MEMORIAL ESSAYS

THURGOOD MARSHALL'S IMAGE
OF THE BLUE-EYED CHILD IN BROWN

ANTHONY G. AMSTERDAM*

At least in the years I knew him, Thurgood Marshall wasn’t hot on celebrations. He had a vast capacity for joy and for sharing joy, and a fierce pride in the advances that civil rights had made in his lifetime. But he was too intensely aware of the work yet undone to waste his time reflecting on the past except as prologue. Responding to a ceremony in his honor at the Association of the Bar of the City of New York on March 24, 1992, Thurgood closed with these words:

For all of you here, please bear in mind: it’s a long road ahead. It’s a tough one and it’s not going to get any easier. But if you all have faith in, one, our government, and, two, ourselves, we can make it. Why do I say, with faith we can make it? What the hell else have we had but faith. And we haven’t made it. But, by golly we’re on our way. Thanks again. I appreciate it very much.

To try to do what Thurgood might have most appreciated, I will limit my remarks in this commemorative issue to discussing one of his accomplishments as a source of practical instruction—something that lawyers can learn from, not simply admire. I will look at one aspect of his oral arguments before the Supreme Court in Brown v. Board of Education as an example of a master legal strategist at work. In every public role he played, advocate, civil rights leader, government attorney, judge, and Justice, Thurgood taught by example. Let us see what we can learn from a single instance of his skill as a revolutionary litigator.

* Judge Edward Weinfeld Professor of Law and Director of the Lawyering Program, New York University.

1 "I would pass on to you the answer I give to people who ask, ‘What is the most important case you have argued?’ My reply has always been, ‘The next one.’” Thurgood Marshall, The Federal Appeal, in Counsel on Appeal 141, 142 (Arthur A. Charpentier ed., 1968).


3 347 U.S. 483 (1954) (Brown I); Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II). Brown I and its companion decision, Bolling v. Sharpe, 347 U.S. 497 (1954), covered five cases from four states and the District of Columbia, argued on December 9-11, 1952 and reargued on December 7-8, 1953. The second Brown opinion covered all of these cases after further argument on the issue of relief, heard on April 11-14, 1955. Seven lawyers argued for the plaintiffs seeking school desegregation in the five cases. Thurgood made the opening and rebuttal arguments in the South Carolina case in 1952; he shared the opening argument and made the rebuttal argument in the South Carolina and Virginia cases, and he also shared the opening argument in the Delaware case, in 1953; he made the opening argument and two rebuttal arguments in the South Carolina and Virginia cases in 1955.
By the time Brown was argued in 1952 and 1953, there were ample doctrinal grounds for attacking the long-held assumption that Plessy v. Ferguson permitted racial segregation in "separate but equal" public schools. Earlier litigation by Thurgood and his colleagues had produced Supreme Court decisions arguably saying that, at least in University graduate schools, African-American students consigned to "separate" facilities were so handicapped by this isolation from the Anglo cultural mainstream that their education could not be "equal" to the education given Anglos. In addition, the Supreme Court had frequently held—and was continuing to profess in terms pointedly directed to issues of racial discrimination—that any governmental regulatory classification violated equal protection principles unless it bore a rational relationship to the underlying regulatory objective. These developments did not demolish Plessy as a precedent for validating segregated public education, but they made its demolition doctrinally possible. If Thurgood could not win Brown, the impediment would not be doctrine.

Nor would it likely be a failure to convince the Court that segregation was abhorrent to conspicuous constitutional values. The United States had only recently emerged from World War II with a self-image defined by our public posture as the standard bearer of egalitarian de-

---

4 163 U.S. 537 (1896).
7 See Oyama v. California, 332 U.S. 633, 644, 646-47 (1948); see also the dictum in Kotch v. Board of River Port Pilot Comm'rs:

> Clearly, . . . [a regulation setting apart a classified group] might offend . . . [the Equal Protection Clause] if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities.

8 The classic statement of the rule is found in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("[A classification] must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").
9 The personifying pronoun is not inadvertent. Civil rights advocates in the 1950s were facing a generation of Justices who thought in such terms. See, e.g., Korematsu v. United States, 323 U.S. 214, 219-20 (1944) ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces . . . ."); cf. Younger v. Harris, 401 U.S. 37, 44 (1971) ("This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' ").
mocracy against the atrocities of Nazi German racism and our private shame at our own atrocious treatment of Japanese-Americans. The attitudes of people with sufficient power to make their voices surrogates for the spirit of "our basic governmental institutions" were running heavily against segregation by the early 1950s. The Justices themselves were tuned by temperament and history to receive the message that *Plessy v. Ferguson* was dead and should be buried.

But burying *Plessy* was one thing; toppling the segregated schools that were a settled feature of the landscape of millions of Americans was another. However convinced the Justices might be that segregation was an evil, they were also convinced that it was a deeply rooted way of life. To eradicate it threatened to disturb much else, much that was not necessarily evil, much that was cherished by individuals who could not be

---

10 The decision in *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), and the language of the majority opinion in *Korematsu* reflected the Justices' guilt at having subordinated principle to expediency in *Hirabayashi* v. United States, 320 U.S. 81 (1943):

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty . . . . Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we were at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, . . . and . . . because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. . . . We cannot—by availing ourselves of the calm perspectives of hindsight—now say that at that time these actions were unjustified.


None of the lessons of the Relocation Cases were lost on Thurgood. Consider this passage from his argument in 1953:

> And in . . . our reply brief, we quote from a document which just came out, . . . [a] monograph . . . from the selective service of our Government . . . .

I don't emphasize or urge the quotes as such, but a reading of that monograph will convince anyone that the discriminatory segregation policies, education and otherwise in the South, almost caused us to lose one war, and I gather from the recommendations made in there that unless it is corrected, we will lose another.

Argument: The Oral Argument Before the Supreme Court in *Brown v. Board of Education of Topeka*, 1952-55, at 236 (Leon Friedman ed., 1969) [hereinafter Argument]. To facilitate the reader's access to the *Brown* arguments, I will cite and quote them by reference to this readily available book.

11 See quotation from *Korematsu* in note 9 supra.

12 See, e.g., President's Committee on Civil Rights, Report: To Secure These Rights 79-87, 139-48, 166-72 (1947).

viewed as evil. For judges to uproot so deeply, to displace the known and to plant the seeds of the unknown, to assume responsibility for what might grow from those seeds—here, indeed, was cause for that judicial dread that

puzzles the will,
And makes us rather bear those ills we have
Than fly to others that we know not of.  

So Thurgood had to overcome a monstrous case of Hamlet’s hangup to win *Brown*.

His most difficult task in the oral arguments was to construct a line of legal reasoning and a narrative structure such that any Justice who saw segregated schools as a Trouble could not fail to take up arms against that Trouble. This was an acute instance of a commonplace plaintiff’s problem in impact litigation. Convincing the judge that one’s client has suffered grievous wrong is almost always a necessary but insufficient condition of victory for the plaintiff’s lawyer. A second necessary condition is to convince the judge that something can be done to correct the wrong without too much risk of making things worse. A third is to convince the judge that s/he is responsible for doing whatever needs to be done and for accepting whatever risks need to be run.

Legally, the second and third conditions call for (or permit) varying forms of arguments in various settings: that the wrong inflicted on one’s client is within the catalog of wrongs cognizable by courts (because it is a tort, or a Denial of Equal Protection, or something that the courts of Westminster would have trucked with); that the law provides a remedy “within the judicial power” for this particular wrong; that the remedy is practicable, prudent, equitable, consistent with the public interest, etc. Narratively, the second and third conditions almost always call for telling an action story with the court as hero and the rectification of the wrong as the hero’s duty. Legally or narratively or both, the lawyer out to satisfy the second and third conditions can elect either or a combination of two strategies: to focus on the rectification of the wrong and show that it is proper, feasible, not disruptive of anything beyond the wrong itself, and so forth; or to focus on the wrong and portray it as the kind of evil that no decent hero can permit to go unrectified.

In *Brown*—at least before the Supreme Court decided the merits

---

17 This phrase, redolent of sections 1 and 2 of Article III of the Constitution, was twice used in the questions that the *Brown* Court asked the parties to address when it ordered reargument in 1953. See *Brown v. Board of Educ.*, 345 U.S. 972 (1953).
and ordered further argument on the question of relief in 1954—a strategy focused on rectification would have been disastrous for the plaintiffs. The propriety of judicial rectification was the thorniest legal issue in the case;\(^{18}\) the feasibility of rectification was uncertain; its potential disruptiveness was frightening. Thurgood therefore chose to focus on the nature of the wrong of segregation, to make it a species of wrong that no right-minded judge could tolerate.

His way of doing this was a stroke of tactical genius. From the outset of his opening argument in 1952, he made it plain that his primary legal theory was that racial segregation constituted an irrational classification:

On the question . . . whether or not there is any relevancy to this classification on a racial basis or not, . . . we placed into the record Dr. Redfield's testimony.

. . . Dr. Redfield's testimony was to this effect, that there were no recognizable differences from a racial standpoint between children, and that if there could be such a difference that would be recognizable and connected with education, it would be so insignificant as to be unworthy of anybody's consideration.

. . . [W]e produced testimony to show what we considered to be the normal attack on a classification statute, that this Court has laid down the rule in many cases set out in our brief, that in the case of the object or persons being classified, it must be shown, (1) that there is a difference in the two, and (2) that the state must show that the difference has a significance with the subject matter being legislated, and the state has made no effort up to this date to show any basis for that classification other than that it would be unwise to do otherwise.\(^{19}\)

He was led away from this point by questioning but returned to it immediately at a crucial juncture, when Justice Frankfurter demanded that he state the first premise of his legal reasoning:

JUSTICE FRANKFURTER: . . . [Y]ou have to face the fact that this is not a question to be decided by an abstract starting point of natural law, that you cannot have segregation. If we start with that, of course, we will end with that.

MR. MARSHALL: I do not know of any other proposition, sir, that we could consider that would say that because a person who is as white as snow with blue eyes and blond hair has to be set aside.

JUSTICE FRANKFURTER: Do you think that is the case?

MR. MARSHALL: Yes, sir. The law . . . [we are attacking] applies that way.

JUSTICE FRANKFURTER: Do you think that this law was

\(^{18}\) Questions 2(b) and 3 in the Court's 1953 order for reargument evidenced the difficulty that the Justices were having with the issue. See note 17 supra.

\(^{19}\) Argument, supra note 10, at 37-38.
passed for the same reason that a law would be passed prohibiting blue-eyed children from attending public schools? . . . You think that this is the case?

MR. MARSHALL: No, sir, because the blue-eyed people in the United States never had the badge of slavery which was perpetuated in the statutes.\(^\text{20}\)

He returned to the same theme in rebuttal:

MR. MARSHALL: May it please the Court, so far as the appellants are concerned . . . it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states.

There is nothing involved in this case other than race and color, and I do not need to go to the background of the statutes or anything else. I just read the statutes, and they say, "White and colored."

. . . [I]f Ralph Bunche were assigned to . . . [a Southern State], his children would have to go to a Jim Crow school. No matter how great anyone becomes, if he happens to have been born a Negro, regardless of his color, he is relegated to that school.

. . . But it seems to me that in a case like this that the only way that . . . [a State], under the test set forth in this case, can sustain that statute is to show that Negroes as Negroes—all Negroes—are different from everybody else.\(^\text{21}\)

And again in the conclusion of his rebuttal in 1953:

I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true.

Those same kids in Virginia and South Carolina—and I have seen them do it—they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school.

There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same state university and the same college, but if they go to elementary and high school, the world will fall apart . . . .

So whichever way it is done, the only way that this Court can decide this case in opposition to our position, is that there must be some reason which gives the state the right to make a classification that they can make in regard to nothing else in regard to Negroes, and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings.

---

\(^{20}\) Id. at 44.

\(^{21}\) Id. at 61-63.
Nobody will stand in the Court and urge that, and in order to arrive at the decision that they want us to arrive at, there would have to be some recognition of a reason why of all the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.

It can't be because of slavery in the past, because there are very few groups in this country that haven't had slavery some place back in the history of their groups. It can't be color because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.

The only thing can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.\textsuperscript{22}

Thurgood wove two other arguments into this one. He argued that separate is inherently unequal,\textsuperscript{23} and he argued that segregation statutes are Black Codes.\textsuperscript{24} But his chief reliance and his constant refrain was the argument with which he began and ended: that segregation statutes involve an irrational classification.

On a first take, this emphasis is surprising. Legally and narratively, the irrational classification argument would seem to be far weaker than the others Thurgood backed it up with. Consider the three arguments in outline:

\begin{itemize}
  \item \textbf{separate is inherently unequal}
  \item \textbf{The Equal Protection Clause as construed even in Plessy forbids the States to treat the races unequally.}
\end{itemize}

\textsuperscript{22} Id. at 239-40.
\textsuperscript{23} In the field of education, Thurgood said, "this Court has made segregation and inequality equivalent concepts." Id. at 238. He referred specifically to the \textit{McLaurin} case, which in 1950 held that when a Negro student was admitted to a formerly all-white university graduate school and classes but required to remain physically isolated from whites, he "suffered constitutional inequality in the enjoyment of these identical offerings." Id. (citing \textit{McLaurin v. Oklahoma State Regents}, 339 U.S. 637 (1950)). According to Thurgood, the States now argue "that \textit{McLaurin} had a constitutional grievance . . . [only] because he was denied equality, but in the McLaurin case the answer is that the only inequality which he suffered is that which is inherent, emphasis on 'inherent,' if you please, in segregation itself." Id.; see also id. at 42, 66, 199-206.
\textsuperscript{24} If anybody wants to say, one way or the other, the Fourteenth Amendment was intended to deprive the states of power to enforce Black Codes or anything else like it.

We charge that . . . [the segregation statutes] are Black Codes. They obviously are Black Codes if you read them. . . . [The States' lawyers] haven't denied that they are Black Codes, so if the Court wants to very narrowly decide this case, they can decide it on that point.

Id. at 239; see also id. at 198.
(2) *McLaurin* holds that "separate" is inherently unequal when separation denies a Negro student access to the educational mainstream.

(3) Public school segregation does just that; so it denies Negro children equal protection.

**segregation statutes are Black Codes**

(1) The Equal Protection Clause unmistakably forbids the States to enact statutes like the Black Codes.

(2) The salient feature of the Black Codes was a blatant subordination of Negroes solely on account of race.

(3) Segregation statutes blatantly subordinate Negroes solely on account of race; so they deny Negro children equal protection.

**segregation statutes involve an irrational classification**

(1) The Equal Protection Clause forbids state legislation to classify persons or objects irrationally from the standpoint of the objectives of the legislation.

(2) Segregation statutes classify children as Negro or white for purposes of school assignment.

(3) Such a classification can be upheld as rational only if Negro children differ generically from white children in regard to factors pertinent to school assignment.

(4) The States have presented no evidence that such generic differences exist; so the Court can uphold segregation statutes only by making the unsupported, discriminatory finding that Negroes are inherently inferior beings.

(5) This is an impossible position for the Court to take; so segregation statutes affront the equal protection command of rationality.

The *irrational classification* argument had obvious weaknesses in its major premise. Despite its hoary credentials, the *Guano* doctrine requiring rationality in the legislative classification "of the object or persons being classified" was essentially a relic of the pre-New Deal Supreme Court and had assumed the flavor of its name by 1952. It had

---

25 See note 8 supra.
26 See text accompanying note 19 supra (quoting Thurgood’s 1952 argument).
no narrative punch at all. It began from a highly abstract premise, one having nothing to do with race and little to do with humanity. These things were the heart of Thurgood's case, and he knew it. The *irrational classification* argument depended on a long and complex logic chain. It did not directly accuse the Southern state legislatures of bigotry. Both of Thurgood's other arguments, by contrast, were simple and straightforward, and portrayed the Southern legislators as the wilful perpetrators of a racial caste system. (An oral advocate ordinarily strives for logical simplicity and a story line in which the opposing party can be made the subject of action verbs of oppression.) Moreover, Bob Carter, who had made the first of the plaintiffs' arguments in 1952, immediately preceding Thurgood's opening argument, had broached the *irrational classification* theme among others and had drawn a highly skeptical reaction to it from Justice Frankfurter. Thurgood's invocation of the theme again drew Frankfurter's fire. Yet Thurgood persisted in making it his central legal argument. Why?

The more direct caste-system arguments depicted the legislative authors of the segregation laws in a classic villain's role. *They* had oppressed Thurgood's clients with discriminatory *animus*. So far, so good. But this story line necessarily cast the *Justices* in the classic role of uninvolved arbiters, passing judgment on the villain's evil deeds. The Justices were guilty of no discrimination. *They* might abhor discrimination and discriminators, yet their judgment must reflect impartial weighing of the wrong against the costs of righting it. The self-image of the unengaged judge, the traditions of equity jurisprudence, the example of Athena in the *Eumenides*, all call for moderation in this judgment. Balancing Discrimination versus Disruption becomes the name of the case. And that view of the case was the worst possible from Thurgood's

---

28 See note 30 infra.
30 JUSTICE FRANKFURTER: Meaning by that that there was no rational basis for the classification?

MR. CARTER: Well, I think that our position is that there is no rational basis for classification based on that.

JUSTICE FRANKFURTER: But do you think that you can argue that or do you think that we can justify this case by some abstract declaration?

Id. at 26.
31 JUSTICE FRANKFURTER: You may recall that this Court not so many years ago decided that the legislature of Louisiana could restrict the calling of pilots on the Mississippi to the question of who your father was.

Id. at 45. The reference is to *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (Black, J.).
standpoint.\textsuperscript{32}

The irrational classification argument, on the other hand, brings racial discrimination into the case as a vice that the Justices themselves must either practice or put aside. The Justices are asked to determine whether the States' classificatory categories are rational, and Thurgood insists that "the only way to arrive at . . . [the] decision [that they are] is to find that for some reason Negroes are inferior to all other human beings."\textsuperscript{33} Thurgood's story structure makes bigotry something that the Justices must choose to act upon or not to act upon, rather than something that they must choose to correct or not to correct. The latter choice could have gone either way in 1952 and 1953; the former could not.

So Thurgood's argument makes superb dramatic sense. What he has done is to shift discrimination from its obvious place as a part of the definition of the precipitating Trouble into the place of a Temptation that assails the hero in the course of the hero's response to a different Trouble. Once discrimination is rewritten as Temptation, the costs of overcoming it are no longer reasons for inaction but are spurs to action. Those costs become a measure of the hero's commitment to rectitude; the hero's willingness to pay them becomes a measure of the hero's fidelity to duty.

At the same time, Thurgood could not—and he did not—depict the costs of desegregation as disruption of the Nation. That would have been a bit too much of a Temptation.\textsuperscript{34} He dealt with this problem by a double move.

First, he described the most frightening aspects of potential disruption as contingent upon his opponents' failure to do their duty and as exaggerated by their advocates in an effort to cow the Court:

JUSTICE FRANKFURTER: But the consequences of how you remedy a conceded wrong bear on the question of whether it is a fair classification.

MR. MARSHALL: I do not know. But it seems to me that the only way that we as lawyers could argue before this Court, and the only way that this Court could take judicial notice of what would happen, would be that the Attorney General or some responsible individual officer of the State . . . would come to this Court and say that they could not control their own state.\textsuperscript{35}

This approach had the secondary benefit of permitting Thurgood to cast

\textsuperscript{32} See text accompanying notes 15-18 supra.

\textsuperscript{33} See text accompanying note 22 supra (quoting Thurgood's 1953 argument).

\textsuperscript{34} Thurgood was keenly aware that he had to defuse the fear of wholesale disruption in order to carry the day in Brown. See Thurgood Marshall, An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts, 21 J. Negro Educ. 316, 320-21, 325-26 (1952).

\textsuperscript{35} Argument, supra note 10, at 64.
his adversaries in a suitable sort of villain’s role after all.\footnote{I for one have more confidence in the people of the South, white and colored, than the lawyers on the other side. I am convinced they are just as lawful as anybody else, and once the law is laid down, that is all there is to it. Id. at 237. Thurgood returned to these themes in his 1955 argument. See id. at 395-99. For example, [W]e believe that in considering the difficulty of the problem, you have to take, not only the fact that some Attorney General would be unhappy about supporting the decision in this case or that he would have problems. I say, in all deference to the Attorneys General, they get paid for the handling of problems. Id. at 398.}

Second, Thurgood addressed the more quotidian, more basic aspects of potential disruption by his picture of white and African-American children playing together—playing in the yards, playing in the fields, playing on the roads, playing together everywhere but school.\footnote{See text accompanying note 22 supra (quoting Thurgood’s 1953 argument). This was plainly a scene that Thurgood had in mind to paint from the outset. See, for example, his 1952 argument: I think when we predict what might happen, I know in the South where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together. Argument, supra note 10, at 67.} Implied in this picture is the deep naturalness of an unsegregated society. Kids, Thurgood was telling the Court, are not disrupted by having to be together, but by having to be apart. Discriminatory attitudes are not the birthright of an unspoiled nature, but are products of the very segregation laws that the Court was being asked to set aside. Setting them aside would restore a natural balance, not erect a precariously artificial one.

It is interesting to watch the transformation of Thurgood’s image of the innocent blue-eyed child in all of this. S/he first emerges as an ostensible example of irrational classification—a homely and familiar illustration of a meaningless class distinction utterly unrelated to race.\footnote{See text accompanying note 20 supra (quoting Thurgood’s 1952 argument).} Then s/he becomes the blue-eyed, white-skinned African-American child, indistinguishable from her white playmates even in appearance, but consigned to segregated schools by the mere accident of her ancestry.\footnote{See text accompanying note 21 supra (quoting Thurgood’s 1952 argument).} Finally, s/he reappears in Thurgood’s coda, following the scene of the children playing together. Against the background of that company of innocents, it is no longer possible to tell or care from what race the blue-eyed child has sprung. And that, of course, is no small part of Thurgood’s point—or of his legacy.