A Man for His Time

by William J. Watkins, Jr.

Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991
by Mark V. Tushnet
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Charles Hamilton Houston, dean of the Howard Law School, taught his students to view law as an instrument of social engineering, and Thurgood Marshall, one of Houston's top students in the early 1930's, never forgot this basic lesson. As a leading advocate in the nation, Marshall served as a catalyst for social change as he led the NAACP Legal Defense Fund in the landmark case of *Brown* v. *Board of Education*.

Mark Tushnet charts Marshall's career post-NAACP. Though he recounts the life of Marshall the judge rather than Marshall the advocate, the reader quickly learns that the two are separated only by a black robe. Marshall never wore the so-called judicial mask, permitting him to decide a case based on law rather than personal beliefs. To the very end, Marshall remained Dean Houston's social engineer. Tushnet, who served as Marshall's law clerk, is to be commended for the honesty in his account of his former boss's time on the Supreme Court. Except for a minor lapse when discussing affirmative action, the author never pretends Marshall was anything but a social engineer who invented the necessary law when he perceived a societal problem. This short book covers much ground and unintentionally highlights what is wrong with modern American jurisprudence.

Tushnet begins his book with Marshall's appointment to Court of Appeals for the Second Circuit, the most prestigious appellate court in the nation at the time. President Kennedy originally wanted to appoint Marshall to a district court, but Marshall held out for a larger feather in his cap. He could not have been more unsuited for the Second Circuit, since 90 percent of the court's business concerned corporate law—an area in which Marshall had no experience. Tushnet describes Marshall's performance as "unspectacular."

Lack of experience hindered Marshall in his next position as well. In 1965, after four years on the Court of Appeals, Thurgood Marshall was appointed Solicitor General of the United States. Tushnet recounts one case involving business law in which Marshall responded to questions from Justice Abe Fortas by reading answers that a staff attorney sitting next to him had just written out. When Fortas demanded that Marshall explain an answer, the Solicitor General replied, "I am handing them up to you just as fast as I get them." Such a stellar performance apparently convinced LBJ that Marshall was well suited for the Supreme Court. Marshall's appointment to the Court was confirmed by the Senate in August 1967.

Tushnet describes the Supreme Court in 1967 as the right place for Thurgood Marshall and at the right time—a time when the justices saw themselves as a branch of "a coordinated national government dedicated to reducing economic disparities." These liberal justices "no longer felt attracted to the general theory of judicial restraint. As they saw things, a big Court was a natural part of a big government." As for Marshall's personal philosophy of the law, it seems much akin to his storytelling. "As a storyteller," writes Tushnet, "Marshall was not above modifying his account of real events a bit to give his stories a better punch line." So too with the Constitution. Marshall fervently believed that a judge who identified a pressing social problem could invent the necessary constitutional law to go along.

Such a philosophy is evident in Marshall's dissenting opinion in *Dandridge* v. *Williams*, where he argued that Maryland denied a welfare recipient the equal protection of the laws by imposing an upper limit on welfare payments, thus allowing the recipient $250 when he "needed" $296. The majority refused to second-guess state officials charged with allocating limited funds, and Marshall criticized "the Court's emasculation of the Equal Protection Clause as a constitutional principle." During his years on the High Court, Marshall adroitly used a sliding scale of equal protection analysis to uphold laws he fancied by applying to them a low level of scrutiny, and in turn striking down laws he objected to by using a higher standard. By his reliance on the sliding scale, he found it easier to discuss public policy in the manner of a super-legislator rather than that of a judge interpreting the law. Unfortunately, Marshall's equal protection methodology is alive and well in the Supreme Court today.

After examining Marshall's equal protection theory, Tushnet inadvertently exposes the Justice's hypocrisy regarding affirmative action, saying Marshall "simply asked the court to respect legislative choices." Marshall, so he claims, only looked to see if the corporate body was within its powers when it enacted the program. In this way Marshall comes across as some sort of states' rights champion who cried foul when an overreaching majority of the Court struck down affirmative action programs. What both Marshall and Tushnet seem to have missed is that with *Brown*, which Marshall argued in front of the Court, the days of judges deferring to legislative choices and ignoring their own views came to a close. Constitutional law had been moving steadily in that direction, and Thurgood Marshall—with the help of Earl Warren—formally ushered in a new era of activism and consolidation. Fittingly, some affirmative action programs later died by the judicial sword Thurgood Marshall was so instrumental in fashioning.

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LIBERAL ARTS

IMMIGRANTS ON THE DOLE

According to data cited in the *FAIR Immigration Report*, 25 percent of immigrants who receive monthly Supplemental Security Income (SSI) payments belong to families whose incomes exceed $64,000 a year. Taking advantage of a loophole in SSI regulations, wealthy immigrants bring their elderly parents or grandparents to states like California and then sign them up for SSI, which benefits those who cannot qualify for Social Security. The Public Policy Institute of California, which published the data, also found that "immigrants getting welfare had higher incomes than American natives and others receiving assistance."

Letter From Alabama

by Michael Hill

This Dog Won't Hunt

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Judge Roy Moore of Etowah County, Alabama, was sued by the ACLU and something called the Alabama Freethought Association (Unitarian-Universalists, I believe they are) back in 1995 for displaying the Ten Commandments on his courtroom wall and for beginning each session with a prayer by a Christian clergyman. Over the past year, the affair has taken several legal twists and turns and has now become something of a *cause célèbre* among the common folk of Alabama. Earlier this year, a Montgomery County judge ruled that Moore must take down the offending Mosaic code and put an end to the prayers; however, the Alabama Supreme Court has since issued Judge Moore a stay. This means that the next time the case reaches a courtroom it will probably be argued before a *federal* instead of a state judge, and whereas the state courts have thus far been favorably inclined toward Judge Moore, the federal courts are likely to rule against him. This could lead to a showdown between Governor Fob James, who has promised to call out the National Guard and state troopers to protect Moore, and the federal courts.

When Governor James in 1995 first mentioned using the Alabama Guard on Judge Moore's behalf, the media paid little attention. However, since then public support for the governor and the judge has been growing. Both men have criss-crossed the state, speaking at large and enthusiastic public rallies, and in the spring public officials at the governor's mansion in Montgomery said they were receiving some 17,000 pieces of mail a day in support of James and Moore. Suddenly, the media—both statewide and national—began to take seriously the governor's flirtation with nullification and interposition.

But just how serious is Forrest Hood (Fob) James about all this? In a recent interview, he reiterated his stand on calling out the Guard and the troopers, but when asked what he would do in case the President federalized the Guard, James answered: "Then that would be it." What "it" is he did not say, but most folks are betting that he will simply go back to Montgomery and tell his supporters that he did his best. Not that the Governor would be lacking support if he were really determined to oppose an intrusive federal government; his office reports that more than a few well-armed, patriotic Alabamians (and other Southerners) have offered to back him all the way. And then there is the tantalizing question of the first loyalty of the Alabama National Guard.

While all this is the stuff of political drama, I doubt a meaningful constitutional showdown will ever come to pass. For his part, Judge Roy Moore, whom I've interviewed at length, is determined to see this stand through as a matter of deeply-held principle. But Governor James has some room to wiggle out of the coals if they get too hot. What is worse, the affair began to take on a comic note with the arrival of Ralph Reed's Christian Coalition and the usual neoconservative camp followers, ever eager to jump on the religion bandwagon.

On April 12, Reed joined Governor James, Judge Moore, and several other neoconservative speakers at a "Save the Ten Commandments Rally" on the steps of the Alabama State Capitol in Montgomery. Organizers confidently predicted a turnout of 50,000 to 75,000; in fact, estimates of the crowd size ranged between 6,000 and 25,000. The rally's lower than expected attendance may reflect dissatisfaction with the organizers' decision to ban certain cosponsors of the event out of fear of bad publicity. For example, the Southern League, after having been accepted as a cosponsor, received word at the last minute that it could not participate because of its "secessionist" leanings (which would, according to rally officials, "embarrass the Governor and the Judge").

While nearly every speaker blasted away at federal judges for making rather than interpreting law, there was more heat than light. What seemed lost on both speakers and rally-goers was that the issue surrounding Judge Moore and Governor James is states' rights. Instead of complaining about judicial tyranny while hoping that a "conservative" Supreme Court will some day right the jurisprudential wrongs of the last several decades, the participants at the rally would have been better off looking for local solutions to the problems inflicted by a central government that now defines the limits of its own authority. Governor James's threat to call out the Guard sounds the theme of states' rights, but James is alone, and his words may prove to be more bluster than principle.

The Confederate battle flag stood out as one of the few heartening signs at the rally; at least a few of the attendees realized the centrality of states' rights to the whole affair. However, it was strange and disconcerting to see that banner waving amid paeans to Abe Lincoln and Martin Luther King, Jr., both of whom did their best to destroy limited government and state autonomy. This neoconservative love-fest, which occurred in the first capital of the Confederacy, was an insult to the memory of Jeff Davis, whose statue looked sadly down on hundreds of people who neither knew nor cared about the cause for which he and his contemporaries suffered.

If Christian Southern conservatives follow the lead of Ralph Reed, then the courage displayed by Judge Moore and Governor James will have been in vain. Any serious consideration of states' rights still scares the pants off the leaders of the Christian Coalition. A good backbone transplant would seem to be in order for those who organized the rally. By their cowardice they are reducing Christ's admonition to be faithful unto death to something more like faithfulness that stops short of inconvenience. Anyone who expected this affair to spark a constitutional crisis would be better off looking elsewhere for excitement. This dog won't hunt.

Michael Hill is a historian and president of the League of the South, formerly known as the Southern League.