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the Rule of Law**

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MARK TUSHNET'S THURGOOD MARSHALL AND THE RULE OF LAW

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It is interesting that the man who urged "Taking the Constitution Away from the Courts"¹ would devote so much of his career to writing about a man who devoted his own life to taking the constitution *into* the courts in the first place. These two figures, Mark Tushnet and Thurgood Marshall, are of different generations. They saw in law and in courts different possibilities. Perhaps what has bound them together, more than the historical accident that Tushnet just happened to be Thurgood Marshall's Supreme Court law clerk, is that they shared an end point. For both, there is a vision of justice at the end of the constitutional rainbow. So if there is a paradox in Tushnet's scholarly identification with Thurgood Marshall, it is not so much on first principles. It is in the problem that is so much more vexing: the role of law and courts in getting to justice.

There are many Thurgood Marshalls. There is the heroic Marshall, a bit larger than life, in Richard Kluger's *Simple Justice*,² or in documentaries of the civil rights era.³ There is Marshall, the friend, with copious amounts of ribald language, in Carl Rowan's *Dream Makers, Dream Breakers*.⁴ There is the cranky view of Marshall, informed perhaps by his later, more difficult years, which comes through in Juan Williams' *Thurgood Marshall: American Revolutionary*.⁵ There is the view from some on the left who saw Marshall as an obstacle to direct

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1. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).
2. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (rev. ed. 2004).
3. See, e.g., *Eyes on the Prize: America's Civil Rights Movement: Awakenings, 1954-1956* (Blackside 1987).
4. CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* (1993).
5. JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998).

action because of his preference for litigation, while there is also the more affectionate movement view of John Lewis, who thought “Thurgood had this abiding concern that we didn’t need to continue to put ourselves in harm’s way.”⁶ And then, of course, there are the clerks. Sometimes it seems as if there are as many true takes on Marshall as there are Marshall law clerks.⁷

Mark Tushnet was a Thurgood Marshall law clerk, though he tries to put this aside in his scholarship. He served during the October 1972 Term, when Marshall was sixty-four years of age. By then, the years had taken their toll on this icon of the civil rights era. A gregarious man had retreated to a more insular life.⁸ Michael Seidman, Tushnet’s co-clerk, describes their first day of work. The Justice, recovering from a traffic accident,

lumbered into his chambers on crutches . . . , plopped into his chair, and began explaining our new job to us with his characteristic crusty good humor. In the course of describing the details of office routine, apropos of nothing at all, he said something like this: “And by the way, I don’t want you knuckleheads telling me to uphold any patents. I haven’t voted to uphold a patent in all the years I’ve been a judge, and I don’t plan to start now, so you can save your breath.”⁹

One of the “knuckleheads” would, as Seidman put it, go on to become Marshall’s “most distinguished and insightful biographer,”¹⁰ a description that holds even as more works on Marshall appear.

In his scholarship, Tushnet has approached Thurgood Marshall in stages. First, there was his work on the NAACP’s legal strategy. Before the book, *The NAACP’s Legal Strategy against Segregated Education, 1925-1950*,¹¹ was published in 1987, Tushnet had already published his

6. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 216-18 (1992). See JOHN LEWIS WITH MICHAEL D’ORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1998).

7. See, e.g., David B. Wilkins, *Justice as Narrative: Some Personal Reflections on a Master Storyteller*, 6 HARV. BLACKLETTER L.J. 68 (1989); Randall Kennedy & Martha Minow, *Thurgood Marshall and Procedural Law: Lawyer’s Lawyer, Judge’s Judge*, 6 HARV. BLACKLETTER L.J. 95, 99-100 (1989); William W. Fisher, III, *The Jurisprudence of Justice Marshall*, 6 HARV. BLACKLETTER L.J. 131, 137-40 (1989).

8. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); WILLIAMS, *supra* note 5.

9. Louis Michael Seidman, *Mark Tushnet: A Personal Reminiscence*, 90 GEO. L.J. 127, 128 (2001).

10. *Id.*

11. MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

first piece on “Thurgood Marshall as a Lawyer.”¹² Then came two volumes on Marshall: *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961*,¹³ and *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991*.¹⁴ More essays appeared here and there, and one more book, an important edited collection: *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscences*.¹⁵ Although Tushnet follows Marshall through his professional life, including his Court years, he never leaves his starting point. The focus throughout is on Thurgood Marshall as a lawyer.

Tushnet is right to say that Marshall was “the most important lawyer in [the 20th] century”¹⁶ Such a lawyer needed this sort of biographer—a leading scholar of the constitution and the courts—to bring the full story of his work to life. Tushnet described why Marshall was a great lawyer in the *Maryland Law Review* in 1981.

His considerable courtroom skills, though they were not irrelevant to his greatness, were secondary. Those who know him understand his wisdom, the superb qualities of his judgments about life and law. As general counsel in the NAACP’s campaign against school segregation, he assembled a staff and a “kitchen cabinet” which presented him with the ingenious and innovative arguments that the litigation needed. Marshall then selected, almost always correctly and without hesitation, the set of arguments that would work best.¹⁷

But there was something else. Marshall was “a great politician,” and for Tushnet, this not only contributed but “may have been the prerequisite to . . . his greatness.”¹⁸ When Marshall faced “conflicting demands from disparate elements in his constituency, [he] was able to unite the constituency behind a program with which many had initially disagreed.”¹⁹ Tushnet does not hold back his admiration. Had Marshall never been appointed to the Supreme Court, he writes, “he would

12. Mark V. Tushnet, *Thurgood Marshall as a Lawyer: The Campaign Against School Segregation, 1945-1950*, 40 MD. L. REV. 411 (1981).

13. TUSHNET, *supra* note 8.

14. MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* (1997).

15. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS AND REMINISCENCES (Mark V. Tushnet ed., 2001).

16. Mark V. Tushnet, *Thurgood Marshall: The Inner-Directed Personality*, 26 VAL. U. L. REV. xxxi, xxxiii (1991).

17. Tushnet, *Thurgood Marshall as a Lawyer*, *supra* note 12, at 411.

18. *Id.*

19. *Id.*

nevertheless have joined the first Justice Marshall as one of the few lawyers who have shaped this country's history through their legal activities."²⁰ In the NAACP legal campaign, Tushnet argues that Marshall "played a part overshadowed by no other individual in setting in train the modern movement for the liberation of black people in America, a movement aimed at the most deeply-rooted evil in American society."²¹

Tushnet illustrates the ways Marshall brought his perspective as a civil rights litigator to the bench. As a judge, "Marshall believed that the right answers to legal questions yielded sensible solutions to practical problems. A judge who identified these solutions found the law at the same time."²² This approach enabled Marshall to take "advantage of what everyone agreed was his greatest strength: the soundness of his judgment."²³

What helps us understand Marshall *as a lawyer*? Tushnet provides some conflicting clues. He distinguishes his remarkable book about Marshall's work as a civil rights lawyer, *Making Civil Rights Law*, from others by noting that the other authors' "purposes and audiences lead them to 'humanize' Marshall, for example by emphasizing the dramatic incidents in which he was involved, in ways that in my view make it difficult for readers to appreciate how Marshall was a great lawyer."²⁴ But in a 1996 essay, Tushnet opened with references to Marshall's participation in the Masonic Lodge and the Episcopal Church, explaining that they "provide an important clue to understanding Marshall jurisprudence, . . . they help identify what kind of lawyer he was."²⁵ Surely Tushnet was right the second time around: when we pay attention to all of a person's life, we can better understand their life in the law.

Tushnet came to Marshall's defense in 1991,²⁶ the year the Justice retired from the Court. In his last opinion, a dissent, Marshall harshly criticized the Court majority for abandoning stare decisis in a ruling that

20. Mark V. Tushnet, *Mr. Justice Marshall: A Tribute*, 6 BLACK L.J. 142, 142 (1978).

21. *Id.*

22. TUSHNET, MAKING CONSTITUTIONAL LAW, *supra* note 14, at 31.

23. *Id.*

24. TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 8, at 371.

25. Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129, 1130-31 (1996).

26. Mark V. Tushnet, *Thurgood Marshall and the Rule of Law*, 35 HOWARD L.J. 7, 14-22 (1991).

upheld the use of victim impact statements in death penalty cases.²⁷ Why was Marshall “hold[ing] himself out as an ‘ardent apostle’ of stare decisis?” wondered Justice Antonin Scalia, who sided with the majority.²⁸ After all, Marshall was counsel for the plaintiffs in *Brown v. Board of Education*,²⁹ which overturned the segregation case *Plessy v. Ferguson*,³⁰ and he had supported the Warren Court, which expanded rights, overturning many precedents. But Marshall was not being inconsistent, Tushnet argued. Instead, Marshall’s position on stare decisis was consistent with the Justice’s broader vision of the rule of law.³¹ Justice Marshall generally supported overruling precedent when special circumstances made it justifiable. One factor was the passage of time since the original ruling. As Tushnet put it, “twenty years might have been enough time for the difficulties in applying a doctrine to reveal themselves, or for a case gradually to become anomalous as the court pursued other paths in related areas. Four years,” as was the case in the death penalty ruling, “was certainly not enough.”³²

Filling in Marshall’s conception of the rule of law, Tushnet explained in the *Howard Law Journal* that, as a litigator, Marshall understood that “the rule of law was both an impediment and an advantage.”³³ It advantaged lawyers when the law was on their side, and they could press for its implementation. Marshall learned from the legendary civil rights lawyer Charles Hamilton Houston that “unfavorable law could gradually be converted into favorable law, through the careful pursuit of a litigation strategy.”³⁴ For Tushnet, Marshall’s insistence on special circumstances before overturning a previous decision was “the judge’s equivalent of what he had done as a

27. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); see also Tushnet, *Thurgood Marshall and the Rule of Law*, *supra* note 26, at 14-22.

28. *Payne*, 501 U.S. at 834 (Scalia, J., concurring).

29. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

30. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

31. Tushnet, *Thurgood Marshall and the Rule of Law*, *supra* note 26, at 14-22. Debate about the meaning of the “rule of law” is “riven by disagreements over what it means.” Brian Z. Tamanaha, *A Concise Guide to the Rule of Law 2* (St. John’s Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 07-0082, 2007) (forthcoming as chapter in FLORENCE WORKSHOP ON THE RULE OF LAW (Neil Walker & Gianluigi Palombella eds., 2008)), available at <http://ssrn.com/abstract=1012051>. See also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004). This Essay does not seek to reconcile that debate, but instead to explore the way rule of law values resonate in Marshall’s work.

32. Tushnet, *Thurgood Marshall and the Rule of Law*, *supra* note 26, at 9-10.

33. *Id.* at 12.

34. *Id.*

lawyer.”³⁵ The proper course was to use “the tools of reason, not power.”³⁶

There is another place to look for rule of law values in Marshall’s life. Although he is thought of as an American civil rights figure, Marshall’s work had a global impact, and along with many other American lawyers and judges of his generation, he took his legal tools abroad.³⁷ Marshall’s global legal experiences help illuminate the way he navigated tensions between the rule of law and the imperatives of sovereignty. This Essay will turn to just one example: the story of Marshall dressing down the legendary Jomo Kenyatta of Kenya over rights violations, but then supporting him as Kenya became a nation.

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In 1960, Marshall served as advisor to nationalists from the British Colony of Kenya during their negotiations with the British on a constitution for Kenya, a step toward independence.³⁸ In 1963, he returned to Nairobi, hoping to see how a bill of rights he had written for Kenya was working.³⁹ Marshall, a judge on the Second Circuit Court of Appeals, traveled to Kenya at the request of the U.S. State Department. The U.S. government sent speakers overseas that summer in an effort to restore American prestige around the world, which had been battered by racial incidents in the United States during the spring of 1963.⁴⁰

35. *Id.*

36. Tushnet, *Thurgood Marshall and the Rule of Law*, *supra* note 26, at 12.

37. On the global impact of *Brown*, see MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000). On American lawyers overseas, see PAUL D. CARRINGTON, *SPREADING AMERICA’S WORD: STORIES OF ITS LAWYER MISSIONARIES* (2005); KEVIN K. GAINES, *AMERICAN AFRICANS IN GHANA: BLACK EXPATRIATES AND THE CIVIL RIGHTS ERA* (2006) (discussing Pauli Murray in Ghana); YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF THE PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002). See also HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008).

38. This episode is discussed in Mary L. Dudziak, *Working Toward Democracy: Thurgood Marshall and the Constitution of Kenya*, 56 *DUKE L.J.* 721 (2006). See also MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY* (2008) [hereinafter *EXPORTING AMERICAN DREAMS*].

39. See *EXPORTING AMERICAN DREAMS*, *supra* note 38, app. at 173-83 (publishing for the first time Marshall’s Draft Bill of Rights for Kenya).

40. After U.S. international prestige was damaged by police violence against civil rights demonstrators in Birmingham, Alabama in May 1963, which was widely covered in the international press, the State Department sent speakers around the world to place Birmingham “in context,” and to emphasize federal efforts to support civil rights reform. See TAYLOR

For Thurgood Marshall, returning to Kenya was deeply meaningful. He would call it his “homeland.” Perhaps more than anything, it was a place where he could be something that escaped African Americans in his own nation. Derrick Bell would later reimagine the framing of the United States, imagining that an African American woman was in the room, helping to craft the nation’s constitution.⁴¹ In Kenya, no imagining was required. Africans and an African American, along with others, had debated the framing of a nation. Now, he was returning to see what they had made.

Marshall’s arrival was front-page news in Nairobi. “Welcome for Famed U.S. Judge,” was the *Daily Nation* headline, and a smiling photograph of Marshall at the airport with nationalist leaders captured his delight.⁴² The State Department got Marshall to Kenya, and his schedule included the sort of speaking engagements in any such trip, but Marshall’s own objective was to see how “his” Bill of Rights was working.⁴³ He would not be happy with what he saw. As Marshall and his traveling companion, U.S. Civil Rights Commission staff director Berl Bernhard, drove through Nairobi, Bernhard remembered, “We saw all these signs . . . and it looked like the Indians and Pakistanis were being thrown out of the country.”⁴⁴ Marshall was “very upset about it.”⁴⁵ Indians and Pakistanis were a sizeable minority in Kenya. Many were middle-class business owners. The new Kenya constitution was

BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63, at 786 (1988); DIANE McWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA, THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION (2001); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 37, at 169-75. Thurgood Marshall and Supreme Court Chief Justice Earl Warren were just two of those enlisted in the summer of 1963. Interview by author with Berl Bernhard, Former Staff Dir., U.S. Comm’n on Civil Rights, in Wash., D.C. (July 16, 2003); Schedule of Appointments for Thurgood Marshall and Berl Bernhard (not dated), Folder: Africa Trip, 1963, Box 1, Papers of Thurgood Marshall, U.S. Court of Appeals, General Correspondence, Library of Congress; *Welcome for Famed U.S. Judge*, DAILY NATION (Nairobi), July 11, 1963, at 1.

41. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

42. *Welcome for Famed U.S. Judge*, *supra* note 40; John Dumonga, *They Call Him . . . Mr. Civil Rights*, DAILY NATION (Nairobi), July 11, 1963, at 13.

43. Schedule of Appointments for Thurgood Marshall and Berl Bernhard, *supra* note 40. Very little is written on Marshall’s work in Africa. Juan Williams briefly covers Marshall’s trips to Africa in THURGOOD MARSHALL: AMERICAN REVOLUTIONARY, *supra* note 5, at 284-86, 307-09. See also ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 139, 153, 178-79 (1992); TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 8, at 313; TUSHNET, MAKING CONSTITUTIONAL LAW, *supra* note 14.

44. Interview with Bernhard, *supra* note 40.

45. *Id.*

supposed to protect minorities from discrimination, but Asians seemed to be running into trouble.⁴⁶

Marshall and Bernhard saw a sign in a shop window on the way to a speech. It read: "Forced to Leave." Marshall wanted to know what was going on, and they went in to investigate. The shop owner, who was Indian, said that he was being boycotted. "No one was going to buy their stuff," Bernhard recalled.⁴⁷ Marshall was irate. Asian shopkeepers throughout Nairobi felt vulnerable. This was not what Marshall expected. He said, "Well, I don't know what's going on. They're supposed to protect their property. I'll talk tonight when we see the [Prime Minister]."⁴⁸

The year had begun with optimistic pronouncements. Kenya's new Colonial Governor announced that the British Government would "lose no time in making all the practical arrangements which are necessary" for Kenya's independence.⁴⁹ The focus of attention at 1960 constitutional negotiations had been the rights of whites, who were about to lose political power and were concerned about the way loss of political control would affect their property rights. Whites remained wary as the hand-over neared, but their interests had been addressed through a land buy-out scheme and the ability to emigrate to England.⁵⁰ The minority group whose rights seemed more unsettled as independence neared was Asians (Indians and Pakistanis). Asians were the in-between race in a rigid class and race hierarchy. They, like Africans, were barred from owning land in the best agricultural area, the "white highlands." They were paid less when they held the same jobs as whites. They had challenged white supremacy, but it was white rule that gave them the political and economic power they maintained in Kenya's

46. *Id.* Studies of Kenya politics during this period more traditionally focus on tribalism and the problem of land, especially land rights of white settlers and of forest fighters once they returned from seclusion. *See, e.g.*, GARY WASSERMAN, *POLITICS OF DECOLONIZATION: KENYA EUROPEANS AND THE LAND ISSUE, 1960-1965* (1976); *DECOLONIZATION AND INDEPENDENCE IN KENYA, 1940-93* (Bethwell A. Ogot & William R. Ochieng' eds., 1995). These issues were of great importance in Kenya, but the status of Asians cuts through Kenya's history, and was an important issue as independence neared, even if some accounts of the Kenya independence story tend to ignore it.

47. Interview with Bernhard, *supra* note 40.

48. Telephone Interview by author with Berl Bernhard, Former Staff Dir., U.S. Comm'n on Civil Rights (Jan. 12, 2007); Interview with Bernhard, *supra* note 40.

49. *We'll Lose No Time*, *DAILY NATION* (Nairobi), Jan. 5, 1963, at 1; Amconsul Nairobi to Department of State (Jan. 9, 1963), Airgram A-449, 745R.00/1-963, RG 59, Central Decimal File, 1960-63, National Archives, College Park, Maryland [hereinafter National Archives]; KEITH KYLE, *THE POLITICS OF THE INDEPENDENCE OF KENYA* (1999).

50. WASSERMAN, *supra* note 46, at 119.

tiered racial structure. Independence meant that the old racial hierarchy would be replaced. "Africanization" would be the focus, as the independence government tried to quickly train Africans for the sort of civil service positions Asians had traditionally held.⁵¹ The Asian's in-betweenness meant that their interests were squeezed from both sides as groups in Kenya jockeyed for position.⁵² A resounding electoral victory for his party elevated nationalist leader Jomo Kenyatta to the post of Prime Minister in May 1963, and he reached out to the Asian electorate, hoping to "dispel 'some of the suspicions which some of our Indian brothers have in their hearts.'"⁵³ People who harassed Asians would "be punished worse than under the British," Kenyatta insisted.⁵⁴ "We will try to follow the Constitution to the best of our ability."⁵⁵ But continuing African/Asian tensions were acknowledged in Kenyatta's warning to Africans: "'You must understand that other people have every right in so far as they declare themselves citizens of Kenya to live and work and enjoy the fruits of their labour in Kenya without intimidation.'"⁵⁶

When constitutional clauses were negotiated, Marshall must have thought that he and the nationalists had shared the same vision. Their apparent common values were reinforced when Kenyatta, on his release from years of detention in 1961, called for unity and equal rights. For Marshall, independence was the most crucial issue, and equality was the central value going forward. He must have seen his vision in Kenyatta, who insisted, "We shall not steal anything from them except our freedom." When Kenyatta attended constitutional negotiations in 1962, he wrote that his party would "treat as sacred provisions of the Constitution [and] Bill of Rights which will guarantee to all persons the

51. DONALD ROTHCHILD, *RACIAL BARGAINING IN INDEPENDENT KENYA: A STUDY OF MINORITIES AND DECOLONIZATION* (1973); AGEHANANDA BHARATI, *THE ASIANS IN EAST AFRICA: JAYHIND AND UHURU* 105 (1972).

In 1962, the racial breakdown in Kenya included an estimated 8,365,942 Africans, 176,613 Asians, and 55,759 Europeans; 34,048 were listed as Arabs, and 3,901 as "Other." The majority of Asians in Kenya, nearly 62%, had been born in the Colony. DANA APRIL SEIDENBERG, *UHURU AND THE KENYA INDIANS: THE ROLE OF A MINORITY COMMUNITY IN KENYA POLITICS, 1939-1963*, at 173, 177 (1983).

52. SEIDENBERG, *supra* note 51, at 161.

53. *Kenyatta welcomes Asians*, DAILY NATION (Nairobi), May 3, 1963, at 20.

54. *Id.*

55. *Id.*

56. *Id.* See also *KANU Leader's Assurance to Non-Africans*, DAILY NATION (Nairobi), May 6, 1963, at 4; *Intimidation of Asians Denied*, DAILY NATION (Nairobi), May 7, 1963, at 4; Bethwell A. Ogot, *The Decisive Years 1956-63*, in *DECOLONIZATION AND INDEPENDENCE IN KENYA: 1940-93*, *supra* note 46, at 48, 75-76.

fundamental freedoms, and equality before the law,” and would “recognize and respect rights in private property.”⁵⁷ This rhetoric sounded good to an American interested in equality rights, but Marshall and Kenyatta had different objectives in 1963. As Africans took power in Kenya, Kenyatta’s central concerns were about sovereignty and independence from Britain, and about national unity rather than a country divided by tribe and race.⁵⁸

At the end of their first day in Kenya, Marshall and Bernhard attended a reception and dinner in their honor at the home of Tom Mboya, who first invited Marshall to Kenya in 1960, and now held a Cabinet post in the new government.⁵⁹ Bernhard recalled,

About halfway through the cocktail hour, Thurgood got a hold of Kenyatta and said: “Jomo, what the hell you doing?” and I thought, my God, . . . and he said: “I spent all my time busting tail in that wet place in London writing a constitution for you with a bill of rights. And you don’t go around taking people’s property without *due process of law*. And I’ve only been here one afternoon, and what is the first thing I see. You’re beginning to make it impossible for Indians and Pakistanis to stay in Kenya and operate their business. What are you going to do about it?”⁶⁰

Bernhard described Kenyatta as a very impressive man, “very cool, very elderly.” Kenyatta responded to Marshall: ““We’re looking into all of these”⁶¹

Marshall interrupted: ““No it’s not ‘looking into.’ It’s *doing* something about it Will you get Tom over here?” So Mboya came over and Thurgood was saying, ‘Your responsibility is to see that despite what the Prime Minister wants to happen, that we’re going to protect property rights in the country.’”⁶²

57. JOMO KENYATTA, *SUFFERING WITHOUT BITTERNESS: THE FOUNDING OF THE KENYA NATION* 149, 168, 211 (1968) (quoting *KENYA WEEKLY NEWS*, 1961).

58. JEREMY MURRAY-BROWN, *KENYATTA* 368 (1972); William R. Ochieng’, *Structural & Political Changes, in* *DECOLONIZATION AND INDEPENDENCE IN KENYA: 1940-93*, *supra* note 46, at 83, 83-85; JENNIFER A. WIDNER, *THE RISE OF A PARTY-STATE IN KENYA: FROM “HARAMBEE!” TO “NYAYO!”* 53-55 (1993).

59. *EXPORTING AMERICAN DREAMS*, *supra* note 38.

60. Interview with Bernhard, *supra* note 40 (emphasis in original).

61. *Id.*

62. *Id.* (emphasis in original).

“Tom Mboya said, ‘Well we are going to do that, Judge, and’” Marshall cut in: “‘You’re *not* doing it.’”⁶³

Bernhard was taken aback. “Never in diplomatic history has an American treated another nation’s head of state this way!” he thought to himself. But Marshall had a touch that worked with these men, who he thought of as colleagues. He as quickly berated Kenyatta as he teased him. “They *loved* Thurgood,” Bernhard recalled.⁶⁴

Kenya was not the only country to come under criticism for inaction on rights that evening at Mboya’s home. Marshall and Bernhard had been concerned that there was so much anger over U.S. treatment of African Americans that it “would spill over and ruin the trip.”⁶⁵ Sure enough, they encountered “a lot of criticism about the United States because of deprivation of civil rights.”⁶⁶ When these issues came up in discussions with Kenyatta and others, Bernhard remembered:

Thurgood was explaining how bad the situation was, not just for the people in the U.S., but the impact overseas, that this was really hurting the United States. How could we ever have decent relations with the African nations, the African continent, when we had these problems at home. And so his thought was the only way to deal with it was not to deny the problem but, “the problems are there for all to see,” that’s what he kept talking about. “It’s what we’re *doing* about it, and what you may *not be doing* about your own constitution.”⁶⁷

That evening, Marshall defended his country, and quarreled with Kenyatta and Mboya over the rights of Asians. But this was Marshall’s return to his “homeland.” Although he was deeply disappointed in what he had found, it did not displace Marshall’s utter joy at being a part of Kenya’s founding moment, at being with the ones who had helped carry the colony over this crucial political threshold. This episode does raise the question, however, of how Marshall’s embrace of Kenyatta squared with his conception of the rule of law.

63. *Id.* (emphasis in original).

64. Interview with Bernhard, *supra* note 40 (emphasis in original).

65. *Id.*

66. *Id.*

67. *Id.* On civil rights lawyer Pauli Murray responding to negative press treatment of the United States in Ghana, see GAINES, *supra* note 37, at 111. Murray’s effort to defend the American image in Ghana at a time when American civil rights problems were eroding U.S. international prestige led to difficulties for her. Marshall’s activities, in contrast, seemed to solidify his role in Kenya, rather than undermine it. For more on this comparison, see EXPORTING AMERICAN DREAMS, *supra* note 38.



Marshall's work in Kenya engaged his life passion: equality under law. And what he saw in 1963 enraged him. The greatest puzzle is that this episode did not diminish Marshall's excitement at Kenya's independence, and his great pride in having played a hand in crafting rights for this new country. He was thrilled to be at Kenya's Independence Ceremonies later that year. Marshall and his wife Cissy were among the very few special guests whose expenses were paid by the new Kenya government.⁶⁸ Marshall's affection for Kenyatta was genuine, and yet Kenyatta was focused less on rights than on consolidating national power and unity, to make a nation. When the Constitution stood in the way of his political objectives, he would be quick to cast it aside.⁶⁹ In the years after independence, many whites and Asians would leave Kenya. Those who remained faced discrimination if they did not become Kenyan citizens, and controversy over the role of minorities in the Kenya government and economy continued.⁷⁰

Thurgood Marshall once said that if civil rights were not enforced by courts in the United States, "It would be anarchy. It would be the end of the country. I can't imagine it coming to that."⁷¹ His conception of the rule of law assumed that courts, or some organ of government, would at some point give legal norms concrete meaning. And yet in Kenya, he admired the nation's founding leaders even as he knew that they were failing to enforce the laws he had written for them. What sort of rule of law vision would accommodate this tension?

Berl Bernhard thought that Marshall attributed "more goodness across the board to Kenyatta than I had ever read or heard was appropriate."⁷² The reason seemed to be his focus on the task at hand:

68. Letter from Mr. Crockett to G. Mennen Williams, Oct. 11, 1963, RG 59, Bureau of African Affairs, Office of Eastern and Southern African Affairs, Country Files, 1951-1965, Box 1, Folder: POL – Political Affairs & Rel. Kenya, Independence – Ceremonial & Social Affairs, National Archives.

69. See KYLE, *supra* note 49, at 199; DECOLONIZATION AND INDEPENDENCE IN KENYA: 1940-93, *supra* note 46.

70. Mougo Nyaggah, *Asians in East Africa: The Case of Kenya*, 1 J. AFR. STUD. 204 (1974); Donald Rothchild, *Kenya's Minorities and the African Crisis over Citizenship*, 9 RACE & CLASS 421 (1968); Robert M. Maxom, *Social & Cultural Changes*, in DECOLONIZATION AND INDEPENDENCE IN KENYA, *supra* note 46, at 110-47.

71. Bernard Taper, *A Reporter at Large: A Meeting in Atlanta*, NEW YORKER, Mar. 17, 1956, at 106.

72. Interview with Bernhard, *supra* note 40.

bringing a subject people to independence. Marshall later said that he had “the greatest respect for him. And had it not been for him, it would have been one of the damndest bloodbaths you ever saw in your life. He was the one thing that stood in the way of that.”⁷³ Bernhard told Marshall, “This guy’s not all clean,” and Marshall replied, “What do you expect?”⁷⁴ Bernhard stressed: Marshall “wanted to protect that freedom, period, and he wasn’t going to listen to a lot of carping about the method.”⁷⁵ It seemed that a rule of law depended on context. Compromise on some principles could protect something more fundamental: the very survival of a nation.⁷⁶

Marshall had faith in some fighters for justice. His allegiance to Kenyatta is reminiscent of his deep affection for Lyndon Baines Johnson. He had to have known of the foibles of both men. But he saw them both as leaders committed to a cause he believed in, and who were uniquely situated to carry it forward.⁷⁷ In Kenyatta, he chose to see the freedom fighter and independence leader. And even in later years, when human rights in Kenya took an ugly turn, when Marshall’s thoughts turned to Kenyatta, they were memories of the time they both worked for Kenya’s liberation.⁷⁸ He would not have needed to go far to find that the rule of law was not functioning well when he returned to Kenya for the last time, in 1978, for Kenyatta’s funeral.⁷⁹ That he could not or would not go there may say something about his need to see the people he admired and his own legal handiwork functioning. To do otherwise would require him to erase a part of his own biography: that he had helped protect rights at Kenya’s founding.

In what Marshall would not see, perhaps the door is wide open for the rest of Tushnet’s corpus of legal scholarship. Law is unstable, legal

73. Thurgood Marshall, Oral History Interview, in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 15, at 413, 446.

74. Interview with Bernhard, *supra* note 40.

75. *Id.*

76. *But see* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (criticizing the framers of the U.S. Constitution for compromises over slavery).

77. Marshall, Oral History Interview, *supra* note 73, at 413; Interview with Bernhard, *supra* note 40.

78. EXPORTING AMERICAN DREAMS, *supra* note 38.

79. *See id.* at 170-72 (discussing the detention without trial of leading Kenya novelist Ngugi wa Thiong’o in 1978); Thurgood Marshall, *Remarks at the Second Circuit Judicial Conference [Civil Rights Enforcement and the Supreme Court’s Docket] (Sept. 8, 1978)*, in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES, *supra* note 15, at 174, 174.

institutions are open to capture, courts are no safe haven, rights are better realized in the hands of the people. From this perspective, perhaps Marshall's work in Africa was as ephemeral as formal equality in America.

But there is another story to tell, captured in Marshall's Kenya sojourn. Constitutionalism in Kenya was deeply flawed, but it was in part through a process of constitutional politics that this colony became a nation. Debating rights—around the table with Marshall, and then back home in local communities—provided a method of disputing. For a colony with a history of violent conflict, in an era of turmoil in Africa, finding a peaceful way to engage in political warfare was no small matter.⁸⁰ From this perspective, the rule of law was not an outcome, but a process. It was less a set of norms than a form of politics.⁸¹

Although constitutionalism in Kenya would pass through a dark period, it later reemerged as a form of politics that is remarkably Tushnetian. The most effective enforcer of constitutionalism in Kenya today is not the judiciary, long thought to be especially corrupt and subject to executive influence.⁸² As the recent 2007 presidential election crisis made clear, constitutionalism in Kenya has been, under the people's watchful eye, enforced in the streets.⁸³



The Epilogue of Tushnet's *Making Constitutional Law* describes the scene at Thurgood Marshall's funeral. It was a time when the Court had drained much of Marshall's vision from the reigning doctrine of American constitutional law. Yet Tushnet found a story of constitutional meaning in the Court's chambers. "[A]n extraordinary

80. See Dudziak, *Working Toward Democracy*, *supra* note 38. On the importance of creating political space for constitutionalism to work, see JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* (2001) (discussing Tanzanian chief justice Francis Nyalali's efforts to create a political constituency supportive of judicial review in Tanzania).

81. On Marshall and legal process in the American context, see Kennedy & Minow, *supra* note 7, at 99-100; Fisher, III, *supra* note 7, at 138-40.

82. TRANSPARENCY INTERNATIONAL, *THE GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS* (2007); Makau Mutua, *Justice under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96 (2001).

83. *Focus 580: Current Events in Kenya*, (WILL-AM radio broadcast Jan. 16, 2008), available at <http://will.uiuc.edu/am/focus/archives/08/080114.htm> (interview with Makau W. Mutua, Interim Dean, Buffalo Law Sch., State Univ. of N.Y.); Joel D. Barkan, *Kenya's Great Rift*, FOREIGN AFF., Jan. 9, 2008, available at <http://www.foreignaffairs.org/20080109faupdate87176/joel-d-barkan/kenya-s-great-rift.html>.

procession of ordinary citizens circled the Supreme Court building,” he writes, “waiting hours on a cold and windy day to pass by his coffin. Nearly twenty thousand people went through the building Some paid their respects by leaving a copy of the Supreme Court’s opinion in *Brown* next to the coffin.”⁸⁴ *Brown* was a symbol of what Marshall had stood for. The case was a global icon, so we might think of this procession as a remembrance of Marshall’s impact beyond the nation’s borders. Although, Tushnet writes, the Court itself had displaced Thurgood Marshall’s constitutional vision, he saw that vision engaged by the mourners: “In celebrating Marshall, and through him the Constitution, his mourners simultaneously expressed their regretful understanding that the vision Marshall worked to make real no longer animated the Supreme Court.”⁸⁵

In this passage, we see a confluence between the story of Thurgood Marshall, who sought rights in court, and the vision of Mark Tushnet, who, instead, came to embrace popular constitutionalism. In the very passing of this icon whose hopes had been in the courts, Tushnet finds an expression of constitutionalism, not among those left on the bench, but in the long and silent lines outside the Supreme Court chambers, waiting against the wind.

84. TUSHNET, MAKING CONSTITUTIONAL LAW, *supra* note 14, at 195.

85. *Id.* at 196.