

Columbia Law School

## Scholarship Archive

---

Faculty Scholarship

Faculty Publications

---

1993

### What He Was For

Eben Moglen

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

---

# WHAT HE WAS FOR

by  
Eben Moglen\*

It will be said frequently in the years to come that an era in American history died when Thurgood Marshall left us. It will take some time for us to absorb the truth, for our sadness to be replaced by desperation. More than an era closed when his gallant heart failed him at last; in every corner of our battered country, maimed as it is by years of recklessly cultivated hatred, we lost the voice that constantly called us to attend to the work of our salvation.

In the grave moment of his resignation in 1991 when he knew there were no cases left that he could win, he announced to the country his own impending dissolution, and we started hearing of him as the great dissenter. I won't bother to say that this is not the way we should honor his memory — he didn't much care how people thought about him, having risen in his own estimation as any honest workman does, who leaves his achievement to speak for itself. And certainly there was plenty of dissenting done, as the American century hurtled toward its end, confronting the reality of American injustice. Like everyone else who worked for him, I helped him write a few of those dissents. I learned firsthand the greatness of his anger, bitterness, and sorrow, when the realities of life were swept aside in the interest of our cherished myths: myths about our racial fairness, the integrity of our police and prosecutors, the saving majesty of our electric chair. But I never saw TM enjoy dissenting, or relish his inability to turn the tide of opinion toward the quarter of his hope. Dissent was his misfortune, and our own. For our sake, before it is too late altogether, we'd better think again about what he was for, not what he was against.

There are many kinds of great minds, but the kind that wins major battles is the simplest: it has one great idea and understands the implications. Thurgood Marshall lived and died by one single idea: equality. Equality is a simple idea, on the surface. It has always been with us, one of the root American ideas. It sings its beautiful high note in the second sentence of Jefferson's Declaration, and it growled in his gravelly bass from everything Thurgood Marshall wrote. We are a nation conceived in equality, but perhaps not so dedicated. Our country's life reflects other ideas as well — about power and the prosperity of those who have it — that sometimes displace our

---

\* Associate Professor of Law, Columbia Law School. I was one of Justice Marshall's law clerks in the October Term, 1986. My thanks, as always, to Pamela Karlan.

commitment to equality. Our brothers and sisters of African descent have been wandering in the wilderness for almost four hundred years, and equality has not been accorded them yet; as Thurgood Marshall said, he'd never been in any city or town in the United States where he had to hold up his hand before his face to tell the color of his skin.

But equality is more than justice for the group in America most frequently the victim of inequality. Equality, if we take it seriously, as Thurgood Marshall urged us to do every day of his life, reaches into every corner of our existence. The further coloring of the United States by ethnic immigrant groups, particularly from Latin America, poses unabated challenges to the protection and pursuit of this ideal. President Clinton spoke in his inaugural address of the recognition we must keep that we — the fortunate and the unfortunate — might, but for the chance of fate, have been each other. This too is one of the meanings of equality. Some people speak about it. Other people try to live it. A few — and these are the greatest heroes of our culture — are prepared to fight for it.

Equality is not without its opponents in America, and the years just past have shown us how great are the temptations for our political leaders to use the urges towards inequality to make power for themselves. Against those evils Thurgood Marshall fought ceaselessly for more than fifty years, until at last his enormous strength failed him, and he left us to carry on. Above the great doors of the Supreme Court building, facing the Capitol and thus the People of America, is the announcement, in marble letters ten feet high, "Equal Justice Under Law." Ours is a culture that builds monuments to equality. But monuments built of stone are empty, unless we fill them with ones of flesh and blood. America never built a greater monument to equality than Thurgood Marshall. Now he is fallen, and we must go forth to fight our own fight, for we still hold this truth to be self-evident, that all people are created equal. Thurgood Marshall was our equal, and our better, and I fear for us now that he is gone.