctions in a shifting burden of production and burden of persuasion in civil rights cases).

145. Brief for Appellants, *supra* note 7, at 11.

146. *Id.* at 14.

147. *Id.*

148. Cf. *Rule of Law*, *supra* note 104, at 22 (suggesting that the Court was constrained by underlying Southern attitudes at the heart of gradualist arguments favoring deferred relief).

149. Brief for Appellants, *supra* note 7, at 14.

150. *Id.*, at 15–16, 18; *Rule of Law*, *supra* note 104, at 18.

effects to show that gradualism created tension, anxiety, and unrest among students.¹⁵¹ That evidence, Marshall argued, demonstrated that there was no distinction between “piecemeal desegregation of schools” and segregation itself.¹⁵² Marshall then cited human behavior studies to argue that immediate enforcement of the Court’s desegregation ruling would not have the deleterious results that gradualists feared.¹⁵³ He concluded that proponents of gradual desegregation were opponents of desegregation.¹⁵⁴

D. Core Components of Marshall’s Persuasive Writing Techniques

Review of Marshall’s legacy as a persuasive practitioner reveals the core components of effective advocacy. First, Marshall was keenly aware of the racial realities that threatened the success of immediate desegregation.¹⁵⁵ He used empirical evidence that several states were already complying with *Brown I* to overcome the ethical dilemma implicit in proposing swift remedies in the face of Southern resistance.¹⁵⁶ Moreover, Marshall’s advocacy approach was particularly effective in view of historical accounts of segregationist sentiment among members of the Court.¹⁵⁷ Identifying fully integrated school districts under the Court’s jurisdiction validated the feasibility of *Brown I* and painted a realistic picture of children attending school without regard to race.¹⁵⁸ Anything less than the Court’s firm stance on remedies would undermine those endeavors and erode public confidence in the ability of local authorities to enforce *Brown I*.¹⁵⁹

151. Brief for Appellants, *supra* note 7, at 20.

152. *Id.*

153. *Id.* at 18 n.9, 20 n.12; see, e.g., Kenneth B. Clark, *Some Principles Related to the Problem of Desegregation*, 23 J. NEGRO EDUC. 339, 343 (1954) (questioning the notion that change in racist attitudes must precede change in racist behavior); Bernard Kutner, et al., *Verbal Attitudes and Overt Behavior Involving Racial Prejudice*, 47 J. ABNORMAL AND SOC. PSYCHOL. 649, 652 (1952) (confirming that a demand for non-racist conduct yields non-racist acts despite racist attitudes).

154. Brief for Appellants, *supra* note 7, at 31.

155. See David M. Gersten, *Dynamic Trial & Appellate Advocacy*, 31 FAM. ADVOC. 41, 41 (2008) (citing the “know your case” rule as an essential feature of preparedness in effective advocacy).

156. See Brief for Appellants, *supra* note 138 and accompanying text.

157. See Tushnet & Lezin, *supra* note 140 and accompanying text.

158. Brief for Appellants, *supra* note 7, at 3–4.

159. Marshall’s argument accorded weight to Delaware officials’ public statements

Marshall balanced optimistic accounts of integration against a candid appraisal of the need for the Court to issue a strong endorsement favoring immediate relief.¹⁶⁰ Employing the “blunt truth” of school enrollment statistics for children of color still educated solely on the basis of their race,¹⁶¹ Marshall urged accelerated desegregation. Moreover, the persuasive practitioner was frank in his prognosis that without an unequivocal ruling on remedies, school officials would continue exacerbating the ailing atmosphere of racist attitudes throughout the South.¹⁶²

Finally, Marshall’s advocacy in *Brown II* conveyed the theme of protecting individual rights that marks the legacy of his legal writings. Previewing his scholarship and jurisprudence as Supreme Court Justice,¹⁶³ Marshall embraced fairness, equality, and liberty in the Appellants’ Brief advocating immediate desegregation in *Brown II*.¹⁶⁴ By arguing that enforcing remedies for constitutionally guaranteed rights was indistinguishable from protecting those rights, Marshall championed principles of racial equity. For those reasons, and the reasons set forth in the following sections, Marshall’s legal writings represent a legacy that cannot be erased.

IV. PROFILE THREE: A SOLICITOUS SCHOLAR’S *REFLECTIONS ON THE BICENTENNIAL OF THE CONSTITUTION*

Much of the writing about Thurgood Marshall highlights his early work as an NAACP attorney.¹⁶⁵ It was in the early civil

announcing “the complete termination of segregation” in public schools. *Id.* at 5.

160. Brief for Appellants, *supra* note 7.

161. Marshall cited to eighty-five percent of Black children in Kansas remaining in segregated schools. *Id.* at 3–4.

162. Brief of Appellants quoted one South Carolina school superintendent who proclaimed publicly that desegregation was unbiblical. *Id.* at 8.

163. See, e.g., Marshall, *supra* note 9, at 3 (decrying the Framers as guilty of “trad[ing] moral principles for self-interest” in creating a document propagating slavery); Payne v. Tennessee, 501 U.S. 808, 856 (1991) (Marshall, J. dissenting) (opposing prosecutorial use of victim-impact statements during the sentencing phase of capital cases, in part, because of the disproportionate impact of the death penalty on the poor, racial minorities, and under-educated criminal defendants).

164. Brief for Appellants, *supra* note 7.

165. See, e.g., MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936–1961 (1994); Anita F. Hill, *A Tribute to Thurgood Marshall: A Man Who Broke with Tradition on Issues of Race and Gender*, 47 OKLA. L. REV. 127 (1994); Constance Baker Motley, *Standing on His Shoulders: Thurgood Marshall’s Early Career*, 35 HOW. L.J. 23 (1991); WILLIAMS, *supra* note 4; Hill, *supra* note 4.

rights cases that Marshall's role as a social engineer and moral activist¹⁶⁶ was most apparent.¹⁶⁷ Those cases, however, were not the only avenue for his moral activism. Marshall's public speeches and scholarship also allowed him to voice the moral principle that guided his life's work: equality for all.¹⁶⁸

As a Supreme Court Justice, Marshall spoke in public less frequently than he did in his early career, but he would often use his regular addresses to fellow judges at Second Circuit Judicial Conferences¹⁶⁹ to candidly discuss recent Supreme Court cases.¹⁷⁰

166. See WILLIAMS, *supra* note 4, at 69 ("Marshall was using his legal training to become a social activist."). From Marshall's earliest days as an attorney for the NAACP Legal Defense Fund, he saw himself in the role of social engineer, believing that the aim of law was to build a great society. *Id.* at 400–04. "Moral activist" is a term Christine Parker and Adrian Evans use to describe lawyers who serve the role of social engineer by using general theories of ethics and morals to seek justice through legal reform. See CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS' ETHICS* 23 (Cambridge Univ. Press 2007). This moral-activist role is one of the roles our Model Rules of Professional Conduct contemplates for lawyers. See Preamble: A Lawyer's Responsibilities, MODEL RULES OF PROFESSIONAL CONDUCT 2 (2010) ([6] "As a public citizen, a lawyer should seek improvement of the law As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education;" [7] "a lawyer is also guided by personal conscience;" and [9] when conflicts arise, they "must be resolved through the exercise of sensitive professional and moral judgment"). These terms and duties reflect the modern understanding of a lawyer's role, but the concepts are timeless. Respected scholars such as Ronald Dworkin have long asserted that "morality is *always* relevant to law." See Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L. J. 1195, 1244, 1241–44 (2009) (emphasis in original).

167. WILLIAMS, *supra* note 4, 109–110; Hill, *supra* note 4, at 190–191 (As Marshall pursued his goal of winning Blacks the right to vote—believing universal voting was the key to integrating the South—he chose Texas as a test case. When the first plaintiff he chose didn't work out, he continued fundraising and searching until he finally found Dr. Lonnie Smith). *Cf.* Smith v. Allwright, 321 U.S. 649, 650–651 (1944). Marshall's strategy of searching for plaintiffs to fit the cause reflects the concern that many commentators have with the moral activist approach—"[i]n extreme cases, the participation of individual clients is almost subordinated to the bigger cause." PARKER & EVANS, *supra* note 166, at 29.

168. See, e.g., Marshall, *supra* note 9, at 2–5; Elena Kagan, In Memoriam, *For Justice Marshall*, 71 TEX. L. REV. 1125, 1128–1129 (1993); WILLIAMS, *supra* note 4, at xvi, 400, 404, 412 ("He worked in behalf of Black Americans but built a structure of individual rights that became the cornerstone of protections for all Americans."); Juan Williams, *The American Conservatism of Thurgood Marshall*, WALL. ST. J. July 3, 2010, at A9, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704293604575342872399310184.html [hereinafter *American Conservatism*] ("[Marshall] believed in a very conservative principle: liberty and justice for all.").

169. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 171 (Mark V. Tushnet ed., 2001) [hereinafter THURGOOD MARSHALL WORKS]. Marshall's first judicial appointment was as a judge on the Federal Court of Appeals for the Second Circuit. As Supreme Court Justice, he handled emergency appeals for that circuit and spoke at the Second Circuit Judicial Conference—the circuit's annual gathering of

A few of his speeches were subsequently transcribed or published¹⁷¹ — including his controversial 1987 *Reflections on the Bicentennial* speech, which was reproduced in the Harvard Law Review later that year.¹⁷²

The speech was controversial because Marshall refused to celebrate the Constitution's creation, applauding instead those who struggled for 200 years to give full meaning to the Constitution's promise of equality.¹⁷³ Marshall, however, did not use the speech to merely rail against the Founders and the Constitution they drafted. Instead, he tempered his criticism and apprehension with appreciation for the last century's significant strides toward equality, and looked ahead, hopeful and eager to see the Constitution continue to evolve.¹⁷⁴

The truth of Marshall's critique was evident in the 1987 reaction to his speech. That reaction appears to have been less damning than the reaction to Marshall's critique during Elena Kagan's Supreme Court confirmation hearings in 2010.¹⁷⁵ The 1987 audience seems to have recognized that the Bicentennial speech employed classic rhetorical writing techniques to give voice to Marshall's guiding moral principle.¹⁷⁶ It was in this speech that

judges and lawyers. *Id.*

170. See, e.g., Thurgood Marshall, *The Dangers of Judicial Restraint*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 180, 181. In discussing a recent Supreme Court decision, Marshall asserted, "my colleagues afforded insufficient protection to constitutional rights." *Id.* at 181. Then in response to the Court upholding a rule subjecting inmates to body cavity searches after every contact visit, Marshall could not hide his disgust: "[i]t is simply an outrage that these unwarranted intrusions on personal privacy should be allowed to continue." *Id.* at 182; Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 286 (detailing Marshall's experiences with death penalty cases and his fear of the practicalities of the administering the death penalty.).

171. THURGOOD MARSHALL WORKS, *supra* note 169, at 67; see e.g., Thurgood Marshall, *Law and the Quest for Equality* (1967), in THURGOOD MARSHALL WORKS, *supra* note 169, at 220; Thurgood Marshall, *Civil Rights Enforcement and the Supreme Court's Docket*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 174; Thurgood Marshall, *Acceptance of Learned Hand Medal*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 266; Thurgood Marshall, *Remarks at the Annual Dinner in Honor of the Judiciary*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 293.

172. Marshall, *supra* note 9; see also Thurgood Marshall, *Reflections on the Bicentennial of the U.S. Constitution*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 281.

173. Marshall, *supra* note 9, at 2, 5.

174. *Id.* at, 1–2, 4–5.

175. See *infra* note 209 and accompanying text.

176. *Id.*

Marshall's moral activism took the form of solicitous¹⁷⁷ scholarship—intentionally advocating a controversial position that ran contrary to blind patriotism, offering an uncompromising warning against complacency in the struggle for equality, and eagerly anticipating the challenges yet to be confronted in that struggle.¹⁷⁸

A. *Historical Context and Content of Bicentennial Speech*

By the mid-1980s, Thurgood Marshall had, after losing a number of race cases to the conservatives on the Court, become “resentful of his colleagues, . . . writing strong dissents . . . and . . . using the justices’ conferences to raise hell.”¹⁷⁹ According to his good friend Monroe Dowling, “If it hadn’t been for Brennan, I guess they would have put him in jail. Thurgood called them everything but the son of God in conference.”¹⁸⁰ Marshall, however, did not limit his complaints to those behind-closed-doors sessions. Previously, he made some critical comments in his regular addresses to fellow judges at Second Circuit Judicial Conferences,¹⁸¹ but by the mid 1980s, Marshall began to broaden his audience and deliver more provocative remarks.¹⁸²

Former Chief Justice Warren Burger was the head of the Bicentennial celebration during this period.¹⁸³ Marshall refused Burger’s invitation to take part in a reenactment of the Constitution’s signing, during which the Justices were to play the Founding Fathers, saying in effect, I’m not in much of a party

177. Solicitous means: full of concern or fears, apprehensive, full of desire, eager. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1187 (11th ed. 2003).

178. See Marshall, *supra* note 9, at 2, 5.

179. WILLIAMS, *supra* note 4, at 381.

180. *Id.*

181. See *supra* note 170.

182. WILLIAMS, *supra* note 4, at 381; see e.g., Thurgood Marshall, *The Need for Effective Remedies When Constitutional Rights are Violated*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 198. Frustration over a recent court decision led Marshall to state: “[a]nd again, the Supreme Court recognized the right while it destroyed the remedy.” *Id.* at 200. In an interview with Carl Rowan for broadcast television, Marshall “broke with Supreme Court decorum by making personal comments about current politics and personalities . . .” WILLIAMS, *supra* note 4, at 382–83. In the interview, he criticized Attorney General Meese for attempting to “undermine the Supreme Court itself.” *Id.* at 383. Marshall was most critical of the sitting President Ronald Reagan, ranking him among all presidents at “[t]he bottom . . . I think he’s down with [Herbert] Hoover and that group and [Woodrow] Wilson, when we didn’t have a chance.” *Id.*

183. WILLIAMS, *supra* note 4, at 382.

mood.¹⁸⁴ Of the reenactment, Marshall later quipped, “If you are going to do what you did two hundred years ago, somebody is going to have to give me short pants and a tray so I can serve coffee.”¹⁸⁵

Marshall’s reaction to Burger’s request reflects his belief that the Framers had “barely beg[un] to construct” the Constitution that stands for “the individual freedoms and human rights, that we hold as fundamental today.”¹⁸⁶ Those beliefs led Marshall to criticize “the wisdom, foresight, and sense of justice”¹⁸⁷ of the Framers as not “particularly profound.”¹⁸⁸ To him, the Constitution’s inherent defects validated his belief that it was more appropriate to celebrate the Constitution’s evolution rather than its creation, and to recognize that fulfilling the promises embodied in the Constitution’s language would require ongoing struggles.¹⁸⁹

As Marshall grew more outspoken both behind the bench and in public during the 1980s, another development fanned the fire that would ultimately flare in Marshall’s controversial speech.¹⁹⁰ This development was the movement advocating an original-intent approach to interpreting the Constitution, which then-Attorney General Edwin Meese III and his Department of Justice embraced and forcefully promoted.¹⁹¹ Critics of original intent agree that the Constitution’s text is the obvious starting point for legal questions, but they assert that the drafters’ intent and expectations are not controlling.¹⁹² For support, those critics point to the drafters’

184. *Id.*

185. *Id.*

186. Marshall, *supra* note 9, at 2.

187. *Id.* at 1.

188. *Id.* at 2.

189. *Id.* at 2, 5.

190. THURGOOD MARSHALL WORKS, *supra* note 169, at 281.

191. *Id.*; see, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981–982 (1987) (distinguishing between the Constitution, which is the supreme law of the land, and constitutional law, which is “what the Supreme Court says about the Constitution”); Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society of Lawyers Division, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 71 (Steven G. Calabresi ed., 2007) (explaining constitutional fidelity and the administration’s approach to constitutional interpretation using original intent).

192. THURGOOD MARSHALL WORKS, *supra* note 169, at 281; see also William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown Univ., (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 191, at 55, 61 (“We current Justices read the Constitution in the only way we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation.

deliberate decision to write in general terms, which allowed the Constitution's language to endure, regardless of societal changes.¹⁹³

Marshall was one of those critics.¹⁹⁴ He praised the U.S. Constitution in 1960 when he helped draft a constitution for Kenya's independence, saying, "[T]here's nothing that comes close to comparing with . . . the U.S. [Constitution]. This one is the best I've ever seen."¹⁹⁵ But by the time of his Bicentennial remarks in 1987, he was challenging original-intent jurisprudence¹⁹⁶ and using provocative rhetoric to argue that the Constitution was "defective from the start."¹⁹⁷ Marshall believed that the Constitution was an ever-evolving document whose meaning was not "forever 'fixed' at the Philadelphia Convention"¹⁹⁸ or by the expectations of those who wrote its words in 1787. Instead, as part of America's continuing quest to fulfill the promise of equality for all, the Constitution required "several amendments, a civil war, and momentous social transformation."¹⁹⁹

Given Marshall's critique of original-intent jurisprudence, it is no surprise that his Bicentennial speech warned against oversimplifying and blindly celebrating the Constitution.²⁰⁰ He urged his listeners to "seek, instead, a sensitive understanding of

What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

193. See RICHARD A. POSNER, *OVERCOMING LAW* 233 (1995).

194. See Marshall, *supra* note 9. Marshall's ally on the Supreme Court, Justice Brennan, shared Marshall's opposition to the approach, criticizing it as "arrogance masked as humility." Brennan, *supra* note 192, at 58.

195. WILLIAMS, *supra* note 4, at 285.

196. THURGOOD MARSHALL WORKS, *supra* note 169, at 281.

197. Marshall, *supra* note 9, at 2. Speaking about the Constitution in 1960, Marshall may have been praising the document with all of its modern amendments (including securing rights for Blacks and giving women the right to vote). He made a similar proclamation a few months after his Bicentennial speech in a 1987 broadcast interview with Carl Rowan. See TUSHNET, *supra* note 165, at 5 ("Oh, we're going to have our setbacks, we're bound to have them, but it'll work. You'll never find a better Constitution than this one, I know."). Marshall's use of rhetoric to be deliberately provocative was at least partly behind this apparent shift (see text accompanying *infra* notes 200–206), but his other 1960 and 1987 public statements about the Constitution—at least in its modern form—demonstrate that his opinion did not change that drastically.

198. Marshall, *supra* note 9, at 2.

199. *Id.*

200. *Id.* at 2, 5.

2011]

THURGOOD MARSHALL

237

[its] inherent defects, and its promising evolution.”²⁰¹ To demonstrate the Constitution’s defects and evolution, Marshall cited the opening words of the preamble, “We the People,” which, when written, did not include all of America’s citizens.²⁰²

Marshall elaborated:

[T]he government [that the Founding Fathers] devised was defective from the start . . .

. . . .

. . . [Southern states were allowed to continue the slave trade, because] [m]oral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truth[] ‘that all men are created equal . . .’²⁰³

Here, Marshall engaged his audience by proposing a view that sharply contrasted with the rest of the Bicentennial’s celebratory agenda. In choosing the word ‘defective,’ Marshall demonstrated his gift for provoking emotions and thoughtful reflection.²⁰⁴ By jabbing at the Framers, he ensured an attentive audience and a memorable speech so he could set out his guiding principle—equality for all.²⁰⁵ Marshall combined his provocative words with recognizable and universally-embraced language from the Declaration of Independence.²⁰⁶ That rhetorical writing choice helped him establish credibility for an argument that might otherwise have caused the audience to reject his position.²⁰⁷

Marshall continued by focusing on the progress America made in the time since the Constitutional Convention:

201. *Id.* at 5.

202. *Id.* at 2 (“We the People” included, in the Framers’ words, “the whole Number of free Persons.” Although slaves were counted at three-fifths each for representational purposes.).

203. *Id.*

204. *Id.*

205. See *supra* note 168 and accompanying text. Had Marshall’s choice of words been less controversial, his message may have been lost in the hoopla surrounding the Constitution’s Bicentennial.

206. Marshall, *supra* note 9, at 2–3.

207. See *infra* note 209 and accompanying text.

[T]he effects of the [F]ramers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.

....

... 'We the People' no longer enslave, but the credit does not belong to the [F]ramers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them.

....

... We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making. . . .²⁰⁸

Here, Marshall concluded his speech by explaining how the Framers' original intent fell short of the text's promise. But instead of continuing to focus on the document's shortcomings, he looked at the evolution and accomplishments the Constitution's language allowed. Audiences at the time found it hard to dispute the truth of Marshall's assertion that the 1787 Constitution was flawed.²⁰⁹ In 2010, however, some audiences have focused more

208. Marshall, *supra* note 9, at 4–5.

209. Marshall's speech certainly made headlines, see Stuart Taylor Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES, May 7, 1987, at B18, available at <http://www.nytimes.com/1987/05/07/us/marshall-sounds-critical-note-on-bicentennial.html>, but throughout the bicentennial year, reactions were supportive. For example, then-Speaker of the House Jim Wright recognized that “[n]o, the Constitution did not ordain instant utopia. It was a creature of its time.” Irvin Molotsky, *Washington Talks: Symposium; Mothers, Fathers, Forefathers*, N.Y. TIMES, May 25, 1987, at 20, available at <http://www.nytimes.com/1987/05/25/us/washington-talk-symposiums-mothers-fathers-forefathers.html>. Senator Charles McCurdy Mathias, Jr., applauded Marshall for “injecting spirited interest into the observation,” and declared of the Constitution, “[i]t left some things to be desired.” Irvin Molotsky, *Slavery Issue Adds Vigor to Debate*, N.Y. TIMES, May 21, 1987, at A22, available at <http://www.nytimes.com/1987/05/21/us/slavery-issue-adds-vigor-to-debate.html>. And Mayor Goode of Philadelphia, speaking at a bicentennial event with Chief Justice Burger and Vice President Bush, said, “It is critical to remember these words and realize that this document did not originally mean all the people [It] was not a perfect document.” *Excerpts From Speeches by Bush, Burger and Goode at the Bicentennial*, N.Y. TIMES, May 26, 1987, at A21, available at <http://www.nytimes.com/1987/05/26/us/excerpts-from-speeches-by-bush-burger-and-goode-at-the-bicentennial.html>. In fact, even Benjamin Franklin, speaking on the last day of the Constitutional Convention on September 17, 1787, stated that he would support the Constitution “with all its faults.” James Madison, *Notes on the Debates in the Federal Convention*, THE AVALON PROJECT YALE LAW SCH., http://avalon.law.yale.edu/18th_century/debates_917.asp (last visited Aug. 19, 2010) (letter from Sept. 17, 1787).

on Marshall's condemnation of the Framers' compromise than on his aspirations for the continued quest for equality.²¹⁰

B. Reaction to the Bicentennial Speech

Public reaction to Marshall's criticism of both the Constitution and the Founders appears to have been more measured in 1987 than in 2010.²¹¹ Perhaps the 1987 audience recognized what many could not appreciate in 2010—that the speech was not an unpatriotic and unethical rant from a lawyer rejecting the rule of law and our Constitution. Instead, it was an intentionally provocative challenge to recommit to the Constitution's principles with a realistic understanding of the ever-present and ever-changing obstacles to be overcome in the struggle for equality.²¹²

Nearly twenty-five years after his Bicentennial speech, Marshall's writing received renewed attention, and ignited even more controversy when President Obama nominated Elena Kagan, Marshall's former clerk,²¹³ to the Supreme Court. On the day of Kagan's nomination, Michael Steele, Chairman of the Republican National Committee, launched the first of what would become a series of attacks linking Kagan to Marshall's view of the Constitution²¹⁴ and questioning the ethics and allegiance of those who consider the Constitution of 1787 to be flawed.²¹⁵ Steele

210. See *infra* note 215.

211. See *supra* note 209 and Steele, *infra* note 215.

212. See Marshall, *supra* note 9, at 5.

213. Justice Kagan clerked for Marshall in the 1987-88 Supreme Court Term, during which time he delivered the *Reflections on the Bicentennial* speech. Robert Barnes, *Relevance of Kagan's Work as Clerk on Supreme Court Debated*, WASH. POST, June 14, 2010, at A15, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/06/13/AR2010_061304744.html.

214. Justice Kagan has noted that Marshall viewed the Constitution as flawed because of its commitment to slavery, but unlike Marshall, she has not disparaged the Framers. Instead, Justice Kagan has simply praised those who, like Justice Marshall, have fought inequalities, stating "our modern Constitution is his." Kagan, *supra* note 168, at 1130.

215. Michael Steele, *Statement on President Obama's Supreme Court Nominee*, May 10, 2010, http://www.gop.com/index.php/chairman_steele/comments/statement_on_president_obamas_supreme_court_nominee/. Steele's initial press release did not mention Marshall, but was calculated to unnervingly present Kagan as critical of the Constitution. Steele's statement reads:

Over the past year, the American people have been witness to President Obama's massive expansion of the federal government into our daily lives. To assure the

warned that Kagan's support for statements "suggesting that the Constitution 'as originally drafted and conceived, was 'defective,'"²¹⁶ required her "to demonstrate that she is committed to upholding the vision of our Founding Fathers, who wrote a Constitution meant to limit the power of government, not expand it."²¹⁷ According to one commentator, Steele's statement and the ensuing assault from members of the Senate Judiciary Committee made Thurgood Marshall "the unlikely bridge between empathy, activist judging, and Kagan,"²¹⁸ and would leave many others

American people, President Obama's Supreme Court nominee, Elena Kagan, will need to demonstrate that she is committed to upholding the vision of our Founding Fathers, who wrote a Constitution meant to limit the power of government, not expand it. The President has stated repeatedly that he wants a justice who will understand the effects of decisions on the lives of everyday Americans. But what Americans want is a justice who will stay true to the Constitution and defend the rights of all Americans, adhering to the rule of law instead of legislating from the bench. Given Kagan's opposition to allowing military recruiters access to her law school's campus, her endorsement of the liberal agenda and her support for statements suggesting that the Constitution "as originally drafted and conceived, was 'defective,'" you can expect Senate Republicans to respectfully raise serious and tough questions to ensure the American people can thoroughly and thoughtfully examine Kagan's qualifications and legal philosophy before she is confirmed to a lifetime appointment.

Id. Weeks later, during Kagan's confirmation hearings, a number of senators continued to use Thurgood Marshall as ammunition against the nominee by characterizing him as a judicial activist whose radical opinions evidenced disrespect for ethics and the rule of law, and by suggesting that the country could expect more of the same if his former law clerk were confirmed to the bench. The remarks from senators included the following: Senator Kyl (R-Ariz.) stated, "Justice Marshall's judicial philosophy . . . was not what I would consider mainstream." Jon Kyl, *Statement on Elena Kagan*, UNITED STATES SENATOR FOR ARIZONA (June 28, 2010), available at <http://kyl.senate.gov/record.cfm?id=326009>. Senator Jeff Sessions (Ala.), the ranking Republican, claimed that Marshall's "record as an 'activist' judge constituted a violation of a responsible jurist's oath to apply the law without political favor." *American Conservatism*, *supra* note 167. Senator Chuck Grassley (R-Iowa) said Marshall's legal view "does not comport with the proper role of a judge or judicial method." *Id.* Sen. John Cornyn (R-Tex.) "pronounced Marshall 'a judicial activist' with a 'judicial philosophy that concerns me.'" Dana Milbank, *Kagan May Get Confirmed, But Thurgood Marshall Can Forget It*, WASH. POST, June 29, 2010, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062805129.html>.

216. Steele, *supra* note 215 (quoting Kagan, *supra* note 168, at 1130). Kagan was quoting Marshall's Bicentennial remarks. See Marshall, *supra* note 9, at 2.

217. Steele, *supra* note 215.

218. John Paul Rollert, Op-Ed., *The Surprising Star at Elena Kagan's Hearing: Thurgood Marshall*, CHRISTIAN SCI. MONITOR, July 8, 2010, available at <http://www.csmonitor.com/Commentary/Opinion/2010/0708/The-surprising-star-at-Elena-Kagan-s-hearing-Thurgood-Marshall>. The elements of the bridge Rollert referred to first surfaced during the Sonia Sotomayor confirmation process, when critics blasted President Obama for valuing empathetic judges because, to them, empathy was a euphemism for judicial activism. See generally Major Garrett, *Obama Pushes for 'Empathetic' Supreme Court*

wondering whether the Senate Judiciary Committee was holding hearings to confirm Thurgood Marshall rather than Elena Kagan.²¹⁹

As Marshall's biographer, Juan Williams,²²⁰ explained in his July 3, 2010, Wall Street Journal op-ed piece, the Kagan confirmation furor was really over Marshall's work as a lawyer, not as a judge.²²¹ But even the reality of Marshall's record as lawyer flies in the face of the caricature certain senators tried to portray during Kagan's confirmation hearings.²²² As both a lawyer

Justice, FOXNEWS.COM (May 1, 2009), <http://www.foxnews.com/politics/2009/05/01/obama-pushes-empathetic-supreme-court-justices/> (last visited August 2, 2010); Sam Stein, *Steele: Perez Hilton is Obama's Kind of "Empathetic Judge"*, THE HUFFINGTON POST (May 12, 2009), http://www.huffingtonpost.com/2009/05/11/steele-perez-hilton-is-ob_n_201916.html (last visited August 2, 2010). Judicial activism does not have a universally accepted definition. See Green, *supra* note 166, at 1197–98 n.3. Green's article analyzes the roots of the term, identifies and rejects four current—and typically pejorative—uses of the term, and reconceives judicial activism as a departure from “norms of judicial role that are culturally, temporally, and institutionally specific.” *Id.* at 1249, 1260–61. According to Green, judicial activism “does not depend on a court's deference to other political entities[,]” and “lacks any essential link to progressive politics or liberty.” *Id.* at 1227.

219. See, e.g., Milbank, *supra* note 215. By one count, in an example of the extensive focus on Marshall during the hearings, his name came up 35 times on the first day alone. See Christina Bellantoni, *Thurgood Marshall Takes Center Stage at Kagan Hearings*, TPM (June 29, 2010, 4:27 PM), <http://tpmdc.talkingpointsmemo.com/2010/06/thurgood-marshall-takes-center-stage-at-kagan-hearings.php>.

220. WILLIAMS, *supra* note 4.

221. See *American Conservatism*, *supra* note 168. (“The Supreme Court's unanimous ruling in [the Brown] decision required courage, given that segregation, either by law or in fact, had become the norm in much of the nation. If one argues that Marshall encouraged judicial ‘activism’ by seeking to have this overturned, that means Plessy was correctly decided, and racial segregation should have been protected under the Constitution. History has long ruled that is not a winning argument.”).

222. See *id.* Perhaps, as Williams suggests, the senators who disparaged Marshall during Kagan's confirmation hearings were confusing moral activism and judicial activism. Moral activism is a term that distinguishes lawyers who are guided by “general ethics, particularly social and political conceptions of justice [and] moral philosophy” from those guided by zealous advocacy, responsibility to the integrity of the legal system, or concern for individual clients' non-legal interests. PARKER & EVANS, *supra* note 166, at 23. Historically, the definition of judicial activism has never been clear. See Green, *supra* note 166, at 1200–1217 (rejecting modern definitions, which include “(1) any serious legal error, (2) any controversial or undesirable result, (3) any decision that nullifies a statute, or (4) a smorgasbord of these and other factors.”). *Id.* at 1217. Marshall was certainly guided by general theories of morals and ethics, but under the current understandings of judicial activism and under Green's reconception of that term, the most Marshall's critics could assert is that his dissents (if they, instead, were to have been the opinion of the majority) would have led to undesirable results. See e.g., *Holland v. Illinois*, 493 U.S. 474, 486 (1990) (In his majority opinion for *Holland v. Illinois*, Justice Scalia criticized Justice Marshall for “roll[ing] out the ultimate weapon, the accusation of insensitivity to racial discrimination—which will lose its

and as a judge, Marshall lived up to the modern understanding of legal roles and ethical obligations.²²³ Marshall's record as a practicing attorney establishes his place within the legal mainstream—he won twenty-nine of the thirty-two Supreme Court cases he argued as a lawyer.²²⁴ Moreover, Marshall's judicial opinions confirm his deep regard for the rule of law²²⁵—not one of his more than 100 opinions and rulings as a Second Circuit judge was ever overruled.²²⁶

Contrary to the view many senators expressed during the Kagan confirmation hearings, Marshall's comments about the Constitution are not evidence of a lawyer more committed to special interests or political ideology than to ethics and the rule of law.²²⁷ They are instead, according to Williams and others who have studied the late Justice or who knew him personally, evidence of a lawyer devoted to one guiding moral and Constitutional principle: equality for all.²²⁸ Marshall's words exemplify the

intimidating effect if it continues to be fired so randomly.”); Terence J. Galligan, *The Prosecutor's Duty to Disclose Exculpatory Evidence After United States v. Bagley*, 1 GEO. J. LEGAL ETHICS 213, 232–33 (1988), (“One could argue, in criticizing [Marshall's] approach, that because practically everything in the prosecutor's files may be relevant to guilt or innocence, Justice Marshall's understanding of Brady could require a prosecutor to give away the entire case before the trial. Moreover, a liberal standard of materiality might increase the likelihood of witness harassment, subornation of perjury, or the destruction of evidence. . . . An additional argument against Justice Marshall's approach is that a duty to turn over all materially relevant evidence would generate a large number of appeals and undermine the goals of judicial economy and the finality of judgments.”).

223. See generally MODEL RULES OF PROFESSIONAL CONDUCT (2010) and Preamble: MODEL CODE OF JUDICIAL CONDUCT 1 (2010) (emphasizing the importance of an impartial judiciary).

224. *American Conservatism*, *supra* note 168; Tushnet, *supra* note 44, at 1277; Friedman, *supra* note 15, at 4.

225. Marshall's respect for precedent and the rule of law was in fact the foundation for his dissent in *Payne v. Tennessee*, 501 U.S. 808 (1991), and he recognized that overturning cases absent a “special justification” risked destroying the individual rights our Constitution guarantees. *Id.* at 849–50. See *infra* note 305 and accompanying text. Some would argue that Marshall's dissent was rank hypocrisy given his opinions in the death penalty cases. See *id.* at 833–34 (O'Connor, J., dissenting) (“The response to Justice Marshall's strenuous defense of the virtues of stare decisis can be found in the writings of Justice Marshall himself. That doctrine, he has reminded us, ‘is not an imprisonment of reason.’”). Chief Justice Rehnquist, writing for the majority in *Payne*, did not mention “special justification” in his opinion. Rather, he argued that the Court could overturn two recent precedents because they “were decided by the narrowest of margins, over spirited dissents that challenged the basic underpinnings of those decisions.” *Payne*, 501 U.S. at 828–29. See *infra* Part V.A.

226. WILLIAMS, *supra* note 4, at 317; see also Friedman, *supra* note 15, at 9, 19.

227. See *supra* note 215 and accompanying text.

228. See *supra* note 168 and accompanying text.

solicitous qualities that contributed to his legacy, not as a judicial activist, but rather as a moral activist—one of the ethical legal roles that our Model Rules of Professional Conduct contemplate for lawyers.²²⁹ The Model Rules of Professional Conduct envision that role for lawyers by requiring lawyers to “seek improvement of the law” and to use their knowledge “to reform the law.”²³⁰ Marshall spent his career fulfilling that obligation through both his actions and his writing.

C. Legacy of the Bicentennial Speech

During his lifetime, Marshall recognized that the law was the most effective tool to resolve the racial problems that the Constitution failed to address and that America continued to face in the aftermath of slavery and the Civil War.²³¹ In his Bicentennial speech, Marshall noted the law’s shifting role in the struggle for Black equality stating, “What is striking is the role legal principles have played throughout America’s history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law.”²³² Marshall never embraced Dr. King’s peaceful protests and could not condone Malcolm X’s violent tactics; instead, he put his faith in the law as a tool for achieving equality.²³³ The significance of Marshall’s work, though, stretches well beyond the Black American civil rights movement.²³⁴ “His great achievement was to expand rights for individual Americans. But he especially succeeded in creating new protections under law for America’s women, children, prisoners, homeless, minorities, and immigrants.”²³⁵ Marshall did not see the Founding Fathers’ role as architects of our nation as complete, nor did he perceive his own

229. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 166, at 6–7.

230. *Id.*

231. WILLIAMS, *supra* note 4, at 400; Marshall, *supra* note 9, at 2, 4.

232. Marshall, *supra* note 9, at 5.

233. WILLIAMS, *supra* note 4, at xiv.

234. *Id.* at 400 (Juan Williams concludes his biography by noting that “His every argument spoke to individual rights for all. Protections for Black Americans or any other minority . . . were a function of the inviolable constitutional principle of individuals . . . As Marshall won case after case advancing the rights of Black Americans, he left behind him case law protecting the rights of *all* citizens.”) (emphasis in original).

235. *Id.* at xv.

role as social engineer as finished—instead, he believed those frameworks and foundations were the legacy on which successive generations would build.²³⁶

If Marshall were here to witness America's progress in the nearly twenty-five years since the Bicentennial, he likely would not be shocked that America continues its slow pace toward equality for all.²³⁷ Marshall recognized when he wrote *Reflections on the Bicentennial* in 1987 that it was unrealistic to tout America's progress as a victory.²³⁸

In a tribute to his mentor, Charles Houston, Marshall the moral activist and solicitous scholar again tempered apprehension with eagerness to confront the inevitably ongoing struggles for equality as he recounted a favorite story:

So let's look forward, and let's see. Maybe we can do it. Maybe we can make the day come. An old Pullman porter used to tell me that he'd been in every city of the country, and he'd always hoped that one day he would get someplace in the United States where he [had to] put his hand up in front of his face to find out if he was a Negro.²³⁹

Then-Professor Elena Kagan recognized the breadth of Marshall's contributions toward this Pullman porter's dream as she concluded a tribute to *her* mentor, "Justice Marshall's deepest commitment was to ensuring that the Constitution fulfilled its promise of eradicating such entrenched inequalities—not only for

236. See *id.* at 404; Marshall, *supra* note 9, at 5.

237. See THURGOOD MARSHALL WORKS, *supra* note 169, at xviii (According to Tushnet, "he always recognized that the real world did not fulfill the Constitution's commitments, and might never do so," and in Marshall's own words "Of course it's not true. Of course it will never 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."). Writing in 1998, Marshall's biographer, Juan Williams, noted the post-*Brown* setbacks to integration: "When he first joined the high court in the late 1960s, almost two thirds of Black students were in integrated schools. When he died, however, two thirds of Black students were back in mostly segregated schools." WILLIAMS, *supra* note 4, at 398.

238. See generally, Marshall, *supra* note 9, at 5.

239. Thurgood Marshall, *Tribute to Charles H. Houston*, in THURGOOD MARSHALL WORKS, *supra* note 169, at 272, 276; see Kagan, *supra* note 168, at 1128–29 (stating "Justice Marshall used to tell of a Black railroad porter who noted that he had been in every state and every city in the country, but that he had never been anyplace where he had to put his hand in front of his face to know that he was Black.").

African-Americans, but for all Americans alike.”²⁴⁰

Marshall knew that neither he nor the Framers could anticipate every context that would challenge the principles embodied in the Constitution. That appreciation for the inevitability of change is precisely why Thurgood Marshall used his writing to insist that future generations stay committed to ensuring a broad concept of equality under the law and to building on the foundation Marshall spent his career constructing.

V. PROFILE IV. THE JUST JURIST’S DISSENT IN *PAYNE V. TENNESSEE*

Justice Marshall’s writings as a jurist, similar to his writings as a practitioner and a scholar, consistently focused on protecting the civil and criminal rights of others. In his writings in the criminal law, he sought to protect defendants’ rights against bias and injustice.²⁴¹ His criminal law jurisprudence was rooted in the deep and personal understanding of the criminal justice system that he acquired as a criminal defense lawyer.²⁴² Those experiences—

240. Kagan, *supra* note 168, at 1129.

241. See generally Bruce A. Green & Daniel Richman, *Of Laws & Men: An Essay on Justice Marshall’s View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369 (1994).

242. See generally Gerald F. Uelman, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403 (1994). “As a law student at Howard University, under the deanship of Charles Houston, Marshall participated in one of the earliest clinic programs in criminal law . . .” Green & Richman, *supra* note 241, at 370–71; see also WILLIAMS, *supra* note 4, at 58. In his last year there he worked closely with Charles Houston and other faculty to defend a Black man charged with murdering two white women in Virginia, and who then, in fear of lynch mobs, fled to Massachusetts. Juan Williams, *Thurgood Marshall: American Revolutionary*, 25 U. ARK. LITTLE ROCK L. REV. 443, 451–52 (2003). As a new lawyer in Baltimore, trying to establish a law practice in a still largely segregated city, the young Thurgood Marshall regularly represented criminal defendants. Green & Richman, *supra* note 241, at 370. Marshall was legal counsel for the NAACP from 1936 until 1961. WILLIAMS, *supra* note 4, at 84, 296. He acted as assistant legal counsel from 1936 to 1938, and in 1938, he became head of the NAACP’s legal department. *Id.* at 99. In 1940, Marshall and NAACP board members created the Legal Defense Fund (LDF) to operate as the NAACP’s legal defense organization. *Id.* at 104–05. Marshall continued to work in this position until he was appointed to the U.S. Second Circuit Court of Appeals in 1961. *Id.* at 296. In his work with the NAACP and the LDF, Marshall defended poor, Black, and often innocent criminal defendants while he worked to break down racial discrimination through desegregation. Green & Richman, *supra* note 241, at 373. Justice Marshall’s understanding of the meaning of justice in the criminal law system was surely informed by his own experiences as a criminal defense lawyer in a way that was unique among the Justices. The 1992 Supreme Court was made up of Justices with professional experiences quite different than those of Justice Marshall. See *infra* notes 254–255 and accompanying text discussing Marshall’s experience as a criminal defense lawyer.

with criminal law defense and with criminal law jurisprudence—shaped Justice Marshall's final Supreme Court opinion: his dissent in *Payne v. Tennessee*,²⁴³ a 1991 capital sentencing decision.

Justice Marshall is well known as a lifelong and unflagging opponent of the death penalty.²⁴⁴ He believed that capital punishment was in all circumstances unconstitutional, and voted

Chief Justice William Rehnquist was known for his conservative views. Early in his career he was a law clerk for Justice Jackson, and he prepared a memorandum in support of segregation in the Brown case. Under President Nixon, he was the head of the Office of Legal Counsel within the Justice Department. Keith E. Whittington, *William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 8. 8–11 (Earl M. Maltz ed., 2003). Justice Harry Blackmun was thought to be conservative in criminal justice, but liberal in civil rights. In private practice, he focused on wills, property, and tax. Richard C. Reuben, *Justice Defined: Harry A. Blackmun*, in THE SUPREME COURT AND ITS JUSTICES 254 (2d ed., Jesse Choper ed., 2001). Justice Sandra Day O'Connor was considered a "middle of the road" Justice. At the start of her career, larger firms would not hire her because she was a woman. She worked for the Attorney General's office in Arizona, and later served on the Arizona Court of Appeals. David O. Stewart, *Holding the Center: Sandra Day O'Connor*, in THE SUPREME COURT AND ITS JUSTICES 275. Justice Anthony Kennedy was known for his conservative views on racial equality issues. Prior to Supreme Court nomination, he practiced law in his family's private firm, he taught Constitutional Law, and served on the U.S. Court of Appeals for the Ninth Circuit, as the youngest federal appellate judge in the nation. Earl M. Maltz, *Anthony Kennedy and the Jurisprudence of Respectable Conservatism*, in REHNQUIST JUSTICE 140. Justice Antonin Scalia was a professor of Law at University of Virginia and served on the faculty of University of Chicago. While teaching, he also served as general counsel for the Office of Telecommunications Policy, chairman of the Administrative Conference of the U.S., Assistant AG for the Office of Legal Counsel, chairman of the APA Section of Administrative Law, and chairman of the APA Conference of Section Chairmen. Ralph A. Rossum, *Text and Tradition: The Originalist Jurisprudence of Antonin Scalia*, in REHNQUIST JUSTICE 34. Justice John P. Stevens practiced anti-trust law in Chicago for twenty years. While serving on the Seventh Circuit Court of Appeals, he was considered moderately conservative. As a Supreme Court Justice, his opinions often differed from a conservative majority. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in REHNQUIST JUSTICE 157. Justice Byron R. White practiced in a Colorado Firm, with a focus on antitrust, bankruptcy and tax law, in his early career. He later became a Deputy Attorney General in the Justice Department, with a tendency to back law enforcement in criminal cases and urged the Justice Department to take a back seat on civil rights cases. Kenneth Jost, *The Legacy of Justice Byron White*, in THE SUPREME COURT AND ITS JUSTICES 209. Justice David H. Souter served in the Attorney General's Office of New Hampshire. He served as a state trial court judge, a state supreme court judge, and a First Circuit U.S. Court of Appeals Judge. He was considered to be more liberal than most of the 1992 Supreme Court Justices. Thomas M. Keck, *David H. Souter: Liberal Constitutionalism and the Brennan Seat*, in REHNQUIST JUSTICE 185.

243. *Payne v. Tennessee*, 501 U.S. 808 (1991). Justice Marshall announced his retirement just after the Court handed down the decision in *Payne*. David M. O'Brien, *Charting the Rehnquist Court's Course: How the Center Folds, Holds, and Shifts*, 40 N.Y.L. SCH. L. REV. 981, 981 (1996).

244. Randall Coyne, *Taking the Death Penalty Personally: Justice Thurgood Marshall*, 47 OKLA. L. REV. 35, 43 (1994).

against imposing the death penalty in every case that came before him.²⁴⁵ Central to his criminal law jurisprudence is his personal understanding of how imposing the death penalty reflects discrimination by disproportionately affecting low-income, minority defendants.²⁴⁶

His staunch opposition to capital punishment was grounded in his many years of work with the NAACP and the Legal Defense Fund.²⁴⁷ Throughout his career as a lawyer for the NAACP and the Legal Defense Fund,²⁴⁸ Marshall represented countless Black men, usually on trial for rape or murder, in backwater towns in the still segregated South and elsewhere.²⁴⁹ Those men were frequently falsely charged by police²⁵⁰ and forced, through police beatings, to confess to crimes they did not commit.²⁵¹ They were often tried by all white juries in small-town local courts, far from outside scrutiny,²⁵² and if convicted, they would most often face death sentences.²⁵³ Through Marshall's many years witnessing those injustices first-hand, he recognized the criminal justice system's frequent failings, particularly in capital cases, and the disproportionate effect those failings had on poor, minority defendants. Marshall gained this awareness of the many ways the law could be applied in an arbitrary and capricious fashion while

245. Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases, 1987, 1991*, 27 MISS. C. L. REV. 335, 336 (2008).

246. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit* (1986), in THURGOOD MARSHALL WORKS, *supra* note 169, at 286–95.

247. See Green & Richman, *supra* note 241, at 369–73.

248. See *supra* note 242 for information on Marshall's involvement with NAACP and LDF.

249. See, e.g., *supra* text accompanying notes 51–65, discussing Marshall's defense work in *Lyons v. Oklahoma*, 322 U.S. 596 (1944). In 1944, while working on the *Lyons* case, Marshall was also called upon to defend Joseph Spell, a Black butler accused of raping his white female employer in Connecticut. WILLIAMS, *supra* note 4, at 119–21.

250. See, e.g., *infra* note 254. When one of the Black men accused of raping a seventeen-year-old woman was asked to take a plea bargain, including admitting to raping the woman, the accused man spat on the floor and refused, saying, "I didn't and I'm not going to say so." WILLIAMS, *supra* note 4, at 155.

251. See, e.g., *supra* case cited and text accompanying notes 51–65.

252. See, e.g., *Watts v. Indiana*, 338 U.S. 49 (1949) (The U.S. Supreme Court overruled a verdict for the State, in which the defendant was beaten until he provided a confession and found guilty by an all white jury, from which Blacks were specifically excluded). See WILLIAMS, *supra* note 4, at 147.

253. Green & Richman, *supra* note 241, at 370–71.

representing criminal defendants in capital cases.²⁵⁴ It was that understanding that sensitized him to the system's potential limitations,²⁵⁵ and permeated his criminal law jurisprudence. Marshall's understanding of how human failings can adversely affect the implementation of Constitutional safeguards, and how bias can affect the criminal justice system²⁵⁶ pervade his opinions, and are specifically evident in his dissent in *Payne*.

A. *Background of Payne*

Payne v. Tennessee was a 6–3 decision in which the majority

254. For example, in Groveland, Florida, while Marshall was head of the NAACP, in a highly publicized case, four Black men were accused of raping a seventeen-year-old white woman. The four men were chased at night by a white mob through a Florida swamp. The mob killed one of the men and beat the other three bloody and unconscious. The three were taken to jail where the beatings continued. The police claimed that the three confessed. Although there were no written confessions and no evidence that the woman was raped, the three were convicted. Two were sentenced to death and the third, only sixteen years old, was sentenced to life in prison. WILLIAMS, *supra* note 4, 152–53. The U.S. Supreme overturned the death sentences and ordered a new trial. When the two defendants were being transferred to a different jail, however, they were shot, one fatally, by a sheriff. *Id.* at 153–54. During the new trial, Marshall himself was threatened with physical violence. *Id.* at 155. At the new trial of the surviving capital defendant, the judge banned Marshall and another NAACP lawyer from representing him because “the NAACP was a group of agitators who had ‘stirred up trouble in the community.’” *Id.* at 154. The new trial ended with another conviction. Marshall appealed the case up to the Supreme Court, which refused to hear it. Marshall then used the news media and the political contacts of the NAACP to put public pressure on the governor who changed the sentence to life in prison. *Id.* at 156–57.

255. Marshall's experience with the justice system of the 1930s and 40s became quite personal on at least one occasion. In 1946, Marshall and several other LDF lawyers were in rural Tennessee representing two Black men charged with rioting and attempted murder. Each night they made the forty-five mile drive to Nashville to sleep because they feared they would be killed if they slept in the small town. One night, as they drove just outside of the town, they confronted a police roadblock. When Marshall asked the policeman why he was stopped, the trooper replied “for drunken driving.” Marshall was forced into the back of the police car with two gun-bearing deputies and was driven to a wooded area where a group of white men were waiting. Marshall's colleagues followed them, defying the police order to get back on the road to Nashville and forcing the police, who wanted no witnesses to what they had planned, to take Marshall back to town to appear before a judge. The judge, after smelling Marshall's breath, declared “Hell, this man hasn't had a drink. What are you talking about?” Marshall, realizing how close he had come to death, was immensely relieved when the judge released him. *The Reminiscences of Thurgood Marshall* (1977), in THURGOOD MARSHALL WORKS, *supra* note 169, at 428–430. There are slight variations of the reports of the judge's exact words. See WILLIAMS, *supra* note 4, at 141 (“That man hadn't had a drink in twenty-four hours, what the hell are you talking about.”); Thomas C. Battle, *Thurgood Marshall: The Power of His Legacy*, 37 HOW. L. J. 117, 118–19 (1993) (“You're crazy. This man hasn't even had a drink. He's certainly not drunk.”).

256. Green & Richman, *supra* note 241, at 373.

of the Court²⁵⁷ held that it was constitutionally permissible for a prosecutor to introduce “victim impact evidence”²⁵⁸ during the penalty phase of the trial.²⁵⁹ In 1988, Pervis Tyrone Payne was convicted in a Tennessee court of two counts of first-degree murder and one count of first-degree assault with intent to murder.²⁶⁰ The victims of the particularly gruesome crime were a mother and her two children.²⁶¹ The mother and her two-year-old daughter, Lacie were murdered; her three-year-old son, Nicholas, survived the brutal attack.²⁶²

In arguing for the death penalty, the prosecutor commented on the murders’ continuing effects on the victim’s family.²⁶³ He then put the victim’s mother, Mary Zvolanek, Nicholas’s grandmother, on the stand and asked her “[h]ow has the murder of Nicholas’s mother and his sister affected [Nicholas]?”²⁶⁴ The grandmother replied that “he cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times . . . and asks me, Grandmama, do you miss my Lacie? . . .”²⁶⁵ The prosecutor then argued that while there was nothing the jury could do for the mother and Lacie or for the Zvolaneks, there was something that they could do for Nicholas: sentence Payne on Nicholas’s behalf.²⁶⁶ The jury sentenced Payne to death.²⁶⁷

Payne took his case to the Tennessee Supreme Court where he

257. 501 U.S. 808, 811 (1991). The majority opinion was written by Chief Justice Rehnquist.

258. Victim-impact statements include information about both the victim’s character and the crime’s emotional impact on the victim’s family. In *Booth*, the victim-impact evidence included statements by the victim’s family about the character of the victim and the emotional impact of the loss on the family. *Booth v. Maryland*, 482 U.S. 496 (1987). In *Gathers*, the Court expanded its holding in *Booth* to include characterizations of the victim by the prosecutor. *South Carolina v. Gathers*, 490 U.S. 805 (1989).

259. *Payne*, 501 U.S. at 827.

260. *Id.* at 811.

261. *Id.*

262. *Id.* at 812.

263. *Id.* at 814–815.

264. Ranae Bartlett, *Payne v. Tennessee: Eviscerating the Doctrine of Stare Decisis in Constitution Law Cases*, 45 ARK. L. REV. 561, 563 n.6 (1992) (citing Joint Appendix for Petitioner at 1, *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990), *aff’d* *Payne v. Tenn.*, 501 U.S. 808 (1991)).

265. *Id.*

266. *Payne*, 501 U.S. at 815.

267. *Id.* at 816.

argued that the Eighth Amendment per se barred the grandmother's testimony about the emotional impact of the murders on the victim's family.²⁶⁸ The Tennessee Supreme Court, in contradiction to the then-controlling precedents,²⁶⁹ rejected Payne's argument and affirmed his death sentence.²⁷⁰ Payne appealed to the U.S. Supreme Court.²⁷¹

In 1991, the U.S. Supreme Court, just two years after it prohibited the type of evidence at issue in *Payne*, abruptly reversed itself and upheld the Tennessee Supreme Court's decision, approving the introduction of victim-impact evidence.²⁷² In doing so, it overturned two recent precedents, *Booth v. Maryland*,²⁷³ decided four years earlier in 1987, and *South Carolina v. Gathers*,²⁷⁴ decided just two years earlier in 1989.

268. *Id.*; see also *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990), *aff'd*, *Payne v. Tennessee*, 501 U.S. 808 (1991).

269. At the time of the Tennessee Supreme Court's decision, *Booth* and *Gathers* were the controlling precedents. Those cases prohibited the introduction of information about the victim in capital cases. See *Booth v. Maryland*, 482 U.S. 496 (1987); *South Carolina v. Gathers*, 490 U.S. 805 (1989). The Tennessee court's decision was clearly inconsistent with those decisions. Justice Marshall, in his dissent in *Payne*, noted that the majority's willingness to overturn closely decided precedents would diminish the Court's stature by encouraging "defiance" of its closely decided cases. *Payne*, 501 U.S. at 845 (Marshall, J., dissenting).

270. *Id.* at 816. See *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990), *aff'd*, *Payne v. Tennessee*, 501 U.S. 808 (1991).

271. See *Payne*, 501 U.S. at 817.

272. *Id.* at 827.

273. *Booth*, 482 U.S. 496 (1987). In *Booth*, the defendant was sentenced to death for murdering an elderly couple in their home. *Booth*, 482 U.S. at 497–98. At sentencing, the prosecutor read a presentence report that, pursuant to state law, included a victim impact statement. *Id.* at 498–500; see MD. ANN. CODE, ART. 41, § 609(C), (D) (1986). The report contained statements by the victim's son, daughter and other family members. The statement focused on the victim's exceptional personal qualities and described the emotional problems that various family members suffered as a result of the murders. The daughter noted that she slept poorly, could "no longer watch violent movies or look at kitchen knives without being reminded of the murders." *Booth*, 482 U.S. at 500. The granddaughter described how the deaths had ruined the wedding of another close family member and that the bride had to cancel her honeymoon to attend the victims' funeral. *Id.* The son stated that he suffered from lack of sleep and depression, that he had become fearful and, that in his opinion, his parents were "butchered like animals." *Id.*

274. *South Carolina v. Gathers*, 490 U.S. 805 (1989). In *Gathers*, the defendant was sentenced to death for the murder of a man who, although he had no formal religious training, considered himself a preacher. *Gathers*, 490 U.S. at 806–07. No victim impact evidence was admitted, but in his closing argument the prosecutor read a long prayer that was found among the victim's possessions. The prayer, titled the "Game Guy's Prayer" portrayed the victim as humble and sympathetic. It read, in part:

Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. . . . [H]elp me to always play

Chief Justice Rehnquist, writing for the majority, almost summarily defended the Court's readiness to overturn its very recent precedents. He noted that the Court has found that *stare decisis* was not an "inexorable command; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'"²⁷⁵ He supported his argument by asserting that "considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights and that the opposite is true in cases involving procedural and evidentiary rules"²⁷⁶ In defending the Court's decision, Rehnquist added that the two overturned precedents "were decided by the narrowest of margins, over spirited dissents that challenged the basic underpinnings of those decisions."²⁷⁷

Chief Justice Rehnquist argued that it is entirely appropriate and consistent with the historical development of the law to consider evidence of the harm done in determining punishment.²⁷⁸ He argued that rather than shifting the focus from the defendant and the circumstances of his crime, victim-impact evidence "is designed to show . . . each victim's 'uniqueness as an individual human being.'"²⁷⁹ Additionally, Justice Rehnquist maintained that, as a matter of fairness, because defendants are permitted to offer mitigating evidence, prosecutors should be permitted to offer evidence and argument about the harm the defendant caused.²⁸⁰

B. Marshall's Dissent in *Payne*

Relying on the themes of his criminal jurisprudence, Justice

on the square. . . . I'd only like to know that you feel that I have been . . . a good game guy.

Id. at 808–09. The prosecutor then went to note that the victim had mental problems and could not hold a job, but that among the victim's few possessions was a voter registration card. *Id.* at 809.

275. *Payne*, 501 U.S. at 828 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

276. *Payne*, 501 U.S. at 828. (See *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, (1932) (Brandeis, J., dissenting), *overruled by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924); *The Genesee Chief v. Fitzhugh*, 12 How. 443 (1852), *superseded by statute*, 28 U.S.C. § 1333(1), *as recognized in Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)).

277. *Id.* at 828–29.

278. *Id.* at 819–29.

279. *Id.* at 823.

280. *Id.* at 825–27.

Marshall wrote a vehement and powerful dissent to the Court's opinion. At the heart of his writing in *Payne* were two beliefs: his resolute opposition to the death penalty and his understanding that failing to implement laws impartially is most harmful to the most vulnerable individuals.²⁸¹

While the arguments in Justice Marshall's dissent were predicated on and permeated with his deep personal understanding of the frequent unfairness in the application of the law, the framing of his argument in *Payne* also reflected his genius as a legal strategist, writer, and jurist. Instead of focusing narrowly on the immediate unfairness the majority's decision created, he took a more expansive approach and went beyond critiquing the majority's substantive argument. As a writer, he chose to identify and attack a primary presumption underlying the opinion: that the Court could, without justification, disregard its recent precedents.²⁸² Thus, in his dissent, Justice Marshall limited his expression of his disagreement with the majority's reasoning on the merits of the case. Instead, he focused on the broader argument that the majority's disregard for the long-established principle of *stare decisis* would inevitably reverse other protections of individual rights.²⁸³

The first portion of Marshall's dissent explained that *Booth* and *Gathers* were correctly decided because in capital murder proceedings, evidence about the victim is irrelevant and inherently prejudicial.²⁸⁴ Justice Marshall supported a ban on victim-impact evidence in capital murder cases because he concurred with the premise of both *Booth* and *Gathers*: a death sentence must be predicated on an "individualized determination" of the defendant's moral guilt and the factors before a jury must minimize the risk of an "arbitrary and capricious" decision.²⁸⁵ An individualized determination is based on "whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."²⁸⁶ By introducing evidence about the victim's character or reputation, or about the harm the

281. See *supra* notes 241–256 and accompanying text.

282. *Payne*, 501 U.S. at 844–45 (Marshall, J., dissenting).

283. See *Id.* at 851.

284. *Id.* at 845–48.

285. *Id.* at 845 (citing *Booth v. Maryland*, 482 U.S. at 502).

286. *Payne*, 501 U.S. at 846 n.1 (citing *Booth*, 482 U.S. at 502).

crime caused, the focus shifts from the defendant's blameworthiness to the victim's personality and the victim's family's grief.²⁸⁷ Thus, if the victim "was a sterling member of the community,"²⁸⁸ if the victim's family circumstances were particularly tragic, or if the family members were especially articulate, a defendant would be more likely to have the death penalty imposed than if the victim had been less reputable or had less articulate family members.²⁸⁹

Additionally, Marshall argued that many defendants have no knowledge about their victims at the time of the murder, thus raising the possibility that they would be sentenced to death based on inherently poignant or disturbing information that was unknown to them at the time of the crime.²⁹⁰ To Justice Marshall, it was unacceptable for a jury to hear this type of information. Introducing such evidence inevitably created an unacceptable risk of arbitrariness in capital sentencing because the evidence was based on emotional factors related to the victim or the victim's family, not to the defendant and the crime itself.²⁹¹ For Justice Marshall, admitting this type of evidence was inherently prejudicial.²⁹²

In the second and more powerful part of his dissent in *Payne*, Justice Marshall issued an ominous warning about a shift in the Court's source of power.²⁹³ He asserted that the majority's opinion reflected a change from decisions grounded in precedent, to opinions that reflected the personal predilections of the members of the Court.²⁹⁴ He railed against what he perceived as the majority's willingness to overturn recent precedent for no reason other than their own disagreement with it.²⁹⁵ He attacked the foundation of the majority's decision—its failure to adhere to the

287. *Id.* at 845–46 (citing *Booth*, 482 U.S. at 504; *South Carolina v. Gathers*, 490 U.S. 805, 810) (1989).

288. *Booth*, 482 U.S. at 506.

289. *Id.* at 505.

290. *Payne*, 501 U.S. at 845–46 (Marshall, J., dissenting) (citing *Booth*, 482 U.S. at 504; *Gathers*, 490 U.S. at 810).

291. *See id.* at 846.

292. *Id.*

293. *Id.* at 848–55 (Marshall, J., dissenting).

294. *Id.* at 850–51.

295. *Id.*

principle of *stare decisis*²⁹⁶—and identified the decision’s broader harmful impact: its potential for reversing individual rights.²⁹⁷ In this part of the dissent, he articulated his abiding opposition to what was for him the most disturbing aspect of the opinion, and its greatest threat to justice: the majority’s disregard for *stare decisis*.²⁹⁸ Justice Marshall argued that the majority dangerously ignored the principle of *stare decisis* and substituted its will for the accumulated judgment of the Court, thereby threatening not only those being sentenced for capital murder, but also jeopardizing other protections previously guaranteed by the Court.²⁹⁹

Justice Marshall argued that *stare decisis* played a critical role in the U.S. legal system for two reasons. First, “fidelity to precedent is fundamental to a society governed by the rule of

296. *Id.* at 848–54.

297. *Id.* at 855–56.

298. The merits of horizontal *stare decisis*, the concept that the Court must follow its own prior decisions, has generated a significant dispute among both scholars and judges. Proponents insist that *stare decisis* serves several important functions: (1) it allows for predictability and stability because individuals are able to conform their behavior to a set of guidelines knowing that their behavior will be protected; (2) it promotes judicial efficiency by providing a disincentive to re-litigating precedent cases thus reducing judicial caseloads; (3) it promotes the notion that decisions are not simply the result of the predilections of a single judge or group of judges; and (4) *stare decisis* helps legitimize the judicial function in several ways. It promotes the notion that the Court’s decisions are not arbitrary—by treating similarly situated individuals similarly. By adhering to precedent, courts not only show deference to their predecessors, but also give weight to current decisions because people recognize the lasting impact of their decisions. William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 54 (2002). On the other hand, as Justice Rehnquist argued, *stare decisis* is not an “inexorable command,” *Payne*, 501 U.S. at 828; and that unwavering adherence to the principle would have some troubling and damaging results: (1) adhering to wrongly decided cases would also damage the Court’s legitimacy; (2) strictly adhering to precedent would fail to consider changing and developing social and political factors that can make prior decisions outdated or ineffective; and (3) adhering to *stare decisis* would limit the Court’s ability to alter “bad” law—and would thus leave this function to Congress—further damaging the Court’s power and legitimacy. Consovoy, *supra* at 54; see also Emery G. Lee, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 585 (2002). As these arguments suggest, in the Supreme Court, horizontal *stare decisis*, creates a tension between the value of conforming decisions to precedent and the notion that each case should be correctly decided. Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 128 (1994). While the view that it is most important that cases be decided correctly is often attributed to conservative Justices, Professor Power notes that “[c]onservatives have no monopoly on attacks on stare decisis,” *id.* at 130, and that the sides have at times been reversed. Rather, he concludes that “devotion to precedent is largely a losing side’s gambit.” *Id.* at 131.

299. *Payne*, 501 U.S. at 850–52 n.2 (Marshall, J., dissenting).

law.”³⁰⁰ Second, failing to adhere to precedent, absent some change in circumstance or some way to distinguish the case at hand from the precedents is nothing short of the “blatant disregard for the rule of law,”³⁰¹ which is how Marshall viewed the majority’s decision in *Payne*. Marshall argued that *stare decisis* is the mechanism that assembles a collection of discrete cases into a cohesive legal system.³⁰² If individual decisions do not adhere to the collective judgment of Justices over time, those decisions would do little more than reflect the politics of the sitting Justices.³⁰³ In such a system, all decisions risked being arbitrary, unpredictable, and unfair.³⁰⁴

For Justice Marshall, when the Court’s precedents are overturned without a “special justification”³⁰⁵—something the

300. *Id.* at 848 (citing *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1993), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)). *See supra* note 222 for a discussion of critics who questioned Marshall’s commitment to the rule of law.

301. *Id.* at 854–55.

302. *See id.* at 848–49.

303. *Id.* at 851.

304. One commentator noted that Justice Marshall very accurately saw through the majority’s rhetoric when he bluntly stated that only the members of the Court had changed since *Booth* and *Gathers* were decided. Lynn McCreery Shaw, *Five to Four Over Spirited Dissent: Justification to Overrule?*, 13 MISS. C. L. REV. 419, 433 (1993). Between the time *Booth* was decided in 1987 and the *Payne* opinion in 1991, Justices Powell and Brennan left the Court. *Id.* Justice Powell, a moderate and the author of the *Booth* majority, retired and was replaced by Justice Kennedy, who voted with the majority. *Id.* Brennan, the author of *Gathers*, was replaced by Justice Souter, who joined the majority in *Payne*, and voted to overrule *Booth* and *Gathers*. *Id.* In Marshall’s view, the problem of arbitrariness is exacerbated by the majority’s rationale that both *Booth* and *Gathers* were 5-4 decisions. In addressing Rehnquist’s reason that overturning *Booth* and *Gathers* because they were decided by “the narrowest of margins,” and “over spirited dissents,” *Payne*, 501 U.S. at 828–29, Marshall noted that the ramifications of this statement are broad. *Id.* at 851 (Marshall, J., dissenting). He argued that the decision placed all existing and future 5-4 decisions in potential jeopardy including “scores of decisions” involving the Bill of Rights and the Fourteenth Amendment. *Id.* at 852 n.2.

305. *Payne*, 501 U.S. at 849 (Marshall, J., dissenting). Of course, the Supreme Court is not bound by its precedents, but to preserve its legitimacy, the Court has looked for “special justifications” before changing its course in a body of law. The requirement of a special justification was an important tenant of the Court’s *stare decisis* jurisprudence. The use of special justification in constitutional cases can be traced to *Arizona v. Rumsey*, 467 U.S. 203 (1984); Lee, *supra* note 298, at 582. The use of special justification was developed during a time when the Court required a standard for overruling precedent, due to the unstable political climate in the Court at the time. Lee, *supra* note 298, at 583. Special justification required the Justices to have more than the “conviction that the challenged precedent was wrongly decided.” *Id.* at 582. Justice Kennedy established three special justifications in *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), which Justice Marshall reiterated in his dissent in *Payne*, 501 U.S. at 849. Justice Marshall listed: (1) “The advent of ‘subsequent

Court had previously required — the threat to fairness extended beyond defendants facing capital sentencing.³⁰⁶ He argued that the majority's rationale for overturning *Booth* and *Gathers*, both of which had been decided within the past four years, was not grounded in a "special justification."³⁰⁷ Rather, he maintained that in the two years that elapsed since *Booth* and *Gathers*, there was no change in the facts or the law supporting those opinions.³⁰⁸ He asserted that the only change was a change in the make-up of the Court, and that the decision reflected the majority's politics, rather than a reasoned justification for a policy change.³⁰⁹

Justice Marshall used several classic legal discourse and writing techniques in his dissent. By assailing the underpinnings of the majority's opinion rather than simply attacking the argument's logic or the result's unfairness, Justice Marshall's dissent reflected the theme of his career as both a lawyer and a jurist, championing individual rights.³¹⁰ He did so without resorting to using policy arguments. Instead, he used his strongest argument—the law—to advance the policies he supported throughout his legal career. By asserting that the majority abandoned the principle of *stare decisis*, he argued that the Court sanctioned the arbitrariness that he fought throughout his career in a way that set the stage for reversing other individual rights.³¹¹ By

changes or development in the law' that undermine a decision's rationale," *Payne*, 501 U.S. at 849 (citing *Patterson*, 491 U.S. at 173); (2) "The need 'to bring [a decision] into agreement with experience and facts newly ascertained,'" *Payne*, 501 U.S. at 849 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932), *overruled by* *Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938)); *see also* *Patterson*, 491 U.S. at 173; and (3) "A showing that a particular precedent has become a 'detriment to coherence and consistency in the law,'" *Payne*, 501 U.S. at 849 (citing *Patterson*, 491 U.S. at 173). Justice Marshall acknowledged that the majority's reasoning is based on the fact that *Booth* and *Gathers* "have defied consistent application by the lower courts." However, he further states that the evidence provided to support this claim is feeble. The majority never refers to a "special justification" in the opinion. *Payne*, 501 U.S. at 849–50.

306. *See id.* at 851–52.

307. *Id.* at 849 (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

308. *Id.*

309. *Id.* at 850–51.

310. *See Payne*, 501 U.S. at 851–52 n.2; Jeffery Rosen, *Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.*, 43 N.Y.L. SCH. L. REV. 41, 66 (1999), (referring to the dissent in *Payne*, "Justice Marshall listed a number of opinions he predicted might be overruled by those who do not have great regard for precedent. Some already have been").

311. *Payne*, 501 U.S. 851–52 (Marshall, J., dissenting).

attacking the foundation of the majority's analysis, his dissent ultimately defended a much broader panoply of rights than just the rights of those facing bias from victim-impact evidence. His dissent became a powerful argument for justice for the powerless and vulnerable defendants who find themselves immersed in the justice system.

Justice Marshall concluded his sweeping critique of the majority's opinion with a warning that reflected his analysis of the larger harm of the decision:³¹² "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent."³¹³ That is indeed, an ominous and fitting warning from a just jurist as the United States is confronted with an increasingly politicized Court.

VI. CONCLUSION

Thurgood Marshall wrote for many audiences: other attorneys, judges, Justices, and legal scholars. No matter who the reader was, however, Marshall always wrote with persuasion, passion, and purpose. As a practitioner, Marshall made sure that his briefs were carefully written. He is quoted as saying "I never filed a paper in any court with an erasure on it. If I changed a word, it had to be typed all over."³¹⁴ As a scholar, his tone, although considered harsh by some critics, was always candid. Indeed, many considered him to be a "curmudgeon,"³¹⁵ yet it was his adherence to his principles that colored his perspective and led him to engage in such rigorous legal discourse with others. In his final role as a Supreme Court Justice, he authored not only articulate and distinct dissents, but also well-reasoned opinions.³¹⁶ Even as a Justice, however, he was not without his critics, many of whom questioned his intellect.³¹⁷ Yet Marshall worked against this

312. See *supra* note 304.

313. *Payne*, 501 U.S. at 856 (Marshall, J., dissenting).

314. WILLIAMS, *supra* note 4, at 68.

315. Juan Williams, *The Many Masks of Thurgood Marshall: Behind the Justices Curmudgeonly Persona A Special Kind of Torment*, WASH. POST, Jan. 31, 1992, available at www.thurgoodmarshall.com/speeches/masks_article.htm.

316. William J. Brennan, *A Tribute to Justice Thurgood Marshall*, 105 Harv. L.Rev. 23, 23 (1991); see generally ROWAN, *supra* note 2, at 438-54.

317. Williams, *supra* note 315; Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131, 1164 (1993) ("In certain comments, one can detect an implicit criticism—that the skills necessary to successful trial

unfortunate preconception of intellectual inferiority³¹⁸ and became a leading defender of rights while serving on a conservative bench.

Becoming a Supreme Court Justice would be the pinnacle of most legal careers. For Thurgood Marshall, however, it was only one of his many accomplishments. Through his writings, Marshall brought success to many causes: desegregation, equality, and the rights of criminal defendants. As a writer, he demonstrated the power of the written word—its ability to educate, persuade, and ignite change.

advocacy are different from those appropriate to the thoughtful and reflective role of a judge.”).

318. Williams, *supra* note 315.