document he believed was flawed from the start because of its commitment to preserve slavery.[11] Through this writing, Marshall's legacy as a moral activist is examined.

Part V reviews Marshall's final opinion as a Supreme Court Justice—the dissent penned in Payne v. Tennessee.[12] That case overruled two Supreme Court opinions and held that victim-impact statements were admissible in the sentencing phase of death-penalty cases.[13] In a scathing dissent, Marshall criticized the Court's disregard for stare decisis.[14] His dissent solidified his commitment to fairness and equality for all in the courts. By examining Marshall's legal, scholarly, and judicial writings, lawyers, academics, and students can increase their knowledge of how the written word so profoundly impacts society — from changing the make-up of our schools to shaping discourse about Supreme Court nominations.

II. PROFILE ONE: CAREER AND EARLY WRITINGS

A. Marshall's Early Years

Thurgood Marshall was born in West Baltimore, Maryland, on July 2, 1908, to Norma Arica Williams and William Canifield Marshall.[15] He was named after his uncle, Thoroughgood.[16] The name Thoroughgood was a variation of the name held by his paternal grandfather, Thorney Good, a former slave.[17] At age six, Marshall had his mother change his name on his birth certificate from Thoroughgood to Thurgood because, Marshall said, "[i]t was too damn long."[18] Even at that early age, it appears he had a sense of the importance of writing concisely, a characteristic that would

serve him well in his future career choice.

Marshall attended Frederick Douglass High School in Baltimore, Maryland.[19]

only a life sentence on him instead of the death penalty.[55] For an innocent Black man being tried in a Southern court for killing white people, a life sentence was a victory.[56]

In one of his letters to the NAACP, Marshall wrote:

> Reached Oklahoma City at 8:10 A.M. and caught 12:30 bus for Hugo. Arrived here at 6:30 Sunday night. Worked on preparation of the case Sunday night. Started trial yesterday morning.
>
> At least a thousand white and one Negro people in Court House. Court room jammed. Everyone here to see trial and also to see a certain Negro lawyer-first time in this court-so sayeth the bailiff.
>
> Jury is lousy. State investigator and County prosecutor busy around town stirring up prejudice, etc. No chance of winning here. Will keep record straight for appeal.
>
> Only point we will have in our favor is use of confession secured after force and violence was used.
>
> Trial will last at least four days. Went over to Idabell last night with Dunjee who has been with us at the counsel table. Raised $120 for the case last night in Idabell from that town and others in this section. If nothing happens-will write in detail later in time for press release.[57]

That letter provides insight into Marshall's reputation as an attorney. When people of different races heard he was coming to town, they wanted to see him.[58] Although in the early 1940s his name was not established enough that the public would recognize it in Oklahoma, what citizens did know was that Marshall was a lawyer from New York and he was a Black-American.[59] That was a combination the community was simply not accustomed to.

the case. In one, Marshall wrote:

> One thing this trial accomplished – the good citizens of that area have been given a lesson in Constitutional Law and the rights of Negros which they won't forget for some time. Law enforcement officers now know that when they beat a Negro up they might have to answer for it on the witness stand. All of the white people in the Court room passed some mighty nasty comments after the officers lied on the stand. Several told the officers what they thought of them out on the halls. I did all of the cross-examining of the officers because we figured they would resent being questioned by a Negro and would get angry and this would help us. It worked perfect.[62]

That passage provides a sense of what a strategist Marshall was in court. One of the reasons he did the cross-examinations was to anger the officers and to provoke them into saying things they would not have said if they were calm.[63] His plan worked. Not only did it upset the officers, but what the officers said upset the audience and upset the jury. That is exactly what Marshall wanted to accomplish.[64] The strategy not only helped his client's case, which was his primary obligation as an attorney, but it also set him up to do some real fund-raising for the NAACP.[65] For Marshall, the case gave the NAACP some needed funds to continue fighting for equal rights.

C. Marshall's Career Path

Throughout the 1940s and 1950s, Marshall was acting as chief legal counsel for NAACP.[66] During this time as an advocate, his personal life was not without its challenges.[67] He was married twice. First, to Vivian Burey from 1929 until her death in 1955.[68] Unfortunately, she suffered several miscarriages and they had no

62. Smith & Ellis, *supra* note 6.

63. Tushnet, *supra* note 44, at 1280.

64. Id. at 1280–81; WILLIAMS, *supra* note 4, at 117.

65. WILLIAMS, *supra* note 4, at 115, 118. The Lyons case made it to the U.S. Supreme Court and the conviction was affirmed. Id. at 118. In 1965, the Governor pardoned Lyons. ROWAN, *supra* note 2, at 97.

66. Barker, *supra* note 19, at 1240; *see also* Friedman, *supra* note 15, at 19.

67. WILLIAMS, *supra* note 4, at 163.

68. Id. at 50, 236; Friedman, *supra* note 15, at 19.

In 1965, at age fifty-seven, he became the Solicitor General of the United States.[83] As the Solicitor General he won fourteen of the nineteen cases he argued before the U.S. Supreme Court.[84] This is a job he did not keep for long, however, because President Lyndon B. Johnson asked him to take on another role in 1967.[85]

In the summer of 1967, Johnson nominated Marshall to the U.S. Supreme Court.[86] His nomination was not unopposed. A group of Southern senators tried to block his nomination for two reasons: 1) because he was a Black-American and 2) because he was a liberal.[87] Nonetheless, his qualifications could not be denied and his nomination was confirmed in a 69-11 vote.[88]

Johnson was tremendously proud of the nomination and was focused on what the achievement would say to all Black-American children and what that achievement meant they could aspire to in their own lives.[89] Johnson was not the only one who felt this pride. Martin Luther King, Jr. sent a telegram to Marshall congratulating him on his appointment, writing, "May I congratulate you for being appointed to the United States Supreme Court. Your appointment represents a momentous step toward a color blind society. You have proved to be a giant of your profession and your career has been one of the significant epochs of our time."[90] That landmark nomination was something that would have been impossible even a decade earlier if it were not for the work of both Marshall and King.

On October 2, 1967, Marshall began his tenure on the Supreme Court.[91] During his twenty-four years as a Supreme Court Justice, he became known as a liberal voice on a Court

83. WILLIAMS, supra note 4, at 313–16; Freedman, supra note 27, at 1495.

84. Friedman, supra note 15, at 19; see WILLIAMS, supra note 4, at 6, 11.

85. WILLIAMS, supra note 4, at 11, 330–33; Freedman, supra note 27, at 1495.

86. WILLIAMS, supra note 4, at 330–31.

87. Id. at 334–37.

88. Id. at 337.

89. Rudolph Lewis, Blacks, Unions, & Organizing in the South, 1956-1996, CHICKENBONES: A JOURNAL, http://www.nathanielturner.com/thurgoodmarshall.htm (last visited Oct. 11, 2010) (quoting Mary L. Dudziak).

90. Telegram from Martin Luther King, Jr. to The Honorable Thurgood Marshall (June 13, 1967), STANFORD UNIV., http://mlk-

Next, this section presents the specific methods of persuasion that enabled Marshall to resolve the critical dilemma implicit in arguing for desegregation without delay when he believed that the Court would embrace a gradual approach to desegregation. This section then unveils the advocacy approach that Marshall employed to address relief for the aggrieved school children. Finally, this section reviews the core components of Marshall's practical persuasive techniques, which led the Court to order racial desegregation "with all deliberate speed."[106]

A. Historic Context Shaping Marshall as a Persuasive Practitioner

The Supreme Court's composition,[107] the racial climate, and

children of color as the foundation for his arguments.[110]

The background surrounding Brown I provides compelling insight into the unique picture framing the persuasive practitioner used. Although Brown I was unanimous, members of the Court grappled with the prospect of issuing a decision in favor of educational equality for Blacks.[111] Arguably, that reluctance to resist racial separatism reflected national sentiment.[112] Challenging segregated schools during the 1950s meant assaulting a practice deeply entrenched in the fabric of American society: namely, racial norms that relegated Blacks to second class citizenship.[113] Furthermore, the public atmosphere surrounding Brown I was strained by reports of lynching mobs, cross burnings, and other violent acts of vigilante terrorism against civil rights activists.[114]

in favor of desegregation. Thurgood Marshall believed in educational equality because the school desegregation cases resonated personally with him. His father was a bright, yet uneducated man,[116] and Marshall himself confronted a policy of segregation when considering his own admission to law school.[117] Amidst a celebrated victory in *Brown I* and antagonistic attitudes toward racial justice,[118] Marshall adopted several strategies that would instill hope and promise for "equal participation in our system of education."[119]

B. An Ethical Dilemma

While *Brown I* represents an historic legal decision in favor of social change, integrating schools proved problematic.[120] Under the guise of gradualism, Southern states introduced stall tactics to avoid racially balanced public schools.[121] The Justices called on appellate counsel to address the issue of remedies that would enable the Court to dispose "of a variety of local problems" in implementation plans.[122] The Justices turned their attention to remedies at the close of *Brown I* by ordering further argument addressing specific questions on the desegregation decrees.[123] Marshall faced an awkward ethical dilemma. An argument consistent with legal theories advanced in *Brown I* compelled a position advocating immediate desegregation; yet he feared that position would fail in the face of the segregationists' argument for a gradualist approach.[124]

116. WILLIAMS, supra note 4, at 210.

117. See WILLIAMS, supra note 29 and accompanying text.

118. See, e.g., Tushnet & Lezin, supra note 107, at 1896 (quoting correspondence from Justice Jackson, who questioned the impact of "deeply held attitudes whether of the South or of the colored peoples" on *Brown I*

Marshall needed to find a way to advocate a favorable remedy the Court would adopt even though the remedy appeared to conflict with the reality of the social order.[125] Marshall knew the high stakes in advocating swift life, particularly in Southe2r5 knew the

announced by the Court, while acting in the reality of prevailing opposition to desegregation.[133] Some observers describe the NAACP's final legal position as a compromise in accepting two years as the timeline for school desegregation.[134] Marshall, however, argued vehemently that the outset for immediate relief.[135] After a clear statement of the issues,[136] Marshall invoked favorable images of integration efforts in a section entitled, "Developments in These Cases Since the Last Argument."[137]

effects to show that gradualism created tension, anxiety, and unrest among students.[151] That evidence, Marshall argued, demonstrated that there was no distinction between "piecemeal desegregation of schools" and segregation itself.[152] Marshall then cited human behavior studies to argue that immediate enforcement of the Court's desegregation ruling would not have the deleterious results that gradualists feared.[153] He concluded that proponents of gradual desegregation were opponents of desegregation.[154]

D. Core Components of Marshall's Persuasive Writing Techniques

Review of Marshall's legacy as a persuasive practitioner reveals the core components of effective advocacy. First, Marshall was keenly aware of the realities that threatened the success of immediate desegregation.[155] He used empirical evidence that several states were already complying with *Brown I* to overcome the ethical dilemma implicit in proposing swift remedies in the face of [illegible][156]

rights cases that Marshall's role as a social engineer and moral activist[166] was most apparent.[167] Those cases, however, were not the only avenue for his moral activism. Marshall's public speeches and scholarship also allowed him to voice the moral principle that guided his life's work—equality for all.[168]

As a Supreme Court Justice, Marshall spoke in public less frequently than he did in his earlier career, but he would often use his regular addresses to fellow judges at Second Circuit Judicial Conferences[169] to candidly discuss recent Supreme Court cases.[170]

166. See WILLIAMS, supra note 4, at 69 ("Marshall was using his legal training to become a social activist.").

From Marshall's earliest days as an attorney for the NAACP Legal Defense Fund, he saw himself in the role of social engineer, believing that the aim of law was to build a great society. Id. at 400–04. "Moral activist" is a term Christine Parker and Adrian Evans use to describe lawyers who serve the role of social engineer by using general theories of ethics and morals to seek justice through legal reform. See CHRISTINE PARKER & ADRIAN EVANS, IY FromE FromRS (es at 7.02 0 0 7.02 214.771 T1 1 Tf) Tj uia 1.2 14 S

A few of his speeches were subsequently transcribed or published[171] — including his controversial 1987 Reflections on the

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Constitution's signing, during which the Justices were to play the Founding Fathers, saying in effect, I'm not in much of a party mood.[184] Of the reenactment, Marshall later quipped, "If you are going to do what you did two hundred years ago, somebody is going to have to give me short pants and a tray so I can serve coffee."[185]

Marshall's reaction to Burger's request reflects his belief that the Framers had "barely beg[u]n to construct" the Constitution that stands for "the individual freedoms and human rights, that we hold as fundamental today."[186] Those beliefs led Marshall to criticize "the wisdom, foresight, and sense of justice" of the Framers as not "particularly profound."[187][188] To him, the Constitution's inherent defects validated his belief that it was more appropriate to celebrate the Constitution's evolution rather than its creation, and to recognize that fulfilling the promises embodied in the Constitution's language would require ongoing struggles.[189]

As Marshall grew more outspoken both behind the bench and in public during the 1980s, another development fanned the fire that would ultimately flare in Marshall's controversial speech.[190] This development was the movement advocating an original-intent approach to interpreting the Constitution, which then-Attorney General Edwin Meese III and his Department of Justice embraced and forcefully promoted.[191] Critics of original intent agree that the Constitution's text is the obvious starting point for legal questions, but they assert that the drafters' intent and expectations are not controlling.[192] For support, those critics point to the drafters'

184. Id.

185. Id.

186. Marshall, *supra* note 9, at 2.

187. Id. at 1.

188. Id. at 2.

189. Id. at 2, 5.

190. THURGOOD MARSHALL WORKS, supra note 169, at 281

191. Id.; see, e.g. Edwin Meese III, The Law of the Constitution, 61 TUL. L. REV. 979, 981–982 (1987) (distinguishing between the Constitution, which is the supreme law of the land, and constitutional law, which is "what the Supreme Court says about the Constitution"); Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society of Lawyers Division, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 71 (Steven G. Calabresi ed., 2007) (explaining constitutional fidelity and the administration's approach to constitutional interpretation using original intent).

192. THURGOOD MARSHALL WORKS, supra note 169, at 281; see also William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown Univ., (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, supra note 191, at 55, 61 ("We

deliberate decision to write in general terms, which allowed the Constitution's language to endure, regardless of societal changes.[193]

Marshall was one of those critics.[194] He praised the U.S. Constitution in 1960 when he helped draft a constitution for Kenya's independence, saying, "[T]here's nothing that comes close to comparing with . . . the U.S. [Constitution]. This one is the best I've ever seen."[195] But by the time of his Bicentennial remarks in 1987, he was challenging original-intent

made in the time since the Constitutional Convention:

> [T]he effects of the [F]ramers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to

on Marshall's condemnation of the Framers' compromise than on his aspirations for the continued quest for equality.[210]

B. Reaction to the Bicentennial Speech

Public reaction to Marshall's criticism of both the Constitution and the Founders appears to have been more measured in 1987 than in 2010.[211] Perhaps the 1987 audience recognized what many could not appreciate in 2010—that the speech was not an unpatriotic and unethical rant from a lawyer rejecting the rule of law and our Constitution. Instead, it was an intentionally provocative challenge to recommit to the Constitution's principles with a realistic understanding of the ever-present and ever-changing obstacles to be overcome in the struggle for equality.[212]

Nearly twenty-five years after his Bicentennial speech, Marshall's writing received renewed attention, and ignited even more controversy when President Obama nominated Elena Kagan, Marshall's former clerk,[213] to the Supreme Court. On the day of Kagan's nomination, Michael Steele, Chairman of the Republican National Committee, launched the first of what would become a series of attacks linking Kagan to Marshall's view of the Constitution[214] and questioning the ethics and allegiance of those who consider the Constitution of 1787 to be flawed.[215] Steele

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http://avalon.law.yale.edu/18th_century/debates_917.asp (last visited Aug. 19, 2010) (letter from Sept. 17, 1787).

210. See infra note 215.

211. See supra note 209 and Steele, infra note 215.

212. See Marshall, supra note 9, at 5.

213. Justice Kagan clerked for Marshall in the 1987-88 Supreme Court Term, during which time he delivered the Reflections on the Bicentennial speech. Robert Barnes, Relevance of Kagan's Work as Clerk on Supreme Court Debated, WASH. POST, June 14, 2010, at A15, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/06/13/AR2010061304744.html.

214. Justice Kagan has noted that Marshall viewed the Constitution as flawed because of its commitment to slavery, but unlike Marshall, she has not disparaged the Framers. Instead, Justice Kagan has simply praised those who, like Justice Marshall, have fought inequalities, stating "our modern Constitution is his." Kagan, supra note 168, at 1130.

215. Michael Steele, Statement on President Obama's Supreme Court Nominee, May 10, 2010, http://www.gop.com/index.php/chairman_steele/comments/statement_on_president_obamas_supreme_court_nominee/. Steele's initial press release did not mention Marshall, but was calculated to unnerve readers by presenting Kagan as critical of the Constitution. Steele's statement reads:

warned that Kagan's support for statements suggesting that the Constitution 'as originally drafted and conceived, was 'defective,'"[216] required her "to demonstrate that she is committed to upholding the vision of our Founding Fathers, who wrote a Constitution meant to limit the power of government, not expand it."[217] According to one commentator, Steele's statement and the ensuing assault from members of the Senate Judiciary Committee

wondering whether the Senate Judiciary Committee was holding hearings to confirm Thurgood Marshall rather than Elena Kagan.[219]

As Marshall's biographer, Juan Williams,[220] explained in his July 3, 2010, Wall Street Journal op-ed piece, the Kagan confirmation furor was really over Marshall's work as a lawyer, not as a judge.[221] But even the reality of Marshall's record as lawyer flies in the face of the caricature certain senators tried to portray during Kagan's confirmation hearings.[222] As both a lawyer

activism. See generally Major Garrett,

principle: equality for all.[228] Marshall's words exemplify the solicitous qualities that contributed to his legacy, not as a judicial activist, but rather as a moral activist—one of the ethical legal roles that our Model Rules of Professional Conduct contemplate for lawyers.[229] The Model Rules of Professional Conduct envision that role for lawyers by requiring lawyers to "seek improvement of the law" and to use their knowledge "to reform the law."[230] Marshall spent his career fulfilling that obligation through both his actions and his writing.

C. Legacy of the Bicentennial Speech

During his lifetime, Marshall recognized that the law was the most effective tool to resolve the racial problems that the Constitution failed to address and that America continued to face in the aftermath of slavery and the Civil War.[231] In his Bicentennial speech, Marshall noted the law's shifting role in the struggle for Black equality stating, "What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They were enslaved by law, emancipated by law, disenfranchised and segregated by law; and, finally, they have begun to win equality by law."[232] Marshall never embraced Dr. King's peaceful protests and could not condone Malcolm X's violent tactics; instead, he put his faith in the law as a tool for achieving equality.[233] The significance of

against imposing the death penalty in every case that came before him.[245] Central to his criminal law jurisprudence is his personal understanding of how imposing the death penalty reflects discrimination by disproportionately affecting low-income, minority defendants.[246]

His staunch opposition to capital punishment was grounded in his many years of work with the NAACP and the Legal Defense Fund.[247] Throughout his career as a lawyer for the NAACP and the Legal Defense Fund,[248] Marshall represented countless Black men, usually on trial for rape or murder, in backwater towns in the still segregated South and elsewhere.[249] Those men were frequently falsely charged by police[250] and forced, through police beatings, to confess to crimes they did not commit.[251] They were often tried by all white juries in small-town local courts, far from outside scrutiny,[252] and if convicted, they would most often face death sentences.[253] Through Marshall's many years witnessing those injustices first-hand, he recognized the criminal justice system's frequent failings, particularly in capital cases, and the disproportionate effect those failings had on poor, minority defendants. Marshall gained this awareness of the many ways the law could be applied in an arbitrary and capricious fashion while

245. Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The McCleskey Cases, 1987*, 27 MISS. C. L. REV. 335, 336 (2008).

246. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit* (1986), *in* THURGOOD MARSHALL WORKS, *supra* note 169, at 286–95.

247. *See* Green & Richman, *supra* note 241, at 369–73.

248. See supra note 242 for information on Marshall's involvement with NAACP and LDF.

249. See, e.g., *supra* text accompanying notes 51–65, discussing Marshall's defense work in *Lyons v. Oklahoma*, 322 U.S. 596 (1944). In 1944, while working on the *Lyons* case, Marshall was also called upon to defend Joseph Spell, a Black butler accused of raping his white female employer in Connecticut. IL WAMS , *supra* note 4, at 119–21.

250. See, e.g., *infra* note 254. When one of the Black men accused of raping a

of the Court[257] held that it was constitutionally permissible for a prosecutor to introduce "victim impact evidence"[258] during the penalty phase of the trial.[259] In 1988, Pervis Tyrone Payne was convicted in a Tennessee court of two counts of first-degree

Chief Justice Rehnquist, writing for the majority, almost summarily defended the Court's readiness to overturn its very recent precedents. He noted that the Court has found that stare decisis was not an "inexorable command"; rather it 'is a principle of policy and not a mechanical formula of adherence to the latest

Marshall wrote a vehement and powerful dissent to the Court's opinion. At the heart of his writing in *Payne* were two beliefs: his resolute opposition to the death penalty and his understanding that failing to implement laws impartially is most harmful to the most vulnerable individuals.[281]

While the arguments in Justice Marshall's dissent were predicated on and permeated with his deep personal understanding of the frequent unfairness in the application of the law, the framing of his argument in *Payne* also reflected his genius as a legal strategist, writer, and jurist. Instead of focusing narrowly on the immediate unfairness the majority's decision created, he took a more expansive approach and went beyond critiquing the majority's substantive argument. As a writer, he chose to identify and attack a primary presumption underlying the opinion: that the Court could, without justification, disregard its recent precedents.[282] Thus, in his dissent, Justice Marshall limited his expression of his disagreement with the majority's reasoning on the merits of the case. Instead, he focused on the broader argument that the majority's disregard for the long-established principle of *stare decisis* would inevitably reverse other protections of individual rights.[283]

The first portion of Marshall's dissent explained that *Booth* and *Gathers* were correctly decided because in capital murder proceedings, evidence about the victim is irrelevant and inherently prejudicial.[284] Justice Marshall supported a ban on victim-impact evidence in capital murder cases because he concurred with the premise of both *Booth* and *Gathers*: a death sentence must be predicated on an "individualized determination" of the defendant's moral guilt and the factors before a jury must minimize the risk of an "arbitrary and capricious" decision.[285] An individualized determination is based on "whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."[286] By introducing evidence about the victim's character or reputation, or about the harm the

281. See supra notes 241–256 and accompanying text.

282. *Payne*, 501 U.S. at 844–45 (Marshall, J., dissenting).

283. See *id.* at 851.

284. *Id.*

crime caused, the focus shifts from the defendant's blameworthiness to the victim's personality and the victim's family's grief.[287] Thus, if the victim "was a sterling member of the community,"[288] if the victim's family circumstances were particularly tragic, or if the family members were especially articulate, a defendant would be more likely to have the death penalty imposed than if the victim had been less reputable or had less articulate family members.[289]

Additionally, Marshall argued that many defendants have no knowledge about their victims at the time of the murder, thus raising the possibility that they would be sentenced to death based on inherently poignant or disturbing information that was unknown to them at the time of the crime.[290] To Justice Marshall, it was unacceptable for a jury to hear this type of information. Introducing such evidence inevitably created an unacceptable risk of arbitrariness in capital sentencing because the evidence was based on emotional factors related to the victim or the victim's family, not to the defendant and the crime itself.[291]

principle of stare decisis[296]—and identified the decision's broader harmful impact: its potential for reversing individual rights.[297] In this part of the dissent, he articulated his abiding opposition to what was for him the most disturbing aspect of the opinion, and its greatest threat to justice: the majority's disregard for stare decisis.[298] Justice Marshall argued that the majority dangerously ignored the principle of stare decisis and substituted its will for the accumulated judgment of the Court, thereby threatening not only those being sentenced for capital murder, but also jeopardizing other protections previously guaranteed by the Court.[299]

Justice Marshall argued that stare decisis played a critical role in the U.S. legal system for two reasons. First, "fidelity to precedent is fundamental to a society governed by the rule of

296. Id. at 848–54.

297. Id. at 855-56.

298. The merits of horizontal stare decisis, the concept that the Court must follow its own prior decisions, has generated a significant dispute among both scholars and judges. Proponents insist that stare decisis serves several important functions: (1) it allows for predictability and stability because individuals are able to conform their behavior to a set of guidelines knowing that their behavior will be predicted; (2) it promotes judicial efficiency by providing a disincentive to re-litigating precedent cases thus reducing judicial caseloads; (3) it promotes the notion that decisions are not merely the result of the predilections of a judge or group of judges; and (4) stare decisis helps legitimize the judicial function in several ways. It promotes the notion that the Court is consistent and decisions are not arbitrary–by treating similarly situated indivduals similarly. By adhering to precedent, the Court not only respects their predecessors, but also give weight to current decisions because people recognize the lasting impact of their decisions. William S. Consovoy, The Rehnquist Court and the End of Constitutional Sare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication, 2002 UTAH L. REV. 53, 54 (2002). On the other hand, as Justice Rehnquist argued, stare decisis is not an "inexorable command," Payne, 501 U.S. at 828, and unwavering adherence to the prinhave some troubling and damaging results: (1) adhering to wrongly decided cases would actually damage the Court's legitimacy; (2) strictly adhering to precedent would fail to consider changing and developing social and political factors that can make prior decisions outdated or ineffective; and (3) adherence to stare decisis would limit the Court's ability to alter "bad" law—and would thus leave this function to Congress—further damaging the Court's power and legitimacy. Consovoy, supra, at 54; see also Emery G. Lee, Overruling Rhetoric: The Court's New Approach to Constitutional Cases, 33 U. TOL. L. REV. 581, 585 (2002). As these arguments suggest, in the Supreme Court, horizontal stare decisis creates a tension between the value of consistency in decisions to precedent and the notion that each case should be correctly decided. Robert C. Power, Affirmative Action and Judicial Incoherence, 55 OHIO ST. L.J. 79, 128 (1994). While the view that it is most important that cases be decided correctly is often attributed to conservative Justices, Professor Power notes that "[c]onservatives have no monopoly on attacks on stare decisis," id. at 130, and that the sides have at times been reversed. Rather, he concludes that "devotion to stare decisis is largely a losing side's gambit." Id. at 131.

299. Payne, 501 U.S. at 850–52 n.2 (Marshall, J., dissenting).

law."[300] Second, failing to adhere to precedent, absent some change in circumstance or some way to distinguish the case at hand from the precedents is nothing short of the "blatant disregard for the rule of law,"[301] which is how Marshall viewed the majority's decision in Payne. Marshall argued that stare decisis is the mechanism that assembles a collection of discrete cases into a cohesive legal system.[302] If individual decisions do not adhere to the collective judgment of Justices over time, those decisions would do little more than reflect the politics of the sitting Justices.[303] In such a system, all decisions risked being arbitrary, unpredictable, and unfair.[304]

For Justice Marshall, when the Court's precedents are overturned without a "special justification"[305] — something the

300. Id. at 848 (citing Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 420 (1993), overruled by Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)); supra note 222 for a discussion of critics who questioned Marshall's commitment to the rule of law.

301. Id. at 854–55.

302. See id. at 848–49.

303. Id. at 851.

304. One commentator noted that Justice Marshall very accurately saw through the majority's rhetoric when he bluntly stated that only the members of the Court had changed since Booth and Gathers were decided. Lynn McCreery Sharp, Five to Four Over Spirited Dissent: Justification to Overrule, 73 Miss. C. L. R

Court had previously required—the threat to fairness extended beyond defendants facing capital sentencing.[306] He argued that the majority's rationale for overturning *Booth* and *Gathers*, both of which had been decided within the past four years, was not grounded in a "special justification."[307] Rather, he maintained that in the two years that elapsed since *Booth* and *Gathers*, there was no change in the facts or the law supporting those opinions.[308] He asserted that the only change was a change in the make-up of the Court, and that the decision reflected the majority's politics, rather than a reasoned justification for a policy change.[309]

Justice Marshall used several classic legal discourse and writing techniques in his dissent. By assailing the underpinnings of the majority's opinion rather than simply attacking the argument's logic or the result's unfairness, Justice Marshall's dissent reflected the theme of his career as both a lawyer and a jurist, championing individual rights.[310] He did so without resorting to using policy arguments. Instead, he used his strongest argument—the law—to advance the policies he supported throughout his legal career. By asserting that the majority abandoned the principle of stare decisis, he argued that the Court sanctioned the arbitrariness that he fought throughout his career in a way that set the stage for reversing other individual rights.[311] By

changes or development in the law' that undermine a decision's rationale." *Payne*, 501 U.S. at 849 (citing *Patterson*, 491 U.S. at 173); (2) "The need 'to bring [a decision] into agreement with experience and facts newly ascertained.'" *Payne*, 501 U.S. at 849 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932), *overruled by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938), and *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938)); see also *Patterson*, 491 U.S. at 173; and (3) "A showing that a particular precedent has become a 'detriment to coherence and consistency in the law.'" *Payne*, 501 U.S. at 849 (citing *Patterson*, 491 U.S. at 173). Justice Marshall acknowledged that the majority's reasoning is based on the fact that *Booth* and *Gathers* "have defied consistent application by the lower courts." However, he further states that the evidence provided to support this claim is feeble. The majority never refers to a "special justification" in the opinion. *Payne*, 501 U.S. at 849–50.

306. See *id.* at 851–52.

307. Id. at 849 (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

308. Id.

309. Id. at 850–51.

310. See *Payne*, 501 U.S. at 851–52 n.2; Jeffery Rosen, Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, 48 N.Y.L. SCH. L. REV. 41, 66 (1999), (referring to the dissent in *Payne*, "Justice Marshall listed a number of opinions he predicted might be overruled by those who do not have great regard for precedent. Some already have been.").

311. Payne, 501 U.S. 851-52 (Marshall, J., dissenting).

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