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Justice Thurgood Marshall In Memoriam.

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IN MEMORIAM

JUSTICE THURGOOD MARSHALL

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Even before I met Justice Thurgood Marshall in 1975, I had followed in a few of his incomparable footsteps. I graduated from Howard University School of Law thirty-three years after Justice Marshall. We were both at the top of our class. I joined the NAACP Legal Defense and Educational Fund, Inc. Justice Marshall was the Fund's Director-Counsel for almost twenty years. Justice Marshall served on the United States Court of Appeals for the Second Circuit from 1961 to 1965, and the United States Supreme Court from 1967 until 1991. From 1979 to 1988, I served on the United States District Court for the Southern District of Texas, the same court that had ruled against Justice Marshall in his challenge during the 1940s to all-white Democratic primaries.

Justice Marshall's vision, and his sterling accomplishments, had a profound effect on me, and scores of other African-American lawyers of my generation who were brought up to view the law as an instrument of oppression. Justice Marshall saw the law differently. Vernon

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Jordan described the Justice's vision by stating that, throughout Justice Marshall's career, he "demonstrat[ed] that the law could be used as an instrument of liberation. . . ."[1] Justice Marshall's lifetime commitment to employing the court system to establish equal justice under the law inspired me also to use my legal education to foster justice and equality.

Along with his demanding legal career, Marshall was a dedicated family man. Married to Vivian Burney for twenty-five years, until her death in 1955, Marshall subsequently married Cecilia Suyat, a secretary at the Legal Defense Fund. Together, they had two sons, both of whom became lawyers.

Undoubtedly, Thurgood Marshall, the lawyer, will be well remembered for having argued before the Supreme Court the landmark *Brown v. Topeka Board of Education*,[2] the school desegregation case that abolished the "separate but equal" doctrine and established the bedrock in the struggle for racial equality. Laurence Tribe, a Harvard University constitutional scholar, has said that the *Brown* victory made Marshall "the greatest lawyer in the Twentieth Century."[3]

Racial minorities, however, were not the exclusive beneficiaries of Marshall's unwavering, persuasive vision for America. Thurgood Marshall, the Supreme Court Justice, viewed the Bill of Rights and the Civil War amendments as the instruments by which to protect the politically disenfranchised. Through his sliding-scale method of analyzing the Equal Protection Clause, Justice Marshall lifted the politically disadvantaged—the poor, the accused, and women. His analysis led to the creation of a protected class, a class whose rights no law could infringe unless that law survived heightened judicial scrutiny.

Thurgood Marshall was born on July 2, 1908 in Baltimore, Maryland, at a time when racial segregation had the full force and effect of law. His father was a Pullman-car waiter, and his mother a school teacher. His parents, who valued the importance of education, initially encouraged Marshall to enter the field of dentistry. However, because Marshall was raised to think and act like a lawyer, respond-

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1. Joan Biskupic, *One "Whose Career Made Us Dream Dreams,"* WASH. POST, Jan. 29, 1993, at A1.

2. 347 U.S. 483 (1954).

3. Martin Weil, *Marshall Transformed Nation in the Courts*, WASH. POST, Jan. 25, 1993, at A11.

ing to challenges to his logic and proving almost every statement he made, he began his higher education with the goal of becoming a lawyer. Marshall attended Lincoln University in Pennsylvania, then referred to as the "Black Princeton." When turned down for admission to the all-white law school at the University of Maryland, he applied to Howard University School of Law in Washington, D.C. Marshall later won a Pyrrhic victory in *Pearson v. Murray*,[4] when Maryland's Court of Appeals struck down the racially exclusionary policies of the University of Maryland Law School.[5]

When Marshall entered Howard University School of Law, Dr. Charles Hamilton Houston was serving as Vice-Dean, and he soon became Marshall's mentor. A brilliant lawyer who had been a Phi Beta Kappa at Amherst and had graduated from Harvard School of Law, Houston believed that existing laws could be used to defeat racial discrimination. He not only encouraged Marshall to study diligently, but to believe that African-American lawyers should be social engineers. Marshall later joined Houston at the newly created legal arm of the NAACP, the Legal Defense Fund.

Marshall and Houston both had a profound effect upon the NAACP. When I went to work, fresh out of law school, at the Legal Defense Fund, the small cadre of Fund lawyers was using the Houston-Marshall strategy of social engineering. Under the tutelage of James Nabrit and then Jack Greenberg, who had each followed Marshall as Director-Counsel of the Fund, the other Fund lawyers and I employed the Houston-Marshall tactic of borrowing from existing precedent to fashion arguments for new challenges. This creative advocacy has continued to characterize the Fund's excellence.

In 1965, President Johnson named Thurgood Marshall as Solicitor General of the United States. In doing so, President Johnson not only validated Marshall's reputation as an outstanding advocate but also—some say by design—placed Marshall in a position to gain more experience, experience that could defuse any challenges to his future nomination to be an Associate Supreme Court Justice. Thurgood Marshall lived up to his advocacy reputation. In his career as a lawyer, he argued thirty-two cases before the Supreme Court, and won twenty-nine of them.

In 1967, Thurgood Marshall became the first African-American to

4. 182 A. 590 (Md. 1936).
5. *Id.* at 594.

sit on the Supreme Court of the United States. Prior to his ascension, Justice Marshall distinguished himself on the Second Circuit by authoring 118 opinions, none of which was reversed. Justice Marshall joined the Warren Court after it had already decided the landmark civil rights cases for which the Warren Court is famous. Warren Burger replaced Earl Warren as Chief Justice in 1969, and, having begun his high-court experience in the waning years of the Warren Court, Justice Marshall increasingly found that he could assert his views in the Burger Court only in dissent. By the 1980s, Justice Marshall joked that he was in the majority on only one issue: "[B]reaking for lunch."

Justice Marshall's constitutional jurisprudence is described by Roger Goldman and David Gallen in *Thurgood Marshall — Justice for All*:[6]

> Where the constitutional text is clear, Marshall follows it, even if the results seem inconsistent with his personal views. Marshall reads expansively those parts of the Bill of Rights and Civil Rights amendments that are broadly phrased—"due process," "equal protection," "freedom of speech," "cruel and unusual punishments"—finding principles that transcend narrow historical confines and apply to modern society. These provisions permit the Court to protect those outside the political mainstream—the poor, racial and political minorities, and women.[7]

Justice Marshall developed and enunciated a sliding-scale method of determining what persons are entitled to special protection under the Equal Protection Clause of the United States Constitution. This analysis involves (1) an evaluation of the interest affected to determine the importance of that interest and (2) scrutiny of the state-statute classification used to test the legitimacy of that classification. If the interest involved is important, and the classification largely irrelevant to legitimate law-making, Justice Marshall would assert that courts should examine the statute with heightened scrutiny.

Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*[8] provides a good example of this method of analysis. According to Justice Marshall, the interest affected—education—and the persons harmed—residents of poor districts—are entitled to

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6. ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL passim (1992).

7. *Id.*

8. 411 U.S. 1 (1973).

heightened protection,[9] though the Court's majority held that education is not a fundamental right because it is neither implicitly nor explicitly found in the United States Constitution.[10] The *Rodriguez* dissent indicates that Justice Marshall's approach expands the reach of the Constitution to protect those excluded from the political mainstream.

Although Justice Marshall may well be remembered more for his dissents than his majority opinions, many of his majority opinions are legal touchstones. In *Shaffer v. Heitner*,[11] Justice Marshall wrote one of the three most important decisions dealing with personal jurisdiction in the Supreme Court's history. Justice Marshall also authored the first opinion of the Court holding marriage to be a fundamental privacy right, protected by the Constitution.[12]

The Justice's view of constitutional protections, however, forced him to dissent often on important issues that shape our society. Justice Marshall continued to oppose the death penalty; and he dissented in *Harris v. McRae*,[13] when the Court upheld a federal law prohibiting the use of federal funds for some therapeutic abortions.[14] Justice Marshall also dissented in *Richmond v. J.A. Croson, Co.*,[15] when a majority of the Supreme Court invalidated the City of Richmond's set-aside plan for minority contractors.[16] In Justice Marshall's opinion, the Court erred by treating race-based remedial legislation as governmental activity that perpetuates the effects of such racism.[17]

Justice Marshall's dissents are important for they offer a clear, well-reasoned, and jurisprudentially sound articulation of principles that support basic freedoms. With the Supreme Court Justices beset by illnesses and advanced age, today's dissenters could become part of tomorrow's majority, a majority embracing the constitutional jurisprudence of Justice Thurgood Marshall.

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9. *See id.* at 125 (arguing that Texas school-financing scheme should be subject to heightened scrutiny).

10. *Id.* at 28.

11. 433 U.S. 186 (1977).

12. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

13. 448 U.S. 217 (1980).

14. *Id.* at 297.

15. 488 U.S. 469 (1989).

16. *Id.* at 470-72.

17. *See id.* at 554 (arguing that Richmond's policy was remedial, and not simply "racial politics").