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Celebrating Thurgood Marshall: The Prophetic Dissenter

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Thurgood Marshall was born 100 years ago into a country substantially divided along color lines. Marshall could not attend the University of Maryland School of Law because he was a Negro;1 he had trouble locating bathrooms that were not for “whites only.”2 Today, by contrast, we celebrate his life and accomplishments. Broadway has a play called Thurgood devoted to him;3 Baltimore/Washington International Airport is now BWI Thurgood Marshall Airport;4 even the University of Maryland renamed its law library in his honor.5 How did we come this far? How far do we still have to go? This article will consider what Justice Marshall would think of the Supreme Court’s jurisprudence during the seventeen years since his retirement. In my opinion, he would be “appalled, but not surprised,” particularly by those decisions involving affirmative action, an area about which he was especially passionate. Justice Marshall would be “appalled, but not surprised” because he foresaw the future direction of the Court and did not like it. In his last dissent, issued only hours

2. Id. at 23 (noting the prevalence of Jim Crow laws at the time of Marshall’s birth, and, in particular, a Maryland law requiring segregated public bathrooms).
5. See WILLIAMS, supra note 1, at 371; see also Susan Kinzie, Tracking Marshall’s Steps to the Supreme Court; Exhibit Reveals Justice’s Diplomacy, WASH. POST, Sept. 20, 2008, at B3; see discussion infra at n.63.
before his surprising announcement that he would retire immediately, Justice Marshall blasted the Court as it overruled two recent precedents:

Power, not reason, is the new currency of this Court’s decision making. Four Terms ago, a five-Justice majority of this Court held that “victim impact” evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. . . . By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. . . . Nevertheless, having expressly invited respondents to renew the attack, today’s majority overrules [both prior cases] and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting [those cases] underwent any change in the last four years. Only the personnel of this Court did. . . .

. . . In dispatching [these two recent cases] to their graves, today’s majority ominously suggests that an even more extensive upheaval of this Court’s precedents may be in store. . . . [T]he majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices now disagree. . . .

. . . [T]he continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who now comprise a majority of this Court.

. . . [T]his impoverished conception of stare decisis cannot possibly be reconciled with the values that inform the proper judicial function. . . . [S]tare decisis is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of “the judiciary as a source of impersonal and reasoned judgments. . . .” [T]he “strong presumption of validity” to which “recently decided cases” are entitled “is an essential thread in the mantle of protection that the law affords the individual. . . . It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law.”

. . . [T]he majority’s debilitated conception of stare decisis would destroy the Court’s very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly

7. Id. at 851.
8. Id. at 852-33.
expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. 9

Marshall’s words were prophetic. Since his retirement, the Court has overturned more than twenty-six cases. And this number does not include those cases where the Court, rather than overturning a precedent outright, distinguished it with such unpersuasive rationales that even those who agreed with the majority on the results were outraged. In fact, Justice Scalia essentially called Chief Justice Roberts “a wimp and a hypocrite” for this very reason. 10 In Scalia’s words:

[T]he principal opinion’s attempt at distinguishing McConnell [v. FEC] is unpersuasive enough, the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules McConnell without saying so. . . . This faux judicial restraint is judicial obfuscation. 11

Scalia added, in a companion case:

Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law which is logic and reason. 12

One area in which the Court has changed direction dramatically and with which Marshall would be very distressed is the issue of affirmative action. He would be particularly unhappy with the Court’s movement away from the real world foundations of Brown v. Board of Education 13 and toward an increased reliance on sterile formalisms so distrusted by Marshall.

The Court first considered an affirmative action case in 1974 when Marco DeFunis, a prospective law student rejected by the University of Washington School of Law, brought suit alleging that less

9. Id. at 853.
10. Linda Greenhouse, Even in Agreement, Scalia Puts Roberts to Lash, N.Y. TIMES, June 28, 2007, at A1 (“It’s not every day that one Supreme Court justice, even one as rhetorically unrestrained as Justice Antonin Scalia, characterizes another justice, let alone the chief justice of the United States, as a wimp and a hypocrite. Yet, Scalia did something very close to that, not once but twice, in separate opinions on Monday.”).
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qualified applicants had been admitted as part of an affirmative action program.\textsuperscript{14} That affirmative action would be a difficult issue for the Court became immediately apparent when the majority chose to avoid the issue. Five Justices voted to dismiss the case as moot because the lower court had ordered that plaintiff DeFunis be admitted and by the time the case reached the Supreme Court, DeFunis was about to graduate.\textsuperscript{15} This decision to evade the issue triggered an angry dissent by Marshall, Douglas, Brennan, and White, who believed the majority was simply avoiding a difficult issue that would undoubtedly recur:

\begin{quote}
[I]n endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six amicus curiae briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. . . . Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. . . . Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases.\textsuperscript{16}
\end{quote}

Not surprisingly, the dissenters were correct. Only three years later, in 1977, a virtually identical lawsuit was brought by a prospective medical student, Allan Bakke, who had been denied admission to the University of California Medical School at Davis.\textsuperscript{17} This time, the Court agreed to hear the case. In a very complicated decision, five Justices, including Marshall, held that the University could consider race in its effort to increase the diversity of the class.\textsuperscript{18} However, a

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\item \textsuperscript{14} DeFunis v. Odegaard, 416 U.S. 312, 314 (1974).
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id. at 348-50 (Brennan, J., dissenting).
\item \textsuperscript{17} Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
\item \textsuperscript{18} Id.
\end{itemize}

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\item The Justices disagreed on whether the case should be decided on a constitutional basis, relying on the Fourteenth Amendment, or on a statutory basis relying on § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Four Justices—Stevens, Burger, Stewart, and Rehnquist—said that Title VI prohibited the affirmative action program at issue, that it was therefore unnecessary to reach the constitutional issue, and that therefore Bakke should be admitted. Id. at 408-21. Four Justices—Brennan, White, Marshall, and Blackmun—found that the program was permissible under both the statute and the Constitution, and thus, that Bakke was properly rejected. Id. at 324-79. Powell provided the critical fifth vote, holding that the Constitution permitted the consideration of race, but that the particular program at issue involved an unconstitutional quota. Id. at 269-320.
\end{itemize}
different group of five Justices, with Justice Powell again the key fifth vote, held that the particular program of the University of California was unlawful because it included a quota. Thus, there were five votes in favor of Bakke’s admission. But, more importantly, there were five votes supporting the concept of affirmative action. Marshall was pleased with that aspect of the opinion, as he indicated in a separate opinion:

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person’s skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.19

Justice Harry Blackmun also supported the Court’s approval of the concept of affirmative action, observing succinctly: “In order to get beyond racism, we must first take account of race. There is no other way.”20 The Court’s very fractured line-up in Bakke confirmed that this issue was very controversial and not likely to go away anytime soon.

After Bakke, additional affirmative action cases came to the Court—some in the educational domain, others in business settings. The biggest source of contention among the Justices was deciding the appropriate standard of review for these cases. Should the standard be strict scrutiny because the government was using race-based classifications? Or, should it be intermediate scrutiny because the intent behind the programs was benign, not malevolent? No standard could garner five votes so each Justice applied his or her own standard. The result was a jurisdictional mess.

Justices Marshall and Brennan argued passionately for intermediate scrutiny. In their view, there was a marked difference between programs that hurt minorities and those that were adopted to ameliorate the effects of past discrimination.21 Thus, in City of Richmond v. J. A. Croson Co.,22 when the majority of the Court appeared to adopt a strict scrutiny standard, at least for affirmative action plans adopted

19. Id. at 401-02 (Marshall, J., writing separately).
20. Id. at 407 (Blackmun, J., writing separately).
21. Id. at 401 (Marshall, J., writing separately).
by states and municipalities, Marshall dissented. Criticizing those who were advocating strict scrutiny, Marshall said:

A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism. . . . Racial classifications “drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism” warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation’s history and continues to scar our society. As I stated in Fullilove: “Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization . . . such programs should not be subjected to conventional ‘strict scrutiny’—scrutiny that is strict in theory, but fatal in fact.”

Then, in Metro Broadcasting v. FCC, one of Justice Brennan’s last opinions for the Court, it looked as if the Court finally had five votes to adopt an intermediate scrutiny standard, at least for federal programs. In an opinion written by Justice Brennan, and joined by Justices Marshall, White, Blackmun, and Stevens, the Court upheld a federal regulation designed to enhance minority participation in radio and television ownership. The Court distinguished Croson on the basis that the constitutional limitation on city and state use of race as a distinguishing factor among businesses comes from the Fourteenth Amendment, while the Fifth Amendment governs federal programs.

But Metro Broadcasting turned out to be a fleeting victory for Marshall and Brennan’s intermediate scrutiny standard. In 1995, a few years after both had retired, the new Court, with Clarence Thomas taking Marshall’s seat and David Souter replacing Brennan, voted 5-4 to reject the intermediate scrutiny standard for all govern-

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23. Id. at 508 (holding that the plan was not narrowly tailored enough to be constitutional).
24. Id. at 551-52 (Marshall, J., dissenting) (citations omitted).
26. See id. at 566. As noted above, one year before Metro Broadcasting, the Court used strict scrutiny to find unconstitutional a plan by the city of Richmond to increase the participation of minority subcontractors in city contracts.
27. Id.
28. Id. at 605-06.
ment programs. In *Adarand Constructors, Inc. v. Pena*, the Court announced, “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” Henceforth, the standard of review for all affirmative action programs—federal, state, and local—would be strict scrutiny. Thus, to pass constitutional muster, affirmative action programs must be narrowly tailored to meet a compelling governmental interest.

How have affirmative action programs fared under strict scrutiny? In a word: Badly. Once again, Marshall had been prophetic. As he suggested in his dissenting opinion in *Croson*, strict scrutiny has turned out to be strict in theory, but virtually fatal in fact. Marshall predicted the Court would strike down more affirmative action programs, and he was correct: it has. In 2005, in one of Justice Sandra Day O’Connor’s last significant decisions before her retirement, she provided the crucial fifth vote to decide the constitutionality of the University of Michigan’s affirmative action admission programs. The Court decided, 5-4, to strike down the undergraduate school’s program; it was not narrowly tailored enough. In the companion law school case, O’Connor provided the crucial fifth vote to uphold that program, because, in her view, the law program utilized sufficiently individualized consideration. Unfortunately for the supporters of affirmative action, the undergraduate case has proven to be the more

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29. Since Thomas voted differently from Marshall and Souter voted the same way that Brennan had in these cases, the outcome changed. It was still 5-4, but in the opposite direction.
31. *Id.* at 224.
32. *Id.* at 227.
34. *Id.* at 561 (“The new and restrictive tests [the Court] applies scuttle one city’s effort to surmount its discriminatory past, and imperil those of dozens more localities.”).
36. *Id.* at 276-77 (“Unlike the law school admissions policy . . . , the procedures employed by the . . . Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants . . . . The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis . . . . By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant . . . . The selection index thus precludes . . . the type of individualized consideration the Court’s opinion in *Grutter* . . . requires”) (O’Connor, J., concurring) (citations omitted).
durable precedent. The law school’s victory for affirmative action was short-lived.

Just two years after the Michigan cases, in the spring of 2007, the Court considered the constitutionality of two race conscious programs designed by local school boards in Seattle and Louisville to keep the local schools from becoming more segregated.38 By this time, Justice O’Connor had been replaced by Justice Samuel Alito, who joined those Justices opposed to race-based programs. Writing for a plurality including Scalia, Thomas, and Alito, Chief Justice Roberts applied strict scrutiny and said, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”39 Justice Kennedy provided the fifth vote to strike these programs down, but was careful not to rule out the possibility that some “race conscious programs” might still be constitutional. According to Kennedy:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to a different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.40

But because the programs at issue in the Seattle and Louisville cases classified students on the basis of race, they required strict scrutiny. And under such scrutiny, they were unconstitutional because, in Kennedy’s view, they were not narrowly tailored enough.41

39. 127 S. Ct. at 2768.
40. Id. at 2792 (Kennedy, J., concurring).
41. Id. at 2797-92. In Kennedy’s view:
This Nation has a moral and ethnical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.
Id. at 2797.
The dissenters—Stevens, Breyer, Ginsburg, and Souter—agreed with Kennedy that strict scrutiny need not be applied to all race conscious programs. But they assumed that *Adarand* and *Grutter* required that strict scrutiny be applied in these cases; nonetheless, even under that strict standard, the dissent found these programs constitutional. Given the programs’ purpose—to encourage integration and decrease segregation—the scrutiny, while “strict,” should not be “fatal in fact.”\(^{42}\) As Justice Breyer noted for the dissenters:

> [These programs do not use race] to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. [They do not] stigmatize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.\(^{43}\)

That is where the law stands today. Race-conscious methods designed to fight segregation and increase integration are not per se unconstitutional. However, they are on thin-ice. In order to survive judicial scrutiny today, schools desiring to avoid becoming more racially segregated must design programs that accommodate Justice Kennedy’s idiosyncratic view.

Looking more philosophically at the arguments for and against affirmative action, it is clear that both sides agree on the ultimate goal. Ideally, all people should be treated the same, regardless of race; racial distinctions should generally be irrelevant. The disagreement is whether we have reached the point when, given our history and the effects of past discrimination, we can, should, and must abandon all such distinctions. Justice Marshall described the dispute well in his address to the Second Circuit Judicial Conference in September 1986:

> I believe all of the participants in the current debate about affirmative action agree that the ultimate goal is the creation of a color-blind society. From this common premise, however, two very different conclusions have apparently been drawn: The first is that race-conscious remedies may not be used to eliminate the effects of past discrimination in American society. This conclusion has been expanded into the proposition that courts and parties entering into

\(^{42}\) *Id.* at 2817-18 (Breyer, J., dissenting).

\(^{43}\) *Id.* at 2818.
consent decrees are limited to remedies which provide relief to identified individual victims of discrimination only. But the second conclusion which may be drawn from our common preference for a color blind society is that the vestiges of racial bias in America are so pernicious, and so difficult to remove, that we must take advantage of all the remedial measures at our disposal. The difference between these views may be accounted for, at least in part, by difference of opinion as to how close we presently are to the 'color-blind society' about which everybody talks.44

As Justice Marshall said, all agree the ultimate ideal goal is a colorblind society, but they differ on what path to take to get there. Justice Marshall clearly believed in what he called “the second conclusion.” As he said in his Second Circuit address:

Justice Harlan, . . . dissenting in *Plessy v. Ferguson*, gave the first expression to the judicial principle that ‘our constitution is color-blind and neither knows nor tolerates classes among citizens.’ If Justice Harlan’s views had prevailed, and *Plessy* been decided upon the principle of race neutrality, our situation now, 90 years later, would be far different than it is. Affirmative action is an issue today precisely needed because our constitution was not color-blind in the 60 years which intervened between *Plessy* and *Brown*.

Obviously, I too believe in a colorblind society; but it has been and remains an aspiration. It is a goal toward which our society has progressed uncertainly, bearing as it does the enormous burden of incalculable injuries inflicted by race prejudice and other bigotries which the law once sanctioned, and even encouraged. Not having attained our goal, we must face the simple fact that there are groups in every community which are daily paying the cost of the history of American injustice. The argument against affirmative action is but an argument in favor of leaving that cost to lie where it falls. Our fundamental sense of fairness, particularly as it is embodied in the guarantee of equal protection under the law, requires us to make an effort to see that those costs are shared equitably while we continue to work for the eradication of the consequences of discrimination. Otherwise, we must admit to ourselves that so long as the lingering effects of inequality are with us, the burden will be borne by those who are least able to pay.45

45. Id. at 352-53.
Yet Marshall did not blindly approve all affirmative action programs. He understood the downside of using racial differences and believed there should be some judicial scrutiny of such programs. In Marshall’s words:

This is not to say, of course, that affirmative remedies such as the establishment of goals, time tables, and all of that, in hiring, in promotion, or for protection of recently hired minority workers from the disproportionate effects of layoffs, are always necessary or appropriate. Where there is no admission or proof of past discriminatory conduct, or where those individuals whose existing interests may be adversely affected by the remedy have not had an opportunity to participate, serious questions arise which must be carefully scrutinized.46

Thus, Marshall advocated careful, or intermediate, scrutiny.47 Strict scrutiny was too demanding and rational review was too lenient. Intermediate—careful—scrutiny was just right. Under this standard of review, affirmative action programs are constitutional if the government proves the classification “serve[s] important governmental objectives and is substantially related to the achievement of those objectives.”48

Justice Thomas has spoken for those who disagree with Marshall. In Adarand, Thomas wrote:

[T]here is a “moral [and] constitutional equivalence” . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated . . . by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.

46. Id. at 353.
47. Id.
There can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination.49

Over time, many of the Justices who believed in what Marshall called the “second conclusion”—that is, those believing that affirmative action was still necessary—began to retire from the Court. At the same time, those who believed in the “first conclusion”—those generally opposed to governmental use of racial classifications—gained ascendancy. That is the best explanation for the results in the recent Seattle and Louisville school cases. As Justice Stevens noted in his dissent in the Seattle case: “It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”50

An essential difference between those like Marshall, who generally favor affirmative action, and those like Thomas, who oppose it, is a fundamental disagreement over *Brown v. Board of Education*52 and its interpretation of the Fourteenth Amendment’s requirement for “equal protection of the laws.”53

For Thomas, *Brown* means the law should be colorblind. As he wrote in the Seattle case:

What was wrong in 1954 cannot be right today. Whatever else the Court’s rejection of the segregationists’ arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court’s opinions was irrelevant to the *Brown* Court. The same principles guide today’s decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards’ race-based

49. *Adarand*, 515 U.S. at 240-41 (Thomas, J., concurring in part and concurring in the judgment).
51. Included among those Justices who favor affirmative action are Marshall, Brennan, Blackmun, Ginsburg, Breyer, Souter, Stevens, and White. Included among those opposed are Scalia, Rehnquist, Thomas, Roberts, Alito, Burger, and Stewart. As noted, Powell, O’Connor and Kennedy held somewhat intermediate views.
plans because no contextual detail . . . can “provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”

For Marshall (who had successfully argued for the plaintiffs in *Brown*) and his supporters, *Brown* means there should be no more discrimination and no more segregation; remedies should be aimed at integration. It does not mean there can be no race conscious efforts to promote integration. As Stevens said in his dissent in *Seattle*:

There is a cruel irony in The Chief Justice’s reliance on our decision in *Brown v. Board of Education*. . . . The first sentence in the concluding paragraph of [Robert’s] opinion states: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.” This sentence reminds me of Anatole France’s observation: “[T]he majestic equality of the law forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice re-writes the history of one of this Court’s most important decisions.

Justice Breyer, in his *Seattle* dissent, asked:

What of the hope and promise of *Brown*? For much of this Nation’s history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court’s finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of a true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

. . . Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the

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55. *Id.* at 2797-98 (Stevens, J., dissenting).
complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten the promise of Brown. The plurality’s position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.56

As noted earlier, all agree that, ideally, a colorblind society is the ultimate goal. The disagreement concerns what we can, and should, do now. Marshall and those voting like him assert we are not there yet and, accordingly, we may use race conscious methods, if necessary. Thomas and those voting with him assert that, whether or not we are there, the use of discrimination to get to a colorblind state is fundamentally wrong and unconstitutional.57

What accounts for the two different views articulated by Marshall and Thomas? Without attempting to be a psychoanalyst, I would suggest that different life experiences are highly relevant. Both Marshall and Thomas had confronted racial discrimination and both hated

56. Id. at 2836-37 (Breyer, J., dissenting).
57. Justice O’Connor characteristically took a somewhat modified position in these affirmative action cases, one closer to Marshall’s than to Thomas’s. In the University of Michigan Law School case, writing for the majority, O’Connor expressed the hope that in 25 years, such programs would no longer be necessary. As she said:

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. . . . It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (citations omitted). Thomas tried to make this reference to 25 years a deadline, saying: “It is difficult to assess the Court’s pronouncement that race-conscious admissions programs will be unnecessary 25 years from now.” Id. at 394 (Thomas, J., dissenting). But Justice Ginsburg made it clear that the majority had simply expressed a hope, not a deadline: “As lower school education in minority communities improves, an increase in the number of . . . students [who can meet admission standards without the need for affirmative action] may be anticipated. From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.” Id. at 346 (Ginsburg, J., concurring). See Carl Cohen & James P. Sterba, Affirmative Action and Racial Preference: A Debate (2003) (discussing the pros and cons of affirmative action).
those encounters. Marshall knew firsthand the experience of not being able to find a men’s restroom in downtown Baltimore or a hotel in most of the South.\footnote{See Williams, supra note 1, at 60 (describing a trip Marshall and Charles Hamilton Houston took to the south to investigate school facilities during which they stayed in private residences); see also id. at 106 (explaining how hotels would not accept black travelers on Marshall’s trips to the South on behalf of the NAACP).} He was barred from the University of Maryland Law School because he was black.\footnote{It is fitting to note that Howard University School of Law was the beneficiary of that decision by Maryland. Instead of Maryland, Marshall enrolled at Howard and graduated in 1933, first in his class. Fittingly, one of Marshall’s first legal actions after graduation was to sue the University of Maryland, challenging its discriminatory policies. And he won. See Pearson v. Murray, 169 Md. 478 (1936). Years later, when the University of Maryland dedicated its law library in Marshall’s honor and invited him to attend the opening, Marshall refused to attend. See Williams, supra note 1, at 371-73 (“[Justice Marshall] told [the dean of the law school] that since there had been no place for the young Thurgood Marshall at the school, he would not have anything to do with it now.”). When the dean invited other members of Court to the ceremony, Marshall wrote to his colleagues: “I will not go there. I am very certain that Maryland is trying to salve its conscience for excluding the Negroes from the University of Maryland for such a long period of time.” Juan Williams, Poetic Justice, N.Y. Times, Jan. 18, 2004, at A4.} As he traveled the country litigating against “separate but equal,” he had trouble finding places to stay and to eat.\footnote{One of my favorite Marshall stories is his account of a southern trip in which he had stopped off at a small Mississippi town and was contemplating an overnight stay: “I was out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip comes up. ‘Nigghu,’ he said, ‘I thought you oughta know the sun ain’t nevah set on a live nigghu in this town.’ So I wrapped my constitutional rights in cellophane, tucked ’em in my hip pocket . . . and caught the next train out of there.” Richard Kluger, Simple Justice 224 (1976).} Thomas, too, had experienced the pain of discrimination. Growing up in the heavily segregated deep-South of the 1940s and 50s, the “second class status [of blacks] was so firmly accepted,” Thomas said, “that no unpleasantness was needed to enforce it.”\footnote{Clarence Thomas, My Grandfathers Son: a memoir 31-35 (2007); see also Kevin Merida and Michael A. Fletcher, Supreme Discomfort: The Divided Soul of Clarence Thomas 61 (2007).} Like Marshall, he had experienced separate water fountains and exclusions from whites-only “parks, schools, restaurants, movie theaters, and libraries.”\footnote{Thomas, supra note 61, at 32.}

But, because Clarence Thomas was born 40 years after Marshall, his life experiences were different. Both had experienced racial discrimination, but Thomas, unlike Marshall, had personally experienced the downsides of affirmative action in his education, including its costs.\footnote{Id. at 86-87.} As he said in his autobiography, Thomas believed that affirmative action devalued his law degree from Yale University.\footnote{Id.} Describing his search for a job, Thomas explained:

\footnote{58. See Williams, supra note 1, at 60 (describing a trip Marshall and Charles Hamilton Houston took to the south to investigate school facilities during which they stayed in private residences); see also id. at 106 (explaining how hotels would not accept black travelers on Marshall’s trips to the South on behalf of the NAACP).
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60. One of my favorite Marshall stories is his account of a southern trip in which he had stopped off at a small Mississippi town and was contemplating an overnight stay: “I was out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip comes up. ‘Nigghu,’ he said, ‘I thought you oughta know the sun ain’t nevah set on a live nigghu in this town.’ So I wrapped my constitutional rights in cellophane, tucked ’em in my hip pocket . . . and caught the next train out of there.” Richard Kluger, Simple Justice 224 (1976).
62. Thomas, supra note 61, at 32.
63. Id. at 86-87.
64. Id.
One high-priced lawyer after another treated me dismissively, making it clear that they had no interest in me despite my Ivy League pedigree. Many asked pointed questions unsubtly suggesting that they doubted I was as smart as my grades indicated. A firm in Atlanta briefly seemed interested in me, then started to blow hot and cold, stringing me along with expressions of interest but refusing to make a commitment. . . . By late December I had yet to receive a single job offer. Now I knew what a law degree from Yale was worth when it bore the taint of racial preference. I was humiliated—and desperate.65

Thomas concluded: “Those blacks who benefited from [affirmative action] were being judged by a double standard. . . . But it was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements.”66

Those experiences clearly influenced Justice Thomas’s views of affirmative action throughout his years on the bench. In the University of Michigan Law case, he wrote:

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. . . . Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.67

Speaking more generally about affirmative action, Thomas opined in his separate opinion in *Adarand*:

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal

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65. Id.
66. Id. at 74-75.
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protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, “invidious [racial] discrimination is an engine of oppression,” . . . It is also true that “[r]emedial” racial preferences may reflect “a desire to foster equality in society.” But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called “benign” discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled” to preferences. 68

What can we learn from these observations? If nothing else, it seems clear that the life experiences of a judge affect his or her judicial views. In particular, experiencing discrimination and affirmative action seems to influence one’s opinions. 69 Thus, diversity on the Court, especially diverse life experiences, is extremely important. And of course, the ability to share those experiences is vital. Justice O’Connor explicitly applauded and appreciated Marshall’s stories about his experiences. In Thurgood Marshall: The Influence of a Raconteur, 70 Justice O’Connor noted:

Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and estab-

69. That seems clear, looking not only at the views of Marshall and Thomas, but also at those of Justices O’Connor and Ginsburg, especially in the areas of discrimination, affirmative action, and abortion. See Craig Joyce, Afterword: Lazy B and the Nation’s Court: Pragmatism in Service of Principle, 119 Harv. L. Rev. 1257, 1267 (2006) (“Her common sense approach to issues, while perhaps first formed in ranch days, had been honed . . . by her experience as a legislator and state court judge.”); see also Brenda Kruse, Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions, 36 U. Tol. L. Rev. 995, 1003 (2005) (“Although life experiences may not be overwhelmingly influential in Justice O’Connor’s and Justice Ginsburg’s opinions, the fact that both women were victims of sex discrimination may be the reason why the Justices frequently agree on Title VII cases.”). But exploring the views of Justices O’Connor and Ginsburg must be left to another paper.
lished safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them voice.  

Justice O’Connor illustrated her point with a typical Thurgood Marshall story:

I was particularly moved by a story Justice Marshall told during the time the Court was considering a case in which an African American defendant challenged his death sentence as racially biased. Something in the conversation caused his eyebrows to raise characteristically, and with a pregnant pause, to say: “That reminds me of a story.” And so it began, this depiction of justice in operation.

In conclusion, as we celebrate Thurgood Marshall’s 100th birthday, it is important to appreciate and applaud his uniquely valuable contributions to the Court. As one of the only members of the Court who had personally experienced race discrimination, who had defended real people on death row, who had seen innocent people convicted and poor people starve, Marshall was able to remind his brethren of the real world and its complexities. Sterile formulas de-

71. Id. at 1217.
72. Id. at 1218. According to O’Connor, Marshall then told of a client who was accused of raping a white woman. The government offered a life sentence in prison, instead of the death penalty, if the defendant agreed to plead guilty. Marshall recounted that the client adamantly refused to plead guilty. “Raping that woman? You gotta be kidding. I won’t [plead].” According to Marshall, that is when he knew his client was an innocent man. Nonetheless, the man was convicted. “But,” said Marshall, “he never raped that woman . . . . Oh well,” Marshall added, “he was just a Negro.” Id. That story helps to explain Marshall’s abhorrence of the death penalty. As he stated in Furman v. Georgia:

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our “beyond a reasonable doubt” burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death. . . . We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

408 U.S. 238, 366-68 (1972) (Marshall, J., concurring). Marshall believed that the death penalty was inherently cruel and unusual and thus a violation of the Eighth Amendment. Ultimately, Brennan, Blackmun, and Stevens agreed. See Linda Greenhouse, Death Penalty Is Renounced By Blackmun, N.Y. Times, Feb. 23, 1994, at A1 (“From this day forward, I no longer shall tinker with the machinery of death.”) Justice Blackmun, the Court’s 85-year-old senior member, wrote in an emotional, highly personal and solitary dissent from the Court’s refusal to hear the appeal of a Texas inmate. . . . Justice Blackmun’s tone was urgent, as if in the twilight of his career he wanted to reopen a dialogue on the death penalty that had all but disappeared from the Court with the retirements of Justices William J. Brennan Jr. and Thurgood Marshall, who both believed that the death penalty was inherently unconstitutional.”); see also Linda Greenhouse, After a 32-Year Journey, Justice Stevens Renounces Capital Punishment, N.Y. Times, Apr. 18, 2008, at A22.

73. When the Court upheld the imposition of a fifty dollar filing fee for a bankruptcy petition by minimizing the magnitude of the fee, Marshall dissent angrily. Noting that the “desperately poor almost never go to see a movie,” while the majority assume it to be “an almost
Marshall, The Prophetic Dissenter

tached from reality were, in his view, inadequate for the difficult issues that come before the Court. As Justice Byron White noted:

Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we know but would rather forget; and he told us much that we did not know due to the limitation of our own experience.74

Marshall, said Justice Kennedy, reminded his brethren of their “moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries.”75 Marshall’s best friend, Justice Brennan, summed it up best:

Justice Marshall’s persuasive voice made all of us more sensitive to the legacy of discrimination. As President Johnson predicted at the time of his nomination, placing Thurgood Marshall on the Court was “the right thing to do, the right time to do it, the right man and the right place.” This was true not only in the desegregation era, but also in later years, when questions such as affirmative action reached the Court.76

Let us hope that our future Presidents choose their appointees as wisely, nominating individuals with the breadth of knowledge, experience, and wisdom that Thurgood Marshall brought to the Court. Such appointments will be the ones that pay true homage to the legacy of Thurgood Marshall.


74. Byron White, A Tribute to Justice Thurgood Marshall, 44 STAN. L. REV. 1215, 1216 (1992); see also O’Connor, supra note 70, at 1217 (“At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.”).


76. Id.