MR. JUSTICE MARSHALL: SOME PRIVATE REFLECTIONS

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Despite the ignominious failure of *Brown v. Board of Education*[1] to end racial segregation in the nation's public schools (indeed, there are probably more children attending segregated public schools today than there were in 1954),[2] that decision is probably still regarded by much of the public as the high point in Mr. Justice Marshall's career. *Brown*, of course, represented the culmination of many years of Justice Marshall's work as a brilliantly successful civil rights lawyer.[3] It marked the fruition of an extended effort to forge, through court decisions, a constitutional doctrine defining the due process and equal protection guarantees of the Constitution as dynamic instruments capable of effectively removing all real life impediments to the various forms, remnants and vestiges of racial discrimination. Justice Marshall sought to make the 15th Amendment similarly efficacious in barring the denial of equal franchise rights for racial reasons. I believe, however, that Justice Marshall's Supreme Court opinions contain a legacy of faith in our Constitution as a document designed to nurture democratic and egalitarian values; faith in our law as the protector of the poor and the powerless; and faith in the survival of our social and political system as an open society, that will prove to be his most enduring contribution to the development of American constitutional jurisprudence and will provide him an eminence that will far outshine and outlive whatever fame he has gained as a civil rights advocate.

In view of Justice Marshall's civil rights background and his unique status as the "first black" on the High Court, it is particularly interesting to examine his opinions against the background of the Court's steady movement away from any particular guardianship of individual rights to a concentrated concern for the effective functioning of societal institutions, though a diminution of individual freedom may inevitably result.[4]

Mr. Justice Marshall, along with other blacks in positions of public prominence, must assume not only the traditional burdens and responsibilities that go hand in hand with the powers and privileges of public office, but also the additional weight and pressure of fulfilling a representational role, *i.e.*, as a

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1. 347 U.S. 483 (1954) (hereinafter cited as *Brown*).

2. *See* Bell, *Waiting on The Promise of Brown*, 39 L. & CONTEMP. PROB. 341, 345-46 (1975); (Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. C.R.-C.L. L. REV. 1, 1-4 (1972); Comment, *Keyes v. School District No. 1: Unlocking the Northern Schoolhouse Doors*, 9 HARV. C.R.-C.L. L. REV. 124 (1974). *See also* Fleming, *Brown and the Three R's: Race, Residence, and Resegragation*, 4 J.L. & EDUC. 8, 11-12 (1975).

3. R. Kluger, *Simple Justice passim* (1976).

4. *See, e.g.*, Chase, *The Burger Court, The Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U.L. REV. 518 (1977); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977); Reid, *Cast Aside by the Burger Court: Blacks in Quest of Justice and Education*, 49 NOTRE DAME LAW, 105 (1973).

member of his ethnic group or race.[5] The pressures of the "first black" syndrome can be discounted. The status of race relations in this country was such that to virtually all successful blacks of Mr. Justice Marshall's generation being the "first black" became a commonplace. Moreover, after ten years of service his status as a "first" is of no immediate consequence. Whatever significance it has or may have had is for history.

Yet, the potential for conflict between the institutional and representational roles[6] of the black jurist is ever present and should be readily apparent when one considers that a judge's oath requires him to enforce the law conscientiously, including various Supreme Court decisions which severely restrict the scope of constitutional guarantees protecting civil rights (*see, e.g., Washington v.* Davis),[7] or which gut statutory remediation of civil rights infringements (*see, e.g., International Brotherhood of Teamsters v. United States*)[8] A black judge must personally regard these cases as wrongly decided and threatening, if not to the survival, then at least to the full absorption of blacks into the mainstream of American life. If the judge is lucky, he may never in his institutional role be

5. These representational pressures are not limited to blacks, but affect in varying degrees all members of minorities who become a part of the power structure. Mr. Justice Frankfurter's opening words of dissent in West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) illustrate the point well.

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general liberation views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution . . . . As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

6. I do not wish to be misunderstood as asserting that minority group judges always experience conflict between their institutional and representational roles. Rather, the contrary is true; the two are readily and easily accommodated in the main. An example of such an accommodation involving Mr. Justice Marshall occurred last term in Castaneda v. Partida, 430 U.S. 482 (1977). There, a Texas prisoner of Mexican-American origin filed a petition for a writ of habeas corpus alleging that Mexican-Americans had been discriminated against in the selection of the grand jury that had indicted him. The evidence disclosed that although Mexican-Americans constituted some 79% of the population of Hidalgo County, over an eleven year span only 39% of the persons called for grand jury service were Mexican-American. However, a majority of the elected officials in the county as well as a majority of the jury commissioners were Mexican-American. The Court (5-4) speaking through Mr. Justice Blackmun, held the grand jury selection to have been constitutionally defective.

Mr. Justice Powell, speaking in dissent, *Id.* at 507, placed great emphasis on the fact that there was a majority of Mexican-Americans among elected officials and jury commissioners in Hidalgo County and argued that when Mexican-Americans controlled the jury selection and the political process, "rational inferences from the most basic facts in a democratic society render improbable" a claim of intentional discrimination against the minority group. *Id.* at 515. The foundation of constitutional doctrine in jury discrimination cases, he argued, is based on the perceived likelihood that jurors will favor defendants of their own class. *Id.* Mr. Justice Marshall who had joined in the majority opinion wrote a concurring opinion to respond to Justice Powell. *Id.* at 501. In it he pointed to social science behavioral studies which demonstrated that members of disadvantaged minority groups frequently respond to discrimination by attempting to disassociate themselves from their group and often adopt negative attitudes towards their own kind. This, he contended, was found to be particularly true among minority group members who had gained acceptance in the dominant society, citing to E. Frazier, *Black Bourgeoisie* (1957), among others, for support. Justice Marshall then makes the real point of the concurrence: that the foundations of constitutional interpretation can not be based on "broad generalizations concerning minority groups. If history has taught us anything, it is the danger of relying on such stereotypes." 430 U.S. at 504. The Justice, in writing this opinion, was acting in his representational capacity in a way which was harmonious with his institutional role because few white judges, I submit, would have felt compelled, as Justice Marshall apparently did, to write an opinion suggesting to Justice Powell that which Justice Powell must know—that no reasoned decision can be made on the basis of conventional wisdom about minority groups.

7. 426 U.S. 229 (1976) (hereinafter cited as *Davis*).

8. 431 U.S. 324 (1977).

presented with a case which would seemingly be controlled by the holdings of *Washington v. Davis*, or cases of like import, or if presented with such a case, he may find sufficient distinctions to render the holdings of the Supreme Court inapposite. However, if avoiding a confrontation is impossible, the black jurist must apply the law as construed by the High Court and bury the sars to his psyche that such a task inflicts.

Justice Marshall's situation is both easier and far more burdensome than that of his fellow black judges. It is easier, I believe, because he will never be required to issue a decree of enforcement in respect to any of the above cases. He need never write an opinion endorsing their principles as governing law. Furthermore, he is free to articulate and publish in dissent reasons why such decisions are error and should be overturned. Yet, since the current constitutional yardstick enunciated in *Davis* requiring proof of purposeful discrimination threatens to narrow those civil rights gains which the Justice devoted a large part of his life to secure, he must be personally affected more deeply by such restrictive interpretations than any of his fellow black judges on the other courts.

Mr. Justice Marshall has not been a silent bystander as the Court has announced decisions making effective implementation of a realistic antidiscrimination policy more difficult. His opinions touching on civil rights concerns constitute a well reasoned protest against this current Court trend.[9]

The Justice seems to view the constitutional guarantees in much the same way as he did when a civil rights lawyer: as proscriptions against discriminatory and authoritarian governmental action, requiring court implementation having an actual impact on everyday life. His perspective has broadened considerably, however, since donning his judicial robes. As a civil rights advocate, he strove to erect legal and constitutional barriers to discrimination against blacks. As a Supreme Court Justice, his concern is with all disadvantaged minorities and indeed with any identifiable group that is the subject of public or institutional discrimination.

He is a pragmatist and seems to abhor the notion that judges should operate in a vacuum, removed from the currents of the society affected by their decisions. "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."[10] He is deeply concerned about the pervasive effects and the deadening brutality of poverty on the lives of the poor. "It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."[11] His opinions contain many such indications of sensitivity, awareness and compassion. Although he speaks most often in dissent, one rarely discerns despair or querulousness. There is an ever present underlying optimism—confidence in his eventual vindication through the good sense of the American people.

9. *See, e.g.*, Justice Marshall's dissents in Morris v. Gressette, 432 U.S. 491, 507 (1977) (Voting Rights Act of 1965); Beer v. United States, 425 U.S. 130, 145 (1976) (Voting Rights Act of 1965); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 441 (1976) (school desegregation); Milliken v. Bradley, 418 U.S. 717, 781 (1974) (school desegregation); *cf.* Dandridge v. Williams, 397 U.S. 471, 508 (1970) (AFDC grants); Schneckloth v. Bustamonte, 412 U.S. 218, 277 (1973) (consent to search).

10. United States v. Kras, 409 U.S. 434, 460 (1973).

11. *Id.* at 460.

In *Furman v. Georgia*,[12] apparently discounting public opinion polls evidencing overwhelming public support for the death penalty, Justice Marshall writes that his views concerning the unacceptability of the death penalty will become the views of the American public.[13] Once fully informed as to the purpose of the penalty and its liability, the American public, he is certain, will consider capital punishment shocking, unjust and unacceptable. Even in *Milliken v. Bradley*,[14] perhaps his most bitter outburst against the views of the majority, whose opinion he regarded as a retreat from effective enforcement of meaningful school desegregation,[15] his confidence that the American people will see things from his egalitarian perspective comes through: "[I]t may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black, but it is a course, I predict, our people will ultimately regret."[16] When he believes the Court's opinion has victimized the poor or failed to afford a minority the constitutional or statutory protection he believes warranted, his dissents are galvanized with force and eloquence.

He believes that discrimination against the poor—white or black—stands on no firmer footing under the 14th Amendment, than does discrimination against blacks.[17] "It is far too late in the day to contend that the 14th Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect."[18]

On rare occasions in the civil rights field, he announces the judgment or writes the opinion for the Court. Those occasions probably tell as much about the nature of the Court as they reveal facets of Justice Marshall's own mind.

In *McDonald v. Santa Fe Trail Transportation Co.*,[19] three employees—two whites, one black—were charged with theft. Only the white employees were discharged, and they claimed violations of 42 U.S.C. § 1981 and Title VII. Speaking for a unanimous Court, Justice Marshall wrote, "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes. . . ."[20] As to their § 1981 claim, he read the legislative history of the adoption of the Civil Rights Act of 1866 as indicating that the 39th Congress intended for the statute to apply to both whites and blacks:

> Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And

12. 408 U.S. 238 (1972).
13. *Id.* at 362-63. *See* Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171; Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974).
14. 418 U.S. 717 (1974).
15. *Id.* at 782. *See* Wright, *Are the Courts Abandoning the Cities?*, 4 J.L. & EDUC. 218, 219-20 (1975).
16. Milliken v. Bradley, 418 U.S. 717, 815 (1974).
17. *Cf.* Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107, 147-48, 154-55 (1976).
18. James v. Valtierra, 402 U.S. 137, 145 (1971).
19. 427 U.S. 273 (1976).
20. *Id.* at 280.

> while the statutory language has been somewhat streamlined in reenactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons.[21]

In *Peters v. Kiff*,[22] Justice Marshall announced the judgment of the Court, but only two other Justices joined in his opinion. Involved was the right of a white defendant to challenge the constitutionality of his conviction on the grounds that Blacks were excluded from both the grand and petit juries. Justice Marshall wrote that the right to challenge a racially skewed jury selection process could not be limited solely to Blacks because:

> [T]he exclusion . . . of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.
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> . . . When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[23]

That statement is perhaps one of the most succinct rationales for equal opportunity for all people to participate in the mainstream of American life that has ever been voiced by our judiciary. Absent such openness, society's loss is inestimable.

Two other of his majority opinions are, for our purpose, of more than ordinary interest. In *Emporium Capwell Co. v. Western Addition Community Organization*,[24] a group of employees of a department store in San Francisco had met with their collective bargaining representative to complain about the racially discriminatory policies and practices of the store. The union decided to utilize the labor-management machinery to attack these practices. This meant proceeding on the basis of individual grievances rather than demanding the adoption and implementation of an overall policy of nondiscrimination. Several black employees felt that the individual grievance procedure was an inadequate approach to a problem which affected black employees as a group. Accordingly, they refused to cooperate with the union, held a press conference, denounced management as racist, picketed the store, distributed handbills describing the store as a "20th Century colonial plantation"[25] and their employer as a "racist pig"[26] and urged the public not to patronize the store. All of these protest activities, however, were done on their non-duty hours. The black employees involved were warned not to continue their protest and when the warning was not heeded, they were fired.

A complaint was subsequently filed with the National Labor Relations Board charging the employer with an unfair labor practice[27] in firing the black employees. The Trial Examiner exonerated the employer, and his recommendations were adopted by the Board,[28] with two members dissenting.[29] The Court of Appeals

21. *Id.* at 295-96.
22. 407 U.S. 493 (1972).
23. *Id.* at 503-04 (footnote omitted).
24. 420 U.S. 50 (1975).
25. *Id.* at 55 n.2.
26. *Id.*
27. *See* National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).
28. The Emporium 192 N.L.R.B. 173 (1971).
29. *Id.* at 173 (Member Jenkins' dissent) and at 177 (Member Brown's dissent).

reversed[30] on the theory that, while the right of exclusivity in representing employees accorded to the collective bargaining agent by the National Labor Relations Act might be undermined by the separate concerted activities of the black employees, the union's right of exclusive representation must accommodate the right of minority workers to attack practices of racial discrimination.[31] The Supreme Court reversed.

Justice Marshall wrote that employees were required to use the established grievance machinery in their fight against discrimination. He stated that the employer should not be required to bargain separately with several minority groups, and probably could not reach an agreement satisfactory to all as to what remedial steps to take. The union, he wrote, has a legitimate interest in presenting a united front on grievances relating to racial discrimination as much as any other issue, and in not having its strength fragmented by subgroups pursuing special, separate interests.

What Justice Marshall seems to be saying here is that when the fight for minority rights can be effectively made within an established institutional framework (in this case, the collective bargaining machinery), that course is required. There is no need to weaken the machinery by allowing independent operations outside its framework, so long as that machinery is functioning properly. The union had accepted responsibility for attacking the racist practices of the employer, and, in fact, two employees who protested being denied promotion for racial reasons were granted their promotions after grievances had been filed.

The decision can be faulted, however, for ignoring or failing to deal adequately with several facets of the controversy. While the language used in the handbill was vituperative, it is not unusual for employers to be so vilified. Normally, such language voiced in a labor dispute is protected,[32] and the protest about the employer's racial policies and practices was clearly a labor dispute within the meaning of the National Labor Relations Act.[33] Moreover, the union owes both a duty of fair representation to all members of the bargaining unit,[34] and a duty to use the collective bargaining machinery to seek the elimination of racial discrimination in the terms and conditions of employment.[35] Accordingly, the protest of the blacks was not inconsistent with the obligations of the union.

30. *Sub nom.* Western Addition Community Organization v. NLRB, 485 F.2d 917 (D.C. Cir. 1973).

31. This decision evoked considerable commentary. *See, e.g.*, Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, The Better?*, 42 U. CHI. L. REV., (1974) (the decision disrupted the orderly bargaining processes); Gould, *Racial Protest and Self Help Under Taft Hartley: The Western Addition Case*, 29 ARB. J. 161 (1974) (union unresponsiveness to minority employees' complaints of discrimination necessitates a protected status for separate self-help activity to combat racial discrimination).

32. *See* Bechtel Corp., 141 N.L.R.B. 844, 849, 855 (1963); *cf.* Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 273 (1974) (Mr. Justice Marshall cites federal policies established under the National Labor Relations Act "favoring uninhibited, robust and wide-open debate in labor disputes" as affording free speech protection to the union against state libel laws *in re* the distribution of a newsletter calling people scabs and describing them as of the same substance as rattlesnakes, toads and vampires).

33. *See* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

34. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330 (1954); Vaca v. Sipes, 386 U.S. 171 (1967).

35. *See* Local Union No. 12, United Rubber Workers, v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

In addition, Section 704(a) of Title VII[36] bars the discharge of an employee for peacefully picketing an employer's business to protest racial discrimination, and *Southern Steamship Co. v. NLRB*[37] would seem to require a reading of the National Labor Relations Act that is consistent with the objectives of Title VII. Justice Marshall, however, treated these latter two issues (protected activity under the National Labor Relations Act and protected speech under Title VII) as separate and independent each of the other. "Under the scheme of [the National Labor Relations] Act, conduct which is not protected concerted activity may lawfully form the basis for the participants' discharge. That does not mean that the discharge is immune from attack on other statutory grounds in an appropriate case."[38] If Title VII was violated by the discharge, the employees could always utilize *its* remedial provisions.

One wonders whether the fragmentation of the civil rights struggle in the 1960's, when, seemingly, a thousand different voices sought to function as spokesman for the movement, might have convinced Justice Marshall that genuine achievement in the quest to eliminate institutional racism is best attained through orderly organized effort, rather than in separate, uncoordinated, often ego-inspired, independent activity. Yet, one must also wonder whether the Justice would have been as sanguine about authoring an opinion which erects so formidable a hurdle in the path of the efforts of black employees to eliminate racial discrimination in the terms and conditions of their employment if he had foreseen *Washington v. Davis's* "purposeful discrimination" standard and the downgrading of "racially disproportionate impact" as a critical yardstick of actionable discrimination.[39]

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36. 42 U.S.C. § 2000e-3(a) (1970), which provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

37. 316 U.S. 31, 47 (1942).

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purposes calls for careful accommodation of the statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task.

38. Emporium Capwell Co. v. Western Addison Community Organization, 420 U.S. 50, 72 (1975).

39. There have been a number of recent decisions that have placed rather severe limitations on the reach of the Constitution's protection against racial discrimination and the scope of statutory remediation of civil rights infringement. In Washington v. Davis, 426 U.S. 229, 239 (1976), the Court held that governmental action is not rendered constitutionally invalid merely because it has a racially disproportionate impact. While such an impact was said to be "not irrelevant, . . . it is not the sole touchstone of invidious racial discrimination." *Id.* at 242. What was required to establish a constitutional infraction was proof of purposeful or intentional discrimination. *Accord:* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). This places an extremely heavy burden on litigants seeking to establish racial discrimination in the context of constitutional proscriptions, since in this more sophisticated age of race relations, the raw, open racism of Gomillion v. Lightfoot, 364 U.S. 339 (1960), is rarely evident. Success in showing purposefulness will, I think, be rare.

In City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), a city charter amendment required that all land use changes agreed to by the city council had to be submitted to a referendum and approved by a 55% vote of the electorate. A land developer sought a zoning variance to construct a high rise apartment building on some property he owned in the township. The zoning change was voted down in the referendum. The Court found nothing in the city charter amendment at variance with federal constitutional requirements. In *The Village of Arlington Heights, supra*, a land developer sought a zoning variance on property zoned for single family housing to enable him to

Another of his majority opinions of considerable interest is *Linmark Associates v. Township of Willingboro*.[40] In that case, a township ordinance prohibited the posting of "For Sale" signs on the lawns of homes. The township was concerned about the decline of the white population, believed to be caused by panic selling by whites who feared that Willingboro, then roughly 18% black, was turning into a black community. Speaking for a unanimous Court, Justice Marshall struck the ordinance down as an abridgment of First Amendment rights. The information pertaining to the sale of housing in the town was said to be ". . . of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families,"[41] and signs on the lawns were said to be the most effective means of communicating the message. If the town could restrict dissemination of information as to the sale of homes because of fear that whites will choose to leave the town, ". . . every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.' "[42]

On the surface, one might think that the Justice would take the opposite point of view, but the decision is surely correct from a civil rights perspective. Barring the lawn signs, as the town fathers sought to do, was certainly not purposed to serve the maintenance of an integrated community. It was to bar white flight and to deprive whites of the right to sell, and blacks of the opportunity to buy, housing in the township. Even if the ordinance's objective is assumed to be the preservation of a racially balanced community, that objective cannot be obtained through suppression of the First Amendment rights of white homeowners, particularly when there were other means available—e.g., an educational campaign and other inducements to persuade white homeowners to accept integration as a priority—for achieving that purpose.

It is in his concurrences and dissents, however, that we know we have Mr. Justice Marshall's own ideas, not a court or majority consensus, being presented, and it is in his dissents that his views about the reach of the constitutional proscription against discrimination because of race, color, sex, or status are most clearly evidenced.

When the Court sustained state medicaid regulations barring use of public funds for non-therapeutic abortions,[43] Justice Marshall wrote a forceful dissent attacking the majority holding as victimizing the poor:

> The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many

construct an integrated moderate and low income multifamily housing project. Township officials refused to approve the change. While recognizing that the decision had a racially disproportionate impact on minorities, the Court found no constitutional violation had occurred. *The City of Eastlake* and *Village of Arlington Heights*, read together, appear to be a further tightening of the white suburban ring around the increasingly minority populated poor and decaying central city. Open housing is nowhere in sight.

International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) holds that legitimate seniority systems do not violate Title VII even though such systems perpetuate pre-Act discrimination. Thus, blacks victimized by past discrimination which denied them their rightful seniority, are locked forever in their disadvantaged status.

These decisions must be regarded as real setbacks to current and future civil rights gains.

40. 431 U.S. 85 (1977).
41. *Id.* at 96.
42. *Id.*
43. Beal v. Doe, 431 U.S. 438 (1977).

> thousands of unwanted minority and mixed race children now spend blighted lives in foster homes, orphanages and 'reform' schools. . . . Many children of the poor will sadly attend second-rate segregated schools. . . . And opposition remains strong against increasing AFDC benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. . . . I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children.[44]

In *San Antonio Independent School District v. Rodriguez*,[45] again in dissent, he challenged the majority holding, which validated a state educational funding program based on a minimum level of support from the state treasury to each school district, augmented through a local tax levied on real property in each district, as countenancing the denial of equal educational opportunity to children from property-poor school districts. He recognized that there was no general agreement among educational authorities that increased educational dollars meant better educational quality. That, however, he regarded as, at best, a peripheral issue. The critical consideration, as he saw it, was that the disparity among the school districts in available educational resources meant that the more affluent school districts were able to offer their children more extensive educational opportunities than the less affluent. This he regarded as a clear denial of equal educational opportunities to the children in the poorer districts.

> Authorities concerned with educational quality no doubt disagree as to this significance of variations in per-pupil spending. Indeed, conflicting expert testimony was presented to the District Court in this case concerning the effect of spending variations on educational achievement. We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes and a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning—may nevertheless excel is to the credit of the child, not the State. . . . Indeed, who can ever measure for such a child the opportunities lost and the talent wasted for want of a broader, more enriched education. Discrimination in the opportunity to learn that is afforded a child must be our standard.[46]

There is no easy answer to the issues *Rodriguez* raises.[47] Certainly, a

44. *Id.* at 456-57 (citation of cases omitted).

45. 411 U.S. 1 (1973).

46. *Id.* at 83-84. (footnote omitted).

47. *See generally*, McDermott and Klein, *The Cost-Quality Debate In School Finance Litigation: Do Dollars Make a Difference?*, 38 LAW & CONTEMP. PROB. 415 (1974). The authors outline and criticize the various standards that have been applied by the courts to define "equality" in educational opportunity, including the "inputs" standard suggested by Justice Marshall and the "minimum adequacy" standard adopted by the *Rodriguez* Court. The authors conclude by proposing a close variation of Justice Marshall's approach: any variance in the input of resources must have a rational justification, or equality of educational opportunity is denied.

For a discussion of the position of the majority and the several dissenters with regard to the various issues raised by *Rodriguez*, *see* Note, *San Antonio Independent School District v. Rodriguez: The Court Places Limits on the New Equal Protection*, 6 COLUM. HUMAN RIGHTS L. REV. 195, 206-18 (1974).

leveling of educational standards is no solution. Yet, since the constitutional mandate of equal educational opportunity runs to the *states*, an educational funding program that fosters differences in available educational opportunities between property poor and property rich school districts in the same state would seem to fall far short of meeting the obligation the Constitution requires.

In *Village of Belle Terre v. Boraas*,[48] in which the Court sustained an ordinance which placed a limit on the number of unrelated persons who could occupy a home, but placed no such restrictions on occupancy by persons related by blood or marriage, Justice Marshall again broke with the majority. While agreeing that governmental judgments concerning land use must be given deference, he contended that when zoning ordinances, as an incident to zoning for land use, established density limits only with regard to unrelated persons, they seek not to control the use of land or population density, but the private lifestyles of people. He regarded the latter as an unconstitutional governmental interference with personal freedom.[49]

As indicated previously, perhaps his strongest and most bitter dissent came in *Milliken v. Bradley*[50]—the Detroit school desegregation case. He argued that the evidence had established that Michigan operates a statewide educational system, not one subject to local control; that state practices and policies had produced the massive segregation of Detroit schools; and that the Detroit system could only be desegregated pursuant to a metropolitan area-wide plan involving school districts outside Detroit, as the lower court had ordered:

> Because of the already high and rapidly increasing percentage of Negro students in the Detroit system, as well as the prospect of white flight, a Detroit only plan simply has no hope of achieving actual desegregation. Under such a plan white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that *Brown I* was aimed at will not be cured, but will be perpetuated for the future.[51]

Milliken was handed down at a time when public outcry against busing to achieve integration was at its peak, and Justice Marshall accuses the majority of being influenced by that factor. "[I]t is plain that one of the basic emotional and legal issues underlying these cases concerns the propriety of transportation of students to achieve desegregation."[52]

On civil rights questions embracing the equal protection clause, the Justice has been a persistent critic of the Court's approach to decision.[53] He has urged the abandonment of the traditional two-tier test: *strict scrutiny* when a fundamental

48. 416 U.S. 1 (1974).
49. *Id.* at 17.
50. 418 U.S. 717 (1974).
51. *Id.* at 802.
The *Milliken* decision provoked bitter comment in the law reviews as well. *See, e.g.*, Comment, *Milliken v. Bradley in Historical Perspective: The Supeme Court Comes Full Circle*, 69 NW. U.L. REV. 799 (1974); Note, *Race Relations and Supreme Court Decision-Making: Jurisprudential Reflections*, 51 NOTRE DAME LAW. 91 (1975). For a more optimistic view of the possibilities for achieving integration in a post-*Milliken* world, *see* Kanner, *Interdistrict Remedies for School Segregation After Milliken v. Bradley and Hills v. Gautreaux*, 48 MISS. L.J. 33 (1977).
52. 418 U.S. at 812.
53. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (dissenting (opinion); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (dissenting opinion); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (dissenting opinion); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (dissenting opinion).

right is touched upon or the classification is suspect, and *mere rationality* in all other areas.[54] His unhappiness is based on three factors. First, it is clear that the Court will not expand its category of fundamental rights or suspect classes which are entitled to special judicial protection. But there remain, he argues:

> [R]ights, not now classified as 'fundamental' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect', that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and these classes, we simply cannot forgo all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choices can be termed 'wholly irrelevant' to the legislative goal.[55]

Second, Justice Marshall believes that in the two-tier approach, the result is preordained by an act of definition. If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny and is almost always held to be invalid. In all other instances, when mere rationality is the standard, the legislation is in the main upheld.[56] Finally, he contends that the " 'rational basis' test has no place in equal protection analysis when important individual interests with constitutional implications are at stake."[57] Mr. Justice Marshall would redefine the standard and not deal with what he calls *a priori* definitions.[58] The approach he suggests would be a concentration on the character of the classification being examined, "the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the state interest asserted in support of the classification."[59]

Mr. Justice Marshall's view of the equal protection and due process clauses as barring all governmental discriminatory treatment directed against identifiable groups, and as proscribing public regulations that have a disproportionate impact on those disadvantaged in society by social or economic status, although uttered most frequently in dissent, is destined for future prominence in the development of constitutional law in this country; that is, unless we have no future as an open, democratic, multiracial society.

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54. *See, e.g.*, San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 17 (1973).

55. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976); (dissenting opinion).

56. *See id.* at 319. *See also* Dandridge v. Williams, 397 U.S. at 519-20 (1970) (dissenting opinion). And those cases in which the Court has voided legislative schemes under the mere rationality test are evidence that the Court does indeed occasionally depart from rigid adherence to the two-tier analysis—at least in substance if not in form. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976) (dissenting opinion); San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 103-10 (1973) (dissenting opinion); Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 26-37 (1972).

57. Sosna v. Iowa, 419 U.S. 393, 420 (1975).

58. Dandridge v. Williams, 397 U.S. 471, 520 (1970).

59. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (dissenting opinion). For a brief explanation of this "sliding scale" approach to equal protection analysis, *see* Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 71-72 (1971).

The Commentators, too, have found the two-tier model an inadequate approach to equal protection issues, *see* Gunther, *supra* n.56; Note *Legislative Purposes, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).