Thurgood Marshall

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Thurgood Marshall's life as a civil rights lawyer inspired my decision to go to law school, so it was the greatest of dreams fulfilled when I came to work as his law clerk at the Supreme Court. Now, as he leaves the Court, it is an honor to mark his retirement in these pages.

Marshall is an extraordinary figure in American legal history. He has lived many lives—indeed, while others marvel over his professional durability at the age of eighty-three, I actually think of him as having compressed more than a hundred years of living into that time span. He was the country's greatest civil rights lawyer during the greatest period for civil rights advances in our history, and in that role he lived a life of relentless intensity and danger, and one of transforming achievement. He was a United States Court of Appeals Judge. He was Solicitor General of the United States (his favorite job, he has often said with complete seriousness—an advocate's job in which he spoke for "the United States," not simply a faction or insurgent part of the whole). Finally, he became a Justice on the Supreme Court of the United States during one of its most dramatic periods of change. While he was a top government official for much of this time—an insider and a colleague of the advantaged—he spent his entire career trying to protect the disadvantaged and identifying with them.

The centerpiece of his public life is and always will be *Brown v. Board of Education.*[1] Marshall did not win *Brown* alone, and never claimed to have done so, but he was the guiding force and justly became the symbol of the triumph. Much has been written about the long litigation campaign leading to the Supreme Court's unanimous decision in *Brown.* But one aspect of Marshall's achievement is rarely emphasized: to do what he did required an heroic imagination. He grew up in a ruthlessly discriminatory world—a world in which segregation of the races was pervasive and taken for granted, where lynching was common, where the black man's inherent inferiority was proclaimed widely and wantonly. Thurgood Marshall had the capacity to imagine a radically different world, the imaginative capacity to believe that such a world was possible, the strength to sustain that image in the mind's eye and the heart's longing, and the courage and ability to make that imagined world real.

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1. 347 U.S. 483 (1954).

The predicate for the great achievement of *Brown* was to imagine something better than the present—to resist the acquiescence, passivity, fear, and accommodation that overcome so many, to defy an insistent reality with imagination and then to fight for what was imagined.

Brown changed the world. And because of that, Thurgood Marshall's life stands for the idea that law can change the world and that the Supreme Court can be a powerful force in fulfilling our best public values. That was what drew me to the law, and what has drawn so many others. *Brown*, then, is not just a case; its importance cannot be assessed just by totalling up what ending enforced school segregation may have accomplished. Its importance cannot be assessed even by recognizing that it gave broad legitimacy to the modern political struggle for racial equality. Its broadest importance is its embodiment of a conception of law and of the courts.

The naming of Thurgood Marshall to the Supreme Court, therefore, was an act of the greatest importance. His becoming a part of the Court showed how much he had changed the world—in many ways it was the most striking indication of the transformation he had wrought. For all of his imaginative heroism, it is hard to believe that in the 1930's, '40's and '50's Marshall ever imagined that he might someday sit on the Court, be more than an insurgent advocate waiting for others—the Justices—to vindicate him. He created the world that made his own ultimate personal triumph possible. He would now share the power to decide. His becoming a Justice became part of what *Brown* meant.

The perspective he brought to the Court was unique. The other Justices had diverse life experiences, and many were major public figures in their own right. But Marshall brought something distinctive to the Court. The distinctiveness was not simply that he was the first black to sit on the Court, but that he had spent much of his professional life working among the oppressed and the insurgent. To be sure, by the time Marshall came to the Supreme Court he knew more Presidents and Congressmen than most Justices, and he knew their needs and their weaknesses; indeed, they were the subject of many of his best stories. But Marshall also knew the other side of the tracks, not simply as an observer but as one who had called it home; and he always thought of himself as an activist on its behalf. He brought to the Court a sense of how the world worked, and how it worked against those at the bottom. He knew what police stations were like, what rural Southern life was like, what the New York streets were like, what trial courts were like, what hard-nosed local political campaigns were like, what death sentences were like, and what being black in America was like—and he knew what it felt like to be at risk as a human being. Most importantly, perhaps, he knew the difference that law could make in all those places. None of his experiences with the harshness of life made him bitter or cynical about law's possibilities. He knew well how law could trample individ-

uals, but he remained faithful to an ideal of what it could do to protect individuals.

Marshall is, as Louis Pollak once called him, "larger-than-life."[2] In his presence one thinks: This man has genuinely lived. That is partly because of what one knows of him, partly from the vast and shifting fields of reference in his fecund supply of stories, and partly from the earned aura given off by someone who has experienced life especially intensely. For all of that, he is utterly human. He is earthy, compassionate, determined, funny, and proud. He does not act like someone taken with his own legend—indeed, at times he seems to defy people's expectations of who he is. He is outwardly unsentimental. He never coddled his law clerks, and almost never praised them. Yet he is in fact a man of strong sentiment and loyalty. The day after I argued my first Supreme Court case I was back at home in my study reading when the phone rang. "Paul, it's Thurgood Marshall. I just wanted to tell you that you were really great yesterday and that I was so proud of you." My fantasies about arguing before the Court—and there were many—had not included such a moment. "Now, remember, that doesn't mean you're going to win," he quickly added, "but I just wanted you to know you did a great job."

He came to the Court during what seemed the heyday of the Warren Court, but the Court's membership rapidly changed. He wrote many important majority opinions, but soon found himself a frequent dissenter from a considerable portion of the Court's work. He found that discouraging, but in some sense it was his more accustomed position. While he would have devoutly wished to have ended his career as a comfortable member of the Court's majority, his role as dissenter was perhaps more authentic for him, or at least more continuous with what had come before.

For me at least, it is his dissents that sound with the greatest power and resonance, whether or not one agrees with their ultimate conclusions. I particularly have in mind his dissent in *San Antonio Independent School District v. Rodriguez*,[3] the case that marked the true end of the Warren Court, and perhaps most especially his dissent in *Milliken v. Bradley*,[4] in which the Court rejected the appropriateness of most interdistrict relief in school desegregation cases. The *Milliken* dissent emerged from the core of Marshall's pre-Court experience and ended with a sad and angry prophecy:

> Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be

2. Louis H. Pollak, *Thurgood Marshall: Lawyer and Justice*, 40 MD. L. REV. 405, 408 (1981).
3. 411 U.S. 1 (1973).
4. 418 U.S. 717 (1974).

> permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret. I dissent.[5]

Justice Marshall's views evolved while he was on the Court. Always a patriot, he nevertheless became more skeptical of the government's professed need to promote national interests by restricting individual liberty. He had a strong distaste for flag burners and others who attacked our country, but he disciplined that distaste and supported their First Amendment claims, as he concluded the Constitution required him to do.

Always an egalitarian on racial matters, he broadened his own understanding of the meaning of equality to other social groups. Interestingly, when affirmative action issues first started to emerge in bold relief, I can recall, he was very uneasy with race-conscious hiring, admissions, and set-asides as a corrective for past discrimination. In time, he became their most passionate defender on the Court. He came to that position, I think, in much the same way many others did: reluctantly, through a gradually developed judgment that, against the backdrop of centuries of oppression, colorblind measures would not work, or at least not work fast enough, to achieve a significantly greater inclusion of minorities in mainstream American life. Those who have tried to quote back at the Justice his endorsement of colorblind remedies at the time of *Brown* ignore the fact that judges continue to change while in office, and that the life revealed in cases continues a judge's education.

The departure of Justice Marshall, of course, is not just the end of a great man's career on the Court, but also the end of a large chapter in the Court's history, the breaking of the final link to the Warren Court. At the end, Justice Marshall was an isolated figure on the Court, not only deprived of majorities in the cases that mattered most to him, but deprived even of the shared memories and dissenting faith provided by Justice Brennan. For that reason, his departure produced in many an elegiac mood that Justice Brennan's departure had not. Linda Greenhouse of *The New York Times*, writing on a daily deadline, captured that sense exactly:

> Thurgood Marshall . . . knows the Court's potential as an instrument for social change better than almost anyone who has ever served there. Even in advanced age, in evident anger and sorrow, his continued presence on the bench made him a powerful symbol of the era when the Court demonstrated that potential to a remarkable degree. His

5. *Id.* at 814-15 (Marshall, J., dissenting).

> departure crystallizes a moment when a historic tide, long in the ebbing, has finally run out and a new history of uncertain dimension has begun to unfold.[6]

In law, of course, the link to the past is never fully cut because those who come before always provide some authority for those who come after. History itself is authority, and history can never be permanently erased. The central legal strategy leading up to *Brown*, like the central political strategy of figures such as Martin Luther King, Jr., was to invoke Americans' historic ideals as the basis for insisting that America's racial practices had to change. We, after all, were a country conceived with the proclamation that all men are created equal, and we have often reproclaimed that faith. *Brown* did not embody some radical new principle, but rather was seen as the fulfillment of promises made a century or two earlier in the Declaration of Independence, in the Fourteenth Amendment, and in cases like *Strauder v. West Virginia*,[7] whose sweeping rationale had been ignored in subsequent decisions. The appeal in *Brown* was not to ideas outside the central American tradition, but to the core of that intellectual tradition itself. That is why Thurgood Marshall's intuitively patriotic response to flag burning or Communists should never have surprised me: the premise of the great litigation campaign leading up to *Brown* was that what blacks had to work with, their best hope, was America's own ideals, the symbols of its democratic faith.

The Justice's dissents of the past two decades, progressively harsher and more numerous, also appealed to the country's historic ideals. But they were also appeals to the future—at least implicitly a beacon to some later day when the Court might change and perhaps follow the alternative path laid out by today's dissent.

As the new Court consolidates its membership and direction, the great historic question is this: A hundred years from now, will the Warren Court be seen as a parenthesis in the history of the Court—an essentially aberrant deflection from the true path of the Court's development? Or will the newly emergent late twentieth century Court itself be seen as the parenthesis, the aberrant deflection? There is, of course, no way to know; "[t]here is no pulling open the buds to see what the blossom will be."[8] There may, in fact, be no ultimate answer. But if the Warren Court is the parenthesis, Marshall's dissents will be ignored; if the Rehnquist Court proves to be the aberration, then Marshall's dissents will be rediscovered and will provide authority and guidance for the future. Dissenters (whether the Marshalls or the Scalias) hope to become like Holmes and Brandeis—prophets vindicated by the future, dissenters who

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6. Linda Greenhouse, *The Conservative Majority Solidifies*, N.Y. TIMES, June 30, 1991, § 4, at 1.
7. 100 U.S. 303 (1880).
8. D.H. LAWRENCE, *Democracy*, *in* PHOENIX: THE POSTHUMOUS PAPERS OF D.H. LAWRENCE 699, 715 (Edward D. McDonald ed., 1936).

became great prophets because (indeed, only because) they were vindicated by history.

If we can predict anything about our constitutional future, though, we know that Thurgood Marshall is indelibly impressed upon it. Perhaps more clearly than any other recent member of the Court, he is an historic figure. He fundamentally changed our world for the better, which can be said of very very few lawyers. And he deservedly has become a symbol of America's possibilities—the possibility that we can redeem our terrible racial past, that our constitutional ideals are part of our strength as a nation, and that a life in the law can be a life of the largest purpose and achievement.