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Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall

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SEPARATING PREJUDICE FROM RATIONALITY IN EQUAL PROTECTION CASES: A LEGACY OF THURGOOD MARSHALL

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I. Introduction

"Prejudice, once let loose, is not easily cabined."[1] These words of Thurgood Marshall have special meaning and importance because of his experiences and his achievements as a lawyer and as an Associate Justice of the United States.

Marshall, of course, is best known and most admired for his contributions to the struggle for racial equality. On this subject, his victory in *Brown v. Board of Education*[2] is the foundation of his reputation, and rightly so.[3] The legal principle that grew out of his work is familiar: Intentional racial discrimination by government authority is suspect, presumptively unconstitutional, and justifiable only in the rarest case when race classifications are absolutely necessary to achieve compelling interests.[4]

As a Justice in the years when Chief Justices Earl Warren and Warren Burger presided, Justice Marshall was present at the creation, and instrumental in the exposition, of doctrine protecting fundamental rights within the framework of the Equal Protection Clause.

This essay focuses on another aspect of Justice Marshall's view of the Equal Protection Clause: His criticisms of the rational basis test as the nearly automatic

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1. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 464 (1985) (Marshall, J., concurring in part and dissenting in part).

2. 347 U.S. 483 (1954); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

3. With the retirement and death of Justice Marshall, the first wave of tributes have been published. Among the most relevant to the themes of this article are: Martha Minow, A Tribute to Justice Thurgood Marshall, 105 HARV. L. REV. 66 (1991); Lucius J. Barker, *Thurgood Marshall, the Law and the System: Tenets of an Enduring Legacy*, 44 STAN. L. REV. 1237 (1992) (mentions Marshall's influence briefly); Susan L. Bloch, *Symposium Honoring Justice Thurgood Marshall*, 80 GEO. L.J. 2003 (1992); Mark V. Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109 (1992); Mark V. Tushnet, *Justice Thurgood Marshall: The Principled Dissenter*, A.B.A. J., June 1986, at 28.

4. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (supporting strict scrutiny of intentional race classifications in affirmative action plan); *id.* at 528 (Marshall, J., dissenting) (opposing strict scrutiny of affirmative action plans as "an unwelcome development").

approach when no suspect classifications have been proved and no fundamental rights have been threatened. Justice Marshall argued for realism and candor in the search for governmental prejudice, even when invidious classifications could not be cataloged neatly in predefined categories of prohibited conduct.

II. A Brief History of the Rational Basis Test

Race was the issue that prompted the adoption of the Fourteenth Amendment.[5] The earliest cases in which equal protection arguments prevailed were race cases.[6] Too often in cases involving racial bias, doctrine reflected a conscious or unconscious betrayal[7] of the fundamental purpose of the Fourteenth Amendment: Racial equality before the law.[8]

The primacy of racial discrimination as a motivation for the Fourteenth Amendment justified closer scrutiny of laws promoting racial bigotry, though the promise of the Amendment was recognized by the U.S. Supreme Court belatedly. The category of race cases could be kept separate, and the judicial rules would remain objective and clear for easy application by judges, who—it was believed—needed standards for neutral and fair application. The courts would use less restrictive standards to evaluate all other classifications and laws.[9]

In non-race cases, the Supreme Court's attitude toward the statutory work of legislatures was deferential. The Justices were strongly inclined to uphold all legislative classifications, if the Justices concluded that the classifications were reasonable. One older — and therefore "classic" — formulation of the judicial test was that "the classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[10] Despite the ambiguity of such language, for decades after the ratification of the Fourteenth Amendment, equal protection arguments directed against any discrimination based on factors other than race were regarded as "the usual last resort of constitutional arguments."[11]

James Bradley Thayer expressed the classic view in his famous law review article, *The Origins and Scope of the American Doctrine of Constitutional Law*.[12] Professor Thayer argued that if the judiciary is to remain true to its limited office,

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5. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873).

6. Strauder v. West Virginia, 100 U.S. 303 (1879); Yick Wo v. Hopkins, 118 U.S. 351 (1886).

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

8. *Compare, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 74-83 (1990) (contending that "equality under law" was the "primary goal" of the Fourteenth Amendment) *with* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 312 (1988) ("[T]he framers of the Fourteenth Amendment and the state legislatures that ratified it, intended the amendment to establish the principle of racial equality before the law.").

9. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), illustrates the "two-tier" analysis of equal protection doctrine. *See infra* notes 55-58 and accompanying text.

10. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

11. Buck v. Bell, 274 U.S. 200, 208 (1927).

12. 7 HARV. L. REV. 129 (1893).

it must be careful not to trench on the proper powers of other governmental departments. The judiciary must allow full and free play to "that wide margin of considerations which address themselves only to the practical judgment of a legislative body."[13] Judicial respect for the other branches requires that courts strike down statutes only "when those who have a right to make laws have not only made a mistake, but have made a very clear one, — so clear that it is not open to rational question."[14]

Through decades of litigation before the Court, Thayer's view has prevailed more often than not. Even though the categories of cases deserving closer judicial attention expanded, Thayer's "rule of the clear mistake" became the rational basis test, and in constitutional cases involving a wide variety of issues, the test became the customary benchmark for analysis.[15]

In the years following Franklin Roosevelt's triumphant reshaping of the Supreme Court, the Justices moved steadily toward pronounced and emphatic policies of deference in cases involving social and economic welfare legislation. The approach became a strategy to approve the expansion of federal power to fight the Great Depression and other problems deemed national in character.[16] The approach became the instrument for laying to rest an experiment in judicial activism which defended liberty of contract.[17]

Again and again, the Court's opinions instructed, only a strong presumption of constitutionality would properly delineate the roles of court and legislatures.[18] Echoing Thayer, the Court's language seemed to require a litigant challenging a state or federal law to prove irrationality beyond a reasonable doubt.[19] If some precedents seemed to require a "fair and substantial relationship"[20] between legislative means and legitimate ends, the Court concluded that anything less than a minimum rationality standard would invite courts to substitute their judgment for the opinions of politically accountable officials.[21]

The classic arguments for the rational basis test are rooted in confidence about democracy and corresponding doubts about the judicial capacity. Courts are not well equipped to undertake a careful assessment of whether a legislature's statutory choices effectively promote its objectives. The ends-means analysis is intrinsically a complex matter of fact and policy. The legislative process should resolve such issues. On this point, analysis has never proceeded much beyond the observations

13. *Id.* at 135.

14. *Id.* at 144.

15. The link between Thayer's analysis and the deferential tests of the modern Supreme Court were analyzed in ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 35-46 (1962).

16. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

17. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (holding that reasonable regulations of liberty of contract do not violate due process).

18. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (holding that regulatory legislation affecting ordinary commercial transactions is constitutional unless evidence precludes the assumption that the law rests upon some rational basis).

19. *Id.*

20. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

21. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

of Chief Justice John Marshall in *McCulloch v. Maryland*.[22] In cases when law "is really calculated to effect any of the objects entrusted to the government, [for the judiciary] to undertake . . . to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground."[23] The opinions of the United States Supreme Court are filled with disclaimers to "all pretensions to such a power."[24]

For the infinite number of classifying standards — other than race, gender and other presumptively unconstitutional grounds for legislative choice — the constitutional rule demands little logic and less consistency. In the words of Thurgood Marshall:

> In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference" to its goals.[25]

A classification must relate to the law's objectives, but a reasonable discretion must be preserved.[26] Courts must allow legislators room for generality in purpose. The judiciary must be tolerant of imprecision in policy judgments respecting ends and means.[27] "[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[28]

Quite apart from the presumed superiority of the political branches as "experts" in the development of policy, judicial deference is rooted in practical considerations. Harsh, unyielding rules of law could make it too difficult to govern. The reason is simple: All statutes classify; all statutes discriminate. Classifications and discrimination are and shall always be essential to law.[29] To "discriminate" is merely to "choose" or to "distinguish." The mere fact that a law classifies or discriminates cannot be a persuasive basis for a rule or standard that might inevitably lead to declaring the law unconstitutional. Therefore, a court cannot be suspicious of such laws — all laws[30] — because classification or discrimination of some sort is normal, inevitable, and a necessary part of legislation. The Equal

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22. 17 U.S. (4 Wheat.) 316 (1819).

23. *Id.* at 423.

24. *Id.*

25. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 (1985) (Marshall, J., concurring in part and dissenting in part); *see also, e.g.*, Allied Stores v. Bowers, 358 U.S. 522, 527 (1959).

26. Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.").

27. *Id.* at 485. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

28. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

29. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

30. *Id.*

Protection Clause cannot prohibit all discrimination. A reasonable interpretation of the Amendment bans only the worst classifying devices.

The nature of politics is the key underlying motive for a deferential standard. The need to legislate is a need to make reasonable choices; in order to preserve the capacity to govern, legislatures must have room to breathe.[31] In a democratic system, a legislature needs room for compromise. Even apparently irrational standards can be rationalized as necessary compromise designed solely to allow the legislature to promote different and seemingly inconsistent values and objectives.[32] Given the republican form of government — the need for coalition building and compromise — legislatures must be able to create exceptions that are necessary for the building of majorities. If courts insist on a perfect, ideal rationality, the legislative process will be restricted unduly.

Courts created the rational basis test as an instrument for the promotion of democratic values. If judges restrain their impulse to second-guess legislative judgments about facts, strategies, policy and morality, representative bodies can govern. Doctrine has followed logically from this basic beginning point. Most classifications are presumptively constitutional.[33]

Another feature of this judicial approach was a steadfast refusal to reweigh competing interests once the legislature made its judgment. In equal protection cases not involving race and other constitutionally problematic criteria, courts usually have not measured the social worth of the government's identified objectives against the allegedly invidious character of the classification.[34]

III. Justice Marshall's Critique of the Rational Basis Test in Equal Protection Cases

The arguments in favor of the rational basis test and judicial deference were — and are — strong. As Justice Marshall explained in his dissenting opinion in *Dandridge v. Williams*,[35] "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation [of business interests] may . . . be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to

31. *Dandridge*, 397 U.S. at 485. "'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.'" *Id.* (quoting Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913)).

32. Bowen v. Owens, 476 U.S. 1137 (1986) (sustaining legislative compromises regarding adjustments in a "complex system of entitlements"); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981); Railway Express Agency v. New York, 336 U.S. 106 (1949).

33. "In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional . . . ." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459 (1985) (Marshall, J., concurring in part and dissenting in part); *see also* New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

34. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972); *see also, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (rejecting due process and equal protection claims, and refusing to strike down laws "because they may be unwise, improvident, or out of harmony with a particular school of thought").

35. 397 U.S. 471 (1970).

protect interests that have more than enough power to protect themselves in the legislative halls."[36]

Still, extremism breeds extremism. The emphatic refusal of the Supreme Court to review the reasonableness of legislation with any care was bound to provoke criticism. One problem was that the literal meaning of the U.S. Supreme Court's words required little more than minimum sanity to sustain laws that were deeply controversial. The problem was articulated by Felix S. Cohen with wit and brevity: "Taken seriously, this conception [that what is rational is constitutional] makes . . . our courts lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren."[37] In the context of specific cases, this approach of extreme deference often loses appeal.

In several equal protection cases, Justice Marshall condemned overuse and glorification of the rational basis test. On the Court, Justice Marshall expressed a consistent and profound "disagreement with the Court's rigidified approach to equal protection analysis."[38] He preferred a "sliding" set of standards that ascertained the level of judicial suspicion "in light of the constitutional significance of the interests affected and the invidiousness of the particular classification."[39]

The issue presented by the recurring application of the rational basis test and by criticism of some decisions reached because of considerations of judicial deference is relatively clear: Should federal courts undertake a careful scrutiny[40] of challenged governmental action in cases in which government uses a classification other than race? The answer is also relatively clear: Perhaps and sometimes.

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36. *Id.* at 520 (Marshall, J., dissenting).

37. BICKEL, *supra* note 15, at 37 (quoting THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 44 (Luck K. Cohen ed., 1960)).

38. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

39. *Id.* at 109.

40. Terminology can be confusing when the judicial tests in equal protection cases are labelled and described.

In hopes of clarity, this article refers to two forms of "heightened scrutiny." First, "strict scrutiny" is the test developed for intentional race discrimination. It requires government to persuade courts that challenged laws are necessary to achieve compelling interests. "Close scrutiny" or "intermediate scrutiny" is the test developed for purposeful gender discrimination. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

The only other standard formally accepted and used by the court is a rational basis or "minimal scrutiny" test. This test was discussed in part II of this article.

In addition to the three formally defined standards, one other seems to exist. "To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must . . . be called 'second order' rational-basis review rather than 'heightened scrutiny.'" City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part and dissenting in part). Another label is "rational basis with bite." *See, e.g.*, Gayle L. Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987); Gunther, *supra* note 34, at 18-19. For lack of a better alternative and for purposes of consistency, this article refers to this test as "careful scrutiny," which is another term used by Justice Marshall in his *Cleburne* concurring opinion. *Cleburne*, 473 U.S. at 460.

The basic characteristics of careful scrutiny are easy to list, though no definitive statement of a toughened rationality test appears in the Court's majority opinions.[41] In *City of Cleburne v. Cleburne Living Center*,[42] Justice Marshall offered the following formulation of heightened scrutiny, which could provide a useful benchmark for different versions of a toughened analysis designed to separate prejudice from rationality:

> The government must establish that the classification is substantially related to important and legitimate objectives, . . . so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate.[43]

Using such analysis, a federal court should "approach[] certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered."[44] The court should not guess government objectives. The states or the federal government should articulate its objectives. Moreover, the articulation should not be after-the-fact or, worse, after the commencement of litigation.

Next, a federal court should insist on evidence of a real and substantial relationship between ends and means. The touchstone of this idea is that there must be genuine reason to believe that a law is reasonably effective in promoting identifiable goals. As Gerald Gunther argued in a famous article, the Court should put the two ideas together and thus "take seriously" its own words:[45] A legislative classification "must be reasonable, not arbitrary, and must rest on some ground of

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41. Justice Byron White's majority opinion in *Cleburne* cited two cases often listed as examples of careful scrutiny: Zobel v. Williams, 457 U.S. 55 (1982) (holding that Alaska law distributing income from natural resources to citizens based on length of residence within the state violated equal protection), and United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that equal protection was violated by irrational restrictions of food stamp eligibility to "households" of "related persons"). As Justice Marshall pointed out, these were "two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational-basis standard." *Cleburne*, 473 U.S. at 460 n.4. Moreover, Marshall continued, "these cases must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language." *Id.*; *see, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1090 n.10 (1978) (discussing *Moreno*).

42. 473 U.S. 432 (1985).

43. *Id.* at 472.

44. *Id.*

45. Gunther, *supra* note 34, at 20.

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[46] Gunther argued that careful means-focused analysis might induce a more serious and rational legislative process. It might also improve the quality of the political process by requiring a more candid airing of the real purposes for legislation.

At a minimum, when a litigant proves facts that bring into question the legitimacy and impartiality of a classification, a government should be required to articulate its objectives. This requirement would help to ensure that the legislative process produces evidence of conscious legislative choice, so that judges will be sure to have something real as the object of their deference. Moreover, in such cases, a government should be required to present evidence of a law's usefulness in promoting the articulated objectives.

A careful scrutiny need not require government to prove its belief in the effectiveness of a law past the point of all controversy or reasonable doubt. Rather, the Court could require government to demonstrate that substantial evidence of a policy's effectiveness existed and that policymakers actually relied on such evidence at the time they made their decision. A legislative classification of doubtful legitimacy should not be "rationalized" after the fact. Speculation and the imagination of attorneys should not be enough to uphold a statute. A more rigorous scrutiny of the relation between selected legislative methods and defined legislative ends can prompt — or at least create incentives for — a more thoughtful and careful legislative process.[47]

Perhaps most relevant to Justice Marshall's view of heightened scrutiny or close scrutiny, a toughened test would make it easier to separate genuinely reasonable explanations from thinly disguised prejudice. Careful scrutiny would allow federal courts to "weigh" or "balance" the government's claim of utility against the harm to a disadvantaged class. Though this process can often result in little more than second-guesses of original legislative judgments, closer judicial scrutiny can focus on the problem of government impartiality and the telltale signs of prejudice. A more rigorous scrutiny of state law can help block the stereotyping and thoughtless reflexes embodied in statutes that are truly the just concerns of a court enforcing the equal protection principle.

Thurgood Marshall's case for careful judicial scrutiny boiled down to two basic essentials: Realism and candor. He made his case most forcefully in three opinions: dissenting in *Dandridge v. Williams*,[48] dissenting in *San Antonio Independent School District v. Rodriguez*,[49] and concurring in part and dissenting in part in *City of Cleburne v. Cleburne Living Center*.[50]

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46. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

47. Professor Gunther thoroughly discussed the potentialities and the problems of a more focused judicial search for a legislative classification's rationality in an essay on equal protection. Gunther, *supra* note 34, at 44-48. For additional discussion, see Harry F. Tepker, Jr., *The Trouble with Pool Halls: Rationality and Equal Protection in Oklahoma Law*, 3 EMERGING ISSUES IN ST. CONST. L. 151 (1990).

48. 397 U.S. 471 (1970).

49. 411 U.S. 1 (1973).

50. 473 U.S. 432 (1985).

In *Dandridge*, the Court articulated a policy of judicial deference respecting social welfare legislation, even in the context of an equal protection challenge. Maryland's AFDC program limited the monthly grant to any one family to $250, regardless of size or computed need. Plaintiffs challenged this statutory maximum because persons who were otherwise similarly situated were given different benefits, different treatment — with some of the larger families receiving assistance grossly below their calculated need.

The Court held that the maximum limitation was a rational effort to limit welfare benefits, to maintain equity between families on welfare, and to reduce incentives to stay on welfare. Nevertheless, the Court admitted that the maximum was not well tailored to achieve these objectives. Some recipients were not employable, and no incentive to get off welfare could be effective. Also, some smaller families with employable adults would have less incentive to work, if the state's theory were correct.

However, these criticisms, the Court reasoned, were matters of policy, not fundamental rights. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination."[51] Worse, the Court suggested, judicial invalidation of this welfare plan would be "reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident or out of harmony with a particular school of thought.'"[52]

Dandridge was Justice Marshall's first important and comprehensive argument against a "two-tiered" analysis. He favored a more flexible approach:

> [C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[53]

In Marshall's view, the two-tier analysis was mechanical and oversimplified. It was not sensitive to the realities of the cases. And it was not candid because it does not reflect the actual analytical approaches of the Court.

Justice Marshall suspected the Maryland cap had roots in prejudice against welfare recipients. "[T]he classification's underinclusiveness or overinclusiveness clearly demonstrates that *its actual basis is something other than that asserted by the State* . . . ."[54] In other words, the arbitrariness of the cap was evidence that the policy bears "some resemblance to the classification between legitimate and illegitimate children which we [have] condemned as a violation of the Equal Protection Clause."[55]

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51. *Dandridge*, 397 U.S. at 486-87.
52. *Id.* at 484.
53. *Id.* at 520-21.
54. *Id.* at 508 (emphasis added).
55. *Id.* at 523.

In *San Antonio Independent School District v. Rodriguez*,[56] Justice Marshall elaborated on his critique of "two-tiered" equal protection doctrine. Texas, like many states, employed a system of financing public education that was extremely dependent on local property taxes. The effect of the system was that poorer school districts (with less of a property tax base) could afford less expenditure per pupil than more affluent school districts. Even with a statewide "Minimum Foundation School Program," the district spending varied dramatically. Plaintiffs — parents of school children — challenged the Texas system as a violation of the Equal Protection Clause of the Fourteenth Amendment.

The Court held that the Texas system may have discriminated on the basis of district wealth, but it did not classify individuals on the basis of wealth. "The [plaintiffs] have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent."[57] There was not a "direct correlation . . . between the wealth of families within each district and the expenditures therein for education."[58] Also fatal to the plaintiff's equal protection argument was the undeniable fact that Texas law resulted in no absolute deprivation of education. The Court suggested that the Constitution did not guarantee the right to an education. Here, the Court offered an explanation that does not stand up to a careful analysis of the Court's actual decisions:

> The key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[59]

Texas' school financing system was evaluated against the rational basis test because "[i]t should be clear . . . in accord with the prior decisions . . . that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights."[60]

As in *Dandridge*, Justice Marshall argued for a candid jurisprudence. In *San Antonio*, however, his analysis was more forceful and probing:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination . . . . This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely

56. 411 U.S. 1 (1973).
57. *Id.* at 22.
58. *Id.* at 25.
59. *Id.* at 33.
60. *Id.* at 40.

> affected and the recognized invidiousness of the basis upon which the particular classification is drawn.[61]

The invidious character of wealth classifications could only be understood in relation to the importance of the interest affected — education. Marshall insisted that the issues of "fundamental right" and "invidious classification" were not separate.

The persuasiveness of Justice Marshall's analysis varies from case to case. In the presence of formidable and realistic fiscal concerns—arguably present in both *Dandridge* and *San Antonio*—it can be difficult to accept Justice Marshall's insistence that prejudice was the basis for legislation. In such cases, Justice Marshall — and his frequent ally on the court, William Brennan — often expressed his view of state law with a brief and brusque dismissal of legitimate state interests: Saving money can never justify invidious discrimination. Few would disagree with the proposition in the abstract. However, when the issue is whether prejudice or rationality is the basis of law, the presence of a genuine fiscal reason often may be a legitimate, nondiscriminatory reason that effectively negates the presence of bias or hostility. On the other hand, the approach has more persuasive appeal in a case like *City of Cleburne v. Cleburne Living Center*,[62] when the reasoning of the state or local communities has a decidedly hollow ring.

Justice Marshall did not fully endorse the decision of the Court in *Cleburne*. Nevertheless, his arguments for a sliding scale, for a careful scrutiny above and beyond the traditional, minimal scrutiny of the rational basis test, foreshadowed the arguments, the reasoning and the result in *Cleburne*.

A city in Texas required a special permit for operating homes to care for the insane, the "feeble-minded," the alcoholic, or the drug addicted. The city determined that the proposed home was for the feeble-minded. After a public hearing, the city council denied a special permit for a group home for the mentally retarded. The opinion of the Court, written by Justice Byron White, uses the form of the rational basis test to declare Cleburne's bias violated the Equal Protection Clause. As Justices Marshall and John Paul Stevens made clear, however, the decision was anything but deferential. It embodied real judicial doubt about the fair-mindedness of Cleburne.

In his concurring and dissenting opinion, Justice Marshall pointed out that the city policy would be valid under the traditional rational basis test. When the case was examined carefully in light of earlier equal protection decisions, the *Cleburne* result could only be explained as the product of the Court's "heightened scrutiny."

Once again, Justice Marshall's argument was basically an appeal for candor. "The refusal to acknowledge that something more than minimum rationality is at work here is, in my view, unfortunate."[63] Justice Marshall could not agree with the majority opinion because it "holds the ordinance invalid on rational-basis grounds

61. *Id.* at 98 (Marshall, J., dissenting).
62. 473 U.S. 432 (1985).
63. *Id.* at 459 (Marshall, J., concurring in part and dissenting in part).

and disclaims that anything special, in the form of heightened scrutiny, is taking place."[64]

To resolve a case using one type of analysis while pretending to use another could only threaten the basic analytical framework developed after decades of litigation over the meaning of the Equal Protection Clause. "The suggestion that the traditional rational basis test allows this sort of searching inquiry [invites] this Court and lower courts to subject economic and commercial classifications to similar . . . review."[65] Equally dangerous, the technique gives the Court a measure of discretion to resolve cases whenever it is willing to resort to thin disguises and confusing formulations.

> Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.[66]

Justice Marshall agreed with many of the implications of the *Cleburne* decisions. The majority basically agreed with Justice Marshall's view about the specific practices at issue:

> Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them from where the elderly, the ill, the boarder and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded and perhaps invidious stereotypes.[67]

In his concurring and dissenting opinion, Justice Marshall sought to make the lessons explicit. Disparate treatment of the mentally retarded deserved heightened scrutiny for two reasons. First, at issue was whether human beings could find a home. This was a matter of both societal importance and constitutional significance.[68] Second, the mentally retarded have been subject to a "lengthy and tragic

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64. *Id.* at 456 (Marshall, J., concurring in part and dissenting in part).
65. *Id.* at 467-68 (Marshall, J., concurring in part and dissenting in part).
66. *Id.* at 460 (Marshall, J., concurring in part and dissenting in part).
67. *Id.* at 465 (Marshall, J., concurring in part and dissenting in part).
68. *Id.* at 461-62. Justice Marshall stated:

> [T]he interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. For retarded adults, this right means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community.

Id. (citations omitted).

history of segregation and discrimination that can only be called grotesque."[69] And Cleburne's policies reflected an important truth: "Prejudice, once let loose, is not easily cabined."[70] There was enough historical evidence to persuade a realistic Court that Cleburne's policy was only part of a continuing historical pattern: a "lengthy and continuing isolation of the retarded [that] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them."[71]

Justice Marshall argued a presumption of constitutionality should not exist merely because a group like the mentally retarded begins to win some relief from the political process. The courts should retain their skepticism even when society begins to recognize discrimination. Partial relief should not dissuade the federal courts from careful scrutiny.[72]

> For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; out-dated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people.[73]

Second, Justice Marshall's realism led him to doubt the usefulness of mechanical, rigidified or artificially mathematical principles. He rejected the idea that judicial standards could turn on estimates of political influence or the probabilities of wise political decisions. On this point, Marshall challenged the Court's conclusion that "the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant."[74] Again, realism and personal experience inform Marshall's analysis:

> [T]hat a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very different on a bathroom door than a courthouse door.[75]

To be sure, Justice Marshall admitted that strict scrutiny was applied to race classifications because of the Court's judgment that racial traits are almost always irrelevant and unfair. Likewise, "[h]eightened but not strict scrutiny is considered

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69. *Id.* at 462.
70. *Id.* at 464.
71. *Id.* at 464; *see also id.* at 465 n.17.
> Cleburne's current exclusion of the "feeble-minded" was written in the darkest days of segregation and stigmatization of the retarded and simply carried over to the current ordinance. . . . [T]he roots of a law that by its terms excludes from a community the "feebleminded" are clear. . . . "[F]eebleminded" was the defining term for all retarded people in the era of overt and pervasive discrimination.

Id. (citation omitted).
72. *Id.* at 465-66.
73. *Id.* at 467.
74. *Id.* at 468.
75. *Id.* at 468-69.

appropriate in areas such as gender, illegitimacy, or alienage because the Court views the trait as relevant under some circumstances but not others."[76] Nevertheless, logical beginnings do not always yield logical conclusions. There is no way to "calculate the percentage of 'situations' in which a characteristic is validly and invalidly invoked before determining whether heightened scrutiny is appropriate."[77] To avoid the danger, "careful review is required to separate the permissible from the invalid in classifications relying on retardation."[78] The mere potential of a classification's wise use does not negate the danger of an invidious judgment. The danger alone is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens.[79]

Justice Marshall's argument confers discretion as well as responsibility on the courts. In a passage relegated to a footnote, Marshall explained his reasoning in terms that reflected strong faith in the integrity and wisdom of the courts:

> To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic."[80]

IV. Conclusion: A Future for Careful Judicial Scrutiny

There is a real temptation to assume that Justice Marshall's techniques influenced a handful of decisions in the 1980s[81] and that his "sliding scale" is doomed to be a footnote in constitutional history. While this view may prove to be true, there is real evidence that Justice Marshall's techniques will endure.

First, other Justices have echoed Marshall's views, though they have not always been willing to endorse the specifics of his analysis. For example, Justice Stevens argues for a comprehensive "reasonableness" standard, in which the Court would openly weigh the importance of governmental objectives. In *Cleburne*, he expressed

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76. *Id.* at 469.
77. *Id.* at 470.
78. *Id.* at 469.
79. *Id.* at 470.
80. *Id.* at 472 n.24 (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.)).
81. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 217 (1982) ("[C]ertain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment . . . by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.").

a view similar to Justice Marshall's, though Justice Stevens has argued his approach is a form of traditional rationality review:

> I have always asked myself whether I could find a 'rational basis' for the classification at issue. The 'rational,' of course, includes a requirement that an impartial law-maker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational' — for me at least — includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[82]

In *Cleburne*, Justice Stevens spoke for a judicial pragmatism rooted in "the belief that modest injections of logic and compassion by disinterested, sensible judges can serve as a counterforce to some of the excesses and irrationalities of contemporary governmental decision-making."[83] So did Marshall. Though some commentators claim that this pragmatism was "generated as well as moderated by the pragmatic men of the center,"[84] it seems fair to give Justice Marshall some credit at least for inspiring and guiding this form of judicial activism.[85]

If Justice Marshall's realism can be linked persuasively and durably to moderate pragmatism, then perhaps there is reason for hope that such decisions as *Bowers v. Hardwick*[86] are not the last word on one civil rights issue of the 1990s: Discrimination against the homosexual. In *Bowers*, the Supreme Court held that *Griswold v. Connecticut*,[87] *Roe v. Wade*[88] and other substantive due process cases do not create a right of privacy that extends to homosexual conduct.

Often *Bowers* is compared to *Plessy v. Ferguson*;[89] the implication is that another *Brown*[90] lies in the future. Perhaps a different comparison is appropriate. In tone and meaning, *Bowers* is a case very much like *Buck v. Bell*,[91] in which Justice Holmes spoke for a Court to uphold compulsory sterilization with words that

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82. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

83. Vincent Blasi, *The Rootless Activism of the Burger Court, in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 216 (Vincent Blasi ed. 1983).

84. *Id.*

85. Regrettably, there is some tendency to overlook Marshall's contribution. *But see* Richard A. Brisbin, Jr. & Edward V. Heck, *The Battle Over Strict Scrutiny: Coalitional Conflict in the Rehnquist Court*, 32 SANTA CLARA L. REV. 1049 (1992) (containing an in-depth discussion of Justice Marshall's influence on intermediate scrutiny); Michael W. Dowdle, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165 (1991) (offering brief credit for Marshall's influence on mid-level scrutiny); Wendy K. Mariner, *Access to Health Care and Equal Protection of the Law: The Need for a New Heightened Scrutiny*, 12 AM. J.L. & MED. 345 (1986) (discussing Marshall's views in *Dandridge*, *Rodriguez*, and *Cleburne*).

86. 478 U.S. 186 (1986).

87. 381 U.S. 479 (1965).

88. 410 U.S. 113 (1973).

89. 163 U.S. 537 (1896).

90. Brown v. Board of Educ., 347 U.S. 483 (1954).

91. 274 U.S. 200 (1927).

seem to endorse state-regulated breeding practices to eliminate the frail and unfit from our society. Years later, the cruel significance of Justice Holmes' words became clearer, in part because our nation was engaged in a death-struggle with Nazi Germany. In the first full year of the Second World War, the Court reached a decision in *Skinner v. Oklahoma*[92] that, in effect, overruled *Buck* without saying so. The Court turned to the equal protection clause and to vague discussion of fundamental rights to strike down Oklahoma's compulsory sterilization law.

Justice Marshall's reasoning in *Dandridge*, *Rodriguez* and *Cleburne* help to sustain hope that the Court will again render a *Skinner*-like decision to lead the nation to a more humane and compassionate view of homosexuals and homosexuality through the language and doctrine of equality.

A recent decision of the Court of Appeals for the District of Columbia suggests the potential.[93] In 1987, the United States Naval Academy dismissed a midshipman as he prepared to graduate. The record reflected that the victim of this discrimination was well qualified. His "exemplary performance at the Academy had earned him numerous honors and the respect and praise of his superior officers."[94] Nevertheless, to the direct question, "are you a homosexual?," he answered honestly, "yes." The Navy never alleged that the midshipman engaged in homosexual conduct. He never admitted such conduct. He was dismissed based on Department of Defense Directives stating that homosexuality is incompatible with military service.

The Court of Appeals found no rational basis for the Navy's discrimination. The appellate court declined to decide whether "compelling" or "important" interests were at stake.[95] Recognizing its "limited role under rationality review," the judges ruled that the government's policy rested "solely upon irrational and invidious prejudices against a class of people (whether or not a 'suspect class')."[96] The appellate court rejected the government's argument that the dismissal for sexual orientation was a rational calculation of the midshipman's "propensity" to commit misconduct. Such reasoning was "inherently unreasonable"[97] and constituted punishment for thought and ideas, rather than behavior.[98]

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92. 316 U.S. 535 (1942).

93. Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993). The court vacated the judgement and granted a rehearing en banc on Jan. 7, 1994. After rehearing en banc, the court upheld the dismissal of a homosexual from the armed forces. Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994). The court defined the proper judicial inquiry as "whether banning those who admit to being homosexual rationally furthers the end of banning those who are engaging in homosexual conduct or are likely to do so." *Id.* at 685. Rejecting the distinction between dismissal for status and dismissal for conduct, the court found that the military "can treat someone who intends to pursue homosexual conduct in the same manner as someone who engages in that conduct, because such an intent is a precursor to the proscribed conduct and makes subsequent homosexual conduct more likely than not." *Id.* at 685-86.

94. *Id.* at 59.

95. *Id.* at 63.

96. *Id.*

97. *Id.* at 65.

98. *Id.*

In another portion of its opinion, the court rejected the idea that the discomfort or hostility of other servicemen could justify the Navy's discrimination:

> [A] cardinal principle of equal protection law holds that the government cannot discriminate against a certain class in order to give effect to the prejudice of others. Even if the government does not itself act out of prejudice, it cannot discriminate in an effort to avoid the effects of others' prejudice. Such discrimination plays directly into the hands of the bigots; it ratifies and encourages their prejudice.[99]

Citing *Cleburne*, the appellate court ruled "[t]he constitutional requirement of equal protection forbids the government to disadvantage a class based solely upon irrational prejudice, whatever the standard of review."[100]

If courts continue to insist on real proof of substantial justifications for laws that target homosexuals, perhaps the nation will learn the lesson that such laws rest on little more than prejudice, fueled by a zeal for punishing only the "sins" of powerless minorities. Without doubt, Justice Marshall would have been proud of such a legacy.

99. *Id.* at 68.
100. *Id.* at 70.