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ILLUMINATING JUSTICE MARSHALL'S DEATH PENALTY JURISPRUDENCE VIA THE PRISM OF DYNAMIC CONSTITUTIONALISM

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> In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.
> - *Furman v. Georgia* (Marshall, J., concurring)

I. INTRODUCTION

As we enter the centennial anniversary of Justice Thurgood Marshall's birth, history is beginning to drift away from Marshall's substantive contribution to American Constitutional jurisprudence. At a time in American constitutional history when the jurisprudence is slipping away from the Marshallian ideals anchored in an expanded abstraction of law, manifested by recent jurisprudential developments in civil liberties[1] and death penalty issues,[2] revisiting Marshall's legacy is vitally important. Against this backdrop, I shall respectfully pen my tribute to Marshall's jurisprudential philosophy with a view to establish that Marshall's equality conception can best be judged through the interpretive gloss of dynamic constitutionalism,[3]

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1. *See generally* Saby Ghoshray, *Untangling The Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249, 270 (2006) (discussing the recent curtailment of civil liberty of citizens by the Bush Administration's War on Terror and offering differing viewpoints on the issue).

2. *See generally* Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-*Roper, 45 J. CATH. LEGAL STUD. 561 (2006) (highlighting various viewpoints and recent developments in death penalty jurisprudence post-*Roper v. Simmons*, 543 U.S. 551 (2005)).

3. By referring to a dynamic Constitution, attention is drawn to the process by which the Constitution adapts to the changing conditions in the society. As the frontiers of the freedom of speech, the freedom of religion, the rights to privacy and sexual practices among consenting adults continue to expand within the meaning of our Constitution, we are confronted with its dynamic aspect. In most parlance, the phrases "dynamic Constitution" and "living Constitution" are used synonymously. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3–4 (2001) (explaining that the

perhaps an area of his jurisprudence that has not been the subject of much scholarly discussion.

Justice Marshall's jurisprudence was built on his conception of equality—equality he found elusive in the lives of impoverished African Americans during his legal career. Thus, as a firsthand witness of the segregated minority's disenfranchisement, Marshall allowed these life experiences to shape his jurisprudence into a relentless pursuit of equality in the legal process. This struggle for equality prompted Marshall to extricate substantive justice from its formal procedural counterpart. Perched on this illuminated vision of substantive justice was built perhaps the most profound legacy of Marshall—his embrace of a dynamic interpretation of the Constitution. This interpretation was animated by the aspiration set forth in the Declaration of Independence, while transcending law into a value-centric justice mechanism[4] and along the way, paving a more attainable road to equality for future generations. During his time on the Court, Marshall sought to achieve this goal by dismantling legal barriers through his powerful dissents and concurring opinions, as well as his writings for the majority.

As I contemplate Marshall's jurisprudence for posterity, I am confronted by his contributions in civil rights,[5] free expression,[6] poverty law,[7]

Constitution provides principles that the Court identifies and implements "through a highly moralized, philosophic inquiry").

4. By "value-centric justice mechanism," I draw attention to the framework which derives its fundamentals from the recognition that, every individual within a society is capable of imparting value, which calls for an analysis of economic trade-off between lengthy incarceration and parole-probation. I have examined this concept of value-centric punishment mechanism in my forthcoming work, Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT (forthcoming 2008).

5. *See* Rhode, *infra* note 35.

6. Justice Marshall wrote a number of pioneering decisions for the Supreme Court, which bolsters, in unmistakable terms, an individual's right to privacy. In *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), the Court ruled that states cannot criminalize possession of pornographic material within one's private dwelling. Justice Marshall illuminated the meaning of the First Amendment stating:

> [W]e do not think [statutes regulating obscenity] reach into the privacy of one's own home. If the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. Similarly in *Police Department of the City of Chicago v. Moseley*, 408 U.S. 92, 95-96 (1972) (internal citations omitted), Marshall declared a city ordinance in violation of the Constitution because:

> [T]he First Amendment means that government has no power to restrict expression because of its message its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.

7. Marshall's greatest contribution to the Supreme Court was his powerful dissents, an array of which illuminated his conception of how law should treat poor people. While his colleagues in the Court, in most cases, refrained from providing relief to individuals disabled by impoverishment, Justice Marshall saw this as the majority's mistreatment of the poor. In *United States v. Kras*, 409 U.S. 434, 459-60 (1973) (internal citations omitted), while the majority upheld the constitutionality of the filing fee requirement, Marshall unleashed a strong dissent:

> "I cannot agree with the majority that it is so easy for the desperately poor to save $1.92 each week over the course of six months. The 1970 census found that over 800,000 families in the Nation had annual incomes of less than $1,000, or $19.23 a week. I see no reason to require

and death penalty.[8] Mostly, however, I am drawn to his juridical objective of abolishing the death penalty, a commitment in which he never wavered. His death penalty jurisprudence is revealed through his relentless dissents, speeches, and court briefs, and developed through his half-century of work towards abolishment in the future. He espoused the belief that the death penalty is cruel and unusual punishment and thus, violative of the Constitution's Eighth Amendment. This belief emanated from his deep conviction in the essence of human morality and ethics.[9] His unflinching commitment to restoring equality within the legal process made it untenable to accept the arbitrariness with which capital sentencing is disbursed in the U.S.[10] I seek to illuminate Justice Marshall's death penalty jurisprudence through two distinct threads. In the first, I draw attention to Marshall's view of dynamic constitutionalism to illustrate how this interpretive technique is consistent with his abolishment position. In the second, I examine how Marshall's interpretation of the Eighth Amendment's "cruel and unusual"

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that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy.

8. *See* Tracy B. Fitzpatrick, *Justice Thurgood Marshall and Capital Punishment: Social Justice and the Rule of Law*, 32 AM. CRIM. L. REV. 1065, 1065-86 (1995).

9. In *Furman v. Georgia,* 408 U.S. 238, 343–58 (1972) (Marshall, J., concurring), Justice Marshall analyzed the social purposes for the imposition of the death penalty: retribution, deterrence, recidivism, eugenics, economy, and encouraging guilty pleas and confessions. *See also Gregg v. Georgia*, 428 U.S. 153, 236–42 (1976) (Marshall, J., dissenting) (discussing the concepts of retribution and deterrence and their relationship to capital punishment). He systematically considered and eliminated each one of them. First, he eliminated retribution by itself as a legitimate penological objective, contending: "[T]he Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance." *Furman*, 408 U.S. at 343 (Marshall, J., concurring). Second, he rejected arguments that the death penalty is a necessary deterrent to crime in society. Citing research, and supporting the idea that the death penalty is no more effective a deterrent than life imprisonment, Justice Marshall asserted that "[i]n light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect." *Id.* at 345–54. Third, Marshall examined evidence contending that convicted murderers rarely commit murder again even if they are not sentenced to die. *See id.* at 355. Next, Justice Marshall established the economic argument that the death penalty is more expensive than life imprisonment. *See id.* at 358. Additionally, he felt the leverage used by the invocation of the death penalty to encourage guilty pleas and confessions is morally repugnant and a violation of the defendant's Sixth Amendment right to a jury trial. This led him to believe that life imprisonment is penologically sufficient as it "can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency." *Id.* at 356 (discussing Justice Marshall's abolitionist position). For a more comprehensive discussion of the Justice Marshall's objections to capital punishment, *see* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL, 11–13, 143–44, 182–84, 187–89 (Northeastern University Press 1996).

10. To better understand the arbitrariness and capricious nature of the death penalty I have relied on general sources such as: Samuel R. Gross, Still Unfair, Still Arbitrary - But Do We Care?, Keynote Address, *in* 26 OHIO N.U. L. REV. 517 (2000); Ben Steiner, *Still Arbitrary: Capital Sentencing in the Post*-Furman *Era,* 10 CRIM. JUST. POL'Y REV. 85 (1999); Amnesty International, *The Death Penalty is Arbitrary and Unfair*, http://www.amnestyusa.org/abolish/arbitraryandunfair.html; Michael Burkhead and James Luginbuhl, *Sources of Bias and Arbitrariness in the Capital Trial*, 50 J. SOC. ISSUES 103 (1994); Ronald J. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 REV. L. & SOC. CHANGE 797 (1986); David Baldus, et al., *Arbitrariness And Discrimination In The Administration Of The Death Penalty: A Challenge To State Supreme Court*, 15 STETSON L. REV. 133 (1986); John Blume, Theodore Eisenberg, and Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD., 165-207 (2004); American Civil Liberties Union, *Scattered Justice: Geographic Disparities of the Death Penalty*, March 5, 2004, http://www.aclu.org/capital/unequal/10532pub20040305.html.

doctrine stems from his vision of morality, extracted from the deeper confines of society's evolving standards of decency. Drawing upon these two apparently discordant threads, I trace the constitutional contours of Marshall's "death-is-different" jurisprudence to establish that his death penalty jurisprudence is an extension of his equality conception.

Although Marshall envisioned the emancipation of downtrodden minorities through the legal process, he did not believe in the Constitution's original intent. To him, the framers' intent was not consistent with the direction of social change required to bring about equality in the legal process. Marshall saw the promise of social change through legal process only within his view of dynamic constitutionalism, a viewpoint that might seem inconsistent with Marshall's professed allegiance to established legal process. In my view, embracing dynamic constitutionalism does not attenuate Marshall's fidelity to rule of law. Rather, it provides a window through which to interpret his conception of equality and liberty. And it is within these doctrines that he sought to bring equality in the legal process.[11] Through his adherence to these normative components buried in the Constitutional texts, Marshall set forth a jurisprudential goal to bring substantive equality to the legal process. His substantive equality differs from "genuine equality"[12] in that his equality does not seek equal outcome. Rather, it places reliance on access to the legal process for all people so that equitable legal outcomes can be achieved by all.

Marshall's recognition of the evolving nature of the Constitution can be viewed through his steadfast belief in a more malleable interpretation, rather than perhaps what was intended by the framers, especially in race relations and social justice. To him, the Constitution was made for all the people and was to be given life and substance via the aspirations and will of all. He believed that deep in the bosom of the indeterminate texts of the constitutional statutes, there is a promise of fairness and equality to those victimized by discrimination.[13] This very conception of equality shaped his view of the original intent. Therefore, constitutional interpretation must not rely on precedents, especially when it cannot address societal problems

11. *See* Cass R. Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267, 1267-75 (1992).

12. This term appeared in Marshall's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265, 398 (1978).

13. Marshall's commitment to equal opportunity for all people came through his early cases, in which he challenged the practice of applying second-class citizen in children, as he responded to Justice Reed's question in his argument in *Brown*:

> I know in the South where I spend 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 play together. I do not see why there would necessarily be any trouble if they went to school together.

Oral Argument, *Briggs v. Elliot* (Dec. 10, 1952) (companion case to *Brown*) *in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 345-46 (Philip B. Kurland & Gerhard Casper eds., 1975).

stemming from the inequality found in the darkest recesses of human nature and reveals itself through bigotry, hatred, and selfishness.[14] Therefore, Marshall's fidelity to the Constitution comes from his recognition of the need for a flexible legal process that would seek to maximize social equality for every citizen.

Besides allegiance to an evolving constitutionalism, Marshall's conception of equality can be traced to his viewpoint of morality.[15] I have no doubt that this morality prism will further irradiate Marshall's conception of equality for reasons I shall highlight in this article. The moral compass Marshall uses is illuminated by an evolving conception of civilized humanity, which is a far cry from the hackneyed ideals of morality that flow from the strict religious connotations of Puritanism. His morality must be viewed through the lenses of societal evolution, where all societal changes are prompted vis-à-vis enlightenment in social understanding. According to this view, the death penalty is a barbaric punishment mechanism, originated in the early medieval days, more for the purpose of vengeance and retribution, and less aimed at achieving deterrence.

With the evolution of society, however, the threshold of human decency must be elevated, allowing the advancement to be measured. Marshall contended that by correcting the moral compass of the society, humanity can achieve this elevated threshold of decency.[16] Thus, if we measure this evolving standard of decency, not only can we inculcate a newer dimension to morality, but also can recognize the death penalty's cruel and unusual elements, which will automatically render such punishment prohibited under the Eighth Amendment.

Therefore, this short monograph will be constructed in three parts. In Part II, by going through Marshall's speeches, concurrences and dissenting opinions, I will draw an analysis of his view of dynamic constitutionalism.

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14. Marshall saw the Constitution as an evolving document, which acquired newer meaning with various Amendments along its two-hundred years of journey from birth. As a result, Marshall did not believe in the original meaning of the Constitution, as seen through his multiple opinions and speeches. While rejecting the notion of caste-like barriers in the society, Marshall observed, "[t]he intent of the Fourteenth Amendment was to abolish caste legislation. When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated." *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 469 (1988) (Marshall, J., dissenting) (citations omitted).

15. Morality takes an important stage in Marshall's jurisprudence. Justice Marshall used moral discourse in establishing the legal validity of his abolitionist position in several instances during his *Furman* opinion. According to him, the death penalty "violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history." *Furman v. Georgia*, 408 U.S. 238, 360 (1972) (Marshall, J., concurring). Marshall further noted that a punishment is morally acceptable "unless 'it shocks the conscience and sense of justice of the people.' " *Id.* (quoting *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir. 1952)) (footnote omitted). Justice Marshall then concluded that, by abolishing the death penalty, "[w]e achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment." *Id.* at 371 (quoting RAMSEY CLARK, CRIME IN AMERICA 336 (1970)) (footnotes omitted).

16. By threshold of decency, I draw attention to a measuring stick by which humanity's progress with respect of acquiring traits of civility or decency can be measured. The concept of decency or evolving standards of decency has been further elaborated. *See, e.g., San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 (1973).

In Part III, I will expand upon the morality-centric jurisprudence of Justice Marshall and explain how the morality and the evolving standard of decency must be viewed together. This will lead to an in-depth look at Marshall's death penalty jurisprudence and how it matured through his invocation of dynamic constitutionalism and his imparting morality in the death penalty discourse. Along the way, I will analyze Marshall's death penalty jurisprudence through his view of the Eighth Amendment, dynamic constitutionalism, evolving standards of decency, and finally the morality of the death penalty.

II. DYNAMIC CONSTITUTIONALISM OF JUSTICE MARSHALL

Justice Marshall's allegiance to living constitutionalism is not as widely publicized as Justice Oliver Wendell Holmes' affinity for a living Constitution.[17] Neither is Justice Marshall known for his uncompromising affection for originalism as Justice Scalia.[18] Marshall's embrace of living constitutionalism, manifested via the chain of causation he provides in his constitutional interpretation, is used to show support for his abolishment principle. Marshall rejected the judicial method of the death penalty on the grounds that validation of the death penalty relies predominantly upon *de facto* implementation of the Court's legal rulings. These rulings base their doctrinal support on the Court's adherence to historical precedent. Thus, according to Marshall, precedential rulings may not illuminate the particularized complexities of an emerging situation. This may cause reason to be buried under the inflexibilities of precedent,[19] an outcome not conducive to equitable legal process. Over reliance on precedent, without careful analysis of

17. Justice Oliver Wendell Holmes is one of the early proponents of an evolving, living Constitution. "Oliver Wendell Holmes, ha[s] always insisted that the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events." *Vreeland v. Byrne*, 370 A.2d 825, 845 n.9 (N.J. 1977) (citing ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 174 (1941)). According to Justice Holmes, constitutional development "could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism. . . ." *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

18. Justice Scalia acknowledges that his textualist approach is regarded in "some sophisticated circles" of the legal profession as "simpleminded—'wooden,' 'unimaginative,' 'pedestrian.'" Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997). He rejected this characterization and denied that he was "too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve." *Id.* Justice Scalia insisted that the Justices "have no authority to pursue those broader purposes or write those new laws." *Id.* Justice Scalia searches out the ordinary meaning of the words used at the time of the provision's adoption, frequently consulting dictionaries of the era. In fact, Justice Scalia consults dictionaries more often than any of his colleagues. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.14, 1441–42 (1994). *See also* Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709, 716-23 (2006) (examining Justice Scalia's originalist jurisprudence).

19. *See Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 618 (1983) (Marshall, J., dissenting) (quoting *Untied States v. Int'l Boxing Club of N.Y., Inc.*, 348 U.S. 236, 249 (1955) (Frankfurter, J., dissenting)).

its applicability to present situations, therefore, is tantamount to unreasonable usurpation of power.[20] Thus, Marshall believed reason must be the overriding basis through which constitutional decisions based on precedent must be overruled. According to Marshall, established procedures and constitutional decisions are based on the majority's view of life and the meaning of existence, which do not comport with the divergent life experiences of minorities. In his address at the Constitution's bicentennial celebration, Justice Marshall made his view abundantly clear:

> I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as a fundamental today. When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.[21]

Marshall's strong opposition to established legal process came from his recognition of the majority's need for hijacking reason as a means to continue the status quo of suppressing minority's pursuit of equality in the legal process. Marshall wanted to break such a caste-like system, and envisioned an equality-based legal process that would take into consideration the trials, tribulations, hopes, and aspirations of people of all social spheres. As he observed in *Dandbridge v. Wiliams*:

> The extremes to which the Court has gone in dreaming up rational bases for state regulation in an area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls. This case, involving the literally vital no interest of a powerless minority- poor families without breadwinners- is far removed from the area of business regulation, as the Court concedes.[22]
>
> In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right,"

20. *See* Mark Tushnet, *Thurgood Marshall and the Rule of Law*, 35 How. L.J. 7, 12 (1991) (noting Marshall's reasoning for overruling constitutional precedents based on the power of reasoning, not via power of judicial decision making).

21. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 282 (Mark V. Tushnet ed., Lawrence Hill Books 2001).

22. *Id.* at 323.

> fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification.[23]

Therefore, according to Justice Marshall's jurisprudence, the meaning of existence must be construed through the mosaic of people's diverging life experiences. This can be attained by taking into consideration the life lessons of a wider array of people and putting into context the difficulties of minorities, all while crafting a legal process that would benefit them all. If the same yardstick is applied to death penalty jurisprudence, it would become apparent that the inherent arbitrariness of the death penalty can never provide equal outcome for all cases. Marshall noted in his remarks at the Annual dinner in honor of the Judiciary of the American Bar Association:

> I have spoken out often to decry the gross injustices in the administration of capital punishment in our country. I air my concerns once again today with the fervent hope that they reach receptive ears. When in *Gregg v. Georgia* this Supreme Court gave its seal of approval to capital punishment, this endorsement was premised on the promise that capital punishment would be administered with fairness and justice. Instead, the promise has become a cruel and empty mockery. If not remedied, the scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come. We cannot let it continue.[24]

If we consider the very finality of the death penalty[25] it becomes incumbent upon civilized society to strive for a legal process that can guarantee an equal outcome for the administration of such a procedure. This is

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23. *Id.*

24. *Id.* at 295.

25. The finality and irreversibility of the death penalty is indoctrinated throughout the post-*Furman* era capital jurisprudence in the Supreme Court. *See* Ring v. Arizona, 536 U.S. 584, 616-17 (2002) (Breyer, J., concurring) (noting that DNA evidence indicating that the convictions of numerous persons on death row are unreliable is especially alarming since "death is not reversible"); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (referencing irrevocability); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) (same); *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part) (same); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (same); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (referencing finality); *Furman*, 408 U.S. at 290 (Brennan, J., concurring) ("[T]he finality of death precludes relief."); *Furman*, 408 U.S. at 306 (Stewart, J., concurring) (finding death "unique in its total irrevocability"). While giving primacy to procedural safeguards, the Court has sought to reshape the scope of the Eighth Amendment's Cruel and Unusual Punishment Clause in several cases. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 306-07 (2002) (holding it cruel and unusual to execute the mentally retarded because they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (finding

the conception of equality that Marshall worked tirelessly to insert into the constitutional decision-making process. In my view, this equality emanates from an emerging conception of constitutional interpretation akin to dynamic constitutionalism.

A. *Tracing the Constitutional Contours from* Brown *to* Furman

Since his days of representing clients in the segregated South, Justice Marshall has progressively espoused a constitutional interpretation that does not restrict the law with rigid, artificial boundaries of procedural hurdles. Thus, his judicial philosophy is manifested through his pursuit of expanding the frontier of equal protection jurisprudence for those victimized by discrimination, in spite of past decisions that rendered them powerless. Thus, the Marshallian Constitution is animated by the American aspiration enshrined in the Declaration of Independence and the various Amendments, having the objective to transcend law's temporal barrier of regulating one group's behavior in favor of another to gain primacy. Since his judicial philosophy gained maturity through decades of representing African-American minorities, Marshall was adept in delineating between formal and substantive justice.[26] This is because Marshall worked as a lawyer at a time when the legal process was still mired in the frozen inequalities borne out of over-reliance on procedural formality. It requires decades of relentless work by lawyers like Marshall to expand the legal process to elicit substantive justice capable of accommodating judicial needs of impoverished and disenfranchised minorities.

Marshall understood the Constitution to create a "right of every American to an equal start in life,"[27] a viewpoint that percolated into every aspect of Marshall's jurisprudence, including his view on death penalty. While attempting to illuminate Justice Marshall's death penalty jurisprudence, I am immediately drawn to the decision in the *Furman v. Georgia*,[28] which has consistently been heralded as one of the watershed moments of

it cruel and unusual to pronounce death upon a defendant who was under sixteen at the time of his crime); Enmund v. Florida, 458 U.S. 782, 797 (1982) (finding it cruel and unusual to punish one convicted of felony murder but who did not actually commit the murder with death absent a showing that the defendant possessed a sufficiently culpable state of mind); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding it cruel and unusual to punish the crime of rape with death).

26. A commentary contends that, "Without question, however, Justice Marshall's career as a lawyer and judge surpassed all others in securing constitutional access and opportunity for America's poor and disenfranchised. The legal principles resulting from Thurgood's efforts read as modern American social history: equal voting opportunities for all citizens; freedom from discrimination in housing; equal educational access for all races; freedom of association; equal access to public transportation and accommodations; and fairness and freedom from race discrimination in the administration of our criminal laws." Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 STAN. L. REV. 1249, 1249 (1992) (citing *Smith v. Allwright*, 321 U.S. 649 (1944) (prohibiting exclusion of African Americans in state primary elections); Shelley v. Kraemer, 334 U.S. 1 (1948) (invalidating racially restrictive covenants on property); Brown v. Board of Educ., 347 U.S. 483 (1954) (prohibiting racial segregation in public schools); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (invalidating segregated public beaches and bathhouses maintained by the state); Chambers v. Florida, 309 U.S. 227 (1940) (prohibiting use of confessions obtained through mental duress or exhaustive questioning)).

27. *Bakke*, 438 U.S. at 398.

28. 408 U.S. 238 (1972).

American Supreme Court jurisprudence on the death penalty.[29] However, *Furman* was written when Marshall was firmly ensconced in the Supreme Court, where he may not have arrived but for his tumultuous stop at *Brown v. Board of Education*.[30] History will forever remember him for his achievement in this barrier-breaking case because it is *Brown*—where the bold ideals of Marshall's equality jurisprudence first saw the light of day—which nearly two decades later evolved into his abolishment viewpoint in *Furman*. While some commentators have viewed *Brown* as a case about racial discrimination, and many others viewed it as a case about equal opportunities, I view *Brown* as the harbinger of Marshall's vision of equality, which would shape the American constitutional jurisprudence for years to come.

Realizing the goals of *Brown* remained Marshall's life objective. His conception of equality was an outgrowth of his experiences of segregation, and its defining feature was his commitment to equal opportunities. Thus, where *Brown* trumpets the right to equal access to education, it transcends the tunnel vision of education and unravels the principled opposition of all caste systems, including second class-type citizenship in a systemic framework where a particular class of people is kept below the majority on the basis of a morally repugnant factor, such as race, sex, or gender. In Marshall's view, "[t]he intent of the fourteenth amendment was to abolish caste legislation . . . . When State action has the predictable tendency to entrap the poor and create a permanent under class, that intent is frustrated."[31] Life experience undoubtedly shaped the jurisprudential philosophy of Justice Marshall in tangible ways, as witnessed in all facets of his jurisprudence.

B. Rejection of Original Intent to Embracing Dynamic Constitutionalism

Marshall did not believe in the narrow doctrinal interpretation of the framers' intent, as seen in his view of *stare decisis*. Marshall examined the intent of the framers in the fourteenth amendment and questioned their intention, which implicitly provides evidence for Marshall's adherence to the evolving nature of the Constitution. Accordingly, he notes:

> For a sense of the evolving nature of the Constitution, we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind a majority of American citizens. "We the People" included, in the words of the framers, "the whole Number of free persons." On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes- at three-fifths each.

29. *Id.* at 240.
30. 347 U.S. 483 (1954).
31. *Kadrmas*, 487 U.S. at 469 (Marshall, J., dissenting).

> Women did not gain the right to vote for over one hundred and thirty years.[32]

Therefore, Marshall was not convinced that the Constitution served the best interest of all people. As a result, he embarked on a crusade to expand the frontiers of equal protection. He realized that, in order to extricate the law's intention from the frozen inequalities of the framing period, he needed "a revolution in Constitutional law," which "would entail a piece of judicial law making which could only be justified only by a philosophy of extreme judicial activism, and this at the hands of a court wherein several of the justices had repeatedly expressed their judicial activism and lawmaking by Court-made fiat."[33] According to Marshall, separate but equal "could never be equal, that segregation in the public school had a harmful effect on Negro children."[34]

This brings us to the query of whether Marshall truly believed in judicial activism or whether he simply hoped to shake the law so "that law may catch up"[35] to the evolving societal needs. The answer may be found in Marshall's vision of precedent. He noted in *Payne v. Tennessee*,[36] "[t]he overruling of one of this Court's precedents ought to be a matter of great moment and consequence. Although the doctrine of *stare decisis* is not an 'inexorable command,' this Court has repeatedly stressed that fidelity to precedent is fundamental to 'a society governed by the rule of law.'"[37] To Marshall, *stare decisis* was "a basic self governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion."[38] In *Payne v. Tennessee*, Marshall further laid the groundwork for when the Court could depart from precedential cases with "special justification[s]."[39] To him, "such justifications include the advent of 'subsequent changes of development in the law' that undermine a decision's rationale, the need 'to bring a decision into agreement with experience and with facts newly ascertained,' and a showing that a particular precedent has become a 'detriment to coherence and consistency in the law.'"[40]

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32. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 282 (Mark V. Tushnet ed., Lawrence Hill Books 2001).

33. *Nomination of Thurgood Marshall: Hearing Before S. Comm. on the Judiciary*, 85th Cong. 167 (1961).

34. J.B. Grossman & R.S. Wells, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 324 (Wiley 1972).

35. *See* Deborah L. Rhode, *Letting the Law Catch Up*, 44 STANFORD LAW REVIEW 1259 (1992) (observing how Marshall's conception of law may be ahead of his time).

36. 501 U.S. 808 (1991).

37. *Id.* at 848 (Marshall, J. dissenting) (citations omitted).

38. *Id.* at 848-849 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST, No. 78, at 480 (A. Hamilton) (H. Lodge ed. 1888)).

39. *Id.* at 849 (Marshall, J. dissenting) (citations omitted).

40. *Id.* (citations omitted).

The pursuit of this coherence and consistency in law has been the founding tenet of Marshall's jurisprudence. Marshall was profoundly impacted by the travesty of justice in the segregated south while working as an appellate lawyer defending felony criminal trials that at times lasted less than a few minutes. While seeing innocent clients being whisked away for a life behind bars, in the mockery of southern court proceedings, Thurgood Marshall internalized the deepest wounds in the social fabric. He rightly observed in *Regents of California v. Bakke*:

> The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negros in a position of legal inferiority for another century after the Civil War.[41]

He attempted to bring about a coherency and consistency of law to help heal those wounds. To him, there was a strong correlation between the Constitution and the American life, and through the transparent prism of this relationship, he viewed the Constitution. The very conception of equality through which he attempted to bring justice found life and substance in his experience of segregated America. The faces of segregated America that Marshall saw lived without hope, food, or shelter and, in addition to being subjected to random and systemic subjugation, were victims of law. Through this life experience, Marshall attempted to understand the vulnerabilities of the accused and endeavored to establish safeguards for their protection through application of a stronger equal protection clause or, alternatively, a more expanded abstraction of the equal protection clause.

Therefore, in his expansive view of Fourteenth Amendment jurisprudence, we find a conception of equality that is consistent with his fidelity to the Constitution. His jurisprudence is empowered by his intellectual competency and his decision-making, and engineered by his technical approach of carefully placing the Court's precedential cases in line with their true relevance and meaning. This methodology helped Justice Marshall in reminding us that law is not an abstract concept removed from the aspiration

41. *Bakke*, 438 U.S. at 349 (citation omitted).

of the society it is meant to serve. Thus, to him, the Constitution must constantly interpret and evolve itself to narrow the gap between the goals of equal justice and the reality of its unequal implementation. As one commentator noted:

> Marshall's use of courts and the law has wrought fundamental change in our politics and society. He espoused principles and fought for causes of the highest order. His contributions give us a more thorough understanding of the political system, and how that system may be made to work for the "have-nots" as well as the "haves."[42]

The living constitutionalism of Justice Marshall took shape through his half-century of work extracting liberty and equality from the fixed originalist interpretation of the Constitution. In this journey, he was guided by his awareness of society's evolving standard of decency and his judicial philosophy with the morality-laden viewpoint. Therefore, to Marshall, the Constitution is a living being—a belief that may be observed through his remarks:

> And so we must be careful, when focusing on the advance which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. Otherwise, the odds are that for many Americans the bicentennial celebration will be little more than a blind pilgrimage to the shrine of the original document now stored in a vault in the National Archives. If we seek, instead, a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history, the celebration of the "Miracle at Philadelphia" will, in my view, be a far more meaningful and humbling experience. We will see that the true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune then was not.
>
> Thus, in this bicentennial year, we may not all participate in the festivities with flag-waving fervor. Some may more quietly commemorate the suffering, struggle, and sacrifice that have triumphed over much of what was wrong with the original document, and observe the anniversary with hopes not realized and promises not fulfilled. I plan to celebrate the

42. Lucius J. Barker, *Thurgood Marshall, The Law, and the System: Tenets of an Enduring Legacy*, 44 STAN. L. REV. 1237, 1246 (1992) (footnote omitted).

> bicentennial of the Constitution as a living document, including the Bill of Rights and other amendments protecting individual freedoms and human rights.[43]

As I peer through his vision, I submit that Justice Marshall sought out the framer's intention through an evolving awareness of society's inequality and disenfranchisement, where the aspirations of all people must be enshrined in the equality of law. Thus, for Marshall, constitutional interpretation of affirmative action "pervert[ed] the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve."[44] Marshall intended to achieve genuine equality, which was to him seeing a system in which the artificial caste-like societal barriers would be dismantled, and hopes and aspirations of all humanity would be upheld.

III. UNDERESTIMATING MARSHALL'S DEATH PENALTY JURISPRUDENCE THROUGH HIS VIEWS ON THE EIGHTH AMENDMENT

While placing reliance on equality, Marshall developed his death penalty jurisprudence by constructing multiple layers of causation, as evident in *Furman.* First, by delving into the archives of historical tradition of the Eighth Amendment, Marshall established the unconstitutionality of the death penalty under the cruel and unusual framework.[45] Second, by invoking rigid practicality and lack of practicability, Marshall rejected the juridical value of constitutional precedents for wider application in death penalty

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43. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 284 (Mark V. Tushnet ed., Lawrence Hill Books 2001).

44. *Bakke*, 438 U.S. at 398.

45. In *Furman*, Justice Marshall, indicated that the death penalty violates the constitution because it is morally unacceptable. The contemporary legal discourse on the death penalty cannot escape the moral overtones that come with it. While the issue of constitutionality requires defining legal statements, reasoning utilized to arrive at any conclusion can be driven by moral overtones. I argue that Justice Marshall's principled opposition to the constitutionality of the death penalty is based on moral values. *See Furman,* 408 U.S. at 344–45 (commenting that the Eighth Amendment provides insulation from the cry of vengeance that our "baser selves" would ordinarily demand in response to certain crimes). *See supra* note 9 at 343-58. Justice Marshall analyzed the social purposes for the imposition of the death penalty: retribution, deterrence, recidivism, eugenics, economy, and encouraging guilty pleas and confessions. *Furman,* 408 U.S. at 343–58; *see also Gregg*, 428 U.S. at 236–42 (Marshall, J., dissenting) (discussing the concepts of retribution and deterrence and their relationship to capital punishment). He systematically considered and eliminated each one of them. First, he eliminated retribution by itself as a legitimate penological objective as he contended, "[T]he Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance." *Furman*, 408 U.S. at 343 (Marshall, J., concurring). Second, he rejected arguments that the death penalty is a necessary deterrent to crime in society. Citing research, and supporting the idea that the death penalty is no more effective a deterrent than life imprisonment, Justice Marshall asserted that "[i]n light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect." *Id.* at 345–54. Third, Marshall examined evidence contending that convicted murderers rarely commit murder again even if they are not sentenced to die. *See id.* at 355. Next, Justice Marshall established the economic argument that the death penalty is more expensive than life imprisonment. *Id.* at 358. Additionally, he felt the leverage used by the invocation of the death penalty to encourage guilty pleas and confessions is morally repugnant and a violation of the defendant's Sixth Amendment right to a jury trial. This led him to believe that life imprisonment is

cases. Third, by analyzing all the attributes of the death penalty, he established the extraordinary unfairness, arbitrariness, and discrimination inherent within the capital punishment system. Lastly, Marshall noted that not only is the death penalty not morally acceptable, but the direction in which the society is evolving is inconsistent with the continued existence of such a perverse penalty. Interspersed with this argument is another important finding. That is, if all the evidence surrounding the death penalty becomes transparent to the public, their opinion with regard to the death penalty will change irreversibly. The *Furman* decision is significant[46] not only because complex constitutional issues unraveled therein, but because of the Justices' willingness to embrace morality-laden reasoning within contemporary legal discourse.[47]

A. *Justice Marshall's Evolving Interpretation of Eighth Amendment in* Furman

In *Furman*, Justice Marshall presented a lengthy opinion that examined the efficacy of death penalty under the doctrines of retribution,[48]

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penologically sufficient as it "can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency." *Id.* at 356.

46. In almost every aspect, *Furman*'s individual decisions represent the Justices' evolution towards a greater understanding of the death penalty's inherent, structural deficiencies. Justice White's concurrence is of no exception as he pondered over the question whether the death sentence is a cruel, inhuman, or degrading punishment in the ordinary meaning of these words, or whether it is a cruel, inhuman, or degrading punishment within the meaning of the Constitution. It, therefore, comes as no surprise when Justice White said in *Furman,* "The imposition and execution of the death penalty are obviously cruel in the dictionary sense." *Furman*, 408 U.S. at 312 (White, J., concurring). Ironically, however, the very same Justice was one of the Justices concurring with the holding in *Gregg v. Georgia* that capital punishment was not per se cruel and unusual punishment within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution. *Gregg*, 428 U.S. at 207 (White, J., concurring). In light of his reversal in *Gregg*, therefore, we must focus on White's concern about the constitutionality of the death penalty centering on the widely held social objectives of retribution and deterrence. With regards to the retributive effects of the death penalty, Justice White points out the infrequency with which the punishment is carried out, thereby making any legitimate claims of retribution absurd. Therefore, he concluded, "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring). On the other hand, Justice White accepted, on face value, the utilitarian ideals of the death penalty's deterrent effects on society, but he was skeptical about its explicit utilitarian impact, as he noted that deterrence, like retribution, is undermined by the infrequency with which the death penalty is imposed. "[The deterrence of] others by punishing the convicted criminal . . . would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others." *Id.* at 312.

47. *See supra* note 15.

48. In *Furman*, Justice Marshall systematically eliminated each of the established objectives of punishment from his death penalty jurisprudence. *See supra* note 45. Further, contemporary research supports Marshall's view as retribution serving no penological purposes in light of research. Author Gerhard O. W. Mueller notes:

> Closely related to the aim of vindication is the aim of retribution. But the addressee of retribution is a different one. It is not the law itself; it is, rather, the organized group whose rules have been violated and whose sense of security has been disturbed. This society includes, of course, the direct victim of the wrong (or his immediate relatives, in case of a homicide). Perhaps, at one time the demand of retribution was purely that of the direct victim of the homicide, namely the family. But as the law community grew from the family to the state or nation, it was that larger body which became the recipient of the retribution.

deterrence,[49] and recidivism,[50] while flushing out both the economics and the political processes underlying the punishment. Reviewing Marshall's opinion in *Furman*, I see two relationships that the Justice holds as guiding principles for rendering the death penalty unconstitutional: first, the relationship between the death penalty and our society's self-respect;[51] and second, the relationship between the death penalty and our society's sense of morality.[52] Marshall's principled opposition to the death penalty, therefore, must be viewed through a spectrum of constitutional jurisprudence,

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Gerhard O. W. Mueller, THE TASKS OF PENOLOGY: A SYMPOSIUM ON PRISONS AND CORRECTIONAL LAW 57 (Harvey S. Perlman & Thomas B. Allington eds., University of Nebraska Press 1969). Continuing on his theme of retribution, the author called it bankrupt on two grounds, "'Getting even' is not a very mature motive" and "the second reason why it appears to me that retaliation is not a proper ground for imprisonment is that we are not consistent." *Id.* "We could be much more drastic in the severity of imprisonment . . . .[w]e no longer whip felons . . . [t]he public conscience has grown too tender to permit drastic punishments." *Id.* Other authors note the continued value of retribution:

> The currently growing realization of many criminologists that the normative barrier against prescribed behavior (including crime) is strongly linked with the depth of the internalization of norms and values by a certain person. The extent to which the non- (or anti-) criminal norms have been incorporated into the personality of a certain person, i.e., his being morally orientated may largely determine his chances of becoming an offender and his subsequent 'reformation' or his becoming a recidivist.

See id. at 58-59 (citation omitted). *See generally* Note, *The Moral Dilemma of Penal Treatment*, 1963 JURID. REV. 135, 138.

49. *See* Justice Marshall's view on deterrence, *supra* note 45.

50. *See* Justice Marshall's view on recidivism, *supra* note 45.

51. Although Justice Marshall questioned the society's self-respect in trying to establish that reliance on the death penalty as a punishment mechanism is not consistent with upholding a mature society's self-respect, contemporary research paints a rather grim picture. Against the 10-year death penalty moratorium, new death penalty laws ushered in more aggressive death penalty jurisprudence. On January 17, 1977, Gary Gilmore faced his firing squad by proclaiming, "Let's do it." He became the first prisoner since 1976 to be executed under the new death penalty laws. Whereas, Kenneth Boyd, on December 2, 2005, became the 1000th person to be executed since the death penalty was reintroduced. *See* Recent Legal History of the Death Penalty in America: Executions Resume, http://usgovinfo.about.com/library/weekly/bldeathpenalty.htm; *see also* Bureau of Justice Statistics, Attitudes Toward the Death Penalty for Persons Convicted of Murder, United States, Selected Years 1953–2006, http://www.albany.edu/sourcebook/pdf/t2512006.pdf (demonstrating society's acceptance of capital punishment). Numerous opinion polls have been conducted to gauge the public position on the death penalty. Consistently, polls dictate that a majority of the American public supports the death penalty. Consider the following: In May 2005, a Gallup poll stated that 74% of respondees are in "favor of the death penalty for a person convicted of murder." Public Opinion and the Death Penalty,Public Opinion Polls, http://www.clarkprosecutor.org/html/death/opinion.htm. The poll highlights that when life imprisonment without parole was given as an option instead of the death penalty, 56% supported the death penalty, and 39% supported life imprisonment. *Id.* Again, in May 2003, 37% of Gallup poll respondees chose "Eye for an Eye Punishment" as the reason they favor the death penalty. *Id.* This same poll noted that 61% of respondees in May of 2005 believe the "death penalty is applied fairly in this country." *Id.*

52. The normative ethical perspective of moral equity was originated by Aristotle, and defined by Rawls: "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored." JOHN RAWLS, A THEORY OF JUSTICE 303 (Harvard University Press 1971). Here, Rawlism legal justice attempts to bring equitable application across all constituents, but law's inherent deficiencies sometimes make equitable application untenable, the same way *Furman*'s prescribed consistency in death sentences has become untenable in the long run. This, therefore, calls for developing actions that can correct the defects in moral consistency and trace a path of moral contour along the rigid lines of law. This is what Aristotle described as moral contour formation.

which straddles a dual rationality of Justice Marshall's death penalty jurisprudence. In this dual rationality, I first expand on the constitutional contour Marshall traversed in his illumination of the Eighth Amendment's "cruel and unusual punishment" doctrine. Second, I bring in Marshall's morality-laced jurisprudential philosophy that emerged from his view on society's evolving standards of decency.[53] Although the Court's decision in *Gregg* overturned *Furman*, Justice Marshall remained convinced that the *Furman* findings remained intact.

Marshall's problem with the death penalty emanates from the fundamental disconnect between the genuine equality sought by law and the actual implementation of legal principles. During his three decades on the Supreme Court, through his dissents and concurring opinions, Marshall attempted to place the abolishment of the death penalty on a firmer ground.[54] Perhaps in some aspects, his views were clearly ahead of his time. But he believed he was doing the right thing and was waiting for the "law to catch up." So fundamental was his belief in this cause that his opinion in *Furman* can be seen as a spirited assault on the constitutionality of the death penalty. Under the Eighth Amendment's "cruel and unusual" doctrine, Marshall proceeded in multiple layers as if he was building a castle brick by brick.

"Before Marshall went on his substantive exposé of the historical tradition of the Eighth Amendment, he brought in the relevance of society's attitude by drawing from his playbook of dynamic constitutionalism. On this, he asked, "the question is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect and, therefore, violative of the Eighth Amendment."[55]

See ARISTOTLE, NICOMACHEAN ETHICS 140–43 (Martin Ostwald trans., Macmillan Publishing Company 1962) (opining that law is not always equitable and this is why not all things are determined by law).

53. Aristotle, *supra* note 52 at 101. There exist books and articles further discussing the historical context of the addition of "evolving standards of decency" into the case opinions. *See* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 359 (Simon & Schuster 1997) (describing the standard); *see also* Charles Hobson, Atkins v. Virginia, *Federalism, and Judicial Review*, 11 WIDENER L. REV. 23, 39–41 (2004) (discussing "evolving standards of decency"). The phrase "evolving standards of decency" is taken from the opinion of the Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86 (1958). Speaking for the Court, the Chief developed the measure of permissible punishment under the Eighth Amendment of the Constitution by referencing "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Since then, various Justices have used this as the guiding principle for deciding claims of Cruel and Unusual Punishment. Sometimes "evolving standards of decency" has been used synonymously with "contemporary standards of decency." For example, in *People v. Anderson*, 493 P.2d 880 (Cal. 1972), *superseded by statute*, CAL. PENAL CODE § 190.2 (Deering 1985), Chief Justice Wright, speaking for the Supreme Court of California, said, "Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency." *Id.* at 893. In this context, Justice Scalia's comment in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), is noteworthy: "Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views." *Id.* at 865 (Scalia, J., dissenting).

54. Thompson, 487 U.S. at 465.

55. *Furman*, 408 U.S. at 315 (Marshall, J., concurring) (citation omitted).

Marshall believed that the unconstitutionality of the death penalty flowed from the reasoning of being excessive, which serves no valid legislative purpose. He brought in the "evolving standards of decency" doctrine, long introduced in constitutional jurisprudence by Justice Warren,[56] and championed by other Justices[57] in later years, by connecting this punishment's cruel and unusual nature with popular sentiment. While setting aside the cruelty element, Marshall grafted an unusual element in the argument by showing the larger society's distaste for this punishment mechanism. In my view, Marshall believed that if he successfully established that society in general finds this punishment so distasteful and unusual, then by virtue of the Constitution's Eighth Amendment's prohibition, it would be invalidated. Perhaps Marshall highlighted this issue of popular sentiment in an attempt to extricate the Constitution from the frozen inequality of the eighteenth century viewpoint and give life to substantive ideals in the twenty-first century. Moreover, I view this as the Justice's attempt to issue a climatic jolt to the individual members of society, who may have been under the influence of a false consciousness.[58]

In my view, what Justice Marshall truly sought was to point out the flagrant inequality and the stark disenfranchisement that percolated throughout the decades prior to his coming to the Court. Looking back at the history of the death penalty, it has obviously been implemented disproportionately among minorities, against a societal framework that is predominantly formed and controlled by the majority's norms.[59] So, if a minority is at the receiving end of the ultimate punishment, can we truly

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56. *See* Cray, *supra* note 53.

57. *Id.*

58. I have discussed this concept of false consciousness and collective consciousness in an upcoming work. *See* SABY GHOSHRAY, SYMMETRY, RATIONALITY AND CONSCIOUSNESS: REVISITING MARCUSEAN REPRESSION IN AMERICA'S WAR ON TERROR (forthcoming).

59. While tracing the genesis of death penalty jurisprudence of the Supreme Court, I assert here that, the views taken by several Justices in some of the significant post-*Furman* era cases, in which their opinions, either in concurrence or in dissent, have significantly shaped the moral contours of the Court. In my view, sustained dissent by two Justices—Brennan and Marshall—in capital penalty cases, produced a rich body of legal literature where the issues of morality and ethics have shaken the very core of the doctrine of stare decisis. These Justices' relentless unwillingness to accommodate the views of the majority signals a clarion call to change the law in a certain direction within the capital penalty jurisprudence. In a direct confrontation to Justice Brandeis' timeless observation, "[i]t is usually more important that a rule of law be settled than that it be settled right." *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting), *overruled in part by People of State of California v. Thompson*, 313 U.S. 109 (1941). The continued dissents by Justices in cases upholding the death penalty perhaps signals that the law of capital punishment is far from being settled. I would argue that this abiding conviction to settle the law correctly drove Justices to dissent in landmark cases. *See generally* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTING L.J., 427 (1986) (discussing the relevance of dissenting opinions). I have shown elsewhere that, Justices Brennan and Marshall have repeatedly questioned the morality of the death penalty in their dissents, which leads us to explore the larger question as to whose morality is being upheld in those majority decisions. *See* Dr. Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-*Roper, 45 J. CATH. LEGAL STUD., 561-629 (2007). The death penalty gets complicated while viewing it through the prism of morality. In any morality-laden discourse, the inevitable issue before the scholars is to answer the focused question of whose morality the legal discourse should doctrinalize. In this context, Professor Perry notes: "The penetration of legal discourse by moral discourse is not surprising. Moral controversy is often at the center of legal controversy; in particular, controversy about whether one or another

call it justice? Is there any credence to the majority's view? That is why Justice Marshall viewed this as a morality issue, and he attempted to correct the moral compass of the Court by posing some poignant questions: "If retribution alone could serve as a justification for any particular penalty then all the penalties selected by the legislature would by definition be acceptable means for society's abrogation of a particular act."[60]

Clearly, Justice Marshall challenged us to dig deeper in our collective consciousness, to bring out that inherent humanity, and to recognize the morality of vengeance.[61] To him, by recognizing this morality of vengeance, society would allow for the correction of the moral compass by carefully eliminating the scope of vengeance from the punishment mechanism. According to him, recognizing this will not only correct the moral compass, but realign both the penological objectives and the fundamentals to death penalty jurisprudence into a more value-centric punishment mechanism. In this context, he provides us with the qualitative guidelines found in the Eighth Amendment, clearly warning us against society's debasement from erroneous implementation of vengeance: "[t]he Eighth Amendment is our insulation from our baser selves. The "cruel and usual" language limits the avenues through which vengeance may be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case."[62]

Marshall's morality-centric jurisprudence is manifested in his attempt to awaken society to the moral vulnerability of the death penalty. First, morality is intricately related to the maturation of a society by traversing a corrected moral compass. A society is understood to follow a path of evolving enlightenment; in this path, a society is expected to do the right thing, and to Marshall, that path would be establishing unusual nature of the death penalty. Second, by connecting moral vulnerability with the evolution of the society, he sought to create a continuous contour where the death penalty must be declared unconstitutional on moral grounds, for

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practice (abortion, homosexual sexual conduct, physician-assisted suicide, etc.) is, at least in some instances . . . legally permissible." Michael J. Perry, *What Is "Morality" Anyway?* 45 Vill. L. Rev. 69, 70 (2000). *See also id.* at 72-74 (explaining that the sword of moral discourse can cut both ways into a legal doctrine's development, as opposing sides lobby for either banning or upholding the relevant law in question). This article, therefore, attempts to navigate this issue by first tracing a moral contour involving death penalty and then proposing a robust framework supporting the abolitionist viewpoint that can transcend narrow doctrinal considerations.

60. *See Furman, supra* note 9, at 344 ("At times a cry is heard that morality requires vengeance.").

61. *See* JOYCELYN M. Pollock, ETHICS IN CRIME AND JUSTICE: DILEMMAS AND DECISIONS 59 (Wadsworth Publishing Company 2d ed. 1994). Further outlined by authors Allen and Simonson is the historical relevance of vengeance:

> The idea of vengeance is not new, nor is it unique in any fashion. Roughly four thousand years ago the Hammurabi Code (1750 B.C.) prescribed specific punishments for Babylonia. Examples include: If a man knocks out the tooth of a man of his own rank, they shall knock out his tooth. If a son strikes his father, they shall cut off his fingers. If a man destroys the eye of another man, they shall destroy his eye. If a man of higher social rank destroys the eye of a man of lower rank, the man shall pay a fine.

Harry. E. Allen & Clifford E. Simonsen, Corrections in America 6 (5th ed. 1989).

62. *See* Furman, *supra* note 9, at 344.

"people who [are] fully informed as to the purpose of the [death] penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."[63] Therefore, not only does he utilize moral vulnerability, he brings in the "shock the conscience test"[64] and connects both with a sense of justice.

Finally, Justice Marshall brought forth a new interpretative dimension of the Eighth Amendment jurisprudence by melding morality-laced discourse into judicial decision-making. In this interpretation, Marshall attempted to expand the judicial interpretation of death penalty much further. His ingenious way of connecting Eighth Amendment jurisprudence with society's moral compass was not only brilliant but will forever be an enduring principle in death penalty jurisprudence. The interpretation of the Eighth Amendment is predicated on society's evolving standards. Marshall provided a deterministic paradigm for identifying whether the cruel and unusual punishment doctrine of the Eighth Amendment has been violated by introducing a transparent mechanism to measure the threshold of the evolving standard of decency. Although this transparent mechanism cannot eradicate the cloud of arbitrariness that continues to hover over the death penalty jurisprudence, at least this can provide an additional interpretative gloss on the individual elements of the Eighth Amendment. However, the issue before us is: could the majority of the Justices view the Eighth Amendment interpretation as such? Until and unless the majority believes in an expanded conception of the Eighth Amendment following the line of reasoning espoused by Marshall, the "death-is-different"[65] principle may never materialize.

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63. *Id.* at 361.

64. *See* Rochin v. California, 342 U.S. 165, 172 (1952). The 'shock the conscience' test was popularized after Justice Felix Frankfurter established the test, based on the Fourteenth Amendment's prohibition against states depriving any person of "life, liberty, or property without due process of law." This test attempts to determine whether an action/behavior falls outside the standards of civilized decency. *Id.* at 173. The basic premise of the "shock the conscience" test for certain rights resides in the premise that certain rights are so inherent, so fundamental in the current conception of our human existence that any abrogation or explicit denial of such a right must be seen as shocking the conscience. *Id.* at 169. Not all rights are fundamental rights. Nor are they all human rights. Rights can be envisioned or derivative of existing rights. In order for a right to qualify as a fundamental human right, the right must pass the "shock the conscience" test. *Id.* at 172.

65. In addition to *Furman*, the qualitative difference of the death penalty has been established throughout the post-*Furman* era. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (arguing that the majority opinion holding it cruel and unusual to punish retarded persons with death is the "pinnacle of . . . death-is-different jurisprudence"); Ring v. Arizona, 536 U.S. 584, 605–06 (2002) (noting that "there is no doubt that death is different") (internal quotation marks omitted); *Ring*, 536 U.S. at 614 (Breyer, J., concurring) ("[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.") (citing Gregg v. Georgia, 428 U.S. 153, 153 (1976)); McCleskey v. Kemp, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death."); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (referencing that "the death penalty is qualitatively different" from other punishments) (citing Spaziano v. Florida, 468 U.S. 447, 468 (1984)); *Spaziano*, 468 U.S. at 459 (noting the Court's prior "recognition of the 'qualitative difference' of the death penalty") (citing *Furman* 408 U.S. 238)); *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part) ("[T]he death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards. . . ."); Locket v. Ohio, 438 U.S. 586, 604 (1978) (holding that the death penalty is "qualitatively different") (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)); *Gregg*, 428 U.S. at 188 (joint opinion of Stewart, Powell, and Stevens, JJ.) (finding that the

IV. CONCLUSION

In this article, I have spotlighted a narrow segment of Justice Marshall's jurisprudence: his philosophy on the death penalty. While providing a different interpretative gloss, I have established that Marshall's death penalty jurisprudence emanated from his expansive conception of equality, anchored within a Constitution, which ensures equitable legal outcome for all humanity. In his pursuit, Marshall, whose substantive jurisprudence was committed to elevate the asymmetrical social conditions of the disenfranchised minority, was guided by a compassionate legal process. I have shown that these compassionate ideals of law do not flow from Marshalls's morality-centric jurisprudence, nor are they found within the textual meaning of the Constitution. Additionally, they cannot be gleaned from legal precedents. Instead, I posit that the expanded ideals and the wider abstraction of law that Marshall brought forth in both the contemporary politics and society could only emanate from his conception of a living Constitution. Therefore, his rejection of constitutional precedents is no accident. Rather, Marshall formed his judicial philosophy on the basis of his life's experiences, where he fought relentlessly to alleviate inequality and castelike barriers within the judicial process.

Through his principled rejection of the death penalty, Marshall espoused a viewpoint of the justice mechanism as a reflection of society's inner core. To him, law must evolve, and the trajectory of that evolution must trace the moral contours of a civilized society. Unfortunately, contemporary judicial interpretation is shaped by the political process, in which

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"penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.").

The finality and irreversibility of the death penalty is indoctrinated throughout the post-*Furman* era capital jurisprudence in the Supreme Court. *See Ring*, 536 U.S. at 616–17 (Breyer, J., concurring) (noting that DNA evidence indicating that the convictions of numerous persons on death row are unreliable is especially alarming since "death is not reversible"); *Wainwright*, 469 U.S. at 463 (Brennan, J., dissenting) (referencing irrevocability) (quoting *Spaziano*, 468 U.S. at 468)); *Spaziano*, 468 U.S. at 460 n.7 (same) (citing *Gregg*, 428 U.S. at 187)); *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part) (same); *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.) (same) (citing *Furman*, 408 U.S. at 286–291)); *Woodson*, 428 U.S. at 305 (joint opinion of Stewart, Powell, and Stevens, JJ.) (referencing finality); *Furman*, 408 U.S. at 290 (Brennan, J., concurring) ("[T]he finality of death precludes relief."); *id.* at 306 (Stewart, J., concurring) (finding death "unique in its total irrevocability"). While giving primacy to procedural safeguards, the Court has sought to reshape the scope of the Eighth Amendment's Cruel and Unusual Punishment Clause in several cases. *See, e.g.*, *Atkins*, 536 U.S. at 306 (holding it cruel and unusual to execute the mentally retarded because they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (finding it cruel and unusual to pronounce death upon a defendant who was under sixteen at the time of his crime); Enmund v. Florida, 458 U.S. 782, 789–93 (1982) (finding it cruel and unusual to punish felony murder with death absent a showing that the defendant possessed a sufficiently culpable state of mind); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding it cruel and unusual to punish the crime of rape with death). In this same context, Professor Abramson believes, "In the words of Justice Stevens, the death sentence 'is the one punishment that cannot be prescribed by a rule of law as judges normally understand rules,' but is instead an ethical judgment expressing the conscience of the community as to whether 'an individual has lost his moral entitlement to live.' " *See* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 119 (2004) (quoting *Spaziano*, 468 U.S. at 469 (Stevens, J., concurring in part and dissenting in part)).

constitutional opinions are rendered via a game-theoretic, bargain-centric mechanism interested more in coalition-building in the Court than in rendering the most equitable justice. To Marshall, this majority view, more often than not, subsumes the cries of injustice, as manifested in his countless dissents—the hallmark of his three decades on the Court. To me, Justice Marshall was the conscience of a judiciary that at times was lost in a confused conundrum, borne out of a conflict between fidelity to the political process and an ethical obligation to disperse equitable justice. However, through his relentless dissents, Marshall was able to impart within the American constitutional jurisprudence a broader expanse of ideals of the conception of justice that surely will reverberate for a long time.

As I review Marshall's death penalty jurisprudence, I am emboldened by his morality-centric decision-making process in which he reminded us of the death penalty's debased dimension by invoking society's lofty ideals and humanity's elevated inner sanctum. Through his clarion call jolting humanity out of its false consciousness, Marshall prompted us to look within our inner selves and to attempt to elevate our threshold of morality. According to Marshall, this morality would be sufficient to guide society to recognize that state-sanctioned killing would only devolve humanity towards accepting their debased selves. Sadly, in a world where violence continues to mount, that clarion call remains unanswered as we continue to execute humans via state machinery.

Finally, more than two decades have passed since the conscience of the Supreme Court has departed. At a time when Justices routinely uphold the constitutionality of torture, our society watches without blinking at the barbaric execution of 76-year-old infirm individuals. Without doubt, his conscience is very much needed within the Court. Although that conscience is gone, I must end with hope; the hope that springs from Marshall's past deeds and remains within our existence. His words continue to echo the conception of equality, his dissents give us hope for equality in the legal process, as he reminded us:

> 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. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.[66]

66. *See* Marshall, *supra* note 21, at 284.