Mr. Justice Marshall: A Tribute

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Had Thurgood Marshall somehow missed the appointment to the Supreme Court that was so clearly his due, he would nonetheless have joined the first Justice Marshall as one of the few lawyers who have shaped this country's history through their legal activities. In coordinating the campaign that led to *Brown v. Board of Education*[1] and in serving as one of the chief appellate advocates for black rights in the 1940's and 1950's, Mr. Justice Marshall played a part overshadowed by no other individual in setting in train the modern movement for the liberation of black people in America, a movement aimed at the most deeply-rooted evil in American society.

It is a comment on the present role of the Supreme Court that Mr. Justice Marshall can never accomplish as much as a judge as he did in his role as advocate. But the accomplishments of his judicial career have already matched, and exceeded, those of most other Justices with ten years' service. Mr. Justice Marshall's major doctrinal achievement, as we all know, has been the articulation of a theory of the equal protection clause that is both internally coherent and consistent with the demands of justice.[2] No competitors to Mr. Justice Marshall's theory have appeared that satisfy both of these essential conditions. Equality has been one of the major concerns of recent constitutional law, and Mr. Justice Marshall's work has enduring value.

The merits of other positions taken by the Justice have not been so apparent to the academic community. As the Court has groped with problems of substantive due process,[3] Mr. Justice Marshall has made some important suggestions that derive from his fine grasp of the needs of our society. In *Board of Regents v. Roth* and *Massachusetts Board of Retirement v. Murgia*,[4] he would have given constitutional protection to an individual's pursuit of an occupation. The implications of this position are provocative: it may be, for example, that on this view the government is constitutionally compelled to act as employer of last resort. Plainly, the Court is nowhere near adopting this view, but Mr. Justice Marshall may be seen in the future as one of the Court's "Great Dissenters," pointing the path to constitutional development down which the society's emerging values will lead the Court.

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

2. *See* Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

3. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

4. 408 U.S. 564, 587 (1972) (Marshall, J., dissenting); 427 U.S. 307, 317 (1976) (Marshall, J., dissenting).

I believe that Mr. Justice Marshall's contributions to constitutional doctrine would alone make him a distinguished Justice. But his most significant contributions to the Court are of a different sort. If law is to be made well, it must be responsive to the world as it is, so that we may some day reach the world as it may be. And Mr. Justice Marshall's knowledge of the real world in which Americans affected by injustice live is unsurpassed in the modern era.

This knowledge infuses every one of his important opinions. I could quote, for example, from his moving dissent in *Milliken v. Bradley*,[5] but a rather more obscure case will illustrate how pervasive is the influence of a deep understanding of American society on the Justice's work. *Tollett v. Henderson*[6] involved a black defendant who pleaded guilty in 1948 in Tennessee to a charge of murder. Twenty years later, he sought habeas corpus because the grand jury that indicted him was unconstitutionally composed. The Supreme Court held that his guilty plea barred consideration of the constitutional challenge. It offhandedly remarked that Henderson would have difficulty in establishing that his attorney, who failed even to investigate the composition of the grand jury, acted "outside the 'range of competence demanded of attorneys in criminal cases'" because a judge in Tennessee asserted in 1968 that "[n]o lawyer in this State would ever have thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948."[7] Mr. Justice Marshall correctly thought that the state court's assertion proved the inadequacy of the attorney's performance. It was surely not irrelevant that the case began in Tennessee in 1948, that the defendant was black, that the grand jury rolls identified which persons were black, and that no black served on a grand jury until 1953. Mr. Justice Marshall understood that the administration of justice in Tennessee was not exonerated by the observation that no attorney would have thought of objecting to the composition of the grand jury. He knew that a system so pervaded by racism deserves no respect at all, and he would have given it none.

Consider, also, *United States v. Kras*,[8] where the Court held it constitutional to require a person seeking a discharge in bankruptcy to pay a $50 filing fee. Mr. Justice Marshall was properly outraged by the Court's insensitivity to the burdens of poverty, revealed by its cavalier assumption that "the price of a movie" each week was within an indigent's "able-bodied reach":[9]

> "[N]o one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. . . . It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."[10]

5. 418 U.S. 717, 781 (1974) (Marshall, J., dissenting). *See especially id.*, at 814-15: "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. . . . 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."

6. 411 U.S. 258 (1973).

7. *Id.*, at 268, 269.

8. 409 U.S. 434 (1973).

9. *Id.*, at 449.

10. *Id.*, at 460 (Marshall, J., dissenting).

Mr. Justice Marshall need never make assumptions about how the poor, the black, and the oppressed actually live. His contributions to American law, as advocate and as judge, are unique in our history. They will stand as a monument to a man who, more than any other figure in recent American history, embodies the best aspirations of our society.