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A Vision of the Constitution

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Growing up is a process of having one’s heroes rendered less inspiring. For me, Thurgood Marshall was the exception.

Almost twenty-five years ago I made the familiar high school trip to Washington, D.C. My classmates and I took in all the monuments. We even managed to catch a few minutes of the Supreme Court in session. We entered in the middle of an oral argument, and though we did not fully understand what was transpiring in the courtroom, no one could miss the sense of drama. A tall black lawyer was addressing the Court, and all eyes — set in a sea of white — were fixed on him.

The lawyer spoke with a very special eloquence. He was dignified and proper, but his words were accessible to all. The formalisms that so often mask the law and make it forbidding were gone. The case was put in simple, clear, powerful words. These words were uttered with patience, with a steel, almost icy serenity, yet beneath them was an urgency, a longing, that could not help but move the Justices and the audience. The moment was electrifying — it infused me with a spirit and determination that helped shape my life, it captured the nation. Afterward I learned that the case was called *Brown v. Board of Education* and the lawyer Thurgood Marshall.

A decade later we met again, this time on a somewhat more direct basis. The lawyer had recently become a judge, of the Court of Appeals for the Second Circuit, and I became his law clerk. I was given a chance that was both extraordinary and risky, to work for a hero of my youth — though, until now, I never dared to tell him how much he meant to me. He is not that kind of person — he is open, always joking, and warm, but with little tolerance for explicit displays of sentiment (“knucklehead” is his favorite word of endearment).

The qualities I saw in the courtroom in the 1950s filled his chambers in the 1960s, and there was more. There were his stories — that conveyed to me the terror, the sacrifice, and, once in a while, even

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the joy of being a civil rights lawyer in the 1930s and 1940s, still a time of the most crude and brutal racism. There were the daring moments on the bench — when he "overruled" some Supreme Court precedents, those, he said, of an earlier age and likely to be repudiated by the Supreme Court itself whenever it got around to the task;¹ or when he questioned a decision of an even higher authority for the Second Circuit — L. Hand.² There were also our disagreements over the cases — extraordinary arguments, in which his vision of the Constitution and my recently acquired education at the Harvard Law School — a place then consumed by Wechsler's "neutral principles" — did not exactly mesh. In time I learned, I learned a lot, about the law and about him.

Thurgood Marshall has probably had the most stunning legal career of the twentieth century — the lawyer in Brown, a turning point in American jurisprudence; a judge of the Second Circuit; later the Solicitor General of the United States; and still later a Supreme Court justice. Clearly he was on the side of history (though that was not apparent to all — his grandmother greeted his decision to study law with an insistence that he learn to cook, so that he could be sure of a job). But there was a cause more personal to the man, a vision of American society that sees law as the central instrument of reform and protection of human rights as the highest purpose of the Constitution. This was the vision that led him to the NAACP and sustained him through the harassment and defeats of his career. This was the vision


that found expression in his work as a civil rights lawyer and also as a judge.

Thurgood Marshall's commitment to that vision was not shared by all his colleagues on the Second Circuit. Now and then a civil rights case came before that court in the 1964-65 term, the year of the clerkship, and the Judge took his stand — in dissent. A more frequent area of disagreement centered on the rights of the individual in the criminal process — *Mapp v. Ohio*, *Gideon v. Wainwright*, *Fay v. Noia*, and *Escobedo v. Illinois* (the stepping stone to *Miranda v. Arizona*). Some of the judges on the Second Circuit, particularly those in positions of leadership in the bar and the academy, received these decisions of the Warren Court only in the most grudging fashion. Thurgood Marshall, on the other hand, insisted that these decisions be taken at their full value — not in obedience to a higher authority, but because they embodied the right principles of our constitutional order. He took these stands repeatedly, and courageously, at some discomfort — it is no fun for a new judge, one whose appointment took the Senate almost a year to confirm, one with no ties to Wall Street, then the spiritual center of the Second Circuit, repeatedly to raise his voice in protest, against the prominent, the established, the recognized. He spoke on behalf of the Supreme Court, true, but in the early 1960s that institution was at the center of controversy and criticism — it needed support and had little to confer. As it turned out, history was once again on Thurgood Marshall's side, he moved on to be Solicitor General at the end of the year, giving up the tenure of his judgeship because he too could not say "no" to LBJ.

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3 People v. Galamison, 342 F.2d 255, 275 (2d Cir. 1965), *cert. denied*, 380 U.S. 977 (1965) (Marshall, J., dissenting) (arguing that demonstrators who disrupted traffic to N.Y. World's Fair should be given opportunity to amend removal petitions and have district court conduct full hearings); Ephraim v. Safeway Trails, Inc., 341 F.2d 815, 820 (2d Cir. 1965) (Marshall, J., dissenting) (arguing that a bus company that picked up passengers in the New York Port Authority should be held liable for damages suffered by a black woman in an incident that occurred in Georgia, at the instigation of his driver, when she refused to change her seat, despite the fact that the incident occurred on the bus of a connecting carrier.)

Last spring I took my daughters to Washington, D.C. We made a stop at the Supreme Court, and I introduced them to Thurgood Marshall, not in the courtroom, but now in his chambers. He was his usual jovial self, yet beneath the surface, beneath the joking and the stories (which were retold for my daughters), one could see the grandeur of the man who had stood in the courtroom twenty-five years ago, with that same sense of struggle and determination, now resisting the efforts of the Burger Court to undo many achievements of Brown and the Warren Court era. One could also see, and marvel at, his continued capacity and effort to recharge a new generation, even though the present state of the law could not have been for him a source of satisfaction or optimism — so much that he stands for is in jeopardy.

That is why it is so fitting to honor Thurgood Marshall today. Not because we are at another anniversary — he could not care less about things like that (it pained him to sit for the sculpture Baltimore is erecting for him, and not simply because it is so near the one the city erected for its other Justice, Taney). Rather, because we are at a time when there is a need to celebrate the personal qualities that Thurgood Marshall exemplifies — courage sustained by a vision of the centrality of human rights to our constitutional order. In honoring him we express the hope that his vision will once again be triumphant. We renew his spirit and ours, and thus do what we can to make certain that Thurgood Marshall will once again be on the side of history.