The Public Meaning of Thurgood Marshall

Rebecca L. Brown

Supreme Court nominees come and go, and by and large they are confirmed. And so it will be with Elena Kagan. But that does not make irrelevant the spectacle of public question and answer that is the gladiatorial ritual of the confirmation process. It is quite clear that the rhetoric of law and principle that appears in confirmation hearings has some important relation to the development of public views about the Court and the law.

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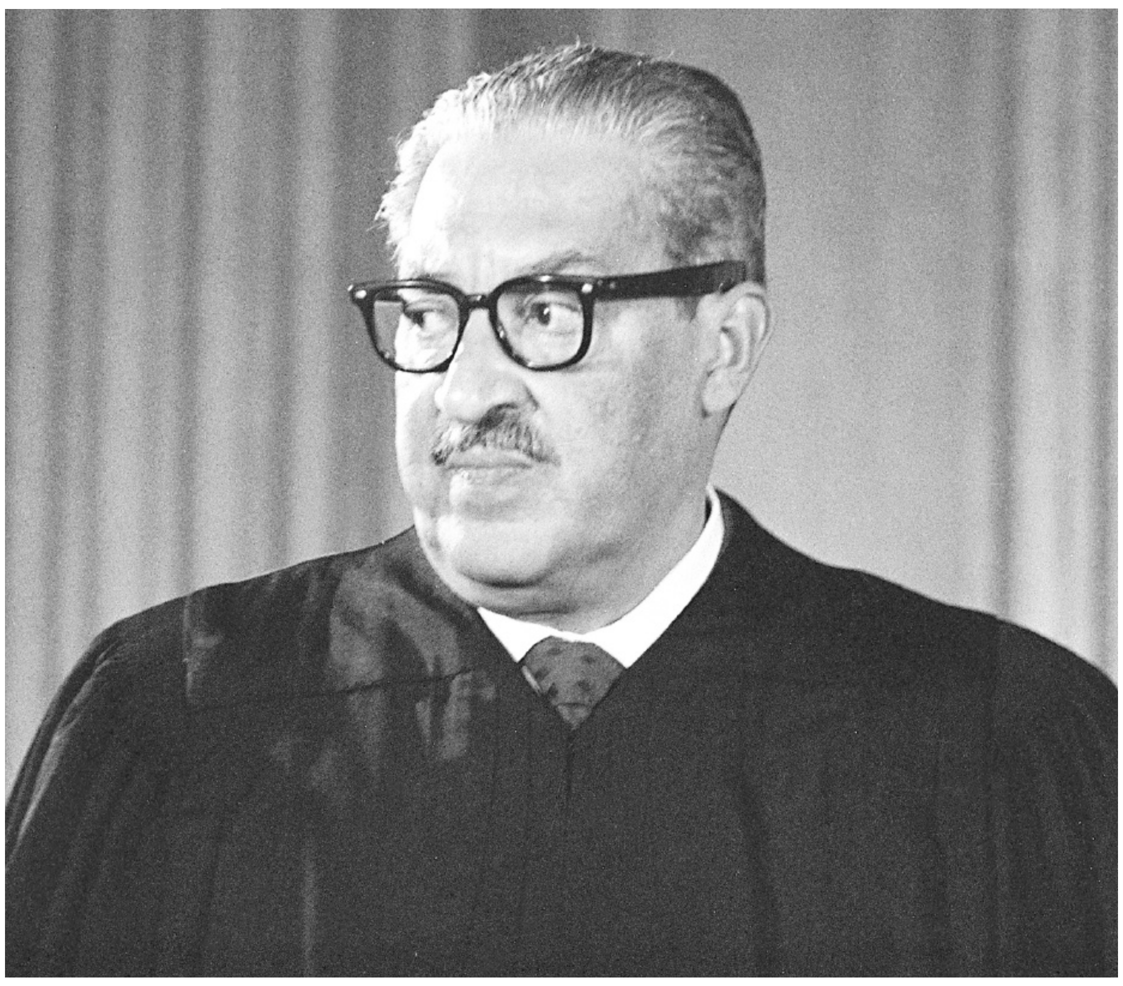
We can see a correlation, for example, in the progression over time regarding that Supreme Court opinions "must" be explicitly endorsed by the nominees. There was a time when it was acceptable for Supreme Court nominees to voice severe doubts about the *Brown v. Board of Education* decision. That was no longer true in 1971 and 1986 when William H. Rehnquist had to disavow the implications of his pre-*Brown* writings, in which he had praised the separate-but-equal doctrine later overruled in *Brown*. Similarly, at one time it was acceptable to question *Griswold v. Connecticut*, the 1965 case first identifying a constitutional right to privacy. A few years ago, even nominees John G. Roberts Jr. and Samuel A. Alito Jr. found it necessary or prudent to espouse some acceptance of *Griswold* in order to survive the crucible of public opinion. What is said about foundational principles in this setting can reflect the speaker's sense of public opinion at the time.

It is therefore highly troubling that several Senators have excoriated the performance of Thurgood Marshall as a justice on the Supreme Court. Although the attacks are thinly couched in terms of "activist" judging, even those who somehow use that term with a straight face (during the same week that the *McDonald* case was decided and in the same Term as the *Citizens United* case, where democratically passed statutes and decades of judicial interpretation were overruled on the basis of dubious historical or textual justifications) can no longer claim that "activism" is really the object of their concern. The Rehnquist and Roberts Courts have been as activist as any in history. Nor could anyone knowing even a modicum of Justice Marshall's jurisprudence say that he was impervious to the commands of clear law (sometimes perhaps to a fault, as in the case in which he interpreted a requirement that a filing be made "prior to December 31" to render out of time a document filed *on* December 31). The critique of Justice Marshall is not directed, then, toward any judicial methodology in general.

What, then, is the object of the derisive remarks we heard last week? The only answer is the use to which Justice Marshall put his judicial methodology, in pursuit of the ideas and principles that he valued. As a justice, Marshall's vision of the Constitution was as a document true to its promise of equal moral and political status for all; a document dedicated to protecting individuals from arbitrary and unfair treatment by government; a document protecting the integrity of the democratic process as one open to all people, all points of view, all economic classes, and all political parties; a document designed to protect freedom of conscience in all people from government orthodoxy, and to protect personal dignity from unwarranted invasion. These are some of the principles that Justice Marshall recognized in the Constitution and voted consistently to vindicate when he was on the bench. Justice Marshall's name is synonymous with these ideals.



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U.S. Supreme Court Justice Thurgood Marshall.

So, when U.S. senators hold up the name of Thurgood Marshall as a negative symbol of judicial behavior, they are conspicuously condemning an understanding of the Constitution as a vehicle for protecting equality, fairness, electoral integrity, and autonomy, the ideas in whose service Justice Marshall voted in every case. And of course most saliently, because of Justice Marshall's personal history, first as a principal architect of the litigation strategy that ultimately dismantled Jim Crow, and then as the first justice who was a descendant of slaves, they are also most painfully condemning in a broad symbolic sense the early successes of the civil rights movement itself.

The thought that politically astute senators would feel free to make these implicit statements without fear of reprisal is nothing short of appalling. Rarely has a Supreme Court justice been held up individually as a negative model in a formal political arena. One that has been so denounced is Roger Taney, the author of the infamous 1857 *Dred Scott* decision, in which he wrote that slaves and their descendants were not citizens of this country. After a civil war and a constitutional amendment enshrining the country's repudiation of Taney's idea, it should perhaps be safe to denounce him. Surely the Senators of today will be proven wholly wrong in their cynical calculation that, in a bizarre pendulum swing, the American people are ready to take a similar view of the ideas associated with Thurgood Marshall.

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Uh-Oh, SpaghettiOs

By Deborah L. Stein

Product recalls seem to be all the rage lately, from SpaghettiOs to Children's Tylenol to, of course, Toyotas. Yet as commonplace as recalls may have become, many companies are not insured for costs associated with them. And these costs can be quite significant. For example, when Kellogg Co. recalled crackers with potentially contaminated peanut butter last year, the recall reportedly cost Kellogg $70 million. Likewise, many months into its recall of pet food in 2007, Menu Foods estimated its recall expenses had already exceeded $55 million.

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Although product recalls can present meaningful financial threats to retailers and manufacturers alike, many have not procured product recall insurance, perhaps assuming — incorrectly — that their traditional commercial general liability insurance policies would cover recall-associated costs. Depending on the terms of the particular policy, recall insurance may cover a broad range of expenses, ranging from inspection, withdrawal, and replacement costs, to lost profits, to crisis communications and response expenses. Manufacturers and distributors that have not procured such insurance should consider the recent recalls a strong reminder to review their insurance programs to plan for potential exposures.

Companies depending solely on their "CGL" policies for recall protection do so at their own peril. Such policies insure damages, for which a policyholder becomes liable, resulting from bodily injury or property damage but do not generally warranty faulty products or workmanship. In fact, most CGL policies issued to product manufacturers and distributors contain an express exclusion for recall costs. This standard "sistership" exclusion — originating in the wake of insurance claims relating to the grounding of "sister" aircraft when one plane was found to have a defect — precludes coverage for "any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal" of a product if such product "is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it."

Recent cases have construed this exclusion against insureds seeking coverage for losses stemming from a product recall. For example, in *Sokol & Co. v. Atlantic Mutual Insurance Co.*, 430 F.3d 417 (7th Cir. 2006), an Illinois food products manufacturer discovered that the peanut butter paste included in its boxes of cookie mix was "rancid." Before its affected cookie mix boxes had been sold to the public, the manufacturer retrieved all of the affected boxes, removed the peanut butter packets, and substituted new peanut butter paste acquired from a different vendor. The manufacturer demanded reimbursement from the supplier of the rancid peanut butter, who in turn sought coverage from its commercial general liability insurer. In affirming the decision of the trial court, the 7th U.S. Circuit Court of Appeals — which found that coverage was not even implicated because of the absence of bodily injury or property damage — examined the insurance policy's sistership exclusion and found that it applied "straightforwardly to the facts of this case" given that the peanut butter paste's withdrawal from the market, replacement and disposal resulted from an obvious "inadequacy."

Although traditional commercial general liability insurance does not usually provide the answer for companies seeking protection from recall-associated financial risks, insurers have developed a wide range of recall insurance products. The nature and scope of protection, however, can significantly vary depending on the particular insurance policy, and thus companies should evaluate their options carefully to make certain the insurance they select is adequately tailored to their needs. For example, some insurers offer product recall insurance as an endorsement to a CGL policy. While that may be sufficient for some, it proved inadequate for the substantial recall expenses incurred by the insured in *Atlantic Mutual Insurance Co. v. Hillside Bottling Co.*, 903 A.2d 513 (N.J. Super. Ct. App. Div. 2006).

In *Hillside Bottling*, the insured produced and bottled soft drinks for various beverage companies. The bottler, Hillside, received certain necessary ingredients from its beverage company customers, and supplied other ingredients on its own. During Hillside's introduction of carbonation into the beverages, certain bottles were contaminated with ammonia. As a result, the beverage companies were forced to recall all products that bore the bottler's plant code without regard to whether they were actually contaminated. The beverage companies sued the bottler for the costs and losses incurred as a result of the recall and the bottler, in turn, sought defense and indemnity from its insurer. The insurer responded by notifying the bottler that the insurer's obligation was limited to the $25,000 in coverage afforded pursuant to a product recall endorsement. After paying the $25,000, Hillside's insurer then filed a complaint against Hillside seeking a declaratory judgment that it was not obligated to defend the bottler or to cover any of the bottler's costs or losses in excess of the $25,000.

As commonplace as recalls may have become, many companies are not insured for costs associated with them. And these costs can be quite significant.

The trial court entered summary judgment in favor of the bottler, holding that the bottler was entitled to coverage under the standard CGL provisions in Hillside's policy. But the appellate court reversed. The court reasoned that the bottler was not providing the beverage companies with a service that harmed the *beverage companies'* property. Rather, the bottler created its *own* product (by adding its own ingredients and introducing carbonation). As such, the appellate court concluded that Hillside's claim "inescapably seeks coverage for its own faulty performance," and that a "party's liability to others for its own faulty work is a matter of warranty and not a matter of insurance coverage." The court further determined that the bottler's claims were barred by several policy exclusions, including the business risk and the sistership exclusions. In ruling that Hillside's coverage was limited to that provided by the product recall endorsement, the court noted that if "coverage for product recalls were included in the general insuring agreements, Hillside would have had no need to purchase the endorsement at all."

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Campbell Soup Co. recalled 15 million pounds of SpaghettiOs with meatballs after a cooker malfunctioned at one of the company's plants in Texas and left the meat undercooked.

The decision in *Hillside* serves as an important reminder that recall coverage does not fall within the scope of standard CGL policy language, and that companies facing potential recall liability should carefully evaluate their recall insurance needs before procuring coverage. For some companies, an endorsement or stand-alone policy covering the logistical costs of a recall may be sufficient. For others, a more specialized policy that includes coverage for lost profits and rehabilitating a product's brand may be essential. Since recall risks can vary from company to company and industry to industry — particularly given that some industries are more heavily regulated than others — there is no one-size-fits-all solution. However, the range of options available allow companies to procure recall coverage designed for their particular needs, and it would be prudent for any company with meaningful recall exposure to consider doing so.