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Second Justice Marshall, The

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From 1801 until 1835 the first Justice Marshall served a distinguished tenure as Chief Justice of the United States Supreme Court. Legal scholars, political scientists, historians and even high school civics teachers recognize his tremendous contribution to the development of American Government and to the definition of the relationship between the Court, the Executive, and the Legislative branches of government. No one man has done more to establish the Court as an institution or to provide the foundation of American Constitutional law. Since the first Justice Marshall's tenure there have been great Justices: Black; Frankfurter; Brandeis; Hughes; Harlan; Holmes; Cardozo; etc. The greatness of these men stems primarily from their able service on the Court. But for a few their greatness resulted, in part, from their contributions to law before ascending to the High Court. Some in this category served on lower appellate courts,[1] while others were outstanding practitioners of law.[2] And of course there was Frankfurter—the Harvard Law Professor. All these men, and others not mentioned, in some way left the mark of their thoughts and ideas on the Constitution. Since the first Justice Marshall, however, no man has left a more indelible mark on the Constitution itself and on the development of Constitutional law than the second Justice Marshall. As chief counsel for the NAACP for approximately 25 years and as Solicitor General of the United States he has been in a unique position to influence the Court's interpretation of the Constitution, and thereby the development of Constitutional law.

For all intents and purposes, Marshall comes to the Court a free man. He carries no portfolio and no charge. Much of the change he labored for as chief counsel for the NAACP he has seen come to fruition.[3] As an advocate before the Supreme Court he experienced unprecedented

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1. Justices Blair, Holmes, Field, Cardozo, Lurton, Peckham and Taft.

2. Justices Brandeis, Story, Sutherland, Taney, Fuller, John Marshall, Harlan, Waite and Fortas.

3. Brown v. Board of Education, 347 U.S. 483 (1954); The Civil Rights Act of 1964, 42 U.S.C. § 1971 *et seq.* (1964); The Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (Supp. II, 1967); 79 Stat. 437.

success.[4] Thus, he will not be required or tempted to use his position on the Court to make law as a Justice that he could not make as an advocate.

Those individuals who automatically place him in the line-up of liberals because of his background may or may not be correct in so doing. Former Justice Frankfurter, a founder of the American Civil Liberties Union, engendered much hostility on his appointment on the grounds that he was an extreme liberal. But it is well known that he became one of the Court's leading proponents of the doctrine of judicial restraint. Care must be taken not to make the same error with Justice Marshall.

Marshall's place in history as a constitutional advocate is assured. His place or standing as a Supreme Court Justice is yet to be determined. Hopefully in the future some legal scholar will study the impact of Marshall on the growth of constitutional law from the Supreme Court Bench. Clearly it is premature to attempt to make such a judgment now. It is not premature, however, to attempt to discern his thinking about the Constitution. Unfortunately, because he was appointed to the Court from the position of Solicitor General, he was forced to disqualify himself in numerous cases. However, he did write a few majority opinions and joined in others which, although the picture is incomplete, give an indication of his position on various sections of the Constitution. This article is not an attempt to use Marshall's first year on the bench to predict how he will view future issues before the Court, but rather to examine and analyze what is already in the records. I leave the predictions to the soothsayers.

The Eighth Amendment

Marshall's majority opinion in *Powell v. Texas*[5] provides us insight into his thinking and his personality.

In *Powell* the defendant was found guilty of violating a statute

4. Brown v. Board of Education, 347 U.S. 483 (1954); Smith v. Allwright, 321 U.S. 649 (1944); Shelley v. Kramer, 334 U.S. 1 (1948); Katzenbach v. Morgan, 384 U.S. 641 (1966); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); Cooper v. Aaron, 358 U.S. 1 (1958); Boynton v. Virginia, 364 U.S. 454 (1960); Patton v. Mississippi, 332 U.S. 463 (1947). Marshall was on the brief in the following cases: Garner v. Louisiana, 368 U.S. 157 (1961), N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) and Barrows v. Jackson, 346 U.S. 249 (1953). Marshall was on briefs amicus curiae submitted on behalf of the N.A.A.C.P. in Steele v. L.&N. R. Co., 323 U.S. 192 (1944) and Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

5. 88 S. Ct. 2145 (1968).

which made it unlawful to be drunk in a public place. Defendant argued that to punish him criminally would constitute a violation of the Eighth Amendment's cruel and unusual punishment prohibition because he was afflicted with the disease of chronic alcoholism and therefore his appearance in public was not of his own volition. Marshall's experience in preparing Constitutional litigation both at the original trial level and before the Supreme Court makes him demand high quality and craftsmanship from those who work for him and from lawyers who would have the Court rule on significant Constitutional questions.[6] Thus, in his majority opinion in Powell, he stated "We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases."[7] Showing the candor and pragmatism for which he is known, Marshall observes that medical facilities to treat indigent alcoholics are so woefully lacking across the country that society runs the risk of "the hanging of a new sign—reading hospital—over one wing of the jailhouse." In addition, commitment for criminal offenses such as public drunkenness are for a time certain, usually of short duration. Whereas, if the state chooses to treat alcoholism civilly, historically one is committed until "cured." Facing the limited alternatives available to the state Marshall concludes:

> The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release, and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming.[8]

In the court below defendant relied on *Robinson v. California.*[9] Marshall distinguished *Robinson* observing that there the statute punished the status of being a narcotics addict, whereas here Powell

6. A friend of mine who worked under Marshall at the NAACP-LDF often relates the story of how he would write a brief and submit it to Marshall, only to have it returned bleeding red from Marshall's pen.
7. Powell v. Texas, 88 S. Ct. 2145, 2149 (1968).
8. *Id.* at 2153.
9. 370 U.S. 660 (1962).

was punished for being drunk in a public place. Powell argued his conduct was involuntary, the product of compulsion and therefore he should not be punished. Marshall, however, refused to accept this argument recognizing its Constitutional imperfections:

> If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering."[10]
> . . .
>
> But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, are not yet clear either to doctors or to lawyers.[11]

Powell v. Texas is in my opinion, for the purpose of analyzing the first year of the second Justice Marshall, a most important case. One might have expected Marshall to have a more emotional response to the problem of the chronic alcoholic—the plight of the penniless drunk, a victim of both his weakness and his poverty, helpless against the forces of society aligned against him, not differing significantly from the cause to which Marshall dedicated his life—the black man a victim of birth operating in a white society with the forces of that society aligned against him. Nonetheless Marshall, refusing to be swept up in emotion, calmly examined the problem to determine rational available alternatives. It is significant that he recognized that the adoption of the position advocated by Powell would affect other areas and therefore the Court must be certain it is establishing precedent it wants to establish. It is also significant that Marshall was unwilling to formulate a constitutional rule while medical science still disputes the basis of alcoholism *i.e.,* whether or not it is in fact a mental disease. Thus, although Marshall has been individually responsible for the evolution and development of Constitutional law as much as any man since the first Justice Marshall, he nonetheless, in *Powell,* advocates change which has some rational basis in understanding and experience. More particularly, although he has championed the cause of the under-

10. Powell v. Texas, 88 S. Ct. 2145, 2155 (1968).
11. *Id.* at 2156.

dog, the underdog must show that he has been wrongfully injured before Marshall will adopt his cause. Here Powell showed an injury, but he did not demonstrate that in light of the interest of the state there was a viable alternative to the state's response to his public drunkenness.

The Sixth Amendment

In the 1967-1968 sessions of the Supreme Court Justice Marshall wrote two opinions and joined in seven others interpreting the Sixth Amendment. In *Mempa v. Rhay*,[12] with Marshall speaking for the majority, the Court held an accused is entitled to counsel at a proceeding where his formerly granted probation is revoked and a new sentence imposed. Conceding the state's authority to provide for deferred sentencing coupled with probation, Marshall nonetheless holds, "a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing."[13] To save the state expense Marshall suggests counsel appointed for trial be used for this deferred sentencing procedure.

Barber v. Page[14] served as a vehicle for the Court to make more explicit the sixth amendment guarantee of the right of confrontation. The right of confrontation historically has been limited by the concept of unavailability, *i.e.*, where a witness is outside the jurisdiction or control of the state, the state is not required to produce him for trial. This concept is primarily used when a witness for the state subsequently dies. The state's witness in *Barber* was outside the state's jurisdiction in a federal prison. There was no showing that the state attempted to have the witness brought in to testify. Instead the state relied upon the witness's testimony taken at a preliminary hearing. Marshall, speaking for the majority, held a witness is not unavailable "unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[15] The fact that Barber's counsel did not cross-examine the witness at the preliminary hearing was not controlling. To Marshall "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."[16]

12. 389 U.S. 128, 88 S. Ct. 254 (1967).
13. 88 S. Ct. at 258.
14. 390 U.S. 719, 88 S. Ct. 1318 (1968).
15. 88 S. Ct. at 1322.
16. *Id.*

In *Smith v. Illinois*[17] the Court reversed the conviction of a defendant where it was shown that counsel for the defendant was denied the right to cross-examine an informer as to the informer's actual name and address. Whereas the majority held a defendant was entitled to know the actual name of his accuser, Mr. Justice White, with whom Justice Marshall joined, concurred on the basis that the state or the witness must come forward with some reason why the informer's actual name should not be disclosed. Absent such a showing the defendant is entitled to know the name of his informer.

Marshall also joined in opinions where the Court: upheld a Tennessee statute which made criminal contempt punishable by 10 days in jail and $50 dollar fine without a jury trial;[18] held the constitutional guarantee to a jury trial extended to a defendant who was sentenced to 24 months in prison without a jury trial;[19] reversed a conviction of murder and a death sentence where the veniremen were excluded for cause when they expressed reservations about the death penalty;[20] ruled under facts similar as before, that a defendant was not denied due process of law where he received life imprisonment and not death;[21] reversed the conviction of a defendant who was convicted without a jury trial of a petty offense punishable by two years in prison although the defendant had only been sentenced to 60 days;[22] held that where prior convictions were constitutionally infirmed under the requirements of *Gideon v. Wainwright*[23] the introduction of the defendant's prior convictions under the Texas recidivist statute to enhance the jury's determination of punishment was prohibited even though there was no showing that the defendant suffered additional punishment.[24] Finally, Marshall joined in a dissenting opinion where the Court denied certiorari to a petitioner where it was shown that without the advice of counsel the petitioner offered to give information on the condition that he be allowed to plead guilty before a certain judge and receive a life sentence, and the inspector testified and recounted this offer of compromise to the jury.

17. 390 U.S. 129 (1968).
18. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).
19. Bloom v. Illinois, 391 U.S. 194 (1968).
20. Witherspoon v. Illinois, 88 S. Ct. 1770 (1968).
21. Bumper v. North Carolina, 88 S. Ct. 1788 (1968).
22. Duncan v. Louisiana, 391 U.S. 216 (1968).
23. 372 U.S. 335 (1963).
24. Burgett v. Texas, 88 S. Ct. 258 (1967).

The dissenting judges argued that the petitioner had been denied a fair trial.[25]

Looking at the sixth amendment cases collectively we see a number of interesting things. First, the Court in *Mempa* extends the right to counsel to what could be likened to an administrative proceeding. In the state of Washington, when the probation of a prisoner is revoked on the grounds of violation of probation, state statutes require the judge to impose the maximum sentence. Thus, the judge, after it has been determined that the prisoner violated the term of his probation, has no discretion. Yet Marshall and the Court require the defendant to be represented by counsel at this proceeding, recognizing that the record at the probation revocation proceeding is critical at future parole administrative proceedings. Thus, it is not unreasonable to assume that Marshall favors the extension of the right to counsel to administrative proceedings. Second, his vote with the majority to extend the right to jury trial to the states and his opinion in *Barber* restricting the concept of unavailability of witnesses indicates his strong commitment to the jury trial. And finally his vote with the majority reversing the conviction of an accused who had been sentenced where veniremen who expressed reservations about the death penalty had been excused, evidences his commitment to a jury trial by men truly representative of all shades of American opinion.

The Fifth Amendment

Marshall did not write a separate opinion on the problems presented by the fifth amendment. He did, however, join in three opinions which provide some insight into his thinking. In *Gardner v. Broderick*[26] the Court reversed the dismissal of a petition for reinstatement by a policeman dismissed because he refused to sign a waiver of his privilege against self incrimination and testify before a grand jury investigating bribery and corruption of police officers. Mr. Justice Fortas held the provision of the New York charter requiring the officer's dismissal violated the officer's Constitutional privilege against self-incrimination. A similar case applied the same protection to sanitation workers.[27]

The Court, however, through Justice Fortas, refused to strike down

25. Johnson v. Massachusetts, 88 S. Ct. 1155 (1968).
26. 88 S. Ct. 1913 (1968).
27. Uniformed Sanitation Men Ass'n v. Commission of Sanitation, 88 S. Ct. 1917 (1968).

a provision of a New York statute instructing public agencies to cease dealing with contractors who refused to testify before a grand jury investigating price rigging in contracts with public agencies. The Court held that since the privilege against self-incrimination does not apply to corporations, the plaintiff who refused to sign the waiver of immunity could not invoke the privilege to challenge the constitutionality of the statute.[28]

Marshall joined with the court in *Haynes v. United States*[29] in reversing the conviction of Haynes for failure to register his sawed-off shotgun as required by statute, holding that the registration requirement violated the defendant's right against self-incrimination. He joined also in overruling the case of *McNally v. Hill*[30] which held that the federal habeas corpus statute[31] prohibited attacks upon consecutive sentences to be served in the future.[32]

The import of these cases is to define the parameters of the protections of the fifth amendment.

The Fourth Amendment

Mapp v. Ohio's[33] protection against unreasonable search and seizure is difficult to apply and tough for the public to understand. The fact that "guilty" criminals are released because of "technicalities" causes the general public and many policemen concern. In the last term of the Court Justice Marshall wrote one opinion and joined in six others dealing with the problem of search and seizure. In *Sabbath v. United States*[34] two federal officers, after knocking on the door of a suspect and receiving no response, opened an unlocked door, arrested the suspect, and seized heroin. By statute a federal officer is required to give notice of his authority and purpose before forcing entry.[35] Marshall held that the method of entry vitiated the arrest and the evidence seized in the subsequent search should not have been admitted. As far as Marshall was concerned:

> An unannounced intrusion into a dwelling—what 3109 basically

28. Geoerge Campbell Printing Corp. v. Reid, 88 S. Ct. 1978 (1968).
29. 390 U.S. 85 (1968).
30. 293 U.S. 131 (1934).
31. 28 U.S.C. § 2241 (1964).
32. Peyton v. Rowe, 391 U.S. 54 (1968).
33. 367 U.S. 643 (1961).
34. 88 S. Ct. 1755 (1968).
35. 18 U.S.C. § 3109 (1964).

> proscribes—is no less an unannounced intrusion whether officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or as here, open a closed but unlocked door.[36]

Marshall joined in opinions of the Court where it: upheld the right of a police officer who observes suspicious conduct to stop and question and search the outer garments of a suspect;[37] reversed the conviction of a prisoner convicted of unlawful possession of narcotics where it was shown that the officer stopped and frisked the accused because he saw him talking to known narcotics addicts and in the subsequent search the officer was looking for narcotics and not conducting a self-protective search;[38] reversed the conviction of a union official after a warrantless search, based on the issuance of a subpoena duces tecum issued by the district attorney, was used to justify the seizure of union records;[39] held that where police intercepted the conversations of a defendant in violation of the Federal Communications Act[40] such conversations were not admissible against the defendant to prove a violation of state lottery laws.[41] Finally Marshall joined with the Court in *Harrison v. United States*[42] extending the fruit of the poison tree doctrine to reach the question of the admissibility in a second trial of testimony by the defendant at his first trial placing him at the scene of the crime. Here the original conviction was reversed because of the involuntariness of Harrison's confession and in the second trial the prosecution did not show that the former admission was not the product of the original involuntary confession.

Marshall's majority opinion in *Sabbath* and the opinions of the Court in which he joined demonstrate quite clearly his concern with the protection of the citizen's fourth amendment right of privacy. Apparently despite the great criticism the court has received for its rulings on the protections of the fourth amendment, Marshall refuses to be intimidated by existing public controversy and supports the Court's rulings in this area.

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36. Sabbath v. United States, 88 S. Ct. 1775, 1778 (1968).
37. Terry v. Ohio, 88 S. Ct. 8168 (1968).
38. Sibron v. New York, 88 S. Ct. 1889 (1968).
39. Mancusi v. DeForte, 88 S. Ct. 2120 (1968).
40. 47 U.S.C. § 605 (1964).
41. Lee v. Florida, 88 S. Ct. 2096 (1968).
42. 88 S. Ct. 2008 (1968).

The First Amendment

As is the case with labor law, much of the law of the civil rights movement is based on the First Amendment. Marshall's majority opinions in several cases, his concurring opinion and those opinions where he joined with the majority provide some insight into Marshall's current thinking about the protections of this amendment.

In *Amalgamated Food Employees v. Logan Valley*,[43] speaking for the majority, Marshall reversed the Pennsylvania Supreme Court and upheld the peaceful picketing of a business located within a shopping center. Citing *Marsh v. Alabama*[44] Marshall suggested ". . . the precise issue was the right under the First Amendment, to handbill on property used for commercial purposes." On the other hand, Marshall voted with the majority in holding that a Mississippi anti-picketing law prohibiting picketing which obstructs or unreasonably interferes with free ingress or egress to and from public buildings and property was not void for vagueness.[45]

In *Pickering v. Board of Education*,[46] a teacher was dismissed for sending a letter to a local newspaper critical of the fiscal practices of the Board of Education. The court, with Marshall speaking for the majority, held that the question of the necessity of additional funds is a matter of public concern and that it is essential that teachers who, as a class, are likely to have informed opinions of this issue, be able to speak out freely without fear of dismissal. Petitioner Pickering contended that the *New York Times*[47] rule should be applied to public statements made by teachers i.e., an "equation of dismissal from public employment for remarks critical of superiors with [the] awarding [of] damages in a libel suit by a public official for similar criticism." Marshall rejected this contention but observed that where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication" the teacher is to be regarded as a member of the general public. "Thus absent proof of false statements knowingly and recklessly made by him, a teacher's exercise

43. 88 S. Ct. 1601 (1968).
44. 326 U.S. 501 (1946).
45. Cameron v. Johnson, 390 U.S. 611 (1968).
46. 88 S. Ct. 1731 (1968).
47. 376 U.S. 255 (1964).

of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[48]

The problem of censorship also came before the Court.[49] The City of Dallas had an ordinance requiring the classification of films as suitable for young people. Marshall, speaking for the majority, found the ordinance invalid because its operative term—sexual promiscuity—was not defined therein and therefore the "only limits on the censor's discretion in his understanding of what is included in the term 'desirable, acceptable, or proper.' " Thus, producers unable to understand the meaning of such words, rather than run the risk of being foreclosed from a significant portion of the movie-going public—young persons—might choose to produce "nothing but the innocuous." Marshall rejected Dallas' argument that this constitutionally vague ordinance was necessary to protect children from undesirable films. "The permissible extent of vagueness is not directly proportional to or a function of the extent of the power to regulate or control expression with respect to children."[50]

Marshall, however, joined in sustaining the conviction of a defendant for violating a New York statute prohibiting the sale of obscene material which appealed to the prurient interests of minors under 17 years of age.[51] The Court ruled that the adjusting of the definition of obscenity on the basis of its appeal to minors under 17 years of age had a rational relation to the valid state objective of safeguarding such minors.

Also in the first amendment area Marshall joined the majority in *Board of Education v. Allen*[52] upholding a state statute authorizing the lending of textbooks to students in parochial schools, and in *Flast v. Cohen*[53] holding that federal taxpayers had standing to sue to prevent the expenditure of federal funds for the purchase of instructional materials for use in parochial schools on the ground that such expenditures were allegedly prohibited by the establishment clause of the first amendment.

48. Pickering v. Board of Education, 88 S. Ct. 1731, 1738 (1968). *See also* St. Amant v. Thompson, 390 U.S. 727 (1968), where in an action for libel Marshall voted with the majority to reverse the judgment of the Louisiana Supreme Court and to hold that statements read by the defendant on television referring to the passing of money between a union official and the plaintiff deputy sheriff did not amount to "reckless" publication within the New York Times rule, actual malice not having been established.
49. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S. Ct. 1298 (1968).
50. 88 S. Ct. at 1306.
51. Ginsberg v. New York, 390 U.S. 629 (1968).
52. 88 S. Ct. 1923 (1968).
53. 88 S. Ct. 1942 (1968).

Marshall voted with the majority to strike a teachers' loyalty oath for vagueness. The oath, when read with the alteration and membership clauses of the Maryland Subversive Activities Act, would proscribe alteration of the government by peaceful revolution.[54] Marshall also voted with the majority in holding that the first and fourteenth amendments gave a union the right to hire an attorney on salary to aid its members in processing workmen's compensation claims, thereby rejecting the argument of the Illinois State Bar Association that this constituted the unlawful practice of law.[55]

We can draw a number of conclusions from Marshall's opinions and votes in cases which brought to the Court questions on the first amendment. First, as his opinion in *Amalgamated* indicates, and as his past experience as chief counsel of the NAACP Legal Defense and Educational Fund demonstrates, Marshall values highly the first amendment right to communicate grievances by peaceful picketing. Similarly his opinion in *Pickering* upholding the right of a school teacher to criticize the school board and his vote upholding the right of a union to hire an attorney to process workmen's compensation claims probably reflect his own experience of defending on first amendment grounds the right of Negro school teachers to join and be active in the NAACP without fear of losing their jobs. Second, although the state has a legitimate interest in protecting youth from obscene material, it must effect this interest in terms neither constitutionally vague nor in terms which give virtually unlimited discretion to the censor. Thus, Marshall falls within that group of Justices which have represented the majority in the obscenity area who have recognized the right of the state to censor, but who argue that the state must in clear terms place the individual on notice as to what is constitutionally permissible and impermissible activity. We can make a similar observation about his opinion on loyalty oaths. Third and finally, his understanding of the first amendment's requirement of the separation of church and state does not require him to conclude that the state is prohibited from lending text books to parochial schools. His vote in this area of church-state relations might be more important for the future than any other position he took his first year on the Court. The Court's most recent decisions on the school prayers stood as an obvious threat to the constitutional validity of aid to parochial schools by the states. With

54. Whitehill v. Elkins, 389 U.S. 54 (1967).
55. United Mine Wkrs. of America v. Illinois State Bar Ass'n., 389 U.S. 217 (1967).

Marshall joining those who take a more flexible approach to the church-state problem of the first amendment, the proponents of federal and state aid to religious schools need not fear constitutional attack of aid properly given.

ANTITRUST

Based on his first year on the Court, Marshall's thinking in the anti-trust area remains unsettled. Neither his majority opinion in *Case-Swayne Co. v. Sunkist Growers, Inc.*[56] nor his majority opinion in *First National Bank of Arizona v. Cities Service Co.*[57] point in any particular direction.

However, Marshall's concurring opinion in *Perma Life Mufflers, Inc. v. International Parts Corp.*[58] does provide some insight into his thinking on anti-trust problems. In *Perma Life* plaintiffs sought treble damages for alleged Sherman Act violations. The majority, through Black, held the doctrine of *in pari delicto* no defense to an anti-trust action.[59] Marshall, however, would apply *in pari delicto* "where a defendant in private anti-trust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault. . . ."[60]

Philosophical differences between Justices Black and Marshall are apparent in this case. Black restates the position taken previously by the Court that the private antitrust action serves an important public purpose in favor of competition. "A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."[61] Marshall, on the other hand, stresses the equities between the parties. While agreeing that there is a strong public interest in eliminating restraint on competition, Marshall cannot agree that this public interest is so strong as to require that a person who "has actively sought to bring about about illegal restraints on competition for his

56. 389 U.S. 384 (1967).
57. 391 U.S. 253 (1968).
58. 88 S. Ct. 1981 (1968).
59. *In pari delicto* means in equal fault.
60. Perma Life Mufflers, Inc. v. International Parts Corp., 88 S. Ct. 1981, 1989 (1968). Justice Marshall also joined the majority in finding an illegal restraint of trade under the Sherman Act where a newspaper combined with another company to solicit subscribers away from an independent carrier, hired a person to deliver papers to successfully solicited customers and forced the independent carrier to charge its customers no more than the maximum retail price advertised by the newspaper. Albrecht v. Herald Co., 390 U.S. 145 (1968).
61. *Id.* at 1984.

own benefit be permitted to demand redress . . . from a partner who is no more responsible for the existence of the illegality than [he]."[62]

Thus, whereas Justice Black places primary emphasis on enforcing public policy opposing restraints in trade, Marshall balances against the public interest the extent to which the person seeking redress participated in the illegal scheme. Marshall's opinion here is interesting because it represents the traditional Christian ethic that a co-conspirator should not be rewarded once he has decided that the conspiracy is no longer in his best interests.

His opinion in this case, while not revealing particular leanings in economic philosophy, does evidence the great emphasis he places on individual responsibility. How this emphasis on individual responsibility will affect his votes in the anti-trust area and in other problem areas faced by the Court remains to be seen.

Taxation

The power to tax is the power to destroy said the first Justice Marshall. However, the interval between *McCullough v. Maryland*[63] and the present has witnessed significant changes in the federal-state relationship. As far as the second Justice Marshall is concerned distinctions can now be made which would permit a state to tax certain aspects of a national bank's activity. This precise issue arose in the case of *First Agricultural Bank v. State Tax Commission.*[64] There the Court held that 12 U.S.C. § 548 prescribed the only methods by which the states could tax national banks and thus concluded national banks were immune from both the Massachusetts sales and use taxes.[65] Justice Marshall, joined by Justices Harlan and Stewart, dissented. Starting from the premise that the "Constitution of its own force does not prohibit Massachusetts from applying its uniform sales and use taxes to, among other things, appellant's wastebaskets,"[66] Marshall insisted that the Court's failure to come to grips with this constitutional issue gives renewed life to an "outmoded doctrine." He argued that "in light of present functions and the role of national banks . . . they should not in this day and age be considered constitutionally immune from nondiscriminatory state taxation."[67]

62. *Id.* at 1991.
63. 17 U.S. 316 (1819).
64. 88 S. Ct. 2173 (1968).
65. Mass. Gen. Laws Ann. Ch. 58, §§ 1-1, 1-2 (1958).
66. 88 S. Ct. at 2178.
67. *Id.*

The thrust of Marshall's argument is that there are vital differences between the federal functions performed by the Second Bank of the United States and the federal functions performed by the national banks in *Owensboro,* and in the case before the Court.[68]

> [T]here is little difference today between a national bank and its state-chartered competitor: The ownership, control and capital source of each is private; each exists for private profit. More importantly, neither may issue legal tender. . . . The national banks perform no significant fiscal services to the Federal Government not performed by their state competitors. Any federally insured bank, state or national, may be a government depository. . .[69]

Two things are apparent from Marshall's opinion in this case. First, he here demonstrates a willingness to reexamine prior precedent to determine its current validity. Thus, Marshall will not be a captive of the past. Second, he recognizes and supports the sovereign power of the state and therefore would allow it to assert its taxing power in the manner it attempts to do here. His willingness not to be bound by the past supports those who looked upon his appointment as a new and liberal voice for the Court. However, his recognition of the power of the state to tax national banks demonstrates that he will not be a captive of doctrinaire federalism. His opinion in this case flies in the face of those who would dogmatically assert the central government's freedom from state control.

In General

Marshall and a unanimous Court struck down two "freedom of choice" plans and one "free transfer" plan as inadequate compliance with the school boards' responsibility to promptly and reasonably desegregate their school systems.[70]

Marshall also joined the majority in: reversing the judgment of the Louisiana Supreme Court which denied illegitimate children the right

68. The precedents cited for holding federal instrumentalities immune from state taxation are McCullough v. Maryland, 17 U.S. 316 (1819), Osborn v. Bank of the United States, 22 U.S. 738 (1824) and Owensboro National Bank v. City of Owensboro, 173 U.S. 664 (1899). In reviewing these cases, Marshall points to the fact that in both McCullough and Osborn the statutes struck as unconstitutional were patently discriminatory against the Second Bank of the United States. However, Chief Justice Marshall's failure to limit his opinions in those two cases to discriminatory taxes combined with a mechanical application of the concept espoused therein led the Court to hold in Owensboro that a nondiscriminatory franchise tax could not be levied upon a national bank.

69. First Agricultural Bank v. State Tax Commission, 88 S. Ct. 2173, 2183 (1968).

70. Green v. County School Board, 88 S. Ct. 1689 (1968), Raney v. Board of Education, 88 S. Ct. 1697 (1968), Monroe v. Board of Commissioners, 88 S. Ct. 1700 (1968).

to recover for the wrongful death of their mother holding that such denial constituted an invidious discrimination;[71] holding that the Alabama "substitute father" regulation which required disqualification of otherwise qualified children from aid to dependent children if the mother "cohabits" with a man not obligated by law to support the children defines "parent" in a manner inconsistent with the Social Security Act;[72] in holding that an 1874 statute providing that all citizens of the United States shall have the same right in every state as is enjoyed by white citizens to inherit, purchase, lease, sell, hold and convey real property, bars all racial discrimination, public and private, in the sale or rental of property.[73]

Marshall joined the majority in holding that a United States Court of Appeals was without jurisdiction to review, in the first instance, a decision denying a stay of deportation of the District Director of the Immigration and Naturalization Service;[74] and in holding that where a treaty with certain Indians provided that the Indians could fish at "usual and accustomed places" but did not give the Indians the right to fish in the "usual and accustomed manner" the state could not qualify the places by conservation laws but could qualify the manner fish were taken provided it did not discriminate against the Indians.[75]

71. Levy v. Louisiana, 391 U.S. 68 (1968).
72. King v. Smith, 88 S. Ct. 2128 (1968).
73. Jones v. Alfred H. Mayer Co., 88 S. Ct. 2186 (1968).
74. Cheng Fan Kwok v. Immigration and Naturalization Service, 88 S. Ct. 1970 (1968).
75. Puyallup Tribe v. Department of Game of Washington, 88 S. Ct. 1725 (1968). Marshall also joined the majority in finding that it was unfair labor practice for a union to expel a member on the ground that the member filed an unfair labor practice complaint with the NLRB without exhausting internal union remedies, N.L.R.B. v. Industrial Union of Marine and Shipbuilding Wkrs., 88 S. Ct. 1717 (1968); joined the majority in reversing the judgment of the United States Court of Appeals for the Third Circuit which ordered compliance with an arbitrator's award which was not an operative command capable of enforcement and in reversing the contempt order for its violation as an invalid exercise of federal judicial authority, International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64 (1968); joined the majority in ruling that where it was not feasible to join a car owner without eliminating diversity jurisdiction he was an indispensable party whose nonjoinder required dismissal of the action, Provident Tradesmen's Bank and Trust v. Patterson, 390 U.S. 102 (1968); joined the majority in holding that an employer's claim under the no-strike clause of a collective bargaining agreement was a claim arising under the "laws of the United States" within the scope of the removal statutes, Avco Corp. v. Aero Lodge, 390 U.S. 557 (1968); joined the majority in finding that a company which owned, maintained and leased refrigerator cars to railroads and which serviced its own cars, controlled their eventual destination and had yards and repair facilities for its cars, was not a "common carrier by railroad" within the Federal Employee's Liability Act, Edwards v. Pacific Fruit Express Co., 390 U.S. 538 (1968). With the majority, Marshall held that an employer's unpaid contributions to an annuity plan were not entitled to priority in bankruptcy as being "wages due to workmen" within the statute giving such wages priority in advance of the payment of dividends to creditors, Joint Industry Board of the Electrical Industry v. United States, 391 U.S. 224 (1968). Marshall joined the majority in holding that a district court had jurisdiction under the All Writs Act to issue an order in the nature of a writ of mandamus in a case against a

The general pattern of this line of cases finds Marshall voting for what we can identify as the liberal position. His vote on the right to buy a house, the substitute father, and the so-called freedom of choice plans all fall within the pattern one might expect from a man who for 25 years fought for the rights of Negroes to live, to eat, and to be educated. These cases are therefore helpful, but not definitive.

Conclusion

To the extent that a Supreme Court Justice's prior experience provides a basis to anticipate how he will vote on issues faced by the Court, Marshall's 25 years championing the cause of the underdog certainly places him on the side of the liberals. Superficially a review of his votes and his opinions for his first year on the Court supports this conclusion. His votes in the first amendment area supporting the right of a person to communicate ideas by picketing at a shopping center, his extension of the right to counsel in *Mempa v. Rhay*, and his support of the Court's approach to the fourth amendment's protection of the right of privacy and his flexible approach to the problem of church-state relations all lead to the conclusion that he will be a liberal member of the Court. However, his support of the right of the state of Massachusetts to tax national banks, his espousal of the concept that a wrongdoer should not benefit from his wrongdoing in *Perma Life Mufflers*, and his highly pragmatic vote and opinion in *Powell* should give those who would automatically place him in the line-up of liberals some pause. We must keep in mind that much of the change in the law Marshall labored for as an advocate he has seen come to fruition. Thus, as stated in the introduction he comes to the Court a free man.

Marshall's first year on the Court indicates that we can probably expect, on the issues clearly identifiable with liberal and conservative positions, he will, a majority of the time, vote with the liberals. But if his passion for craftsmanship and his highly pragmatic approach to constitutional problems, as demonstrated by his opinion in Powell, provide any guide to his future position on issues before the Court, it would be foolish to expect any slavish following of the liberal line by the second Justice Marshall.

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private party, Stern v. South Chester Tube Co., 390 U.S. 606 (1968); joined the majority in reversing a state tax commissioner's application of a mileage formula to an interstate railroad's rolling stock, which assessment was twice the value such stock was assessed when in the hands of another railroad, Norfolk & Western Ry. v. Missouri State Tax Commission, 390 U.S. 317 (1968).