

J U S T I C E F O R A L L

THE LEGACY OF
Thurgood Marshall

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Thurgood Marshall, 1967

Cover photo: Thurgood Marshall, on September 11, 1962, after his Senate confirmation to the U.S. Court of Appeals for the Second Circuit.

Enlisting the Courts in the Civil Rights Fight

BY MICHAEL JAY FRIEDMAN

The name of Thurgood Marshall may not be as well-known outside the United States as that of his fellow civil rights leader, Martin Luther King Jr. And yet, Marshall's achievement in demolishing the legal structure that sustained racial segregation in the American South advanced the civil rights cause as profoundly as the nonviolent protests led by King.

"No other American did more to lead our country out of the wilderness of segregation than Thurgood Marshall," said his fellow Supreme Court Justice Lewis Powell.

Thoroughgood (actual birth name) Marshall was born in Baltimore, Maryland, on July 2, 1908. His father was a railroad porter and his mother was an elementary schoolteacher. In second grade, young Marshall shortened his name to Thurgood. He graduated from Baltimore's segregated Colored High School and then Lincoln University, "the first institution founded anywhere in the world to provide a higher education in the arts and sciences for youth of African descent." Lincoln produced acclaimed figures such as Marshall's classmate Langston Hughes, a major contributor to the literary "Harlem Renaissance"; Kwame Nkrumah, the first leader of independent Ghana; and his Nigerian counterpart, Nnamdi Azikiwe.

Marshall quickly distinguished himself as a gifted storyteller and a skilled debater. These were among the skills of the successful trial lawyer, and Marshall decided to pursue a career in the law. He aimed to enroll close to home, at the University of Maryland Law School. But, as a segregated

school, Maryland would not admit a black student. Marshall did not apply, but it was a harsh lesson in the discrimination and resulting lack of opportunity that held back many African Americans. Maryland Law's stance, ironically, opened the door to unexpected opportunity for Marshall.

He enrolled instead at a black institution, Howard University Law School, in Washington, D.C. His mother pawned her wedding and engagement rings to pay the tuition. Marshall excelled at his studies, graduating number one in his class in 1933. At Howard Law, Marshall encountered one of the major, if under-celebrated figures of U.S. history, Vice Dean Charles Hamilton Houston (see "Charles Hamilton Houston: A Visionary on Racial Equality").

It was Houston who devised the legal strategy that Marshall would employ in courtrooms — from the deep South to the Supreme Court of the United States — to dismantle the legal segregation that still disadvantaged African Americans.

After the 1861–65 Civil War and the freeing of the slaves in the American South, the U.S. government approved the Fourteenth Amendment to the Constitution. The amendment prohibited a state from depriving "any person within its jurisdiction the equal protection of the laws." But, a few years later, white Southerners resorted to segregation of the races, a practice often called "Jim Crow." (This is a term derived from a song in an 1828 minstrel show where a white man first performed in "blackface.") An 1896 Supreme Court decision, *Plessy v. Ferguson*, upheld this practice, ruling that racially "separate but equal" facilities met the "equal protection" standard.

Houston and Marshall determined to overturn the *Plessy* decision in the U.S. courts by demonstrating that, in the real world, separate was never equal. Their strategy required the patient accumulation of facts that supported their point. They also realized that it would take time to get rid of *Plessy*. They would undermine legal segregation one case at a time.

In 1934, Houston began to work for the National Association for the Advancement of Colored People (NAACP), an interracial group founded in 1909 to work for the abolition of segregation and discrimination. He traveled throughout the South

to document the appalling state of black schools for the NAACP. Marshall, who had set up a private legal practice in Baltimore, often accompanied him on these trips.

In 1935, Marshall — and Houston as his adviser — won their first victory over legal segregation, in the case *Murray v. Pearson*. The triumph was especially sweet for Marshall, as the defendant was the very same University of Maryland Law School that Marshall once had hoped to attend.

In Maryland state court, Maryland Law’s lawyers argued that the school met the “separate but equal”



Charles Houston, Marshall’s mentor, argued cases in court during his years as dean of Howard University’s law school.



This high-school photograph of Thurgood Marshall was taken around 1921-25.



"White" (top) and "colored" (above) schools in Paxville, South Carolina (1935-1950), where, as in other states in the South, "white" schools often received two to three times more money per student than did schools for African Americans.

requirement by granting qualified black applicants scholarships to enroll at out-of-state law schools. In *Murray v. Pearson*, the state court in Maryland rejected this argument. While the court was not yet prepared to rule against separation in public schools, it did hold that the alternative opportunities Maryland afforded black law school applicants were not equal. Maryland Law was ordered to admit qualified African-American students.

After the *Murray* triumph, Marshall became an NAACP staff lawyer under Houston. In 1940, at the age of 32, he helped found and became the chief of the NAACP Legal Defense Fund, dedicated to providing legal assistance to poor African Americans. In that year, he won his first Supreme Court victory, a ruling that the 14th Amendment's due process clause barred the use of coerced confessions.

During the two decades that followed *Murray*, Marshall, Houston, and the NAACP team of civil rights attorneys struck down one pillar after another of the segregationist order:

- In *Missouri ex rel. Gaines v. Canada* (1938), argued by Houston, the U.S. Supreme Court extended to the entire nation the rule that where a state maintains only one law school or other type of school, it may not limit admission by race.
- In *Smith v. Allwright* (1944), Marshall won a Supreme Court decision barring the “whites only” primary elections in which political parties chose their general election candidates. His biographer, Juan Williams, has described how Marshall considered the case his most important triumph: “The segregationists would [demand that (the candidates) support segregation to capture their party's nomination], and by the time the black and Hispanics and ... even in some cases, the women, got to vote in the general election, they were just voting for one segregationist or the other; they didn't have a choice.”
- In *Morgan v. Virginia* (1946), Marshall obtained a Supreme Court ruling barring segregation in interstate bus transportation. In a later case, *Boynton v. Virginia* (1960), Marshall persuaded the court to order desegregation of bus terminals and other facilities made available to interstate passengers.

These cases led to the “Freedom Ride” movement of the 1960s.

- In *Patton v. Mississippi* (1947), the Supreme Court accepted Marshall's argument that juries from which African Americans had been systematically excluded could not convict African-American defendants.
- In *Shelley v. Kraemer* (1948), Marshall persuaded the Supreme Court to rule that state courts could not constitutionally prevent the sale of real property to blacks even if that property is covered by a racially restrictive covenant. These covenants were a legal tactic commonly used to prevent homeowners from selling their properties to blacks, Jews, and other minorities.

In all, Marshall would prevail in a staggering 29 of 32 cases he argued before the Supreme Court. His stunning record reflected the great legal talent that had congregated at the NAACP Legal Defense Fund, Marshall's shrewdness in selecting cases that would advance the team's long-term strategy of undermining segregation, and his own formidable legal skills. He was, United Press International later concluded:

... an outstanding tactician with exceptional attention to detail, a tenacious ability to focus on a goal — and a deep voice that often was termed the loudest in the room. He also possessed a charm so extraordinary that even the most intransigent Southern segregationist sheriff could not resist his stories and jokes.

Armed with this potent combination of likeability and skill, Marshall in 1946 persuaded an all-white Southern jury to acquit 25 blacks on a charge of rioting. On other occasions, he escaped only narrowly the beatings or worse that every assertive African American in the “Jim Crow” South risked.

Even as Thurgood Marshall dismantled the lies and evasions that for so long justified racial segregation, he was stockpiling the experience and wisdom that would carry him to the landmark case, *Brown vs. Board of Education*, and beyond.

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The Case of the Century

BY MICHAEL JAY FRIEDMAN

Thanks to Marshall and the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, the federal courts had ruled that “separate but equal” schools really had to be equal. That was a real achievement, but not the best tool to effect broad change. Poor African Americans in each of the hundreds of school districts in the South could hardly be expected to litigate the comparative merits of segregated black and white schools.

Only a direct ruling against segregation itself could at one stroke eliminate disparities like those in Clarendon County, South Carolina, where per pupil expenditures in 1949–50 averaged \$179 for white students and only \$43 for blacks. Marshall and his team stepped in to get just such a ruling with the *Brown* case, and in the process changed the face of American society.

When it reached the Supreme Court, the litigation known as *Brown v. Board of Education* included five consolidated lawsuits from four states, including South Carolina (from Clarendon County, see photos of Paxville, Clarendon County schools on page 3) and Kansas. The Topeka, Kansas, case involved grade-schooler Linda Brown, who had been obliged to attend a black school 21 blocks from her house. There was a white school only seven blocks away.

Significantly, the trial court had denied the Kansas plaintiff (technically, the plaintiff was Linda Brown’s father, the Rev. Oliver Brown) relief by finding that the segregated black and white schools there were of comparable quality. This gave Marshall the chance



Moments after the *Brown v. Board of Education* ruling, lawyers George E. C. Hayes, left; Thurgood Marshall, center; and James M. Nabrit, right, join hands before the U.S. Supreme Court in celebration of their victory.

to urge that the Supreme Court at last rule that segregated facilities were, by definition and as a matter of law, unequal and hence unconstitutional.

Marshall's legal strategy relied on social scientific evidence. The NAACP Legal Defense Fund assembled a team of experts spanning the fields of history, economics, political science, and psychology. Particularly significant was a study in which the psychologists Kenneth and Mamie Clark sought to determine how segregation affected the self-esteem and mental well-being of African Americans. Among their poignant findings: Black children aged three to seven preferred white rather than otherwise identical black dolls.

The Supreme Court heard arguments on *Brown* on two separate occasions. At the second, December 8, 1953, many people realized that history might be in the making. Lines for the 50 general public seats were long. The fortunate heard Assistant U.S. Attorney General J. Lee Rankin offer the federal government's endorsement of the plaintiffs' argument. He asserted that the justices possessed the "power and duty" to rule that segregation violated the Constitution. Those present also heard Thurgood Marshall's powerful summation: The question, Marshall told the Court, was "whether or not the wishes of these [segregationist] states shall prevail or whether our Constitution shall prevail."



Federal troops escort black students as they arrive at Central High School in Little Rock, Arkansas, during the first week of integration in September 1957. Marshall won the lawsuit that set the stage for the federal government to step in with troops to protect the black students from violent protestors and the Arkansas governor's calling of the National Guard to foil integration.



Linda Brown Smith is shown in this 1952 photo, when she was nine years old. Smith's father started a class-action suit that, together with four other suits, led to the landmark *Brown v. Board of Education* decision.



Thurgood Marshall arrives at the U.S. District Court in Little Rock, Arkansas, on September 20, 1957. His legal skills succeeded in forcing Arkansas Governor Orval Faubus to withdraw the National Guard from Central High School and integrate the previously all-white school.

On May 17, 1954, a unanimous Supreme Court vindicated Marshall's strategy. Citing the Clark paper and other studies identified by plaintiffs, the Supreme Court ruled decisively:

... in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated ... are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Education attorney Deryl W. Wynn, a member of the Oxford University Roundtable on Education Policy, has said of the significance of *Brown*,

Here was the highest court in the land essentially saying that something was wrong with how black Americans were being treated. ... I remember my father, who was a teenager at the time, saying the decision made him feel like he was somebody. ... On a personal level, *Brown's* real legacy is that it serves as a constant reminder that each child, each of us, is somebody.

The Court did not specify a timeframe for ending school segregation, but the following year, in a group of cases known collectively as "Brown II," Marshall and his colleagues secured a Supreme Court ruling that desegregation proceed "with all deliberate speed."

Even then, resistance continued in parts of the South. In September 1957, when black students were forcibly turned away from Central High School in Little Rock, Arkansas, Marshall flew to the city and filed suit in federal court. Marshall's victory in this case set the stage for President Dwight Eisenhower's declaration of September 24: "I have today issued an Executive Order directing the use of troops under Federal authority to aid in the execution of Federal law at Little Rock, Arkansas. ... Mob rule cannot be allowed to override the decisions of our courts."

Ultimately, Marshall would obtain another Supreme Court decision, this one ordering the immediate desegregation of the Little Rock public schools.

In 1956, Marshall — using *Brown* as the key decision — came to the legal rescue of Martin Luther King Jr. and his followers in the Montgomery, Alabama, bus boycott. The boycott began on December 1, 1955, sparked by Rosa Parks' brave refusal to relinquish her seat on a segregated municipal bus to a white man. It was Marshall and the NAACP's legal team who argued for Montgomery's blacks before the courts. A November 13, 1956, Supreme Court ruling held unconstitutional the policy of relegating blacks to the back of the bus. The city of Montgomery yielded and the boycott succeeded at last.

Although many dedicated professionals worked with him, no American contributed more than Thurgood Marshall to the dismantling of legal segregation. Few could boast of a greater record of achievement, but Marshall's career of public service had only begun. He would support the cause of civil rights for all at the highest federal level, as the first African American appointed to the Supreme Court.



Baltimore kindergarten teacher Gwendolyn Michaels poses a question to her class on September 7, 1954.

ANOTHER FIRST

Supreme Court Justice Marshall

BY MICHAEL JAY FRIEDMAN

By 1961, Thurgood Marshall had contributed as much as any American to the legal defeat of segregation. Thanks to Marshall's efforts, activists like Dr. Martin Luther King Jr. would have the law — and the millions of Americans who respect the law — on their side. By setting the law firmly against public segregation, Marshall and his colleagues contributed to a climate in which laws like the Civil Rights Act of 1964 would outlaw many forms of private discrimination.

Unlike King and other African-American leaders, Marshall waged this struggle through the courts and then from within government. In another measure of the improving climate for blacks, President John F. Kennedy in 1961 appointed Marshall to the U.S. Court of Appeals for the Second Circuit, which serves the states of New York, Connecticut, and Vermont. The Court of Appeals is the second highest level of federal court, and Marshall was only the second African American to serve as a federal appellate judge.

Marshall wrote 98 opinions as a Circuit Court judge. Not a single one was ever overturned by the Supreme Court.

In 1965, President Lyndon B. Johnson appointed Marshall, already the prevailing advocate in nearly 30 Supreme Court decisions, as solicitor general of the United States. This meant he was responsible for arguing the government's positions before the Supreme Court.

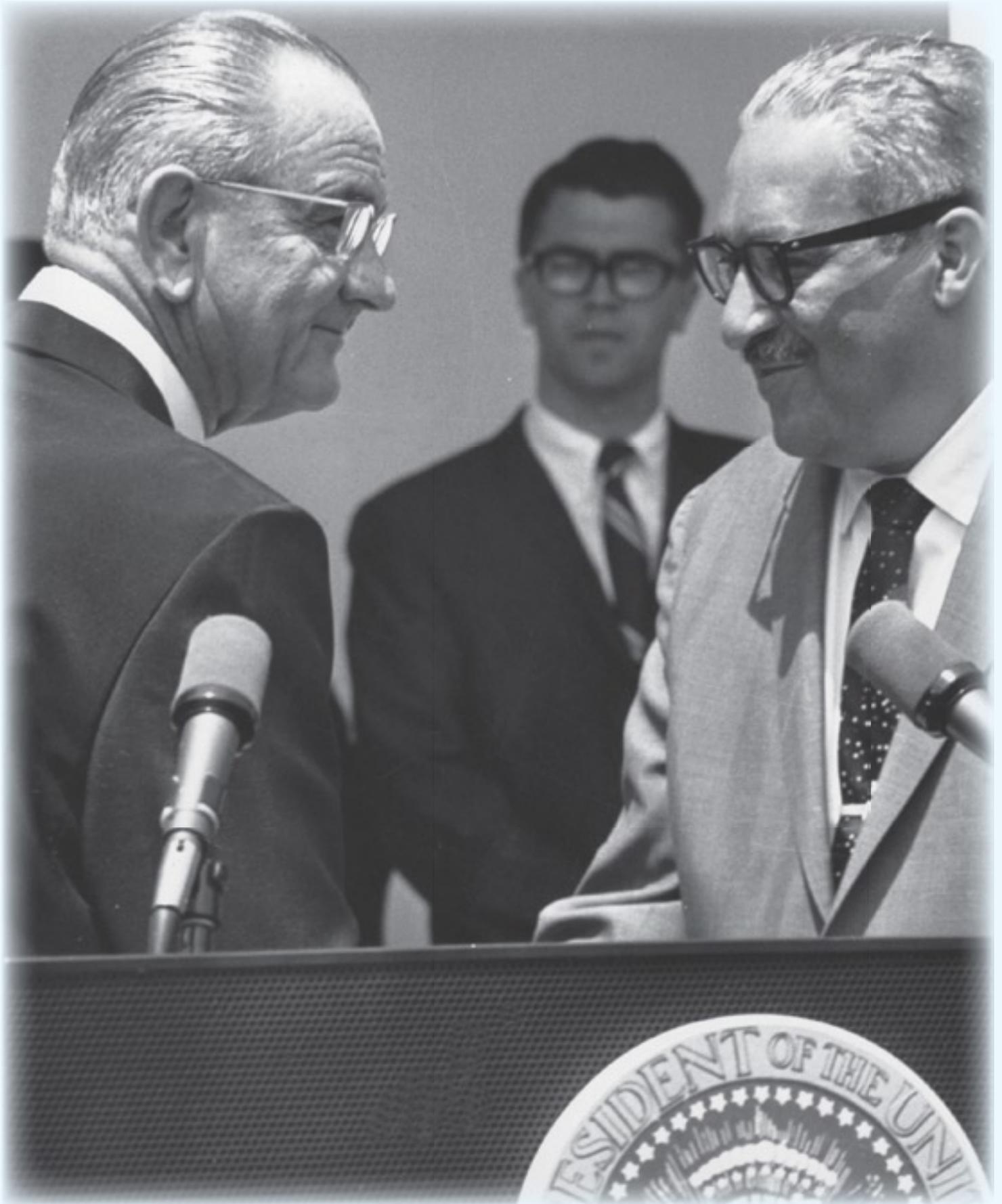
Fittingly, his first case as solicitor general was to present the federal case in the murder of the civil rights activists James Chaney, Andrew Goodman,



As Associate Justice Thurgood Marshall prepares to take his seat on the U.S. Supreme Court on October 2, 1967, his wife Cecilia helps him with his robes.

and Michael Schwerner. The three victims, who had been registering black voters, were killed in 1964 in Nashoba County, Mississippi, by racist conspirators. The Mississippi state courts had refused to convict the murderers, but Marshall persuaded the Supreme Court to order a trial on federal civil rights charges.

On June 13, 1967, President Johnson nominated Marshall to be the nation's first African-American



President Lyndon B. Johnson, left, after announcing on June 13, 1967, that he was nominating Solicitor General Thurgood Marshall, right, to serve on the Supreme Court.



The Supreme Court justices in 1990: Standing, from left, Anthony M. Kennedy, Sandra Day O'Connor, Antonin Scalia, and David Souter. Seated, from left: Harry A. Blackmun, Byron R. White, Chief Justice William H. Rehnquist, Thurgood Marshall, and John Paul Stevens.

Supreme Court justice. “I believe he has already earned his place in history,” the president said. “But I think it will be greatly enhanced by his service on the Court.”

Johnson was right. Despite opposition from some Southern senators, Marshall was confirmed and assumed his seat as an associate justice on October 2, 1967. He quickly emerged as a reliable supporter of the rights of “organized labor, racial minorities, the advancement of women, the broadening of rights to freedom of expression, and the narrowing of police authority,” Harvard Law Professor Randall L. Kennedy has written. “No member of the Supreme Court has ever been more keenly alive to social inequalities.”

Justice Marshall was an unyielding opponent of capital punishment, and voted to overturn every death sentence that came before the Court. He proved as strong a champion of freedom of expression as he had been for civil rights. In 1972, Marshall sided with Earl Mosley, a postal employee who had picketed a public high school with a sign alleging racism at the school. When the city passed an ordinance prohibiting picketing within 50 meters of a school except for labor picketing, Mosley challenged the law. Marshall held that the city could not distinguish between those types

of speech it would permit and those it would restrict. He wrote,

Above 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.

Marshall served on the Supreme Court until 1991. He died in 1993, at the age of 84. President Bill Clinton attended Marshall’s memorial service at the National Cathedral in Washington, D.C., which was televised nationwide. Chief Justice William Rehnquist said in his eulogy:

Inscribed above the front entrance to the Supreme Court building are the words “Equal justice under law.” Surely no one individual did more to make these words a reality than Thurgood Marshall.