The Symbolic Justice

Thurgood Marshall was a great litigator, but not a great Justice

By David J. Garrow

THURGOOD MARSHALL: American Revolutionary
By Juan Williams
Times Books, $30

THURGOOD MARSHALL ought to be remembered more for his twenty-three years of work as director-counsel of the NAACP Legal Defense and Educational Fund (1938-1961) than for his twenty-four years of service as a justice on the U.S. Supreme Court (1967-1991). During his time as the NAACP's top lawyer, Marshall won a long list of landmark Supreme Court cases and had great fun doing so. Badly miscast as an appellate judge, Marshall's record as a justice was highly disappointing, and the reclusive strictures of judicial life transformed the once happy lawyer into a depressed and eventually angry jurist.

Marshall grew up in the racially mixed world of Baltimore, Maryland, influenced more by his mother, who taught in an all-black public school for discriminatorily low wages, than by his alcoholic father. Juan Williams, in his informative and perceptive new biography, attributes Marshall's optimistically integrationist legal vision to his early life experiences in Baltimore. Williams likewise ascribes Marshall's early courtroom agenda of challenging discriminatory teachers' salaries and whites-only state-supported law schools to the home state practices that had disadvantaged his mother and kept him from applying to the University of Maryland rather than to Howard University's School of Law.

Marshall graduated from Howard Law in 1933, and within four years Marshall's Howard mentor, Charles H. Houston, brought his 28 year-old protege up to New York City as his only aide in the NAACP's nascent legal office. Two years later Marshall succeeded Houston in the top job and began litigating the long string of constitutional challenges to southern segregation that culminated in *Brown v. Board of Education* in 1954. Along the way Marshall won other notable victories—such as *Smith v. Allwright* (1944), abolishing "white primaries," and *Shelley v. Kraemer* (1948), voiding racially restrictive housing covenants—which nowadays are no longer as famous as *Brown*. For Marshall those years were a nonstop bout of "frantic activity," not only because of the dozens of anti-segregation cases Marshall helped prepare but also on account of the endless requests for legal aid that poured into NAACP headquarters from individual black citizens who were suffering abuse in one or another corner of America's criminal justice system.

His workload notwithstanding, Marshall had tremendous fun during the '40s and early '50s, Williams explains, because "he liked people, and he liked to travel. He enjoyed going out drinking . . . until the small hours of the morning" in whatever locale his NAACP work had taken him to. Marshall also fared well even in the rigidly racist worlds of southern jails and courtrooms, for "he was a charmer who got along well with whites."

Throughout those years, and especially during the crucial 1952-1955 period in which Marshall and his NAACP colleagues on three separate occasions argued the *Brown* set of cases before the U.S. Supreme Court, Marshall displayed what in retrospect can only be seen as a blissfully naive and optimistic attitude toward what would follow from Supreme Court condemnation of segregated schools. Not only did Marshall and other NAACP leaders erroneously anticipate that the actual process of school desegregation would be relatively quick and untroubled; Marshall also blithely asserted that Black America would happily and eagerly assimilate itself into the mainstream white culture. "What's going to happen to the 'Negro College'?" Marshall asked an audience four months before *Brown* ordered an end to racial segregation. "I'll tell you what's going to happen. It's going to cheerfully drop the word 'Negro' from its name."

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Williams astutely portrays the extent to which the Thurgood Marshall of 1954 sounded like the Ward Connerly or Shelby Steele of the 1990s. One month after *Brown*, Marshall declared that every American ought to be judged on "individual merit rather than to be limited by such irrelevant considerations as race and color."

But the happy, victorious, and optimistic Thurgood Marshall of 1954 was shortlived, for an underappreciated transformation was in the offing. Some of the change stemmed from the early 1955 death of Marshall's wife Buster. Their relationship "had become distant and lifeless" well before 1955, both because of Marshall's constant travels and because of their inability to have children. Her death led to exceptionally intense unpleasantness between her family and Marshall, and Marshall's Legal Defense Fund deputy Jack Greenberg told Williams that Marshall "was really in very bad shape" and "really didn't function for a period of maybe several years in his job" following Buster's death.

Marshall nonetheless remarried to Cecile "Cissy" Suyatt, an NAACP secretary of Filipino extraction with whom he soon had two boys, but the years after *Brown* were not happy ones for either Marshall or the NAACP. Segregationists waged an intense war not just to obstruct *Brown* but also to put the NAACP and its lawyers out of business all across the south, and Marshall and his colleagues now spent most of their time playing defense, not offense.

Marshall also felt surprisingly and increasingly distant from the younger civil rights proponents who were giving new leadership to black activism in the south. Marshall had been highly ambivalent about the international attention and credit that had been given to Dr. Martin Luther King, Jr.'s doctrine of nonviolent resistance as a result of the successful boycott of segregated buses in Montgomery, Alabama, in 1955-1956, and the rise of the black student protest movement, starting with the "sit-ins" of early 1960, intensified Marshall's unhappiness all the more. Williams writes that "the question for Thurgood Marshall was whether the times had passed him by," but even Williams' thoughtful and empathetic account leaves one puzzled as to why Marshall felt so alienated from the younger activists who had been stimulated by and now were building upon Marshall's courtroom triumphs.

Marshall had turned fifty in the summer of 1958, just days before the birth of his own second son, and Williams leaves little doubt that Marshall had decided he wanted out of his NAACP top lawyer's job even well before President John F. Kennedy nominated him to a judgeship on the U.S. Court of Appeals for the Second Circuit, in Manhattan, in the fall of 1961.

Williams states early on that Marshall "had a desperate need to be respected," and Marshall's belief that his successful lawyering for the NAACP ought to result in his being honored with an important judgeship had been growing for some years prior to 1961. Williams presents Marshall's interest in a judicial appointment—and particularly Marshall's insistence on a higher-ranking and more prestigious appellate post rather than simply a federal trial court appointment—as involving both pride and money; a judgeship would also represent a significant salary increase.

But Williams does not fully address the question of whether Marshall was fundamentally "burned out" as an active civil rights litigator and was looking for some honorable form of quasi-retirement. Twenty-five years of such intense and exhausting lawyering as Marshall had undertaken was perhaps indeed an entire lifetime's worth of achievement, and Williams suggests that Marshall's desire for an appellate judgeship had little if anything to do with the actual work of judging and everything to do with his sense of being entitled to an honorific status that carried with it a guaranteed lifetime salary.

The two most fundamental mysteries of Thurgood Marshall's life—why he felt so alienated from the black protest movement of the '50s and '60s, and why he so misjudged his own aptitudes in aspiring for the appellate bench—thus both fall within the least noted period of his life, following his victory in *Brown* and preceding his 1967 nomination to the Supreme Court. Marshall's entirely unremarkable service on the Second Circuit stretched from 1961 until 1965, when President Lyndon B. Johnson drafted him to be U.S. Solicitor General, the executive branch's top voice in front of the Supreme Court. Marshall was understandably reluctant to give up his lifetime judgeship for a short-term presidential appointment, but he and Johnson, like much of the rest of the country's legal and political elite, both understood that the Solicitor Generalship was less an appointment in its own right than it was a trial run to see whether Marshall's performance in a high-visibility Washington post would be sufficiently adept to justify Johnson making him America's first African-American Supreme Court justice. Two years later, when Johnson's nomination of Acting Attorney General Ramsey Clark for the permanent position all but forced Clark's father, Justice Tom C. Clark, to announce his retirement from the bench so as to avoid an unseemly

conflict of interest, Johnson felt comfortable enough with Marshall's record of high-profile advocacy to proceed with his nomination. At the age of fifty-nine, Thurgood Marshall ascended to a seat on the U.S. Supreme Court.

Less than twenty percent of Williams' biography is devoted to Marshall's twenty-four years (1967-1991) of service on the Supreme Court, and anyone seeking a comprehensive overview of Marshall's judicial contributions ought to turn to the second of Mark Tushnet's two important scholarly volumes on Marshall, *Making Constitutional Law*. Lyndon Johnson all but explicitly acknowledged that his selection of Marshall was as much the nomination of a symbol as it was the nomination of an individual, and Marshall's presence on the High Court during the '70s and '80s indeed often seemed more symbolic than tangible.

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Williams portrays Marshall as having been considerably more engaged in the internal work of the Court during his first years on the bench than was usually the case later on, but even in 1967 some of his closest friends and colleagues viewed Marshall as a significantly troubled man. Williams shies from calling Marshall a sexual harasser, but he quotes one of Marshall's top deputies in the Solicitor General's office as acknowledging that Marshall had "a tendency to let his hands stray" and often "was less than entirely subtle" in expressing affection. Former Attorney General Nicholas Katzenbach told Williams that "I expect Thurgood always had a little bit of a drinking problem, but it never interfered with his work." Yet one of Marshall's oldest friends related how Marshall when drunk "would accost women, any woman," and recounted one episode in which companions "had to drag Marshall into the house after he grabbed a woman."

More intriguing than accounts of judicial disengagement or unseemly personal behavior, however, is the question of how and why Marshall changed from an assimilation-minded integrationist in the '50s to an angry and bitter "race man" by the late '80s and early '90s. Williams acknowledges this transformation, but pays it much less attention than he should. Marshall's closest friend on the Court, the late William J. Brennan, Jr., told Williams that among the justices themselves, Marshall regularly employed edgy racial humor "no matter how uneasy it made any of us." Williams may not have fully appreciated the significance of Brennan, an amazingly charitable man, having told him that even "I got worried about whether he carried that too far." Brennan completely shared Marshall's view that racial discrimination continued to permeate American life, but in a remarkable statement he told Williams that "I will not accept his feeling that that may also have been true of our colleagues, that they are personally racist or that their votes reflect any racism."

Williams' book leaves a definitive account of Marshall's Supreme Court service for some subsequent author, but his portrait of Marshall the man is rich and valuable, even if he fails to plumb fully some of the most fascinating complexities of Marshall's life. Williams has a repeated weakness for using oral recollections, by both Marshall and others, without confirming or disproving the stories' accuracy from other available sources. Sometimes, as in his highly overblown account of Marshall's supposed "alliance" or "secret ties" to J. Edgar Hoover's FBI, Williams shows himself to be amazingly credulous and uncritical. Law professors will be especially disappointed by Williams' legal missteps, particularly his staggering omission of one of Marshall's most important pre-*Brown* Supreme Court victories, *McLaurin v. Oklahoma State Regents* (1950).

But those shortcomings detract surprisingly little from what overall is an excellent and important book. Williams insists that Marshall was "a genuine American revolutionary," one of those few Americans "who literally transformed their nation and defined not only their era but what would come after them." Academic historians will cavil at Williams's overly-individualistic assertion that "it was Marshall who ended legal segregation in the United States," but few could quarrel with Lewis F. Powell, Jr.'s more precise avowal that Marshall "did more to establish equal justice under the law than Martin Luther King Jr., or any other single individual." Juan Williams' biography of Marshall is neither definitive nor perfect, but it's an admirable portrait of a superb litigator whose undistinguished judicial record should not be allowed to eclipse his remarkable earlier achievements.

Style, not Substance

Affirmative action is not as liberal as you think

By Richard D. Kahlenberg

THE SHAPE OF THE RIVER, says *The New York Times*, is meant to "lead the charge in a liberal counteroffensive" on affirmative action. But the study, conducted by former Princeton president William Bowen and former Harvard president Derek Bok, is neither a "counteroffensive" nor particularly "liberal." The book successfully rebuts only the weakest second-tier arguments against affirmative action, leaving the central attack on racial preferences standing. At the same time, the book is profoundly conservative, rejecting the moral arguments for affirmative action in favor of more "pragmatic" considerations, dismissing as wrong-headed widely-held concerns about fairness in the university admissions process, and rejecting any significant role for universities in promoting social mobility by reaching out to disadvantaged applicants.

THE SHAPE OF THE RIVER: Long-Term Consequences of Considering Race in College and University Admissions
By William G. Bowen and Derek Bok
Princeton University Press, $24.95

As a basis for their study, Bowen and Bok constructed an important new database involving more than 45,000 students from the entering classes of 1976 and 1989 at 28 selective universities. The data generated are of enormous value, shedding new light on subjects that have been shrouded in secrecy: the nature and extent of racial preferences at elite universities, the relative performance of those admitted with preferences, and, most significantly, the eventual success of preferred students in the workplace.

The biggest limitation to the data is Bowen and Bok's decision to restrict analysis to blacks and whites, an unfortunate decision now that the number of Hispanic youth has officially surpassed the number of blacks in the United States. The decision to exclude Asian-Americans is also troubling since Asians play a poignant role in the affirmative action debate as a minority group generally believed to be hurt by race-sensitive admissions.

Bowen and Bok's book seeks to do three things: demonstrate that affirmative action has been a success in creating diverse university learning environments and in promoting qualified blacks into the professional middle class; establish that eliminating racial preferences would undercut these positive gains and that alternatives to racial preferences are wanting; and convince readers that race should be considered an element of "merit" broadly defined. We take each of these three arguments in turn.

Over the Rainbow

Bowen and Bok's data make clear that affirmative action has been good for blacks and good for diversity, effectively rebutting several of the more extreme arguments made by opponents of such programs. The authors find that blacks admitted to the 28 elite colleges were in fact able to compete. Although blacks were admitted with lower average academic credentials than whites and earned lower grades in college, the vast majority graduated, many went on to graduate school, and eventually took on leadership roles in public and private life. Significantly, blacks admitted to the 28 schools graduated at a higher rate than those blacks who attended less selective schools.

Bowen and Bok find little evidence that preferences stigmatize blacks and leave them doubting whether they deserved to be admitted. Only 6 percent of blacks in the 1976 cohort said they were dissatisfied with their college experience, the same level as found among whites. Even among black students scoring over 1300 on the SAT, students less likely to need preferences and therefore most likely to resent the assumption that they benefitted, 75 percent of 1989 matriculants said colleges should place "a great deal" of emphasis on racial diversity. There is also evidence of significant interaction among students of different races. In the

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