



1991

Living Without the Judge

Stephen L. Carter

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylj>

Recommended Citation

Stephen L. Carter, *Living Without the Judge*, 101 YALE L.J. (1991).
Available at: <https://digitalcommons.law.yale.edu/ylj/vol101/iss1/1>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Tributes

Living Without the Judge

Stephen L. Carter†

Thurgood Marshall, I thought, would always be there.

My life has been rounded by his. I was born in 1954, scant months after his advocacy led to the stunning victory in *Brown v. Board of Education*,¹ and so I grew up in the world he had helped to build. I arrived at college just as the Warren Court, which he joined only near its end, began to fragment. I was privileged to serve as his law clerk at the very instant when liberalism ran into the stone wall of electoral distaste—the Reagan landslide of 1980. And now, upon his retirement, I am at last coming to grips with my partial estrangement from the liberal establishment to which Marshall has always been a hero.

Thurgood Marshall has long been my hero, too. Few black Americans would say otherwise. Not long ago, I chatted with an elderly taxi driver, a beautiful black man who popped up one day like a Greek chorus, to help me keep my head on straight. The driver explained to me that I was too young to remember what it was like in the old days. He told me that for his generation, rooting for Thurgood Marshall was like rooting for Joe Louis—the heavyweight out to battle and demolish one white hope after another. Marshall was the man to call whenever the racists struck. Marshall, the lawyer, using the white man's weapons to fight back the white man's system. Marshall, the symbol. Marshall, the hero.

† William Nelson Cromwell Professor of Law, Yale University. This is an expanded and slightly rewritten version of an article that appeared on the Op-Ed page of the *Wall Street Journal* on July 1, 1991, under the title, *An Old Soldier of Liberalism Musters Out*.

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

John Ely, in dedicating *Democracy and Distrust* to Earl Warren, writes, “You don’t need many heroes if you choose carefully.” Point taken—but choosing Thurgood Marshall as my hero didn’t require much care. He was simply *there*. I met him for the first time in the spring of 1978, when he came to Yale to preside over the final moot court arguments, in which I was a finalist. For me, he was already larger than life. Before attending law school, I had spent a week reading *Simple Justice*, Richard Kluger’s fascinating, but flawed, history of the litigation culminating in *Brown*. Kluger writes history by locating heroes and telling their stories. Some of the heroes of his book were the individuals with the courage to stand up against the totalitarian white supremacist power structures then governing their states and communities. Some of the heroes of his book were judges. And some of the heroes were lawyers, like Charles Hamilton Houston and William Hastie, even now too often ignored in law school classrooms, and Thurgood Marshall—who would probably be ignored, despite his remarkable legal achievements, but for his elevation to the Supreme Court.

Before I read *Simple Justice*, I had only the thinnest appreciation for the achievements of the legal arm of the civil rights struggle. Although I was a history major, my courses on twentieth century American history treated *Brown* as an axiom and the civil rights movement that followed—which we *did* study in history—as what really mattered. Indeed, in the armchair radicalism of my undergraduate days, I was inclined to treat law as relatively unimportant, as a cloak for the true power relations of society. Certainly I could not imagine lawyers as heroes.

Which is why Kluger’s book was an eye-opener for me. Kluger’s tale has its faults—I have in mind particularly his exaltation of Earl Warren and his crediting the inner dynamics of the *Brown* Court, rather than the skill or force of the litigants before it, as well as his notion that Marshall and others in the New York office of the NAACP Legal Defense Fund had to be pushed to confront segregation directly. Later, listening eagerly at the feet of Thurgood Marshall and also of Spottswood W. Robinson, III, for whom it was my privilege to serve as law clerk at the Court of Appeals for the District of Columbia Circuit, I would hear most of the same tales, and many others, with greater nuance and complexity. But my critique would come later. At the time, it was the heroes who got to me, and Kluger’s book is full of them. Kluger, much like David Halberstam, paints his principal figures as much larger than life, and as a budding lawyer, I was content, even delighted, to leave them that way. I came away from Kluger convinced that there were indeed giants roaming the earth in those days, giants who might have won the battle much earlier than they did except that the moral Lilliputians who fought them were far more numerous and held all the guns.

Very few of the Justices who have served on the Supreme Court would have been in the legal hall of fame without their careers on the Court, but

Marshall was one of these. So to meet Thurgood Marshall in the flesh was, for me, to come into contact with a demigod. I had no idea what to expect, but I was worried and not a little awed. What I found, to my delight, was a great warmth, an openness, and an earthy good humor. His supreme unpretentiousness, his choice not to subject himself to the opinions of others, put me immediately at ease.

And then, in the late summer or early fall of 1979, I was astonished to be invited to serve as one of his law clerks, to join, for twelve months, his chambers family. (As an officer of the *Yale Law Journal*, I had been trained to see the Supreme Court as a sort of wholly owned subsidiary that was obliged to give us employment upon application, but the Justices did not always play their proper roles.) And for those twelve months, Justice Marshall, or the Judge, as we used to call him around the chambers, was one of the finest teachers I have ever had—at pool as well as at law. Because he was so often in dissent as the Burger Court majority chipped away at the edifice he had spent a lifetime building (an edifice the Rehnquist Court would later hit with a bulldozer), it would have been easy for the chambers to develop a bunker mentality, to see the rest of the Justices as enemies. But the Judge would have none of that. In those days, he was far too confident, far too good humored, and had far too capacious a view of human nature for those sins to turn him bitter. And for his ability to maintain his aplomb and his warmth even as the edifice began to crumble, I loved him all the more.

So, yes, Thurgood Marshall is my hero, too—but my reasons are not the same as those cited in some of the agonized commentaries on his departure. The greatness of a judge should no more be measured by the results he reaches than the greatness of a writer should be judged by the titles of her books. It is a trivialization of Marshall's importance to the Court for those on the left or the right to reduce his towering career to a series of outcomes in concrete cases.

Yes, every vote matters, and the new and relatively untested Justice Clarence Thomas makes many people nervous. One may easily make predictions about the Court without Marshall: *Roe v. Wade*² hangs by a thread, more bizarre First Amendment decisions are sure to follow, civil rights statutes are likely to receive ever more restrictive interpretations, and the Court has lost its one member whose clients once included large numbers of those who sat on the other side of the interrogation tables in police stations.

On the other hand, many of the precedents that are said to be threatened are marked by judicial overreaching. Well before Marshall arrived to join the Warren Court in 1967, the Justices, perhaps awed by their own stellar achievements in helping to hasten the end of America's version of apartheid, occasionally began to write as though their own moral compasses were the true signposts of constitutional law. In the early 1970's, the last years of liberalism

2. 410 U.S. 113 (1973).

triumphant, the Court seemed to develop a “We have the votes” mentality that is always dangerous in the judicial branch—the same arrogance, as it happens, that lately seems to be infecting the Rehnquist Court, to the unfortunate glee of people on the right who ought to know better.

If President Bush, as his rhetoric suggests, wants to avoid the sin of judicial legislation, then one must hope that in appointing Clarence Thomas, he has followed Marshall with someone like Marshall—but like Marshall in a particular and rarely mentioned sense.

Thurgood Marshall’s entire legal career has been marked by a strong and abiding faith in the rule of law—a faith too often absent in the antilegal cynicism of those on the left or the right who measure the success of the Supreme Court by whether it reads into the Constitution the political programs they prefer.

Just consider the fight against racial segregation. When others were sure that the only route to racial justice in America was direct action, Thurgood Marshall was out litigating—and litigating, it must be said, before a Supreme Court that included no members selected for their opposition to segregation. Marshall could do this with such confidence, such passion, only if he believed that people of good will would keep their minds open and could be persuaded if presented with clear and sensible legal arguments.

This ideal of the judge as someone amenable to reason is generally lost in today’s popular clamor for the preservation of this precedent or the rejection of that one. If a President, pressured from his right flank, seeks a candidate who will vote “the right way,” or if a Senate, pressured from the left, rejects a nominee who will vote “the wrong way,” enormous damage is done to this ideal. Indeed, enormous damage is done to the notion of law as a guiding rather than a governing force in our democracy.

As a legal scholar, I rather unfashionably prefer that judges attempt a sharp separation of personal political and moral preferences from constitutional analysis. That judges generally seen as on the left cross that line in their quest for a better society has long been a commonplace of constitutional theory, which is probably why so much of contemporary scholarship is devoted to proving that it isn’t so. But judges who are considered to be on the right do it too, with increasing frequency, most recently in the Court’s restrictions of the constitutional right to seek writs of habeas corpus. Indeed, I fear that the Rehnquist Court’s monument in the struggle for racial justice may prove to be its sharp departure from the original understanding of the Fourteenth Amendment in *McCleskey v. Kemp*.³ There the Justices rejected the claim that the death penalty is administered in a racially discriminatory fashion, even though statistics plainly demonstrate that capital juries value the lives of white murder victims higher than the lives of black ones; and the rejection came notwith-

3. 481 U.S. 279 (1987).

standing the clear concern of the authors of the Fourteenth Amendment that the criminal law would be used to protect whites but not blacks.

Critics of Thurgood Marshall have long contended that he has, at some points in his career on the Court, identified his personal moral compass with the commands of the Constitution. Certainly I do not agree with every legal position that he has taken. But if the line is going to be crossed, I think we could do far worse than have the judge who does the crossing be a person of the integrity, compassion, and commitment to individuals that the Judge has displayed throughout his career. This is not because his moral instincts are always right—whose are?—but because they are always compassionate. There are other judges of integrity and compassion, conservatives as well as liberals, and some of them are on the Court. But there is only one Thurgood Marshall.

Still, his decision to step down from the bench should not be viewed as a light going out. In the three and a half decades since *Brown*, people who describe their goals as progressive have come to rely far too much on the Court as an ally for social change; whereas, if the truth is told, it has not been a reliable ally for those on the left in two decades. (Even *Roe*, fiercely defended, and as fiercely attacked, as a decision about reproductive privacy, is, if one reads it carefully, much more a quasi-administrative-law decision, deferring to the considered judgment of the medical establishment.)

In fighting for a cause, one must use the tools that are available, and in the fifties and sixties, the Court happened to be available. That the Court was on the side of the angels in the battle against segregation was simply a coincidence. It is not easy to study the fabric of social change and come away with the conclusion that had *Brown* come out the other way, the civil rights movement would have died aborning. More likely, the Court would have sunk slowly into obscurity; a vital element in the prestige the Court now enjoys comes from the rhetorical buildup it received as antisegregation intellectuals and politicians in the fifties insisted that its edicts, no matter how controversial, must be obeyed.

In that sense, it is a tragedy of our era that everyone who has a cause seems to suppose that the *Brown* litigation is necessarily the model to follow. *Brown* was wonderful, but it does not represent the whole fabric of social change. For most of human history, people have relied on themselves rather than on their courts to make vital moral judgments and to ensure human ethical progress. The skill of deciding difficult issues through public moral debate, rather than through arcane legal argument, is one that it is time for all of us to recover.

Public dialogue is risky, for one must face and persuade not a few judges, members of the ruling elite, but a broader range of people, many of them not subject to any particular conversational constraints. In other words, a tough world awaits when one leaves the courts and enters politics. Yet we live in a constitutional democracy, which means that not every moral wrong must be

remedied by the creation of a constitutional right. The Constitution places some moral choices outside the political process, but most of them are—and should be—left within it. The legislatures, not the courts, are the places where most of our great moral battles should be fought.

Besides, it is simply not true that Thurgood Marshall's departure, along with that of William Brennan last year, marks the end of the era when the Court was the first and best hope for curing the nation's ills. That era ended long ago, and I can even give it a date—a date, I think, when Justices Brennan and Marshall themselves knew with certainty that the era had passed, even though, on many issues, their side still had the votes.

During my year as a law clerk for Justice Marshall, I was a witness—the only witness, I think, other than the participants—to an incident I promised myself I would never reveal until both Justices were off the Court. The incident occurred the morning after Ronald Reagan's landslide election in November 1980. Jimmy Carter's defeat was, by that time, a foregone conclusion; what stunned many observers was that the Democrats lost control of the Senate for the first time in more than two decades.

The court was sitting that day to hear oral arguments—a little thing like a presidential election could hardly disrupt the precise schedule—and, as usual, the Justices were rushing to the robing room and the law clerks to our little marble alcove off to the side of the courtroom. I left the chambers fast on the Judge's heels. In the broad, sunny corridor, Marshall encountered Brennan. From where I stood, it appeared that Brennan had tears in his eyes.

Brennan, looking unusually frail, gazed up at his old friend and ally. "Is it really true," he asked softly, "that Strom Thurmond is going to be chairman of the Judiciary Committee?" Senator Thurmond, one of Marshall's principal tormentors in his confirmation hearings,⁴ was once an ardent segregationist. The name, no doubt, was a symbol for Marshall of all that he had spent his career struggling against.

Marshall, towering over his friend, looked down, hesitated, then slipped his arm around Brennan's narrow shoulders. They walked to the robing room that way, passing in and out of the shadows where the brilliant morning sunlight struck curtains or walls. That is the moment when the era ended, as these two great soldiers of liberalism squared their shoulders and marched off to fight their battle against the new political order.

And so the old order passeth. Perhaps it was time. But we will never see their like again.

4. I discuss the nastiness of many of the questions at Thurgood Marshall's confirmation hearings in Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990).