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Essay: Justice Thurgood Marshall, Great Defender of First Amendment Free-Speech Rights for the Powerless

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INTRODUCTION

When considering the U.S. Supreme Court Justices who are most protective of the First Amendment, a standard litany of names is listed: Oliver Wendell Holmes and Louis Brandeis are referred to as the fathers of the First Amendment;[1] Hugo Black[2] and William O.

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[1] David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*. 95 YALE L.J. 857, 862 (1986) (referring to Justices Holmes and Brandeis as "two strong fathers of the First Amendment."); Bernard Schwartz, *Supreme Court Superstars: Ten Greatest Justices*, 31 TULSA L.J. 93, 117-18 (1995) (praising Justice Holmes for the development of the clear and present danger test in First Amendment jurisprudence); Thomas Healy, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind – and Changed the History of Free Speech in America* 7 (2013) ("Holmes's dissent in Abrams marked not just a personal transformation but the start of a national transformation as well."); Elizabeth Todd Bryan, *Louis D. Brandeis: An Interdisciplinary Retrospective A Progressive Mind: Louis D. Brandeis and the Origins of Free Speech*, 33 TOURO L. REV. 195, 210 (2017) (concluding that "Brandeis played the key role in the shaping of the jurisprudence for the freedom of speech.").

[2] Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1234-39 (2002) (describing Justice Black's commitment to the First Amendment as part of his significant legacy on the Supreme Court).

Douglas[3] receive kudos for their defenses of free-speech; William J. Brennan deservedly receives a lion's share of attention;[4] and the oft-overlooked Frank Murphy receives praise for his usually keen defense of civil liberties.[5]

John Paul Stevens has received kudos for his free-speech populism.[6] In more recent times, Anthony Kennedy[7] and Chief Justice John G. Roberts, Jr.[8] have emerged as something of free-speech defenders. Even Clarence Thomas has received praise for his strong defense of commercial speech.[9]

One Justice who has been underappreciated for his First Amendment jurisprudence is Justice Thurgood Marshall. Perhaps this is because some pay more attention to Marshall's pivotal role as a Supreme Court advocate in school desegregation and as "Mr. Civil Rights,"[10] focus on his opinions on racial discrimination,[11] consider his

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[3] Hon. Stephen Reinhardt, *William O. Douglas Lecture: Whose Ox is Gored?*, 35 GONZ. L. REV. 1, 10 (1999) (describing Justice Douglas as a "free speech purist."); Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1482 (describing Justice Douglas as moving toward an absolutist position on the First Amendment).

[4] Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1333 (1991) ("During his long tenure on the Court, Justice Brennan established himself as one of the staunchest defenders of the freedom of speech the Court has ever known."); David H. Souter et al., *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 25 (1997) ("In his equal protection and First Amendment jurisprudence, Justice Brennan elaborated a broad conception of democratic political culture, as expansive as the idea of a democratic way of life.").

[5] David L. Hudson, Jr., Justice Frank Murphy: 'Champion of First Amendment *Freedoms'*, NEWSEUM INSTITUTE (Nov. 26, 2001), http://www.newseuminstitute.org/2001/11/26/justice-frank-murphy-champion-of-first-amendment-freedoms/.

[6] *See* Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens' Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2202 (2006) ("This substantively pragmatic approach to free speech controversies, filtered through a pragmatic judicial methodology, has led Justice Stevens to a populist focus on disparities in social power that can exclude economically and politically marginal speakers from public debate.").

[7] *See* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994-2000*, 48 UCLA L. REV. 1191 (2001) (ranking Justice Kennedy as the Justice most often who votes to protect freedom of speech).

[8] *See* David L. Hudson, Jr., Chief Justice Roberts and the First Amendment, Knoxville News Sentinel (April 27, 2011) http://archive.knoxnews.com/opinion/columnists/david-l-hudson-jr-chief-justice-roberts-and-the-first-amendment-ep-404857472-357886211.html.

[9] *See generally* David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial Speech Protector*, 35 CREIGHTON L. REV. 485 (2002).

[10] *See* James O. Freedman, *Thurgood Marshall: Man of Character*, 72 WASH. U. L.Q. 1487, 1494-95 (1994) (noting Marshall's advocacy in Brown as his "crowning achievement" and noting the press called him "Mr. Civil Rights."); see also Sherilynn Ifill, *Thurgood Marshall*, 68 N.Y.U. L. REV. 220, 220 (1993) ("It is impossible to work as a civil rights attorney without feeling the enduring presence of Thurgood Marshall.").

[11] Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARI. ST. L.J. 429 (1994).

path-breaking work for public interest advocacy,[12] or diminish his jurisprudence as a follower of Brennan.[13]

This is a tragedy of sorts because Justice Thurgood Marshall consistently defended free-speech principles in his years on the U.S. Supreme Court.[14] This essay explains that Marshall's passionate defense of freedom of expression can be seen most clearly in his defense of free-speech rights even when the government acts not as sovereign, but as warden, employer, or educator. In other words, Marshall's commitment to free-speech is shown most forcefully by how he consistently protected the free-expression rights of inmates, public employees, and public school students.

INMATES

Justice Marshall's jurisprudence reveals a consistent pattern of expanding the constitutional rights of prison inmates. He wrote the Court's opinions establishing a right to medical care[15] and the right to a law library to ensure access to the courts.[16] Marshall consistently emphasized that prisoners do not forfeit all of their First Amendment free-speech rights by virtue of their incarceration. As Professor Melvin Gutterman explained: "He had a sense, perhaps more than most of his colleagues, that there are real people living in the overcrowded facilities and that they matter."[17]

His commitment to prisoner rights can be seen most directly by his concurring opinion in *Procunier v. Martinez*, a case involving challenges to the California Department of Corrections mail censorship provisions and bans on law students and paralegals interviewing in-

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[12] Julius Chambers, *A Tribute to Justice Thurgood Marshall: Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1250-55 (1992).

[13] Donna F. Coltharp, *Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making*, 29 ST. MARY'S L.J. 1, 3 (1997) (noting that some of Justice Brennan's law clerks referred to Justice Marshall as Justice Marshall-Brennan.).

[14] Judge Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, 7 HARV. L & POL'Y REV. 113, 129 (2013) ("On the Supreme Court, Marshall almost always voted for the free-speech claimant."); N. Douglas Wells, "Thurgood Marshall and 'Individual Self-Realization' in First Amendment Jurisprudence," 61 TENN. L. REV. 237, 238 (1993)(" A careful reading of Justice Marshall's writing reveals that he was a vigorous and principled proponent of the First Amendment."); David L. Hudson, Jr. "Justice Marshall: Eloquent First Amendment Defender," Newseum Institute, Feb. 4, 2013, at http://www.newseuminstitute.org/2013/02/04/justice-marshall-eloquent-first-amendment-defender/.

[15] Estelle v. Gamble, 429 U.S. 97 (1976).

[16] Bounds v. Smith, 430 U.S. 817 (1977).

[17] Melvin Gutterman, *The Prison Jurisprudence of Justice Thurgood Marshall*, 56 MD. L. REV. 49, 49 (1997).

mates.[18] The Court subjected prison regulations to a form of intermediate scrutiny and found that many of the regulations were unconstitutional.[19]

In his concurring opinion, Justice Marshall went further than his colleagues in criticizing the State's justifications for reading inmate mail. "The mails provide one of the few ties inmates retain to their communities or families—ties essential to the success of their later return to the outside world," he wrote.[20]

Marshall explained in beautiful language,[21] the importance of First Amendment freedoms for inmates who are otherwise cut off from the outside world:

> The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. . . . When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded.[22]

Procunier v. Martinez represented the high point for prisoner rights.[23] Sadly, the Court reduced prisoner constitutional protections more than a decade later in *Turner v. Safley*.[24] In this decision, the Court significantly reduced the standard of review to a form of rational basis – a "reasonably related to legitimate penological interests" standard.[25] Marshall joined Justice John Paul Stevens' dissenting opinion.

Marshall continued his passionate defense of inmate First Amendment rights in his dissenting opinion in *Jones v. North Carolina Prisoners' Labor Union*.[26] The case involved a prison labor union's challenges to several regulations adopted by the state of North Caro-

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[18] Procunier v. Martinez, 416 U.S. 396 (1974).

[19] *Id.* at 416.

[20] *Id.* at 426.

[21] Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L.L. REV. 443, 456 (1998).

[22] Procunier, 416 U.S. at 427.

[23] David L. Hudson, Jr., *Remembering the High Point of Prisoner Rights*, NEWSEUM INSTITUTE (Apr. 29, 2011) http://www.firstamendmentcenter.org/remembering-the-high-point-of-prisoner-rights/.

[24] Turner v. Safley, 482 U.S. 78 (1987).

[25] *See* David L. Hudson, Jr., *Turner v. Safley: High Drama, Endurinng Precedent*, NEWSEUM INSTITUTE (May 1, 2008) http://www.newseuminstitute.org/2008/05/01/turner-v-safley-high-drama-enduring-precedent/.

[26] *See* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 139 (1977).

lina. These regulations included: (1) a ban on inmates soliciting other inmates to join the prison labor union, Prisoners' Labor Union; (2) a ban on inmates meeting with other inmates about the union; and (3) a ban on bulk mailings concerning the union.[27]

A three-judge federal district court enjoined prison officials from instituting the regulations, writing: "There is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions."[28] On appeal, the U.S. Supreme Court reversed, upheld the policies, and ruled in favor of prison officials. The majority reasoned that the lower court started off incorrectly by not according appropriate deference to prison officials.[29] The majority determined that group activity of prisoners in union activities "would pose additional and unwarranted problems and frictions in the operation of the State's penal institutions."[30] The majority also dismissed the challenge to the prohibition on bulk mailings, writing that there were still other means of sending mail to inmates.[31]

Marshall dissented. He accused his colleagues of "tak[ing] a giant step backwards" towards the view that prisoners were simply "slaves of the state."[32] He acknowledged that running a prison was a challenging undertaking,[33] but explained that courts cannot "blindly defer to the judgment of prison administrators."[34] According to Marshall, prison wardens naturally want to suppress disorder to avoid public criticism; "[c]onsequently, prison officials inevitably will err on the side of too little freedom."[35]

Addressing the regulations, Marshall deemed them easily unconstitutional. He wrote that the solicitation ban was "particularly vulnerable to attack."[36] He said it made little sense to allow the inmate to exist in principle but then prohibit inmates from soliciting other inmates to join. He also found little trouble in determining the bulk

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[27] *Id.* at 121.

[28] *Id.* at 124.

[29] *Id.* at 125.

[30] *Id.* at 129.

[31] *Id.* at 131.

[32] Jones, 433 U.S. at 139, citing Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) (J. Marshall, dissenting).

[33] *Id.* at 141.

[34] *Id.*

[35] *Id.* at 141-42.

[36] *Id.* at 144.

mailing ban unconstitutional, because it clearly was being used to bolster the solicitation ban.[37]

Finally, Marshall addressed the ban on union meetings in the prison. He noted that the prison's two expert witnesses testified at the district court level that union groups generally play a constructive role in prisons.[38] Prison officials claimed that union meetings are risky and could lead to disruption. Marshall responded in classic First Amendment lore: "The central lesson of over a half century of First Amendment adjudication is that freedom is sometimes a hazardous enterprise, and that the Constitution requires the State to bear certain risks to preserve it."[39] He acknowledged that prison officials could regulate the time, place, and manner of union meetings, but "cannot outlaw them altogether."[40]

As indicated earlier, Marshall later joined in Justice Stevens' dissent in *Turner v. Safley,*[41] a predictable result for the Justice who seemingly cared most about inmates' individual self-fulfillment and ability to express themselves. In *Safley*, the U.S. Supreme Court adopted a rational-basis type standard for evaluating restrictions on inmates' constitutional rights. Under this standard, prison regulations were constitutional as long as they are "reasonably related to legitimate penological interests" such as safety or rehabilitation.[42] The standard has led to a-near insurmountable hurdle in many prisoner rights cases.[43]

PUBLIC EMPLOYEES

Justice Marshall consistently voted for public employees in First Amendment free-speech cases while on the Court. Most notably, he wrote the Court's seminal public employee, free-speech decision *Pickering v. Bd. of Education*.[44] In that decision, the Court ruled that public school officials in Illinois violated the free-speech rights of former science teacher Marvin Pickering, when they fired him for writing a letter-to-the-editor, critical of the school board's allocation of mon-

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[37] *Id.* at 144-45.

[38] *Id.* at 145.

[39] *Id.* at 146.

[40] *Id.*

[41] Turner v. Safley, 482 U.S. 78 (1987).

[42] *Id.* at 89.

[43] HUDSON, *supra* note 25.

[44] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

ies.[45]. Pickering had criticized vehemently, the building of a new football field, instead of completed classrooms.[46]

Pickering lost in the Illinois state courts but appealed all the way to the U.S. Supreme Court. Some initially dismissed the dispute as an insignificant case about a public school teacher.[47] However, the Court's decision remains the landmark decision for public employee First Amendment cases.[48]

Marshall explained that "[t]he 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."[49] Marshall explained that Pickering's letter touched on matters of public concern, or importance, to the community and that his statements did not detrimentally impact "close working relationships."[50] Marshall noted that public school teachers are the persons most likely to be the most informed members of the community on school finance and funding issues.[51]

Marshall joined Justice Brennan's dissenting opinion in *Connick v. Myers*,[52] a case which emphasized the power of public employers to punish public employees when they engage in speech that causes disruption or impairs harmony in the workplace. The case involved the legendary New Orleans District Attorney Harry Connick, Sr. (the father of the famous musician[53]) who fired one of his assistant district attorneys for circulating a questionnaire critical of the office's functioning. Brennan wrote in his dissent that the majority in *Connick* had "distorted" the balancing that Marshall had envisioned in *Pickering*.[54]

In a lesser known case, Marshall filed the solitary dissent in *Smith v. Arkansas State Highway Employees*.[55] The Court determined that the Arkansas State Highway Commission could require employees to

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[45] *Id.* at 566.

[46] *Id.* at 566.

[47] David L. Hudson, Jr., *Teacher Looks Back On Letter That Led To Firing – And Supreme Court Victory*, NEWSEUM INSTITUTE (July 10, 2001), http://www.newseuminstitute.org/2001/07/20/teacher-looks-back-on-letter-that-led-to-firing-and-supreme-court-victory/.

[48] *Id.*

[49] Pickering, 391 U.S. at 568.

[50] *Id.* at 570.

[51] *Id.* at 572.

[52] Connick v. Myers, 461 U.S. 138 (1983).

[53] Harry Connick, Jr. is one of the world's best known jazz musicians and a popular actor. See https://www.harryconnickjr.com/.

[54] Myers, 461 U.S. 138, 157-58 (Brennan, J., dissenting).

[55] Smith v. Arkansas State Highway Emp. Local 1315, 441 U.S. 463, 466-67 (1979).

submit grievances directly to the employer rather than through its union, rejecting the idea that this requirement violated employees' First Amendment rights of speech, petition, and association.[56] Marshall questioned his colleagues' summary handling of the case writing: "I decline to join a summary reversal that so cavalierly disposes of substantial First Amendment issues."[57]

Marshall also wrote the Court's majority opinion in *Rankin v. McPherson*, protecting the free-speech rights of a clerical employee in a Texas constable's office who was fired for making a negative remark about President Ronald Reagan.[58] Ardith McPherson allegedly told her boyfriend and co-worker upon learning of an assassination attempt on the President: "Shoot, if they go for him again, I hope they get him."[59] She also spoke negatively about the President cutting welfare, Medicaid and similar programs.[60] Constable Walter Rankin fired her for her speech.[61]

Marshall determined that McPherson clearly spoke on a matter of public concern, the initial requirement in public employee free-speech cases.[62] He noted that much of her speech was political speech critical of a political leader.[63] As for the Constable's interest, Marshall noted that the comment was made in private, out of the public eye and that the comment was "unrelated to the functioning of the office."[64] Marshall also noted that, as a clerical employee, McPherson's statements would not be attributed to the Constable's office.[65]

PUBLIC SCHOOL STUDENTS

Justice Marshall also consistently voted for public school students in First Amendment cases. He joined the majority of the Court in the landmark student-speech decision, *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, in which seven justices ruled that public school officials violated the free-speech rights of three Iowa students who wore black peace armbands to school to protest the Vietnam War.[66] The

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[56] *See generally* Smith, 441 U.S. 463.
[57] Smith, 441 U.S. 463, 467 (Marshall, J., dissenting).
[58] *See* Rankin v. McPherson, 483 U.S. 378 (1987).
[59] *Id.* at 381.
[60] *Id.* at 381.
[61] *Id.* at 382.
[62] *Id.* at 386.
[63] *Id.*
[64] *Id.* at 389.
[65] *Id.* at 391-92.
[66] Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969).

Court declared that public school officials could not censor student expression unless they could reasonably forecast that the student speech would cause a substantial disruption of school activities or invade the rights of others.[67]

While Marshall did not write the Court's opinion in *Tinker*, he made his presence felt at the oral argument with his incisive questioning of the school board's attorney. At oral argument, Marshall questioned whether the student's wearing of the armbands really caused a disruption. He asked how many students wore the armbands. Upon receiving the answer of seven, Marshall asked: "Seven out of eighteen thousand, and the school board was afraid that seven students wearing armbands would disrupt eighteen thousand. Am I correct?"[68] Legal historian John W. Johnson wrote that, "Marshall was another sure vote for the students in the *Tinker* case."[69]

Tinker represented the high-water mark of student free-speech rights. In the 1980s, a more conservative Court created exceptions to the Tinker standard.[70] The Court created the first exception in *Bethel Sch. Dist. v. Fraser*, ruling that public school officials could punish students for speech that was vulgar, lewd, or plainly offensive.[71] Matthew Fraser delivered a speech nominating a fellow student for elective office that was filled with sexual innuendo. While students giggled and some officials were upset, the speech caused no real disruption. However, school officials suspended him for violating the following no-disruption rule: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[72]

Because his speech caused no real disruption, a federal district court and the 9th U.S. Circuit Court of Appeals ruled in favor of Matthew Fraser.[73] However, the school district appealed to the U.S. Supreme Court and prevailed. Writing for the majority, Chief Justice Warren Burger declared that "[t]he undoubted freedom to advocate unpopular and controversial views in school . . . must be balanced

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[67] Tinker, 393 U.S. at 508.

[68] DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS 64 (2011).

[69] JOHN W. JOHNSON, THE STRUGGLE FOR STUDENT RIGHTS: TINKER v. DES MOINES AND THE 1960s, LANDMARK LAW CASES & AMERICAN SOCIETY 150 (Peter Charles Hoffer & N. E. H. Hull eds., 1997).

[70] Hudson, *supra* note 68, at 85-88.

[71] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[72] *Id.* at 678.

[73] *Id.* at 679-80.

against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[74] He added that a chief mission of the public schools was to inculcate moral values.[75]

Justice Marshall, one of only two dissenting votes along with Justice Stevens, wrote a short dissenting opinion because he believed that the school district failed to show that Fraser's speech was disruptive of school activities.[76] He noted that school officials should have wide latitude in determining what speech is appropriate, but added that "where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education."[77]

The U.S. Supreme Court created another exception to *Tinker* in *Hazelwood School District v. Kuhlmeier*, ruling that a school principal had the authority to censor articles in the student newspaper that dealt with teen pregnancy and the impact of divorce upon teens.[78] The Court created a new standard for what it termed "school-sponsored" student speech, or speech that bears the imprimatur of the school: "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[79] This rational basis standard creates an easy path to censorship.

Justice Marshall signed on to Justice Brennan's powerful dissenting opinion, which accused the majority of sanctioning "brutal censorship,"[80] and notably left off the adverb respectfully from his closing two words: "I dissent."[81]

CONCLUSION

Justice Thurgood Marshall receives deserved laudation for his civil rights advocacy and his defense of equal-protection values. He certainly receives well-deserved respect as a true racial pioneer. However, he also should be lauded as a First Amendment hero. His colleague and friend, Justice William Brennan, wrote eloquently about

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[74] *Id.* at 681.
[75] *Id.* at 683.
[76] *Id.* at 690 (Marshall, J., dissenting).
[77] *Id.*
[78] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[79] *Id.* at 273.
[80] *Id.* at 289 (Brennan, J., dissenting).
[81] *Id.* at 291 (Brennan, J., dissenting).

Justice Marshall upon his retirement from the Court stating: "More than any other Justice on the Court, Thurgood Marshall knew what it was like to stand up for unpopular ideas."[82] Justice Marshall's free-speech heroism and commitment to unpopular ideas is best shown by his consistent defense of freedom of speech for those often most vulnerable–the inmate, the public employee, and the public school student.

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[82] William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 28 (1991).