WORKING TOWARD DEMOCRACY: THURGOOD MARSHALL AND THE CONSTITUTION OF KENYA

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ABSTRACT

This Article is a work of transnational legal history. Drawing upon new research in foreign archives, it sheds new light on the life of Thurgood Marshall, exploring for the first time an episode that he cared very deeply about: his work with African nationalists on an independence constitution for Kenya. The story is paradoxical, for Marshall, a civil rights legend in America, would seek to protect the rights of white landholders in Kenya who had gained their land through discriminatory land laws, but were soon to lose political power. In order to understand why Marshall would take pride in entrenching property rights gained through past injustice, the Article tells the story of the role of constitutional politics in Kenya's independence. While sub-Saharan Africa is often dismissed as a region with “constitutions without constitutionalism,” the Article argues that constitutionalism played an important role in Kenya's independence. Against a backdrop of violence, adversaries in Kenya fought with each other, not with weapons of violence, but with...
constitutional clauses. The resulting Kenya Independence Constitution would not function as an American-style icon, but in that historical moment, constitutional politics aided a peaceful transition. In this context, Marshall built compromise into his bill of rights for Kenya to keep the parties together at the table.

Thurgood Marshall’s role in Kenya’s independence was limited, of course, but in following this story we gain an entirely new perspective on a major figure in American law. Before he began writing constitutional law as a Justice in the United States, Marshall played the role of a framer, crafting constitutional principles in the first instance. From the intersecting narratives of Marshall’s travels and Kenya’s constitutional development, we can also see constitutionalism at work in new ways, as constitutional politics functioned as a peace process. The Article also provides an historical example of a process more familiar in our own day: the role of American lawyers in constitution writing and nation building overseas.

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This Article takes up Thurgood Marshall’s most important work with African nationalists, which occurred in 1960. The fuller story of Marshall’s engagement with Africa, set in the context of his role in the U.S. civil rights movement in the 1960s, will be taken up in MARY L. DUDZIAK, EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY (Oxford University Press) (expected 2008).
INTRODUCTION

“Thurgood Freezes as Kenyans Feud,” announced the Cleveland Call and Post in a January 30, 1960 headline. The famous American civil rights lawyer Thurgood Marshall was in London in 1960, and was embroiled in a controversy. He had come at the invitation of Tom Mboya, a young nationalist leader from Kenya. Marshall traveled first to Kenya, and then to London to serve as an advisor to nationalists during negotiations on a new constitution for Kenya, at the time a British colony. But as the Call and Post reported it, “Marshall sat in a London hotel room . . . ‘too cold by American standards’ . . . sipping ‘warm beer’ and fretting for action,” as the British government and the nationalists faced an impasse over constitutional advisors.3

What had brought Thurgood Marshall, a major figure in American legal history, to this London hotel room? What role did this American play in the dramatic developments that would lead to Kenya’s independence? And how did this Kenya sojourn, remembered so intently by Justice Marshall in later years, figure into

2. Thurgood Freezes as Kenyans Feud, CLEVELAND CALL & POST, Jan. 30, 1960, at 1A.
3. Id.
the constitutional thought of a man who would later write constitutional law in America?

The story of Marshall and the Kenya Constitution has eluded the attention of Marshall’s biographers. It is revealed in archives in the United States and England, and in press accounts from Africa, the United States, and England. This study reveals a portrait of Marshall at midcareer as he grappled with legal rights in a new context. The story may seem paradoxical, for Marshall, a champion of the rights of African Americans in his role as chief NAACP Legal Defense Fund (LDF) litigator, would support a Bill of Rights that protected the rights of white landholders in Kenya. Whites were a numerical minority in Kenya, yet they had long held a monopoly on the finest agricultural land in the colony. Once it became clear in 1960 that indigenous Africans would soon become the dominant political power, a central question was the property rights of minorities in an independent Kenya. Marshall sought to entrench minority safeguards by including strong property rights protection in his draft Bill of Rights. In doing so, Marshall accorded formal legal rights to a group that he described as worse than the Ku Klux Klan.

Was Marshall’s support for the rights of whites who had been the beneficiaries of a historic injustice—the longstanding racially discriminatory distribution of land in the colony of Kenya—an indication that his commitment was to formal equality, regardless of material conditions? Was he simply oblivious to the impact of an American-style conception of equality in a postcolonial society, in keeping with the coming critique of law and development, that American ideas of law reform are often ill-fitting in foreign lands?

Was this paradoxical move in keeping with more personal goals: was

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his support for whites in Kenya a foreign parallel to his later embrace of a white successor, Jack Greenberg, which some have seen as Marshall’s effort to curry favor with white elites in the hope of advancing his own career? Or is there a different story to tell about this Kenya sojourn, captured in Marshall’s own words, that in his own necessarily imperfect way he sought to do the work of democracy, and that in this context democracy required that a historically oppressed group, upon assuming power, must reach out and accord entrenched rights to those who had oppressed them? One aim of this narrative is to explore these questions.

Thurgood Marshall’s story intersects with another narrative: the story of Kenya’s first constitution as an independent nation. The boundaries of what would become the nation of Kenya had been drawn by colonial powers during the “scramble for Africa” in the 1880s. Colonial lines brought together different tribes, cultures, and languages into what would become one nation, and these lines also divided particular tribal lands between what would become one country and another. The only authority that had governed the entire territory was the departing colonial regime. The constitution writing that happened in Africa in the early 1960s occurred in this particularly precarious context for nation-building. The difficulties in constitutionalism in sub-Saharan Africa are legion, leading to the widespread belief that the region has “constitutions without constitutionalism.” As a result, even as constitutional studies take a

6. See ROBERT L. CARTER, A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS 145–47 (2005) (“[Marshall] thought . . . that in choosing a white man to take his position, he was making clear that he would operate within an accepted race-relations format.”).


9. See generally JEFFREY HERBST, STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL (2000) (discussing the weakness of African states at independence, and the consequences of their inability to project power across national territory).

transnational turn, comparative constitutional scholars tend to take interest only in the one African nation seen as successful: South Africa. Because Kenya became a corrupt and authoritarian regime by the 1980s, perhaps constitutionalism in the country has “failed,” and there is nothing to learn from this “failure.” But in the records from Kenya, an interesting picture emerges. Against a backdrop of violence, in the early 1960s, groups that had been killing each other—African nationalists, white farmers, the colonial government—fought with each other over the things they held most dear, land and political power, not with weapons of violence but with constitutional clauses. As violence erupted in the Congo, South Africa, and elsewhere in the early 1960s, in Kenya the result of constitutional bargaining was peaceful regime change. Constitutional politics aided that important achievement in Kenya, even if constitutionalism could not shield the country from the national and international political forces that

would unravel Kenya’s first attempt at democracy. If we look at constitutional moments in a different way, we can see constitutionalism at work in Kenya. Moments of constitutionalism can have value in themselves, even if the result is not an American-style iconic document that endures for ages to come. Constitutionalism may have functioned only for a moment in Kenya in the 1960s, but in that snapshot in time, the results nevertheless were measurable and meaningful.

These two narratives—Thurgood Marshall’s and Kenya’s—come together in a context that seems both foreign and familiar. Americans have been framing constitutions for other countries in the many years since the United States Constitution was written. They have sometimes been official American government representatives. Other times they have played this role as private citizens. For Thurgood Marshall, the role of framer gave him an opportunity to imagine constitutionalism unconstrained by the American text. Marshall would later criticize the original United States Constitution as a constitution that embraced slavery. In Kenya, as he saw it, he could start from scratch and get it right from the start. But as the story would unfold, getting it right ultimately involved accommodation and compromise. It involved striking a balance not unlike one struck by

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12. For the conventional approach to the idea of constitutional moments, see BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 7 (1998) (arguing that the U.S. Constitution was informally amended during the “transformational” New Deal period, providing constitutional legitimacy for the activist welfare state). For Ackerman, a “constitutional moment” marks a transition in a nation’s constitutional regime, ratifying a new vision which then becomes entrenched as part of the nation’s constitution, and constrains everyday politics. The constitutional moment in this story is instead a period of time when constitutional politics aid democratization. The fact that a constitutional vision from that moment does not constrain everyday politics in time number two does not mean that constitutionalism did not work in a powerful and important way in time number one.


the U.S. framers he criticized: an affirmative accommodation of injustice to enable an ongoing political dialogue.

Ultimately, this rich and unusual story gives us a window not only into the constitutional thought of someone who would soon write American constitutional law, but also gives us a window into constitutional politics. Constitution writing often happens against a backdrop of violence. In that environment, constitution writing can be a peace process. Whether constitutionalism has worked or failed in Africa and other regions cannot be determined simply by looking for later signs of American-style constitutions and judicial review. In Kenya, for a short period of time, constitutional politics provided a structured and nonviolent forum for political warfare. It is when we look for signs like this outside of courts that we get a fuller picture of how constitutionalism works, and what constitutional politics can do.

I. “MR. CIVIL RIGHTS”

When Thurgood Marshall boarded a plane for his first trip to Africa in January 1960, a trip to aid nationalists in Kenya, he was following a well-worn path. African Americans had long been interested in Africa. The earliest organized efforts by African Americans to aid African nations were missionary groups hoping to “Christianize and civilize” Africa in the nineteenth century. Later generations saw in Africa not a primitivism in need of redemption, but a source of the history of a people. W.E.B. DuBois organized a series of Pan-African conferences with the goal of uniting peoples of African descent and aiding African liberation, and Pan-Africanism became a major theme in twentieth century relations between African Americans and Africa. Support for Africa was often


complicated by the state of global affairs and U.S. foreign policy, and this was especially so during the Cold War years.\textsuperscript{19} Even as Ralph Bunche played a leadership role at the United Nations on trusteeship, and eventual independence, for the colonies of the losing powers after World War II, anticolonial organizations increasingly found themselves on the wrong side of American Cold War politics.\textsuperscript{20} As African Americans reached out to Africa during the 1950s and early ‘60s, their internationalism was constrained by the Cold War. Cold War politics opened avenues for international engagement, as African American cultural figures gained opportunities for government-sponsored travel. Their very middle-class status was an advertisement abroad of the multiracial character of American society and was a rebuttal to Soviet propaganda that portrayed American democracy as unjust due to racial segregation and discrimination.\textsuperscript{21} But along with other activists, African Americans sometimes lost their passports because of their politics. For Paul Robeson, W.E.B. DuBois, and other African Americans barred from travel during the early Cold War years, their tendency to criticize American racism overseas was considered to be a particular threat, at a time when international criticism of American racism was thought to undermine U.S. foreign relations.\textsuperscript{22} Yet even when structured through a Cold War frame, travel itself had an impact. James Baldwin described the paradox of the African American soldier overseas, discriminated against by the military, and yet “far freer in a strange land than he has ever been at home.”\textsuperscript{23}

Marshall’s own exposure to African nationalists predated his tenure at the NAACP. Marshall attended Lincoln University, the

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oldest historically black college in the United States. It was part of Lincoln’s founding vision to train African Americans who would then work in Africa, especially as missionaries. Many Africans attended Lincoln over the years, and one of Marshall’s undergraduate classmates was Nnamdi Azikiwe, who would later become President of Nigeria. Through the 1950s, occasionally the NAACP would be called upon to help Africans in the United States. Marshall took a special interest in the case of Reuel Mugo Gatheru, a Lincoln student from Kenya who was threatened with deportation in 1953. The United States apparently sought to deport Gatheru because the British believed he had ties to the ongoing Mau Mau uprising. The NAACP was concerned that if the U.S. sent him back, he would be persecuted by the colonial government. Marshall “expressed great enthusiasm at the possibility of being able to take over this particular case,” and made inquiries on his behalf at the Justice Department.

Marshall’s trip to Africa did not only carry on a tradition of African American engagement with the continent. He was also an early proponent of what would come to be called “law and development.” By the time Thurgood Marshall went to Kenya, Americans had long conceptualized the world as divided into “developed” and “underdeveloped” spaces. President Harry Truman had argued in 1949 that there were widespread benefits from promoting economic expansion, for “[g]reater production is the key to prosperity and peace.” Technical expertise would bring about “development,” and soon American lawyers lent a hand in bringing


law to bear to aid “underdeveloped” nations.\textsuperscript{28} By the 1960s, development discourse was so ubiquitous in thinking about Africa and other “Third World” nations, that, as Arturo Escobar put it, “reality . . . had been colonized by the development discourse,” and “it seemed impossible to conceptualize social reality in other terms.”\textsuperscript{29}

Marshall had no meaningful background in Kenya law, politics, and culture before his trip, but within an understanding of the world framed by a development continuum, he had something that an “underdeveloped” area like Kenya needed: expertise in a “developed” legal system.

Marshall had brought his legal skills to bear on matters outside U.S. borders before 1960. During the Korean War, Marshall responded to pleas of African American soldiers who had received harsh sentences for misconduct. Korea was the first major U.S. military engagement since President Truman had issued an executive order to desegregate the military in 1948, and many have argued that it was the Korean War that finally accomplished desegregation in the Army, as it became impractical to send needed replacement troops according to race.\textsuperscript{30} But as reports came out of alleged disparities in disciplinary actions based on race, resulting in horrific sentences for African American soldiers, Marshall was concerned about discrimination. He traveled to Japan and then to Korea to research the cases, interviewing soldiers near the front lines. Ultimately he was successful in reducing the sentences of thirty soldiers.\textsuperscript{31}

\textsuperscript{28} See James C.N. Paul, Foreword to \textit{LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY} vii–xi (John Hatchard & Amanda Perry-Kessaris eds., 2003) (describing historical development of “law and development”); Merryman, \textit{supra} note 5, at 462–63 (“Law, properly employed, is . . . an instrument of development.”); Trubek & Galanter, \textit{supra} note 5, at 1066 (describing how legal scholars, through their involvement in action agencies, became exposed to legal issues of the Third World).

\textsuperscript{29} Escobar, \textit{supra} note 26, at 5. On the critique of law and development, see, e.g., J. Tamanaha, \textit{The Lessons of Law-and-Development Studies}, 89 AM. J. INT’L L. 470 (1995) (stating that scholars who critique Law and Development’s reliance on Western ethnocentrism are thereafter prevented from promoting said Western values that are, in fact, integral to the scholars’ perspectives); Trubek & Galanter, \textit{supra} note 5 (arguing that law and development academics have been faced with a crisis that has impeded their ability to establish law and development as an area of law).


Marshall represented these soldiers in Korea during the early 1950s when he also shouldered the burdens, and nourished the hopes, of the long legal struggle that resulted in *Brown v. Board of Education.* However, Marshall faced the world in a different posture in 1960. *Brown* was won, and in the eyes of the nation, his name was forever associated with that compelling victory. The way his colleague Constance Baker Motley saw it, the case made Marshall the “undisputed spokesman for black America.” *Time* magazine solidified his status, putting him on its cover in 1955. But the years after *Brown* were difficult ones for him. According to Motley,

> [h]e was simultaneously exhilarated and awestruck by his leadership position in black people’s struggle for equality. At times, he seemed immobilized by the inherent responsibility to move forward with implementation; at other times, he was literally overwhelmed by the onrush of events that the decision set in motion. It was like trying to navigate a ship in a hurricane.

The Supreme Court, in 1955, undercut his hard-won victory by requiring only “all deliberate speed” in *Brown*’s implementation. The decision was widely viewed as allowing delay. The Supreme Court would not announce that “[t]he time for mere ‘deliberate speed’ has run out,” until 1964. In 1960, less than 6 percent of African American children in the South attended non-segregated schools. Marshall was frustrated with this lack of progress. At the same time, his attention was drawn away from enforcement efforts as the NAACP and the LDF lawyers found themselves under attack in the South. Resistance to *Brown* would take many forms, and one of those forms was a campaign to harass civil rights lawyers. National

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and regional NAACP leaders were targets of Cold War antisubversive investigations conducted by Southern states.  

The civil rights movement regained its momentum in 1960, but civil rights lawyers were no longer the leading edge. Sit-ins and civil disobedience had been a strategy drawn upon by some activists in earlier years, but when four African American college students in Greensboro, North Carolina, sat-in at a whites-only lunch counter in February 1960, a broad-based sit-in movement seemed to erupt overnight. The LDF soon had to consider what its relationship would be to a movement whose agenda was framed principally by

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39. Tushnet, supra note 4, at 295.
others. According to Mark Tushnet, “Marshall and other NAACP leaders were ambivalent about the sit-in tactic at first.” As Constance Baker Motley remembered it, “the NAACP and LDF had consciously avoided urging individuals to risk arrest by defying local Jim Crow laws and customs,” because under existing Supreme Court doctrine on state action, private restaurants and other public accommodations might be protected from liability. Another concern the lawyers had was that “a new group of leaders might displace them. Robert Carter believed that . . . providing too much support for sit-ins ‘would tie us to something that some other organization has taken and run with.’”

Marshall was quite uncomfortable with another development, the increasingly popular Nation of Islam, and with ideas of black separatism or black power. In response to Nation of Islam calls for racial solidarity among African Americans in 1955, Marshall said, “Let’s stop drawing the line [between] colored and white . . . . Let’s draw the line on who wants democracy for [America].” In 1959 Nation of Islam spokesmen denounced Marshall “as a middle-class lawyer with strong ties to the black elite and the white establishment.” They called him a “half-white nigger,” who worked “hand in glove with the white folks.” Malcolm X called him a “fool.” Marshall disliked the separatism advocated by the Nation. As Juan Williams has suggested, it was contrary to Marshall’s constitutional vision. He was uncomfortable as well with Nation of Islam tactics, seeing them as inflaming African Americans during times of crisis, when his role had been to calm things down in the hope of avoiding bloody confrontations.

41. TUSHNET, supra note 4, at 309.
42. MOTLEY, supra note 33, at 131.
43. TUSHNET, supra note 4, at 310. Other concerns included the fact that, because the students were often prosecuted for crimes like disturbing the peace or trespassing, there was a serious question as to whether there was a valid legal theory on which to base a broad challenge to the prosecutions. Handling hundreds of individual cases in state court also would take tremendous resources. Id.; WILLIAMS, supra note 4, at 286–89.
44. WILLIAMS, supra note 4, at 241.
45. Id. at 275.
46. Id. at 275–76.
47. Id. at 276.
48. Id. at 278
Thurgood Marshall had also reached a point in his life, at the age of fifty-one, that he wanted to spend more time with his family. Following the death of his first wife, Vivian, in 1955, he married Cecelia Suyat, and by 1960 they had two children. After getting by for years on the salary of a civil rights lawyer, Marshall wished that he could earn more to better support his family.\textsuperscript{50} He was a legendary lawyer, yet his future path remained unclear. Marshall thought that he would never become a judge because Southern Democrats in the Senate would block his confirmation. This aspiration, of course, would come to pass not long after Marshall went to Kenya. He was appointed by President John F. Kennedy in a recess appointment to the Second Circuit Court of Appeals in 1961. After confirmation hearings were dragged out over nearly a year, he was confirmed.\textsuperscript{51} Marshall would leave the judiciary in 1965 to be Solicitor General of the United States under President Lyndon Johnson. In 1967, Johnson nominated Marshall to the United States Supreme Court. In the altered political landscape of 1967, he was easily confirmed.\textsuperscript{52}

Marshall cannot have imagined this trajectory in 1960. He was instead a man who had secured his place in American legal history, yet he remained unsure of the impact of his life’s work, and unsure of his own future.

Along with so many of his contemporaries, Marshall was a Cold Warrior, so it was not difficult for him to operate within the constraints of Cold War/civil rights discourse, in which it was acceptable to criticize U.S. race discrimination at home, but overseas it was important to argue that American democracy was a superior form of government to communism for peoples of color.\textsuperscript{53} In an era of vicious red-baiting of civil rights activists,\textsuperscript{54} Marshall believed that it

\textsuperscript{50}. WILLIAMS, supra note 4, at 242–43, 250, 272–74.


\textsuperscript{52}. WILLIAMS, supra note 4, at 312, 328–31, 337.

\textsuperscript{53}. See DUDZIAK, supra note 21, at 12–15, 29, 61–77 (describing the way Cold War politics narrowed acceptable civil rights discourse within the United States and U.S. government surveillance of those who criticized American race discrimination overseas).

was in his interest to maintain strategic ties with potential threats, including J. Edgar Hoover, a man he had long criticized.⁵⁵ Later, as a federal judge, Marshall would travel to Kenya on a trip sponsored by the U.S. Information Agency for the purpose of improving the U.S. image abroad.⁵⁶ Marshall’s 1960 trip, however, was that of a private citizen. He later speculated that perhaps the CIA had funded it.⁵⁷ Previously secret, now declassified, U.S. State Department and British government internal documents expressed surprise and initial displeasure upon hearing of Marshall’s involvement.⁵⁸ It is entirely possible that there was covert CIA financial support, but there is no evidence to support the idea that Marshall himself collaborated with the U.S. or British government before he began his work with Kenya nationalists.

Tom Mboya would be Marshall’s initial tie with nationalists in Kenya.⁵⁹ Mboya was a young, dynamic emerging leader in Kenya in the 1950s. A labor activist, Mboya became active in the International
Confederation of Free Trade Unions. Through this work, Mboya developed ties with labor activists around the world, including Walter Reuter of the United Auto Workers Union, and A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, an important African American labor union. In 1959, Mboya returned to the United States to lecture and generate support for the rights of Africans in Kenya. On a number of occasions he appeared with Thurgood Marshall.

It was after Mboya’s 1959 trip that he invited Marshall to serve as advisor at the upcoming conference on the Constitution of Kenya. Mboya apparently acted on his own. This was just one of Mboya’s unilateral actions, which sometimes irritated his compatriots. But the nationalists had much to gain by associating themselves with Marshall. He was “Mr. Civil Rights” in the United States and he had built his career through the promotion of minority rights. As Kenya moved toward majority African representation in its legislature, minority rights became a crucial issue. Having Marshall on board therefore provided the Africans with a tangible means of reassuring other groups that minority rights were central to their agenda as well. Julius Kiano later recalled that Marshall “readily agreed to come to Nairobi and then to come with us to London to be . . . our . . . main constitutional advisor. And one of his major contributions was to insist that, ‘You’ve got to have a Bill of Rights in that constitution.’ And so that was wonderful assistance that we got from him.”

II. THE AFRICANS’ ADVISOR

Early 1960 was an unsettling time in the Colony of Kenya. When the year began, Jomo Kenyatta, who would become the first

60. DAVID GOLDSWORTHY, TOM MBOYA: THE MAN KENYA WANTED TO FORGET 31–33 (1982).
63. GOLDSWORTHY, supra note 60, at 133.
President of Kenya, was in detention. Jailed in 1952 on suspicion that he was a leader in the violent Mau Mau rebellion against British Colonial rule, Kenyatta was thought to be so dangerous that he was detained even though he had completed his sentence. Kenya politics were constrained in other ways. Although a seven year state of emergency, the Colonial government’s response to the Mau Mau, had ended, new security legislation was in place which gave the Colonial Governor “reserve powers with which to control all public gatherings for political purposes, provide for the continuance of control over African villages and require the registration of political parties.” A “Detained and Restricted Persons Bill” would “enable the Government to continue to restrain and hold persons for security reasons without trial.” There was a ban on colony-wide political organizations, which fractured the development of a new generation of nationalist leaders. Although the British government tried to contain African nationalism, 1960 was a political moment with a force of its own. Colonialism had been steadily unraveling since World War II. The United Nations created a trusteeship system, leading eventually to emancipation of colonies of the Axis powers of Germany and Italy. Anticolonial movements achieved independence in India in 1948 and Ghana in 1957. 1960 would be known as the “Year of Africa,” as seventeen African nations became independent in that year alone.

The end of colonialism in Africa was not a simple, gradual evolutionary process, however, but was powerfully affected by conditions within particular colonies, as well as politics in the Metropole. Kenya differed from many emerging African nations in that it had a sizeable white settler population. To encourage immigration to the colony, the British government had reserved to white settlers the richest agricultural land in Kenya, the “White

65. Kenyatta was Prime Minister of Kenya during the first year of independence. In 1964 the constitution was amended, changing the position of Prime Minister to President. KEE. KYLE, THE POLITICS OF THE INDEPENDENCE OF KENYA 179, 199 (1999).
67. Amconsul Nairobi to Dep’t of State, Despatch no. 337 (Jan. 8, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.00/1-860, National Archives.
68. Id.; accord Nairobi to Sec’y of State, Telegram no. 222 (Jan. 7, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.00/1-760, National Archives.
70. H.S. WILSON, AFRICAN DECOLONIZATION 177 (1994).
Highlands.” AFRICA were not allowed to own land in these areas. This led not only to concerns about racism and to a need for land reform; it also complicated Kenya’s economic future, because the colony’s principal tie with global economic markets was large-scale, white-dominated agriculture. By 1960, some white families were in their third generation on their farms.

Kenya would not experience an easy path to liberation. Large white-owned farms had depended on African labor. This labor was induced through a brutal colonial regime. In the 1950s, a resistance movement, known as the Mau Mau rebellion, waged guerrilla war on the colonial government, white farmers, and African collaborators. Sensational accounts of violence flooded the newsreels, while Britain responded by detaining and torturing thousands of Africans and by bombing their forest hideaways. The colonial government seemed to have reasserted control over the colony in early 1960, but many in Kenya remained wary. Even before Colonial Secretary Ian Macleod announced that African majority representation in politics, and eventually independence, were coming to Kenya, whites reacted against upcoming constitutional talks and the very idea of African political control.

Many thought that no safeguards would be strong enough to protect the interests of white settlers in an African-run government. Some Kenya residents therefore developed elaborate plans for a transfer of white farms to Africans, and the departure of white settlers from Kenya. Others argued that African rule simply must not happen. A letter signed “E.M.J.” from Mombasa, Kenya to the Colonial Secretary objected to the very idea of self-rule: “[T]he Negros [sic] of Kenya,” the writer insisted, “are not ruling persons,

71. KYLE, supra note 65, at 8–9, 23; see also TIGNOR, supra note 7, at 26 (describing how European settlers expropriated highland lands that belonged to the indigenous African tribes and converted those lands into large farms).

72. See generally KYLE, supra note 65 (describing the lengthy tenure of British settlers in Kenya); TIGNOR, supra note 7 (discussing European settlers’ control over the Kenya economy).


and they have no even knowledge [sic] of regime, . . . they are like animals of the jungle and forest.” Others reacted more strongly. An unidentified writer, in a letter to the Colonial Secretary and others, said, “Dear Sirs, After ten meetings 2500 of us have decided that if you give the African equal voting power as the Europeans in this country we will blow up everything in Kenya. Then the African can start from the beginning the same as we did.” The writer said in a follow-up, “we will not leave one railway Bridge, Power Station, or any Government Building standing.” There would be “nothing left in Kenya worth having.”

The stakes at the upcoming constitutional conference were high. Said one woman in Kenya, “Everything here is hanging on this Conference, and whatever happens I expect it will result in strikes and riots at this end. Most people’s one idea is to sell out quickly, tho’ who is going to buy is quite another matter.” Meanwhile, although the large-scale prison camps of the emergency regime were disbanded, many Africans continued to be detained by the colonial government. Countless others had not survived. For the Kikuyu, the tribe at the center of Mau Mau, the time after the emergency was a time of less brutality, but of continuing trauma.

In these difficult circumstances, Thurgood Marshall embarked on his first trip to Africa. He traveled to Kenya in January 1960, and met with Kenyan nationalists. As he remembered it, “[T]he restrictions

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[79] Anderson, supra note 59, at 332–33 (discussing how released detainees returned to their homes to find their land and other property lost or confiscated, were forced to do communal labor, and were prevented from becoming involved with politics); Elkins, supra note 73 at 340–53 (discussing how even after accounts of brutality by the colonial government came to light and the British Parliament voted against authorizing an independent inquiry into the detainee camps, there were reports of continuing beatings, even some resulting in death, at detainee camps which were still operating in 1959).

were almost unbelievable. Africans could not hold a meeting in a building. So as a result, the only meetings they had were outside."\textsuperscript{81} Some nationalist leaders, including Jomo Kenyatta, "were under detention orders."\textsuperscript{82} Marshall met with a delegation, including Tom Mboya and Hastings Banda: "I listened to them and took their instructions, and . . . I left Kenya after a week or so under great handicap."\textsuperscript{83}

Marshall was quickly introduced to race relations in colonial Kenya. On his second day in the colony, he went to the town of Kiambu for a meeting of the African Elected Members Organization. As Marshall later recounted,

[T]here were two thousand Africans standing out in the field, perfectly quiet, and the leaders were meeting in the building but they couldn’t go in. The leaders were in one building. They were out. They were standing out in that hot sun, all day, waiting for the leaders to come out and report to them.\textsuperscript{84}

Before Marshall could enter the building and join the meeting, the district officer intervened. He "introduced himself, very politely, like the British always are, and he said, ‘What do you propose to do?’"\textsuperscript{85}

I said, “I’m going in there. That’s what I came over here for, was to talk to these people.”

He said, “Well, you can’t go in there.”

I said, “Why?”

He said, “You don’t have a permit.”

\textsuperscript{81} Marshall, supra note 1, at 444.
\textsuperscript{82} Id.
\textsuperscript{83} Id. Marshall’s work on the Kenya constitution was funded by a man he thought to be a multimillionaire, but who he later discovered "had less money that I did. Then, I got two and two—and I still suspect it was CIA money, that’s all I could—I know it wasn’t Commie money, so what else could it be? I don’t know." Id. at 446–47. A Freedom of Information Act request filed by the author with the CIA resulted in no records pertaining to Thurgood Marshall. At this point there is no evidence to support or undermine Marshall’s speculation. Some of Marshall’s later overseas travel was funded by the State Department and the U.S. Information Agency.
\textsuperscript{84} Id. at 444.
\textsuperscript{85} Id.; Amconsul Nairobi to Dep’t of State, Despatch no. 349 (Jan. 15, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.03/I-1560, National Archives.
And Tom Mboya spoke up and he said, “Why, of course he has a permit. We got one last week.”

He said, “Yes, and it was revoked yesterday.”

At that point, Marshall recounted,

I started to be loud and boisterous and get arrested, and suddenly it dawned on me that if I was arrested, I’d be searched. I had money and paraphernalia and stuff for Mboya and others in my pockets, and if I was caught with that, I would really spend the rest of my life in jail.

Instead, he politely said to the district officer, “Of course. I understand. But before I leave, I wonder if I could just say a word to all those people out there?”

They said, “Nope. No speeches.”

I said, “I’m not going to make a speech. Just let me say one word of greeting.”

He said, “All right, all right, just one word.”

I said, “Okay,” and I jumped up on top of this station wagon that Mboya was driving, and I looked over the crowd, and they all recognized Tom Mboya, and I guess they knew who I was, I don’t know.

Well, as I looked at them, I just shouted out real loud one word, “Uhuru!” and pandemonium broke out. They all crowded, cheered, and everything, and the district officer was really mad as all get out.

The reason was, the word “Uhuru” means “Freedom Now,” Not tomorrow, but freedom right now.

And he said, “I told you not to—”

86. Marshall, supra note 1, at 444. The American Consul in Kenya described Marshall’s exclusion from the meeting slightly differently, however the Consul did not witness these events firsthand: “[T]he Acting District Commissioner refused him permission to enter the meeting, saying that his name was not on the list of persons scheduled for attendance submitted at the time the license was granted for the meeting.” Amconsul Nairobi to Dep’t of State, Despatch no. 349, supra note 85.

87. Marshall, supra note 1, at 444.

88. Id.
I said, “But I didn’t say but one word.”

So he told me where I’d better go right quick, so I did.89

On January 14, Marshall held a press conference. According to the American Consul, he told the press that “independence and freedom for Kenya was due now.”90 Marshall said that he was “in complete agreement with the constitutional proposals put forward by the African Elected Members.”91 Marshall had spent the day in Kenya’s White Highlands, and said that he was in complete agreement with the Africans in Kenya about this European area, i.e., that there was no reason for land to be restricted on the basis of race anywhere in the world. He added, however, that he would apply this principle to the African land areas of Kenya as well as the White Highlands.92

The press seemed unsure what to think of Marshall’s role. Under the headline “Negroes’ Lawyer on World Stage,” the New York Times put it this way: “The fast-talking 51-year-old lawyer has argued for Negroes’ rights in the United States for a quarter of a century. Now he is testing his talents on the larger stage of the Negro’s rights in Africa.”93 According to the paper, Marshall’s reasons for assisting the Kenyans were three:

1. There has been a growing awareness of African problems in the United States over the last five years or so.
2. Africa is providing opportunities for expansion and international contacts for Negro business men.
3. Mr. Marshall had never been to Africa before.94

89. Id. at 444–45. Marshall loved to tell stories, and it is likely that he massaged this narrative a bit for dramatic effect; however, the underlying facts of his exclusion from the meeting are supported by other sources. See Amconsul Nairobi to Dep’t of State, Despatch no. 349, supra note 85 (stating that the district commissioner refused to admit Marshall because “his name was not on the list of persons scheduled for attendance”). On Marshall as a storyteller, see David B. Wilkins, Justice as Narrative: Some Personal Reflections on a Master Storyteller, 6 HARV. BLACKLETTER L.J. 68 (1989).
90. Amconsul Nairobi to Dep’t of State, Despatch no. 349, supra note 85.
91. Id.
92. Id.
94. Id.
“I had always meant to go,” he said in an interview, “but never got around to it. I was always too busy.”
Marshall seems not to have prejudged the Kenya context prior to meeting with the nationalists in Kenya. When asked by a reporter upon his arrival whether he supported universal suffrage for Kenya, Marshall demurred and said, “I have got to have a look around.” He planned to meet as well with Asian community leaders in Nairobi. Marshall understood that Kenya had reached a critical juncture: “[T]hese people have had it,” he wrote to his wife, “and they are not going to take any more.”

Marshall soon left Kenya for London and the Lancaster House Conference on the Kenya Constitution. He would be the only person present who was not British or Kenyan. Marshall’s role, as the *Cleveland Call and Post* reported it, was “to write a tricky constitution that will give the Africans in Kenya complete political power on the basis of a democratically elected government by universal franchise, while protecting the rights of the white minorities which is outnumbered about 100 to one.”

The Kenya Constitutional Conference would get off to a rocky start, with a dispute over advisors. Four delegations were present at Lancaster House in London. As Marshall described them, his delegation “was made up of all native African men born in Kenya.” A second one, representing the New Kenya Group, was mixed. “It

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96. U.S. Negro Leader Arrives in Kenya, supra note 80. Although Marshall may have simply intended to be cautious before committing to a position on the constitution, this comment apparently disturbed some nationalists who planned to push for universal adult suffrage. GOLDSWORTHY, supra note 60, at 133.


98. Negroes’ Lawyer on World Stage, supra note 93.

99. Marshall indicated that prior to his work on the Kenyan constitution he had “helped a little” with the Nigerian constitution. Marshall, supra note 1, at 450. He told an interviewer that he was unable to provide details due to State Department restrictions. Id. at 451.

100. Thurgood Freezes as Kenyans Feud, supra note 2. LDF attorney Jack Greenberg recalled that he “helped out by doing research on British Commonwealth constitutions, which I passed on to [Marshall],” however his recollection was that LDF staff had not drafted anything. JACK GREENBERG, CRUSADES IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 223 (1994); E-mail from Jack Greenberg to Mary Dudziak (May 13, 2002) (on file with the author).

101. Marshall, supra note 1, at 445. There was only one group of nationalists at this meeting, and differences among tribes did not figure prominently in the debates. For this reason, this Article does not take up the important issue of tribal differences and their impact on independence politics. These issues would be of great importance at the 1962 Lancaster House Conference. By that point nationalist politics had formally fractured into two competing parties (KANU and KADU), and nationalists were split between two different delegations to the conference. See KYLE, supra note 65, at 115–18 (describing the emergence of the KANU and KADU).
had Africans, it had white British, it had Indians, all mixed together. A third delegation was Asian Indians, a major minority group in Kenya. The fourth delegation representing the United Party, was all white, and as Marshall described it, “[T]he best way I can explain them is that if you compared them to the Ku Klux Klan in its heyday in this country, the Ku Klux Klan would look like a Sunday School picnic. These were real rabid, awful.”

Initially the British were a bit apprehensive about Marshall’s attendance. The British Colonial Office had expressed to the U.S. Embassy in London a “tinge of apprehension” about his appointment, and “expressed [the] hope [that] Marshall had Commonwealth constitutional experience.” Ultimately, however, the Colonial Secretary concluded that he “had no objection to Thurgood Marshall as [a] special adviser.” Other British observers were not so sanguine. One man wrote a letter of protest to Colonial Secretary Ian Macleod. He was “surprised and astounded” to see an announcement of Marshall’s role in the British press. He urged Macleod to “arrange for this to be stopped.” Marshall was “leader of America’s National Association for the Advancement of Coloured People.” The writer was “informed on good authority that this organisation is largely run by Communists and it is known to have stirred up trouble against Britain in many parts of Africa. Surely the British Government cannot permit such an unwise and disgraceful arrangement for legal advice to be used at our Conference on East Africa and Kenya here in London.”

Robert Ruark, in a New York World-Telegram column, agreed, arguing that the conference was “none of America’s interest, and . . . certainly . . . none of Mr Marshall’s business.” Marshall’s work was “meddling of the highest order.” But New York Post columnist Murray Kempton saw it differently. He thought that Marshall’s

103. Id.
104. Id.
105. Amembassy London to Sec’y of State, Telegram no. 555, supra note 58.
106. London to Sec’y of State, Telegram no. 3552 (Jan. 18, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1860, National Archives.
108. Id. (emphasis in original).
presence at the Lancaster House conference was “one of the most extraordinary events in colonial history. . . . There seems to be no record in diplomatic history of a private citizen of the United States sitting at a British government conference whose subject is Crown colonial policy.”

Kempton thought that there was romance in the image of Thurgood Marshall, the product of segregated schools, a child in a border city, welcomed as a distinguished American lawyer by a British Colonial Secretary. He represents the only revolutionary force that we have constructed in this century and it is suitable for export all over the world.

The politics of the conference quickly became complicated. The Africans announced that they sought two advisors at the meeting, Thurgood Marshall and Peter Mbu Koinange. The nationalists were in an awkward position without Kenyatta present. They had taken the position that they should not collaborate with the colonial government, but instead insist on Kenyatta’s release as a condition of any sort of collaboration. Their very presence at Lancaster House without Kenyatta therefore raised questions among some Kenyans at home. Koinange, a nationalist in exile, could provide the group with needed legitimacy, since he shared with Kenyatta having been associated by the British with the Mau Mau and therefore cast outside what the British considered to be an acceptable political community. There was as well an element of personal rivalry. Mboya’s rival, Oginga Odinga, thought that involving Marshall “gave United States’ circles a foot in the door of the conference,” and he was “not happy about it.” This was just one of Mboya’s unilateral moves related to the Lancaster House conference, and his tendency to go it alone generated tension and resentment within the group.

The British government barred Koinange from the meeting, calling him “one of the only two men outside Kenya regarded by the Government of Kenya as responsible for the unhappy events that led to the Emergency in Kenya.” This decision led the African Elected

111. *Id.*
112. *GOLDSWORTHY*, supra note 60, at 133.
113. *Id.* at 133–36; *OGINGA ODINGA, NOT YET UHURU: THE AUTOBIOGRAPHY OF OGINGA ODINGA* 177 (1967).
Members to boycott the conference. As an American newspaper put it, the Africans had given in to “the whites on [the Africans’] insistence that Jomo Kenyatta [sic], convicted and exiled on a charge of leading the Mau Mau terrorists in 1952, as one of their delegation.” Thurgood Marshall explained that, having compromised on Kenyatta, the Africans thought they needed Koinange as an African “elder statesman.” If the Africans gave in to objections to Koinange’s role, Marshall told the paper, “the people back home will accuse them of selling out and any agreement they make at the conference will be regarded with suspicion.”

Because of these developments, the Lancaster House Conference began without the Africans present, and without Thurgood Marshall. According to the U.S. Embassy, “Macleod hoped [that] African-elected members ‘having made protest . . . will join our discussions . . . which are so important to [the] future of Kenya.’”

Ultimately, the controversy over Koinange led the British to embrace Marshall. Macleod called him “a very distinguished lawyer and one whom we will be very glad to see at our Conference.” Koinange, in contrast, was regarded by the British as tainted by Mau Mau ties, and hence unacceptable.

Macleod was sorry to have to proceed without the Africans. In his opening statement, he said “It is to my great regret . . . that we are meeting at this moment with an incomplete Conference.” Macleod set out the ultimate objective of Kenya negotiations: “[W]e intend to lead Kenya on to enjoy full self-government, or if I may use a plainer word, Independence.” This was the ultimate goal, but not the focus of the 1960 conference. Instead, “our task is to plan the next step in Kenya’s constitutional evolution. To see at what pace Kenya can assume greater responsibility for the conduct of her own affairs.”

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115. Thurgood Freezes as Kenyans Feud, supra note 2.
116. Id.
117. London to Sec’y of State, Telegram no. 3552, supra note 106 (omission of closed quote in original).
118. Record of Kenya Constitutional Conference, 1st plen. sess., supra note 114.
119. Id.
120. Id.; accord London to Sec’y of State, Telegram no. 3551 (Jan. 18, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/1-1860, National Archives.
121. Record of Kenya Constitutional Conference, 1st plen. sess., supra note 114.
122. Id.
conferees worked, Macleod emphasized, “we should remember that both Africans are easily the majority of all the people of Kenya and also that all those who have made their homes in Kenya are entitled to make a full contribution to the work of governing their country.”

So Macleod set out the central problem underlying the constitutional talks: the issue of political enfranchisement of the majority without the sacrifice of minority rights. This dynamic created problems that “have to be solved before Kenya can come to independence.” The Secretary emphasized the importance of an inclusive approach to politics, and that, “for the time being . . . the interests of minorities might have to be secured through constitutional safeguards.” He proposed three committees for the conference: a committee on the Council of Ministers, a committee on the franchise and the colonial legislature, and a committee on a bill of rights.

As the conference got underway, Marshall, unable to attend the meeting due to the boycott, instead spoke to the press. He warned of the serious consequences for Kenya if an agreement acceptable to the Africans on Kenya’s constitution was not reached. Marshall warned of “a new uprising in Kenya that nobody can control—any more than they could control Mau Mau.” He was afraid that “a revolt might occur if the constitutional conference meeting ended with what the Kenyans considered to be an ‘imposed’ constitution. ‘This new group throughout Africa know exactly [sic] what they want,’ Mr. Marshall was quoted as saying. ‘They want independence now—tomorrow is too late.’” As the East African Standard reported it, “Mr. Marshall spoke of his hopes for a common-roll democracy, with a constitution providing for minority safeguards and an effective Bill of Rights. ‘The

123. Id.
124. Id. At this point, some British leaders believed that Kenya might become independent in about fifteen years.

The U.S. position was that it “supports the principle of orderly transition to self-government and eventual self-determination in the interest of all parties and peoples involved.” According to the American position, “all people permanently resident in Africa have legitimate interests for which they can rightfully demand fair and just consideration.” Nairobi to Sec’y of State, Telegram no. 262 (Feb. 2, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.00/2-260, National Archives.


126. Id.
128. Id.
most important thing is that we protect property so that no future Government of Kenya can seize the land in the Highlands,’ he added.”

The story continued:

The central fact of Kenya’s political future, in Mr. Marshall’s view, was that there are 6,000,000 Africans as compared with 64,000 Europeans, 165,000 Asians and 35,000 Arabs. What was more, the Europeans had made little effort to learn the Swahili language or otherwise adapt themselves to the culture of their adopted country.

According to the *East African Standard*, Marshall was “working on a ‘Draft bill of Rights,’” which the African Elected Members “propose to submit to the conference.”

The indications are that their case is based on the following points: . . . Welcome for common roll elections; one adult, one vote; a demand for nine elected Ministers, including the Chief Minister; single-member constituencies, based geographically; perhaps three Civil Service Ministers for a transitional period; opposition to high qualifications for the franchise as a safeguard for minorities; no franchise on racial grounds; Africans willing to accept responsibility in the Government; reserved seats definitely unsatisfactory; and a national Parliament instead of the Legislative Council.

Marshall’s task would be complicated, however, for the draft Bill of Rights would become a pivotal issue at the 1960 Lancaster House Conference.

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129. *Id.*

130. *Id.*


132. *Id.*
Finally, according to the Ghana Times, “The Kenya Nationalists stood their ground and boycotted the conference till the Colonial Secretary, perhaps, realised that a Kenya conference without the accredited leaders of Kenya was like Hamlet without the prince." Macleod brokered a compromise. Each delegation would be entitled to one adviser in attendance at the sessions in Lancaster House. Other advisers, including Koinange, could be present in the building, but could not attend sessions. Because of this deal, the African delegation’s sole advisor to be present at the sessions would be Thurgood Marshall. Macleod was now pleased with Marshall’s presence, for without him as an alternative advisor to Koinange, the elements making this compromise possible would be missing. As the U.S. Embassy in London put it, Marshall “appears to be persona grata coloff . . . . (Without Marshall as alternative to Koinange ColSec would have been unable [to] apply [the] formula re attendance [of] advisers which permitted [the] conference [to] get underway this week.)." Marshall’s role also registered back at home. On January 28, Secretary of State Christian Herter cabled the U.S. Embassy in London for information. In “[v]iew [of the] wide press coverage and participation [by] Marshall,” he said, the State Department would “appreciate Embassy comment, [and] analysis [of the] Kenya conference.” The U.S. Embassy kept track of Marshall’s work, and reported on his activities to the Secretary of State.

133. J.G. Amamoo, London Letter: Kenya’s Future, GHANA TIMES, Feb. 2, 1960, at 8. Macleod had been responding to pressure from white settlers, the paper speculated. To the settler representative in London, “recognition of Mr. Koinange, in any form, whatsoever, is an anathema; and the very mention of the man’s name, is said to cause the blood-pressure of certain people to shoot up.” The Ghana Times, the principal paper of a nation that achieved independence in 1957, was not sympathetic: “Well, these people, with all respect, will have to be told that the rising tide of nationalism in Africa is a fact which cannot be denied or ignored, and that it is more prudent to swim with the tide than against it.” Id.


135. London to Sec’y of State, Telegraph no. 3782 (Jan. 29, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.00/1-2960, National Archives. According to the Embassy, “As adviser Marshall does not speak in [the] conference. While he has been mentioned in [the] press on several occasions, he has not become [a] subject of controversy.” Id.


137. E.g., London to Sec’y of State, Telegram no. 3782, supra note 135.
III. WRITING RIGHTS

The meetings at Lancaster House were not pleasant. As Marshall put it, “[e]verybody was at everybody’s throat.” There was a rough consensus, however, on what mattered most: the central issue of voting rights and representation in the legislature. British support for majority African voting rights meant that progress on that issue came sooner than participants had expected. With majority representation possible for Africans, another matter became central: safeguards, or a bill of rights, to protect the interests of the powerful who were soon to become an electoral minority. Reacting to Macleod’s opening statement, speaker after speaker emphasized the importance of “safeguards” to protect minority rights as Africans gained political power.

For the African Elected Members, Ronald Ngala emphasized the importance of moving to democratic self governance soon. Delay, he suggested “would be disastrous.” Minority rights should be protected, but not through reserved seats for racial groups in the legislature, as was the case in 1960. Instead, “the best form of safeguard for all races in Kenya was a Bill of Rights enforced by an independent judiciary.” He announced that Marshall, “an expert on minorities and civil rights, had been retained by the African Constituency Elected Members and was drafting a proposed Bill of Civil Rights.” The Africans repeatedly emphasized that a bill of rights, rather than reserved seats in the legislature, was the ideal way to protect minority rights. This had been a longstanding position, argued Dr. Julius Kiano, and was not “developed merely to quiet the fears of those who were afraid of African domination.” Oginga Odinga had included a call for complete equality in a 1957 election manifesto, and in 1958, the African Elected Members circulated a memorandum pledging support for a bill of rights. Kiano stressed that

140. Id.
141. Id.
142. Id.
Africans intended that an independent Kenya should subscribe to the Convention on Human Rights. 144

Michael Blundell of the multiracial New Kenya Group disagreed about reserved seats in the legislature for racial groups, but he agreed that individual rights must be protected in the new constitution, and he stressed as well the importance of an independent judiciary. 145 Dr. S.G. Hassan, leader of the Asian delegation, emphasized the importance of Asians to economic progress in Kenya. The Asians and Muslims supported independence and majority rule in Kenya, but Hassan urged that the fundamental human rights of their groups must be protected. 146

For their part, members of the all-white United Party stressed not voting rights, but broader education, and argued that full enfranchisement of Africans would have to wait for some time until more Africans had been educated. 147 United Party leader L.R. Briggs described the concerns of white settlers in a B.B.C. interview. According to news accounts, “Briggs said his party was afraid that if Africans had control they would make it ‘virtually impossible’ to farm, either by taxation or by political pressures.” 148 He emphasized: “Our feeling is that if a constitution were introduced which would have the effect of placing the Europeans under the dictatorship of the Africans, then we would naturally wish to enable our people to leave the country if they wished to do so.” 149

Although all conference participants thought that rights were important, a bill of rights was always a second-best source of protection for minority interests. The Secretary of State hoped that a gradual transition in Kenya would provide time for the races to work together: “This should help to generate mutual goodwill, respect and understanding, which will afford more lasting assurance of European position than any constitutional safeguards.” 150

Days of opening statements were accompanied by nights of behind-the-scenes negotiations. Discussions between groups and with

144. Id.
146. Id.
147. Record of Kenya Constitutional Conference, 6th plen. sess., supra note 143.
149. Id.
the Colonial Secretary were productive, and the conference quickly agreed on a new plan for suffrage and representation. According to B.A. Ogot, a new Legislative Council would consist of thirty-three members elected for the first time to open (non-racially designated) seats. The remaining seats in the legislature would be reserved for minority groups: “ten for Europeans, eight for Asians and two for Arabs.” At the conference, “[f]or the first time the British Government conceded the principle of African majority rule in Kenya.”

In a statement for the press, the Secretary of State for the Colonies expressed his pleasure with the progress made at the conference. “I am very happy with the measure of agreement that the Lancaster House Conference has revealed,” he said. “In Kenya the groups mainly concerned had taken up positions which it seemed impossible to reconcile. Here in London, by talking out their differences together, they have come much closer to each other.” He felt that there was “a good chance that the wide measure of agreement for which I have always sought will now be obtained.” It was only the United Party that “stand[s] out completely against [the proposals] and even they are anxious to join in the further discussions of the Conference.”

The Commonwealth Relations Office noted that the “[c]onference has shown greater co-operation and agreement among all groups than ever before.” In particular, the “New Kenya Group has shown great political courage in going beyond views of many supporters (of all races, but particularly of European community).” The question remaining, of course, was whether the positions taken by representatives at the conference would be palatable to their constituencies back in Kenya. “Next week’s political meetings in Kenya will show whether moderates can survive . . . ”

151. Ogot, supra note 69, at 61.
153. Id.
155. Id.
156. Id.
The New Kenya Group agreed to the proposals “provided reasonable agreement is reached on the safeguards.” Much hope was put in the New Kenya Group, as a “rallying point for moderate Africans and as a means of bringing round European opinion.” Government officials hoped that “they may well be able to form an effective sandbag against African extremism.” Meanwhile, back in Kenya, the Acting Governor reported that European opinion was coalescing behind the United Party.

An agreement leading to majority rule in Kenya put Marshall’s work front and center, for Marshall’s contribution to the conference was a draft Schedule of Rights. On February 2, 1960, Marshall submitted a memorandum on a draft Bill of Rights to the Committee on Safeguards at the Lancaster House Conference. There is a puzzling note in Marshall’s memo. Although he was serving as an advisor to the African Elected Members, Marshall submitted his memorandum on behalf of himself alone. “This proposal is solely mine,” he wrote, “and has neither been discussed with nor approved

159. Id.
161. As Marshall recalled:
I wrote the whole “schedule” of rights, as they call it in Britain. I said it was a schedule. The Britishers said, it’s their language, they knew what they were talking about, and the correct pronunciation was “shedule.” I said, “Well, if that’s true, how are your children doing in shul today?” — but it still came down as a shedule.

Marshall, supra note 1, at 445–46. Three papers on a bill of rights were circulated at the conference: one by Thurgood Marshall, one by Colonial Office Advisor W.J. M. Mackensie, and one based on the Nigerian constitution. Land Tenure and Bill of Rights: Kenya Whites Seek to Perpetuate Evil, GHANA TIMES, Feb. 20, 1960, at 4. The Ghana Times reported that “another document covering the best features of all three had been prepared by Dr. Marshall and had been accepted in its general terms by all delegates.” Id.
or rejected by the African Elected Members or any other group. It is, therefore, submitted for use by all members of the Conference.\(^{163}\)

The reason that Marshall submitted the memorandum on his own, and without previously discussing it with the African Elected Members, is not disclosed in archival records or press accounts. It may simply have been a matter of timing, since Marshall’s work in London was cut short when he received an urgent call to return home due to developments in the civil rights movement in the United States. In addition, the nationalists were tied up in negotiations leading to a compromise on representation and suffrage. Besides their behind-the-scenes work on these matters, press interviews and meetings among themselves on various matters were priorities early in the conference. The Bill of Rights also raised many complicated issues which the group would not have had time to consider fully. It is unlikely that the note reveals differences between Marshall and the African delegates, and that this undermined their ability to work together. Marshall was remembered very warmly afterward.\(^{164}\) There is an ambiguous suggestion of the possibility of conflict, however, in the records. After Marshall’s departure later that month, according to press reports, Mboya’s chief rival Oginga Odinga was “reported denying rumours of clash between A.E.M. and Thurgood Marshall,”\(^{165}\) but the British press often played up the possibility of divisions, whether or not they existed. Marshall’s sole authorship cannot shed much light on the nationalists’ views about rights as of the 1960 Lancaster House Conference, but it provides a better

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163. Id.

164. Tom Mboya to Thurgood Marshall (Mar. 25, 1960), Folder: 25.6, General Correspondence with Foreign Countries, Correspondence with USA, Volume one (For/1/v. 1), 1960, March-April, Box 25, Tom Mboya Papers, Hoover Institution; Harry Kreisler, Kenyan Independence: The Early Years: Conversation with Julius Kiano (Sept. 14, 1989) http://globetrotter.berkeley.edu/conversations/Kiano/kiano2.html.


The possibility that Marshall fell out of favor with the nationalists is undercut by the fact that he was mentioned as a possible advisor by both competing nationalist groups for the 1962 Lancaster House Conference, and one of the two groups, KANU, included Marshall’s draft Bill of Rights in their constitutional demands. Nairobi to Sec’y of State, Airgram no. 60 (Nov. 28, 1961), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.03/11-2861, National Archives. Marshall’s appointment to the Second Circuit made him unavailable to serve.
window into Marshall’s thinking than a consensus document would have provided.

Marshall explained his objectives at a Committee on Safeguards meeting later that month. He said that “the intention of his paper . . . was to protect the rights of every individual in Kenya, rather than the rights of any particular minority groups.” The proposed Bill of Rights began with a preamble: “All persons are equal before the law and are entitled without any disorimination [sic] or distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, to equal protection of the law.” Marshall thought that the preamble would “help the Courts when interpreting the particular provisions of the Bill by setting out general principles on which it would be based.”

Section I protected the rights of “Freedom of Religion, Speech, Press and Association.” Section II on “Personal Security” protected rights to life and liberty, rights against slavery, and the right to equal protection of the law. Section III guaranteed rights to “Education, Health and Welfare,” Section IV protected the “Right to Work,” and Section V protected voting rights. Sections I, II and V paralleled in many ways the U.S. Constitution, but Sections III and IV differed, at least from the U.S. text. Section III on “Education, Health and Welfare,” and Section IV on the “Right to Work,” protected affirmative rights to education, to employment, and to what now would be called a “living wage.” Section IV provided that “[e]veryone who works has the right to just and favourable wages.”

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167. Proposed Draft Bill of Rights, attachment to J.A. Sankey and T.M. Heiser, Note by the Secretaries, supra note 162.


169. Proposed Draft Bill of Rights, attachment to J.A. Sankey and T.M. Heiser, Note by the Secretaries, supra note 162.

170. Id.

171. Id.

172. Id.

173. Id.

remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”175 The right to work also protected the right “to form and to join trade unions.”176 Marshall said that his draft drew upon provisions from the U.S. Constitution, the Malayan Bill of Rights, and the Constitution of Nigeria.177 The language of the right to work clause does not parallel provisions of these constitutions, however, and instead tracks the language of the Universal Declaration of Human Rights.178

The key section of the Bill of Rights was Section VI, on “Property Rights.”179 Here Marshall recommended that provisions of the Nigerian Constitution be adapted to conditions in Kenya, and his memo simply incorporated the Nigerian text. He relied on the Nigerian constitution for clauses protecting property rights, because these were “the best he had met.”180 This section provided, in part:

(1) No property, movable or immovable, shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily except by or under the provisions of a law which, of itself or when read with any other law in force—

(a) requires the payment of adequate compensation therefor;

(b) gives to any person claiming such compensation a right of access, for the determination of his interest in the property and the amount of compensation, to the Courts;

(c) gives to any party to proceedings in the Court relating

175. Proposed Draft Bill of Rights, attachment to J.A. Sankey and T.M. Heiser, Note by the Secretaries, supra note 162.
176. Id. Although Marshall’s proposal included voting rights protection, he does not appear to have participated directly in debates over the franchise at the conference. The voting rights section of his proposal does not appear to have been a topic of debate.
177. Kenya Constitutional Conference, Comm. on Safeguards, 1st mtg., supra note 166.
179. Proposed Draft Bill of Rights, attachment to J.A. Sankey and T.M. Heiser, Note by the Secretaries, supra note 162.
180. Kenya Constitutional Conference, Comm. on Safeguards, 1st mtg., supra note 166. Marshall suggested that the Conference should agree on general principles, with detailed drafting to be carried out later. Id.
A “taking” could only be for public purposes, and this section of the Bill of Rights incorporated that idea through a reference to previously existing statutes.\(^{182}\) This proposal would ultimately be modified to include a right to take a dispute over a taking of property directly to the highest court in Kenya.\(^{183}\) Allowing the government to take property seemed to leave open the option of land reform, while the requirement of compensation was principally aimed to protect white minority settlers from government abuse.

The fairly straightforward language of this takings clause masked a deep underlying division at the Kenya Constitutional Conference, a fissure that ran through independence politics in the Colony. The most valuable land in Kenya had originally been tribal land, and now was exclusively in the hands of white settlers. These farmers produced Kenya’s agricultural exports, and so were the principal tie with global markets. The settler community believed that the land belonged to them, and that their property rights must be protected. Many nationalists believed that a key objective of a postcolonial government must be land reform and resettlement. Land reform would redress a historical injustice of displacement of African peoples from their lands under colonialism. For the British, contemplating a continuing relationship with Kenya as part of the Commonwealth, and hoping to protect British citizens who had settled in Kenya, any

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181. Proposed Draft Bill of Rights, attachment to J.A. Sankey and T.M. Heiser, Note by the Secretaries, supra note 162.

182. Subsection Two of Section VI of the Bill of Rights provided that “[n]othing in this section shall affect the operation of any existing law,” including subsequent amendments to existing law which did not “add to the kinds of property that may be taken possession of” or “to the purposes for which or circumstances in which such property may be taken possession of or acquired”; “make the conditions governing entitlement to any compensation or the amount thereof less favourable”; or deprive a person of the rights guaranteed in this section of the constitution. Id. In this way, the constitution would constrain future lawmaking affecting property rights, without immediately unsettling the entire statutory framework the country was based on. This kind of limitation was common in African constitutions written during this period.

183. Because there was only a tiny number of indigenous Africans in Kenya who were lawyers, this meant that property disputes would ultimately be resolved in most cases by Europeans. Marshall was aware of this issue and hence was concerned that Kenyans needed to be trained as lawyers. See Marshall, supra note 1, at 446 (noting lack of African judges). On courts in East Africa, see generally JENNIFER WIDNER, BUILDING THE RULE OF LAW: FRANCIS NYALAI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA (2001).
resettlement scheme must not interfere with settler property rights, and so must be based on just compensation.\textsuperscript{184}

An argument broke out in committee: what “public purposes” could the government take land for? Some white settlers wanted this spelled out very clearly. But to do that would seem to require the Africans to develop a policy on land reform on the spot—something they had not contemplated, and were not in a position to do. Mr. Slade, a white settler with the New Kenya Party, thought that even if compensation was provided, “the right of the state to expropriate land should be restricted to public purposes, and that some definition of ‘public purposes’, even if it were a negative one, should be included in the Bill of Rights.”\textsuperscript{185} Seeing this as an attempt to tie the hands of a future government, nationalists objected. Ronald Ngala believed that “the acquisition of unused land for distribution to the landless of all races should come within the interpretation of ‘public purposes,’”\textsuperscript{186} while Tom Mboya suggested that

the Bill of Rights should not entrench the position of those enjoying a privileged position, nor perpetuate a system that was basically unjust. It should be within the power of the Government of Kenya to bring in legislation to remove injustices. The Courts should be left to interpret “public purposes” in the light of changing circumstances.\textsuperscript{187}

This issue would drive a wedge between groups at the conference, threatening the consensus Colonial Secretary Macleod had hoped for. “We are bogged down over [s]afeguards,” the Secretary of State’s office reported to the Colonial Governor’s office. “Conference pretty well agreed there should be a Bill of Rights . . . largely based on Nigerian model. But hitch came, when we got on to property rights.”\textsuperscript{188} Macleod told the Prime Minister:

\textsuperscript{184} A land buy-out scheme was in place by 1963, with British and World Bank financing. This was directed principally at agricultural land held by white settlers, rather than commercial properties owned by Asians. See Kyle, supra note 65, at 152–58 (noting the various settlement schemes implemented as Kenyan independence became apparent and white settlers wished to leave); Ogot, supra note 69, at 64 (discussing 1960s land settlement).

\textsuperscript{185} Kenya Constitutional Conference, Comm. on Safeguards, 1st mtg., supra note 166.

\textsuperscript{186} Id.

\textsuperscript{187} Id.

The New Kenya Party made their acceptance of the constitutional settlement conditional on reasonable proposals for safeguards, and by that they mean largely land. . . . The Africans don’t like it at all and are very resentful of the Europeans for raising the matter when the Africans have already agreed to a Bill of Rights.189

They “had not come here to discuss land issues and will not commit themselves to any statement of the kind Slade is obviously after.”190 A further wrinkle, Macleod thought, was that “[t]hey are of course very much divided on the issue themselves.”191 Nevertheless, the Africans “want an agreement and they want to return soon to Kenya with an agreement, and so in short although they dislike it very much they are prepared to accept” a portion of the proposal, but not language defining and limiting the public purposes for which land could be confiscated.192 Because of these difficulties, there was “little hope of concluding business” soon, but the government was nonetheless “seized of [the] importance of getting people back to Kenya with an agreement as soon as possible.”193 Meanwhile, the Acting Governor in Kenya warned: “[A]ll sources report growing unrest amongst Europeans. We are afraid that a band of hot heads may do something rash which will spark off a series of racial clashes which will do a good deal of harm particularly to [the] European community.”194

Ultimately the Committee considered the following language:

PROPERTY RIGHTS
Suggested Formula for Report

[p. 1] In regard to rights in property, the Conference considered that the Bill of Rights should include provision to the effect:

(i) that private rights in property of all kinds should be respected and should not be compulsorily acquired or extinguished without full and fair compensation;

190. Sec’y of State for the Colonies to Kenya (O.A.G.), Telegram no. 34, supra note 188.
191. Id.
192. Ian Macleod to Prime Minister, supra note 189.
193. Sec’y of State for the Colonies to Kenya (O.A.G.), Telegram no. 34, supra note 188.
(ii) that any question or dispute as to the property to be acquired or the compensation to be paid therefor should be open to judicial determination by the Courts at the instance of the person from whom the property is to be acquired, and that such judicial determination should be subject to the normal avenues of judicial appeal in civil cases; and

(iii) that compulsory acquisition of property of any kind should be confined to circumstances in which such acquisition is required for the fulfilment of contractual or other legal obligations attaching to the owner of the property or circumstances in which such acquisition is justified in the general public interest.

[p. 2] The Conference did not however consider that compulsory acquisition of private rights in property would be “justified in the general public interest” if the purpose of the acquisition would be to make the property available to another person or persons for his or their private advantage unless the property is after acquisition to be so applied as to be of service to the public outweighing the resultant hardship to the dispossessed owner.

The Conference considered that the provisions in this regard in the Nigerian constitution would provide a convenient model for adaptation and modification to these requirements.\textsuperscript{195}

The nationalists indicated that they could agree to the first page of this language, but not to page two, but Slade held out for the inclusion of page two. Marshall insisted that “he is prepared to stake his reputation that the words on the second page add nothing to those on the first.”\textsuperscript{196}

The central obstacle seemed not to be the New Kenya Party as a whole, but Slade, who Macleod described as “something of a fanatic,” who viewed the issue as a matter of principle. Macleod thought that he might need to bring Slade to see the prime minister, and suggested that “an appeal to Slade on the wider grounds of the importance of the Kenya agreement to the whole of Africa, and indeed the whole


\textsuperscript{196} Id.
Commonwealth, would be the only possible way of breaking through his rigid position; reason alone will not do it.\(^{197}\) The Africans, in contrast, were attempting to compromise, and Macleod thought that they could not go further “or they would be repudiated at home. Indeed, already they may have gone too far.”\(^{198}\)

**IV. COMING HOME**

Before work on the Kenyan Constitution was complete, a call from home brought Marshall back from Kenya. Marshall was in London on February 1, 1960, a historic day in the U.S. civil rights movement. That day, four African American freshmen at North Carolina Agricultural and Technical College held a sit-in at the segregated lunch counter at Woolworth’s in Greensboro, North Carolina. The simple protest soon expanded into a widespread sit-in movement. Jack Greenberg recalled,

> [I]t was as if a spark had been struck in an oxygen-filled atmosphere. The sit-ins spontaneously spread to neighboring cities in North Carolina and within two weeks they were all over the South. Blacks began demanding nonsegregated service at lunch counters, department stores, bus terminals, and all the places from which they had been excluded or segregated; supporters joined them at branches of the offending chain stores in the North as well.\(^{199}\)

Greenberg would later write that the Legal Defense Fund “set out to defend the students immediately.”\(^{200}\) But the sit-ins posed a set of legal and practical dilemmas for civil rights lawyers, among them the problem that the students had violated facially valid trespass laws, not facially vulnerable segregation laws. Once Thurgood Marshall returned to New York, Derrick Bell, then a young lawyer at the LDF, recalled,

> Thurgood stormed around the room proclaiming in a voice that could be heard across Columbus Circle that he did not care what anyone said, he was not going to represent a bunch of crazy colored

\(^{197}\) Ian Macleod to Prime Minister, supra note 189.

\(^{198}\) Id.

\(^{199}\) GREENBERG, CRUSADERS IN THE COURTS, supra note 100, at 271. See generally CHAFE, supra note 40 (discussing the history and impact of the Greensboro sit-in demonstrations). Events like the sit-ins would generate widespread international media coverage, and sympathetic international reaction. On the international impact of the civil rights movement, see generally DUDZIAK, supra note 21.

\(^{200}\) GREENBERG, CRUSADERS IN THE COURTS, supra note 100, at 272.
students who violated the sacred property rights of white folks by going in their stores or lunch counters and refusing to leave when ordered to do so.\textsuperscript{201}

He insisted that he would only take the cases if his staff could find some new and convincing arguments.\textsuperscript{202} But Marshall later simply explained in an oral history interview that “when word came over of the movement of Martin Luther King and the others, and after several telephone calls with the office in New York, I decided I’d better come home and take care of home, instead of trying to take care of Kenya.”\textsuperscript{203} He finished his work on the constitution, he said, and quickly returned home.\textsuperscript{204}

After Marshall departed, meetings continued in London on the question of safeguards. According to the U.S. Embassy in London, the “subject [is] not all plain sailing.” The “goal of [the] conference continues [to] be [a] fairly short set of general principles, which will form [the] basis of [a] detailed constitution to be drafted later in Nairobi and London.”\textsuperscript{205} However, “[h]is highly emotional issue has apparently postponed conclusion [of the] conference. . . . [P]articipants [are] searching hard for [a] formula either to resolve or shelve [the] issue.”\textsuperscript{206} At the same time, Africans were “getting uneasy about [the] extent to which they have accepted Colonial office and Blundell group proposals, for while they recognize [the] merits of [the] proposals, they worried about [the] reaction of their constituents in Kenya.”\textsuperscript{207} As Mboya saw it, some representatives at the conference “want the bill to contain safeguards on land which would exclude any future Government from expropriating land with or without compensation.”\textsuperscript{208} Mboya said, “We are not prepared to discuss this question. The bill already safeguards land and property owners within

\textsuperscript{201} Derrick Bell, \textit{An Epistolary Exploration for a Thurgood Marshall Biography}, 6 HARV. BLACKLETTER L.J. 51, 55 (1989); see also WILLIAMS, supra note 4, at 287 (quoting the same).

\textsuperscript{202} WILLIAMS, supra note 4, at 287; see also Bell, supra note 201, at 55 (regarding Marshall’s concerns about the legal basis for the defense of sit-in protesters).

\textsuperscript{203} Marshall, supra note 1, at 476.

\textsuperscript{204} See id. Marshall’s oral history indicates that these events occurred in 1961, however Marshall worked on the Kenyan constitution in London in 1960.

\textsuperscript{205} London to Sec’y of State, Telegram no. 4038 (Feb. 16, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.002-1660, National Archives.

\textsuperscript{206} London to Sec’y of State, Telegram no. 4088 (Feb. 18, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.002-1860, National Archives.

\textsuperscript{207} Id.

\textsuperscript{208} Land Tenure and Bill of Rights: Kenya Whites Seek to Perpetuate Evil, supra note 161.
According to The Times of London, it was “understood that the Africans agree on the principle of no expropriation without compensation: but other delegates ask how one judges the compensation, and whether it is right that it should be used for the settlement of Africans in the present agricultural system.”

The Ghana Times reported that the Africans wanted to make it “‘crystal clear’ they will always uncompromisingly uphold private property rights of any citizen irrespective of his race or national origin but, Ngala said, ‘we feel that the people of Kenya must preserve their right to carry out such land reforms as will accelerate economic betterment of the country.’”

With the conference facing deadlock, the Ghana Times reported, “all delegates and officials now believe that the only hope for a compromise solution depends on Macleod taking things into his own hands and formulating an alternative policy on which both sides would be able to compromise.”

In late February the conference ended, but with the major question of land and safeguards unresolved. While Thurgood Marshall was no longer in London, his presence continued to be felt. Macleod’s official report on the conference addressed the unsettled question of safeguards. Two documents were singled out as particularly helpful: a discussion of the Nigerian constitution, and “a very helpful paper by Dr. Thurgood Marshall outlining the kind of provisions which might help to meet the situation.” The ideas in these documents would be put to use:

It is the firm view of Her Majesty’s Government that legal provisions are needed in the proposed constitution, which will be made by Order in Council, to provide for the judicial protection of human rights, on the lines of the provisions in the Nigeria (Constitution) Order in Council, taking into account the draft

209. Id.
prepared by Dr. Thurgood Marshall and the special circumstances of Kenya.  

The conference produced no final constitutional text, only Macleod’s report summarizing the meeting’s accomplishments and difficulties.  

214 The ideas in Marshall’s draft would be put to further use. In 1962, the principal nationalist party in Kenya, KANU, included Marshall’s Bill of Rights in their constitutional demands.  

215 The final 1963 independence constitution would contain very detailed clauses regarding confiscation of land for public purposes, along the lines that Marshall had supported in 1960.  

216 At the end of the meeting, most of the major players agreed to go forward with the agreements they had reached so far, but the all-white United Party “denounced [the] conference as [a] death-blow to [the] European community,” and said that “the reported proposals would virtually mean that Europeans and Asians would no longer have genuine representation.” In contrast, the “Africans appeared willing [to] go ahead to [the] next phase.” The Ghana Times called the resolution of the conference “a victory for the African Nationalists, who were, after due thought and consideration, supported by the Colonial Secretary.” Meanwhile, white settlers were reportedly calling Macleod’s constitutional proposals “a Mau Mau victory.” The future remained uncertain. The U.S. Embassy in London was of the opinion that “Macleod has only just managed [to] avoid [a] conference breakdown and that local Kenya reaction to [the] positions of [the] three principal groups may jeopardize [the] results.”

214. Id.
215. Id.
218. London to Sec’y of State, Telegram no. 4129 (Feb. 22, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960-63, 745R.00/2-2260, National Archives.
220. London to Sec’y of State, Telegram no. 4129, supra note 218.
223. London to Sec’y of State, Telegram no. 4129, supra note 218.
Macleod’s proposals were then “endorsed by Her Majesty's Government.” The constitution was now called the “Macleod Constitution,” identified with the Colonial Secretary in the same way that earlier constitutions, less based on deliberation, had been identified with previous officials. The constitution was no longer an agreement that Africans would embrace, however, but rather a colonial position that would be a starting point for their arguments about further change. Meanwhile, the U.S. Consul in Kenya assessed the conference this way: “[I]t would appear that [Britain] has made up its mind to divest itself of its colonial responsibilities in Africa as expeditiously as feasible.”

With independence and an eventual African government on the horizon, a new climate of negotiation emerged back in Nairobi, although colonial politics would be further complicated by an eventual split among nationalists and the formation of two principal nationalist parties. The New Kenya Party would ultimately propose a formula for resolving the land issue. According to Colin Leys, [i]t soon became clear that the essence of the formula must be to have the incoming African settlers purchase the land with funds lent to them by the new Kenya government, which in turn would be lent

224. Amconsul Nairobi to Dep’t of State, Despatch no. 402 (Mar. 1, 1960), Records of the Department of State, RG 59, Central Decimal File, 1960–63, 745R.00/3-160, National Archives.

225. See Kyle, supra note 65, at 63, 81–82, 102–07 (identifying Kenya constitutions with reference to Colonial Secretaries).


the money by the British government, and if possible also by the World Bank.\footnote{228}

Ultimately, the nationalist leaders would agree, and this resolution would be in place before the next Lancaster House Conference on the Kenya Constitution in 1962.\footnote{229}

Perhaps influenced by an economic crisis in the colony that, according to Leys, was precipitated by the move toward independence at the 1960 Lancaster House Conference, upon his release in 1961, Kenyatta would emphasize that property rights would be protected by the future African government, and that “[w]e will encourage investors in various projects to come to Kenya and carry on their business peacefully, in order to bring prosperity to this country.”\footnote{230} In light of these developments, land and the compensation clauses, a focus of the 1960 meeting, were not a major issue in later constitutional negotiations, which would turn instead on regional versus national government, tribal politics, and federalism. The final 1963 independence constitution would contain very detailed clauses regarding confiscation of land for public purposes, along the lines that Marshall had supported in 1960.\footnote{231}

\begin{footnotesize}
\begin{enumerate}
\item[228.] Colin Leys, Underdevelopment in Kenya: The Political Economy of Neocolonialism 1964–1971, at 55 (1975). According to Leys, this formula “was adumbrated in the New Kenya Group’s thinking during 1960, after the first Lancaster House Conference of January 1960 at which the British government finally made it clear that there would be an elected African majority in the next Kenyan legislature.” Id. at 56.
\item[229.] According to Leys, “it may well seem puzzling why the African leaders should have agreed to [the formula], especially since a militant wing of the leading African party, the Kenya African National Union (KANU[)] . . . had been calling for land transfer without compensation.” Possible reasons for this included the moderating influence of Kenyatta; the fear of independence being delayed; the hope of changing things after independence; a lack of interest in the detail of the negotiations; a fear that the rival party, the Kenya African Democratic Union (KADU), for whose supporters the land issue was less vital . . . , might agree to the proposed scheme first and perhaps manage to get KANU excluded from the transitional government; and finally, the risk of alienating the former forest fighters if they were not provided with land quickly.
\item[230.] Leys, supra note 228, at 62; Jomo Kenyatta, Suffering Without Bitterness: The Founding of the Kenya Nation 147 (1968).
\item[231.] The 1963 Kenya Constitution provisions on property rights are, in part, as follows:
\begin{enumerate}
\item[19.] (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:
\end{enumerate}
\end{enumerate}
\end{footnotesize}
But when constitutional negotiations came to a close in February 1960, in Nairobi this future was far from certain. Twenty Kenyan political leaders including Michael Blundell, leader of the multiracial New Kenya Group, and Ronald Ngala, African leader, arrived at the Nairobi airport upon returning from Lancaster House. Blundell was greeted by whites shouting “Traitor,” and “Thirty Pieces of Silver.” A white man with a microphone yelled, “Congratulations, Mr. Ngala, you stood by your policies. Blundell, you have sold your own people.”

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the Supreme Court for:

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the Supreme Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court or any other tribunal or authority in relation to the jurisdiction conferred on the Supreme Court by subsection (2) of this section or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the Supreme Court or applications to the other tribunal or authority may be brought).


The particular language of these provisions, and of other specific clauses, was hammered out in ongoing negotiations in Kenya between the 1960 conference and subsequent Lancaster House conferences. The Kenya Constitution has been amended several times since 1963, but substantive changes have not been made to these clauses. Compare id., with CONSTITUTION, Ch. V (1998) (Kenya), available at http://www.4cskenyatuitakayo.org/downloads/The%20Kenyan%20Current%20Constitution.pdf.

Constitutional scholars sometimes assume that similar constitutions were imposed by the British on former colonies, but the Kenya example reveals a different experience of hard bargaining among competing interests. This suggests that any similarities with other British postcolonial constitutions were not simply imported from one constitution to another, but instead were successfully bargained for by parties to the Kenya negotiations.
An African shouted in response, “Blundell, you will get our votes if necessary. You have sold nobody. You are all right.”232

Mboya, Odinga, and other nationalists would have a different experience when they arrived a couple of days later. They were met at the airport by thousands of Africans. The new constitution would not last, Mboya told the crowd. “[The] struggle [had] only begun,” and a move toward independence would happen “immediately.”233 There was a place in Kenya for all races, Mboya said, but “those who did not believe in democracy should sell out and leave.”234 Kenya’s destiny, Kiano emphasized, was “for [the] first time turned over to Africans.”235

Twenty-five thousand people attended a gathering at the African Stadium. Mboya asked the crowd whether they supported the stand taken by the African delegation on the Kenyan Constitution. If they did, he asked them to raise their hands. Around African Stadium, the press reported, “nearly every hand [was] raised.”236

The crowd was “jubilant.” Not willing to let this moment of promise slip away, as the leaders left the stadium, “crowds began [to] follow Mboya home.”237 When they reached the city limits police tried to turn them back. When they would not disperse, the “riot act [was] read.”238 At this point in the American Consul’s telegram reporting on the incidents, the description of what followed was very simple: “tear gas used and baton charges made, crowd eventually disbursing.”239 It is impossible to know how violent this confrontation was. In the end, only two people were reported to be injured.240 Perhaps the incident best illustrated the limits of Colonial authority in Kenya in 1960. Colonial police could suppress a demonstration, but a spirit of independence was alive in Kenya, and no tear gas canisters or police batons could make it go away.

234. Id.
235. Id.
236. Id.
237. Id.
238. Id.
239. Id.
240. Id.
CONCLUSION

At the 1960 conference on the Kenya Constitution, the issue of greatest concern to Marshall—property rights and their impact on minority rights—was so volatile that it interfered with the Colonial Secretary’s efforts to bring the Conference to a successful conclusion. In the controversy among delegates, Marshall’s ideas played a key role. It is possible that his position on constitutional questions may have placed him in tension with some of the nationalists he was there to support, nevertheless, having Marshall as an advisor was of great political value for the nationalists. When pressed as to whether extending political power to them would abrogate the rights of the white minority, the nationalists could point to the fact that their constitutional advisor had devoted his career to the protection of minority rights.

Thurgood Marshall and other American civil rights lawyers took American legal ideas to Africa and had an impact. When these sojourners returned home, they brought their African experience with them. Thurgood Marshall maintained ties with his Kenya colleagues, and although he was not present at later constitutional negotiations, his work on the Bill of Rights continued to be influential.

Tom Mboya wrote to Marshall in March 1960. “I do not know whether it will ever be enough to write letters to thank you for your good work at the London Conference,” he said.


[A]s you yourself said, you were glad to come home, we were glad to receive you home. I am sure I speak the mind of all of us, that you were the easiest man to work with, and that any of us who had apprehension before you came were easily disarmed as soon as we met you. Further the co-operation that we had from you has led to a greater understanding of the Negro/African problem.

I hope we shall play a bigger part in extending this friendship and relationship beyond the boundaries of just you and us.\textsuperscript{243}

\textsuperscript{243} Tom Mboya to Thurgood Marshall, \textit{supra} note 164.
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Marshall developed a deep affection for Jomo Kenyatta after his release in 1961. Berl Bernhard, Staff Director of the U.S. Commission on Civil Rights from 1961 to 1963 traveled to Kenya with Marshall on a U.S. State Department sponsored trip in July 1963, and spent much time talking with him about the country. He thought Marshall attributed “more goodness across the board to Kenyatta than I had ever read or heard was appropriate.” The reason seemed to be his focus on the task at hand: bringing a subject people to independence. Bernhard told Marshall, “This guy’s not all clean,” and Marshall said, “what do you expect?” According to Bernhard, “He wanted to protect that freedom, period.” And so, although he fought with Kenyatta in 1963 over the implementation of the rights Marshall had cared so much about writing, this time in the context of discrimination against Asians, he remained proud of the work he had done and his Bill of Rights.

Marshall was an honored guest of Prime Minister Jomo Kenyatta at Kenya’s independence ceremonies in December 1963. After traveling to Kenya in 1978 to attend Kenyatta’s funeral, as Kenya was slipping into a dark period under President Daniel Arap Moi, Marshall nevertheless remarked that he was “happy to find that the Schedule of Rights that I drew for the Kenyan Government was working very well.” Within an American conception of constitutionalism, this comment may seem strange, for Marshall’s Bill of Rights and the constitution as a whole seemed powerless to constrain the Kenyatta and Moi governments from abusing the people of Kenya. Kwasi Prempeh argues that we expect too much of courts if we think that courts could have solved the difficulties of nation-building in Africa during the independence era. Marshall seemed to be saying the same thing about constitutions. The interesting thing, then, is that he found value in the constitution, nevertheless. That value seemed to be in the way the constitution

244. Berl Bernhard, Oral History Interview, supra note 56.
246. Williams, supra note 4, at 307–09; Dudziak, supra note 245.
247. Throup & Hornsby, supra note 227, at 26–50 (discussing consolidation of executive power and repression under the Moi regime).
aided the most fundamental step of all: enabling a people to achieve independence in the first place.²⁵⁰

Marshall remained proud of his work on the Kenya Constitution. It was better than the original U.S. Constitution had been, he thought. In the U.S. Constitution, the Bill of Rights was a set of amendments. In the Kenya Constitution, the Bill of Rights was there in the original.²⁵¹

As he described it, the Bill of Rights “gave the white citizen living in Kenya absolute protection, the strongest, I maintained, of any constitution in the world, spelled out in detail.”²⁵² And in spite of the vast historical and material differences in the minority experience in Kenya and the United States, he would often emphasize a point he made in an oral history interview: “That, to my mind, is really working toward democracy, when you can give to the white man in Africa what you couldn’t give the black man in Mississippi. It’s


²⁵¹. Berl Bernhard, Oral History Interview, supra note 56.

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It may seem a puzzling irony that for this champion of African American rights, a focus in Kenya was protection of the rights of privileged white people. What was he doing? How did he think about it?

If this was “working toward democracy,” as Marshall put it, it was a rather perverse form of democracy, playing out within the halls of the colonial power in Lancaster House. When the Kenya Independence Constitution was completed in 1963, the final act of ratification was not a vote of the people, but the signature of the Queen of England. These and other antidemocratic features of late-colonial politics make it easy to dismiss the entire story of constitutional politics in Kenya and other parts of Africa in the 1960s, at least if we focus only on conventional, contemporary measures of democratic politics. No wonder, among comparative constitutional scholars, sub-Saharan Africa is so often left out of the conversation.

If African constitutionalism was meaningless, why did it look so different from the perspective of the participants at the time? For groups in Kenya, constitutional debates seemed to be the only path away from nearly certain violence. The resistance movement had armed itself in the forests before; with change at hand, threats of destruction now came from the privileged. Adversaries would engage in hard clause-by-clause constitutional bargaining between the 1960 Lancaster House Conference and independence in 1963. During the endless hours of negotiations in Kenya and in London, as armed conflict erupted in other parts of the continent, adversaries in Kenya reached instead for constitutional clauses. Tribal and political differences would split the nationalist coalition after the 1960 conference, but the new nationalist parties, KANU and KADU, made constitutional bargaining a central feature of their political struggles.

253. Id. at 446.
254. See supra note 11.
255. See Nairobi to Sec’y of State, Telegram no. 612 (Feb. 13, 1962), Records of the Department of State, RG59, Central Decimal File, 1960–63, Box 1706, 745R.03/1661, National Archives (discussing KANU and KADU constitutional positions); Amconsul Nairobi to Dep’t of State, Despatch no. 313 (Feb. 1, 1962), Records of the Department of State, RG59, Central Decimal File, 1960–63, Box 1706, 745R.03/1661, National Archives (same); Amconsul Nairobi, to Dep’t of State, Despatch no. 147 (Oct. 6, 1961), Records of the Department of State, RG59, Central Decimal File, 1960–63, Box 1706, 745R.03/1661, National Archives (referring to KANU-KADU constitutional talks); Amconsul Nairobi to Dep’t of State, Despatch no. 355 (Mar. 16, 1961), Records of the Department of State, RG59, Central Decimal File, 1960–63, Box 1706, 745R.03/1661, National Archives (discussing ongoing Kenya constitutional politics); KYLE,
Thurgood Marshall’s part in this, in 1960, was to play a role in a process that kept these adversaries at the table. In light of the bloody alternative, that, in itself, was an accomplishment. As Kenya moved toward majority rule, and “minority safeguards” became the order of the day, Marshall’s mere presence was of political value to the nationalists. There was nothing they could do to reassure the United Party, but it helped their position with white moderates, the British Government, and the international press that one of their advisors was a well-known champion of minority rights.

When Marshall wrote a Bill of Rights for Kenya, he built into it many robust, forward-looking rights, beyond those that the United States has ever seen in the area of economic rights, and more expansive than the rights in the final Kenya independence constitution would be. But on the question of equality and property—the paradox of entrenching rights gained through historic injustice—was he placing form over substance? Was this, perhaps, an earlier manifestation of a contemporary phenomenon that, for David Kennedy, is one of “the dark sides of virtue,” as building a rule of law is turned to as a development strategy in itself, “which obscures the need for distributional choices or for clarity about how distributing things one way rather than another will, in fact, lead to development”? The result is a “sleight of hand, positioning the rule of law as a substitute for politics and economics.” Perhaps in Kenya, “minority rights” was an abstract moniker that obscured the necessary trade-offs on the critical issue of land reform.

It is in describing that particular aspect of the Bill of Rights that Marshall emphasized that he was “working toward democracy.” This tells us not necessarily what he, in substance, accomplished, but how he would like us to remember it.

Marshall’s harsher critics might see him as taking a limited role in a messy and ongoing political struggle but casting it in grandiose

supra note 65, at 115–18 (describing Kenya constitutional negotiations in the years leading to independence).

256. Some resistance groups, however, argued that armed struggle would have resulted in more meaningful social change. See generally MAU MAU & NATIONHOOD: ARMS, AUTHORITY & NARRATION (E.S. Atieno Odhiambo & John Lonsdale eds., 2003). For an argument that Western hegemony must be circumvented for true democratization based on Africa political consciousness to emerge, see CLAUDE AKE, THE FEASIBILITY OF DEMOCRACY IN AFRICA (2000).


258. Id. at 157.
diplomatic terms. Perhaps in working toward democracy he had taken himself beyond the courthouse and onto a broader public stage, one that might help recast him as a lawyer serving the national interest in a way that might gain the attention of the incoming Kennedy administration, in the hopes that they might tap him for a coveted court seat. From this perspective, by saying that he was working toward democracy, he was telling listeners how important his work had been.

But perhaps Marshall was also saying something about a substantive conception of democracy. One reading might be that in protecting the rights of whites, Marshall was embracing formal equality, and was abstracting his conception of equality from the material conditions on the ground in Kenya. Readers may find this idea incredulous. There was such material inequality in Kenya, how could one speak of rights in formal, abstract terms? But American civil rights leaders of this era often spoke about equality in this way. It was as if generalizing rights to all of humanity made others able to see them more clearly, perhaps made them more acceptable, and therefore more within reach. But if Marshall embraced formal equality in Kenya, thereby entrenching a legacy of historic injustice, might he be denying Martin Luther King’s argument that “law and order exist for the purpose of establishing justice”? Perhaps there is a particular wrong in using the tools of law to entrench injustice rather than eradicate it.

259. For this point, I am grateful to Mike Meltsner. Although not embracing this interpretation, he suggested it as a possibility. On Greenberg as Marshall’s replacement, see MICHAEL MELTSNER, THE MAKING OF A CIVIL RIGHTS LAWYER 99–103 (2006).

260. Deborah L. Rhode, who clerked for Marshall when he was a Justice on the U.S. Supreme Court, argues that “the Justice was careful never to confuse formal and substantive justice.” He opposed efforts to stop race-based affirmative action programs in the name of color-blindness, believing that such arguments represented “commitments to formal equality and racial neutrality [that] came several generations too early and several centuries too late.” Deborah L. Rhode, Letting the Law Catch Up, 44 STAN. L. REV. 1259, 1260, 1263 (1992).

261. Although not a formalist, Martin Luther King, Jr. discussed just and unjust laws in abstract terms in his Letter from Birmingham Jail:

An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is difference made legal. By the same token, a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. This is sameness made legal.


262. Id. at 88.
If it was a formal equality that he embraced, it could not have been based on a lack of awareness of its implications, an abstraction that might distance him from the moral consequences of the trade-offs of his theory. In arguing against abstraction, James Baldwin insisted that “it is not permissible that the authors of devastation should also be innocent. It is the innocence which constitutes the crime.”

Marshall had worked among the Lancaster House adversaries for weeks, and he was well aware that he was entrenching rights of the privileged residents of “Happy Valley,” a white settler community that had nurtured a decadent culture through white power and black subordination. The question to ask instead is why knowingly entrenching such rights was so important to him.

“That, to my mind, is really working toward democracy,” he said, “when you can give to the white man in Africa what you couldn’t give the black man in Mississippi. It’s good.”

Perhaps he was speaking of himself, and what it meant to act in a manner that he conceived of as democratic, when conditions allowed him to create structures of equality in one context, yet not in another. In later years he would criticize the framers of the United States Constitution for having framed an undemocratic document that embraced slavery. In his oral history, we can see the way he would like us to remember his role as a framer: as protecting the rights of an “other” very unlike himself. He presents this as “working toward democracy.”


264. See generally NICHOLAS BEST, HAPPY VALLEY: THE STORY OF THE ENGLISH IN KENYA (1979) (tracing the history of affluent white settlers in Kenya and the resulting entrenched political and economic power of whites prior to Kenya’s independence).

265. Marshall, supra note 1, at 446.


267. Beyond the property clauses, Marshall’s vision for democracy in Kenya is reflected in the progressive, forward-looking Bill of Rights he wrote. The importance of rights to his conception of democracy helps us to see the importance of law, American-style courts and judicial review, and lawyers to the democracy he envisioned. For a discussion of democracy and constitutionalism in the American context, see generally FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999).
It mattered most to him to keep these parties talking to each other, and doing so required a document that all the principals could live with. While democracy requires much more, it could begin with bargaining rather than bullets.\textsuperscript{268} Thurgood Marshall, alone, did not staunch the violence in Kenya, of course, but he was part of a process of constitutional politics, a moment of constitutionalism that mattered in Kenya.

What we might see in this story is a historical example of the broader problem of how to make present politics out of a history of violence, and when the tables have turned, the question of whether democracy can require the subordination of a history of injustice to keep some parties at the table. We have seen many examples in the bloody history of the twentieth century of efforts to create a forward-looking politics following historic injustice.\textsuperscript{269} The most dramatic of these, perhaps, were the international efforts after World War II, not only to bring Nazi war criminals to justice, but also to create an international body dedicated to the hope that a global politics could prevent war.\textsuperscript{270} In more recent years, constitution writing has become a familiar ritual to signal change from one political regime to another. New constitutions at times reflect the departure from an unjust regime through the embrace of particular substantive rights.\textsuperscript{271} In this


\textsuperscript{269} See generally \textit{Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence} (1998) (exploring how countries have responded formally on a national or international level to incidents of mass violence with processes including trials, truth commissions and reparations to recoup dignity of victims of violence, enable forgiveness, remember the cultural history of victims, and make a record of the mass violence itself).


\textsuperscript{271} The Constitution of South Africa, for example, provides restitution for some victims of apartheid, while at the same time protecting white minority property rights. See \textit{Joseph William Singer, Entitlement: The Paradoxes of Property} 192 (2000) (describing how the post-apartheid South African constitution simultaneously protects the property rights of the white minority and provides for economic benefits to victims of human rights violations); \textit{Van der Walt, supra} note 11, at 320–58 (comparing the property clauses of the Constitution of
way the outcome of constitutional politics—the text itself—can be the mechanism for addressing a country’s historic injustice.\footnote{See the work of Kim Scheppele, supra note 15.}

Perhaps Marshall is showing us another way to think about it: that there is justice in the process. If constitutional negotiations were not successful, he warned before the Lancaster House conference, it could result in a “new uprising in Kenya that nobody can control—any more than they could control Mau Mau.”\footnote{Kikuyu Protest at Second Advisor: Telegram from Loyalists Sent to Mr. Macleod, supra note 127.} It was writing a constitution itself that kept these adversaries out of the trenches and kept the weapons of violence, at least for a time, out of their hands. Perhaps for Marshall, giving whites in Africa what he hadn’t been able to give blacks in Mississippi—writing a Bill of Rights with the full knowledge that it entrenched a historic injustice—kept democratic politics in motion. What resulted was not a fully formed, ideal democratic constitution, but was a path left open, a way to continue working toward democracy.

That these efforts had profound limits was clear long before Marshall’s first contact with Kenya, Tom Mboya, once groomed to replace Kenyatta, lay dead in the streets of Nairobi from an assassin’s bullets in 1969. Thurgood Marshall never forgot about Kenya, but during his years on the Supreme Court, his principal engagement seemed to be with his memories of the early 1960s, rather than with the dark turn in later Kenya politics.\footnote{In this respect, his experience mirrored others. In his study of African-American engagement with Africa from 1935 to 1961, James Meriwether argues that through much of the twentieth century, African Americans engaged with Africa tended to “focus on countries embroiled in national liberation struggles, as opposed to countries that already had gained independence.” This “enabled African Americans to continue building transatlantic bridges while finessing direct engagement with the deep complications of independent Africa.” MERRIWETHER, supra note 16, at 5.} He recounted stories of Kenya to his colleagues, his law clerks, and his friends. In telling the story, it was at least his object to make it part of the story of his life.