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Thurgood Marshall and the Forgotten Legacy of Brown v. Board of Education

Kenneth F. Ripple
Notre Dame Law School

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I. Introduction

On May 17, 1979, the United States celebrated, with relatively little public ceremony, the twenty-fifth anniversary of *Brown v. Board of Education.*[1] Two years earlier, another anniversary was celebrated even more quietly as Thurgood Marshall, the principal architect of the school desegregation litigation, celebrated his first decade as a Justice of the Supreme Court of the United States.[2] Anniversaries are traditionally a time both of celebration and reflection. These particular anniversaries are appropriate occasions for celebration since each marks an important milestone in American life. At the same time, both present a unique opportunity for reflection upon and reassessment of the impact of this man and of this litigation on American jurisprudence.

A. *The Case*

The principal significance of *Brown* needs little elaboration. As an historical and as a jurisprudential event, the case has had a profound effect on American life. As an historical event, it altered, profoundly, the course of our national development. It removed our society from its collision course with the disaster of institutional racism in our public institutions and committed us to the process of seeking, however haltingly, the elusive goal of human equality.[3] As a jurisprudential event, it breathed a new life into the equal protection clause of the fourteenth amendment,[4] a clause conceived in a desire to ensure

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** Associate Professor of Law, University of Notre Dame. A.B., Fordham University; J.D., University of Virginia; LL.M., The George Washington University.

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1 347 U.S. 483 (1954).

2 Mr. Justice Marshall was nominated to be an Associate Justice of the Supreme Court by President Lyndon B. Johnson on June 13, 1967. The Senate confirmed his appointment on August 30. He took his seat on October 2, 1967.

3 *See generally* Carter, *The Warren Court and Desegregation,* in RACE, RACISM AND AMERICAN LAW 456-61 (D. Bell ed. 1973). For a description of some of the later milestones in the desegration effort, see Hesburgh, *Preface: Fiftieth Anniversary Volume,* 50 NOTRE DAME LAW. 6 (1974). For a description of some of the problems ahead, see Bell, Brown v. Board of Education *and the Interest-Covergence Dilemma,* 93 HARV. L. REV. 518 (1980).

4 The Court's analysis has had its critics and its defenders. *See, e.g.,* Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421 (1960); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959). *See also* Bell, *supra* note 3.

equality before the law but whose growth had been almost smothered by the Court's decisions in *Plessy v. Ferguson*[5] and *Gong Lum v. Rice.*[6]

A great case, like any other milestone, can have, in addition to its primary effect, a secondary impact. However, it is often a great many years before that secondary effect is consciously recognized and fully appreciated. Consequently, on the twenty-fifth anniversary of *Brown,* it seems especially appropriate to reflect on one of those secondary effects—the impact of *Brown* on the manner in which issues of constitutional doctrine are litigated and adjudicated within the American judicial system. It is now clear that the school desegregation cases have had a very great influence on the manner in which American courts perform their task. Consequently, this impact will significantly affect the future ability of other Americans to find the same protection in the law that *Brown* provided for this now-famous nine-year-old girl from Topeka, Kansas.

B. *The Man*

Just as *Brown* had many effects upon our society and upon our legal system, the tenure of Mr. Justice Marshall on the High Bench has also had many implications for our society and its jurisprudence. The mere fact that a black has sat on the Court for ten years is an encouraging sign of national maturity. Moreover, while some have found it necessary, or perhaps fashionable, to denigrate his intellectual contribution to the law while on the bench,[7] it now seems clear that his contributions in that respect are substantial.[8] But, as in the case of the litigation he structured at an earlier stage of his career, Justice Marshall's contribution to the *United States Reports* has also significantly influenced the manner in which future advocates—and perhaps future Justices—will go about the task of litigating future constitutional questions.

II.

It is easy, in retrospect, to underestimate the magnitude of the task which confronted the NAACP lawyers who, under the leadership of Marshall,[9] undertook to seek the reversal of *Plessy v. Ferguson.*[10] Most American lawyers

5 163 U.S. 537 (1896). In *Plessy,* the Court held that a Louisiana statute requiring railroad companies to provide separate but equal accommodations for the "white and colored" races, and forbidding passengers to sit in a section other than that to which their race had been assigned, was violative of neither the thirteenth nor fourteenth amendments.

6 275 U.S. 78 (1927). The petitioner in *Gong Lum* sought the admission of his daughter to a public school providing for the education of white children. The Court held that the State's classification of the child as a member of the "colored" races and its refusal to admit her to the school for whites did not constitute a denial of equal protection. Rather, where equivalent schools were available to children of the "colored" races, the State's refusal was merely the lawful exercise of its power to regulate its schools.

7 These criticisms are summarized and criticized in John P. Frank's review of *Private Pressure on Public Law: The Legal Career of Thurgood Marshall* by Randall W. Bland, 60 A.B.A.J. 26 (1974).

8 *See, e.g.,* Rush v. Savchuk, 48 U.S.L.W. 4088 (U.S. Jan. 21, 1980) (No. 78-952); Kulko v. California Superior Ct., 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

9 Marshall certainly shared this responsibility with others, and the contribution of Nathan Margold, Charles Houston, William Hastie, William Coleman, Jack Greenberg and others cannot be underestimated. At the same time, these others would be the first to recognize that Marshall was the driving force of their enterprise.

10 *See* note 5 *supra.*

recall the holding of that infamous case—that the mandate of the equal protection clause could be fulfilled by the maintenance of "separate but equal" facilities. Few recall, however, the sterility of the Court's analysis:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[11]

That sterility—the Court's blindness to the real impact of the asserted constitutional principle—became the real obstacle confronting Marshall and his colleagues. If the Court were someday to overrule the holding of *Plessy,* it would have to look beyond the words of the amendment and accept the fact that "separate but equal" could never really be "equal." Marshall accomplished this task not by the invention of a novel theory of constitutional litigation but, rather, by the exquisite application of two of its most basic principles:

First, constitutional doctrine unfolds incrementally. The Court rarely takes a single giant step and establishes a new doctrine or definitively rejects an old one. On the rare occasions when it does radically depart from established precedent, it usually articulates its holding as an outgrowth of older, deemphasized strains in the Court's jurisprudence.[12]

Second, advances in constitutional doctrine are based on facts, not only the "facts of record" but also what Professor Karst termed in his seminal and perceptive essay[13] "constitutional facts." When a Court fashions a new doctrine or reshapes an old one, especially in constitutional law, it decides, as a practical matter, many "cases" not actually before it. Consequently, it must be informed of "matters far beyond the facts of the particular case."[14] If the doctrine of "separate but equal" were ever to be overruled, the Court would first have to see the impossibility of "separate" ever really being "equal" from the "constitutional facts" presented to it.

It is, of course, no monumental revelation that these two principles are at the heart of American constitutional litigation. Even as Marshall started his long trek toward May 1954 in the early thirties, the similarities between constitutional doctrinal development and the case-by-case method of the common law were well-known.[15] While the "Brandeis Brief" was hardly an everyday event, its theoretical basis was at least established.[16] Marshall, however, saw, with a

11 163 U.S. at 551.

12 *See, e.g.,* National League of Cities v. Usery, 426 U.S. 833 (1976).

13 Karst, *Legislative Facts in Constitutional Litigation,* 1960 SUP. CT. REV. 75.

14 *Id.* at 77.

15 *See, e.g.,* Stone, *The Common Law in the United States,* 50 HARV. L. REV. 4, 21-25 (1936). This analogy to the common law, while helpful in explaining the methodology of constitutional litigation, can also obscure the special problems of reference to extrajudicial standards in the constitutional context. As Professor Ely notes in his perceptive article, "[w]hen a court, speaking in the name of the Constitution, invalidates an act of the political branches it is by definition thwarting them, overruling their judgment, and in addition is doing so in a way that is not subject to correction by the ordinary lawmaking process." Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399, 404 (1978). Of course, interpretation of a constitution also creates special difficulties because, as a basic framework of government, it necessarily speaks in generalities, not specifics.

16 *See* A. DAVIS, THE UNITED STATES SUPREME COURT AND THE USES OF SOCIAL SCIENCE DATA (1973).

very special pragmatic perception, the inherent tension in these two principles. At each stage of the school desegregation litigation leading up to *Brown,* he presented a case designed to deal with this paradox of the judicial process. In each step toward *Brown,* the courts, and ultimately the Supreme Court, were presented with a litigation theory which would permit them to grant relief without squarely confronting the necessity of overruling the precedent that "separate" is "equal." Simultaneously, through careful factual presentation in each case, the Court was "educated" in the futility of perpetuating this rule and given the opportunity to set out on a more enlightened course. Perhaps the best rendition of this approach was presented by Marshall himself at a symposium at Howard University.[17] A study of his presentation on that occasion demonstrates his conscious awareness of the necessity to deal with the tension inherent in the judicial process between its common law roots and its propensity to go beyond the record in formulating constitutional principles.

A. *The "Substantial Equality" Cases*

The first group of cases taken on by Marshall did not attack *Plessy* head on and even acknowledged, at least *arguendo,* the continued vitality of the holding. In Marshall's words, "the best overall strategy seemed to be an attack against the segregation system by law suits seeking absolute and complete equalization of curricula, faculty and physical equipment in white and black schools on the theory that the extreme cost of maintaining two 'equal' school systems would eventually destroy segregation."[18] The most prominent of these cases was *Pearson v. Murray*[19] which involved the attempt of a young black man to attend the University of Maryland's then segregated law school.[20] In *Pearson,* counsel presented this limited articulated goal of equal educational facilities, and the litigation was carefully conducted to establish a factual basis for that limited theory. However, evidence which clearly suggested the unreasonableness of any attempt to provide a segregated professional education was also proffered. The testimony of Dean Roger Howell, for example, made it abundantly clear that, for the prospective Maryland practitioner of that era, attendance at any other law school but the University of Maryland Law School simply was not an equivalent legal education.[21] The trial court and eventually the Court of Appeals of Maryland[22] ordered the admission of Murray to the University of Maryland. Although *Plessy* permits separate facilities for the different races, noted the court, the State is required by the fourteenth amendment to provide substantially equal treatment to citizens of the different races. Providing a $200

17 Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts,* 21 J. NEGRO EDUC. 316 (1952). *See also* J. GREENBERG, JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION (1977).

18 *Id.* at 318. *See also* Margold, Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Services to the NAACP (unpublished report, copy on file in the New York Public Library); a portion of the report is reproduced in J. GREENBERG, *supra* note 17, at 50-57.

19 169 Md. 478, 182 A. 590 (1936).

20 Interestingly, it was the segregationist policy of this law school which had caused the Baltimore-based Marshall to commute daily to Howard University's law school in the District of Columbia where he met Charles Houston. Houston is largely credited with sparking Marshall's litigating abilities.

21 *See* R. KLUGER, SIMPLE JUSTICE 190 (1975).

22 *See* note 19 *supra.*

scholarship for blacks to attend out-of-state law schools was not substantially equivalent treatment. This principle of "substantial equality" reached the Supreme Court of the United States two years later when, in *Missouri ex rel. Gaines v. Canada,*[23] through the pen of Chief Justice Hughes, the Court specifically ratified the Maryland Court's holding in *Pearson* and made it clear that the "substantial equality" criterion was not satisfied by scholarships to out-of-state schools. A state could not export its fourteenth amendment responsibilities.

Thus, even in these early days, while respecting the propensity of courts bound to the common law tradition to give relief on the narrowest possible ground, Marshall and his colleagues began the task of educating those courts to the impossibility of preserving the values of equality protected by the fourteenth amendment under a "separate but equal" rationale. As Marshall noted, "the greatest gains from this period was [*sic*] the education of school officials, the courts and the general public in the lawlessness of school officials in depriving Negroes of their constitutional rights."[24]

B. *The "Professional School" Cases*

At the same time, it became clear that this "tangential approach" had a limited utility. The "education" given the courts in the earlier stage now became the prime litigation theory. Marshall described the strategy succinctly as follows:

> It appeared that the university level was the best place to begin a campaign that had as its ultimate objective the total elimination of segregation in public educational institutions in the United States. In the first place, at the university level no provision for Negro education was a rule rather than the exception. Then, too, the difficulties incident to providing equal educational opportunities even within the concept of the "separate-but-equal" doctrine were insurmountable. To provide separate medical schools, law schools, engineering schools and graduate schools with all the variety of offerings available at most state universities would be an almost financial impossibility. Even if feasible, it would be impractical to undertake such expenditures for the few Negroes who desired such training. It was felt, therefore, that if effort at this level was pressed with sufficient vigor many states would capitulate without extended litigation. Here also it was easy to demonstrate to the courts that separate facilities for Negroes could not provide equal training to that available in the state universities which for many years had been expanding and improving their facilities in an effort to compete with the great educational centers of the North and West.[25]

The first of these cases was a disappointment and emphasized the importance of adhering to the basic principles of constitutional litigation. When Ada Sipuel, a twenty-one-year-old black woman, attempted to enroll in the School of Law of the University of Oklahoma, she was turned away on the ground that a separate law school with substantially equal facilities would soon be opened

23 305 U.S. 337 (1938).
24 Marshall, *supra* note 17, at 318.
25 *Id.* at 319.

for blacks. Clearly, this case could have been litigated on the principle established in *Pearson*[26] and *Gaines*.[27] However, Marshall did not argue simply that Oklahoma was under a duty either to establish a black law school of equal quality or to admit her to the University of Oklahoma. Through the testimony of leading professors from Harvard, Chicago, Columbia and Wisconsin, he also introduced evidence that the establishment of an all-black law school cut off from the dominant white population would not be—or rather could not be—an equivalent legal education. A law school admissions case was clearly a favorable environment in which to demonstrate to judges the impossibility of receiving a separate but really equal education in a segregated atmosphere. As Mr. Justice Blackmun noted with his characteristic candor in *Bates v. State Bar of Arizona*,[28] judges, "licensed attorneys all,"[29] bring to cases involving the legal profession their own experientially procured "constitutional facts." It would take no imagination for a judge to understand, from his own law school days, that a legal education is received not only in formal classwork but in the normal intellectual and social intercourse with others aspiring to the same professional ends.

This two-pronged approach of establishing the "safe theory" (requiring absolute equality of facilities) while simultaneously laying the groundwork for the next advance on a credible factual foundation was an application of these same basic principles of constitutional litigation. Clearly recognizing Marshall's tactic,[30] the Supreme Court of Oklahoma, rather than accepting the invitation extended, declined even to apply *Gaines* on the tenuous ground that Miss Sipuel was under an obligation to give the state notice of her desire to attend a separate law school in the state rather than accept the available tuition aid for out-of-state study.[31] This attempt to evade the mandate of *Gaines* gave Marshall solid ground for appeal. Yet, in his brief to the Supreme Court, he maintained his dual stance of arguing for application of the present law while simultaneously suggesting that taking the next step would provide an even better basis for decision:

> "Classifications and distinctions based on race or color have no moral or legal validity in our society. . . . Segregation in public education helps "to preserve a caste system which is based upon race and color. It is designed and intended to perpetuate the slave tradition . . . . Equality, even if the term be limited to a comparison of physical facilities, is and can never be achieved . . . the terms

26 *See* note 19 *supra*.
27 *See* note 23 *supra*.
28 433 U.S. 350 (1970).
29 *Id.* at 368.
30 Here we must notice the important point that it is not wholly clear whether petitioner seeks to overturn the complete separate school policy of the state, or seeks to compel equal facilities for the races by obtaining an extension of such facilities to include a separate law school for negroes. That point is made uncertain by the pleadings and brief of petitioner and by the stipulation. There is much to indicate petitioner does not assail and seek to destroy the entire separate school policy, and there is some statement to that effect by her or for her in the oral argument. But there is contradiction thereof in petitioner's brief. There is an assumption or a charge in respondent's brief that petitioner does not desire the institution of a separate law school, does not desire to attend such a school, and would not attend same if it should be duly and adequately instituted.
Sipuel v. Board of Regents, 180 P.2d 135, 137 (Okla. 1947).
31 *Id.* at 144.

> 'separate' and 'equal' can not be used conjunctively in a situation of this kind; *there can be no separate equality.*"[32]

The Supreme Court heard oral argument in *Sipuel v. Board of Regents*[33] on January 7-8, 1948. Four days later, on January 12, it issued a brief *per curiam* opinion which, after reciting the case's procedural history, reaffirmed the holding of *Gaines* in the blunt terms usually found in such summary reversals. The State must afford Miss Sipuel an in-state education either at an in-state law school for blacks or at the University of Oklahoma "as soon as it does for applicants of any other group."[34] The Board of Regents replied to the holding of the Court by roping off a section of the state capitol and calling it a state law school for blacks. Marshall filed a notice for leave to file a petition for a writ of mandamus claiming that this "law school" did not comply with the mandate of the Court. The education given by such an arrangement could never be comparable to the one given at the University of Oklahoma Law School. The Court denied relief. This case did not raise the question, the Justices wrote, of whether the equal protection clause could be fulfilled by the maintenance of a separate school for black students.[35]

Marshall had proceeded too far too fast. The Court was not only not ready to accept the argument that "separate but equal" could never really be equal, it was apparently even prepared to read *Gaines*[36] narrowly. Separate education did not even have to be equal in its quantifiable aspects. It was, in the words of Kluger, "the judicial ratification of tokenism."[37]

It is impossible, of course, to say definitively that this attempt to establish that separate legal educations could never be equal was in fact the cause of the unfortunate precedent created in *Sipuel.*[38] Perhaps the mistake was to press the point on the second trip to the Supreme Court. Clearly, the Court had signaled that it was not ready to go beyond *Gaines.*[39] Still, it was the theory rejected earlier in *Sipuel*[40] which became the foundation of the next litigation effort. Even in its rejection, then, the argument that separate professional schools cannot be equal may have served its function by laying important groundwork for future efforts. Marshall, at least with the benefit of hindsight, realized that the suggestion of such a theory without sufficient factual foundation should never have been expected to reap very concrete results. He apparently did not consider *Sipuel* to be a full-blown effort to establish the *per se* invalidity of segregation statutes as they applied to law schools. Rather, he wrote, it was in the next case, *Sweatt v. Painter,*[41] that "the necessary expert testimony to make a competent judgment of the validity of segregation statutes"[42] was developed. In that case, a black resident of Texas had been refused admission to the prestigious

32 R. KLUGER, *supra* note 21, at 259 (emphasis in R. KLUGER).
33 332 U.S. 631 (1948).
34 *Id.* at 633.
35 Fisher v. Hurst, 333 U.S. 147 (1948).
36 *See* note 23 *supra.*
37 R. KLUGER, *supra* note 21, at 260.
38 *See* note 33 *supra.*
39 *See* note 23 *supra.*
40 *See* note 33 *supra.*
41 339 U.S. 629 (1950).
42 Marshall, *supra* note 17, at 319.

School of Law of the University of Texas on the ground that the state had established another law school for blacks. In Marshall's words, the State had "made every effort to show that if it was not equal to the University of Texas law school insofar as physical facilities were concerned, it would be made equal in short order."[43] In this case, there was a strenuous effort to demonstrate that, no matter how similar the schools might become from the viewpoint of physical facilities or faculty, black students would still receive an inherently unequal legal education in a segregated school. As Marshall described the plan of attack:

> Experts in anthropology were produced and testified that given a similar learning situation a Negro student tended to react the same as any other student, and that there were no racial characteristics which had any bearing whatsoever to the subject of public education. Experts in the field of legal education testified that it was impossible for a Negro student to get an equal education in a Jim Crow law school because of the lack of opportunity to meet with and discuss their problems with other students of varying strata of society.[44]

An even better opportunity to establish the factual impossibility of delivering an equal graduate or professional education in a segregated environment arose simultaneously in *McLaurin v. Oklahoma State Regents.*[45] Here, the University of Oklahoma rejected the application of a sixty-eight-year-old black man for a Doctorate in Education. On the basis of the Supreme Court's ruling in *Gaines,*[46] the district court held that the State had a constitutional duty to provide him "with the education he sought as soon as it provided that education for applicants of any other group."[47] Oklahoma's response was to admit Mr. McLaurin but to require him "to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library . . . to sit at designated table and to eat at a different time from other students in the school cafeteria."[48] Thus, *Gaines* presented an opportunity to compare the relative educational opportunities afforded black and white students when the physical facilities were identical.

When *Sweatt* and *Gaines* came to the Supreme Court for argument at the same time, they clearly presented the issue of whether segregated professional education could ever really be equal. The proper doctrinal base had been established; the necessary judicial "education" had been given in the earlier cases; the records of the instant cases bristled with relevant testimony as to the effects of segregation at that level of education. The results were impressive. In *Sweatt,* Chief Justice Vinson, although still not convinced as to the physical equality of the schools, went on to write:

> Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground

43 *Id.*
44 *Id.* at 319-20.
45 339 U.S. 637 (1950).
46 *See* note 23 *supra.*
47 339 U.S. at 639, *citing* 87 F. Supp. 526, 528 (W.D. Okla. 1948).
48 339 U.S. at 640.

> for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[49]

With respect to the limitations placed on Mr. McLaurin, he wrote:

> The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.[50]

Marshall's ultimate success in the graduate school cases was the product of his pragmatic appreciation of the two basic principles set forth at the beginning of this section. Constitutional doctrine does unfold incrementally. Courts effect such shifts when, over the course of time, they are convinced that such changes are necessary to protect adequately the values protected by the Constitution. Courts are "educated" about that reality through the facts—"constitutional" and adjudicative—presented to them. At this point, Marshall had convinced the Supreme Court of the United States that professional and graduate students were not equally treated if they were separated in their academic environment. The most formidable task was ahead: to attain that same goal with respect to elementary schools. In the process, Marshall would again utilize these same basic litigation principles in a very different context.

C. *The Elementary School Cases*

In *Sweatt*[51] and *McLaurin,*[52] the NAACP had not assaulted the "separate but equal" doctrine of *Plessy* as a general proposition. Rather, it had taken the position that segregation in graduate and professional schools was unconstitutional because, as practiced in that context, equality for blacks was impossible. To provide the Court with the alternative argument—and plant the requisite seed for future cases—the NAACP arranged for a group of law professors from leading schools to present an amicus brief to the Court which would argue squarely that "separate but equal" was unconstitutional and that *Plessy* ought to be overruled. One hundred eighty-seven law professors from across the country signed this brief. They began:

> Laws which give equal protection are those which make no *discrimination* because of race in the sense they make no *distinction* because of race . . . . As soon as laws make a right or responsibility dependent solely on race, they violate the Fourteenth Amendment. Reasonable classifications may be made, but one basis of classification is completely precluded; for the Equal Protection Clause makes racial classifications unreasonable per se.[53]

49 *Sweatt,* 339 U.S. at 634.
50 *McLaurin,* 339 U.S. at 641.
51 *See* note 41 *supra.*
52 *See* note 45 *supra.*
53 R. KLUGER, *supra* note 21, at 274-76 (emphasis in R. KLUGER).

This dual stance followed the pattern of Marshall in the earlier cases of giving the Court a traditional basis for decision while simultaneously arguing for a further doctrinal advance. Even after the victories in *McLaurin*[54] and *Sweatt*,[55] Marshall proceeded cautiously. Chief Justice Vinson had indicated in his opinions in both cases that the Court was in no mood for sweeping doctrinal utterances about *Plessy*.[56] Thus, in the elementary school litigation, from trial to the formulation of the Supreme Court briefs, the courts, while given every opportunity to confront *Plessy* squarely, were also presented with the argument that segregation, as practiced in the public elementary and secondary schools, simply afforded blacks an unequal opportunity. Providing factual support for each of these theses presented special problems. As Marshall himself noted:

> It is relatively easy to show that a Negro graduate student offered training in a separate school, thrown up overnight, could not get an education equal to that available at the state universities. Public elementary and high schools, however, present a more difficult basis for comparison. They are normally not specialized institutions with national or even statewide reputations. Public school teachers at these levels are not likely to gain eminence in the profession comparable to that of teachers in colleges and universities.
>
> . . .
>
> Unfortunately, the effects of segregation in education have not been isolated for study by social scientists. They have dealt with the whole problem of segregation, discrimination and prejudice, and although no social scientist can say that segregated schools alone give the Negro feelings of insecurity, self-hate, undermines his ego, make him feel inferior and warp his outlook on life, yet for the child the school provides the most important contact with organized society.[57]

In short, it would be far more difficult to demonstrate factually that "separate but equal" can never be "equal" in public elementary education. *Sipuel* must have been a stark reminder that the absence of a strong factual basis can be disastrous. At the same time, the state of the social science evidence must have made Marshall acutely aware as he approached his task that all courts, including the Supreme Court, would become increasingly uneasy with social science data as its relevance became less obvious. Judicial mistrust of evidence from the social sciences is no doubt deeply rooted in the "case or controversy" requirement and the concomitant principle that, in a democracy, a court's legitimate capacity for fact evaluation ought to be limited to what it can ascertain through the adversary process. Marshall's presentation of the constitutional issue has been termed a "Brandeisian classic"[58] since, both at trial and before the Supreme Court, he incorporated social science data such as Dr.

54 *See* note 45 *supra*.
55 *See* note 41 *supra*.
56 In *Sweatt*, Vinson observed: "Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court." 339 U.S. at 631. For a similar statement in *McLaurin*, see 339 U.S. at 638.
57 Marshall, *supra* note 17, at 322.
58 Kaufman, *Thurgood Marshall: A Tribute from a Former Colleague*, 6 BLACK L.J. 23 (1978).

Kenneth Clark's famous experiment with the white and black dolls.[59] The success of this approach is probably seen in the famous finding of the district court in the *Brown* case[60] and is most definitely reflected in the famous footnote 11 in Chief Justice Warren's opinion in *Brown.*[61] Yet, an examination of the actual litigation makes it just as clear that Marshall's use of this material was, at all stages of the proceeding, measured. For example, his structure of the presentation of the evidence in the companion case, *Briggs v. Elliott,*[62] demonstrated an acute sensitivity to the traditional tolerance of judges with respect to social science material. It was presented only after evidence from more traditional sources had been offered. In the crucial development of the Supreme Court brief, Marshall likewise approached the area carefully, using most of the material in an appendix to the brief.

As one author has noted,[63] the famous footnote 11 in *Brown* was both a culmination and a beginning. Throughout the school litigation, Marshall had carefully fused the requirement of the judicial process for gradual doctrinal development through case-by-case adjudication and its need to root constitutional doctrine firmly in the values and the needs of contemporary society. His orchestration of the school desegregation cases demonstrated how the courts can "be the voice of the spirit, reminding us of our better selves"[64] without compromising the legitimate restrictions which a democratic society places on a politically unresponsive judiciary. In the years since *Brown,* this contribution has served the Court and the constitutional litigator well. Whether one agrees or disagrees with a particular result or with the Court's ideological direction at a given moment, there can be little doubt that today's constitutional cases are litigated with far more concern for the real societal impact of doctrinal development.

III.

Thurgood Marshall continues to give both bench and bar a further lesson in the art of making the constitutional decision-making process reflective of societal values. As a Justice, he has not forgotten the lessons of *Brown.* He continues to demonstrate a unique perception of the Court's subtle, gradual doctrinal shifts. Marshall was among the first on the Court to perceive the necessity for a more refined two-tiered equal protection analysis.[65] His opinion in *San Antonio Independent School District v. Rodriguez*[66] manifests an acute perception of the Court's unarticulated, perhaps semiconscious movement toward the now

59 *See, e.g.,* K. Clark, *Effect of Prejudice and Discrimination on Personality Development,* REPORT FOR MID-CENTURY WHITE HOUSE CONFERENCE ON CHILDREN AND YOUTH, CHILDREN'S BUREAU—FEDERAL SECURITY AGENCY (1950). For a critique of the "doll experiment," see Cahn, *Jurisprudence,* 30 N.Y.U. L. REV. 150 (1955); van den Haag, *Social Science Testimony in the Desegregation Cases: A Reply to Professor Kenneth Clark,* 6 VILL. L. REV. 69 (1960).

60 98 F. Supp. 797, 800 (D. Kan. 1951).

61 347 U.S. 483, 494 n.11 (1954).

62 This case was decided with *Brown.*

63 Hesburgh, *supra* note 3, at 7.

64 A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 117 (1976).

65 *See* Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting).

66 411 U.S. 1 (1973).

well-established "sliding-scale" analysis of governmentally imposed classifications.

However, it is with respect to the second basic principle—the need to inform the Court of the real impact of its decision—that Mr. Justice Marshall has excelled. His abilities in this area and his consequent impact on the judicial process have not been unnoticed by his colleagues. The Chief Justice noted recently that "[t]o his [Marshall's] working knowledge of legal craftsmanship he adds a practical, commonsense understanding of the law in relation to its ultimate objectives."[67] In a similar vein, a former colleague, Judge Irving R. Kaufman, of the United States Court of Appeals for the Second Circuit recalled:

> My most abiding memory of Thurgood on this court was his ability to infuse his judicial product with the elements of the advocate's craft. As an attorney Thurgood stressed "the human side" of the case. As a judge he wrote for the people. (And would not we all be enriched if more judges exhibited this concern for the consumer?) He possessed an instinct for the critical fact, the gut issue, born of his exquisite sense of the practical. This gift was often cloaked in a witty aside: "There's a very practical way to find out whether a confession has been coerced: ask, how big was the cop?" But behind this jovial veneer is a precise and brilliant legal tactician who, to quote his 1966 Law Day speech in Miami, was able "to shake free of the 19th century moorings and view the law not as a set of abstract and socially unrelated commands of the sovereign, but as an effective instrument of social policy." Thurgood was able to sear the nation's conscience and move hearts formerly strangled by hoary intransigence. And, because of him, we are all more free.[68]

With respect to the adjudicative facts, he has demonstrated an unique ability to make the record come alive in the marble chamber of the Supreme Court. For instance, during the oral argument in *Haines v. Kerner,*[69] a case which dealt with conditions in a prison's solitary confinement facility, [70] counsel for the State referred to the arrangement as "administrative segregation or . . . corrective measures."[71] Marshall interrupted in mid-sentence: "Or the hole."[72] The point was made. In similar fashion, dissenting in *Dukes v. Warden*[73] on the ground that the record clearly demonstrated a conflict of interest on the part of petitioner's counsel,[74] Marshall deftly dissected the trial record to support his point.

Still, it is when he is dealing with "constitutional facts" that Marshall's unique appreciation of the constitutional litigation process is most evident. Indeed, at times, he seems to be consciously attempting to assist his brethren in understanding those facets of American life upon which their decisions impact

67 Burger, *Introduction to a Symposium in Honor of Mr. Justice Marshall,* 6 BLACK L.J. 1 (1978).
68 Kaufman, *supra* note 58, at 25.
69 404 U.S. 519 (1972) (per curiam).
70 In a short *per curiam,* the Court remanded the case on the ground that the district court had erred in granting the State's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(6). *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957).
71 Haines v. Kerner, 404 U.S. 519 (1972) (per curiam), Tr. Oral Arg. 30.
72 *Id.*
73 406 U.S. 250 (1972).
74 406 U.S. at 259-71.

but about which some[75] have little firsthand knowledge. In *United States v. Kras,*[76] for example, the Court held that an indigent could be required to pay a fee to file a voluntary petition in bankruptcy. Dissenting, Marshall wrote:

> It may be easy for some people to think that weekly savings of less than $2 are no burden. But no 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 may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as Kras must do.
>
> 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.[77]

Yet, despite his deep interest in seeing constitutional doctrine reflect the realities of American life, Marshall has recognized, for the most part, the limitations of the judicial process. His deep feelings for the rights of minorities rarely impede his adopting "a reasoned approach to Constitutional problem-solving."[78] In his address to the Conference on World Peace Through Law, he noted that the legitimacy of the judicial process is grounded in the tradition that "unlike the other branches of government, judges are required to give reasons for their decisions and to justify those decisions by reference to some broader principle."[79] Consequently, in *Powell v. Texas,*[80] he refused to hold that a " 'person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease.' "[81] Remembrances of *Sipuel* must have crossed his mind as he wrote:

> The difficulty with that position . . . is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared

75 It would be a great mistake to characterize the rest of the present Supreme Court as having no extra-judicial exposure to poverty or to civil rights concerns. The early public career of Mr. Justice White is perhaps the best example.

76 409 U.S. 434 (1973).

77 *Id.* at 460.

78 Burger, *supra* note 67.

79 Address by Justice Thurgood Marshall to the Conference on World Peace Through Law, Abidjan, Ivory Coast, 1973, *quoted in* Bazelon, *Humanizing the Criminal Process: Some Decisions of Mr. Justice Marshall,* 6 BLACK L.J. 3, 8 (1978).

80 392 U.S. 514 (1968).

81 *Id.* at 521, *quoting* the dissenting opinion of Mr. Justice Fortas, *id.* at 569.

> adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.
>
> Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease."[82]

On the Bench, then, Marshall remains very much the same person he was as a litigator. He retains an ability to gauge instinctively the pragmatic limits of judicial power. He insists that constitutional doctrine be based on reality. This daily insistence on attention to the *basics* of constitutional litigation makes him a model for those who now bring to the courts the causes of the unborn, the physically handicapped, the mentally ill and others for whom sterile constitutional analysis of the *Plessy* variety remains a formidable barrier.[83]

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82 392 U.S. at 521-22.

83 Of course, in his own digestion of "constitutional facts," Marshall has not been without his lapses into a sort of judicial tunnel vision. His assessment of the Court's holding in Beal v. Doe, 432 U.S. 438 (1977), is reminiscent of Holmes' callous language in Buck v. Bell, 274 U.S. 200 (1927) with respect to "three generations of imbeciles." In *Buck,* Holmes wrote:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

274 U.S. at 207.

Marshall wrote in *Beal*:

> The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives in foster homes, orphanages, and "reform" schools. . . . Many children of the poor, sadly, will attend second-rate segregated schools. . . . And opposition remains strong against increasing Aid to Families With Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. . . . I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children.

432 U.S. at 456 (Marshall, J., dissenting).