

Thurgood Marshall: An Heir of Charles Hamilton Houston

By J. Clay Smith, Jr.

It has been said, "there are only three great charters of freedom among Anglo-Saxon people, the Magna Charta, which the barons wrung from King John at Runnymede, the Declaration of Independence, which a few colonials threw at the head of an obstinate king, and the Emancipation Proclamation, which Lincoln cast into balance for the Union. The Magna Charta gave freedom to the nobility; the Declaration of Independence brought freedom down to plain people; the Proclamation of Abraham Lincoln set free the under man and proclaimed liberty to the slave and the serf throughout the world."¹

William Henry Lewis, a noted African-American lawyer from Boston, Massachusetts, uttered these words eighty years ago on February 12, 1913, before the House of the Commonwealth of Massachusetts, to commemorate the signing of the Emancipation Proclamation.² Thurgood Marshall was five years old when Lewis delivered this speech, but Lewis's words have travelled far since spoken and, later in Marshall's life, are likely to have been apprehended by him.³

When William T. Coleman, Jr., delivered a tribute to Justice Mar-

* Professor of Law, Howard University School of Law. Justice Thurgood Marshall wrote the Foreword to Professor Smith's book, *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* (forthcoming 1993).

1. William H. Lewis, *Lincoln's Birthday, Address Before the Massachusetts House of Representatives*, in *HOUSE REPORTS OF THE COMMONWEALTH OF MASSACHUSETTS*, No. 1912, Feb. 12, 1913 at 481, 492. See generally John Hope Franklin, *The Emancipation, in RACE, RACISM AND AMERICAN LAW* 55 (1973) ("emancipation of the slaves was 'sincerely believed to be an act of justice.'"); A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* v ("This Great Charter dealt with grievances of the time in a practical way. It gave legal redress for the wrongs of a feudal age.").

2. Lewis, *supra* note 1; *Lewis Reviews Emancipation*, *BOSTON GLOBE*, Feb. 13, 1913, at 11.

3. The spirit of William Henry Lewis no doubt was present at the Department of Justice on June 13, 1965, the day that Thurgood Marshall was sworn in as Solicitor General of the United States. This must have been a strange, but exciting day at the Department of Justice: an African American was now the chief legal spokesman for the nation before the United States Supreme Court. It also was a moment to remember William Henry Lewis, who in 1911, fifty years before, had become the first African-American lawyer nominated by the President and confirmed by the Senate as Assistant Attorney General of the United States. J. CLAY

shall at his funeral, I was reminded of Lewis's speech.⁴ Coleman, an African-American lawyer, caused us to think about Abraham Lincoln and the Emancipation Proclamation⁵ in the context of Thurgood Marshall's life and accomplishments.⁶ Coleman urged us to consider

SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* (forthcoming 1993).

4. See Stephen Labaton, *Thousands Fill Cathedral To Pay Tribute to Marshall*, N.Y. TIMES, Jan. 29, 1993, at A16.

5. The preliminary proclamation was issued on September 22, 1862. It was "a notification to the world that certain slaves would be freed The Emancipation itself was made on January 1, 1863." MERLE R. EPPSE, *THE NEGRO, TOO, IN AMERICAN HISTORY* 213-14 (1943) (followed by text of the Emancipation Proclamation).

6. Thurgood Marshall, Associate Justice of the Supreme Court of the United States, was born in Baltimore, Maryland, on July 2, 1908, the son of William C. and Norma A. Marshall. On September 4, 1929, he married Vivian Burey, who died in February, 1955. On December 17, 1955, he married Cecila A. Suyat. They had two children, Thurgood, Jr., and John William, and three grandchildren. They made their home in the Commonwealth of Virginia.

Justice Marshall attended public schools in Baltimore. In 1930, he graduated with honors from Lincoln University, where he had gone with the intention of becoming a dentist. His aims changed to law, and in 1933 he graduated at the head of his class from Howard University School of Law in Washington, D.C. He later received numerous honorary degrees.

Upon graduation from Howard, Justice Marshall entered the private practice of law in Baltimore, and in 1934, he became counsel for the Baltimore branch of the National Association for the Advancement of Colored People. In 1936, he joined the organization's national legal staff and, in 1938, was appointed chief legal officer. He served from 1940 until his appointment to the federal bench twenty-one years later as Director-Counsel of the NAACP Legal Defense and Educational Fund.

President John F. Kennedy nominated Thurgood Marshall for appointment to the Second Circuit Court of Appeals on September 23, 1961. He was given a recess appointment in October, 1961 and his nomination was confirmed by the Senate on September 11, 1962. President Lyndon B. Johnson nominated Judge Marshall for appointment as Solicitor General of the United States on June 13, 1965. He took the oath of office on August 24, 1965. He was the first African-American lawyer to hold this post. President Johnson nominated him as Associate Justice of the Supreme Court of the United States on June 13, 1967. The Senate confirmed him on August 30, 1967. He took the constitutional oath and his seat on the Court on October 2, 1967, as successor to Justice Tom C. Clark. Thurgood Marshall became the first African American to serve as a Justice of the Supreme Court.

He had served his country in many capacities in previous years. In 1951, he visited Japan and Korea to investigate court-martial cases involving African-American soldiers. He served as a consultant at the Constitutional Conference of Kenya in London in 1961 and as President Kennedy's personal representative to the independence ceremonies of Sierre Leone in 1961. Just prior to becoming Solicitor General, he was Chief of the United States Delegation to the Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which convened in Stockholm in August, 1965. Thurgood Marshall was former President Truman's personal representative to the laying of the cornerstone ceremony at the Center for the Advancement of Peace (Harry S Truman Centre) in Jerusalem on July 11, 1966. He attended, as Special Ambassador and head of the United States Delegation, the funeral of the late Prime Minister Sangster of Jamaica on April 17, 1967. Justice Marshall was a member of the Board of Directors of the John F. Kennedy Library. He was a member of the American Bar Association, the National Bar Association, the Association of the Bar of the City of New York, New York County Lawyers Association, the Research Institute, the Alpha Phi Alpha Fraternity, and the College of Electors, Hall of Fame, New York University. He was the

Thurgood Marshall, the civil rights lawyer, judge, Solicitor General of the United States, and Associate Justice of the United States Supreme Court, as an agent of change.⁷ In all of these professional roles, Marshall sought to "complete the work . . . left undone by Lincoln."⁸ Coleman's tribute to Justice Marshall was appropriate because Marshall spent his life filling in the interstices of the Emancipation Proclamation and resurrecting the original meaning of the Reconstruction amendments to the Constitution, often referred to as the "Negro's charter of liberty."⁹

In 1930, when Thurgood Marshall enrolled in the Howard University School of Law, he was probably familiar with Everett J. Waring, a pioneering African-American lawyer from his hometown of Baltimore. On October 10, 1885, Waring was the first African American admitted to the Maryland bar following his graduation from Howard University's law school.¹⁰ Waring was a contemporary of the aforementioned William Henry Lewis. As a young law student at Howard University, Marshall may have become acquainted with the legal scholarship of Everett

recipient of scores of national and local medals, awards, and citations for his work in the field of civil rights. He was known as "Mr. Civil Rights." Justice Marshall expired at 2 p.m., on January 24, 1993.

For additional biographical information on the life of Thurgood Marshall, see John P. Mackenzie, *Thurgood Marshall*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 3063 (Leon Friedman & Fred L. Israel eds., 1969); Randall W. Bland, An Examination of the Legal Career of Thurgood Marshall Prior to His Elevation to the Supreme Court of the United States, 1934-1967 (1971) (unpublished Ph.D. dissertation, Notre Dame University); RANDALL W. BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL (1973). But see Randall W. Bland, *Book Reviews*, 79 J. OF AM. HIST. 1687-88 (March 1993) (reviewing Frank R. Kemerer, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY (1991)); See also Ramsey Clark, *Thurgood Marshall*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT THEIR LIVES AND MAJOR OPINIONS 385 (Leon Friedman ed., 1978); CATHERINE A. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES 105 (1978); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); ROGER GOLDMAN, THURGOOD MARSHALL: JUSTICE FOR ALL (1992); CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL (1993); THE OXFORD COMPANION TO THE UNITED STATES SUPREME COURT 526-528 (Kermit L. Hall, et. al. eds., 1992); Juan Williams, *Marshall's Law*, WASH. POST MAG., Jan. 7, 1990 at W12.

7. The Acting Attorney General of the United States described Justice Marshall as "the catalyst that initiated . . . change. [W]e . . . are the grateful benefactors of his . . . industriousness." [Stuart M.] Gerson *Praises Former Justice Marshall*, Att'y Gen. Release, Jan. 28, 1993.

8. Labaton, *supra* note 4, at A16. See also William T. Coleman, Jr., *Mr. Justice Thurgood Marshall: A Substantial Architect of the United States Constitution for Our Times*, 101 YALE L.J. 7 (1991).

9. BERNARD H. NELSON, THE FOURTEENTH AMENDMENT AND THE NEGRO SINCE 1920 1 (1946); Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1252 (1992); Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 95-101 (1989).

10. SMITH, *supra* note 3.

J. Waring, particularly his article, *The Judicial Function in Government*, published in 1886.¹¹ In this article Waring expressed skepticism about the judicial power exercised in *Dred Scott v. Sandford*¹² because such judicial power had ordained white power as superior, and black existence as inferior under the Constitution. Waring called this power structure “infamous.”¹³ Like Waring, Marshall was skeptical of the power of the judiciary since he too recognized that courts were not inclined to erase the dark shadows of *Dred Scott* or reverse *Plessy v. Ferguson*.¹⁴ Indeed, Marshall was born only twelve years after the Supreme Court decided *Plessy*, a case which fueled the racism associated with Jim Crow¹⁵ and froze the separate but equal doctrine into American law.¹⁶

In 1908, Thurgood Marshall was born into a nation that suppressed the Negro. Describing this period, E. Franklin Frazier has written, “[T]he agrarian discontent which found political expression in the Populist movement in the South created the popular but false belief that ‘poor whites’ had captured political power.”¹⁷ White leaders used the general unrest among poor whites to persuade them “that the Negro was the cause of all their troubles.”¹⁸ White political leaders in Mississippi, like James K. Vardaman, declared: “[I]t matters not what [the Negro’s] advertised mental and moral qualifications may be. I am just as much opposed to Booker Washington as a voter, with all his Anglo-Saxon reinforcement, as I am to the coconut-headed, chocolate-colored, typical little coon . . . who blacks my shoes every morning. Neither is fit to

11. Everett J. Waring, *The Judicial Function In Government*, 2 A.M.E. REV. 437 (April, 1886).

12. 60 U.S. (19 How.) 393 (1857).

13. Waring, *supra* note 11, at 439. See also *Dred Scott*, 60 U.S. (19 How.) at 410-12, 415.

14. 163 U.S. 537 (1896).

15. E. Franklin Frazier, the noted historian, reports that “the earliest use of the term ‘Jim Crow’ was in 1835 when Thomas Rice, the first Negro minstrel, presented in Washington, D.C., a song and Negro dance entitled ‘Jim Crow.’ In 1841 the term was applied to a railroad car set apart for Negroes in Massachusetts. After the emancipation of the Negro, the term was applied to all the laws providing for the separation of the races in the South.” E. FRANKLIN FRAZIER, *THE NEGRO IN THE UNITED STATES* 157 n.31 (1957) (citing GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 208 (1910)); see also C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* at preface (3d ed. 1974) (describing Jim Crow as “[t]he period of history that gave rise to the laws of segregation”). Although the term “Jim Crow” is thought to describe southern history, it may also describe a period of history in places such as Ohio and Indiana in the 1830s, and Boston, Massachusetts, in the middle 1850s. JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 229 (3d ed. 1967); LEONARD W. LEVY & DOUGLAS L. JONES, *Introduction to JIM CROW IN BOSTON* vii-xxiii (1974); JOSEPH H. CARTWRIGHT, *THE TRIUMPH OF JIM CROW* 161 (1976).

16. See *Plessy*, 163 U.S. at 537.

17. FRAZIER, *supra* note 15, at 155.

18. *Id.* at 156.

perform the supreme function of citizenship."¹⁹

Thurgood Marshall was born into a world in which a sizable portion of the population in the South, and elsewhere, did not believe that he could perform functions of citizenship. He was born in a nation where lynching was the substitute for due process of law for African Americans,²⁰ and where "Negro education" was said to be a waste of the money of taxpayers which resulted in "the diversion of state funds . . . [from black schools] to white schools."²¹ The Dean of the Department of Education of the University of Mississippi once said: "[I]n educational policy, let the negro have the crumbs that fall from the white man's table."²² Southern justice was rough justice because "southern judges [were] notoriously prejudice[d] against Negroes."²³

Marshall, like Waring, soon understood that "the sanctity and importance of the judicial function [could] not [be] sufficiently estimated."²⁴ Although both men doubted that the courts would soon develop an emancipatory jurisprudence, one that would recognize African Americans as full citizens, they continued to hope and to assert that "judges [were] the custodians of unborn generations."²⁵

As a law student at Howard University, Marshall excelled under the tutelage of a law faculty which was cut from the same cloth as William Henry Lewis and Everett J. Waring. By 1933, the year that Marshall and his ten classmates graduated from law school,²⁶ their teachers had

19. *Id.* at 157 (citation omitted). See LOUIS R. HARLAN, BOOKER T. WASHINGTON: THE WIZARD OF TUSKEGEE, 1901-1915, 176 (1983) (describing Washington's philosophy of higher education for African Americans). Recognizing the struggle that Thurgood Marshall would face in his life to obtain the rights of citizenship may be the reason that his father steered his son to law. Garland L. Thompson, *Thurgood Marshall, Justice, Dies at 84*, CRISIS 6, Feb. 1993.

20. See generally RALPH GINZBURG, 100 YEARS OF LYNCHING 68-69 (1988). The lynching of African Americans occurred without criminal sanction even though many states nominally made lynching a crime. See generally JAMES H. CHADBURN, LYNCHING AND THE LAW (1933).

21. FRAZIER, *supra* note 15, at 159.

22. GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 298 (1971) (quoting THOMAS PIERCE BAILEY, RACE ORTHODOX IN THE SOUTH, AND OTHER ASPECTS OF THE NEGRO QUESTION 93 (1914)).

23. LOUIS P. GOLDBERG & ELEANOR E. LEVENSON, LAWLESS JUDGES 185 (1935).

24. Waring, *supra* note 11, at 437.

25. *Id.* See also Mark V. Tushnet, *Epitaph for an Uncommon Man*, WASH. LEGAL TIMES, Feb. 1, 1993, at 34 ("Few people and even fewer Supreme Court Justices could combine hope and skepticism as Marshall did.").

26. Right after the Great Depression began in 1929, the enrollment declined at Howard University's law school, as at other law schools. In 1933, Thurgood Marshall's classmates were Otho DeWitt Branson, Samuel Roy Bryant, Lorenzo Madero Henderson, Oliver White Hill, Onette Waldo Johnson, Harry Reginald Mitchell, Leslie Sterling Perry, Leon Nathaniel

taught them the elements of contracts, torts, and crimes. Marshall had been inspired by the law faculty and his mentor, Charles Hamilton Houston, the Resident Vice-Dean, to carry out the mandate of emancipation.²⁷

Thurgood Marshall, unlike many of the lawyers who have sat on the courts of this nation, including the United States Supreme Court, attended a law school with an integrated faculty. Indeed, in the history of the United States Supreme Court, Marshall was the first justice of the Court to have been taught by a African-American law professor.²⁸

The Howard University law faculty consisted of twelve professors, including Dean Houston. Five of those twelve professors were white. Marshall's contact with white instructors has not been previously reported by Marshall scholars. The extent to which Marshall's white teachers influenced him remains a mystery, but he must have learned much from Professor Nathan Cayton, who taught Moot Court; Professor Alfred Joseph Buscheck, who taught contracts, Business Units, and Corporations; Professor Theodore Cogswell, who taught Wills and Administration; and Professor Walter Wheeler Cook, who taught Conflict of Laws. Professors Cayton, Buscheck, Cogswell, and Cook were white law instructors.²⁹ The education of Thurgood Marshall, however, was guided essentially by the African-American law faculty who taught the bulk of the curricula. Among them was Dean Charles H. Houston.

Reaves, Louis Edward Saunders, and Henry Wadsworth Sweet. (Interview with Ollie May Cooper, (Oct. 1979); Ms. Cooper, a lawyer, and 1921 Howard University law graduate, was secretary to Charles Hamilton Houston during his deanship.); Telephone interview with Clifford Muse, Archivist, Howard University, (Feb. 10, 1993). See also GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 80 (1983); J. Clay Smith, Jr., *Ollie May Cooper: The "Real Dean" of Howard University School of Law*, 23 *How. L.J.* 367 (1980); J. Clay Smith, Jr., *The Black Bar Association and Civil Rights* 15 *Creighton L. Rev.* 651, 669 n.70 (1981).

As the grip of the Great Depression took hold, "the plight of Afro-Americans . . . did change—for the worse." HARVARD SITKOFF, *A NEW DEAL FOR BLACKS, THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE* 34 (1978). When Thurgood Marshall and his classmates left Howard University's law school in 1933 "most blacks could [not] find jobs . . . [T]he crash erased the category known as 'Negro jobs.'" *Id.* at 35.

27. See MCNEIL, *supra* note 26, at 84.

28. See generally Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 *U.S.F. L. REV.* 385, 394-95 (1986); Henry D. Gabriel, *America's Oldest Law School*, 39 *J. LEGAL EDUC.* 269, 271 (1989) (this article does not identify definitively the name of the first law school, but many believe that Yale University School of Law, is "the lineal descendent of the Litchfield Law School," founded in 1824.).

29. The fifth white instructor was Milton Albert Kallis, who, during the 1932-33 academic year, was on leave of absence.

Dean Houston taught Evidence and, with Professor Leon Andrew Ransom, Legal Bibliography and Argumentation. Ransom was considered one of the brightest men on the faculty. He was a respected civil rights scholar who also taught Sales, Municipal Corporations, and other courses. Marshall was exposed to Professor William L. Houston, Charles Houston's father, who was a leading lawyer in the District of Columbia. The elder Houston taught Insurance, Property, Office Management and Ethics, and other core courses. Each of the African-American law professors was involved in various aspects of civil rights. These teachers were among Marshall's role models.³⁰

Thurgood Marshall's constitutional law teacher was a brilliant and independent scholar, Professor James Adlai Cobb. Professor Cobb graduated from Howard University's law school in 1899. In 1907, one year before Thurgood Marshall was born, Cobb served as a special assistant in the Department of Justice; he later was appointed judge of the municipal court for the District of Columbia. Professor Cobb taught at the law school from 1916 to 1938, and during his lifetime had seen the best of times and the worst of times in American constitutional law as it related to African Americans.³¹ Professor Cobb, perhaps more than any other instructor of Thurgood Marshall, planted the seed for constitutional reform that blossomed and matured in Marshall's persona.³²

A great person like Thurgood Marshall becomes so through a variety of experiences and personal relations. We know very little about Thurgood Marshall's friends during his law school days. One of his "bosom pals" during law school was Oliver White Hill³³ from Richmond, Virginia, who became a legend in his own right through his efforts to

30. See 12 HOWARD UNIVERSITY BULLETIN: THE SCHOOL OF LAW, 1932-1933, 13-14 (1933).

31. For additional biographical information on Professor Cobb, see DICTIONARY OF AMERICAN NEGRO BIOGRAPHY 117 (Rayford W. Logan and Michael R. Winston eds. 1982).

32. In 1933, constitutional law at Howard University's law school was a required, four-hour course, and was offered for two hours each semester during the third year. Professor Cobb was the only instructor on the faculty who taught this course. He used WESTEL W. WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) (Professor Willoughby was a professor of political science at Johns Hopkins University) and EUGENE WAMBAUGH, CASES ON CONSTITUTIONAL LAW (1915) (Professor Wambaugh was a law teacher at Harvard University). HOWARD UNIVERSITY BULLETIN, *supra* note 30, at 27 (1933). At least one scholar has sought to discover the courses that Justice Thurgood Marshall took as a law student to glean understanding of Marshall's rulings in the area of antitrust law. Victor H. Kramer, *The Road to City of Berkeley: The Antitrust Positions of Justice Thurgood Marshall*, 32 ANTITRUST BULL. 335, 337 (1987).

33. RICHARD KLUGER, SIMPLE JUSTICE 179 (1987). Oliver White Hill spoke fondly of his relationship with Marshall at Howard University during a lecture at the "Dean's Lecture Series" at the law school on November 18, 1992. Hill's important work in the field of civil rights has been documented. *Id.* at 483.

desegregate the schools in the Commonwealth of Virginia.³⁴ Thurgood Marshall's personality in law school had attributes that foretold a future judicial career. During his second year in law school, Hill reports that Marshall's classmates elected him as a Justice to the Court of Peers, a student-run honors group. He described Marshall as having "the fine quality of being reasonable with others in the resolution of problems."³⁵ Another classmate, Leslie Sterling Perry, became well-known for his work on the passage of a federal anti-lynching bill and the abolition of poll taxes.³⁶

As a young law student, Thurgood Marshall, had "character, coupled with his excellent sense of humor and inner confidence in his own ability"³⁷ that he used effectively throughout his career to disarm foes who mistakenly underestimated his superior intellect.

Although Howard University's law school had a total of only forty-four students in 1933,³⁸ these students brought regional diversity to the school. They came from places like Pine Bluff, Arkansas; Petersburg, Virginia; Memphis, Tennessee; Burchell, Kentucky; Palatka, Florida; Ansted, West Virginia; Funwood, Mississippi; and up North, from Chicago, Illinois; Atlantic City, New Jersey; Shelby, Indiana; and Wilmington, Delaware. One can reasonably conclude that Thurgood Marshall learned much from these students; he likely learned about racism from his classmates from the deep South, and from those of more humble means.³⁹ There were no women in Thurgood Marshall's class of 1933.

34. *Id.* at 485-506. See also John Bowen, *Integration Would Wreck Local System, Superintendent Says in Trial*, THE TIMES-HERALD, Feb. 11, 1957, at 1. (During a desegregation case in Newport News, Virginia, in which Oliver W. Hill and William Hale Thompson, Sr., both black lawyers, were involved, "he objected to a question as to whether the superintendent considered the physical facilities in the city "substantially equal."") (courtesy of William Hale Thompson, Jr.).

35. Oliver W. Hill, *A Classmate's Recollections of Thurgood Marshall in the Earlier Years*, 35 HOW. L.J. 49, 51 (1991).

36. *Antilynching and Protection of Civil Rights: Hearings on H.R. 115, H.R. 155, H.R. 365, H.R. 385, H.R. 443, H.R. 788, H.R. 795, H.R. 1351, and H.R. 4683 Before Subcomm. No. 3 of the House Judiciary Comm.*, 81st Cong., 2d Sess. 145 (1949); *Pole Tax: Hearings on H.R. 29 Before Comm. on Rules and Administration*, 80th Cong., 2d Sess. 216-18 (1948) (statements of Leslie S. Perry, representing the National Association for the Advancement of Colored People).

37. Hill, *supra* note 35, at 51.

38. HOWARD UNIVERSITY BULLETIN, *supra* note 30, at 30. Thurgood Marshall entered the law school in 1930. He likely became friends with several upper-classmen. In fact, Marshall became friends with Edward Pharaoh Lovett, the top student in the law class of 1932, who would later become one of Marshall's best friends and one of Charles H. Houston's lieutenants in major civil rights litigation. KLUGER, *supra* note 33 at 148-49.

39. In 1930, the year that Thurgood Marshall entered Howard University's law school, the evening program had been terminated. Genna Rae McNeil, *To Meet the Group Needs: The Transformation of Howard University School of Law, 1920-1935*, in NEW PERSPECTIVES

He graduated with honors and at the top of his class.

After Thurgood Marshall's graduation from Howard University's law school, he and Charles Hamilton Houston remained bonded. Houston took Marshall under his wing and led him into the battle to destroy Jim Crow. Three years later, Charles H. Houston, William I. Gosnell, and Marshall sued the University of Maryland to enjoin it from denying the admission of a African-American applicant to the University of Maryland School of Law. In the celebrated case of *Pearson v. Murray*,⁴⁰ the Maryland Court of Appeals declared,

[T]he State has undertaken the function of education in the law, but has omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color. If those students are to be offered equal treatment in the performance of the function, they must, at present, be admitted to the one school provided.⁴¹

Following their success in *Pearson*, the bond between Houston and Marshall continued until Houston's death on April 22, 1950; Marshall's devotion to and respect for his mentor lasted a lifetime. Marshall had been baptized into the emancipation movement by Charles Hamilton Houston, the architect of modern civil rights litigation.⁴²

ON BLACK EDUCATIONAL HISTORY 159 (Vincent P. Franklin & James D. Anderson eds. 1978). Dean Houston believed that chances for winning accreditation for the law school would be greater if the law school was a day school. Houston also believed that students in the law school could not work and attend law school at the same time, a view that was not popular with students like William Benson Bryant, who defied Houston and later became a distinguished lawyer and United States District Judge in the District of Columbia. After all, many law students and graduates could not have obtained a law degree if they had not worked during the day. SMITH, *supra*, note 3. It is not likely that Marshall, or his classmates, worked much during their law school days. DAVIS & CLARK, *supra* note 6, at 48 (reports that Marshall held part-time jobs as a baker, waiter, and bellhop). Excessive working patterns among the student body would have been problematic with the autocratic Houston, whose policy was "all study, no work." Telephone Interview with William Benson Bryant (Feb. 14, 1993) (Bryant entered Howard University's law school in 1933.). However, this must have been a difficult policy to enforce in the face of the Great Depression. Many law students at Howard were of impecunious means. Some may have been of more humble means than Marshall, whose mother was a school teacher and whose father was a porter. DAVIS & CLARK, *supra* note 6, at 36. In 1930, according to U.S. Census data, 1231 "negro females" were employed as school teachers in the state of Maryland. NEGROES IN THE UNITED STATES, 1920-1932, at 305 (Daniel C. Roper ed., 1934). In 1932-1933, tuition and fees at Howard University's law school were \$142. Howard University Bulletin, *supra* note 30, at 21.

40. 182 A. 590 (1936), *aff'g* 169 Md. 478, 489 (1935). The name of the African-American applicant was Donald Gaines Murray.

41. *Id.* at 594.

42. J. Clay Smith, Jr., *Forgotten Hero*, 98 HARV. L. REV. 482, 487 (1984) (reviewing GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983)).

Thurgood Marshall succeeded Houston as head of the legal office of the National Association for the Advancement of Colored People in 1938.⁴³ Marshall, at age 30, became an important force in emancipation litigation. Although Marshall may have been the new leader of the NAACP legal office, Houston's influence remained the center of emancipation litigation until his death. Marshall knew, as Justice William O. Douglas once proclaimed, that Houston was one of the top ten lawyers to appear before Douglas in his thirty years on the United States Supreme Court.⁴⁴

Marshall and Houston shared many personal attributes: both were brilliant, hard working, and fully committed to emancipation litigation. Marshall, though he sometimes had a brooding visage, had a natural down-home personality that put the older black established legal regime at ease. Always the scholar, always extremely keen to speed up the emancipation movement, Marshall merged his intellectual prowess with a common touch. Storytelling⁴⁵ and a hearty laugh helped to shield his

43. Actually, "Houston was granted a six-month leave from his NAACP post in 1936, and Marshall was called to New York to replace him. For the next two years [Marshall's] practice was divided between New York and Baltimore When Houston resigned in 1938 to return to private practice, Marshall was named to succeed him as special counsel for the NAACP." *First Year on Bench as Challenging as NAACP Days to Federal Judge Marshall*, 5 THE HOWARD U. MAG. 4, 5 (Nov., 1962).

44. Letter from Justice William O. Douglas, Supreme Court Justice, to author (Apr. 19, 1974) (on file with author) (stating "I knew Charles H. Houston; and I sincerely believe he was one of the top ten advocates to appear before this Court in my 35 years."). For more on Justice Douglas, see, John P. Frank, *William O. Douglas*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2447 (Leon Friedman and Fred L. Israel eds., 1969).

45. The comments of Justice Marshall's colleagues on the Supreme Court suggest that his storytelling often helped them to understand the plight of blacks in a variety of situations in which they had no experience. It is clear that Marshall's "stories and jokes," told in the context of substantive discussions, merged into the jurisprudence of American law from the secret conference room of the United States Supreme Court. For example, Justice Anthony Kennedy has commented on "[Justice Marshall's] stories and their import." Ludwig P. Gaines, *Thurgood Marshall, "A Prophet" Comes Home*, THE BARRISTER, Jan. 28, 1991, at 1. Justice Sandra Day O'Connor has commented that Marshall "always had a joke or an anecdote. In the 10 years I served with him, I never heard the same one twice." *O'Connor Praises Marshall at Service*, WASH. TIMES, Feb. 16, 1993, at A2. The extent to which storytelling by Marshall merged black realism into Supreme Court decisions is yet untold. *But see* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, J. OF SUPREME COURT HIST. 9, 11 (1992) (reprinted from 44 STAN. L. REV. 1217 (1992)). Justice Marshall may be the "father of storytelling" in the American judiciary. If so, the storytellers in the academy have a leader for their movement, Justice Thurgood Marshall. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435-36 (1989) ("Subordinated groups have always told stories Oppressed groups have known instinctively that stories are an essential tool to their own survival and liberation."); J. Clay Smith, Jr., *Exceptional Differences in Scholarly Paradigms and Scholarly Trends*, 10 ST. LOUIS U. PUB. L. REV. 207, 221 (1991) ("The funny thing about stories is that everyone has one," from

intensity from public scrutiny. Marshall won converts, new allies, and, like Houston, he reached out across the nation to Howard University law graduates⁴⁶ who accepted him as Houston's heir in the ongoing emancipation litigation. At no time before or after Houston's death, however, did Marshall lose sight of Houston's belief that "the race problem [was] one of the most fundamental . . . in American life."⁴⁷

While Marshall won the respect and admiration of many African-American lawyers in the nation, he was viewed as a "troublemaker" not only by white southerners, but by some African-American lawyers in the South as well.⁴⁸ Many of the African-American lawyers in the South were much senior to Marshall and his "rookie" lawyers. Marshall and his lawyers, however, were attempting to centralize the civil rights litigation, and told senior lawyers how to conduct their cases.⁴⁹ These lawyers objected to the instructions from the "Marshallites" on how to litigate civil rights cases. After all, they had pioneered civil rights cases long before Marshall had even become a lawyer.

In time, the African-American legal regime closed ranks behind Marshall's efforts and in 1954, at age 45, Marshall, a descendent of slaves, and his extraordinary team of lawyers, filled another gap in the Emancipation Proclamation. They won a landmark decision: *Brown v. Board of Education*.⁵⁰

Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 425 (1990)). See also David Margolick, *The Justice with the Stories that Moved the World*, N.Y. TIMES, Jan. 31, 1993, § 4, at 4.

The acclaim of Marshall as storyteller must be met with caution, for Marshall was more than a storyteller. He was a scholar, a legal benchmark. He was a lawyer's lawyer. Dorothy Gilliam, *A Universal Benchmark*, WASH. POST, Jan. 30, 1993, at B1. We must never allow the reports on Justice Marshall's storytelling and his jokes to result in an underestimation or the unintentional devaluation of the substance of the man and his brilliant opinions. This would be a callous act. It would unfairly betray and regretfully undermine Marshall's profound and lasting contribution to jurisprudence.

46. See JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 22 (1959) (reporting that "the role of the Howard law alumni has been crucial in civil rights cases.").

47. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 214 (1983) (citation omitted).

48. On January 28, 1991, the term "troublemaker" as applied to Thurgood Marshall was used in a complimentary manner by U.S. District Judge William Benson Bryant in remarks during the unveiling of a bust of Marshall at Howard University School of Law. Ludwig P. Gaines, *Thurgood Marshall, "A Prophet" Comes Home*, THE BARRISTER, Jan. 28, 1991, at 1.

49. See, e.g., MARK V. TUSHNET, *THE NAACP LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* 94-96 (1987).

50. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*). These cases must be studied in the context of federal civil rights policies and the violent aftermath of the *Brown* decisions. See Haywood Burns, *The Federal Government and Civil Rights*, in SOUTHERN JUS-

On May 17, 1954, the day that *Brown* was decided by the Supreme Court, Thurgood Marshall must have wished that Charles Hamilton Houston and the pioneer African-American lawyers of the struggle could have been present to receive due credit for the groundwork they established to make the *Brown* decision a possibility.⁵¹ Marshall praised these pioneer African-American lawyers⁵² throughout his life for significant contributions to the process that led to the composite *Brown* decision and its companion case, *Bolling v. Sharpe*.⁵³ I imagine that in speeches around the nation, Marshall gave credit to William Henry Lewis, Everett J. Waring, William I. Gosnell, Charles Hamilton Houston, and others. He would have certainly called the names of Charles S. Scott and John Scott, the two African-American lawyers from Topeka, Kansas, who litigated the *Brown* case in the lower courts in Kansas.⁵⁴ He would have certainly called the names of his co-counsel on the consolidated *Brown* brief: Harold R. Boulware, Robert L. Carter, Jack Greenberg, Oliver W. Hill, Louis L. Redding, Spottswood W. Robinson, III; and the names of counsel, Charles L. Black, Jr., Elwood H. Chisolm, William T. Coleman, Jr., Charles T. Duncan, George E.C. Hayes, Loren Miller, William R. Ming, Jr., Constance Baker Motley, James Madison Nabrit, Jr., David E. Pinsky, Frank D. Reeves, and Jack B. Weinstein.⁵⁵ Of all who contributed as signatory in *Brown*, Marshall reserved the highest tribute for his mentor, Charles Hamilton Houston: "You have a large number of people who never heard of Charlie Houston. But you're going to hear about him, because he left us such important items When *Brown* against the Board of Education was being argued in the Supreme Court . . . [t]here were some dozen lawyers on the side of Negroes fighting for the schools [O]f those . . . lawyers . . . only two hadn't been touched by

TICE 228 (Leon Friedman ed. 1965); see also MICHAEL R. BELKAP, *FEDERAL LAW AND SOUTHERN ORDER 27-52* (1987).

51. KLUGER, *supra* note 33, at 700-747.

52. See Robert L. Carter, *From a Tiny Office on Fifth Avenue*, WASH. POST, Jan. 26, 1993, at A17. ("As a boss, Thurgood Marshall was very demanding While he rarely paid any of his staff personal compliments privately, in public he was generous with his praise about the skills, hard work and dedication of his staff.")

53. 347 U.S. 497 (1954) (calling for desegregation of the public schools in the District of Columbia under the Fifth Amendment. The lead counsels in this case were George E.C. Hayes and James Madison Nabrit, Jr., who argued the case for the African-American petitioners. With them on the brief was George Marion Johnson, dean of the Howard University School of Law, and Howard University law professors Herbert Ordre Reid Sr., and Charles W. Quick.)

54. Charles S. Scott, Sr. has written on the *Brown* case. Charles S. Scott, Sr. and Charles S. Scott, Jr., *The Myth of Brown*, 14 WASHBURN L. J. 47 (1975).

55. These names appeared on the brief as Counsel and Of Counsel in *Brown I*, 347 U.S. 483 (1954).

Charles Houston That man was the engineer of all of it”⁵⁶

The responsibility for oral arguments in the *Brown* case was undertaken by six lawyers, all African-American with the exception of Jack Greenberg. The cases, which had been litigated in the lower courts by yet another group of African-American lawyers, were consolidated for argument before the United States Supreme Court. The lead case, *Brown v. Board of Education of Topeka, Kansas* (Case No. 8), was argued by Robert L. Carter;⁵⁷ *Briggs v. Elliott* (Case No. 101, the South Carolina case) was argued by Thurgood Marshall;⁵⁸ *Davis v. County School Board of Prince Edward County, Virginia* (Case No. 191) was argued by Spottswood W. Robinson, III;⁵⁹ *Bolling v. Sharpe* (Case No. 413) was jointly argued by George Edward Chalmers Hayes⁶⁰ and James Madison Nabrit, Jr.;⁶¹ and the case for the respondents in *Gebhart v. Belton* (Case No. 448, the Delaware case) was jointly argued by Louis L. Redding⁶² and Jack Greenberg.⁶³

Thurgood Marshall always recognized the collective contribution of the lawyers involved in the “school cases” that resulted in the *Brown* decision. His legacy, as he would wish it to be, is tied to all the lawyers, lay persons, and particularly the African-American children and their parents who risked and sacrificed much for so many.⁶⁴

56. COLUMBUS SALLEY, *THE BLACK 100, A RANKING OF THE MOST INFLUENTIAL AFRICAN AMERICANS PAST AND PRESENT* 23 (1993) (quoting Thurgood Marshall); *See also Charles Hamilton Houston Symposium*, 27 *NEW ENG. L. REV.* 589 (1993).

57. Robert L. Carter was assistant counsel of the NAACP Legal Defense and Education Fund, Inc., headed by Thurgood Marshall. *ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55* 11 (Leon Friedman ed. 1969).

58. *Id.* at 5, 36. Thurgood Marshall was Director-Counsel of the NAACP Legal Defense Fund, Inc.

59. *Id.* at 5, 69. Spottswood W. Robinson, III, was a leading practitioner in Richmond Virginia, and was the Southeast Regional Counsel, NAACP Legal Defense and Educational Fund, Inc.

60. *Id.* at 5, 108. George Edward Chalmers Hayes was a leading practitioner in the District of Columbia and taught at the Howard University School of Law.

61. *Id.* at 5, 122. James Madison Nabrit, Jr. was a Professor of Law at Howard University School of Law.

62. *Id.* at 5, 161. Louis L. Redding was a leading practitioner in Wilmington, Delaware, and that state's second African-American lawyer.

63. *Id.* at 5, 166. Jack Greenberg was assistant counsel, NAACP Legal Defense and Educational Fund, Inc.

64. *See, e.g.*, CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 20-21 (1993) (discussing the stresses of Harry and Eliza Briggs, the plaintiffs in the South Carolina case); Adam Sachs, *Recalling Last All-Black School*, *BALTIMORE SUN*, Apr. 12, 1992, at D1 (In Thurgood Marshall's own state of Maryland, “Sidney Sheppard recalls wearing a coat all day in school to stay warm even though the furnace ran full blast, going to the bathroom in outhouses and conducting science labs with candles rather than Bunsen burners.”). However, the “horrors” faced by African-American

Some have asked, "where would America be without the Thurgood Marshall legacy?"⁶⁵ This is an important question, and when Justice Marshall announced his retirement from the United States Supreme Court in June, 1991,⁶⁶ it was asked by many Americans.⁶⁷ The answer is simple. The nation is a far better place for all Americans because of the efforts by Marshall to fill in the gaps of the Emancipation Proclamation.⁶⁸ This

students in desegregating the public schools did not diminish after the *Brown* decisions. See JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* 469-470 (1993) (Patti Jones Smith, reports that as a child, the fair-handed way that Judge Johnson handled a court hearing in which she testified regarding the desegregation of the Tuskegee, Alabama public high schools, helped her "succeed in not internalizing the horror and the ugliness as [she] traveled every day from January to May, 1964 that lonely road to Notasulga, [Alabama] High with my five fellow school mates."). *Id.*

65. A. Leon Higginbotham, Jr., *A Tribute To Thurgood Marshall*, 105 HARV. L. REV. 55, 62 (1991).

66. Justice Marshall submitted his letter of retirement on June 27, 1991, effective upon the qualification of his successor. For text of letter, see ROWAN, *supra* note 64, at 403. See also Bob Dart, *End of an Era: Thurgood Marshall Resigns: The Court Turns Right*, THE ATLANTA CONST., June 28, 1991, at 1. On July 1, 1991, at a press conference at his Kennebunkport, Maine, residence, President George W. Bush nominated U.S. Court of Appeals Judge Clarence Thomas to the U.S. Supreme Court position vacated by the retirement of Justice Marshall. *President Nominates Judge Clarence Thomas for Supreme Court Seat*, 23 THE THIRD BRANCH 1, July, 1991. On October 7, 1991, before calling the first case for the new term at the Supreme Court, Chief Justice William H. Rehnquist read a letter from the members of the Court into the record on the retirement of Justice Marshall which stated, in part, that "[e]veryone who sits on the Supreme Court will be remembered in the history of constitutional law, but you are unique in having made major contributions to that law before becoming a member of the Court. Your role in the battle for equal treatment of the races would entitle you to a prominent place in that history had you never ascended the bench at all." *The Chief Justice Comments on the Retirement of Justice Marshall*, 112 S. Ct. CCXCI (preface materials) (Oct. 1991). In reply, Justice Marshall responded that in his absence, he was "hopeful the Court will meet the upcoming challenges." *Id.* at CCXCIII. On October 15, 1991, the Senate confirmed Clarence Thomas to succeed Marshall on the Court after a tough confirmation battle. See Neil A. Lewis, *Law Professor Accuses Thomas of Sexual Harassment in 1980s*, N.Y. TIMES, Oct. 7, 1991, at A1 (reporting charges by University of Oklahoma law Professor Anita Faye Hill); R.W. Apple, Jr., *Senate Confirms Thomas, 52-48; 'Time for Healing,' Judge Says*, N.Y. TIMES, Oct. 16, 1991, at A1. Marshall's career as jurist continued. On August 18, 1992, an order was issued by the United States Supreme Court "assigning Justice Marshall (Retired) to perform duties in the United States Court of Appeals for the Second Circuit during the period of December 2-4, 1992, and for such time as may be required to complete unfinished business . . ." 113 S. Ct. LXXVII (Aug. 18, 1992). In October, 1992, Justice Marshall returned to his hometown, Baltimore, Maryland, to hear cases in the Fourth Circuit Court of Appeals. Norris P. West, *Justice Marshall Returning*, BALTIMORE SUN, Oct., 17, 1992, at B1.

67. See A. Leon Higginbotham, Jr., *Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 3 (Toni Morrison ed. 1992) (originally published with notes in 140 U. PA. L. REV. 1005 (1992)); TIMOTHY M. PHELPS & HELEN WINTERNITZ, *CAPITOL GAMES* 112-13, 150, 162-63 (1992).

68. See generally Gary A. Hengstler, *Justice Thurgood Marshall: Looking Back*, 78 A.B.A. J. 56 (June, 1992); Clarence Page, *Thanks to Marshall, Whites, Too, are Better Off*,

was the message that William T. Coleman, Jr. delivered during his tribute at Associate Justice Thurgood Marshall's funeral on January 28, 1993, at the National Cathedral in Washington, D.C.⁶⁹

On one occasion Thurgood Marshall phrased the question differently: "Where would I be without the sacrifice and legal genius of the Negro lawyers that were before me?"⁷⁰ The wonder of Justice Marshall

BALTIMORE SUN, Jan. 28, 1993, at 15A. See also *A Tribute to Justice Thurgood Marshall*, 6 HARV. BLACKLETTER J. 1 (1989); *Tributes*, 101 YALE L.J. 1 (1991); *Thurgood Marshall Commemorative Issue: A Tribute From Friends and Colleagues*, 35 HOW. L.J. 1 (1991); *A Tribute To Justice Thurgood Marshall*, 44 STAN. L. REV. 1213 (1992); *A Tribute To Thurgood Marshall*, 105 HARV. L. REV. 23 (1991); *Symposium Honoring Justice Thurgood Marshall*, 80 GEO. L.J. 2003 (1992); J. Clay Smith, Jr., *The Glorious Thurgood Marshall*, 9 BLACK ISSUES IN HIGHER EDUC. 26, Feb. 11, 1993, at 26. While these tributes will stand as monuments to the great work of Marshall and the more-well known lawyers in the *Brown* case, in 1953, Burma A. Whitted, Chairman of the Consolidated Parent Group, Inc., in Washington, D.C., which had helped to raise funds in *Bolling v. Sharpe*, wrote to Julian Riley Dugas, a African-American lawyer, thanking him for his supporting efforts and his "great sacrifice of time and energy in discharging this public duty without compensation." Letter from Burma A. Whitted to Julian R. Dugas (Feb. 23, 1953) (courtesy of Mr. Dugas).

69. *A Funeral Service for the Honorable Thurgood Marshall, 1908-1993*, Thursday, January Twenty-Eighth (1993), at Washington National Cathedral, Mount Saint Alban, Washington, D.C. Principal tributes were presented by William H. Rehnquist, Chief Justice of the United States Supreme Court; Karen Hastie Williams, a former law clerk; Judge Ralph W. Winter, Jr., a former law clerk; William T. Coleman, Jr., a close friend; and Vernon E. Jordan, a civil rights leader. President and Mrs. William Jefferson Clinton were in attendance, and Vice President Albert Gore read a scripture during the funeral program. Marshall had been scheduled to give the oath of office to the Vice President on January 20, 1993, Inauguration Day, but had to cancel this public appearance because of poor health. *Thurgood Marshall Dead at 84*, WASH. AFRO-AMERICAN, Jan. 30, 1993, at 1. For the printed text of eulogies delivered, see William H. Rehnquist, *'Left an Indelible Mark . . . Upon His Country,'* WASH. POST, Jan. 29, 1993, at A15; Karen Hastie Williams, *'Inspired Those He Touched . . . Every American'* WASH. POST, Jan. 29, 1993, at A15; Vernon E. Jordan, Jr., *'Your Voice Is Still but Your Message Lives'*, WASH. POST, Jan. 29, 1993, at A15. William T. Coleman, Jr.'s tribute raised several interesting questions: "We observe . . . President [William Jefferson Clinton] here. Please do not think us ungracious when we wonder aloud if a son of Arkansas would be here if Thurgood Marshall in that hot summer of 1958 had lost, not won, the Little Rock case [*Cooper v. Aaron*, 358 U.S. 1 (1958)]. Would he be here if Marshall had lost, not won, the important voting rights cases? Could there be a Cabinet reflective of the American people if Marshall had lost *Brown v. Board of Education* . . . ?" William T. Coleman, Jr., *Tribute, Mr. Justice Thurgood Marshall 2*, Jan. 28, 1993. Coleman's tribute was mentioned as being "one of the boldest eulogies." It was not published by the press. Simeon Booker, *Thousands Gather in Washington, D.C. to Mourn Death of Thurgood Marshall*, JET, Feb. 15, 1993, at 4-5. In a different forum, A. Leon Higginbotham asked similar bold questions focusing on *Plessy v. Ferguson*: "It is frightening to speculate what America would be like if *Plessy* were still the law of the land If *Plessy* were the law . . . , would more than a few blacks or a few women have been appointed to the federal courts during the last thirty years? Would either Thurgood Marshall or Sandra Day O'Connor have been appointed to the Supreme Court?" A. Leon Higginbotham, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 63 (1991).

70. This statement was made to the author in a telephone conversation by Justice Marshall in February, 1992, during which he consented to write the Foreword to the author's book, EMANCIPATION, THE MAKING OF THE BLACK LAWYER, 1844-1944 (forthcoming

that will live on and magnify his greatness is that he recognized that he was a composite of untold and unsung "Negro lawyers" who had pioneered in civil rights litigation to desegregate public schools as early as 1848.⁷¹ African-American lawyers in both the nineteenth and twentieth centuries, have waged a valiant fight to implement President Lincoln's Emancipation Proclamation. In 1985, the twentieth anniversary of Justice Marshall's tenure on the Supreme Court, I wrote a letter to Justice Marshall. It said, in part:

Your appointment to the United States Supreme Court is one of the most important appointments ever made by a president . . . [Y]our individual contributions to the evolving Constitution . . . [are] unmeasured and not fully told.⁷² You have travelled this nation from coast-to-coast, from border-to-border litigating cases

1993). Marshall's generation was schooled in African-American history during his youth. The words, deeds, and accomplishments of Frederick Douglass, another emancipator, were surely indelibly lodged into his mind. See WILLIAM S. McFEELY, *FREDERICK DOUGLASS* 96-97 (1991).

71. In 1848, Robert Morris, Sr., an African-American lawyer in Boston, Massachusetts, filed the first civil rights action in American history to desegregate the public schools in Boston. He lost the case at trial. On appeal, Morris and Charles Summer, who later represented Massachusetts in the United States Senate, filed the first brief ever co-signed by an African-American and white lawyer in the highest court in Massachusetts, a case that also was lost. See *Roberts v. City of Boston*, 59 Mass. 198 (1849).

72. Justice Marshall's papers are housed at the Library of Congress. Audio tapes of the justice with interviews conducted by Professor Stephen Carter of Yale Law School under the auspices of the Supreme Court Historical Society are being transcribed. Tony Mauro, *Library Saves Marshall's Blazing Paper Trail*, 133 N.J.L.J. 426 (Feb. 8, 1993).

The release of the Marshall papers for public inspection by the Library of Congress in May, 1993, caused quite a stir. Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N.Y. TIMES, May 26, 1993, at 1 ("In an angry letter on behalf of a majority of the Supreme Court, Chief Justice William H. Rehnquist accused the Library of Congress . . . of bad judgement in releasing the papers of Justice Thurgood Marshall so soon after his death, and he warned that Justices might no longer donate their papers to the Library.") *Id.*; Carl T. Rowan, *The Library Betrayed Justice Marshall*, WASH. POST., May 26, 1993, at A19 ("By releasing to the press more than 173,000 items of the late Supreme Court justice's papers, Librarian of Congress James H. Billington has done what Justice Marshall vowed he would never do: embarrass Marshall's Supreme Court colleagues by violating their trust.") *Id.*; Benjamin Weiser, *Librarian Rejects Restrictions*, WASH. POST., May 27, 1993, at 1 ("James H. Billington said in a several-page statement that the library had carried out Marshall's 'exact intentions' and that to impose restrictions on access to the 173,700-item collection would be a 'breach of contract and violation of the trust placed in the library' by Marshall.") *Id.*; Michael S. Arnold, *Librarian of Congress Defends Release of Marshall Papers, Public Access*, WASH. POST., June 12, 1993, at A3 ("Librarian of Congress James H. Billington, criticized for opening the papers of Justice Thurgood Marshall to the public while Marshall's colleagues are still on the bench, defended himself before a Senate subcommittee [on June 11, 1993] and warned of the dangers of government officials restricting access to public papers.") *Id.*; Tony Mauro, *Marshall Papers: Chock Full of Nuggets*, WASH. LEGAL TIMES, June 7, 1993, at 8 ("Marshall and his staff were good at filing things, so the papers will prove endlessly valuable at capturing the paper flow at the Court and the concerns, large and small, of the Court's justices and staff.").

while you slept in substandard hotels . . . faced hostile judges, juries and policemen. You have fought for the very excellence that makes this nation strong and which will allow it to endure While many Black Americans remain trapped in poverty, you did your job when you had to—to free many Americans from the shackles of unjust laws. We thank you.⁷³

The post-Marshall era presents the ongoing challenge to all Americans to continue his fight to emancipate “the under man.”⁷⁴

73. Letter from J. Clay Smith, Jr. to Justice Thurgood Marshall (Oct. 1, 1987). The words of Judge Damon J. Keith describing Justice Marshall when he stepped down from the Supreme Court are here recalled: “Justice Marshall has truly been a foot soldier for the Constitution and a drum major for justice. His legacy provides a true and lasting meaning to the four words beautifully inscribed in marble on the Supreme Court building, ‘Equal justice under law.’” Damon J. Keith, *Marshall Made Impact, Set a Classic Example*, DETROIT NEWS, July 5, 1991, at 11A. Days after the death of Justice Marshall, Congress approved a bill naming the new federal judiciary building in Washington, D.C. for Marshall. Benjamin Dudley, *Federal Court Building Named for Marshall*, WASH. AFRO-AMERICAN, Feb. 6, 1993, B14. *The Nation Pays Tribute to Justice Marshall*, 25 THE THIRD BRANCH 1, 2 (Feb. 1993), (stating that Justice Marshall’s “casket lay on the funeral bier constructed in 1865 to support the casket of Abraham Lincoln.”). The article also reports that when President Bill Clinton signed P.L. 103-4, naming the building after Marshall, the President observed, “It is fitting that a building which houses the work of more than 2000 judicial employees be named after a man who dedicated more than six decades of his life to public service in the judicial arena.” *Id.*

74. Lewis, *supra* note 1, at 492. See also Thurgood Marshall, *The Constitution: A Living Document*, 30 How. L.J. 915 (1987); J. Clay Smith, Jr., *Toward a Pure Legal Existence: Blacks and the Constitution*, 30 How. L.J. 921 (1987); J. Clay Smith, Jr., *In Memoriam: Professor Frank D. Reeves, Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence*, 18 How. L.J. 1 (1973); Olive A. Taylor, *Blacks and the Constitution: (III) Justice Thurgood Marshall*, WASH. POST, July 5, 1987, at D7; J. Clay Smith, Jr., *Thurgood Marshall’s 20/20 Vision of Civil Rights*, WASH. TIMES, Sept. 21, 1987, at D2; Karen DeWitt, *Where Marshall Blazed, 7 Students Take Up Torch*, N.Y. TIMES, Jan. 26, 1993, at A14; Thomas Mitchell, *After Thurgood Marshall, the Next Crusade for Howard Law Students*, L.A. TIMES, Jan. 31, 1993, at M3.

