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RESEGREGATION

Sunday, September 23, 2007

GARRETT EPPS

More than half a century after *Brown v. Board of Education*, its legacy remains in doubt.

Last spring, in cases arising out of Seattle and Louisville, Ky., the four most conservative members of the Supreme Court, led by Chief Justice John Roberts, asserted blandly that programs designed to prevent schools from becoming segregated were morally no different from the old Southern laws designed to prevent them from being integrated.

In other words: School boards cannot take account of race in pupil assignments to ensure that local schools do not become racially isolated. They did this in the name of *Brown*. Though Justice Anthony Kennedy refused to endorse their full reasoning, he added a fifth vote to strike down the programs.

Governments that strive to prevent the re-emergence of two Americas, one white, the other nonwhite, are now on notice that the constitutional ax may fall at any moment.

These two decisions point up a somber anniversary. The first Monday in October marks 40 years since Thurgood Marshall became the first African American to sit on the Supreme Court. The great civil-rights victories of the 1950s and 1960s were won by a generation of civil-rights pioneers that has now passed from the scene -- true candidates for the title of "the greatest generation." And of those greats, Thurgood Marshall deserves a place near the top.

Born in 1908, Marshall was barred from attending his home-state law school, the University of Maryland, which was all white. Nonetheless, he was a lawyer by the time he was 25. By the age of 30, he was head of the NAACP's legal arm. Time and again he faced down death threats, sometimes from Southern police officers, as he traveled the South to defend the idea of racial equality from the attacks of American apartheid. In 1954, he convinced the court that "separate but equal" schools were unconstitutional. Not yet 50, he had won the most important case of the 20th Century, a ruling that had seemed impossible only a few years before.

In 1962, Attorney General Robert F. Kennedy offered Marshall a federal trial-court judgeship. Marshall replied that he could best serve on an appellate court.

"You don't seem to understand. It's that or nothing," Kennedy snapped.

"All I've had in my life is nothing," Marshall replied, and walked out. Kennedy gave in, and Marshall was named to the prestigious Second Circuit. In 1965, President Lyndon Johnson named him U.S. Solicitor General. Two years later, Marshall became a justice of the Supreme Court.

He was part of a "liberal" majority for only about two years; then the long retreat began. Marshall knew intimately the lives of the poor, of the excluded and the hopeless. For a quarter-century he bore witness to their lives inside the most powerful and exclusive tribunal in America. In 1973, the court majority held that the Constitution did not forbid charging the poor a fee to file for bankruptcy. Newly appointed Justice Harry Blackmun rather flippantly wrote that an indigent person could find the fee by skipping a pack of cigarettes or passing up a movie.

Marshall responded, "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 pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely."

As the idea of racial justice receded in importance, he remained fiercely committed to it. And when he left the court in 1991, he would not sugar-coat his resentment of the Rehnquist Court's willingness to cut back on civil rights. His last act on the court was a bitter, in-person dissent from a decision allowing capital juries to consider "victim impact" statements in deciding whether a defendant should be executed. The court had decided the other way just a few years before, he noted. But that was before new appointments gave Rehnquist the votes he needed. "Power, not reason, is the new currency of this court's decision making," Marshall said.

A half-century after *Brown*, public schools are becoming resegregated. African Americans and other minority groups still face exclusion, discrimination and worse in employment, public accommodations and criminal justice. And more and more often, the federal courts are stepping in to close doors, not open them; to limit equality, not realize it.

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During the weary months before the victory in Brown, Marshall told an associate, "I am tired, tired of trying to save the white man's soul." Legal scholar Derrick Bell once summed up the bleakness of much civil-rights jurisprudence by citing the prophet Jeremiah: "The harvest is past, the summer is ended, and we are not saved."

America today faces new challenges as we try to make real the ancient promise of true equality under law. If we are not saved, it is not Marshall's fault; and if we are saved, it will not be by grace of the current court.

Marshall's message to us today is that we must save ourselves.

Garrett Epps is Hollis Professor of Law at the University of Oregon. His most recent book is "Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America."



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