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Pace Jefferson McConkie

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DEDICATION TO THURGOOD MARSHALL

PACE JEFFERSON McCONKIE*

Volumes have been written on the life and works of Thurgood Marshall. Still, his twenty-four year tenure on the United States Supreme Court, his courageous and remarkable career with the National Association for the Advancement of Colored People and the NAACP Legal Defense and Educational Fund, Inc., and his private commitment to family and human dignity far exceed whatever has been penned by deeply grateful admirers and objective observers alike. He was a giant of a man in both stature and character. His works fall nothing short of heroic. In the end, however, his accomplishments stand for one solid conclusion - simple justice.

It is fitting that this issue of the *Denver University Law Review* is dedicated to one whose influence upon the developments of federal law has already proved to be lasting and profound. The term "developments" is carefully chosen, for ours is a legal system of growth, maturation and improvement. Understanding this, Thurgood Marshall decided early to be a social engineer rather than merely a lawyer and he used the law itself to develop and gravitate a legal society in the direction it was required, by Constitutional mandate, to go. In turn, he did "not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention."¹ Instead he looked to the Constitution's "promising evolution through 200 years of history" and recognized that the founders who gathered in Philadelphia in 1787 "could not have imagined, nor would they have accepted, that the document they were drafting would one day be construed by a Supreme Court to which had been appointed a woman and the descendant of an African slave."²

Since his retirement from the high Court in 1991, and again following his death on January 24, 1993, many have paid tribute to Justice Marshall. These tributes, all eloquent and appropriate, have come in various forms and from a diversity of sources including those at the highest levels of government. Perhaps none, however, can match in simplicity and dignity the tribute paid by a young teenage girl who, on a historic September morning in Little Rock, Arkansas, stood alone against the Arkansas National Guard and a beastly cruel white mob outside Central High School in 1957.

Elizabeth Eckford, one of the black students known as the "Little Rock Nine" chosen to integrate Central High, had excitedly pressed the

* Ass't General Counsel, NAACP; B.A. University of Utah, 1984; J.D. University of Arkansas at Little Rock, 1987.

1. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

2. *Id.* at 5.

black and white dress she made for the first day of school. Unaware that the other eight children were gathered at the home of Ms. Daisy Bates, president of the Arkansas State Conference of NAACP Branches, for a police escort to Central, Elizabeth set off for school alone. Refusing to be turned away by the large crowd which had gathered on the school grounds, Elizabeth walked on towards the guardsmen in hopes of both protection and admission to the school. With steely bayonets raised, the guardsmen only served to turn her back, unprotected, to the jeering mob.

As the crowd closed in around Elizabeth, she endured indignities and hurt unimaginable to most of us but unforgettably familiar to some. She was spat upon and scorned. Unrelenting racial slurs were hurled against her. Cries of "lynch her," "nigger bitch" and "drag her over to this tree" numbed her until she could only sit down in despair on a bus stop bench, tears streaming down her cheeks from under her sunglasses. Finally, she was whisked away by a Pulitzer prize winning editor of *The New York Times* and a compassionate woman crying shame at the crowd. Daisy Bates later wrote:

In the ensuing weeks Elizabeth took part in all the activities of the nine — press conferences, attendance at court, studying with professors at nearby Philander Smith College. She was present, that is, but never really a part of things. The hurt had been too deep.

On the two nights she stayed at my home I was awakened by the screams in her sleep, as she relived in her dreams the terrifying mob scenes at Central. The only times Elizabeth showed real excitement were when Thurgood Marshall met the children and explained the meaning of what had happened in court. As he talked, she would listen raptly, a faint smile on her face. It was obvious he was her hero.³

Thurgood Marshall was a hero to many, but especially to those such as Elizabeth Eckford and the countless "freedom fighters," young and old, who have served in the trenches of this nation's civil rights battles. In this regard, a former law clerk and personal friend eulogized Justice Marshall in these words:

From poor sharecroppers in Mississippi who sought the right to vote, to frightened parents in Little Rock who asked only for the right to a decent education for their children, the clarion call of hope sounded when Americans oppressed by racial de-termination heard the words — "The lawyer is coming." Justice Marshall's arrival at the Supreme Court in 1967 changed more than the complexion of the men sitting around the Friday conference table. He changed the nature and focus of the debate — both because he was at the table and because he spoke from the heart for the humble people who could not

3. DAISY BATES, *THE LONG SHADOW OF LITTLE ROCK* 72 (1962 ed.).

be there to speak for themselves.⁴

Though twenty-four years an associate justice of the United States Supreme Court, two years the Solicitor General of the United States and four years a judge on the U.S. Court of Appeals for the Second Circuit, Thurgood Marshall's most significant triumphs came as a NAACP lawyer. The landmark opinion in *Brown v. Board of Education of Topeka*⁵ culminated years of NAACP litigation to eradicate the separate but equal doctrine of *Plessy v. Ferguson*,⁶ with its massive inequalities, and abolished this country's segregated and discriminatory system of public education at all levels.

In the mid 1930s, under the direction of his legal mentor and former law professor, Charles Hamilton Houston, Marshall and the NAACP represented Donald G. Murray, a black graduate from Amherst College, in his successful suit to gain admission to the University of Maryland Law School, the same institution which had earlier denied a legal education to Marshall solely because of his race.⁷ Two years later, Houston and Marshall challenged a Missouri Supreme Court opinion which held that because law schools in surrounding states accepted black students, a black citizen of Missouri was not denied his constitutional rights to equal protection under the law upon exclusion from the state supported law school in Missouri. In *Missouri ex rel. Gaines v. Canada*,⁸ the U.S. Supreme Court ruled that black students constitutionally could not be put to the burden of having to leave the state to attend graduate or professional schools and that Missouri could not furnish white students educational opportunities and deny the same to black students solely upon the grounds of race or color. During Houston's oral argument of this case, Justice James McReynolds turned his back on the NAACP attorney and stared at the wall of the courtroom.

In 1946, Ada Lois Sipuel was denied admission to the University of Oklahoma Law School because of her race. Thurgood Marshall led the NAACP efforts to secure her a legal education afforded by a state institution.⁹ Today, Ms. Sipuel sits as a distinguished member of that institution's Board of Regents. Marshall continued with such cases as *Sweatt v. Painter*¹⁰ outlawing segregation by way of a separate and unaccredited law school for blacks in Texas, emphasizing equality in the educational opportunities offered white and black law students by the state; *McLaurin v. Oklahoma State Regents for Higher Education*¹¹ banning segregation and differential treatment at the graduate school level, where G.W. McLaurin had been "required to sit apart at . . . designated desk[s] in an

4. Karen Hastie Williams, *Inspired Those He Touched . . . Every American*, WASH. POST, Jan. 29, 1993, at A15.

5. 347 U.S. 483 (1954).

6. 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

7. *Pearson v. Murray*, 182 A. 590 (Md. 1936).

8. 305 U.S. 337 (1938).

9. *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948).

10. 339 U.S. 629 (1950).

11. 339 U.S. 637, 640 (1950).

anteroom adjoining the classroom . . . [and] on the mezzanine floor of the library . . . and to sit at a designated table and to eat at a different time from the other students in the school cafeteria"; and *Florida ex rel. Hawkins v. Board of Control*¹² where Virgil Hawkins was entitled to prompt admission to graduate professional school under the rules and regulations applicable to other qualified candidates.

By 1950, Thurgood Marshall and his cadre of NAACP lawyers had logistically turned their full attention to state-imposed racism and segregation at the elementary and secondary levels of public education. Of the five cases later to become known as *Brown v. Board of Education*, four were handled and sponsored by the NAACP (the South Carolina, Topeka, Ka., Virginia, and Delaware cases). The fifth case, out of the District of Columbia, was financed by a local organization known as the Consolidated Parents, Inc. Its attorneys, however, were all members of the NAACP legal committee. After years of meticulous planning, strategy and litigation, the NAACP had finally engineered its cases to the crushing defeat of the *Plessy* doctrine.

The significance of Thurgood Marshall's triumph in *Brown* cannot be overemphasized. It shook the very moral fibre of this country and its public institutions. It crumbled the foundation of segregation. It finally established as the supreme law of the land that in the field of public education, the doctrine of separate but equal has no place, that separate is inherently unequal, and that the segregation complained of deprived the black plaintiffs and those similarly situated of the equal protection of the laws guaranteed by the Fourteenth Amendment. It established the constitutional basis for the democratic ideal of equal opportunity for all Americans regardless of race or color and guaranteed protection from the highest court in the land in the pursuit of those opportunities and rights.

On May 22-23, 1954, NAACP representatives met with Thurgood Marshall in Atlanta, Georgia to develop a legal program "to meet the vital and urgent issues arising out of the historic United States Supreme Court decision of May 17 banning segregation in public schools."¹³ The NAACP there rededicated itself to the removal of all racial segregation in public education "without compromise of principle" and stated that "[t]he total resources of the NAACP will be made available to facilitate this great project of ending the artificial separation of America's children on the irrelevant basis of race and color."¹⁴ From that point in time, the NAACP legal program swept through the officially segregated South with extensive litigation in that region's school districts. Its attention was then turned northward and westward with successful and far reaching litigation in cities such as Dayton and Columbus, Ohio and Detroit, Michigan.

The impact of *Brown* extended well beyond the field of public edu-

12. 350 U.S. 413 (1956).

13. NAACP, ATLANTA DECLARATION (1954), reprinted in, 86 THE CRISIS 198 (1979).

14. *Id.*

cation. For the first time, the long and unremitting struggle for civil rights had reached the possibility of eliminating "separate but equal" from all phases of society; including voting, reapportionment, housing, employment, transportation and public accommodations. Certainly, the aftermath of *Brown* also led to the major Civil Rights, Voting Rights, Equal Employment and Equal Housing statutes of the 1960s.

To link these civil rights milestones to the legacy of Thurgood Marshall and *Brown* is entirely appropriate. After years of successful civil rights litigation not limited to public education alone, *Brown* served to open the floodgates. Thurgood Marshall's other significant victories included, among others: *Smith v. Allwright*,¹⁵ which invalidated the voting practice of "white primaries" and gave blacks the right to vote in Democratic party primary elections; *Morgan v. Virginia*,¹⁶ outlawing segregation in interstate travel; and the combined cases of *McGhee v. Sipes* and *Shelley v. Kraemer*,¹⁷ declaring racially restrictive covenants in housing unconstitutional. Another eulogy delivered at Justice Marshall's funeral service effectively reminds us of how he influenced and shaped the whole of America's society. Looking directly at the President of the United States who was seated on the front row, William T. Coleman, Jr. asked whether a "son of Arkansas" would be in that position today if Thurgood Marshall had not been successful in his efforts to make southern institutions equal:

Please do not think us ingracious when we wonder how a son of Arkansas would be here if Thurgood Marshall in that hot summer of 1958 had lost, not won, the Little Rock school case? Would you be here if Marshall had lost, not won, the important voting rights cases? Could there be a Cabinet reflective of the American people if Marshall had lost *Brown v. Board of Education* or the voting rights case?¹⁸

On the Supreme Court, Justice Marshall was no less distinguished. This is particularly true with regard to his commitment to the rights of the individual and the especial protection of the rights of minorities, women, the poor, the powerless and the disadvantaged. On various issues, he wrote over 300 majority opinions for the Court and never relented in the face of apparent retrenchment by the Court of the civil rights agenda. "This retrenchment . . . caused Justice Marshall's dissents to escalate from a total of 19 in his first five years, while Earl Warren was Chief Justice, to a total of 225 in the [first] five years [after] William Rehnquist became Chief Justice."¹⁹

Some of Justice Marshall's key decisions include *Amalgamated Food*

15. 321 U.S. 649 (1944).

16. 328 U.S. 373 (1946).

17. 334 U.S. 1 (1948).

18. Joan Biskupic, *One 'Whose Career Made Us Dream Large Dreams,'* WASH. POST, Jan. 29, 1993, at A1 (eulogy delivered by William T. Coleman, Jr.).

19. A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 55, 65 n.55 (1991).

Employees Union Local 540 v. Logan Valley Plaza,²⁰ where he wrote for the majority to secure the rights of union organizers to picket in front of a supermarket; *Stanley v. Georgia*,²¹ where the Court recognized the state's broad power to regulate obscenity but refused to extend it to the mere possession by the individual in the privacy of his own home; *Gregg v. Georgia*,²² dissenting from the Court's reinstatement of the death penalty following its four year ban after *Furman v. Georgia*;²³ *Regents of the University of California v. Bakke*,²⁴ writing separately to applaud the Court's judgment that a university may consider race as a factor in its admission process but expressing dissent and irony that, after hundreds of years of class-based discrimination against blacks, the Court was unwilling to hold that a class-based remedy for that discrimination is permissible; and *Rostker v. Goldberg*,²⁵ dissenting from the decision that upheld the discriminating rule requiring men, but not women, to register for the draft, thereby excluding women from a fundamental civic obligation.

Perhaps most representative of Justice Marshall's career on the bench and at the bar is his dissent in *Milliken v. Bradley*.²⁶ The Court there overturned a ruling that required suburban school districts to participate in a cross-district plan to desegregate the Detroit public schools that were 80% to 90% black. In essence, the Court retrenched from the "all out," "root and branch" desegregation remedial standard of *Brown* and its progeny to instigate a "nature and extent of the violation determines the scope of the remedy" principle. The result, however, would leave many schools segregated. Justice Marshall wrote:

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. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. 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.²⁷

Americans of all races and from all walks of life owe a great debt to Thurgood Marshall. His vision, courage and competence established a

20. 391 U.S. 308 (1968), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

21. 394 U.S. 557 (1969).

22. 428 U.S. 153 (1976).

23. 408 U.S. 238 (1972).

24. 438 U.S. 265 (1978).

25. 453 U.S. 57 (1981).

26. 418 U.S. 717 (1974).

27. *Id.* at 814-15.

legacy in law and justice that touches us all. His legacy will continue, but only as long as those of us who cherish the Constitution and its guiding principles recognize the end for which it was established—equal justice under law—and use the power of the law as effectively and judiciously as he did to ensure that this “end” is a reality for those who have long been denied the dignity of both equality and justice.

