Thurgood Marshall

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John P. Martin

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The US Capitol has many statues of historical figures, including one of Roger Taney, a US Supreme Court Justice from Maryland. Taney wrote the majority opinion in the infamous 1857 *Dred Scott* decision which held that Black people were not US citizens and accordingly free and enslaved blacks had no rights under the US Constitution.

On December 14, 2022, the US Congress, in a sign of unusual bipartisanship, unanimously approved legislation that the Taney statue be removed and replaced with a statue of another Supreme Court Justice from Maryland: Thurgood Marshall.

Marshall was born in Baltimore on July 2, 1908, 51 years after the *Dred Scott* decision, and at time when Maryland law mandated racial segregation in toilets on trains and ships and in a year where 89 black men were lynched in the United States. Many of Baltimore's retail stores would not allow entry by blacks; some clothing stores would sell to blacks but not allow the customer to try on the clothes.

Of Marshall's 4 grandparents, 3 were free blacks at the time of the Civil War, while his paternal grandfather was a slave in Virginia.

Marshall grew up in an integrated middle-class neighborhood. His next-door neighbor was a white family. His mother was a teacher and his father worked as a waiter on the railroad.

At age 7, and long before the advent of Grub Hub type delivery services, Thurgood got a job working for a local grocer delivering food to customers on his red wagon.

Thurgood attended segregated elementary and high schools. Unlike the white high school, the "Colored High and Training School" had no library, no cafeteria, and no gym. Despite the lack of facilities, with the encouragement of his parents, Thurgood was a good student and the captain of the debating team.

While a good student, Thurgood also had a reputation for being a mischievous teenager. As punishment for some misbehavior, the principal sent him to the basement and required him to memorize the US Constitution. Thurgood later said that before he left school that day "I knew the whole thing".

After graduating from high school, Thurgood enrolled at Lincoln University, a small black college in Pennsylvania with an all-white faculty.

Thurgood enjoyed college, rarely missing a party. He joined the debating team and a fraternity. In his sophomore year, he followed a fraternity ritual and grew a mustache, which he kept for the rest of his life. In the summers, he worked as a waiter at an all-white county club.

On a weekend trip to Philadelphia, Thurgood met 17-year-old Vivian Burey, a student at the University of Pennsylvania. They were married in 1929; she went to live with his parents, and he went back to Lincoln to finish school.

Thurgood wanted to go to law school, but the schools available were limited. His ideal school would have been the University of Maryland law school, but it only admitted white students. (Later in life, before being the lead attorney who convinced the US Supreme Court to integrate primary and secondary schools, Thurgood led the fight to integrate law schools and other graduate schools, including the Maryland law school.)

In 1930, Thurgood, with tuition money from his job as a waiter and money contributed by his mother from her pawned wedding and engagement rings, enrolled at all black Howard University Law School in Washington DC. Thurgood could not afford to live on campus, so he commuted by train from Baltimore.

In his spare time, he went to the Supreme Court to listen to oral arguments by the attorneys. Among other lawyers, Thurgood was able to watch in action the premier appellate lawyer of his day, John W. Davis. Later, Thurgood would appear in the same Supreme Court with Davis as his opposing counsel in what many believe is the most important case in the 20th Century.

Graduating in June of 1933 and first in his class, Thurgood faced even more challenges in finding a job than most law graduates: it was the height of the Depression and white law firms in the DC area did not hire black lawyers.

After passing the bar exam, Thurgood hung up his shingle and began a solo practice. He packed a lunch from home--his parents' home where he and Vivian lived.

Like many young lawyers, Thurgood took about any case that came in the door: divorce, personal injury, and criminal defense. Over time, Thurgood developed a reputation as a skilled advocate for his clients. Among other cases, Thurgood represented a black man facing murder charges of killing a white man; he convinced the all-white jury to find his client guilty of only manslaughter and a 6-month sentence.

In 1934, a black man, Kater Stevens, was driving in Maryland with his wife and was involved in an accident with a car driven by a white woman. Stevens was arrested at the scene for reckless driving. While being transported to the county jail by a police officer, Stevens was

shot and killed by the officer. The officer claimed that when he stopped at a traffic light, Stevens tried to escape and while the officer was in pursuit, he said he tripped and the gun discharged fatally striking Stevens in the back.

An eyewitness account contradicted the officer's story. The eyewitness claimed that the officer chased Stevens into an alley and shot him 4 times (of course, in 1934, there were no cameras to record what happened.)

A subsequent autopsy report also contradicted the officer's story: the bullets struck Stevens in the front and not the back.

At the request of the local NAACP office, Marshall became involved in the case, lobbying the governor and the local prosecutor to bring criminal charges against the officer. Charges were brought, and although there was considerable evidence to support a conviction, the jury returned a not guilty verdict. While disappointed, Marshall and his co-counsel were not finished; a civil lawsuit for wrongful death was filed against the officer. This time the jury found the officer liable and awarded $2500 in damages. In a letter to the NAACP, Marshall said that the amount of the award was "far beyond our fondest hopes", and while they may never collect the judgment, it was a "moral victory".

As young lawyers learn quickly, you do not win all cases. Marshall represented a black man who was found guilty of murder and received the death sentence. Marshall later as a Justice of the Supreme Court was a vigorous opponent of the death penalty.

After graduation, at the request of the NAACP, Marshall and the Dean of the Howard Law School took a fact-finding trip to seven Southern states to document the status of segregated schools. Marshall, who attended substandard segregated schools in Baltimore, was

shocked at the condition of the Southern schools: dilapidated buildings with holes in the roof and dirt floors that turned in to mud with the rain. Later in his life, Marshall would make the case in court that these schools were not "separate but equal".

While struggling to establish his practice, Thurgood took on his first case challenging school segregation: the University of Maryland Law School, the same school which was not available to a young Thurgood to attend. In 1935, as co-counsel with Charles Houston, they represented Donald Gaines, a black well qualified applicant who had been denied admittance because of his race.

Marshall and Houston had to consider what was the law of the land at the time: the "separate but equal" doctrine established by the 1896 Supreme Court case *Plessy v Ferguson*. In *Plessy*, Louisiana law required that trains have separate cars for white and black passengers. After a black man, Homer Plessy, sat down in the white car and refused to leave, he was arrested.

Homer's attorneys cited the equal protection clause of the 14th Amendment and argued that mandating segregation by race in the cars violated the equal protection clause and had the effect of branding black people as inferior. The US Supreme Court disagreed, saying separating people by their race was "reasonable" and further dismissed the argument that segregation had any harmful effects on blacks.

According to the *Plessy* court, separating the races is permitted, and as for those train cars, if the black and white cars are "equal", there is no violation of the equal protection clause. Marshall spent much of his career taking cases where the issue was whether segregated

schools were equal, and then in the *Brown v Board of Education* case, he renewed the argument that segregation had the effect of branding black school children as inferior.

When Donald Gaines was denied entry to the Maryland Law School because of his race, the school officials could not suggest he apply to the Maryland black law school, because no such school existed. Rather, the officials suggested he go to an out of state black law school, and Maryland would pay the tuition.

Marshall and Houston argued that given the absence of a Maryland law school, there could be no "equal" black law school. As for the option of an out of state law school, such a school could not offer the equivalent of a Maryland Law School in preparing a student to practice in Maryland.

The courts agreed with Marshall and Houston and ordered the Maryland Law School to admit Gaines as a student. Under *Plessy,* separation of the races is permitted, but only if the separate train cars, or in this case law schools, are equal.

Marshall's law practice was generating little income, and he decided to make a career change. In a decision that ultimately contributed to a radical change in American constitutional law, at the age of 28, Marshall took a job as an attorney for the NAACP in New York. Vivian and Thurgood moved in with his mother's sister in an apartment in Harlem. The starting salary was $2400.

Marshall thus began a long career as an attorney for the NAACP defending blacks unjustly charged in criminal cases, some facing the death penalty, and bringing civil lawsuits against state and local authorities with respect to segregated schools.

Marshall always faced the threat of violence while travelling in the South. On one trip Marshall found himself in Hernando Mississippi, and hungry and with a two-hour layover waiting for a train to his next destination. The only restaurant in town did not allow blacks to be seated for dining but allowed blacks to receive carryout from the back of the kitchen. While waiting for his food, a white man with a gun confronted Marshall, asking him why he was in the town. After he explained he was waiting for the train, the man told him the train arrived at 4:00pm, and Marshall better be on it, because "the sun is never going down on a live [n word} in this town." Marshall made the 4:00pm train.

A much more dangerous trip occurred in Columbia, Tennessee in 1946. Marshall had gone to Tennessee to represent black men charged with crimes arising from race riots that erupted when white mobs had attacked black neighborhoods. While not an easy task to defend black men in the South in front of an all-white jury against charges of shooting white police officers, Marshall and his co- counsel were successful: One of the defendants was found not guilty while the other defendant was found guilty of a lesser charge.

After the trial, Marshall and two other defense lawyers left town quickly with Marshall at the wheel of a car. The car was pulled over by sheriff's deputies, and what happened next could the subject of a John Grisham novel. All the details of how Marshall narrowly escaped a lynch mob are in the Juan Williams biography of Marshall.

Another criminal case that brought Marshall to Florida was the infamous Groveland Four case, which was the subject of Gilbert King's Pulitzer Prize winning book *Devil in the Grove*.

We all know the court room scene in *To Kill a Mockingbird* where Atticus Finch defends Tom Robinson from an accusation of rape. The Groveland case can be described as a 20th Century version of the novel, but only real.

Marshall's direct involvement in defending one of the accused did not begin until after the following had occurred: an accusation of rape by a white teenager against two black men and two black teenagers; two of the defendants narrowly escaped being lynched; three of the defendants were beaten in order to obtain confessions; one of the accused was killed by a mob before a trial; the three remaining defendants were convicted, with two defendants receiving the death penalty and the sixteen year old defendant received a life sentence. (And later, a local NAACP official's house was bombed which killed him and his wife.)

The NAACP successfully appealed the convictions of the two death penalty cases and the Supreme Court granted new trials for the defendants. Marshall was preparing to represent the two defendants in the retrial when two suddenly became one. The Sheriff, a notorious racist, while transporting the hand cuffed defendants in his car, shot them both numerous times claiming they were trying to escape. One defendant, Walter Irvin miraculously survived five shots.

Marshall was the lead defense counsel for Irvin in the retrial. The jury panel included three prospective black jurors, but the prosecutor used what are known as peremptory challenges to strike the three prospective black jurors, with the result that an all-white jury would decide Irvin's fate. As for spectators in the court room, blacks could sit only in the balcony.

Marshall's defense included evidence that clearly contradicted the state's case, but the jury came back with the same verdict: guilty and the death sentence.

Marshall appealed the verdict again to the Supreme Court, but this time the court denied the appeal. (Up to this point, Marshall had argued thirty-two cases before the Supreme Court and only lost three, although two of the three had been death penalty cases.) Fortunately for Irvin, there was a new Florida governor, Leroy Colins. Collins was a somewhat progressive "New South" governor. He took trips to New York promoting Florida and urging businesses to re-locate to Florida. Marshall and the NAACP led the successful efforts to convince the Governor to commute Irvin's sentence to life in prison.

What was amazing was that Marshall, while handling the Groveland case, was also preparing in Washington DC for oral argument in the *Brown v Board of Education* case and attending to his wife who was terminally ill in New York.

Schools were not the only facilities that were the subject of legal segregation. When looking to buy a house, blacks were excluded from certain white neighborhoods because of what are called "restrictive covenants".

Restrictive covenants are commonly used in land development. If you live in a subdivision, your lot may be subject to covenants that prohibit you from adding a fence or a pool or operating a business out of your home. In some neighborhoods, the covenants included a prohibition on selling your property to blacks.

The federal government, through the FHA, had encouraged segregated housing, even going so far as to provide model language for drafting racial covenants and restrictions.

Lawsuits were filed challenging the constitutionality of racial covenants. Although these covenants were between private parties, and the Supreme Court had already ruled the covenants themselves did not violate the equal protection clause, Marshall and his co-counsel argued that enforcement of the covenants by state courts did represent a denial by the state of equal protection of prospective black purchasers of property.

Brilliant argument and the Supreme Court agreed: the covenants were not enforceable by the courts and could no longer prevent blacks from purchasing the property.

As a young lawyer reviewing land records for purposes of rendering a title opinion, I was surprised to find such racial covenants in some old neighborhood in Fort Wayne. I was easily able to tell my clients such covenants were not enforceable. Questor Connie Haas Zuber, the Executive Director of ARCH, gave an informative lecture last Saturday on racial covenants and discrimination in housing in Fort Wayne.

Brown v Board of Education

Prior to the *Brown* case, Marshall and the NAACP won many cases arguing that segregated professional and graduate schools were in violation of the equal protection clause because the black schools were not equal to the white schools.

Marshall and the NAACP realized that despite winning these cases, there were two significant shortfalls: First, these cases involved college level education, not primary and secondary schools; and Second, challenges to segregated schools, based on the separate but equal doctrine, required multiple lawsuits in multiple locations over a long period of time.

In 1950, the NAACP decided to make a direct attack on state sponsored segregation and seek the overruling of *Plessy*, and even more important, the lawsuits brought would seek the integration of primary and secondary schools. In contrast to graduate schools, where attendance is voluntary and with a limited number of students, public primary and secondary education is compulsorily and universal. There were seventeen states that required segregation of schools and four states that authorized local schools to discriminate.

Lawsuits seeking to end segregated schools were filed in four states. When the Supreme Court decided to hear the cases, they were consolidated under the name of *Brown v Board of Education*.

Marshall was the lead lawyer for the plaintiffs in the South Carolina case and he and the NAACP coordinated the work of the lawyers in the other states.

The South Carolina case began in the federal courthouse in Charleston South Carolina, at the corner of Meeting and Broad streets (I had a painting of that building in my office for many years). Marshall did not simply rely on legal arguments involving cases interpreting the 14th Amendment. Marshall also called as witnesses social scientists, including a black sociologist named Kenneth Clark, whose work involved black children and dolls. In Clark's experiments, Clark showed black children four dolls, two white and two black, and asked them a series of questions. Which doll do you like better? Which doll is nice? Which doll has a nice color? Which doll looks bad? According to Clark, the black children preferred and liked the white dolls, which reflected a feeling of inferiority and hostility towards themselves and others, which in Clark's opinion resulted from segregation and discrimination.

The State of South Carolina admitted its black schools were not equal to the white schools, but said state was prepared to make the black schools equal, so just give us more time to satisfy the "separate but equal" standard. Marshall responded by showing the schools were egregiously unequal and presented testimony by Clark and others as to harmful effects that segregation had on black children.

Who was on the Supreme Court in 1954 when the final arguments in *Brown* were heard? Among others: Robert Jackson, who in 1945 was appointed the chief prosecutor of Nazi war criminals at the Nuremberg trials; Hugo Black, from Alabama and a former member of the Ku Klux Klan; the recently appointed Chief Justice, Earl Warren, the former governor of California who had been a big supporter of FDR's internment of Japanese Americans in WWII; and a Hoosier, Sherman Minton, who had undergraduate and law degrees from Indiana University, and who also played on the IU football team. (IU Law Bloomington grads will recognize his name adorning the Moot Court Competition).

To defend itself in the Supreme Court, South Carolina hired the nation's preeminent appellate lawyer, and one known by Marshall: John W Davis. While in law school, Marshall had skipped classes to go to the Supreme Court to hear Davis argue cases. Davis, who was 79 years old and the founder of an elite New York City law firm, had argued more cases in front of the Supreme Court than any other lawyer other than Daniel Webster.

Davis made what many court observers thought was a wining argument: stare decisis, based on the *Plessy* case. The court had tolerated if not approved "separate but equal" for many years. In addition, at the time the 14th Amendment was adopted, no one thought it

disallowed segregated schools. And as for South Carolina, it was prepared to spend the money to make the segregated schools equal.

Marshall and the other NAACP lawyers argued that segregated schools, after considering the harmful effect on black children, could never be considered equal. As for the 14th Amendment, the question of segregated schools was not considered at the time of adoption in 1868. Further, the 14th Amendment says equal protection, not separate but equal protection.

The *Brown* opinion itself, decided on May 17, 1954, and only 11 pages in length, was written by Chief Justice Warren, and unanimously agreed to by all the Justices. The opinion may be a model of clarity and how to write a legal opinion that is readable and understandable by mere mortals---those without a law degree. I suggest you look it up and read it. [add slides} (In comparison, the recent Supreme court decision finding that gay couples have the right to marry was ninety-two pages and the *Dobbs* decision with respect to abortion was two hundred and five pages, and both these opinions contained numerous concurring and dissenting opinions.)

After concluding that the Court could not turn the clock back to 1868 to decide the question at hand, and after noting the importance of public education of children, the Supreme Court cited Kenneth Clark's doll experiments as supporting the conclusion that separating black children in segregated schools has a detrimental effect on them. The Court then concluded in public education, "separate but equal' has no place, and further separate schools are inherently unequal. In a subsequent decision, the Court ruled that integration of the schools should be

implemented “with all deliberate speed”. With the victory in *Brown*, Marshall soon became known as Mr. Civil Rights.

In the Fall of 1954, Marshall’s wife Vivian was dying of cancer. Their 25-year marriage was not always ideal. Marshall travelled frequently and spent a lot of time at the office. They were not able to have children, much to their mutual disappointment. Marshall took a leave of absence from the NAACP to care for Vivian in their Harlem apartment. She died on her birthday, February 11, 1955. Ten months after Vivian’s death, Marshall got remarried, to Cissy Suyat, a secretary in the NAACP office. Cissy and Thurgood had two sons, Thurgood jr. and John. Marshall was very proud that Thurgood jr. became a lawyer and John a state trooper.

Marshall had a surprising relationship with another civil rights icon: Martin Luther King.

Shortly after the *Brown* ruling, Rosa Parks was arrested for refusing to give up her seat to a white bus rider in violation of a Montgomery Alabama ordinance. The arrest triggered the Montgomery bus boycott. A young minister by the name of Martin Luther King became the leader of the boycott and quickly gained national prominence for his efforts.

King believed in mass protests and civil disobedience to advance the civil rights movement. In contrast, Marshall believed that litigating in the courts, not in the streets, was the way to end segregation. Marshall sought change in the interpretation of the law, but he also believed in obeying the law as so interpreted. Marshall feared that mass protests and civil disobedience would set back the case for desegregating schools. While Marshall publicly supporting the boycott, he considered the bus boycott and King’s speeches to be “street theater”. Later Marshall was quoted as saying “I used to have a lot of fights with Martin about his theory of disobeying the law…I didn’t believe in that”.

As for the bus boycott, Marshall and the NAACP convinced the Supreme Court to rule that segregated busses were a violation of the equal protection clause. King claimed in a speech that the "universe is on the side of justice" and he became the first passenger to ride in an integrated Montgomery bus. Marshall believed it was not the "universe" that integrated the busses nor was the boycott the sole reason that Marin Luther King got a seat in the front of the bus; rather it was the NAACP's victories in the courts, in this case and prior cases, that allowed the busses to be integrated.

Marshall's career was obviously not over after leading the victory in *Brown* at the age of forty-six. In 1961, he was appointed by President Kennedy to serve on the New York federal appeals court. In 1965, President Johnson appointed him to be the first black US solicitor general, the attorney in charge of handling appeals in the US Supreme Court, a job for which he was very experienced and qualified. (You may find the phone call made by Johnson to Marshall offering the job very interesting; it is available on the Johnson Library website.) In 1967, Johnson called again this time nominating Marshall to be the first black Justice on the Supreme Court.

If I had more time, I would have discussed in greater detail Marshall's arguments in the Supreme Court as solicitor general, the Senate hearings on his nomination to the Supreme Court, and his twenty-four years on the Court.

As for his time as solicitor general, Marshall successfully argued a case that affirmed the federal government's ability, under a federal civil rights statute, to prosecute those who in 1964 killed three civil rights workers in Mississippi. This was the same federal statute that was used to prosecute the officers in the George Floyd case.

As for the Senate hearings on Marshall's nomination to the Supreme Court, the process and the politics were similar but in other ways very different from today's hearings. (Marshall, like today's nominees, refused to say how he would rule on hypothetical cases.) The Senator from North Carolina, Sam Ervin, and later of Watergate fame, led the opposition by southern Senators to the Marshall nomination. The opposition was largely based upon the Senators' disagreement with the *Brown* decision. Ervin, considered at the time a constitutional law expert, was quoted as saying that as a result of the judicial philosophy displayed in the *Brown* case, "the Constitution will be reduced to a worthless piece of paper, the American system of government will perish, and the states and their citizens will be helpless subjects of judicial oligarchy." Imagine that, a politician attacking a Supreme Court opinion saying it threatens our democracy.

Marshall's years on the Supreme Court could itself be Quest Paper topic, but here are a few observations.

Marshall's experience as a criminal defense attorney and as an advocate for civil rights influenced his work on the Supreme Court. Marshall had represented several defendants facing the death penalty for murder and rape charges. While on the Supreme Court, Marshall joined in an opinion that found it was unconstitutional to execute a defendant for rape, although Marshall would have gone farther and ruled that the death penalty was unconstitutional in all cases.

Remember in the trial of Walter Irvin in the Groveland Four case the prosecutor used peremptory challenges to exclude three potential black jurors, with the result that Marshall's

client faced an all-white jury? Marshall joined in a Supreme Court opinion that ruled under the equal protection clause a prosecutor could not exclude a potential juror on racial grounds.

As for cases involving race and education, Marshall was a member of the Court that decided the 1978 *Bakke* decision. Under *Bakke*, the Court ruled that a college could consider race when making decisions as to admitting students, but a quota or a fixed number reserved for minorities was not permitted. In a separate opinion, Marshall agreed that race could be considered in college admissions, but after a long discussion of the history of slavery and segregation, he forcefully argued that the Constitution did allow for a college to set aside some seats for minority applicants.

The legality of affirmative action programs in education is still being litigated in the Supreme Court as we speak. In a recently argued case involving affirmative action policies at Harvard and the University of North Carolina, the *Brown* case was cited in oral argument by the parties no less than 12 times (and was also cited in their written briefs). Each side cited *Brown* as supporting their opposing positions.

In 1991, at the age of 83 and in failing health, Marshall resigned from the Court. He was replaced by another black man, Clarence Thomas.

Suffering from heart disease and other maladies, Marshall died on January 24, 1993.

The Supreme Court today has one Justice who is clearly an admirer of Marshall. In 2010, one of Marshall's law clerks, Elena Kagan, was appointed to the Court.

As a postscript to the Groveland Four case, the two defendants who survived to stand trial were eventually released on parole. Unfortunately, none of the Groveland Four was alive

to receive the official apology from the State of Florida. In 2017, the Florida legislature passed a resolution extending a "heartfelt apology" to the Groveland Four defendants. In 2019, Governor Ron DeSantis pardoned the defendants calling their case a "miscarriage of justice".

What is the legacy of Thurgood Marshall? I think Chief Justice Rehnquist said it best when he spoke at the Supreme Court's tribute to Marshall in 1993:

"The great majority of Supreme Court Justices are almost always remembered for their contributions to constitutional law as a member of this Court. Justice Marshall, however, is unique because of his contributions to constitutional law before becoming a member of the Court were so significant. Beginning with his solo practice in Baltimore in the early 1930s, and extending through his tenure as chief legal counsel for the NAACP … he became a champion of minorities, the poor, and individual rights. He fought many rounds in the battle against school segregation, a battle which culminated with his victory in the case of *Brown* v. *Board of Education.*

As a result of his career as a lawyer and judge, Thurgood Marshall left an indelible mark not just upon the law but upon his country. Inscribed above the front entrance to this Court building are the words, "Equal Justice Under Law." Surely no individual did more to make these words a reality than Thurgood Marshall. "

Marshall's legacy also continues today, thirty years after his death. We need only to look at our US Capital, where Marshall inspired today's Congress to act, not just in a bipartisan way but unanimously, to cause the removal of a statue of a civil war era Justice who denied citizenship to black people, and replace the statue with a Justice known as Mr. Civil Rights: Thurgood Marshall.

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