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## JUSTICE THURGOOD MARSHALL: AN ANALYSIS OF HIS FIRST YEARS ON THE COURT, 1967-1971

RANDALL WALTON BLAND\*

Following a tradition begun by President Truman when he appeared at the swearing-in ceremony for Associate Justice Harold H. Burton in 1945, President Lyndon Johnson quietly took his seat in the "family section" close to the bench in the Supreme Court building. He watched intently as Thurgood Marshall swore to "administer justice without respect to persons, and do equal right to the poor and to the rich." Marshall was President Johnson's second appointee to the Court (Abe Fortas having been the first.) Seated next to the President on this warm morning in October 1967 was retired Supreme Court Justice Tom C. Clark, whose seat Marshall was assuming. The new Associate Justice, smiling broadly after taking the oath, was congratulated by Justice Byron R. White, who would sit nearest to him on the Court. At the conclusion of the five-minute ceremony, President Johnson strode quickly from the chambers, leaving Marshall and the other eight justices on the bench to admit 223 lawyers before the Court. The newcomer's face reflected justifiable pride as he nodded to members of his family, including his wife, Cecilia, and their sons, Thurgood Jr., eleven years old, and John William, nine. Few could have suspected at the time that the first four years Marshall was to serve on the Court would be marked by turmoil and transition.

### THE WARREN YEARS: 1967-1969

The addition of Marshall to the Court to replace Tom Clark strengthened the "liberal" majority to include Warren, Fortas, Brennan, Douglas, Marshall, and in most cases, Black, while the erstwhile "conservatives" were reduced to three: Harlan, Stewart, and White. Aside from the health of Douglas and Black, there was no reason to doubt that the philosophical thrust of the activist Warren Court would remain intact for some time. Indeed, an examination of the new Associate Justice's voting behavior

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during his first two terms shows very little deviation from the other members of the "liberal" bloc.

During the 1967 term 110 opinions were written in disposing of the cases argued before the Court. Of these, Marshall wrote ten majority opinions, three concurring opinions, one dissenting opinion and joined with the majority in thirty-nine others. Having served as Solicitor General, the new Associate Justice did not participate in fifty-seven cases in which the government had an interest.<sup>1</sup>

Of Marshall's majority opinions during the term, five were of such constitutional significance as to bear close examination; three in the area of First Amendment freedoms and two cases dealing with the rights of the accused. In *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), Marshall, speaking for a majority of the Court, with Associate Justice Harlan dissenting, held that a city ordinance establishing a motion picture classification board to classify films as suitable or not suitable for young persons under sixteen years old violated the First and Fourteenth Amendments on the grounds of vagueness. Under the terms of the ordinance, the board was to classify as "unsuitable" any film which described or portrayed "sexual promiscuity or extra-martial or abnormal sexual relations in such a manner as . . . likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interests." Upon objection of the exhibitor as to the classification, the board was required to file suit to enjoin the showing of the picture, which thereafter was subject to de novo review. In this case the court found as "not suitable" the film "Viva Maria" without giving reasons for its determination. After a de novo hearing, an injunction was issued by the trial court to prevent showing of the film.

In delivering the opinion of the Court, Marshall noted in part:

The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and states. . . .

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<sup>1</sup> For a concise description of the work of the Court each term, see Paul C. Bartholomew, "The Supreme Court of the United States," *Western Political Quarterly*, December 1968, December 1969, March 1970, December 1971. Among the more significant cases in which Marshall did not participate were *United States v. Robel*, 389 U.S. 258 (1967); *Katz v. United States*, 389 U.S. 347 (1967); *Schneider v. Smith*, 390 U.S. 17 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968); *Avery v. Midland County, Texas*, 390 U.S. 474 (1968); and *United States v. O'Brien*, 391 U.S. 367 (1968).

The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

The Associate Justice went on to state that the problem of vagueness inherent in such terms as "sexual promiscuity" is not solved by affording de novo review, since such "standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial." Noting the specific and limited concern of the ordinance to juveniles, in compliance with *Freedman v. Maryland*, 380 U.S. 51 (1965), Marshall nevertheless concluded:

Vagueness and [its] attendant evils . . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression. . . . Nor it is an answer . . . to say that it was adopted for the solitary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

In *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), the Court was concerned with a related question as to whether the peaceful picketing of private property devoted to a public use is protected by the free speech provision of the First and Fourteenth Amendments. Answering in the affirmative, Marshall, in a 6-3 decision (Justices Black, Harlan, and White dissenting in separate opinions), held that a union may peacefully picket a business enterprise located within a shopping center without constituting an unconstitutional invasion of property rights:

We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment. . . . To be sure, this Court has noted that picketing involves elements of both speech and conduct, i.e., patrolling. . . . Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects . . . are so great as to render the provisions of the First Amendment inapplicable to it altogether.

Accordingly, and with reference to *Thornhill v. Alabama*, 310 U.S. 88 (1940), the Associate Justice concluded:

. . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise

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their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

The third speech case—*Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968)—concerned the dismissal of a high-school teacher for publicly criticizing a policy decision of the local board of education. Marvin Pickering of Illinois had been dismissed by the board for writing and publishing in a newspaper a letter which attacked the board's allocation of school-bond funds between educational and athletic programs and its methods of preventing disclosure of the "real reasons" why additional tax revenues were being sought for the schools. After a hearing, the board found the contents of the letter to be false and "detrimental to the efficient operation and administration of the schools of the district." Pickering was dismissed in the "interests of the school." The Illinois Supreme Court upheld the dismissal, rejecting the teacher's claim that the letter was protected by the First and Fourteenth Amendments. In an 8-1 decision (Justice White dissenting in part), the Supreme Court of the United States reversed. Speaking for the majority, Marshall stated in part:

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. . . . The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

In the conclusion of his opinion, the Associate Justice directed his attention to the charge that certain statements made by Pickering were false and thus "damaging" to his position as a teacher:

What we do have before us is a case in which a teacher had made erroneous public statements upon issues then currently the subject of public attention . . . but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally . . . we conclude that the interest of

the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

The two remaining opinions delivered by Marshall which warrant discussion are *Barber v. Page*, 390 U.S. 719 (1968) and *Powell v. Texas*, 392 U.S. 514 (1968). In the former case Barber was convicted of armed robbery in Oklahoma primarily on the basis of incriminating statements made by his accomplice at a preliminary hearing. At the time of Barber's trial the accomplice was confined to federal prison in Texas. The prosecution, while making no effort to obtain the presence of the witness at the trial, introduced a transcript of the preliminary hearing as evidence, over the objection of the defense attorney that its admission violated the right of confrontation of witnesses as protected by the Sixth and Fourteenth Amendments. The contention was rejected by the federal district court and the Court of Appeals. In a 9-0 decision, the Supreme Court reversed and remanded the case for further proceedings. In delivering the opinion of the Court, Marshall stated:

The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of testimony at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not . . . such a case.

In the latter case the Court, in a 5-4 decision (Justices Douglas, Brennan, and Stewart joining Justice Fortas in dissent), rejected the appellant's claim that a state's conviction of a chronic alcoholic on the ground of being "found drunk or in a state of intoxication in a public place" violated the Eighth and Fourteenth Amendments. Powell, the appellant, based his claim on *Robinson v. California*, 370 U.S. 660 (1962), in that chronic alcoholism constitutes a disease and that imprisonment under the circumstances described, results in a cruel and unusual punishment.<sup>2</sup>

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<sup>2</sup> In *Robinson* the Court had held a California law providing criminal punishment for drug addiction, as opposed to illegal possession or sale, to be an imposition of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

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While recognizing "the comparatively primitive state of our knowledge" on the nature of alcoholism, the Court refused to draw a parallel between the contentions made in the present case and those made in *Robinson*. Marshall noted:

... we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one [but] . . . This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

An examination of Marshall's first term on the Court clearly demonstrates a high degree of cohesion in his behavior with the other members of the "liberal" bloc which bore fruit in a number of significant decisions. Indeed, the only dissent he authored during the term was in a case in which the majority held void the Massachusetts sales tax and use tax as applied to national banks.<sup>3</sup>

When the Court adjourned on June 17, 1968, Chief Justice Warren tendered his resignation on the condition that the Senate confirm President Johnson's nomination of Associate Justice Abe Fortas as his successor. The President, known to be a close associate of Fortas, also nominated his old friend Federal Judge Homer Thornberry of Texas to fill the vacant slot on the Court. A political controversy of the first magnitude developed after a disclosure of the financial indiscretions of Justice Fortas during his tenure on the Court. With increasing charges of "cronyism" in the selection of the two men by the President, both withdrew their names from consideration prior to the Senate vote. Fortas was moved to resign from the Court altogether on May 14, 1969.

The performance of the Supreme Court itself became an issue in the presidential election of 1968. Opponents of the Warren Court openly accused the "liberal" majority of causing a breakdown of law and order

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<sup>3</sup> *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968); *Flast v. Cohen*, 392 U.S. 83 (1968); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968). Associate Justices Harlan and Stewart joined in the dissenting opinion, *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968).

in the United States by its decisions expanding the rights of the accused in criminal cases at the expense of the victims and the police. Prior to his election, Richard M. Nixon announced that if elected, he would appoint

. . . strict constructionists who saw their duty as interpreting law not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social and political viewpoints upon the American people.<sup>4</sup>

Of course Nixon's statement encompassed the view of one side of the age-old argument on the role of the Court in our constitutional framework; in the political context of the campaign, however, the implication was clear—if he were elected, his nominees would preferably be “conservative,” practitioners of judicial self-restraint, Southern, and Republican. With the passage of time and the development of events, it became evident that Thurgood Marshall was to be the last appointee to the Supreme Court not subjected to a maximum amount of public and political scrutiny.

The 1968 term served as the last for the Warren Court, and apparently the political controversy surrounding that body had little effect in blunting the liberal thrust of its decisions. Again Mr. Justice Marshall joined consistently with his liberal brethren in most of the decisions handed down by the Court. Out of 99 written opinions delivered during the term, the Associate Justice dissented in six; concurred in three; and joined in the majority opinion on 66 occasions. As expected, Marshall participated more fully in his second term than in his first by taking part in the deliberation of all but eleven written opinions. During the term, the Associate Justice wrote thirteen majority opinions, of which two bear some measure of attention.<sup>5</sup>

The first involved Stanley, a citizen of Georgia, who was arrested for possession of obscene material in violation of state law. The arrest took

<sup>4</sup> Speech of November 2, 1968, as cited in *Congressional Quarterly, Weekly Report*, May 23, 1969, p. 798.

<sup>5</sup> Marshall dissented in *United States v. Container Corporation of America*, 393 U.S. 333 (1969); *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Boulden v. Holman*, 394 U.S. 478 (1969); *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62 (1969); *Harrington v. California*, 395 U.S. 250 (1969); *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969). He concurred in *Commonwealth Coatings Corporation v. Continental Casualty Company*, 393 U.S. 145 (1968); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Carolina v. Pearce*, 395 U.S. 711 (1969). Included among the more important cases in which Marshall took no part were *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Alderman v. United States*, 394 U.S. 165 (1969); *Kaufman v. United States*, 394 U.S. 217 (1969); *Desist v. United States*, 394 U.S. 244 (1969).



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place after federal and state forces had searched his home under the authority of a warrant to search for evidence of his alleged bookmaking activities. Finding little evidence of bookmaking, the officers found in his bedroom three reels of eight-millimeter film which, after viewing, they found to be obscene. The Supreme Court of Georgia upheld Stanley's conviction and based the validity of the state statute on the Court's opinion in *Roth v. United States*, 354 U.S. 476 (1957), that "obscenity is not within the area of constitutionally protected speech or press." In a 9-0 decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), the Supreme Court of the United States reversed the state court's judgment and remanded the case for further proceedings. Speaking for the majority, Justice Marshall noted in part:

. . . we do not believe that this case can be decided simply by citing *Roth*. *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. . . . That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

In concluding his opinion, the Associate Justice focused on the rights claimed by the appellant:

He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

In the second case, *Benton v. Maryland*, 395 U.S. 784 (1969), the Court, in a 7-2 decision, held that the double-jeopardy prohibition of the Fifth Amendment is a fundamental ideal in our constitutional heritage and is enforceable against the states through the Due Process Clause of the Fourteenth Amendment. In overruling the thirty-two year precedent established in *Palko v. Connecticut*, 302 U.S. 319 (1937), Mr. Justice Marshall, speaking for the majority, expressed a viewpoint he had held

for some time, as was made clear in his majority opinion in *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (1955).

*Palko* represented an approach to basic constitutional rights which this court's recent decisions have rejected . . . that [they] can be denied by the States as long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is "fundamental to the American scheme of justice" . . . the same constitutional standards supply against both the State and the Federal governments. *Palko's* roots had thus been cut away years ago. We today only recognize the inevitable.

The Associate Justice also joined with the majority in a number of otherwise significant decisions during the 1968 term. An 8-1 majority held Ohio's requirements for a new political party, to be placed on the ballot for the general election as applied to the American Independent Party of George Wallace, violated the Equal-Protection clause of the Fourteenth Amendment. In a 9-0 decision the Court upheld the right of a racist organization to express its provocative views at a public rally, even though a tense atmosphere existed at the time. Marshall joined with six of his colleagues in holding that secondary-school children do have basic free-speech rights and cannot be suspended for wearing black armbands showing their opposition on America's involvement in Vietnam. A 6-3 majority struck down the one-year residency requirement of Connecticut as a prerequisite for payment to welfare recipients. Finally, he joined the majority in a 5-4 per curiam decision in which the Court overruled *Whitney v. California*, 274 U.S. 357 (1927), to invalidate the Ohio Criminal Syndicalism Statute as applied to state punishment of the advocacy of violent acts.<sup>6</sup>

On May 4 Marshall delivered an address to the students of Dillard University in New Orleans which attracted national attention. Recalling the urban rioting which had occurred during the past year and the rising frustrations of more militant Negroes, he reaffirmed his belief that individuals and groups can best obtain their objectives through the legitimate channels of the judicial and legislative processes. Warning his young Negro audience against the self-defeating use of force and violence, the Associate Justice stated:

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<sup>6</sup> *Williams v. Rhodes*, 393 U.S. 23 (1968); *Carroll v. President and Commissioners of Prince Anne*, 393 U.S. 175 (1968); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); and *Brandenberg v. Ohio*, 395 U.S. 444 (1969).

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I know that you have to look to our government and our institutions. . . . Why demonstrate if you don't know what you're demonstrating for? . . . I say that because I am a man of the law, and in my book, anarchy is anarchy is anarchy.<sup>7</sup>

By the end of the term President Nixon was given the opportunity to live up to his campaign pledge to "balance" the Court by the resignations of Abe Fortas and Chief Justice Warren; despite the political controversy which had surrounded the Johnson nominations, Nixon had little trouble in winning Senate confirmation for his first nominee, Warren Earl Burger. The former Judge of the U.S. Court of Appeals for the District of Columbia, known as a moderate on civil rights who opposed the direction of the Court in criminal cases, was easily confirmed by the Senate to succeed Earl Warren as Chief Justice on June 9, 1969. Thereafter the President's troubles began.

In attempting to fill the seat vacated by Fortas, President Nixon twice tried to appoint Southerners to the Court and failed on each occasion. On November 22, 1969, the Senate rejected the nomination of Clement F. Haynsworth, Jr., a conservative federal judge on the Court of Appeals, Fourth Circuit, from South Carolina, by a vote of 55-45. Critics of Haynsworth cited conflict of interest based on his huge diversified financial holdings, as well as his supposed anti-labor, anti-civil-rights voting record. The Haynsworth nomination was so politically unpalatable to the Senate that seventeen members of the President's own party voted against confirmation. The President's second choice, G. Harrold Carswell, a federal judge from Florida, also a Southern conservative, suffered a similar fate. Carswell, his opponents charged, was racially biased and simply not qualified for the appointment. On April 9, 1970, the Senate by a vote of 51-45 defeated his bid for confirmation. Nixon, accusing the Senate of prejudice against the South, finally nominated Federal Judge Harry A. Blackmun of Minnesota, who was confirmed by the Senate with little difficulty shortly thereafter.

Although President Nixon's later selections of Louis Powell and William Rehnquist to fill the vacated seats of Associate Justices Hugo Black and John M. Harlan were approved by the Senate, confirmation came only after close and detailed examinations of their backgrounds. The Senate has served notice that henceforth appointments to the High Court would

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<sup>7</sup> "A Supreme Court Justice's Warning to Fellow Negroes," *U.S. News and World Report*, May 19, 1969, pp. 92-93.

be subject to public scrutiny and would not be solely within the presidential prerogative.

#### THE BURGER COURT: 1969-1971

The 1969 term was somewhat unusual: not only did the Court have a new Chief Justice, but it also functioned with only eight members for most of the term, until Harry Blackmun took his seat on June 9, 1970. There was nothing unusual about the philosophical direction of the Court's opinions during the term, however. The replacement of Burger for Warren did not realign the voting pattern of the Court to any noticeable degree.

In examining Marshall's behavior during the term, it is sufficient to note that with few exceptions he voted with the "liberal" bloc. Out of eighty-eight written opinions during the term, the Associate Justice wrote ten majority opinions, including an opinion in chambers as Circuit Justice for the Seventh Circuit, dissented on four occasions, concurred in four, took no part in ten, and joined with the majority view in sixty-one decisions.<sup>8</sup>

Only one of Marshall's opinions for the majority is sufficiently noteworthy to warrant description. Cornman and others lived on the grounds of the National Institutes of Health (NIH), a federal enclave in Montgomery County, Maryland. In October 1968 they were declared by the Permanent Board of Registry not to be qualified voters under Article I, Section I of the state constitution. They brought suit against the members of the Board, requesting that a three-judge district court be convened to enjoin as unconstitutional the application of the state residency law. The district court issued a temporary restraining order to allow the plaintiffs to vote in the 1968 general election, holding that to deny these registered persons the right to vote violated the Equal Protection Clause of the Four-

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<sup>8</sup> The opinion in chambers was *Brussel v. United States*, 396 U.S. 1229 (1969). Marshall dissented in *Dandridge v. Williams*, 397 U.S. 471 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Williams v. Florida*, 399 U.S. 78 (1970). He concurred in *Turner v. United States*, 396 U.S. 398 (1970); *Ashe v. Swenson*, 397 U.S. 436 (1970); *Dickey v. Florida*, 398 U.S. 30 (1970); *Nelson v. George*, 399 U.S. 224 (1970). Among the more significant of the cases in which he joined the majority were *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Evans v. Abney*, 396 U.S. 435 (1970); *Illinois v. Allen*, 397 U.S. 337; *In re Winship*, 397 U.S. 358 (1970); *Hoyt v. Nebraska*, 397 U.S. 524 (1970); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Schacht v. United States*, 398 U.S. 58 (1970); *Welsh v. United States*, 398 U.S. 333 (1970).

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teenth Amendment. In an 8-0 decision in *Evans v. Corman*, 398 U.S. 419 (1970), with Justice Blackmun not participating the Court affirmed. Speaking for the Court, Marshall noted in part:

In their day-to-day affairs, residents of the NIH grounds are just as interested in and connected with electoral decisions as they were prior to 1953 when the area came under federal jurisdiction and as are their neighbors who live off the enclave. In nearly every election, federal, state, and the local, for offices from the Presidency to the school board, and on the entire variety of other ballot propositions, [they] have a stake equal to that of other Maryland residents . . . they are entitled under the Fourteenth Amendment to protect that stake by exercising the equal right to vote.

Still other cases may further illuminate Marshall's performance during the term. In *Evans v. Abney*, 396 U.S. 435 (1970), Marshall joined five of his colleagues, with Douglas and Brennan dissenting, in upholding the Georgia Supreme Court's decision which in effect reverted a tract of land that had originally been willed to Macon, Georgia, as a park for the exclusive use of white persons, to the heirs of the deceased. The Court agreed that its decision in *Evans v. Newton*, 382 U.S. 296 (1966), four years earlier had rendered impossible the accomplishment of the sole purpose of the deed. In *Dandridge v. Williams*, 397 U.S. 471 (1970), a five-man majority with Douglas, Marshall, and Brennan in dissent, upheld Maryland's ceiling on the total amount of welfare payments to be received by a family unit, irrespective of the size of the family, as being consistent with the purposes of the Social Security Act and not violative of the Equal Protection Clause. Marshall, joined by Brennan, disagreed; he found the state regulation to be "fundamentally in conflict" with the Social Security Act. The Associate Justice continued:

More important in the long run than this misreading of a federal statute, however, is the Court's emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration. The Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects.

In a 7-1 decision in *Williams v. Florida*, 399 U.S. 78 (1970), the Court held, inter alia, that the "trial by jury" provision of the Sixth and Fourteenth Amendments does not forbid states from requiring the use

of a six-man jury for noncapital cases. Marshall dissented from this holding on the basis of the Court's decision in *Thompson v. Utah*, 170 U.S. 343 (1898) that "the jury guaranteed by the Sixth Amendment consists of twelve persons, neither more nor less." The Associate Justice joined his colleagues in the per curiam opinion of *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), which held that it is "the obligation of every school district . . . to terminate dual schools." The Court went on to say that "all motions for additional time" should be denied by the lower courts, since "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible." Finally, in *Welsh v. United States*, 398 U.S. 333 (1970), Marshall joined with four of his brethren—White, Burger, and Stewart dissented and Blackmun abstained—in holding that a registrant's conscientious objection to all war is "religious" within the meaning of Section 6 (j) of the Universal Military Training and Service Act if this objection stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and if these beliefs are held with the strength of traditional religious convictions.<sup>9</sup>

It should be noted that by the time the Court adjourned on June 29, 1970, Justice Blackmun had joined with the Chief Justice in every major decision. The possibility that a "conservative" majority consisting of Harlan, Stewart, White, Blackmun, and Burger, and occasionally Black, would noticeably alter the philosophical direction of the Court's decisions was to become a reality.<sup>10</sup>

Indeed, if one were forced to draw an ideological line of demarcation between the Warren and Burger Courts, it would properly be drawn with the 1970 term. Though a number of important decisions rendered during the term were "liberal" in orientation, the trend was decidedly toward the "conservative" point of view. Marshall's behavior during the term adequately serves to lend credence to this assertion. An examination of the 109 written opinions of the Court shows that Marshall dissented on 28 occasions, a number in excess of 25 percent. He most frequently paired with Justices Douglas and Brennan—perhaps a portent of a "dissenting

<sup>9</sup> The case was controlled by the Court's decision in *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>10</sup> Blackmun's participation was limited, not only by the fact that it was his first term, but also by his having joined the Court near the term's end. His most noteworthy attempt during this period was his dissenting opinion with the Chief Justice and Justice Harlan in *Hoyt v. Minnesota*, 399 U.S. 524 (1970).

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bloc" to come. On the other hand, the Associate Justice wrote nine majority opinions; concurred in six; took no part in one; and joined in the majority opinion in 65.<sup>11</sup>

Certainly the most important of Marshall's majority opinions delivered during the term was in *Gillette v. United States*, 401 U.S. 437 (1971), together with *Negre v. Larsen et al.* The two petitioners, Gillette and Negre, based their claim to conscientious-objector status on their objection to participation in the Vietnam conflict as an "unjust" war, but not to participation in all wars. They challenged the validity of Section 6 (j) of the Selective Service Act, which requires objectors to be opposed "to participation in war in any form" as violative of the free exercise and establishment of religion clauses of the First Amendment.

In an 8-1 decision, with Justice Douglas in dissent, the Court rejected the claims of the petitioners. Marshall, speaking for the Court, expressed the view that Congress had the authority to decide in Section 6 (j) "that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a

<sup>11</sup> See Bartholomew, "The Supreme Court of the United States, 1970-1971," *Western Political Quarterly*, December, 1971. Nearly half the cases in which Marshall dissented were those involving the rights of the accused and criminal procedure. In five decisions, the question concerned First Amendment freedoms. See *North Carolina v. Alford*, 400 U.S. 25 (1970); *Dutton v. Evans*, 400 U.S. 74 (1970); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Bulk Carriers v. Arquelles*, 400 U.S. 351 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Law Students v. Wadmond*, 401 U.S. 154 (1971); *Harris v. New York*, 401 U.S. 222 (1971); *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971); *Labine v. Vincent*, 401 U.S. 532 (1971); *Williams v. United States*, 401 U.S. 646 (1971); *United States v. White*, 401 U.S. 745 (1971); *Hill v. California*, 401 U.S. 797 (1971); *Rogers v. Bellei*, 401 U.S. 815 (1971); *Rosenberg v. Yee Chien Woo*, 402 U.S. 49 (1971); *United States v. Vuitch*, 402 U.S. 62 (1971); *Ehlert v. United States*, 402 U.S. 99 (1971); *James v. Valtierra*, 402 U.S. 137 (1971); *McGautha v. California*, 402 U.S. 183 (1971); *United States v. Photographs*, 402 U.S. 363 (1971); *California v. Byers*, 402 U.S. 424 (1971); *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Gordon v. Lance*, 403 U.S. 1 (1971); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Whitecomb v. Chavis*, 403 U.S. 124 (1971); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *United States v. Harris*, 403 U.S. 573 (1971); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971). The total number of dissenting opinions during the term was ninety-one, the highest number in ten years. Opinions in which Marshall concurred during this term were *Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 37 (1971); *Mackey v. United States*, 401 U.S. 667 (1971); *United States v. Reidel*, 402 U.S. 351 (1971); *Early v. Di Censo*, 403 U.S. 602 (1971). Among the more significant cases decided during the term in which Marshall joined in the majority were *Wisconsin v. Constantineau*, 400 U.S. 433 (1970); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Tate v. Short*, 401 U.S. 395 (1971); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Bell v. Burson*, 402 U.S. 535 (1971); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Griffin v. Breckenridge*, 403 U.S. 88 (1971); and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

particular war does not.” With respect to the claims that the section violated First Amendment guarantees, the Associate Justice concluded:

... our analysis of § 6 (j) shows that the impact of conscription on objectors to particular wars is far from unjustified. The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work penalty against any theological position. The incidental burdens felt by persons in petitioners’ position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government’s interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.

In a number of important decisions Marshall’s joining with the majority was a crucial factor. One case which attracted a great deal of public attention was *Oregon v. Mitchell*, 400 U.S. 112 (1970), which centered on the constitutionality of three provisions of the Voting Rights Act of 1970; these lowered the minimum age of voters in both state and federal elections from twenty-one to eighteen; barred the use of literacy—and similar requirements for eligibility—for a five-year period in state and federal elections in areas where this was not already prohibited by the Voting Rights Act of 1965; and forbade states from disqualifying voters in presidential and vice-presidential elections for failure to meet state residency requirements and provided uniform national rules for absentee voting in such elections. In an opinion by Black, the Court upheld the second provision by a 9-0 margin and the third provision with Harlan in dissent; the Court split drastically over the question of lowering the voting age to eighteen in state and federal elections, however. With Justice Black providing the “swing” vote and Burger, Blackmun, Harlan, and Stewart dissenting, the Court voted 5-4 to uphold the section applying to federal elections as a “necessary and proper” power of Congress under Article I, Section 4, and Article II, Section 1, but voiding the section applying to state elections, since the constitution reserves the power to the states. Dissenting in part, Brennan, White, Marshall, and Douglas felt that there was ample evidence to support the contention of Congress that it could lower the voting age in state elections in order to enforce that Equal Protection Clause of the Fourteenth Amendment. In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), Black joined by Douglas, Brennan, and Marshall—with Stewart filing a concurring opinion, and Burger, Blackman, Harlan, and White dissenting—held that a state bar committee’s power



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to inquire about an applicant's beliefs or associations, including membership in the Communist party, is limited by the First and Fourteenth Amendments, which prohibit excluding a person from the legal profession solely because of membership in a political organization or because of his beliefs. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the decision turned on the reasonableness of a search. Edward Coolidge had been convicted of murder on the basis of evidence obtained by a search of his car under the authority of a warrant issued by the attorney general acting as justice of the peace. Coolidge objected to admission of the evidence at the trial on the ground that the attorney general had not only assumed charge of the investigation but was also the chief prosecutor in the case. The evidence was admitted, and Coolidge was convicted. On appeal, the New Hampshire Supreme Court affirmed. Justice Stewart, speaking for the majority—Black, Blackmun, White, and Burger dissenting—held that the search warrant did not satisfy the requirements of the Fourth and Fourteenth Amendments because it was not issued by a “neutral and detached magistrate.” The judgment was reversed, and the case was remanded for further proceedings not inconsistent with the Court's opinion. In what turned out to be the most sensational case of the term, the Court in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (together with *United States v. Washington Post Company*) held, per curiam, that the United States government had not met the “heavy burden of showing justification” in seeking to enjoin publication by the press of a classified study entitled “History of U.S. Decision-Making Process on Viet Nam Policy” and better known as the Pentagon Papers. Burger, Harlan, and Blackmun wrote separate dissenting opinions, while each of the remaining Justices wrote concurring opinions. Marshall, supporting the Court's decision, pointed out:

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues—to overrule Congress.

In a no less significant decision, but one in which Marshall's vote was not critical—*Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1—the Court, by a 9-0 vote, upheld a federal district order requiring

the use of busing to bring about integration of the Charlotte-Mecklenburg, North Carolina, school system. Chief Justice Burger, in delivering the opinion of the Court, stated that the district courts have broad discretion in ending dual school systems, including "bus transportation as one tool of school desegregation."<sup>12</sup>

Finally, five of Marshall's dissents during the term best typify the increasingly conservative coloration of the Court's decisions. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court upheld the use of hearsay evidence concerning the incriminating statements of a co-conspirator made out of court in order to convict an accomplice of first-degree murder. Mr. Justice Stewart, in delivering the 5-4 decision, felt that, since there were nineteen other witnesses for the prosecution, the admission of the statement into evidence did not violate the defendant's right to confrontation of witnesses under the Sixth and Fourteenth Amendments, since it bore "indicia of reliability" that fully warranted its being placed before the jury. In dissent, Marshall joined by Black, Douglas, and Brennan, felt that the defendant was entitled to a new trial:

If "indicia of reliability" are so easy to come by, and prove so much, then it is only reasonable to ask whether the Confrontation Clause has any independent vitality at all in protecting a criminal defendant against the use of extrajudicial statements not subject to cross-examination . . . I believe the Confrontation Clause has been sunk if any out-of-court statement bearing an indicium of a probative likelihood can come in, no matter how damaging the statement may be or how great the need for the truth-discovering test of cross-examination.

In contrast to its decision in *Baird*, the Court in *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971), in a 5-4 decision upheld New York's requirement that prior to admission to the state bar the applicant must show that he possesses "the character and general fitness" to be an attorney. He must take an oath that he will support the United States and New York Constitutions. Marshall, joined by Brennan, dissented on the ground that the requirement "overreaches legitimate concerns and places an impossible burden on the exercise of fundamental rights." (Douglas joined Black in an additional dissent.) Noting that he would not upset the rule calling for an inquiry as to the "fitness" of applicants, the Associate Justice continued:

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<sup>12</sup> For related cases see *North Carolina State Board v. Swann*, 402 U.S. 43 (1971), and *Davis v. Board of School Commissioners*, 402 U.S. 33 (1971).

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New York is not content with a politically neutral investigation into the fitness of Bar applicants to practice law. Screening officials are specifically directed by state law to assess an applicant's political beliefs and loyalties, and to scrutinize his associational and other political activities for signs that the applicant holds certain viewpoints. Such an inquiry, in my view, flatly offends the First Amendment, and state laws or administrative rules which license such an inquiry must be struck down.

In *James v. Valtierra*, 402 U.S. 137 (1971), the Court by a 5-3 vote upheld the validity of Article XXXIV of the California constitution which prohibited the development, construction, or acquisition by any state public body of a low-rent housing project without the approval of a majority of those voting at a community election. Mr. Justice Black, speaking for the Court, stated that the procedure for mandatory referenda, which is not limited solely to low-cost housing proposals, ensures democratic decision-making and does not violate "equal protection of the laws" as guaranteed by the Fourteenth Amendment. Justice Douglas abstained, while Justices Brennan and Blackmun joined Marshall in dissent; this was the first major case, incidentally, in which Justice Blackmun split with the Chief Justice. In his opinion, Marshall attacked the provision because it "explicitly singles out low-income persons to bear its burden," since prior referenda need not be held for public housing for the aged, veterans, state employees, and others. He concluded:

... after observing that the article does not discriminate on the basis of race, the Court's only response to the real question in these cases is the unresponsive assertion that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." It is far too late in the day to contend that the Fourteenth prohibits only racial discrimination; and to me, singling out the poor to bear a burden . . . tramples the values that the Fourteenth . . . was designed to protect.

In a related case, *Palmer v. Thompson*, 403 U.S. 217 (1971), the Court in a 5-4 decision held that the City Council of Jackson, Mississippi, could close four of its public swimming pools rather than comply with federal court orders to desegregate them, on the claim that the pools could not be operated safely and economically on an integrated basis without violating the Fourteenth Amendment.<sup>13</sup> Nor, in the opinion delivered by Justice Black, could the Court find the action of the City Council in surrendering its lease on the fifth pool to the YMCA, which continued to op-

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<sup>13</sup> The city council did desegregate its other public recreational facilities, including its five public parks.

erate it on a segregated basis, a violation of the Equal Protection Clause. Associate Justices Marshall, White, Brennan, and Douglas felt otherwise. In his dissenting opinion, Marshall, joined by Brennan and White, held the view that if the logic put forth by the City Council, and accepted by the majority, were to be extended, then "schools or even golf courses could be closed." Marshall stated:

By effectively removing publicly owned swimming pools from the protection of the Fourteenth Amendment—at least if the pools are outside school buildings—the majority and concurring opinions turn the clock back 17 years. After losing a hard fought legal battle to maintain segregation in public facilities, the . . . authorities now seek to pick and choose which of the existing facilities will be kept open. Their choice is rationalized on the basis of economic need and is even more transparent than putting the matter to a referendum vote.

In the last case to be discussed—*Tilton v. Richardson*, 403 U.S. 672 (1971)—the Court held valid all but one of the provisions of the Higher Education Facilities Act of 1963, which provides federal construction grants for colleges and university facilities excluding those "used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity." However, Chief Justice Burger, speaking for the majority, invalidated the provision limiting federal interest in the facilities (to a period of twenty years) as violative of the religion clauses of the First Amendment, since this would result in a contribution to a religious body. While agreeing with the latter portion of the Court's decision, Douglas, joined by Black and Marshall (Justice Brennan filed a separate dissent) dissented on the grounds "that even a small amount coming out of the pocket of taxpayers" and going into the coffers of church-supported schools is not "in keeping with our constitutional ideal."

When the Court adjourned on June 30, 1971—the latest adjournment date since 1958—the profound feeling prevailed that the Burger Court had begun to stamp its imprint on American constitutional history—an imprint much more "conservative" and restraintist in coloration than that of the Court under Earl Warren. In the four terms that had passed since Marshall had taken his seat, the "liberal" majority of five had become a minority of three. The addition of Associate Justices Powell and Rehnquist to fill the seats vacated by Black and Harlan at the beginning of the 1971 term, coupled with the ages of Douglas (seventy-three), Brennan (sixty-

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five), and Marshall (sixty-three), make it probable that the swing of the ideological pendulum had just begun. As he was re-elected, President Nixon will probably have the opportunity to name three other justices to the High Court in addition to the four he has already selected. In that case the Court will be "balanced" for some time to come.

As to Marshall's performance as an Associate Justice thus far, one is forced to be less than complimentary. This evaluation is made with full realization that as a junior member of the Court, particularly during the first two terms, he has probably had few opportunities to make a significant contribution. In addition, Marshall has not always been in the best of health; his participation on the Court was sharply curtailed by severe illness during the latter part of the 1969 term. Nevertheless, by any reasonable standard of objectivity, a review of the sixty opinions contributed by Marshall during his first four terms discloses a noticeable lack of judicial scholarship.<sup>14</sup> In the main, his opinions included many, usually lengthy quotations from cited cases; they presented precious little original thought or distinguished conceptualizations. In all fairness, essentially the same criticism could be leveled at most of the justices who have served on the Supreme Court since its creation. Justices recognized for their unique capabilities—John Marshall, Roger Brooke Taney, Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, Felix Frankfurter, and Hugo Black—have proved to be the exception, not the rule. Perhaps Marshall's greatest single contribution since joining the Court was to win over a majority of his brethren to his view that the "double jeopardy" prohibition of the Fifth Amendment should be made enforceable against the states, the majority opinion of which he authored in *Benton v. Maryland* (1969). Moreover, the Associate Justice has adequately presented and defended a "liberal" judicial philosophy characterized by general support of the government in exercising its delegated powers, but not arbitrarily at the expense of the constitutional rights of individuals. While it is true that Mr. Justice Marshall has yet to put the finishing touch on his judicial portrait, one would nevertheless feel compelled to suggest that his most meaningful contribution to constitutional law will be evaluated in terms of his activities as an advocate, not as a jurist.

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<sup>14</sup> This number includes only those cases disposed of by written opinion, not per curiam decisions.