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On Marshall's Conception of Equality Tribute

Cass R. Sunstein

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Was Justice Thurgood Marshall an egalitarian?[1] Did he believe that the Constitution should be used to produce "equality of result" for those he happened to favor?

I write at a time when many people, especially those in the federal judiciary, believe that both questions should be answered with an emphatic "Yes." But it isn't so.

Above all, Thurgood Marshall will be remembered for his role in *Brown v. Board of Education*,[2] and indeed it is in that case that one can find many of the central elements of Marshall's conception of the Constitution. *Brown* is commonly thought to have been a case about racial discrimination. It is even said to have established a constitutional norm of "color-blindness." But to the participants in the case, and to the Court at the time, the case was fundamentally about education.[3] The briefs and oral argument stressed not color-blindness, but the need for equal educational opportunity. And the Court listened. In the passage that Justice Marshall particularly liked to quote, the Court said:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstate our recognition of the importance of

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1. I understand the term to refer to the idea that the state should not permit significant disparities in wealth, income, or other resources. As we will see, Justice Marshall's conception of equality embodied a far more limited and conservative set of ideals.

2. 347 U.S. 483 (1954).

3. *Brown* was followed by Bolling v. Sharpe, 347 U.S. 497 (1954). According to Professor Hutchinson, an early draft of the *Bolling* opinion stated explicitly that education is a fundamental interest for constitutional purposes. The draft read:

> This Court has applied similar reasoning to analogous situations in the field of education, the very subject now before us. Thus children and parents are deprived of the liberty protected by the Due Process Clause when the children are prohibited from pursuing certain courses, or from attending private schools and foreign-language schools. Such prohibitions were found to be unreasonable, and unrelated to any legitimate governmental objective. Just as a government may not impose arbitrary restrictions on the parent's right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides. . . . We have no hesitation in concluding that segregation of children in the public schools is a far greater restriction on their liberty than were the restrictions in the school cases discussed above.

Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 45 (1979) (citation omitted). Professor Hutchinson reports that Justice Marshall was genuinely delighted to see that early draft, responding, "That's it! That's what the case was about!" Personal Communication from Dennis Hutchinson (Dec. 7, 1991).

> education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[4]

Brown was a case about education. In this, I believe, lies the clue to understanding the wellsprings of Marshall's life, work, and vision of the Constitution.

The long struggle by the NAACP—a struggle within and against the "separate but equal" doctrine—was undertaken, first and foremost, with an eye toward the achievement of equal educational opportunity.[5] The original challenge to that doctrine was part and parcel of this goal. Above all, Marshall and others objected to a practice that would engrain second-class citizenship in children, and do so with respect to the social service most indispensable for an equal chance in life. Segregated education stamped notions of racial inferiority into children at an early, even decisive stage. Hence what seems to me the most revealing moment in Justice Marshall's argument in *Brown*. In response to a question from Justice Reed about whether the state should consider desegregation's potential negative impact on "law and order," Marshall said:

> [Whites and blacks] are fighting together and living together. For example, today they are working together in other places. . . . I know in the South where I spend most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and play together. I do not see why there would necessarily be any trouble if they went to school together.[6]

We now take it for granted that after *Brown*, the Court rapidly repudiated the "separate but equal" doctrine not only in education, but across the board, in a series of per curiam opinions.[7] But these cases should not obscure Marshall's focus on education, and the reasons for that focus.

Marshall's early commitment to equal educational opportunity carried

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4. *Brown*, 347 U.S. at 493.

5. Professor Mark Tushnet stresses this point:

> Achieving voting rights and eliminating kangaroo courts were important, of course, but segregated education was different. Every African-American in the South was subjected to segregated education in grossly inadequate schools. Segregated schools were perhaps the central symbol of African-American subordination, a visible and daily demonstration to children as they were growing up that whites did not consider them fit to associate with.

MARK TUSHNET, THURGOOD MARSHALL, CIVIL RIGHTS LAWYER, 1908-1961, at 304 (forthcoming 1992).

6. Oral Argument, Briggs v. Elliot (Dec. 10, 1952) (companion case to *Brown*), *in* 49 LANDMARK BRIEFS AND ARGUMENTS 345-46 (Philip B. Kurland & Gerhard Casper eds., 1975).

7. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (upholding the application of *Brown* to parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches).

over to his work on the Court. It helps explain many of his votes and writings; it unites a number of seemingly disparate ideas.[8] A conspicuous example is Marshall's greatest opinion, dissenting in *San Antonio School District v. Rodriguez*,[9] a case that has emerged as one of the most important since *Brown* itself. In that case, the Supreme Court upheld significant disparities in per-pupil expenditures in school financing in Texas. Marshall's dissenting opinion rested above all on the centrality of education to constitutionally protected liberties. First, Marshall said, education is connected with freedom of speech: "Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life."[10]

Second, education is central to the system of self-government: "Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation."[11] In this way, education is connected to the democratic aspirations of the American legal tradition.

Third, Marshall argued that education is a crucial mechanism for allowing people to overcome disadvantaged conditions. It ensures, not equality of resources or outcomes, but a fair chance. "[T]he right of every American to an equal start in life, so far as the provision . . . of education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record."[12] This is not an egalitarian theme. It is about prospects from the start, not results in the middle. Here Marshall's *Rodriguez* dissent is linked to the deepest goals behind *Brown*.

The same themes appear throughout Marshall's work. For him, education supplies "the basic tools and opportunities that might enable [people] to rise."[13] Thus the Constitution should be seen to reflect "a deep distrust of policies that specially burden the access of disadvantaged persons to the governmental institutions and processes that offer members of our society an

8. In 1986, at the Judicial Conference of the Second Circuit, Justice Marshall repeated words I heard at the end of a clerks' reunion:

> [T]he goal of a true democracy such as ours, explained simply, is that any baby born in these United States, even if he is born to the blackest, most illiterate, most unprivileged Negro in Mississippi, is, merely by being born and drawing his first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller.
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> Of course it's not true. Of course it never will be true. But I challenge anybody to tell me that it isn't the type of goal we should try to get to as fast as we can.

Thurgood Marshall, Address Before the Annual Judicial Conference of the Second Judicial Circuit of the United States (Sept. 5, 1986), *in* 115 F.R.D. 349, 354 (1987).

9. 411 U.S. 1 (1973).

10. *Id.* at 112 (Marshall, J., dissenting).

11. *Id.* at 113 (footnote omitted).

12. *Id.* at 71; *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 471 (1988) (Marshall, J., dissenting) ("For the poor, education is often the only route by which to become full participants in our society. In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope.").

13. *Kadrmas*, 487 U.S. at 469 (Marshall, J., dissenting).

opportunity to improve their status and better their lives."[14] Such distrust is justified because

> [a] statute that erects special obstacles to education in the path of the poor naturally tends to consign such persons to their current disadvantaged status. By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance herself or himself, but also increases the likelihood of the creation of a discrete and permanent underclass.[15]

Thus Marshall understood the Constitution to create a "right of every American to an equal start in life,"[16] at least in the sense of a right that the state provide legitimate reasons for failing to provide equal educational opportunity. In this way, Marshall's work on the Court maintained deep continuity with his work on the school segregation cases.

Marshall was not an egalitarian. His conception of equality was extremely old-fashioned. An outgrowth of his experiences with segregation, that conception involved, as its defining feature, a commitment to equality of opportunity. In Marshall's constitutional vision, this commitment entailed, first and foremost, a right to equal prospects in education. But it also required more generally an opposition to all caste systems—understood as second-class citizenship, in which one group is systematically below others on the basis of a morally irrelevant factor such as race, sex, or disability. In his view, rejection of caste was the central lesson of the Civil War Amendments: "The intent of the Fourteenth Amendment was to abolish caste legislation. When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated."[17]

Thus the equal protection principle did not ban all racial differentiation. It did not require color-blindness. For Marshall, this precept was ahistorical; it was insufficiently attuned to the particular history behind the Civil War Amendments. The principal point of those Amendments was not to require that people who were similarly situated be treated "the same." Instead, Marshall thought that the core meaning of the Equal Protection Clause was that the government could not translate morally irrelevant differences into a form of second-class citizenship. It could not take skin color, or gender, and turn these into social disadvantages for blacks or women.[18] It is highly misleading to say that this is a vision of the Fourteenth Amendment that favored the "rights of groups" over "the rights of individuals." In any

14. *Id.* at 468-69.

15. *Id.* at 470; *see also* Martinez v. Bynum, 461 U.S. 321, 345-51 (1983) (Marshall, J., dissenting) (reiterating his view that a child's education is a fundamental interest).

16. *Rodriguez,* 411 U.S. at 71 (Marshall, J., dissenting).

17. *Kadrmas,* 487 U.S. at 469 (Marshall, J., dissenting) (citations omitted).

18. *See* Rostker v. Goldberg, 453 U.S. 57, 86 (1981) (Marshall, J., dissenting) (arguing that the exclusion of women from registration for the draft is unconstitutional); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting) (arguing that veterans' preference statute constitutes impermissible gender discrimination). It is notable that Justice Marshall was the most vigorous voice of opposition, under the Equal Protection Clause, to official practices connected to the exclusion of women from the military; he insisted that this exclusion was part and parcel of women's second-class citizenship. *Id.* at 285.

effort to dismantle a caste system, caste membership is highly relevant to remedial policies, and precisely in the interest of "the rights of individuals." At least Marshall thought that government could reasonably so believe.

It was on this ground that Marshall argued that discrimination on the basis of disability should be subject to special scrutiny under the Fourteenth Amendment.[19] And most notably, it was on this ground that he rejected the constitutional assault on affirmative action.[20] For him, that assault was filled with bitter ironies. There was no basis, he thought, for the view that affirmative action offended the vision of the framers of the Civil War Amendments, who had themselves engaged in affirmative action.[21] The anti-caste principle, as originally understood, permitted such practices.

Nor was invalidation of affirmative action compelled by principle. In Marshall's view, most racial discrimination was objectionable because of its particular purposes and its particular effects—that is, because it served to create a system of caste. When the use of race has quite different purposes and effects, it should be evaluated more leniently.[22]

To Marshall, the deepest irony of the modern attack on affirmative action was that it ripped the hard-won victories against racial discrimination entirely out of their particular historical context, when it was precisely that context that made the words ones of opprobrium. Thus for Marshall, the constitutional assault on affirmative action "pervert[ed] the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve."[23]

By "genuine equality," Marshall did not mean equality of result. Instead, he referred to a system in which the caste-like features of American society had been dismantled—a dismantling that was part and parcel of the attack, decades earlier, on Jim Crow. Hence his unusually personal last paragraph in *Bakke*:

> I fear that we have come full circle. After the Civil War our Government started several "affirmative action" programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. *Now*, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California.[24]

Thus far I have suggested that Marshall's constitutional vision included

19. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part).

20. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Marshall, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 517 (1980) (Marshall, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part).

21. *Bakke*, 438 U.S. at 396-98.

22. *See* Thomas E. Hill, Jr., *The Message of Affirmative Action*, SOC. PHIL. & POL'Y, Spring 1991.

23. *Bakke*, 438 U.S. at 398.

24. *Id.* at 402 (citations ommitted).

a commitment to equality of opportunity, particularly in education, and a rejection of caste. Of all Justices to serve on the Supreme Court, Marshall was also by far the most insistently protective of poor people. Indeed, he moved very close to a belief in a constitutional right to freedom from desperate conditions. This right is the third and final cornerstone in Marshall's conception of equality. It was also connected, though less directly, with the original wellsprings of *Brown*.

At the very least, Marshall believed that any system that left an identifiable class of Americans in conditions of this kind should be subject to careful scrutiny under the Equal Protection Clause. Under this view, no one should be deprived, without good reason, of adequate education, police protection, food, shelter, or medical care.[25]

This principle is hardly egalitarian. It merely affords a basic minimum. It allows enormous variations in living standards. There is no evidence that Marshall objected to such variations. But it would not permit people to fall below a specified floor. Certainly Marshall believed that poor people could not be deprived of access to the basic institutions of a democratic society, including the political process, the judicial process,[26] and education. In an appropriate case, I think that he would also have held that the government could not constitutionally deprive people of the basic means of subsistence—

25. *See* Harris v. McRae, 448 U.S. 297, 337 (1980) (Marshall, J., dissenting); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259-62 (1974); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

It is important to note that the belief in freedom from desperate conditions is not a twentieth century creation. It was enthusiastically endorsed by both Thomas Jefferson and James Madison—a point worth emphasizing in a period in which the welfare state is often said to be inconsistent with our founding aspirations. Jefferson wrote:

> I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. . . . *Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise.* Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labor and live on.

Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* 8 THE PAPERS OF THOMAS JEFFERSON 681, 682 (Julian P. Boyd ed., 1953) (emphasis added).

Madison expressed a similar view when he listed potential means of combating the "evil of parties":

> 1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.

James Madison, *Parties, in* 14 THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland & Thomas A. Mason eds., 1983) (emphasis in original).

President Franklin D. Roosevelt's Second Bill of Rights—including the rights to a decent home, a good education, adequate medical care, and adequate food, clothing and recreation—embodied this form of freedom in its canonical form. *See* Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), *in* 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 41 (Samuel I. Rosenman ed., 1950).

26. *See* United States v. Kras, 409 U.S. 434, 458 (1973) (Marshall, J., dissenting).

that it could not allow them to fall beneath a decent minimum.[27]

Marshall was not an egalitarian. But in his conception of the Constitution, courts were to assume an aggressive role in promoting equality of opportunity. At a minimum, that role entailed vigilance over discrimination with respect to education, probably even a right to education; an attack on caste systems; and a willingness to look skeptically at any state action that allowed people to be subject to desperate conditions.

The Supreme Court has rejected this vision of the Constitution in all of its fundamentals. Certainly the Court has refused to see freedom from desperate conditions as part of constitutional liberty.[28] It is by no means clear that the Court has been wrong to do this. A serious commitment to Marshall's vision would entail an extraordinary judicial role, one for which the courts are quite ill-suited. There is good evidence that courts are generally ineffective in bringing about systematic, stable social change.[29] A judicial decree does not automatically change the world.[30] Implementation is always required, and implementation will sometimes encounter unexpected obstacles. Courts are ill-equipped to understand the complex systemic effects of ad hoc intervention.[31] The innovative, even ingenious theories and practices of modern commentators and courts should not disguise this fundamental fact.[32]

Even when courts are effective, there are serious problems in judge-led reform from the standpoint of democratic legitimacy. Reform through the courts may dampen the practice of citizenship, an individual and collective good. And if reform does not have a democratic pedigree, it may run into severe resistance. Such resistance may in turn undermine the very causes that the Court purports to favor. The judicial struggle with abortion may well be an example. It is at least plausible to think that *Roe v. Wade*[33] de-

27. *See* Dandridge v. Williams, 397 U.S. 471, 508, 522 (1970) (Marshall, J., dissenting) (noting that the Supreme Court "has already recognized that when a benefit, even a 'gratuitous' benefit, is necessary to sustain life, stricter constitutional standards, both procedural and substantive, are applied to the deprivation of that benefit"). (citations omitted).

28. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 198 (1989) (rejecting a claim that by failing to protect a child from his violent father, a county department of social services deprived him of his Fourteenth Amendment rights); Harris v. McRae, 448 U.S. 279 (1980) (upholding Congress's refusal to fund medically necessary abortions).

29. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 72-106 (1991). Like Rosenberg, I am referring to broad social change through the courts—large-scale institutional shifts, not "negative" decrees that do not involve such shifts.

30. Ten years after *Brown*, for example, less than 2% of black children in the South attended desegregated schools. G. ROSENBERG, *supra* note 29, at 348. Real desegregation did not occur until the executive and legislative branches became actively involved. *See id.* at 72-106.

31. Ironically, Justice Marshall's dissent in *Rodriguez* may itself be an example. It is unclear whether the state courts that have followed his opinion have improved the situation in general, or for the poor in particular. *See, e.g.*, RICHARD F. ELMORE & MILBREY WALLIN MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM 71, 241 (1982) (suggesting that the landmark case of Serrano v. Priest, 18 Cal. 3d. 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (en banc), *cert. denied*, 432 U.S. 907 (1977), has produced mixed results at best).

32. *See generally* OWEN M. FISS, ROBERT M. COVER & JUDITH RESNIK, PROCEDURE (1990).

33. 410 U.S. 113 (1973).

mobilized the women's movement, contributed to the defeat of the Equal Rights Amendment, and helped create the moral majority, in a way having quite adverse effects for the cause of equality on the basis of sex.[34]

The point can be made more generally: Constitutional law is an uneasy amalgam of substantive theory and institutional constraint. In developing constitutional principles, courts must be attentive not only to the best substantive interpretation of the relevant text, but also to institutional limits on judicial capacity. Even if the best substantive theory calls for something like Marshall's vision, institutional considerations would argue powerfully against it.

In any case, the era of *Brown*—an era that produced so many extraordinary developments in American law, many of them engineered by Marshall—was an exceptional one in American history. It had no real predecessors. It is doubtful whether it will have any real successors. Many of those captivated by Marshall's achievement in *Brown* have hoped, for the last thirty years, for one, two, three, or a dozen *Browns*—in which federal courts, following Marshall's lead, reform the multiple unjust practices of American society. For now and for the foreseeable future, this hope looks like nostalgia, based on an anachronistic vision of the role of courts in American society.

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The capacities of the courts are one thing; the relationship of the Constitution to American life is another. Many Americans continue to live in desperate conditions. They are without hope, food, or shelter. They are subject to both random and systemic criminal violence—usually from the private sector, sometimes from the police. Blacks and women are disproportionately victims. Many children are without decent life prospects. A system with caste-like features currently exists with respect to race, sex, and disability. Many Americans never receive a decent education. In educational opportunities there are persistent, extraordinary, and unnecessary disparities, and these are correlated with race and other moral irrelevancies.

Even if the Supreme Court of the United States lacks the willingness, the tools, or the competence to respond to the situation, it remains plausible to think that the Constitution of the United States is not an irrelevance. Other institutions, most notably Congress, the President, and state governments, have duties of fidelity to the founding document. Those institutions are not burdened with the limits that face the judiciary. Their duties of fidelity might well be discharged in a way that is attuned to the fact that for them, institutional disabilities are not present.

We might even think of the judicial rather than legislative enforcement of the Fourteenth Amendment as the most profound irony in American constitutional history—one for which Marshall is above all others responsible. On the original view, it was Congress, not the courts, that would enforce the

34. *See* G. ROSENBERG, *supra* note 29, at 336-43.

Civil War Amendments. In the aftermath of the *Dred Scott* decision,[35] the ratifiers could not possibly have anticipated the extraordinary role of the judges, associated above all with *Brown* and its aftermath. It may well be that in the next generation, there will be an institutional shift more in keeping with the original understanding of that Amendment and, perhaps, with better understandings of the appropriate allocation of authority among Congress, the President, and the judiciary.

In these circumstances, it is fully plausible to think that Marshall's vision of the Constitution will continue to have a conspicuous place in American constitutional thought. But increasingly, its place will be the halls of the legislatures and the bureaucracies, rather than the judiciary. This is an extraordinary irony: More than anyone else, Marshall is responsible for the idea that social reform, through the courts in the name of the Constitution, was both possible and desirable. But the irony is one that Marshall appears fully to appreciate.[36]

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The last words come from Marshall himself. In 1980, the city of Baltimore erected a statute of Thurgood Marshall. It was able to persuade him to attend the ceremony—a real accomplishment in light of his storied reluctance to receive public tribute. But this was a remarkable event. Baltimore had been a segregated city, and one of Marshall's first endeavors after graduating from law school was to desegregate Maryland's all-white law school.[37] The dedication of a statue honoring a black civil rights lawyer who had abolished American apartheid would have been unfathomable fifty or sixty years before.

Surely this was an occasion for celebration—of an extraordinary life of accomplishment, and of the remarkable achievements of the civil rights revolution. But if celebration meant complacency, Marshall would have nothing of it:

> Some . . . feel we have arrived. Others feel there is nothing more to do. I just want to be sure that when you see this statue, you won't think that's the end of it. I won't have it that way. There's too much work to be done.[38]

35. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

36. It may be for this reason that Justice Marshall was extremely attuned to cases involving the availability of the political process for social reform. He was aware of the necessarily limited nature of judicial relief. See in particular his powerful dissenting opinion in City of Mobile v. Bolden, 446 U.S. 55, 103 (1980) (Marshall, J., dissenting).

37. University of Md. v. Murray, 169 Md. 478, 182 A. 590 (1936).

38. Dale Russakoff, *Tribute to Marshall; City of Baltimore Dedicates Statue to 1st Native Son on High Court,* WASH. POST, May 17, 1980, at C1.