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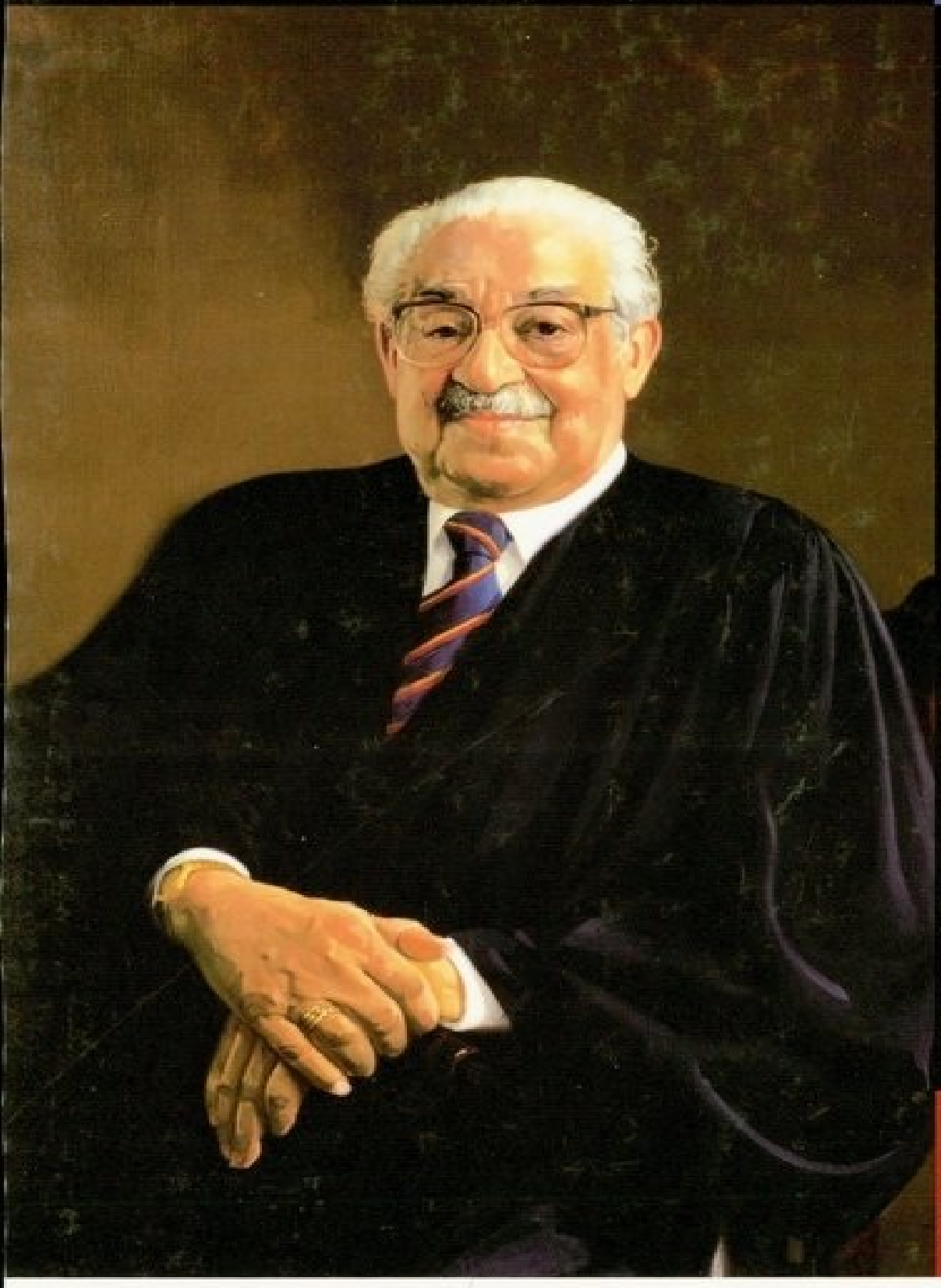

His Speeches, Writings, Arguments, Opinions, and Reminiscences

EDITED BY
MARK V.
TUSHNET

Thurgood Marshall

FOREWORD BY RANDALL KENNEDY

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Foreword

This tremendously useful collection of writings and statements by Thurgood Marshall permits reade to go behind the symbolism that encases Marshall's reputation to see concretely what he wrote an thought over the course of his distinguished career. Many people know that Thurgood Marshall was a important African American "first"—the first black judge to sit on the United States Court of Appeal for the Second Circuit, the first black solicitor general, and the first black Supreme Court justic Many people also know that before he began to be appointed to high government posts in the 1960 Marshall served as the chief attorney for the NAACP and in that capacity directed an extraordinar campaign of litigation that advanced the legal rights of African Americans (and by extension all raci minorities). Largely missing from public understanding, however, is detailed knowledge about th work he produced. In the following pages, one can study firsthand various facets of that work. One ca read briefs and oral arguments in which Marshall attempted to elicit favorable responses from judge speeches and articles in which he attempted to set agendas for fellow jurists, essays in which h attempted to influence lay audiences, and opinions in which, as a justice, he applied his interpretatio of the law to specific disputes. Also in the pages that follow is a transcript of an extensive, intima interview with Justice Marshall that has never before been published. By bringing materials out hard-to-reach research libraries and making them broadly accessible, Professor Mark Tushnet permi readers to make up their own minds on an informed basis about Marshall's strengths and weaknesses

Chief among the strengths was an unflagging persistence directed at exposing massive defects American democracy. From the oldest article in the collection ("Equal Justice Under Law," written i 1939 for *The Crisis*) to the most recent ("A Tribute to Justice William J. Brennan," written in 1990 fo t h e *Harvard Law Review*), Thurgood Marshall single-mindedly identified socially destructiv practices, policies, and habits of mind: lynching, segregation, torture, capital punishmen complacency in the presence of brutality, indifference toward poverty. He was the lawyer a muckraker: exposing injustice, shaming apathy, demanding intelligent response.

Some of the evils against which Marshall railed are safely interred in American history. One o these is the ghastly phenomenon of lynching—murder perpetrated by a group to punish people f perceived violations of law or custom. Between the 1880s and the 1930s, particularly in the Sout white supremacists deployed lynching as a weapon of racial intimidation. During that period at lea 4,700 people were lynched, 70 percent of whom were black. Among the most sobering of the page that follow are those in which Marshall excoriates the failure of states and the federal government protect African Americans from racist, vigilante violence. In an article for the *Lawyers Guild Revie* in 1942 (coauthored with William H. Hastie, the first black federal judge), Marshall devotes an enti section to "lynchings and mob violence." He notes that in the aftermath of a lynching that occurred Sikeston, Missouri, on January 25, 1942, a federal grand jury that declined to indict any of th suspected lynchers evinced considerably more hostility toward the victim of the mob than the mo itself.

Although the days are past when white supremacists could, with impunity, murder blacks accuse of violating Jim Crow racial etiquette, there are other evils Marshall battled that remain all to evident. One is racist police misconduct. Because of racial profiling, routine humiliatin

mistreatment, and racially selective resorts to excessive violence, many blacks harbor inten resentment and distrust toward the criminal justice system, particularly police authorities. Several the documents in this volume highlight the deep-rootedness of this problem. Marshall's brief in *Lyo v. Oklahoma* (1944) details a case in which law enforcement officials beat a confession out of suspect. His article "Negro Discrimination and the Need for Federal Action" (1942) notes the beatin of an African American army nurse by a policeman in Montgomery, Alabama, "because she refused t vacate the rear seat of a bus so that white passengers might be seated"—a remarkable neglected fact light of the landmark Montgomery Bus Boycott of 1954–1955 that was sparked by a similar incide involving the legendary Rosa Parks. Another article, "The Gestapo in Detroit," relates how police that city effectively sided with white thugs who terrorized blacks during disturbances that erupt during the summer of 1943. According to Marshall's carefully substantiated account,

> The trouble reached riot proportions because the police . . . enforced law with an unequal hand. They used "persuasion" rather than firm action with white rioters, while against Negroes they used the ultimate in force: nightsticks, revolvers, riot guns, sub-machine guns, and deer guns. As a result, 25 of the 34 persons killed were Negroes. Of the latter, 17 were killed by police . . . . The entire record . . . reads like the story of the Nazi Gestapo.

* * *

Many commentators have remarked that Marshall's career as an attorney was more impressive tha his career as a justice. This is probably true. In making this assessment, however, one must recogniz that the first act of Marshall's career was so extraordinary that following acts, though impressive b normal standards, were bound to be anticlimactic. After all, the campaign that he led to delegitima segregation, the campaign whose great landmark is *Brown v. Board of Education,* is probably the mo effective and influential campaign of social reform litigation in American history. Events, moreove conspired to limit Marshall's reach as a justice. When he took his seat on the Court in 1967, he joine a slim liberal majority. By 1972, however, because of personnel changes, the Court was dominated b conservatives. Instead of writing opinions for the Court in major contested cases of constitutional law Marshall was increasingly consigned to writing dissents.

Still, it is wrong to portray Marshall, as some do, as a second- or third-rate justice. To the contrar in important respects, his record was exemplary. No justice has more consistently tried to brin judicial practice into line with the noblest sentiments expressed in the foundational documents American democracy—the Declaration of Independence and the Constitution.

He wrote a number of pioneering decisions for the Court. Several are included in this collectio including *Stanley v. Georgia* (1969) and *Police Department of the City of Chicago v. Mosley* (1972 In a key decision that reinforces individuals' rights to privacy, the Court ruled in *Stanley* that stat cannot criminalize mere private possession of obscene material within one's lodgings. "Whatever ma be the justifications for . . . statutes regulating obscenity," Marshall averred, "we do not think the reach into the privacy of one's own home. If the First Amendment means anything, it means that State has no business telling a man, sitting alone in his own house, what books he may read or wh films he may watch. Our whole constitutional heritage rebels at the thought of giving government th power to control men's minds."

In *Mosley,* the Court struck down a city ordinance that generally forbade picketing within 150 fe of a public school but exempted peaceful labor picketing from this restriction. In an oft-cited passag that elevates equality of treatment to a central position in the jurisprudence of freedom of expressio

Marshall declared that the ordinance violated the federal constitution because

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

There is a bit of wishful thinking in Marshall's assertion. His portrayal of the law is mo libertarian than the actual state of the jurisprudence. But it vividly captures one of Marshall's abidi passions: freeing people from wrongful government censorship, including people with whom Marsha himself frequently disagreed.

Marshall succeeded on occasion in obtaining Court majorities in the teeth of circumstances th would have discouraged and silenced a lesser jurist. His role in *Ake v. Oklahoma* is indicative Marshall's efforts to change the minds of colleagues. In that case, a defendant charged with capit murder pleaded not guilty by reason of insanity. When his court-appointed attorney sought funds pay for a psychiatrist, state authorities balked, claiming that the defendant was entitled to a lawyer public expense but nothing more. Meanwhile, the state used psychiatrists in its prosecution a obtained a conviction and sentence of death. When the defendant appealed to the Supreme Court, initially refused to hear his case. Marshall, however, wrote a lengthy dissent from the Court's actio that convinced several of the other justices that the case at least merited a full hearing on the merits. year later, after full briefing and oral argument, a majority sided with Marshall, who wrote an opinio establishing that, at least in certain circumstances, the due process clause of the federal constitutio imposes an affirmative obligation on states to provide criminal defendants with resources beyond t mere provision of an attorney.

Marshall's greatest contribution to the Supreme Court, however, consisted not in his majorit opinions but in his forceful dissents, an array of which are featured here. After the Court permitte states to begin anew to execute defendants convicted of aggravated murder, Marshall (along wi Justice Brennan) dissented in every case in which the justices affirmed a death sentence because believed that capital punishment, no matter how carefully administered, violated the feder constitution in *all* circumstances. Objecting to what he termed the "emasculation" of federal guaranteed equal protection of the laws, Marshall dissented vociferously when the Supreme Cou held in *Milliken v. Bradley* (1974) that "innocent" suburban school districts could not be used to he dilute the racial isolation of predominantly black inner-city school districts even if a state ha participated in purposefully segregating the inner-city schools. Evoking his special relationship to t history of desegregation in public schooling, Marshall observed that

> desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue. . . . Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than

it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.

Similarly harsh was Marshall's dissent in *Regents of the University of California v. Bakke* (1978) the Court's first full-fledged battle over affirmative action. Though the Court narrowly affirmed the authority of public universities to take race into account to assist racial minorities in competition for admission, it did so on an exceedingly narrow basis that did not support the affirmative action program at issue in the case. Arguing in favor of a legal standard that would have given broad leeway to public institutions to engage in affirmative discrimination on behalf of African Americans (and perhaps other historically oppressed racial minorities), Marshall insisted that it was essential to remember that "during most of the past 200 years, the Constitution as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro." Now, he declared, "when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."

What Marshall perceived as mistreatment of the poor also provoked strong dissents. Except in a few sharply defined circumstances, Marshall's colleagues declined to order officials to accommodate the disabilities imposed by impoverishment. Marshall, by contrast, believed that the egalitarian ethos of the Constitution required much more in terms of relieving people of the burdens of poverty. In *United States v. Kras* (1973), for example, a citizen sought exemption from a rule that required petitioners for bankruptcy to pay a $50 filing fee. Unemployed, with children, including one who suffered from cystic fibrosis, Robert William Kras claimed that day-to-day living expenses made it impossible for him to pay the filing fee, even on an installment plan that the government offered. In such circumstances, he argued, it violated the federal constitution to prohibit him from taking advantage of bankruptcy protection simply because he was too poor to pay the filing fee. The Court majority upheld the constitutionality of the filing fee requirement, even as applied to Kras. In the course of doing so the Court noted that the weekly installments would amount to a sum "less than the price of a movie and a little more than the cost of a pack or two of cigarettes." Marshall objected to the majority's reading of doctrine. But even more he objected to the Court's chastising lecture regarding what it perceived as Kras's irresponsible spending habits. In a Dickensian rebuke to the Court's smugness Marshall wrote:

> I cannot agree with the majority that it is so easy for the desperately poor to save $1.92 each week over the course of six months. The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than $1,000, or $19.23 a week. I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy.
>
> 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. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.
>
> 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.

* * *

In addition to allowing readers to appreciate the strengths demonstrated by Marshall's writings, th collection also offers an opportunity to consider certain problems.

One difficulty in evaluating Marshall is the problem of authorship. Most of the items attributed Marshall were, in reality, written in collaboration with others—subordinates at the NAACP or th solicitors general's office and law clerks at the court of appeals and Supreme Court. That being so, what extent can a given item be relied upon as a reflection of the substance and style of Marshall own thinking? This question has relevance, of course, that extends far beyond Marshall. Thom Jefferson wrote George Washington's farewell address. Walter Lippman penned Woodrow Wilson' Fourteen Points. Theodore Sorenson wrote John F. Kennedy's *Profiles in Courage.* Peggy Noona wrote President George H. Bush's "Thousand Points of Light" speech. Anonymous law clerks onl two or three years removed from law school write much, if not most, of what appears under the nam of the justices—addresses, law review articles, and the published opinions that constitute the feder judicial law of the land. Still, the question remains: to what extent did others write Marshall's wor and to what extent, then, can that work be relied upon as evidence about Marshall's qualities as thinker? Although a comprehensive answer is beyond the bounds of this essay and the availab record, I shall hazard a few speculative generalizations. It is likely that Marshall played a larger ro in the crafting of documents when he had fewer assistants to rely upon, a narrower scope responsibilities, and greater stores of personal energy. From published accounts, reliable gossip, an my own observations, it seems that at least during the final decade of Marshall's tenure on the Cour almost all of the justice's writing was produced by law clerks. This is by no means peculiar Marshall. The same can be said of many of the justices, especially as they age. Marshall, moreove directed the law clerks as to substance and tone and was very willing and able to intervene editorial when he perceived a clerk to be advancing his or her pet theory as opposed to advancing a Marshallia perspective on the dispute at hand. That the writings of the Marshall Chambers, albeit penned b various hands, bear internal consistency and distinctive markings reflects, in substantial degree, th justice's supervision of the products that bear his imprimatur. Still, the public should know that whe a justice is said to "write" an opinion, the relationship of his or her labor to the actual words on th page is often complex and sometimes tenuous.

Another problematic facet of Marshall's career is his relationship to the black bar in particular an to black communities in general. Early in his career, he contributed articles to publications base within the black intelligentsia. In this collection, readers will see some of these writings, pieces th appeared in *The Crisis, The Journal of Negro History,* and the *Journal of Negro Education.* Marshal moreover, socialized with, encouraged, and utilized fellow black attorneys during the 1930s, 1940 and 1950s when he toured the country tirelessly representing clients in civil and criminal cases at a levels—state and federal, trial courts and appellate tribunals. One of the most revealing and ra documents in this collection is the transcript of remarks that Marshall offered on November 25, 195 at a testimonial dinner honoring Raymond Pace Alexander, a prominent black attorney in Philadelphi who handled scores of highly publicized criminal and civil rights cases. Lauding Alexander, Marsha acknowledged the racial difficulties that black lawyers faced. "Negro lawyers," he observed, "hav had a tough time." After all, they suffer too from debilitating racist stereotypes—the notion, fo example, that "all Negroes are thieves and cannot be trusted." Marshall insisted, however, that thes

obstacles could be overcome, and joined in the hard work of erasing prejudices by, among oth
things, strengthening the black bar's collective presence.

Unfortunately, as Marshall attained prominence among whites as well as blacks, and especiall
after he entered the government, he became detached from the black bar, black politics, and blac
institutional life. This probably stemmed in large part from Marshall's strict insistence upon doi
nothing that could be said to impair the reality or appearance of his impartiality as a justice. B
whatever the motivation, the fact is that, until his retirement from the bench, Marshall rather sel
consciously distanced himself from activities organized to advance African American interests.

Marshall hired more black law clerks than did his colleagues. But he still hired relatively few, ar
none from his alma mater, the Howard University School of Law. Howard would undoubtedly hav
benefited from more attention from Marshall. And it is possible that Marshall and his work woul
have benefited from a deeper engagement with the contentious universe of black activist thought th
emerged in the aftermath of the civil rights revolution of the 1960s. Marshall fought hard all of h
life for praiseworthy ends. But by the 1970s and 1980s, his fund of ideas about how best to extend th
boundaries of social justice was largely depleted. Indeed, during the final two decades of his publ
career he often resorted to a course of defensive legalism that appears uninspiring and unpersuasiv
even to the sympathetic observer.

An illustration is provided by his dissent in *Payne v. Tennessee* (1991), a decision handed down th
very day that Marshall announced his retirement from the Court. In *Payne,* the Court decided that
state did not violate the federal constitution if it permitted a jury to consider "victim impa
statements" in deciding whether to impose a death sentence. Prosecutors use victim impact statemen
to apprise a jury of the loss generated by a murder. Often such statements will emphasize the virtu
of homicide victims and the agonies that murder has foisted upon friends and families. In the fiv
years prior to *Payne,* a sharply divided Supreme Court twice held that the federal constitutio
prohibited the use of victim impact statements on the grounds that they would impermissibly inje
into trials a high risk of unfairness insofar as juries might be swayed to punish more harshly th
killers of sympathetic as opposed to unsympathetic victims. In *Payne,* however, a still sharply divide
Court reversed itself, ruling that victim impact statements are permissible. Justice Marshall respond
with one of the angriest dissents of his career. "Power, not reason," he charged, "is the new currenc
of this Court's decision making." Neither the law nor the facts supporting the earlier decisions ha
undergone any change, Marshall observed. "Only the personnel of this Court did." Here he wa
referring to the retirement of William F. Brennan, who had voted against the permissibility of victi
impact statements, and his replacement by David Souter, who voted in favor of their permissibilit
As Marshall described the situation, the Court's majority was renouncing a "historical commitment
a conception of 'the judiciary as a source of impersonal and reasoned judgments,"' and declaring itse
free "to discard any principle of constitutional liberty . . . with which five or more Justices no
disagree." Marshall insisted, "The implications of this radical new exception to the doctrine of *sta
decisis* are staggering. The majority today sends a clear signal that scores of established constitution
liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of o
precedents that the majority rewards in this case."

In his dissent, Marshall spent some space discussing the *substantive* merits of his disagreeme
with the Court over the wisdom of permitting victim impact statements. But most of the opinio
including its impassioned flourishes, was devoted to the *procedural* question of whether it was prop
for the Court to overrule precedents that had only recently been established. On this point, Marsha
ironically, adopted the stance of a conservative, emphasizing the benefits of continuity, stabilit
tradition. It was an awkward, ill-fitting stance. Marshall, after all, had spent much of his storied care
figuring out ways to topple precedent. Moreover, as noted above, Marshall never felt himself bou

by the Court's judgment regarding capital punishment. There is—or should be—nothing sacred abo
precedent in and of itself. In the face of uncertainty or evenly balanced merits, it makes sense to def
to tradition. But otherwise what should be decisive is the content of the precedent in question. If th
precedent is good, it should be defended. If it is bad, it should be erased. That Marshall spent so litt
space and effort advancing the positive case in favor of the content of the conclusion he favore
reflects, I think, a regrettable feature of his thought and conduct—a formalistic and legalistic strain
liberalism—that has, thus far, attracted insufficient attention.

Thurgood Marshall's greatness can withstand critical attention. Indeed the impressiveness of h
steady, unflamboyant, but unflinching campaign against social inequities becomes more impressiv
the closer one examines his efforts, career, and the forces against which he battled. The hostility h
weathered and the inertia he somehow overcame would surely have crushed lesser spirits. He was
major presence in American life throughout much of the twentieth century, and the best features of h
career will hopefully be widely emulated by Americans of all sorts in the years to come.

RANDALL KENNEDY
Harvard Law Schoo
January 200

Introduction

"Mr. Civil Rights" to African Americans in the 1950s; the first African American justice of the Unite States Supreme Court; one of the few justices who would appear in history books even if he had n been appointed to the Supreme Court; the last Warren Court liberal on the Supreme Court; one of th most important American lawyers in the twentieth century. All these phrases describe Thurgoo Marshall.

Marshall's career centered on the contradiction between the Constitution's promises and its realit He was passionately devoted to the Constitution, and yet he always recognized that the real world d not fulfill the Constitution's commitments, and might never do so. In a formulation he repeated ofte Marshall said, "the goal of a true democracy such as ours . . . is that any baby born in the Unit States, even if he is born to the blackest, most illiterate, most unprivileged Negro in Mississippi, i merely by being born and drawing his first breath in this democracy, endowed with the exact sam rights as a child born to a Rockefeller. Of course it's not true. Of course it never will be true. But challenge anybody to tell me that it isn't the type of goal we should try to get to as fast as we can."

Born in Baltimore, Maryland, in 1908, Marshall was raised in segregation, and always thought himself as a Southerner; when President Richard Nixon was reportedly seeking a Southerner to nam to the Supreme Court, Marshall jocularly but pointedly commented that as far as he was concerne there already was a Southerner on the Court. But he was of course an African American Southerne shaped by the experience of segregation. Even as the son of reasonably well-established parents, h mother a school teacher and his father the head of the serving staff at an elite white country clu Marshall felt the sting of segregation as he grew up. One of his most vivid memories was of having rush home to find a bathroom he could use, being unable to locate one open to a black child downtown Baltimore. Segregation could not dampen Marshall's spirit, however, and he recalled number of fights provoked by his reaction to being treated as a second-class citizen.

Initially intending to become a dentist like his brother William, Marshall attended Linco University in Pennsylvania, but he encountered trouble in his science classes and changed h aspirations. Excluded by state law from the University of Maryland Law School, Marshall attende Howard University Law School. The Howard experience transformed his life. Marshall went Howard just as it was undergoing a dramatic reorientation under the leadership of Charles Hamilto Houston, a charismatic graduate of Amherst College and Harvard Law School. Houston change Howard Law School from a second-rate night school to what he called a school for "social engineers Houston was a demanding teacher, who inspired his students to do the best work they could and to p their talents to the service of their community.

Marshall commuted from Baltimore to Washington to go to law school. In his second year he took job at the law school's library, and came under Houston's wing. Marshall assisted Houston with lega research as Houston defended George Crawford, an African American accused of murder in Virginia hunt country. Houston and Marshall counted it as a victory when Crawford did not receive the dea penalty upon conviction, and Marshall's observation of Houston at work—the hours spent in legal an factual research—shaped his own understanding of what it meant to be a lawyer for the Africa American community.

After graduation in 1933, Marshall opened a private practice in Baltimore. The econom opportunities for an individual practitioner in the African American community during the Depressio were limited, and Marshall was hard-pressed to make a living. Out of conviction, and to spread h name in the community, Marshall became active in the local branch of the National Association fo the Advancement of Colored People (NAACP). Recalling his own inability to attend the state la school, Marshall leaped at the chance to represent Donald Murray, an Amherst graduate who wante to sue the state to force it to desegregate the university's law school. Counseled by Houston, Marsha won the first court decision requiring a previously segregated state university to admit Africa Americans.

Meanwhile, Houston had moved to New York to develop the NAACP's legal department. From it founding in 1909, the NAACP had sporadically engaged in constitutional litigation. In the late 1920s number of NAACP leaders began to think about developing a more systematic litigation campaig They negotiated with the American Fund for Public Service, also known as the Garland Fund, t obtain a substantial grant to prepare a plan for such litigation. That report, written by Nathan Margol became something of an icon in the NAACP's legal thought. Margold proposed litigation aimed segregation in education and housing. More of an academic than a trial lawyer, Margold had an overi ambitious vision of what the NAACP's small staff could accomplish. When Margold left the NAAC to join the Roosevelt administration, Houston came on board and refocused the litigation campaign.

Houston decided to bring cases like Donald Murray's, involving graduate and profession education, and lawsuits seeking to bring the salaries of African American school teachers up to th level of white teachers. Both branches of Houston's strategy were based on the Supreme Court decision in *Plessy v. Ferguson* (1896), which held that segregated facilities were constitutional if the were "separate but equal." As Houston saw things, the salaries were plainly unequal, and no Souther state provided *any* graduate and professional education for African Americans. In both branches, the the legal theory was a simple one: if "separate but equal" was the law, insist that states comply with i

Houston found an enthusiastic follower in Marshall. In addition to Murray's suit, Marshall filed number of lawsuits in Maryland's counties seeking to equalize teacher salaries. After overcoming number of procedural obstacles, in 1939 and 1940 Marshall won the first major decisions requiri salary equalization. By then, Marshall had relocated from Baltimore to New York, where in 1936 h joined Houston on the NAACP's staff. Houston returned to his Washington law practice in 1938, i part because his father wanted him to come back home and in part because he thought that civil righ lawyers would be out of business when they succeeded in their legal challenges to segregatio Marshall became the NAACP's chief lawyer in 1938, a position he held until he left the organizatio in 1961.

Houston's tutelage and Marshall's own impressive talents made him a superb trial lawyer an appellate advocate. Always respectful (at least in public) of his adversaries, Marshall worke tirelessly to investigate cases involving civil rights violations. Marshall's attention to detail and h ability to get along with adversaries made him an effective investigator of major race-relations event including the Detroit race riot in 1943 and discrimination against African Americans in courts-marti during the Korean War. His effusive personality made him a speaker sought out by nearly all th NAACP's local branches around the country, and his talks and travels provided important mora support to the local lawyers and their clients, who had to face the assaults of the Jim Crow syste daily. Marshall thought of himself primarily as a trial lawyer, adept not so much at cutting cros examination (a tactic unlikely to help his clients in the South) but rather at carefully compiling record that would maximize the chance that some appeals court would reverse the adverse trial cou decisions that were to be expected. As an oral advocate, Marshall was a master as well. A grea raconteur, Marshall developed the capacity to speak in the different voices of the characters in h

anecdotes; and he used that capacity as well as an oral advocate, shifting from a careful legal analys to sharper tones as the occasion demanded. Having immersed himself in civil rights law a procedure, Marshall was usually in full control of oral arguments, meeting skeptical objections to h positions with a tenacious insistence that he asked for only what the law required, slipping only wh he was forced on to unfamiliar terrain.

In 1939 the legal staff was formally split off from the NAACP for tax-related reasons. The NAAC engaged in political lobbying, which meant that donations to it were not deductible as charitab contributions. The new NAACP Legal Defense and Educational Fund, Inc., known as the Inc Fun was a tax-exempt organization. Marshall continued to play a large role in general NAACP affai however.[1]

Marshall pursued Houston's litigation plans for about a decade. Salary equalization suits through the South were initially successful, providing greater income for important members of local Africa American communities and enhancing the NAACP's stature (and increasing its membership grateful teachers signed up). University lawsuits were more difficult. Houston and Marshall achiev a major victory in 1938 when the United States Supreme Court accepted their argument in *Missouri rel. Gaines v. Canada* that the state of Missouri had to provide its African American citizens with law school education in Missouri, either by admitting them to the existing state law school or b creating a new law school for African Americans. The case had a more disappointing outcome on th ground, however, when Lloyd Gaines, the plaintiff, disappeared. Organizing other universi challenges was difficult, and became even harder during World War II, when many potential plaintiff went into the armed forces.

Marshall renewed the university challenges at the end of the war. Conditions had changed important ways. Wartime experiences had made many African Americans even more willing to stan up to segregation. A legal theory that accepted the "separate but equal" doctrine was far mo troublesome in 1945 than it had been in 1935. Marshall found himself pressed by his colleague particularly by his principal deputy Robert Carter, to develop a more radical direct attack segregation. Marshall thought that the legal landscape had to change before such a direct attack ha any reasonable prospect of success. He temporized by bringing a series of challenges to segregate university education in which the main theory was the one the Court had accepted in *Gaines*, th states had to provide equal educational opportunities for whites and blacks either by desegregation by creating new segregated programs. Marshall gave a new twist to that theory, though. Relying on cadre of academic supporters, both black and white, Marshall developed records showing that th educational opportunities offered by new segregated programs were not, and could not be, equal those provided in long-established programs.

The Supreme Court accepted this new theory in *Sweatt v. Painter* (1950), a case involving leg education in Texas. In response to an NAACP lawsuit, the Texas legislature created a law school fo African Americans. Initially housed in an office building in downtown Austin, the state capital, th law school was soon transferred to a segregated university in Houston. The state contended that th new law school would provide education in law substantially equal to that provided by the Universi of Texas Law School. When *Sweatt v. Painter* reached the Supreme Court, Texan Tom Clark was th key figure in casting the state's claims in their true light. Clark pointed out to his colleagues that th University of Texas Law School was a central institution in the state's legal and political culture. I students developed lifetime friendships and relationships that made them more effective lawyers. rejecting the state's case, *Sweatt v. Painter* emphasized that equal educational opportunities had to b measured by more than the material facilities—the "bricks and mortar" of schools—but include important intangible qualities of association as well.[2]

Marshall immediately grasped the importance of this decision, saying that it provided a roadma for the direct attack on school segregation at all levels of education. Parents and students throughou the South were eager to challenge segregation, both to improve the quality of the segregated schoo by enforcing the "equal" part of "separate but equal" and to eliminate segregation entirely through direct attack. Marshall coordinated the NAACP legal staff's lawsuits in four states—Kansa Delaware, Virginia, and South Carolina.[3]

Marshall conducted the trial himself in the South Carolina case, *Briggs v. Elliott*. There govern James Byrnes responded to the lawsuit by getting the state legislature to enact a bond issue that wou devote substantial funds to improving the material aspects of the segregated black schools. Marsha did not oppose this building program, and indeed it smoothed the way for the direct attack: the ne investments in black schools made it more plausible for the state to claim that it was offering separa education that really was equal. As he developed his case, Marshall relied on testimony from soci psychologist Kenneth Clark, who interviewed African American students in the elementary grades Clarendon County, South Carolina, the site of the lawsuit. Clark administered psychological tests the students, and concluded that the students' self-image was impaired by the fact that they we forced to attend segregated schools. Prodded by Robert Carter, Marshall relied on Clark's testimony establish that segregation itself harmed African American students, whether or not they we attending schools that were in a bricks-and-mortar sense equal to the schools for whites.

The segregation cases, under the name of *Brown v. Board of Education* after the Kansas cas reached the Supreme Court in 1952. At the time the Supreme Court was quite divided over findi segregated education unconstitutional. A majority probably favored that course, but Chief Justice Fre Vinson, himself brought up in segregated Kentucky, was unable to provide significant leadership the Court. As a result, the Court asked the parties to argue the case again. Vinson died before th reargument occurred, and his replacement, Earl Warren, was a dedicated opponent of segregatio Warren led the Court to its unanimous decision on May 17, 1954, finding segregatio unconstitutional.

Marshall hoped that the Court's decision would lead to rapid desegregation. Responses in the upp South and border states such as Delaware and Maryland were encouraging. Farther South, thoug resistance to desegregation was strong. *Brown* gave ambitious politicians an opportunity to develo strong constituencies among whites opposed to desegregation. School boards were recalcitrant, at be proposing only the most modest steps in the direction of desegregation. Sporadically, viole resistance to desegregation broke out. When Arkansas governor Orval Faubus sent the state Nation Guard to help those objecting to desegregation in Little Rock, a national crisis occurred. Preside Dwight Eisenhower took control of the state National Guard and dispatched federal troops to ensu that Little Rock's Central High School remained open and desegregated. A challenge to the Litt Rock desegregation order reached the Supreme Court in *Cooper v. Aaron* (1958), in which the Cou dramatically reaffirmed its holding in *Brown* after an emergency session called to ensure that th schools would reopen in the fall of 1958 on a desegregated basis.

Southern defenders of segregation mounted a sustained challenge to the NAACP and its lawyer which occupied much of Marshall's time in the late 1950s. State attorneys charged that the NAAC lawyers had violated ethical rules against stirring up litigation and soliciting clients. State legislatur investigated NAACP branches for alleged Communist influence. Eventually the Supreme Court foun all these attacks unconstitutional, but they diverted the legal staff's effort away from desegregatio litigation and into self-defense.

The pressures of work severely limited the amount of other writing Marshall could do. Not only d he have clients to represent at trial and speeches to give to NAACP branches, he also had to manag the operations of a small law firm—the NAACP's legal staff. Marshall did produce articles for th

NAACP's magazine *The Crisis*, seeking to educate the NAACP's members about civil rights law an the NAACP's legal program. Sometimes he extended his audience to the academy, but what he wro tended to summarize the NAACP's cases and its program. His writings as a lawyer did not ventu bold new theories, largely because he did not have the time to do so. Sometimes, however, he used th investigations he conducted to present vivid accounts of the realities of discrimination.

Marshall found the work he was doing in the late 1950s personally unsatisfying. He had become major figure in the civil rights community (although he resented somewhat the rise of Martin Luth King, Jr., as a leader) but his professional and personal lives were no longer providing him the reward he wanted. He had married Vivian "Buster" Marshall after graduating from college. Although the both wanted children, Buster had a number of miscarriages. Marshall's travels throughout the countr further strained the marriage. Buster died of lung cancer in April 1955. Marshall married Cecil Suyatt, a secretary in the NAACP's office, in December. By the end of the 1950s, they had two your sons, and Marshall wanted to spend more time in New York with his family.

His opportunity arose when President John F. Kennedy nominated him to a position on the federa court of appeals in New York, at the time probably the second most important federal court in th country after the Supreme Court. Southern senators delayed Marshall's confirmation for nearly a yea but eventually he was approved and took his seat on the Second Circuit in 1961, where he served unt 1965. Then President Lyndon Johnson asked him to step down from his lifetime position as a judge t become solicitor general, the government's chief lawyer and advocate before the Supreme Cour Johnson almost certainly intended to use Marshall's service as solicitor general as a prelude to h nomination to the Supreme Court, and Marshall almost certainly understood Johnson's intentio although no records or other evidence exists to confirm these judgments. Marshall accepted Johnson offer, in part because he felt that Johnson, a fellow Southerner, was truly devoted to civil rights.

Marshall had been a great oral advocate when he was arguing NAACP cases. He had an intuitiv grasp of what the justices were concerned about, and was able to respond to their concerns quickly an in ways that accommodated their concerns to the legal positions he was advancing. As solicito general, Marshall was somewhat less successful. He argued cases in areas that he was less famili with, and sometimes he was defending government positions in cases where the Warren Court wa inclined to rule against the government. Marshall argued a federal companion case to *Miranda* v *Arizona* (1966), for example, and defended the warnings the Federal Bureau of Investigation gav suspects, warnings the Court found too limited.

After Marshall had served two years as solicitor general, Johnson maneuvered Tom Clark int retiring by naming his son Ramsey as attorney general, and then nominated Marshall to the Supreme Court. The political situation in 1967 was different from that in 1961, and Marshall was easi confirmed as the nation's first African American justice of the Supreme Court.

Marshall joined the Court when it was thoroughly dominated by New Deal-Great Society liberal Chief Justice Earl Warren and Associate Justice William J. Brennan gave the Court administrative an intellectual leadership. William O. Douglas, appointed to the Court by Franklin D. Roosevel remained a strong voice for liberalism. Abe Fortas, a long-time Johnson crony, was the fifth membe of a solidly liberal majority. They were joined on some issues by Hugo Black, a New Deal liber whose constitutional commitments made him seem more conservative in the Warren Court era, and o others by Byron White, a Kennedy appointee who was conservative on criminal law issues but liber on race ones. The Court's only conservatives were John Marshall Harlan and Potter Stewart, and eve they represented the more liberal wing of the Republican party.

Marshall surely expected to contribute to the further expansion of the Warren Court's libera constitutional agenda, but his expectations were defeated by a rapid change in the Court composition. Earl Warren announced his retirement in June 1968, and Republicans, sensing that the

might regain the presidency in that year's election, refused to confirm a successor. After Richar Nixon's victory, Warren departed, replaced by the far more conservative Warren Burger. Burger wa also less adept than Warren at personal relations, which made Marshall's time on the Court even mor uncomfortable as Burger occasionally blundered in his treatment of Marshall as a person. The Republicans forced Abe Fortas to resign. Fortas's replacement was Harry Blackmun, a reliabl conservative in his first years on the Court who gradually became more liberal. In 1971 Justices Blac and Harlan both retired for reasons of health. When Lewis F. Powell and William Rehnquist joined th Court in early 1972, the solid Warren Court liberal majority of which Marshall was a part became solid moderately conservative majority, from which Marshall consistently dissented.

The Court's changing composition severely limited Marshall. Significantly, he wrote more dissen and separate concurring opinions than he did opinions for the Court; and many of the majori opinions he wrote were in technical and statutory areas, not in constitutional ones. Marshall's mo enduring contribution to constitutional law was probably his theory of the equal protection claus which would have required the courts to balance the importance of a regulation's impact on a grou the nature of that impact, and the goals the state was seeking to achieve by singling out that group f regulation. This theory made more sense of the Court's decisions than the Court's own articulation o its doctrine. In addition, along with Brennan, Marshall was the Court's most consistent opponent o the death penalty. He was the only member of the Court who had represented criminal defendan facing the death penalty, and he drew on his experience in his opinions and extrajudicial comments t emphasize the impossibility of administering the death penalty fairly.

Beyond his contributions to doctrine, Marshall gave the Court a unique perspective. As its onl African American member, Marshall brought to the conversations among the justices a distinctiv range of experience. He was also the only justice with substantial experience as a trial lawyer and as criminal defense lawyer, and his colleagues regularly noted the ways in which Marshall invoke experience, often to chastize them for ignoring the real world in which constitutional rules operate Within his chambers, Marshall was frequently grumpy about the directions in which the Court wa moving, and he expressed his dissatisfaction in a number of his extrajudicial writings and talks. To h colleagues, Marshall expressed his disagreement as a raconteur who came up with an anecdote th pointed out what was wrong with what they were doing.

For most of his time on the Court, Marshall was a "quick study," who could understand the centr point of a legal argument by reading the lawyers' briefs. He relied on his law clerks to draft opinion but not to outline the cases for him. As he aged, Marshall found the Court's work increasingly taxin His law clerks began to draft more extensive memoranda for him before the Court heard cases argue His close friend William Brennan retired for health reasons in 1990. Marshall had not been in goo health for many years, and Brennan's departure, coupled with Marshall's own health problems, le Marshall to retire in 1991. He died in 1993.

* * *

This book presents a selection of Marshall's writings as a lawyer and advocate, and a sma selection of edited excerpts from his most important Supreme Court opinions. Footnotes have bee added to identify cases and names to which Marshall referred; footnotes appearing in the original a specifically identified.

Part I provides a glimpse of Marshall at work as a lawyer. It includes the brief he filed in the fir major case he argued before the Supreme Court and the brief in his most important Supreme Cou case, *Brown v. Board of Education.* Marshall's greatest talent lay in his ability to present a persuasiv oral argument, and Part I contains edited excerpts from the transcripts of his oral arguments in *Brow*

and *Cooper v. Aaron*, the Little Rock school desegregation case. Readers will find in these materials demonstration of Marshall's eloquence and his tenacity in defending his positions against stron challenges.

Part II presents most of the articles Marshall published while he was a practicing lawyer. They a arranged chronologically and, taken as a group, give a good overview of the legal work of the NAAC and the Legal Defense Fund from 1909 to the mid-1950s.

Part III contains nearly all of the speeches and articles Marshall gave while he was a member of th Supreme Court. It is divided into two sections. The first section collects the talks Marshall gave at th annual meetings of the judges of the Court of Appeals for the Second Circuit and the lawyers wh appeared before that court. Brief descriptive titles have been added to the transcriptions and otherwi untitled texts Marshall prepared. Marshall usually offered candid comments on the Court's work i these speeches, and they provide important insights into the generally skeptical view Marshall took the Court's work after Warren Burger became chief justice. The second section of Part III include Marshall's published articles and some previously unpublished speeches. These are arrange chronologically, with a few departures to ensure that speeches and articles that are thematically linke can be read together.

Part IV, the selections from Marshall's Supreme Court opinions, is arranged thematically. It begin with three cases dealing with Marshall's approach to interpreting the equal protection clause, followe by two of his dissents in affirmative action cases. The next cases deal with questions related to th way constitutional law deals with indigents, a matter clearly related to (but sometimes doctrinal distinct from) equal protection law. The final sections deal with Marshall's decisions in free speec and criminal justice cases, concluding with his final opinion as a justice, a dissent in a death penal case in which Marshall insisted on the importance of adherence to precedent and chastised h colleagues for making "[p]ower, not reason . . . the currency" of the Court's action. These excerp provide an introduction to Marshall's constitutional jurisprudence. Readers seeking addition material on that topic can use the Appendix as a guide to some of Marshall's other major decisions.

Part V is a transcript of an extensive oral history interview Marshall gave in 1977. Full of th anecdotes Marshall loved to tell, his reminiscences give readers a feel for Marshall's personality, a well as his own overview of the events in his life.

PART I

LEGAL BRIEFS AND ORAL ARGUMENTS

Insisting that good lawyers had to master the facts of the cases they brought or defended, Charles Hamilton Houston trained Marshall as a trial lawyer. Marshall's own abilities made him a great appellate lawyer. Both in trial courts and before appellate courts, Marshall had a sure instinct for the facts that mattered, and an ability to present his case in the way his audience—sometimes a jury, sometimes one or more judges, and sometimes the African American community—would understand best.

Marshall's work as a trial lawyer is contained in the transcripts of the cases he handled. The most effective trial lawyers do not fit the television image of an attorney cross-examining a hostile witness who ultimately confesses after having been exposed. Rather, these trial lawyers patiently compile a factual record to support their motions asking a judge to find in favor of their clients. Marshall frequently told of learning how to be a trial lawyer by riding in the backseat of Houston's car, balancing a typewriter on his knees while pounding out a motion to exclude evidence. Later, Marshall learned how to coordinate the presentation of facts from expert witnesses, an ability he used to great effect in the school desegregation lawsuits.

When Marshall headed the Legal Defense Fund, he was more a coordinator of other lawyers' work than an initial drafter of legal documents like briefs. By the late 1940s, the Legal Defense Fund's legal briefs were highly collaborative works, incorporating ideas from many members of the Fund staff and its outside advisers. Marshall's oral advocacy, in contrast, was his alone. He was a master at striking the right tone: sometimes engaged in what seemed to be a simple conversation with the justices about how they all should handle a difficult legal problem, sometimes a sarcastic critic of his opponents' position, and sometimes the eloquent orator whose words went to the heart of the moral case for his clients.

What follows are two of Marshall's appellate briefs and transcripts of several of his oral arguments before the Supreme Court. The first brief is from *Lyons v. Oklahoma*, the second case Marshall argued before the Supreme Court.[4] The brief shows Marshall's instinct as a trial lawyer for presenting the facts of a case in a way that should incline the reader to agree with the conclusions Marshall wants the Court to draw. Although an appellate brief,[5] it illustrates some of Marshall's talents as a trial lawyer as well. The second is the initial brief in *Brown v. Board of Education.* This brief is notable for its brevity and for the straightforward manner in which it presents the argument that school segregation is unconstitutional. Marshall's oral arguments in the school desegregation cases were the most important in his career. The cases were argued three times, and this collection includes transcripts of all three of Marshall's arguments. Several years later, the Little Rock school crisis erupted. The Supreme Court scheduled two emergency arguments. The first dealt with some highly technical

aspects of the case's procedural posture and, although it shows Marshall's facility in dealing with a complex legal problem on equal terms with the justices, it is omitted here in favor of the argument on the merits.[6]