Deep and Wide: Justice Marshall's Contributions to Constitutional Law

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When Thurgood Marshall, the lawyer, sought help for his civil rights causes from the judicial branch, it was not necessarily out of a philosophical belief regarding the optimal role for courts in a democracy. Rather, he told us clerks, he went to the third branch third, because it was his last hope.[1]

He had seen that the anti-lynching measures pressed by the NAACP were not succeeding in Congress; and that the massive New Deal legislative revolution of the 1930's had, in large measure, left racial injustice to one side.[2] He had been disappointed in the Justice Department's progress toward federal prosecution of lynchings[3] and he had worked unsuccessfully with the Executive Branch to end discrimination in the military.[4]

He loved to tell us the story about how he had gone to the Far East during the Korean War to meet with General Douglas MacArthur regarding the unfair treatment of black soldiers.[5] After viewing the troops there, and pointing out the total exclusion of African

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1. *See* Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 55 (1991) ("For Thurgood Marshall, the law is our last hope.").

2. *See generally* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 56-60 (The University of Chicago Press) (2004) (discussing racial dynamics of the New Deal); James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 163 (2006).

3. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 49 (Oxford University Press, Inc.) (1994).

4. *See* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 170 (Three Rivers Press) (1998).

5. *See id.* at 171-72 (recounting a version of this story).

Americans from the more elite units, including MacArthur's own personal guard, Marshall listened incredulously to General MacArthur's repeated protestations that there were simply no black soldiers that met the strict qualifications for membership in these groups.[6] Then the parade began, and the military marching band went by, with again not a single black face among its ranks.[7] Marshall turned to MacArthur and said, "General, surely you're not going to tell me you can't find a single Negro who can play a horn!" Meeting frustration in the political branches of government, Marshall, always pragmatic, looked to the federal judiciary as a last resort.

However, when Thurgood Marshall, as Associate Justice, ascended to the bench and himself became part of the third branch, he adopted a different role. Here, he took on the job of understanding the Constitution and taking seriously the daunting responsibility of being final arbiter of its meaning. He often told the story about responding to a clenched-fisted black activist (when I heard this story the Judge identified him as Malcolm X) who called out to Marshall at a speech, "You are nothing but a tool of the Establishment!" Marshall responded, with a twinkle in his eye, "Brother, I *am* the Establishment!" He liked to use that story to show us, I think, the satisfaction he derived from moving into the role of those who helped to make the rules, after so many years of having to play by rules created by others. He appreciated having the opportunity to think about how to get the law right. As a result, his contributions to constitutional jurisprudence were both deep and wide: deep in understanding, to its core, the structure and driving force of American constitutionalism; and wide in seeking to bring that core to the surface in all of the Constitution's applications.

The deep structure that Justice Marshall recognized in the original design of the Constitution involved the obligation on government to act in the common good. In order to be truly democratic, it was not enough that lawmakers be elected by the people. There was also an obligation on lawmakers to pass laws for a public purpose, and not out of the desire to fracture the citizenry or sublimate the needs of some in favor of others. He would not have articulated it as an obligation on government to act in the common good. Rather, he would have said that the government had to have valid, non-discriminatory rea-

6. *Id.* at 172.
7. *Id.*

sons for everything that it did. This basic conception of the role of government entailed important insights on the related issues of equality and public justification for government action. Equality entitles people to reasons, and the public pronouncement of reasons, in turn, promotes equality. These two themes permeated the jurisprudence of Justice Marshall and enriched the work of the Supreme Court during and after his tenure.

Justice Marshall's profound appreciation of the core of the constitutional project, as one structurally committed to equality, led him to speak of the original Constitution's compromises on slavery in a unique way. Many people saw the tolerance of slavery in the original Constitution as regrettable, as a mistake, as an unfortunate political compromise, and perhaps even as a flaw in the promise of liberty.[8] But it was Justice Marshall who called it a "defect." Marshall wrote that the Constitution was "defective from the start," cured of its defect only with the passage of the 13th, 14th, and 15th Amendments.[9] This choice of words, which I know to be his own, reflects his astute sense that equality was not just a good thing left out, or a mistake later corrected, but that its absence undermined the legitimacy of government, which was essentially linked to the obligation of representatives to act on behalf of all. The very idea of the Constitution was at war with its own accession to inequality.

On the one hand, Justice Marshall had an emotional response to this failing. I had the experience of being in his office with him one day in 1986, the year before the 200th anniversary of the signing of the original Constitution, when he got a telephone call inviting him to participate in one of the celebratory events. I heard him bellow into the phone, "If you want me to come, I'll show up wearing knickers and a towel over one arm, mumbling 'yessir' and 'nosir,' cause that's the only way I would have been invited to the first one." His anger often focused on the three-fifths clause in the Constitution, which counted the slaves, for purposes of apportioning representatives, as 3/5ths of one person.[10] Although this provision was not directly concerned with individual rights or treatment, it was a particularly painful symbol to Justice Marshall of the original Constitution's structural defect. It was

8. *See* JOSHUA WOLF SHENK, LINCOLN'S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS 137 (2005).

9. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

10. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

no coincidence that this particularly galling expression had to do with the manner in which legislators were considered to be representative of the people of the United States.

But Justice Marshall also had an intellectual response to the Constitution's original failings. He developed a sophisticated conception of the Constitution as a machine powered by an engine of equality, which led him to a holistic set of views on all aspects of the post-Reconstruction Constitution. These views often linked the objective of equality with an obligation on government to provide reasons for its acts.[11] Justice Marshall was not, by any means, the only person who has recognized an important link between equality of all people and government reason-giving. Indeed, it has been a significant topic of inquiry and investigation by political philosophers and constitutional theorists of several schools of thought.[12] Justice Marshall internalized it, however, in his approach to constitutional law. More than perhaps any other justice, Marshall insisted that government actions must be supported by public reasons, to assure conformity with government's obligation to promote the *common*, impartially defined, good.

This view is reflected, for example, in Justice Marshall's position that procedural due process constraints of notice and reasons apply to all government decisions—not only when it is acting as a regulator, but also when it acts as an employer, an educator, or a contractor. To this effect, Justice Marshall wrote:

> In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. . . . Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.[13]

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11. *See infra* note 13.

12. *See, e.g.*, Frank Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 150-53 (2006); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 39 (1996); Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 40-42 (2006); CASS SUNSTEIN, THE PARTIAL CONSTITUTION 17-39 (1993) ("In American constitutional law, government must always have a reason for what it does").

13. Bd. of Regents v. Roth, 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting); *see also* Jackson v. Metro. Edison Co., 419 U.S. 345, 374 (1974) (Marshall, J., dissenting) ("[M]ajority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve.").

For Justice Marshall, the democratic pedigree, and unique power, of government made it distinctively responsible to all of its constituents; and it imposed an obligation to offer impartial reasons for everything that it did.

Reasons are at the heart, too, of Justice Marshall's famous disagreement with the Court on the issue of how judges should review laws that create inequality.[14] This longstanding debate that Justice Marshall had with the rest of the Court, regarding the standard of review for classifications under the Equal Protection Clause, reveals the Justice's astute constitutional instincts and unique understanding of the role of equality in American constitutionalism.

Much paper and ink have been sacrificed to describing the evolution of the Supreme Court's approach to equal protection analysis.[15] Most say that by 1972, a full-fledged scheme involving two "tiers" of scrutiny had developed, soon to be followed by a third tier of "mid-level" scrutiny.[16] For my purposes, suffice it to say that the Court had developed this structure as a means of determining when it would push the state hard to offer reasons for its classifications, and when it would hold back and let the state classify with little need for serious justification. For most classifications involved in the ordinary regulation of social and economic life, the state would be permitted to justify different treatment with any plausible reason related to the public good.[17] This relaxed form of scrutiny, modeled upon the deference toward economic interests developed during the post-1937 period,[18] was viewed as necessary to make possible ordinary and legitimate governing. Under this scheme, for example, a state could permit advertising on some trucks while prohibiting it on others.[19] As long as there was a public-good justification for such a distinction, the Court would uphold the law.

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14. San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

15. *See, e.g.*, Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372 (2002); James A. Hughes, Note, *Equal Protection and Due Process: Contrasting Methods of Review Under Fourteenth Amendment Doctrine*, 14 HARV. C.R.-C. L. L. REV. 529 (1979).

16. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

17. U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 22-23 (1977).

18. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (court will defer to regulation of economic and social regulation in the absence of special circumstances).

19. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.2 (3d ed. 2006) (discussing Railway Express Agency, Inc., v. New York, 336 U.S. 106 (1949)).

In a few special situations, however, the state's classification would not be permitted unless it could persuade the Court, with strong evidence, that this particular classification was motivated by public-good justifications.[20] This higher burden of justification was imposed when the Court was suspicious that the classification was perhaps not motivated by such benign or impartial governing objectives.[21] In such cases, a good way to tell—or to "smoke out" a discriminatory or invidious motive— was to require that the state offer a more significant state interest and a stronger need for the classification in order to achieve that important state goal.[22] The Court soon identified two such "suspect" situations: when the state made distinctions based on race and when the state made distinctions affecting the ability of some persons to enjoy basic and fundamental rights, such as the right to vote.[23] These two cases were the paradigms for suspect treatment because of the confluence of the historical experience in this country with *de jure* racial classification, along with the intuition that it was unlikely that a legislature acting out of impartial motive would allocate societal burdens in this manner.[24]

With regard to race, it was unlikely that any real, relevant difference existed to justify any such distinction for matters of legitimate governance. As the Court explained, "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[25] In the case of the fundamental rights, it was unlikely that an impartial legislature would unequally compromise a right so generally important as to be considered fundamental, at least not without an exceedingly good reason.[26] So-called "strict scrutiny" developed as a way for the Court to compel the state to justify its reasons for the unequal treatment in these cases. If the state could show that it had a compelling reason for its classification, and that this particular inequality was necessary to achieve that compelling state goal, then the Court could be satisfied that the state had, in fact, been moti-

20. *See id.* § 9.3.2. (explaining origins of strict scrutiny).

21. *See* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 145 (1980) (strict scrutiny functions as a "handmaiden of motivation analysis").

22. *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 438-40 (1997) (setting forth the "smoking out" meaning of strict scrutiny).

23. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (racial classification); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (poll tax for voting).

24. *See* CHEMERINSKY, *supra* note 19, at § 10.8.1.

25. Korematsu v. United States, 323 U.S. 214, 216 (1944).

26. *See generally* Rebecca L. Brown, *Liberty the New Equality*, 77 N.Y.U. L. REV. 1491 (2002) (discussing the equality constraints implicit in the obligations of representation).

vated by an impartial and legitimate state motivation.[27] Thus, strict scrutiny began as an evidentiary device used for the purpose of assisting the Court in determining whether the challenged law had been passed out of invidious motivation and thus in violation of the Equal Protection Clause.[28] Justice Marshall had no disagreement with this technique or with its application in the two paradigm cases of racial classifications and fundamental rights. But as the case law evolved beyond these two paradigm cases, the hard question became how to handle the cases that involved other types of classification falling outside the paradigm.

Justice Marshall began to become uncomfortable when it appeared to him that the Court's resort to strict scrutiny—designed originally to facilitate a serious judicial review of state motivation—began to develop, rather, into a *barrier* against meaningful review of actual state motive under the Equal Protection Clause. Justice Marshall viewed the "strict scrutiny" standard as one point along a "spectrum of standards" to be used by the Court as a device to smoke out invidious motivation.[29] In the paradigm cases of race and fundamental rights, the Court would indeed ask states to show that the inequality was necessary to a compelling state interest. But in a case not exactly implicating one of the paradigm characteristics of racial classification or fundamental right, Justice Marshall argued that the Court should still ask the state for a justification commensurate with the concerns about impartiality that might arise from the nature of the particular classification.

The Court developed a different view of these nearly-suspect classifications. To the Court, strict scrutiny became a finite category comprised *only* of the paradigm situations that had given rise to it: race and fundamental rights.[30] If a case did not implicate one of those strictly defined and narrow categories of classification, then, by default, the Court would employ the most deferential standard of review, which would almost always result in upholding the law.[31] As a result, state laws that burdened groups bearing some, but not all, of the characteristics of a "suspect" class (such as the poor),[32] or laws burdening people with respect to an important interest not quite

27. *See* Rubenfeld, *supra* note 22, at 437.
28. *See* ELY, *supra*, note 21, at 146.
29. *Rodriguez*, 411, U.S. at 99 (Marshall, J., dissenting).
30. *Id.* at 16 (majority opinion).
31. *See* Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).
32. *See id.*

meeting the definition of "fundamental," (such as equal access to education),[33] were given the most deferential treatment, which required the state only to show that its classifications were not irrational.[34] This treatment was accorded despite Justice Marshall's unyielding reminder that these cases still involved many of the indicia of a likelihood of prejudice that had given rise to the "strict scrutiny" device in the first instance.[35] Gone from the Court's new framework was an effort to use the standards of scrutiny as a method to determine, for every challenged law, whether it was in fact motivated by constitutionally illegitimate state goals.[36] The Court's use of its two-tiered system of review simply did not provide space for a serious examination of the motives underlying such in-between laws.

Justice Marshall persistently called for an approach that followed a continuum of judicial scrutiny for these laws, along which the degree of judicial scrutiny and corresponding burden on the state would increase as the particular classification grew closer to touching on interests of constitutional importance or indications of a likelihood of invidious motivation. According to Justice Marshall, the law of equal protection "comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[37] Thus, the more likely it was that the state's classification involved sheer prejudice, the less likely the Court would be to defer to generalized assertions of state interest.[38]

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33. *See Rodriguez*, 411 U.S. at 111 (1973) (Marshall, J., dissenting).

34. *Id.* at 110.

35. *See id.*

36. *See id.* at 110 (Marshall, J., dissenting) ("[I]f the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.").

37. *Id.* at 99 (majority opinion).

38. There is a reason that race and fundamental rights were expected to be the most likely manifestations of sheer prejudice in lawmaking. The history of Jim Crow lawmaking makes the expectation with regard to race clear. With regard to fundamental rights, the idea is that if an interest is socially and politically so important as to be deemed either fundamental, or as Justice Marshall insisted, very close to fundamental for all people, then a representative legislature would be unlikely to limit it for fear of political reprisal. If a right of this degree of importance is limited only for some persons, which is the situation in which an equal protection challenge would be brought, then it is likely that the motivation was illegitimate in that the interest of the burdened group was valued either at zero or negatively. *See* Brown, *supra* note 26, at 1533-34. Thus, both of the "suspect" categories recognized by the Court—race and fundamental rights—are categories in which one would empirically expect that an illegitimate motive underlies the classification at issue in the law.

Education, for example, was for Justice Marshall not only an essential opportunity for bettering one's life, and therefore socially important, it was also constitutionally important because it was very closely tied to the ability to participate effectively in the political life of the nation.[39] In addition, poverty was a classification with many of the characteristics of a suspect class.[40] The case of *San Antonio School District v. Rodriguez* challenged the disparate funding of public schools across Texas. *Rodriguez* implicated both wealth classifications and the right to an education. All markers, therefore, pointed toward a need for increased scrutiny of the state's motivations. Thus, for Justice Marshall, there should have been a significant burden placed on the state of Texas to explain its decision to fund the schools unequally, leaving the poorest school districts with vastly inferior resources compared with other districts.[41] For the majority of the Court, however, because the poor plaintiffs were not a suspect class and the right to an equal public education was not one of the fundamental rights explicitly protected by the Constitution, the claim was automatically booted down to the lowest rung of judicial review, allowing the state to prevail if it could show that it had a rational basis for its unequal treatment of the different school districts.[42] Justice Marshall saw little in this all-or-nothing choice to further the actual goals of the Equal Protection Clause.[43] He pleaded with the Court to "drop the pretense" that "all interests not fundamental and all classes not suspect are . . . the same."[44]

This approach has been termed—although never by him, I believe—Justice Marshall's "sliding scale" approach to equal protection review.[45] I elaborate on it in some detail here because I believe it demonstrates Justice Marshall's profoundly different—and underappreciated—understanding of equality as compared to that of the majority. The Court's equal protection jurisprudence slipped, apparently

39. *See Rodriguez*, 411 U.S. at 110-13 (Marshall, J., dissenting).

40. *Id.* at 120-21 (discussing political powerlessness, social stigma, history of legal disadvantage with regard to the poor, but recognizing that the characteristic of economic status is not immutable or necessarily irrelevant to valid social legislation).

41. *Id.* at 86.

42. *Id.* at 89.

43. *Id.* at 98.

44. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (Marshall, J., dissenting).

45. *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionism*, 107 MICH. L. REV. 391, 428 (2008) ("Thurgood Marshall was well known for arguing that the sliding scale metaphor provided a more accurate view of equal protection jurisprudence in the United States than that of fixed tiers of review.") (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 460 (1985)).

unself-consciously, into a view of equality that can accurately be described as a cost-benefit understanding of equal protection.[46] The all-or-nothing application of strict scrutiny just described suggests that the Court was not interested in smoking out whether there was an invidious motive for unequal treatment. Rather, the Court appears to have believed that there is something substantively meaningful about the paradigm cases for strict scrutiny, racial classifications and fundamental rights. It seems that the Court viewed those cases not simply as a likely place to find the invidious motive that they were are looking for, but rather, that the right not to be discriminated against on the basis of race, or with respect to the exercise of a specific fundamental right, has a special status under the Equal Protection Clause. Under this view, if the state is going to make distinctions along those lines, it must show that it has an interest in doing so that is even stronger than those two individual interests identified as special. The state is asked to *justify* its discrimination with a compelling state interest.[47] In all non-suspect categories, it is again asked to *justify* its unequal treatment, but here, the state interest need not be as strong, since the individual interests, by hypothesis, are less important. Notice that, although the strict scrutiny framework purports to be a rule, when understood this way, it shows itself to be a balancing of two incommensurable values—an individual's interest in not being discriminated against by the state, weighed against the state's need to discriminate in order to achieve some stated goal such as safety or health. Put another way, the state *may* treat people unequally, even if invidiously, if it has a good enough reason for doing so.[48] This is the meaning that the majority has given to the Equal Protection Clause.

For Justice Marshall, this was "an emasculation of the Equal Protection Clause as a constitutional principle."[49] He thought it made no sense for the Court to reject, a priori, any serious effort to smoke out

46. *See* Rubenfeld, *supra* note 22, at 438 (applying this term).

47. *See* Dandridge v. Williams, 397 U.S. 471, 519-20 (1970) (discussing how, under the "'traditional test' . . . if the classification affects a 'fundamental right,' then the state interest in perpetuating the classification must be 'compelling' in order to be sustained").

48. This approach, may be the only way to explain the otherwise doctrinally perplexing later holding in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), that if a state's motivation for unequal treatment is not invidious, the equal protection clause is still violated unless the state can offer a compelling reason. This changes the Court's role in equal protection from a "representation-reinforcing," motive-based protection against acts of prejudice—which used to be the principal distinction between equal protection and substantive due process—into an evaluator of substantive rights subject to quantitative balancing.

49. *Dandridge*, 397 U.S. at 508 (Marshall, J., dissenting).

invidious motive in the non-paradigm cases. For him, the critical constitutional question had always been whether there was "an appropriate governmental interest suitably furthered" by the government action at issue.[50] Basic to each level of scrutiny was "a concern with the legitimacy and the reality of the asserted state interests."[51] This question persisted from the bottom of the scale to the top. The only thing that changed was the likelihood that the state indeed had a legitimate motivation for its classification.[52] But the Court's job remained the same: to determine whether an invidious motive existed. If there was such an invidious motive, then no classification would stand, regardless of whether the victims constituted a suspect class.[53]

Justice Marshall's understanding of the issue occasionally garnered majority support. For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court was faced with a classification that did not involve either of the suspect groups—race or fundamental rights—but still had a smell of an illegitimate motive.[54] This should have been the case in which Justice Marshall's understanding of equality, if wrong, was repudiated definitively by the Court. That is, if equal protection really is just a balancing of the individual interest against the state interest, and if the only interests strong enough for constitutional protection were those involving race and fundamental rights, then the group of developmentally disabled residents excluded from a neighborhood, ostensibly on grounds of traffic congestion and safety, should lose their equal protection challenge. But it didn't happen.[55] Instead, the Court abjured the deference usually given non-suspect claims, and found that, in this case, there appeared to be no real state interest sufficient to dispel the factual inference that the real motivation was prejudice.[56] In this case, the Court confirmed that it was the likely presence of invidious motive, not the a priori strength of

50. Chicago Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

51. *Rodriguez*, 411 U.S. at 125 (Marshall, J., dissenting).

52. *See id.* at 125 (Marshall, J., dissenting) (the care with which the Court scrutinizes the ends and means chosen by the state to support its classification "reflects the constitutional importance of the interest affected and the invidiousness of the particular classification").

53. *See id.* at 17 (declaring that the law must be "examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the *Equal Protection Clause of the Fourteenth Amendment*").

54. *City of Cleburne*, 473 U.S. 432 (1985).

55. *Id.* at 450.

56. *Id.* ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

the individual group interest, that mattered.[57] Every individual, whether a member of a suspect class or not, has a right not to be burdened on the basis of prejudice. This had been Justice Marshall's view all along.[58]

The great irony is that commentators have consistently called Justice Marshall's approach to equal protection a "balancing test."[59] That characterization carries an implication, tacit or express, that it is not rigorous or smart—that it is mushy or value-laden, or outcome-driven.[60] In *Rodriguez* itself, Justice Stewart referred to Justice Marshall's approach, apparently derisively, as "imaginative."[61]

But these accounts get it completely backwards, and in the process do a serious injustice to the constitutional insight that the sliding scale reflects. Justice Marshall's sliding scale is not a balancing test at all. A balancing test suggests that we ask who has the weightier interest, the individual or the state. One set of concerns is weighed against another set of interests and the one that is deemed heavier prevails. Balancing tests are notoriously difficult to administer rigorously because they inevitably involve the comparison of incommensurables, such as private harm versus public good. In the end, they ask the judge to decide whether the state should be allowed to do the action, which teeters on the brink of the kind of policy determination that most believe is inappropriate to the judicial role.[62]

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57. *Id.* at 448 (reasoning that the group interest was "largely irrelevant" unless that interest would "threaten legitimate interests of the city," but finding that there was no such threat).

58. It appeared again after Justice Marshall had left the Court. He must have smiled down when the Court decided *Romer v. Evans*, 517 U.S. 620 (1996), and held that a state could not burden members of a non-suspect class out of dislike of that class, even if rational reasons might exist for the classification.

59. *See* MARK TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991 100 (1997) (describing the sliding scale as "balancing the competing interests"); Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 478-479 (1997); Cass R. Sunstein, *The Supreme Court, 1995 Term—Leaving Things Undecided*, 110 HARV. L. REV., 4, 78 (1996) (equating sliding scale with balancing); Andrew Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2340 n.8 (2006) (describing Justice Marshall's approach as a "formal 'balancing test' or 'sliding scale'").

60. *See* TUSHNET, *supra* note 59, at 100 (Marshall's approach, involving "balancing the competing interests," was vulnerable to Justice Stewart's charge that it left judges "free to impose their vision of the good society on legislatures"); Note, *Equal Protection: Modes of Analysis in the Burger Court*, 53 DENV. L.J. 687, 716 n.105, 697 n.32 (1976) ("really little more than a sophisticated balancing test" . . . "may appear to be . . . arbitrarily manipulated").

61. *Rodriguez*, 411 U.S. at 59 (Stewart, J., concurring).

62. *Id.* at 126 (Marshall, J., dissenting).

That is exactly what Justice Marshall was objecting to when the Court turned strict scrutiny into a balancing test. Although his approach involved a spectrum of standards, under which courts would exercise varying degrees of skepticism in looking at state motive, there was never a balancing of interests involved. His approach was always a means to put the state's feet to the fire to demonstrate the truth of its claim and show that it was not classifying out of sheer prejudice. This is an implementation of the basic constitutional principle that a state *may* treat people unequally if it has legitimate, public-regarding, and non-invidious reasons for doing so, but not if it does so out of animus or prejudice—the only principle that consistently explains the tiers of scrutiny. For Justice Marshall, this was the elision of equality and public reasons: equality demands reasons and reasons can serve the cause of equality.

I have argued elsewhere that Justice Marshall was committed to the enforcement of rules, because it was forced adherence to rules that he believed would protect the powerless from arbitrary or discriminatory treatment.[63] His sliding scale for equal protection is consistent with that orientation. His goal was always rule-like in its mission: to enforce the constitutional prohibition on invidious classifications. Justice Marshall thought it was the Court, with its deceptive two-tier test, that was indulging in *ad hoc* and result-oriented balancing, made worse by the pretense of applying a rule. His approach involved some judgment in deciding where to place a particular type of classification along the spectrum of scrutiny, but it had a very straightforward and rule-like goal of determining whether invidious motive existed. He did not embark, as did the Court, in determining which burdened groups were entitled to a bigger helping of equality in this country than other groups. Nor did he embrace the proposition, as the Court did, that invidious discrimination against any unpopular group could ever be justified under the Constitution.[64]

Indeed, it is again ironic that it was the Court's majority, over Justice Marshall's impassioned dissent, which proclaimed race and fundamental rights to be unique categories of interests that deserved special protection under the Constitution. Only those types of classifications called for stringent examination of state justifications. It was

63. Rebecca L. Brown, *A Tribute to Justice Marshall, or, How I Learned to Stop Worrying and Love Formalism*, 1 TEMP. POL. & CIV. RTS. L. REV. 7 (1992).

64. *See City of Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part); *see also Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting).

Justice Marshall, whose career as an advocate had focused primarily on litigating equality claims involving race and fundamental-rights classifications, who urged a more expansive scope for constitutional protection. Yes, the historical salience of the paradigm cases entitled them to certain presumptions regarding the likely presence of prejudice, but they did not answer to a different principle of equality. That principle protects all persons from invidious discrimination. Justice Marshall argued for meaningful scrutiny for many different classifications, including gender,[65] age,[66] the poor,[67] and the developmentally disabled.[68] He never backed down from the conviction that the Constitution called for a less rigid means for protecting equality.[69]

The sliding scale approach to equal protection scrutiny is the most obvious manifestation of Justice Marshall's understanding of equality as an obligation on government to produce public-regarding reasons for its acts. But his was a comprehensive view of the Constitution. For Justice Marshall, nearly every provision of the Constitution involved a commitment to equality, often supported by reason-giving. His unwavering opposition to the death penalty, for example, had its roots in an equality concern.[70] As such, it arose out of a different philosophical source from that of his fellow death penalty abolitionist, Justice Brennan. Justice Marshall once told me, "Bill [Brennan] worries about whether the state should have the power to take someone's life. I don't even have to think about that, because until they can show me that they can apply it without racial prejudice, I don't need to go any farther." When death was involved, he simply could not agree to acquiesce in procedures that, he believed, could not be purged of invidious motivation. The presence of discrimination throughout the criminal justice system was something for which he showed continual concern, and took every opportunity to purge the system of government-sponsored action not supported by reasons. This is the intuition that led him to write alone, in favor of abolishing all peremptory challenges in criminal trials. Government actors, even

65. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting).

66. *See Murgia*, 427 U.S. at 323 (Marshall, J., dissenting).

67. *Rodriguez*, 411 U.S. at 72 (Marshall, J., dissenting).

68. *See City of Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in part and dissenting in part).

69. *See* Rodriguez, 411 U.S. at 89.

70. *See* Furman v. Georgia, 408 U.S. 238, 364 (1978) (Marshall, J., concurring) (pointing out discriminatory history of capital punishment).

including defense attorneys in their quasi-public role as participants in a trial, should act solely on the basis of reasons that can be articulated and scrutinized.[71] Procedures could never be sufficient to eliminate the element of prejudice throughout the criminal justice system, but in most cases, Justice Marshall was willing to tolerate them, always working toward more transparency to flush out prejudice.

Claims of ineffective assistance of counsel, too, were for Justice Marshall, in lone dissent, repositories of equality concerns. He objected to the majority's establishment of an objective test of reasonableness for the behavior of all criminal attorneys because "a person of means . . . usually can obtain better representation" than a poor person.[72] Would the attorney's competence be measured by what a reasonably competent appointed attorney would do or what a reasonably competent, adequately paid attorney would do? This was, overwhelmingly, an equality concern for Justice Marshall in the allocation of constitutional entitlements.

This commitment shaped Justice Marshall's view on free speech doctrine as well. In his assessment of a restriction on non-labor picketing, but not labor picketing, near schools, Justice Marshall expressly acknowledged the link between state justifications and equality concerns: the state's reasons for its categories "must be carefully scrutinized" to ensure that "discriminations [are] tailored to serve a substantial governmental interest," and not intended to exclude particular messages or messengers.[73] The commitment to view free speech as a particular form of equality jurisprudence overrode any sympathy he might have felt for the underlying messages at issue in the cases. For example, Justice Marshall wrote for the majority in two cases involving the convictions of protestors under an anti-noise provision. In one case, the Court reversed the conviction of a white person who had been arrested while protesting affirmative-action hiring. In the other, the Court affirmed the convictions of African-American civil rights protestors. Justice Marshall's opinions in both cases showed that his paramount concern was with ensuring that the city had not discriminated in its enforcement of the anti-noise provisions.[74]

71. Batson v. Kentucky, 476 U.S. 79, 107-08 (1986) (Marshall, J., concurring).

72. *See* Strickland v. Washington, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

73. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972) (striking down ordinance because "'[p]eaceful' nonlabor picketing, however the term 'peaceful' is defined, is obviously no more disruptive than 'peaceful' labor picketing.").

74. *See* Grayned v. City of Rockford, 408 U.S. 104, 113-14 (1972).

Justice Marshall consistently viewed freedom of speech as having a strong equality component, and was quick to criticize the Court when it tried to separate out the free speech principles from the equality principles, such as when the Court relied on a formal distinction between content-neutral restrictions and content-based restrictions on speech.[75] This distinction, in his view, ran the risk of masking discriminations motivated by hostility toward those speakers who were likely to bear the different types of messages.[76]

Even with respect to the Court's own decisions, Justice Marshall voiced the same concern that, as government actors, the Court needed to increase its transparency with reasoned decision-making. He feared that many of the categorical tests the Court employed were used to muddy the waters and conceal value judgments that the Court was not willing to make openly.[77]

Justice Marshall's influence is not at an end. When the Court held, in 2003, that states could not justify the severe burden caused by criminal enforcement of same-sex sodomy laws, the opinion resounded in equality and reasons.[78] This is true even though the decision in *Lawrence v. Texas*[79] did not rest explicitly on the Equal Protection Clause (a matter which, for Marshall, would be unimportant, I believe, because of his view of the entire Constitution as carry-

75. *See* J. Clay Smith, Jr. & Scott Burrell, *Justice Thurgood Marshall and the First Amendment*, 26 ARIZ. ST. L.J. 461, 466 (1994).

76. This distinction allowed the Court to uphold a ban on sleeping in the park, for example, as it was not content- based, but permitted the Court to overlook the possibility that the anti-sleeping rule could itself have been motivated by hostility to particular groups who might be more likely to want to express themselves by sleeping in the park. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 301 (Marshall, J., dissenting). Justice Marshall in effect accused the Court of indulging in the fallacy of Anatole France's caustic observation about empty promises of equality when he wrote that, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." (from ANTOLE FRANCE, THE RED LILY: IMMORTALS CROWNED BY THE FRENCH ACADEMY (1894)). *See also* Leathers v. Medlock, 499 U.S. 439, 447-50 (1991) (Marshall, J., dissenting) (arguing for a "nondiscrimination principle" for taxation of the media).

77. *See, e.g.*, *Clark*, 468 U.S. at 315-16; Ward v. Rock Against Racism, 491 U.S. 781, 803, 806 (1989) (Marshall, J., dissenting) (time, place, and manner restrictions); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (Marshall, J., dissenting) (criticizing balancing test for defamation); Rostker v. Goldberg, 453 U.S. 57, 94 (1981) (Marshall, J., dissenting) (exclusion of women from combat).

78. *See* Lawrence v. Texas, 539 U.S. 558 (2003) ("The Texas Statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause.").

79. *Id.* at 602 (2003) (noting that when private conduct is made criminal, those who practice it are subjected to unwarranted discrimination); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 914 (2000) (upholding liberty right in part for equality reasons).

ing the imperative of equality). The *Lawrence* opinion quietly bears the fingerprints of the sliding scale of equal protection.

More generally, the Court, at times, has surprised its audience by requiring the government to offer reasons for its actions even with regard to cases involving national security and terrorism.[80] Hints of a relationship between reasons and equality make their way into an occasional opinion to remind us of the principle Justice Marshall held so dear: that a principal guarantor of equality is a requirement that government have adequate reasons to support its actions. Each hint suggests the whisper of Justice Marshall, whose heroic voice for vindicating the heart of constitutionalism, by achieving equality through transparency, still echoes deep and wide.

80. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (reiterating importance of a statement of reasons for government action with regard to enemy combatants).