Mr. Justice Thurgood Marshall: A Substantial Architect of the United States Constitution for Our Times

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Toward the end of the fourth score of the twentieth century, the United States moved a decisive stage closer to a nation in which "[t]he people, not the government, possess the absolute sovereignty,"[1] but with two vital restraints. First, the sovereign power of the majority may not deprive even the most despised minority of their constitutional and other fundamental rights;[2] the latter defined as all rights which are "implicit in the concept of ordered liberty."[3] Second, the history, ethics, decency, and fairness of a civilized people demand on occasion that government, including the courts, provide resources to those to whom it has previously denied basic equality by its own willful misconduct.[4] Events in Eastern Europe today should convince even the most fervent, activist exponent of judicial restraint that free people function well only in an open society, in which there are constitutional and decency restraints, both on government and on majorities.[5]

This nation's advance came about not solely through dramatic incidents, such as *Brown*,[6] *Cooper*,[7] the Civil Rights Act of 1964,[8] or the Voting Rights

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1. MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, at 569 (Jonathan Elliot ed., 1987).

2. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ., 347 U.S. 483 (1954).

3. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

4. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528, 552-53 (1989) (Marshall, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring in part and dissenting in part); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

5. *See, e.g.*, Valery Chalidze, *Tyranny of the Soviet Majority*, N.Y. TIMES, Sept. 29, 1991, at E17.

6. 347 U.S. 483 (1954).

7. 358 U.S. 1 (1958).

8. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (1988)).

Act of 1965,[9] for the results of any one alone were bound to be ephemeral. Instead, the nation advanced due to a combination of factors and forces: the shrinkage of the world due to technological developments, the growth in literacy and education, the pervasiveness of television, the rise of a free press, diffusion of competing ideas, a timely death,[10] and—not the least—the actions of a few great men. Thurgood Marshall is one such man about whom there should be little doubt or debate.

Without years of poring over numerous diaries, letters and records—such as Mark DeWolfe Howe did as he unsuccessfully struggled to finish a biography of Justice Holmes—it is hard to ascertain those special fibers that make a human being a tower of strength. For as Felix Frankfurter reminds us: "Greatness in the law is not a standardized quality, nor are the elements that combine to attain it."[11]

It is easier to describe what Marshall is not.

For example, Justice Thurgood Marshall is not like Percy Bysshe Shelley, who avoided the unpopular fray but considered "wholly unexcusable" others who did likewise.[12] Rather than avoid controversy, Marshall confronted it. As both an advocate and a Justice, he challenged many established practices in American society: the use of forced confessions;[13] racial segregation and discrimination in all forms;[14] wrongful deprivation of the precious right to vote;[15] restrictive covenants;[16] the death penalty as an excessive punishment

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9. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

10. RICHARD KLUGER, SIMPLE JUSTICE 656 (1976).

11. Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 784 (1957). Frankfurter goes on:

> To speak only of Justices near enough to one's own time, greatness may manifest itself through the power of penetrating analysis exerted by a trenchant mind, as in the case of Bradley; it may be due to persistence in a point of view forcefully expressed over a long judicial stretch, as shown by Field; it may derive from a coherent judicial philosophy, expressed with pungency and brilliance, reinforced by the *Zeitgeist*, which in good part was itself a reflection of that philosophy, as was true of Holmes; it may be achieved by the resourceful deployment of vast experience and an originating mind, as illustrated by Brandeis; it may result from the influence of a singularly endearing personality in the service of sweet reason, as Cardozo proves; it may come through the kind of vigor that exerts moral authority over others, as embodied in Hughes.

12. In 1818, Shelley left Sussex and became a wanderer at the height of a political controversy in his district. On April 20, 1818, when the election campaign was reaching a paroxysm, he was in Milan, Italy. In a letter to Thomas Peacock, he wrote: "The number of English who pass through this town is very great. They ought to be in their own country in the present crisis. Their conduct is wholly unexcusable." Letter from Percy Bysshe Shelley to Thomas Love Peacock (Apr. 28, 1818), *in* 2 LETTERS OF PERCY BYSSHE SHELLEY, 1816-1822, at 597 (Roger Ingpen ed., 1914).

13. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949) (use at trial of confession coerced by police violated defendant's due process rights); *accord* Lyons v. Oklahoma, 322 U.S. 596 (1944).

14. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Morgan v. Virginia, 328 U.S. 373 (1946) (statute separating black and white passengers violates Commerce Clause).

15. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

16. Shelley v. Kraemer, 334 U.S. 1 (1948).

unworthy of a civilized society;[17] the disparity between educational facilities of rich and poor (his dissent in *San Antonio Independent School District v. Rodriguez*[18] asserted a right in which all but the most brazen American abstractly believes: "the right of every American to an equal start in life"), and the foolish notion that the horrendous effects of three hundred years of racial segregation simply vanish and lose all detrimental effect when society merely says we will not act that way in the future.[19]

Justice Marshall also is not like many men—such as Disraeli, Talleyrand, Daniel Webster, and John Marshall, to speak only of the dead—who involve themselves in public issues in order to add shekels to their purses.[20]

But why persist in the negative? As an advocate he had an eagle's eye, a lion's heart, a prodigious memory, a flame of genius, a restrained daring, and even—rushing from an adverse trial decision to a Special Term of the Supreme Court to argue *Cooper* before the opening of the schools in Little Rock—a greyhound's speed.[21] In a room of brilliant lawyers, including law professors from the leading law schools, Marshall had the ability to listen, to ask the right questions, and, at the end of the discussion, to become the intellectual leader of those whom he had assembled to advise him. As an advocate he retained the moral character and perspective to consider, question and criticize arguments or theories advanced by younger and older attorneys. Marshall's colleagues on the bench have said he treated them with courtesy and kindness, but brought them to realize "the reality that the protections [in the Constitution] were honored not by their enforcement but by their neglect" and assisted them "in understanding those facets of American life upon which their decisions impact but about which some have little first hand knowledge."[22] Better than any, Marshall can combine what Socrates, Plato, Aristotle, and perhaps Pushkin, gave to the world, what de Tocqueville, Burke, Shakespeare, and Saint Beuve (to name a select few) gave to Europe, and what Lincoln, John Hope Franklin, Alain Locke, Hemingway, and Langston Hughes made peculiarly American.

There is a great sense of humor in that tall hulk of a gentleman. Marshall's humor is neither barnyard nor off-color, and because it is wit and not wisecrack, it is hard to describe. Because his witty, sophisticated remarks are so dependent upon the event or circumstance that gave rise to their display, they

17. Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring); *see also* Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986).

18. 411 U.S. 1, 71 (1973).

19. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting).

20. *How Justices Rank—Richest to Poorest*, U.S. NEWS & WORLD REP., May 27, 1985, at 8.

21. Cooper v. Aaron, 358 U.S. 1 (1958).

22. William J. Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 394, 396 (1981).

are difficult to retell.[23] Perhaps sharing a story he told me when I recently visited him in chambers will illustrate this point. Marshall reminisced:

> Justice Harlan was a wonderful man—a real gentleman. He was a gentleman in every sense of the word, and that was his problem. He did not even cuss. When he got to a cussing point, he would ask me what to say.
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> I remember one time, we were all meeting, and Chief Justice Warren and Harlan were really knocking heads over one point. Well, we took a coffee break and Harlan told me he needed a word or two so I gave him two or three things to choose from. When the meeting started up again, Warren said, "now Harlan, I just don't see what you are trying to say." Harlan looked at him and said, "Chief, it is as clear as a goat's ass going up a hill." Warren looked right at me and said, "Thurgood, I know that was you who gave him that."

The third quality will better emerge after a digression. Perhaps it is not really a digression, as intellectual contests between two superb advocates (Thurgood Marshall and John W. Davis in *Brown*) often take on the mastery of the artist, his canvas, his aim, and the surroundings sought to be implanted forever in the viewer's mind. In Paul Johnson's *The Birth of the Modern: World Society 1815-1830*,[24] an event in the Constable-Turner struggle is described:

> The Royal Academy's annual show in May, which opened the London Season, was the best showplace by far . . . . But there were many disadvantages . . . . The wall space was grotesquely overcrowded, and everything depended on where your work was hung and what was near it. There were tremendous rows in consequence . . . . When Constable finally showed his *Opening of Waterloo Bridge*, done in 1817, he heightened it on varnishing day with vermilion and lake. The painting was hung next to Turner's *Helvoetsluys*, described by C.R. Leslie as "beautiful" but "a grey picture." Turner came several times into the room, looking from Constable's picture to his own, "and at last brought his palette . . . and putting a round daub of red lead, somewhat bigger than a shilling, on his grey sea, went away without saying a word. The intensity of the red lead, made more vivid by the coolness of his picture, caused even the vermilion and lake of Constable to look weak." Hence Constable's bitter comment: "[Turner] has been here, and fired a gun."

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23. His former colleague, Chief Judge Irving R. Kaufman, gave one example. Judge Marshall in a witty aside remarked: "There's a very practical way to find out whether a confession has been coerced: ask, how big was the cop?" Irving R. Kaufman, *Thurgood Marshall: A Tribute From a Former Colleague*, 6 BLACK L.J. 23, 25 (1978).

24. PAUL JOHNSON, THE BIRTH OF THE MODERN: WORLD SOCIETY 1815-1830, at 602-03 (1991) (alteration in original).

Marshall, as advocate and Justice, fired a gun with the selectivity and deftness which are the luxuries of those who have the mark of genius, an incessant activity of mind. Let me share three instances. First, in the *Brown* argument about the form of the decree, the Southern States were making much of the point (though it was due to the states' own neglect) of the reportedly large gap in the educational levels of the two races. Marshall, in his blunt argot, said the solution was simple: "Put the dumb colored children in with the dumb white children, and put the smart colored children with the smart white children—that is no problem."[25] Second, in *Cooper v. Aaron*,[26] the Little Rock School Board argued that requiring integration in the public schools was just like trying to force prohibition on the American people. Marshall's reply was that he did not think that one could equate a constitutional education with a shot of whiskey. Third, like all great artists, his exits are grand and have a dash of style. On the last day of the October 1990 Term, in *Payne v. Tennessee*,[27] the Court overturned previous decisions that had held that the Eighth Amendment bars the admission of victim-impact evidence in the penalty phase of a capital case. Justice Marshall intoned in dissent: "Power, not reason, is the new currency of this Court's decisionmaking."[28] He further warned: "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign to resurrect yesterday's 'spirited dissents' will squander the authority and the legitimacy of this Court as a protector of the powerless."[29]

Mr. Justice Marshall: one note of hope. What you did to make this nation slightly more civilized—restore the supremacy and integrity of a process which puts restraints on irresponsible majorities as well as on government—has a solid foundation, and its retelling by a new generation of teachers and lawyers will inspire the young. Those wielding judicial power, perhaps temporarily restraining progress by not understanding the real beat of America, will meet the same fate as those who felt that Holmes' Twentieth Regiment, the Union Army at Lookout Mountain, or Martin Luther King's march to Selma did not represent the real future of the United States and its real heart and soul. Thanks to you and to those you have inspired and will inspire, history and experience will prove these skeptics wrong. For, as Professor Paul Gewirtz reminds us in his moving tribute, your stunning successes as an advocate and your perceptive opinions as judge and Justice are grounded in "America's own ideals, the symbols of its democratic faith."[30]

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25. RICHARD KLUGER, SIMPLE JUSTICE 730 (1976).
26. 358 U.S. 1 (1958).
27. 111 S. Ct. 2597 (1991).
28. *Id.* at 2619 (Marshall, J., dissenting).
29. *Id.* at 2625.
30. Paul Gewirtz, *Thurgood Marshall*, 101 YALE L.J. 13, 17 (1991).