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## Marshall as a Judge

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# THE THURGOOD MARSHALL LECTURE

## MARSHALL AS A JUDGE

*Robert Post\**

It is a great privilege to inaugurate the annual Thurgood Marshall Lecture at the Second Circuit.<sup>1</sup> I am grateful to the court for making this lecture possible, and to Chief Judge Katzmann and Judge Parker for this wonderful invitation.

Marshall is a towering and inspirational figure in the history of American constitutional law. He changed American life forever and unquestionably for the better. But the contemporary significance of Marshall's legacy is also, in ways that challenge present practices and beliefs, ambiguous.

In this Lecture, I hope to explore that significance by asking which aspects of Marshall's historic career the Second Circuit means to honor in establishing this Lecture series. Does the Second Circuit mean to celebrate Marshall primarily for his accomplishments before coming on to the bench or also, and equally, for his achievements as a judge and as a justice?

Marshall always had great affection for the Second Circuit. As of course you know, he served as a judge here from 1961 to 1965. In 1972, five years after he joined the Supreme Court, he became your circuit justice. At your centennial anniversary in 1991, he expressed without reservation "my admiration of this great court."<sup>2</sup> "To me," he said, "the Second Circuit stands out among all other courts of appeals for the quality of its contributions to the American legal system."<sup>3</sup> "Any discussion of the Second Circuit must start," he added, "with its brilliant judges."<sup>4</sup> "The Second Circuit has been home to such legendary figures as Learned Hand, Augustus Hand, Charles Clark, Jerome Frank, and Henry Friendly," who have endowed the circuit with "an unrivaled reputation for judicial craftsmanship and scholarship."<sup>5</sup>

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\* Sterling Professor of Law, Yale Law School. I am grateful for the indispensable research and assistance of Allaya Lloyd, without whom this lecture would not have been possible. I am also grateful for the perceptive advice and comments of Guido Calabresi, Owen Fiss, Paul Gewirtz, and Deborah Rhode.

1. This lecture was given on December 12, 2018, at the Thurgood Marshall United States Courthouse.

2. Thurgood Marshall, *Introductory Remarks: Celebrating the Second Circuit Centennial*, 65 ST. JOHN'S L. REV. 645, 645 (1991).

3. *Id.*

4. *Id.*

5. *Id.*

The puzzle I mean to explore is provoked by the words of Marshall's generous praise, for Marshall himself would seem to fit oddly in the list of judges that he proposes exemplifies the pantheon of the Second Circuit. At the dedication of this magnificent Thurgood Marshall United States Courthouse in 2003, Chief Judge John Walker characterized Marshall as "the conscience of the Second Circuit."<sup>6</sup> That appellation seems to me true, but it is not one that could comfortably be applied to figures like Learned Hand or Jerome Frank or Henry Friendly, who are instead exemplary precisely because, in Marshall's words, of their "[u]nrivaled reputation for judicial craftsmanship and scholarship."<sup>7</sup> Marshall's greatness, by contrast, would appear to lie in a different dimension altogether. It would seem to lie in the connections that he sought to forge between justice and the perception of justice, a subject rarely theorized by sitting judges.

A clue to the conventional appreciation of Marshall's unique stature may be found in the many tributes he received after he stepped down from the bench. The late Chief Justice William Rehnquist, for example, wrote: "Thurgood Marshall is unique because of his major contributions to constitutional law *before* becoming a member of the Court. . . . These efforts alone would entitle him to a prominent place in American history had he never entered upon judicial service."<sup>8</sup> It is striking that Rehnquist had little if anything to say about Marshall's judicial opinions, with which he so often disagreed. Instead, he praised Marshall's personal bravery, determination, and enormous strategic intelligence in planning and executing a campaign to end state-imposed segregation, which was a great stain on the nation's soul.

It is beyond question that Marshall's life before becoming a judge is the stuff of legends. As a lawyer for the NAACP and the Legal Defense and Educational Fund, Marshall traveled throughout the South defending blacks in criminal trials that were little more than legalized murder. He was a first-rate trial lawyer. His tales of being nearly lynched, of being run out of town, of being hidden and smuggled across county lines, of cross-examining hostile white sheriffs in front of hostile white juries and hostile white judges, are profiles in grit, determination, and courage.

Marshall also planned, supervised, and implemented large national legal campaigns to end pay differentials between black and white teachers, to end the white primary, to end racially restrictive covenants, to end segregation in professional schools, and, finally, to integrate elementary and secondary education. The range and impact of Marshall's work beggars description. It made him arguably the greatest lawyer of the twentieth century.

But to praise Marshall for his lawyering is quite different than to praise him for his judging. The question I'd like to discuss today is whether we

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6. Chief Judge John M. Walker, Jr., Opening Remarks and Introductions at the Dedication Ceremony for the United States Courthouse 5 (Apr. 14, 2003) (quoting Judge James L. Oakes) (on file with the Fordham Law Review).

7. Marshall, *supra* note 2, at 645.

8. William H. Rehnquist, *Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1213, 1213 (1992).

ought equally to celebrate Marshall for his work on the bench. That question cannot be answered until we appreciate exactly how Marshall's unique style of judging gave jurisprudential expression to his experience as a preeminent civil rights activist.

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Before becoming a judge, Marshall had been far more than merely a superb lawyer. As Marshall's first law clerk, your colleague and mine, Judge Ralph Winter, rightly tells us, Marshall was also "a civil rights leader":

With the intensity of his convictions and the aid of his extraordinary personality, he enlisted white political and other leaders . . . in his cause and relentlessly addressed groups across the country with the theme that equal rights under law was not the cause of one group but was in the interest of all citizens. He thus was a major figure in making civil rights a part of mainstream American values.<sup>9</sup>

I should add to Winter's characterization that Marshall's task was not merely to enlist the backing of white leaders, or even of black leaders, but also that of the African American *communities* who were his clients throughout the South. Marshall knew full well that he could not bring lawsuits without what he called the "full support from the Negro community,"<sup>10</sup> who, in Southern and border states, despite "facing threats of firing, or beating or even death, continue[d] to sign the legal petitions and complaints" that were the lifeblood of Marshall's work.<sup>11</sup> He crisscrossed the country, holding mass meetings to inspire NAACP chapters and members to support his legal efforts, all the time making clear that "the N.A.A.C.P. and its legal staff can move no faster than the people themselves."<sup>12</sup>

Marshall's practice as a lawyer was forever dependent on his ability to mobilize his clients in the service of legal reform. As an activist, therefore, Marshall cut quite a different figure than Martin Luther King. Marshall the lawyer addressed the public precisely to change the legal system. "What is striking to me is the importance of law in determining the condition of the Negro,"<sup>13</sup> Marshall told the White House Conference on Civil Rights in 1966, in a speech whose starkly juricentric focus reportedly infuriated

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9. Ralph K. Winter, *TM's Legacy*, 101 *YALE L.J.* 25, 27 (1991).

10. THURGOOD MARSHALL, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 145, 146 (Mark V. Tushnet ed., 2001).

11. *The Law: The Tension of Change*, *TIME*, Sept. 19, 1955, at 23.

12. Thurgood Marshall, Preliminary Statement of Thurgood Marshall at the Texas State Conference of Branches at Denison, Texas 5 (Sept. 5, 1947) (on file with the Library of Congress, Manuscript Division, National Association for the Advancement of Colored People Records, Box II: A535, Folder 1).

13. Thurgood Marshall, Solicitor Gen., U.S. Dep't of Justice, Address at the White House Conference: "To Fulfill These Rights" 52 (June 1, 1966) (transcript available at <http://www2.mnhs.org/library/findaids/00442/pdfa/00442-01894.pdf> [<https://perma.cc/6ED9-LT6L>]).

King.<sup>14</sup> “I submit that the history of the Negro demonstrates the importance of getting rid of hostile laws and seeking the security of new friendly laws. . . . I have faith in the efficacy of law. Perhaps that is because I am a lawyer and not a missionary.”<sup>15</sup> Reform for Marshall was not real until it was embodied in law, legislative or judicial.

Martin Luther King, by contrast, *was* a missionary. He was a minister and a theologian. He sought to reform the soul; law was merely epiphenomenal. What mattered to King were conscience and values. Civil disobedience and protests were tests of character—of moral orientation. Change required regeneration, not merely legislation. King embraced whatever strategies would inspire ethical rebirth. King touched a larger nerve than Marshall, who was in a sense willing to settle for less.

Marshall frequently found King’s tactics distasteful, because Marshall’s commitment to law was fundamental and conservative. It came directly from Marshall’s experience fighting racial oppression. He had good reason to regard law as a shield for the powerless. When violence prevented desegregation after *Brown II*<sup>16</sup> in Mississippi, Marshall proclaimed in disgust that “[t]his atmosphere of lawlessness must be changed.”<sup>17</sup> “Degrees of defiance of the law of the land are unimportant,” he said.<sup>18</sup> “Defiance of the law of the land in any form is dangerous to the country.”<sup>19</sup>

Marshall stuck to his guns as legality became less fashionable in the 1960s. He incurred the wrath of militants in 1969 when, in a famous address at Dillard University, he affirmed: “I am a man of law, and in my book anarchy is anarchy. It makes no difference who practices anarchy. It’s bad, and punishable and should be punished.”<sup>20</sup>

Marshall’s profound and constitutive commitment to law arose because he had survived his perilous journeys throughout the South in part because of law—at least what remained of law in the apartheid South. He had succeeded in his quest for civil rights because, in his view, federal judges considered themselves bound by the rule of law. “[T]hat’s the great benefit of lifetime appointments,” Marshall would later say.<sup>21</sup>

14. Rowland Evans & Robert Novak, *The Civil Rights Parley: Peaceful, Unproductive*, LOUISVILLE TIMES, June 8, 1966.

15. Marshall, *supra* note 13, at 53–55.

16. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

17. Thurgood Marshall, Special Counsel, NAACP, Speech at the AFL-CIO Convention 2 (Dec. 7, 1955) (on file with the Library of Congress, Manuscript Division, National Association for the Advancement of Colored People Records, Box II: A535, Folder 6).

18. Thurgood Marshall, Special Counsel, NAACP, Brainwashing with a Vengeance, Address at the Virginia State Conference of NAACP Branches, Charlottesville, Virginia 5 (Oct. 9, 1955) (on file with the Library of Congress, Manuscript Division, National Association for the Advancement of Colored People Records, Box II: A535, Folder 6).

19. *Id.*

20. *A Supreme Court Justice’s Warning to Fellow Negroes*, U.S. NEWS & WORLD REP., May 19, 1969, at 92.

21. “*The Reminiscences of Thurgood Marshall*” (Columbia Oral History Research Office, 1977), in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 10, at 413, 456 [hereinafter *Reminiscences*]. Marshall

One must not think, however, that Marshall failed to appreciate the contributions of King. In 1976, Marshall observed that the “change from the legal movement in the courts, to the protest movement in the streets, to the legislative halls”<sup>22</sup> had been decisive because “it reached people’s consciousness.”<sup>23</sup> Marshall believed that protests and demonstrations had “saved” the civil rights movement, which otherwise “[m]ight have died on the vine. We knew in the beginning that the courts could not solve the problem, because the courts just don’t have that authority. It’s the public, the minds, the souls of the people that have to do it, and you do that with protest.”<sup>24</sup>

Marshall had learned the limits of judicial authority through his persistent and uphill efforts to enforce *Brown II* in courts of law. Marshall told Dennis Hutchinson in 1979 that

the biggest mistake he made was assuming that once Jim Crow was deconstitutionalized, the whole structure would collapse—“like pounding

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recalled an encounter with a federal judge regarding a case in Norfolk to equalize teachers’ salaries:

[W]hen [the judge] came in, I said, “Well, Judge, I noticed your case is set for Lincoln’s Birthday. And this is a federal court.”

He said, “Well, you follow Lincoln’s Birthday up your way—down here, we follow Jeff Davis day. . . .”

So I knew where I stood then. Then, he just ripped at everything I said. . . . [A]nd it was rough. And he ruled against me. And we carried the case to [the] Court of Appeals of the Fourth Circuit . . . and they reversed him, and said that he was wrong, and that the Negro teachers have to get the same salary as the white teachers.

When we went back and filed our papers, the superintendent of schools said, “I will not be a party to paying a n[—] the same money I pay a white person. And I refuse to do it.”

So we filed contempt proceedings before this same judge, and we had a hearing in his chambers, and he said, “Mr. Marshall,” this is the same judge who really tore into me before and ruled against me. He said, “You have asked in very broad language for contempt, and I don’t know whether you want civil or criminal. Which do you want?”

I said, “Well, Judge, I thought I drew it that way so that you could take your choice.”

He said, “Then I’m asking you, which do you want?”

I said, “I see nothing to be gained by putting a man in jail. Furthermore, his age is against that.” The guy was way up in his sixties. “So I’m perfectly willing to go with civil, if it’s all right with you.”

He said, “Let me ask you a question.”

. . . .  
He said, “Did you know that’s my best friend?”

I said, “No, sir. I did not.”

He said, “Well, despite that, I’m going to go with you. I’m not going to put him in jail.”

That’s the same man. He was getting ready to put his best friend in jail. Because, you see, in his mind, the law had changed. He thought the law was one way. When the court of appeals tells him the law is the other way, that’s the way he went. . . . I’m for federal judges.

*Id.* at 457–58.

22. *Id.* at 476.

23. *Id.* at 479.

24. *Id.*

a stake in Dracula's heart." But in the twelve months between *Brown I* and *Brown II*, he realized that he had yet to win anything. He drove the point home . . . and concluded [the] conversation, by comparing how he felt the day after *Brown I* in 1954 and after *Brown II* in 1955: "In 1954, I was delirious. What a victory! I thought I was the smartest lawyer in the entire world. In 1955, I was shattered. They gave us *nothing* and then told *us* to work for it. I thought I was the dumbest Negro in the United States."<sup>25</sup>

It would take the explosive political protests of the early 1960s to prompt the passage of the Civil Rights Act of 1964, which, as Archibald Cox wisely observed, made "the principle of *Brown v. Board of Education* . . . more firmly law."<sup>26</sup>

Marshall was therefore perfectly aware of the difference between social mobilization that aimed at a moral renewal beyond the law, and social mobilization that sought instead to channel legal institutions and decision-making. His life's work lay with the latter, and it is precisely *this* experience that Marshall brought to his judicial work as a judge and as a justice.

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The question I wish to explore is how this experience shaped Marshall's practice of judging. We can begin to formulate an answer to that question by observing that someone who strives to achieve fundamental legal changes will always have an ambiguous relationship to law. Such a person must necessarily see law as malleable, as subject to transformation under pressure. That is because their entire project is to alter the substance of the law.

Yet such a person also wants to achieve legal change, as distinct from the kind of moral regeneration to which King aspired. Hence such a person must also value the stability, predictability, and solidity of law. Law must matter to them because, as Marshall saw in the federal judges before whom he appeared, it is binding.<sup>27</sup>

A legal change agent must thus experience law as both plastic and entrenched. Marshall's understanding of constitutional law is rife with this paradox. Marshall is of course now best known and celebrated for having revolutionized our understanding of the Equal Protection Clause of the Fourteenth Amendment. He began his legal career under the "separate but equal" regime of *Plessy v. Ferguson*.<sup>28</sup> At the outset, he had sought to implement Nathan Margold's plan, which aimed to force states to actually equalize resources invested in white and black institutions, in the full expectation that the cost of doing so would force states to abandon dual facilities.<sup>29</sup> But ultimately he repudiated that plan's reliance on *Plessy* and

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25. Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 GREEN BAG 2D 157, 168 (2001).

26. Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 94 (1966).

27. See *Reminiscences*, *supra* note 21, at 456–57.

28. 163 U.S. 537 (1896).

29. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* 12–13, 123–25 (1994).

achieved in *Brown I* his long-treasured goal of having the Court declare that “separate educational facilities are inherently unequal.”<sup>30</sup>

Although the Supreme Court now proclaims that “*Plessy* was wrong the day it was decided,”<sup>31</sup> that is merely post hoc rationalization. It is law-office history, not history. It is not what Chief Justice Earl Warren, who was far closer to the issue, actually said in *Brown I*. *Plessy* had been the law of the land for more than half a century, and the authors of the *Southern Manifesto* could, with undoubted accuracy, proclaim in the halls of Congress that *Plessy* had become “a part of the life of the people of many of the States and confirmed their habits, customs, traditions, and way of life.”<sup>32</sup> Throughout the nation, *Plessy* was the Constitution.

Marshall’s undying achievement is to have changed all that, through legal methods and legal strategy. “The extreme right wing of reaction wants to retain the status quo regardless of any other considerations,” he said in 1950.

The extreme left wing would destroy our entire system, the good and the bad, with one stroke. The true liberal believes that it is important to use all of our legal machinery to correct the evils now present and at the same time to carry on a steady campaign of education. Our legal machinery requires a step by step procedure.<sup>33</sup>

Using that procedure, Marshall revised the meaning of our constitutional texts. And yet in 1955, having just fundamentally altered the import of the Fourteenth Amendment, Marshall could declare in perfect good faith that

[t]he difference between the Constitution and the law is something a lot of people don’t seem to appreciate. The law can fluctuate because of the changing whims of the people and their legislators. But the whole purpose of the Constitution is to serve as an instrument which cannot be changed overnight, which does not change when mores and customs change.<sup>34</sup>

The point here is not to catch Marshall in some logical contradiction. The point is rather that *any* figure who seeks legal transformation will always be caught in this same paradox. They must seek to alter law while simultaneously prizing law’s institutional solidity. A legal change agent will always want their own alteration of the law to be respected and enforced in ways that they have refused to enforce and respect existing law. This is a tension that they must resolve.

Marshall’s solution to the problem was to appeal to the basic democratic structure of American government, to what he called “the imperatives of our whole national existence.”<sup>35</sup> He knew full well, as all of us do, that the

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30. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

31. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 863 (1992).

32. 102 CONG. REC. 4516 (1956) (statement of Rep. Smith).

33. Thurgood Marshall, Special Counsel, NAACP, Significance of the Recent Supreme Court Decisions, Speech at Fisk University 17 (July 5, 1950) (on file with the Library of Congress, Manuscript Division, National Association for the Advancement of Colored People Records, Box II: A535, Folder 5).

34. *The Law: The Tension of Change*, *supra* note 11.

35. Thurgood Marshall, Special Counsel, NAACP, Remarks at the Herbert Lehman Dinner, Hotel Roosevelt 3 (Feb. 3, 1956) (on file with the Library of Congress, Manuscript



holdings of the Supreme Court change from decade to decade. But the democratic constitutional structure of the nation, Marshall believed, was endowed with a more stable, a more permanent significance. He pushed to change law in order to recover that significance. Marshall sought to return our constitutional law to what he regarded as its original and pristine meaning.

In a remarkable, unpublished *cri du coeur* entitled *We Are Not Alone*, Marshall wrote:

The essence of democratic government is the right to complete equality. The Negro sharecropper's baby born in the most miserable shack in Mississippi, at his birth is endowed with e[x]actly the same rights, privileges and immunities as a child born to the wealthiest parents in the most palatial mansion in America. Many of these rights privileges and immunities are not derived from any written statute but arise from being born into a democracy. I am talking now of basic principles. Either we have these rights or we do not have a democracy. We either enforce these rights or we will never have a democracy.

But somewhere along the hard road which led us from the past, we have lost sight of some of these principles and what is more important—we have lost the courage to attain them.<sup>36</sup>

Marshall believed that the Reconstruction Amendments “were passed in the high hope of achieving these principles.”<sup>37</sup> Marshall explicitly understood himself to be participating in the “battle” to “implement” those Amendments “by legal action so that someday, at long last, these principles will become the *meaning* as well as the letter of the law.”<sup>38</sup>

For Marshall, therefore, constitutional stability lay in the fundamental principles of American democracy, not in the mere letter of the law, not in the mere pronouncements of the Supreme Court. Legal forms required respect and obedience, as did the decrees and judgments of courts, but ultimately the task of constitutional reform was to reinvigorate the principles that underlay the structure of our government and that were therefore immanent in the American constitutional system. In Marshall's eyes, the job of constitutional law was forever to work itself pure to express the dazzling meaning of these principles. Just as King in his “I Have a Dream” speech had read the Constitution as “a promissory note” in default,<sup>39</sup> so Marshall

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Division, National Association for the Advancement of Colored People Records, Box III: A310, Folder 7).

36. Thurgood Marshall, *We Are Not Alone: Discrimination Against Minorities Other Than Negro* 3–4 (1947) (on file with the Library of Congress, Manuscript Division, National Association for the Advancement of Colored People Records, Box II: A72, Folder 6).

37. *Id.* at 4.

38. *Id.*

39. Martin Luther King, Jr., “I Have a Dream . . .,” Speech at the March on Washington for Jobs and Freedom I (Aug. 28, 1963) (transcript available at <https://www.archives.gov/files/press/exhibits/dream-speech.pdf> [<https://perma.cc/T7WN-RN8N>]).

read the Constitution on its bicentennial as the site of “promises not fulfilled.”<sup>40</sup>

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This is the experience Marshall brought with him as he crossed from the bar to the bench. This experience influenced how he judicially interpreted and applied the Constitution. As a judge, Marshall sought always to read the Constitution in light of its immanent democratic principles. He thus understood the Constitution to promise, as he said in *Regents of the University of California v. Bakke*,<sup>41</sup> the attainment of “[a] fully integrated society, one in which the color of a person’s skin will not determine the opportunities available to him or her.”<sup>42</sup>

The fulfillment of that constitutional promise was not to be measured in abstract rules of positive law, but instead in the life experiences of average citizens, the kind of persons whom Marshall had spent a lifetime representing and mobilizing. The meaning of the Constitution lay in its effect on the actual lives of ordinary persons. Marshall insisted, as he said in his great dissent in *City of Richmond v. J.A. Croson Co.*,<sup>43</sup> that judges ought not close their “eyes to . . . constitutional history and social reality.”<sup>44</sup>

Nowhere is this focus more evident than in Marshall’s moving dissent in *Milliken v. Bradley*,<sup>45</sup> the decision in which the Court held that a district court could not order an interdistrict remedy to desegregate inner-city Detroit schools, even though in the absence of such an interdistrict remedy it would not be possible meaningfully to desegregate Detroit schools.<sup>46</sup> The holding of the Court was that the scope and nature of the constitutional violation determined the reach of equitable remedies,<sup>47</sup> and that therefore in the absence of a showing that surrounding suburban districts had themselves violated the Constitution or were materially affected by the consequences of past violations, a court was powerless to involve these independent suburban districts in a remedy.<sup>48</sup>

Marshall was outraged, viewing the decision as an “emasculat[i]on of our constitutional guarantee of equal protection of the laws.”<sup>49</sup> What mattered to him was purely and simply the effect of the remedy on the lives of black students. The Court’s holding, Marshall said, guarantees that African American students in Detroit “will continue to perceive their schools as segregated educational facilities and this perception will only be increased

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40. Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

41. 438 U.S. 265 (1978).

42. *Id.* at 401 (Marshall, J., concurring in part and dissenting in part).

43. 488 U.S. 469 (1989).

44. *Id.* at 558 (Marshall, J., dissenting).

45. 418 U.S. 717 (1974).

46. *Id.* at 739–45.

47. *Id.* at 744–45.

48. *Id.*

49. *Id.* at 782 (Marshall, J., dissenting).

when whites react to a Detroit-only decree by fleeing to the suburbs to avoid integration.”<sup>50</sup> Marshall grimly and accurately prophesied, “[i]n the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.”<sup>51</sup>

Years of social mobilization had impressed upon Justice Marshall that the object of law is to shape how persons inhabit their everyday lives. The ultimate worth of the Constitution must be judged by its impact on ordinary folk. The Constitution could remain legitimate and “displace the use of violence,” he said, only if it were “perceived by all the people as providing equal justice.”<sup>52</sup> “If the system is not believed to be fair, it will be a failure, for its effectiveness depends almost entirely on its public appearance.”<sup>53</sup>

Marshall liked to illustrate this point by telling the story of his practice in Baltimore during the Depression. At the time, the Maryland Court of Appeals would not accept a case until the complete record, including a printed transcript, had been filed.<sup>54</sup>

This was not a serious barrier for the banks and large businesses represented by prominent law firms in the city. But often it was an insurmountable obstacle for poor criminal defendants and struggling shopkeepers, the sort of clients that I represented. . . . Once I complained to a clerk . . . that this was not fair to my impoverished Negro clients. His reply was simple: “Every man has his day in court—if he can pay.”<sup>55</sup>

A legal system, not in fact accessible because of arbitrary differences in wealth, is not likely to appear fair and hence not likely to retain its legitimacy among ordinary citizens. Throughout his time on the bench Marshall was frustrated with judges who forgot this simple fact. So when the Court in *United States v. Kras*<sup>56</sup> in 1973 upheld a \$50 filing fee for bankruptcy petitions, which could be paid in average weekly payments of \$1.92, in part on the grounds that this is “less than the price of a movie and little more than the cost of a pack or two of cigarettes,”<sup>57</sup> Marshall erupted in anger:

It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. . . . A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. . . .

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50. *Id.* at 804.

51. *Id.* at 814–15.

52. Thurgood Marshall, Address at the Eighth Conference on the Law of the World (Aug. 23, 1977), in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 10, at 256, 259.

53. *Id.*

54. *Id.*

55. *Id.* at 259–60.

56. 409 U.S. 434 (1973).

57. *Id.* at 449.

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.<sup>58</sup>

Commentators often observe that this passage illustrates Marshall's commitment to the virtue of judicial "empathy."<sup>59</sup> But I prefer to think of it as instead expressing the hard-earned lesson of a lifetime of striving for legal reform. Marshall had been able to change the content of American constitutional law precisely because so many ordinary Americans regarded that law as unfair and hence as illegitimate. As a judge, he did not want to perpetuate constitutional law that would be similarly vulnerable. He understood his judicial task to be the creation of constitutional law that would be more stable and solid, and that meant appreciating how the doctrine he articulated would be received by the public, by everyone in the public and not just by legal elites.

In Marshall's view, the only way to underwrite the solidity and legitimacy of constitutional law was to make it true to fundamental democratic principles of equality that would be accepted by all. This meant constructing constitutional law along lines that all could appreciate as embodying fairness in their everyday lives. This was the only way to guarantee both the normative and sociological legitimacy of constitutional law.

Marshall struggled to find a doctrinal language in which to express this insight. His efforts are mostly evident in dissents, because Marshall had the misfortune to join the Court just as it began its rightward turn under the weight of Richard Nixon's appointments.<sup>60</sup> Yet a good illustration of the kind of approach that Marshall advocated might be seen in his opposition to the "tiers of scrutiny" framework of equal protection law.

In *San Antonio Independent School District v. Rodriguez*,<sup>61</sup> for example, the Court rejected a challenge to the economic inequality produced by Texas's system of funding schools.<sup>62</sup> The Court held that elevated scrutiny was required neither by the fact that the right to education was at stake nor by the fact that the funding of school districts differed dramatically based upon wealth.<sup>63</sup> Wealth was not a suspect classification, nor was education a fundamental right. Hence it need only be shown that the Texas system had "some rational relationship to legitimate state purposes."<sup>64</sup>

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

59. See, e.g., Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 17–18 (2009); Veronica Couzo, Note, *Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication*, 89 NOTRE DAME L. REV. 403, 406–10 (2013).

60. In an inspiring but ultimately discouraging essay by a former Marshall clerk, Deborah Rhode, we learn that "[b]y his own account, Marshall was the most likely to get the decisions 'least likely to be cited by any person for any purpose under any circumstances.'" Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1265 (1992).

61. 411 U.S. 1 (1973).

62. *Id.* at 18.

63. *Id.* at 35–39.

64. *Id.* at 40.

Marshall famously disagreed with this “rigidified approach to equal protection analysis.”<sup>65</sup> For him the intensity of judicial scrutiny should instead be determined by a sliding scale based upon “the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.”<sup>66</sup> The creation of such a sliding scale would make equal protection law more responsive to ordinary expectations of justice. Everyone knew the importance of education in modern society; everyone could experience the sting of having wealthy school districts offer a better education than poor districts. But the rigid tiers of scrutiny applied by the Court rendered federal constitutional law deliberately indifferent to these perceptions.

The Court’s majority objected to Marshall’s reasoning on the ground that it would turn the Court into “a super-legislature” that could arbitrarily pick and choose when and how to deploy elevated scrutiny under the Equal Protection Clause.<sup>67</sup> The Court was more concerned with creating doctrine that would constrain judicial discretion by establishing sharp, bright lines, than with using law as a flexible instrument to acknowledge and respond to popular demands for justice.

*Rodriguez* exemplifies a tension that exists within all legal systems. Judges must simultaneously attend *both* to the systemic discipline and order of the legal system *and* to the responsiveness of that system to the expectations of those whom the system serves. It is not accidental that the very judges whom Marshall (accurately) describes as the leading lights of the Second Circuit—Learned Hand, Henry Friendly, Augustus Hand—are judges acknowledged to be virtuosos in designing the internal architecture of the legal system.

But Marshall, by virtue of his remarkable pre-judicial experience, brought a different emphasis to his judging. He focused deeply on the external legitimacy of the legal system.

Lawyers sometimes tell themselves that if they just attend rigorously and rightly to the internal demands of the legal system, the system will legitimate itself in the eyes of the public. But this far oversimplifies the matter. We can learn from Marshall that if the internal doctrinal structure of the legal system grows disconnected from the expectations of its audience, the system will lose external legitimacy. The slide toward distrust and disaffection can corrode support for the rule of law. At its worst, it can produce severe exogenous shocks to the coherence of the internal architecture of the system, as occurred during the crises of the New Deal or *Dred Scott*.

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So the question I leave with you is this: Alongside our wonder at the brilliance of judges like Hand and Friendly, can we equally appreciate the

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65. *Id.* at 98 (Marshall, J., dissenting).

66. *Id.* at 99.

67. *Id.* at 31 (majority opinion).

professional dexterity of a judge like Marshall, who, true to the experience that had made him a genuine American hero, stressed the expectations and values of those authorized to endow the legal system with their faith and trust?

Do we today honor Thurgood Marshall merely for his pre-judicial heroism, or do we also appreciate his philosophy of judging, which is a direct expression of that heroism, and which seeks perennially to attach judicial decision-making to the great, immanent democratic principles of the Constitution that legitimate the rule of law among the American population?

Sadly, it is commonplace now to acknowledge that American society is in crisis. Marshall long ago diagnosed and predicted the coming predicament. In his most eloquent speech, his acceptance of the Liberty Medal at Independence Hall in 1992, he said:

[A]s I look around, I see not a Nation of unity but of division—Afro and White, indigenous and immigrant, rich and poor, educated and illiterate. . . .

[T]here is a price to be paid for division and isolation . . . .

We cannot play ostrich. Democracy just cannot flourish amid fear. Liberty cannot bloom amid hate. Justice cannot take root amid rage. . . . We must dissent from the fear, the hatred and the mistrust. We must dissent from a nation that has buried its head in the sand, waiting in vain for the needs of its poor, its elderly, and its sick to disappear and just blow away. . . . We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.<sup>68</sup>

As a judge, Marshall worked hard to create a judicial philosophy adequate to these moving and prescient insights.

I suggest that a Thurgood Marshall Lecture, in this magnificent courthouse of justice, can offer no more fitting tribute than to illuminate and praise that lost constitutional jurisprudence.

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68. Thurgood Marshall, Liberty Medal Acceptance Speech at Independence Hall (July 4, 1992) (transcript available at <https://constitutioncenter.org/liberty-medal/recipients/thurgood-marshall> [<https://perma.cc/D4AB-29Q5>]).