REMARKS

Former Chief Justice Margaret H. Marshall of Massachusetts

Thank you so much. Like the two Chief Justices before me, I feel a little as though I've just sat through my own eulogy.

It's really wonderful. And my—and you'll forgive me if I don't address them so formally, because I've known them so well for so long—Marsha and Jean. This is just a wonderful opportunity, and I'm going to talk a little bit about why it is so wonderful.

But I wanted to thank, instead of doing what Marsha did, I think on behalf of all of us, going through the entire list; Jessie, who I did not phone this morning when my flight was cancelled. And I'd like to get credit from the medical policies of the Law School for not doing that. And of course, Javid Afzali, thank you so much. I have been to many law schools and I have been met at the airport by many law students, and this was the first one who has met me driving a black Mercedes. This is good news.

I have prepared remarks, but I want to pay tribute to my two colleagues in this way. There have now been several opinions written by the courts of last resort of various states concerning the challenge of same gender marriage, and there's only one court with a vote and opinion that was unanimous. That comes about because of the leadership of the Chief Justice on that court, and so I would like to pay a special tribute to Marsha Ternus, and to say how deeply sorry I am that she no longer serves as the Chief Justice of that state.

She was a great Chief Justice not because of the decision in that case, although that is part of her legacy, but because she cared so deeply about the delivery of justice to the people of Iowa, who are also people of the United States. And I hope that when the history is written, we will see that a wrong turn was taken, and that can never happen again.

So, Chief Justice Ternus, thank you on behalf of everyone.

So, I listened carefully to Chief Justice Toal. I'm not—did she say that one gets admitted to the Yale Law School if you are a woman because you are ugly?

CHIEF JUSTICE TOAL: That's your alma mater!

CHIEF JUSTICE MARSHALL: Jean Toal, you hear it on tape, and you see it on paper, the piece of the history of course that I relate to is the piece that doesn't get said so clearly, which is how dangerous it was for her to take the positions that she took when she took them in the south.

The United States is a wonderful place. We don't fight our battles for centuries, decade after decade after decade, and that's what makes us a wonderful place, so we don't revisit the history as you might revisit it in the former Yugoslavia or Turkey.

But we lose something as well, and we tend to forget how high the price was that were paid by people who went before us. So to have the Chief Justice of South Carolina celebrated as somebody who has such a rich tradition of commitment to civil rights really is a wonderful statement of how great this country is.

So, Jean, thank you for everything that you've done.

I want to talk to you about why I think state courts are so terribly important, and probably more so today than they ever have been in our nation's history. And I want to make clear at the outset where I stand.

In a nutshell, I agree with Justice Sandra Day O'Connor, herself a state court judge, and of course you realize that we don't have anybody on the United State's Supreme Court who has had any experience in state government for the first time in our history. But this is what she said, "[t]he health of the entire legal system, both state and federal, depends on a strong state judiciary," and I hope to explain why today.

So you can't come to a law school without a test. And so my first question is going to be a test. I want to ask you to answer the following. I'm going to give you this data:

In 2008 the last year for which we had comparable data, if you took every case filed in every Federal Court in the United States, trial court and Appellate Court, United State's Supreme Court, filed. So that's all those useless petitions researched, all those pro se petitions from prisoners, every single case filed in the United States, excluding bankruptcy cases, in 2008 there were 325,260 cases filed in all of the Federal Courts in the United States.

And for the same year, in all of the state courts in the United States, trial courts, intermediate Appellate Courts, courts of last resort, excluding traffic cases, how many cases were filed?

The young man in the blue shirt? How many?

AUDIENCE MEMBER: Ah . . .

CHIEF JUSTICE MARSHALL: Pick a number.

AUDIENCE MEMBER: Ten million.

CHIEF JUSTICE MARSHALL: Ten million? Young woman in the red jacket, that's you.

AUDIENCE MEMBER: I'd say five hundred.

CHIEF JUSTICE MARSHALL: Ten million, five hundred. The answer's 48.5 million cases. 48.5 million cases.

State courts are important because justice in America is delivered largely through the state courts, and on average about forty percent of the United States Supreme Court docket originates in state courts.

So the numbers in part are the reason, but there's another reason why I think state courts are so important to the well being of our democracy. And let me suggest the reason by asking two questions concerning the case with which I am so often associated, *Goodridge v. The Department of Public Health*, decided in 2003.

The first is in 2003, how did Massachusetts get so far ahead of the rest of the country? So far out of field, if you don't want to think of it as so far ahead of the rest of the country. And second, what does it mean to say that we live in the United States when the separate parts of our nation so vehemently disagree about fundamental issues of law and social policies such as those who are in a same-gender marriage?

The questions are timely and timeless, and I want to focus my remarks this afternoon on the second, because the question of what keeps our vast, diverse country united goes to the heart of the American system of government and to debates that began well before we became a nation.

And by answering the second question, I hope that I will eliminate the first question. How can one state differ radically from others when it addresses important issues of social equality?

Now, I have to say in the introduction of Chief Justice Ternus we had a wonderful brief history of Iowa's leading decisions by Professor Young. And in that Iowa is not different from the rest of the country.

Chief Justice Toal mentioned the Elizabeth Freeman case. The more significant case was a jury case, and it applied only in one particular case in 1783. The Massachusetts Supreme Judicial Court, the Constitution under which we now function was 1780, and the very first case to come before the court as an Appellate Court, was a case brought against slavery.

The opening words of the Massachusetts Constitution: "[a]ll people are born free and equal and have certain natural and

unalienable rights." All people are born free and equal.

And the case was brought by a slave. People forget that Massachusetts had slavery. And the case was brought by a Massachusetts slave who essentially said to the five justices, "Excuse me, here judges, it says here *all* people."

Now think about this, 1780 we brought thirteen brand new little countries, that's what the states were, brand new little countries, and it's true that the Massachusetts economy didn't rely heavily on slavery, but certainly Virginia did, South Carolina did, North Carolina did, and they were all trying to survive together, and five justices with the stroke of a pen declared slavery unconstitutional in the new Massachusetts Constitution. And it took a very long time before the rest of the United States caught up with that decision.

Decisions of such import regularly punctuate the history of the Supreme Judicial Court.

Another one, 1842, *the Commonwealth v. Hunt*. The case concerned what we today would call union activity, unheard of in its day. Members of the bookmaker's society had been united and convicted for, "offending against the peace and dignity of the Commonwealth." What had they done? The book maker's had banded together to promote their common interests, refusing to work for anyone that employed anyone not a member of the society. The impolite term today would be using scab labor. By a unanimous decision my court overturned the criminal convictions.

In 1842, the *Hunt* decision flew in the face of several laws of the state courts, not just in Massachusetts, which had held that associations of working people formed to increase wages or better working conditions were criminal conspiracies. And again, it would be many decades before union activities would receive the protection of the law rather than the contrary.

My point is not that Massachusetts has a rich history of clairvoyant jurists, but rather seen in the context of our federal system, such groundbreaking state court opinions are anything but unexpected. Indeed in the United States we have seldom, if ever, been a nation that has marched in lockstep over important issues of moral and social policy.

Consider just two other examples, one of which is so familiar to you, *Buick v. MacPherson*, the great decision by Justice Cardozo over a vigorous, dissenting opinion—we often get those—he wrote that Buick reasonably should have foreseen that the defective automobile would cause injury and thereby upsetting the long established law of the requirement of privity. All of you, I suspect,

have read that case.

Now, the opinion had far reaching consequences, economic and otherwise. Just think, for example, where product liability would be today with its class actions and punitive damages. All go back to *Buick v. MacPherson*.

And initially the analysis of Cardozo was rejected not by one state but by a series of state courts across this country, and yet today no one seriously argues that a retail customer cannot recover from an automobile maker for a defective product.

I want to mention one other example, which will be obvious I think. In 1948 Andrea Perez and Sylvester Davis, an interracial couple, were denied a license to marry in California. The reason, because at that time California State law prohibited licenses, "[a]uthorizing a marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race." Think about the statute that Chief Justice Ternus mentioned, which put it the other way around: marriage shall only be between a man and a woman. This was a statute that said you cannot marry if it's between two groups of people.

This was in 1948, Jim Crow reigned supreme, and you know from Professor Randall Kennedy's brilliant book, *Race Matters*, that at the time only two percent of the American people supported interracial marriages.

And yet the California Supreme Court, the state court agreed with Perez and Sylvester Davis and by a fair four person majority, California Justices' great opinion written by Chief Justice Traynor, a great chief justice, and again over vigorous dissents, this time by three colleagues, the Court held that the state could not restrict the right to marry based on race alone.

A remarkable decision. Perhaps as remarkable in 1948 as the decision ending slavery in 1873 or the *Brown v. Board of Education* decision in 1954. But it took nineteen years before the United States Supreme Court declared interracial marriage unconstitutional under the Federal Constitution. Like the landmark Massachusetts cases I discussed earlier, *Perez* and *Buick*, marked a sharp highly controversial turning point in that direction of the law. But the process of these cases illustrates is not exceptional.

In our federal system of diffuse power, fifty-one sovereign state entities make the call. And the key word here is sovereign, fifty-one sovereign entities. We are an unusual country in that regard. The Federal Government and the fifty states.

Of course, our Federal Constitution as interpreted ultimately by the United States Supreme Court does establish the basic protections for citizens and their property. But the safeguards of our Federal Constitution are a floor, not a ceiling, and the separate states, each of the fifty individual sovereigns, are free to provide greater or different protections to their citizens.

Supreme Court Justice Anthony Kennedy has described the purpose of our federal system about as well as anyone could I think. Federalism, Justice Kennedy said, was our nation's own discovery. The flame has split the atom of sovereignty. I've always loved that, split the atom of sovereignty.

It was the genius of their idea, he said that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.

The Federal Constitution created a legal system unprecedented in form and design he said, establishing two orders of government each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.

Hard as it may seem today with our dominating national media, and I might say our dominating textbook industry, which also focuses primarily on federal issues, as our social life evolves a certain diversity in laws can be seen as essential to the protection of individual liberty in our federal system.

Justice Louis Brandeis, that great Boston lawyer, once noted that state governments, state laws, and state constitutions serve as laboratories. And I think if you look at the range of the decisions that have been touched on today, that's exactly what is happening in state courts around this country. If the decision is a good decision, other states follow it and in due course it becomes incorporated in federal law. If it's a bad decision, it just falls by the wayside.

One of the decisions from the Supreme Judicial Court of Massachusetts, for example invented, the phrase separate but equal. It was in fact a school case brought by black parents who wanted to send their child to the closest neighborhood school, and was told by the Boston School Committee that they had to send their child to the black school, which was farther along.

And I like to use that case when I'm talking about state courts because it was the Massachusetts Legislature that then passed the statute that said, no, no, no, you can send your child to the closest school. It's not only the state courts that define civil liberties for all

people.

Of course for those who look back on the United States Supreme Court led by Chief Justice Earl Warren, we know that that court made bold and expansive readings of the Federal Constitution in the areas of race discrimination and gender equality or criminal justice.

And so the idea of looking to a state constitution as a bulwark of human lives may seem quaint if not outmoded. But that sense of oddity is in reality a quirk of history.

You always know chief justices are getting into difficult areas when they start quoting the Founding Fathers. But James Madison and other founders of our nation conceived of state courts as the principal guardians of individual liberties, not the Federal Government. And the enactment of the 14th Amendment, as you know, in 1868, which among other things protected citizens of every state from violations of their federal rights, state courts were virtually the only human rights courts in town. And well into the twentieth century federal courts shied away from issues such as freedom of the press, freedom from unwanted searches and seizures, and equal treatment of the races.

It will not surprise you to discover that I am, not just because of my tenure as a Chief Justice, so committed to state causes because I think so much that is important in our nation's history and in our contemporary world is decided in state courts, but I have to say that I have deep concerns about what is happening to state courts across this nation, and those concerns are really twofold.

The first is we have a structural problem with the funding of state government, and it's the state government that funds the state judiciaries. And each of the three justices that you see before you today can be joined by fifty-three other chief justices. How did I get to fifty-six? There are fifty states and six territories, and each have their own chief justices who are deeply concerned about what is happening in terms of the funding of state courts. It is a serious problem.

The deeper problem I think is capsulated in what happened to Chief Justice Ternus, and I want to close by making a couple of comments about her eloquent description of the difference between a commission-appointed judge and elected judges.

I share with Chief Justice Ternus her concern about the election of judges, although like her I know many judges from electoral systems who have great capability, and who have absolute fealty to the law.

But with respect to her, I think she overlooked what I think is the critical issue. It is not so much how we select our judges in the first instance, it is the vulnerability of having any retention system. The Federal Courts work so well because you have a single lengthy term. No matter how we select our judges, whatever retention system you have, the voters or the appointers or the commission are going to be asked to look at that judge's decisions, and that is what is going to undermine judicial independence. And like Chief Justice Ternus, I have a great concern because Iowa—and you heard her words—had never seen anything like this, but we are seeing it across this great nation. I want to close by recommending to you, not because I was a member of the commission, the American Bar Association's study . . . called *Justice in Jeopardy*.

We have lawyers, judges, governors, lay people from all over this United States with different systems of selection, and the commission came to one conclusion that the best system is to select judges by whatever means and then leave them on the bench for a single lengthy term, typically by a mandatory age or time limit.

If we had that system in Iowa, Chief Justice Ternus would still be the Chief Justice. If we had that system in some of the other states where this battle is going to come, we would have judges who need not look over their shoulder.

And so to those of you in this room today I would ask this: first, understand the importance of state courts, and second, look to see what it is that is not working to make sure that future generations have all the benefits that we have had operating under this great system of constitutional democracy.

Thank you.