

**Professionalism**

**Justice Thurgood Marshall: From Listening to Leading**

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# Justice Thurgood Marshall: From Listening to Leading

## by Roger A. Stetter

... I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights that we hold as fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution* (1987)

Our purpose today is to chronicle briefly the education and career of Thurgood Marshall and provide some insight on how he made the journey from the world of Jim Crow segregation to become America's greatest civil rights lawyer and the first African American to serve as a Justice on the Supreme Court of the United States.

### **Early Life and Education**

Thurgood Marshall was born in Baltimore, Maryland, on July 2, 1908. Thurgood's mother was a kindergarten teacher who earned her diploma from an exclusively black Maryland college and his father was an amateur writer who worked as a dining-car waiter on the Baltimore & Ohio Railroad.

Although Baltimore was segregated from top to bottom, and young Thurgood was forced to attend an inferior, all-black grade school and stay out of the "whites only" sections of public parks, beaches and movie theatres, it also had the largest population of free blacks of any city in the nation before the Civil War.<sup>1</sup> Thurgood's grandfather and namesake was a free man who fought on the side of the Union when the Civil War broke out in 1861. And his father, William Marshall, had a vision of blacks and whites living together as equals under law.

On his days off from work, William Marshall attended courtroom trials and learned the legal procedure and arguments that sent people to jail or won them their freedom. He sometimes took Thurgood and his older brother to court with him. At night, seated around the dinner table, they would debate legal issues. "He never told me to become a lawyer," Marshall

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<sup>1</sup> The terms Negro, black, colored and Afro-American are used throughout this paper in historical context.

later recalled, "but he turned me into one. He did it by teaching me to argue, by challenging my logic on every point, by making me prove every statement I made."

William Marshall also taught his sons to stand up and fight against racial prejudice. Thurgood had his first run-in with racism at about the age of seven. On the playground one day, he heard someone call a Jewish boy "kike." Thurgood asked the boy why he didn't fight back and the boy asked Thurgood how he would respond if someone called him a "nigger." Thurgood had never heard that word before so he went home and asked his father what it meant. "Anyone calls you nigger," the father told his son, "you not only got my permission to fight him – you got my orders to fight him."

After attending a prestigious all-black college, Lincoln University, Thurgood worked as a waiter at an elegant white club on Chesapeake Bay, where his father served as chief steward, and saved money to enroll at Howard University Law School in Washington, D.C. Thurgood was still short of cash to pay the fall tuition. His mother, Norma Marshall, pawned her wedding and engagement rings so that Thurgood could enter the law school in the fall of 1930. Thurgood got up every morning at five-thirty to catch the train to Washington, take his law classes, then return by train to Baltimore. By late afternoon, he reported to his part-time job and then studied after dinner late into the night.

### **The Making of an Advocate**

Housed in a converted, three-story brick residence near the old federal courthouse, amid a block of row houses occupied by African American families, Howard Law School was anything but prosperous when Thurgood Marshall entered the freshman class in 1930. But the law school had one remarkable asset: included among its eleven-member faculty was a recent Harvard Law graduate by the name of Charles Hamilton Houston. The first black editor of the Harvard Law Review and an officer in the black Army corps during WWI, Houston took over the floundering Howard Law School and transformed it into an engine of social progress and racial equality. Many of America's most notable black attorneys and judges share a degree from the all-black Howard Law School in Washington, D.C. in the 1930s. Every facet of Charlie Houston's law school was designed to instill an understanding of the law as a vehicle for human rights and a drive for perfection. Only six students graduated from Thurgood Marshall's entering class of 30, with Thurgood 1st in the class.

"He was constantly challenging us, exposing us to things we wouldn't otherwise see," remembers Oliver Hill. "On Saturdays, Houston would take his students on field trips – to observe an FBI office, an insane asylum, prisons, courtrooms, an unplugged electric chair, an autopsy – anywhere they could sop up an understanding of the legal system." Besides death and criminal law, Houston also exposed his students to a renowned cast of lawyers and scholars, including Clarence Darrow, Roscoe Pound, and Felix Frankfurter. "Justice Thurgood Marshall," *ABA Journal* 64 (June 1992).

Houston also gave his top students the chance to work on real cases. In 1933, Marshall's senior year, Houston invited Marshall to assist with an NAACP case of a Virginia black man

charged with murdering two white women. The Howard legal team argued that the absence of blacks from the list of prospective jurors was evidence that the state was illegally excluding blacks from juries. The circuit court rejected that argument and the defendant was brought to trial even though the prosecution did not have the murder weapon or a witness to the crime. The jury found the defendant guilty but he escaped the death penalty. Juan Williams, **Thurgood Marshall: American Revolutionary** (hereinafter cited as "**American Revolutionary**") 58-59 (1998).

Following graduation, Marshall opened his own law firm in Baltimore. The country was in the midst of the Great Depression and Marshall lost money his first year. Soon thereafter, however, business began to pick up. He handled divorces, personal injury, car accidents, murder, and rape cases. One of his early successes came in 1935.

The Baltimore branch of the NAACP asked Marshall to represent a black suspect, Virtis Lucas, accused of murder in the fatal shooting of Hyman Brilliant, a white man. The police interrogated Lucas for three days, beat him up severely, and obtained a confession. Marshall stood before the all-white jury. He made sure the jury understood how badly his client had been beaten after his arrest. Then he portrayed his client as a weak-minded boy who had been idly shooting off a gun in an alley a few blocks away when the murder occurred. Marshall argued that his client became an easy target when the Baltimore police could not find the real killer. The defendant was found not guilty of murder but manslaughter and sentenced to just six months in prison. **American Revolutionary** 66-67.

Marshall left private practice in 1936 when a job offer came to work as a staff lawyer for the NAACP at its headquarters in New York City. He began trying cases all over the country and, over the next 15 years, emerged as the leading civil rights lawyer in America.

### **Brown v. Board of Education**

On May 17, 1954, Chief Justice Earl Warren read the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), to a crowded courtroom in the Capitol. Warren said:

"In approaching this problem we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted or even to 1895 when *Plessy v. Ferguson* was written.<sup>2</sup> We must consider public education in light of its [current role] in American life."

Warren continued:

"In these days, it is doubtful that any child may reasonably be expected to succeed

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<sup>2</sup> In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the High Court upheld a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and blacks. Only Mr. Justice Harlan dissented. He noted that the "real meaning" of the law was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."

in life if he is denied the opportunity of an education ... a right which must be made available to all on equal terms....To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community."

Then Warren made an historic pronouncement:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

The ruling was unanimous.

After the justices stood and filed out of the chamber, Marshall was surrounded by reporters. But first he turned to James Nabritt and George Hayes, two lawyers on his legal team who argued the Washington, D.C. case, and said, "We hit the jackpot."

Before the school cases reached the Supreme Court, Marshall made the crucial decision to use Dr. Kenneth B. Clark, a black psychologist from the City College of New York, as an expert. Clark and his wife, Mamie, had conducted tests on black children using black dolls and white dolls. When black children were presented with black and white dolls, they almost always said the white dolls were prettier, smarter, and better at everything they did. **American Revolutionary** 197. In the schools case from South Carolina, which was consolidated with the *Brown* case in the Supreme Court, Dr. Clark told the court that he "found the majority of black children tended to reject themselves and their color and [prefer] white as desirable...." He testified that school segregation was distorting the minds of black children and that the damage was "likely to endure as long as the conditions of segregation exist." *Id.* at 202.

Marshall's decision to use the baby doll study in attacking the law of separate but equal was perhaps the most important tactical decision of his career as a civil rights lawyer. Using the results of that study, he persuaded the Justices that separation of the races in our nation's public schools was a badge of inferiority that could no longer be tolerated in a country which had abolished slavery and committed itself to the principle that no person should be denied the equal protection of the law.

In an oral history interview many years later, Marshall was asked:

"Were you dubious at all about the [Kenneth Clark] doll technique?"

Marshall responded:

"No. No....It was so clear that it just couldn't be pushed aside. And I realized that, talking to people. In the South, I knew a man in a pool room on Ninth Street in Little Rock, Arkansas, about 1941 or so – when I'd go into these towns, I would go down to where poor Negroes were and talk to them. And I remember talking to this poor fellow in a pool room, and he said, 'Lawyer, you got anything to do with this business of when you come back after you die?'

I said, "You talking about reincarnation?"

He said, "I don't know, what is it? Is that what it is?"

I said, "Yes."

He said, "Well, if you got anything to do with it, when I come back, I don't care whether it's a man, woman, or dog, or cat, let it be *white*."

Then the interviewer asked:

"When you first examined the [Kenneth] Clark findings, did it come as any surprise to you that this feeling was in children so young, that it was already there? Or did you think that this was something they got later on in life?"

And Marshall responded:

"Oh, I knew it. I knew it, because I knew that Negro kids I talked to, 'What you going to be when you grow up.?"

"I'm going to be a good butler."

"What you going to be when you grow up?"

"Well, I hope I might be able to get in the post office."

*The Reminiscences of Thurgood Marshall* (Columbia Oral History Research Office, 1997), reprinted in Mark Tushnet, **Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences** 499-500 (2001).

### **Supreme Court Nomination**

After serving briefly as a judge on the U.S. Court of Appeals for the Second Circuit, in 1965 President Lyndon Johnson appointed Marshall as Solicitor General of the United States. This was a shrewd political move by LBJ. He knew and liked Thurgood Marshall – both men had come up the hard way and shared a keen interest in politics, history and good whiskey – and he wanted to be the first President to put a black justice on the United States Supreme Court. By appointing Marshall Solicitor General, Johnson intended to prove that he was not just a great civil rights lawyer but a brilliant advocate for our country in every cause heard in its highest judicial tribunal. Marshall proved himself worthy of the task and was nominated for the Supreme Court on June 13, 1967.

The liberal and moderate press greeted the news with praise for President Johnson and admiration for the nominee. "He is one of the special ones – a great rumped bear of a

man....Irrepressibly nonchalant, ... [who] smokes almost compulsively and confronts life with a gargantuan verve that etches him indelibly in the memory of anyone he meets," wrote *Newsweek*. The magazine, describing Marshall as a "black Horatio Alger," added that "America may romanticize its radicals but it more often rewards its reformers. And Marshall is a reformer in the best tradition of the rule of law."

LBJ wanted a happy, quick confirmation and got one. Even hostile questioning by southern politicians on the Senate Judiciary Committee only slowed down Marshall's confirmation for a brief time. Using skills he had developed in southern courtrooms during his 25-year battle to end racial segregation, Marshall easily disarmed his worst critics. North Carolina's senator, Sam Ervin, who was a Harvard trained lawyer with a folksy manner of speech, turned to the Supreme Court's recent *Miranda* decision, and asked Marshall if the courts should accept voluntary confessions when the suspects did not have an attorney and had not been told of their right to remain silent. Marshall responded: "Well, Senator, the word *voluntary* gets me in trouble....I tried a case in Oklahoma where the man 'voluntarily confessed' after he was beaten up for six days." Several days later, the Chairman of the Judiciary Committee, Senator James Eastland of Mississippi, an ardent segregationist, confronted Marshall with the question, "Are you prejudiced against white people in the South?" Marshall replied: "Not at all. I was brought up, what I would say, 'way up south' in Baltimore, Maryland. And I worked for white people all of my life until I got in college. And from there most of my practice of course was in the South and I don't know, with the possible exception of one person that I was against in the South, that I have any feelings about them."<sup>3</sup>

On September 1, 1967, Marshall privately took the judicial oath in the chambers of Justice Hugo Black. On Monday, October 2, Marshall was publicly given the constitutional oath at the U.S. Supreme Court.

Few, if any, of us here today can fully appreciate Thurgood Marshall's monumental achievement in becoming the first black American to be appointed to serve on the Supreme Court. One of his former law clerks on the Court, Paul Gewitz, summed it up this way:

"...He grew up in a ruthlessly discriminatory world – a world in which segregation of the races was pervasive and taken for granted, where lynching was common, where the black man's inherent inferiority was proclaimed widely and wantonly. Thurgood Marshall had the capacity to imagine a radically different world, the imaginative capacity to believe that such a world was possible, the strength to sustain that image in the mind's eye and the heart's longing, and the courage and ability to make that imagined world real....

The naming of Thurgood Marshall to the Supreme Court, therefore, was an act of the greatest importance. His becoming a part of the Court showed how much he had changed the world – in many ways it was the most striking indication of the transformation he had wrought. For all of his imaginative heroism, it is

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<sup>3</sup> Marshall was undoubtedly referring to Leander Perez, the former political boss of Plaquemines Parish, Louisiana, and one of the most outspoken segregationists in the United States.

difficult to believe that ...Marshall ever imagined that he might someday sit on the Court, be more than an insurgent advocate waiting for others—the Justices—to vindicate him. He created the world that made his own ultimate triumph possible. He would now share the power to decide...."

Paul Gewitz, *Thurgood Marshall*, Yale Law Journal (Nov. 1991).

### **Mr. Justice Marshall**

No one who has studied his record on the High Court can help but be awed by the greatness of Justice Thurgood Marshall.

What made Justice Marshall such a great judge? As one who grew up in the world of Jim Crow, and later devoted most of his professional life working to help the disadvantaged and oppressed, he brought a unique perspective to the Court:

"...He brought to the Court a sense of how the world worked, and how it worked against those at the bottom. He knew what police stations were like, what rural Southern life was like, what the New York streets were like, what trial courts were like, what hard-nosed political campaigns were like, and what being black in America was like – and he knew what it felt like to be at risk as a human being. Most importantly, perhaps, he knew the difference that law could make in all those places....He knew well how law could trample individuals, but he remained faithful to an ideal of what it could do to protect individuals."

Paul Gewitz, *supra*.

Yet Justice Marshall did not consider himself different from any other man and he positively disliked the idea of being singled out for his views as a spokesman for black America. When a reporter called to ask Justice Marshall what he planned to do on the newly designated national holiday for Martin Luther King, Jr., he bellowed, "the same damn thing I do on every holiday – stay home." Then he slammed down the receiver and went back to his work. Glen Darbyshire, *Clerking for Justice Marshall*, reprinted in Roger Goldman and David Gallen, **Thurgood Marshall: Justice for All** 178 (1992).<sup>4</sup>

Speaking about his remarkable struggle for civil rights, Marshall once said:

"We weren't fighting for Afro-Americans. We were fighting for the heart of the entire nation."

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<sup>4</sup> Asked following his retirement in 1991 if President Bush should name a black person to succeed him, Marshall said it would be wrong to use race as a ploy to allow the "wrong Negro" to get the job. "I think the important factor is to pick the person for the job, not on the basis of race one way or the other." Then Marshall quoted his father as once telling him that there was no difference between a white and black snake – "they both bite." **American Revolutionary** 392.

Elizabeth Krug, **Great Lives: Thurgood Marshall – Champion of Civil Rights** 146 (1993). Judging from his funeral, Marshall won the heart of the nation. Eighteen thousand people came to pay their respects to this great American as his flag-draped casket lay in state in the Supreme Court's Great Hall. A simple pine casket, set on a bier that had once held the body of President Lincoln, was brought into the Court that morning as all of the living Justices stood on the marble steps of the Supreme Court building to form an honor guard. The following morning, the National Cathedral was crowded with several thousand mourners, including the President and Vice-President, and Justice Marshall's funeral service was telecast nationwide by several of the major networks. In the aftermath of his death, the print and television media were filled with tributes to Thurgood Marshall.

In 1965, Marshall was quoted as describing his philosophy of life this way: "I intend to wear life like a very loose garment and never worry about nothin'." Darbyshire, *Clerking for Justice Marshal, supra*, at 177. Here was a man who became a legend in his own lifetime, a visionary who did more than any other lawyer to fight for equal justice, an outspoken critic of hypocrisy who boldly wrote that "[t]he denial of human rights was etched into the American Colonies' first attempts at establishing self-government."<sup>5</sup> But most of all here was a man who deeply loved his country and worked tirelessly to make it live up to its promise. In the last year of his life, appearing at a function to receive the highest award that can be bestowed by the American Bar Association, Justice Marshall quoted the following lines from a poem by his classmate, Langston Hughes:

*O, let America be America again—  
The land that never has been yet—  
And yet must be—the land where every man is free.*

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<sup>5</sup> *Regents of the University of California v. Bakke* (1978)(Marshall, dissenting).

### Further Reading

1. Roger Goldman and David Gallen, **Thurgood Marshall: Justice for All** (1992).
2. Elisabeth Krug, **Great Lives: Thurgood Marshall-Champion of Civil Rights** (1993).
3. Mark Tushnet, **Thurgood Marshall: His Speeches, Writings, Arguments, Opinions, and Reminiscences** (2001).
4. Juan Williams, **Thurgood Marshall: American Revolutionary** (1998).
5. ABA Journal, *Mr. Civil Rights* (June 1992).
6. *Stanley v. State of Georgia*, 394 U.S. 557 (1969); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)(Marshall, dissenting); *Powell v. Texas*, 392 U.S. 514 (1968); *Furman v. Georgia*, 408 U.S. 238 (1972)(Marshall, concurring); *Bounds v. Smith*, 430 U.S. 817 (1977); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)(Marshall, dissenting); *Dandridge v. Williams*, 397 U.S. 471 (1970)(Marshall, dissenting); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)(Marshall, dissenting); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)(Marshall, dissenting).