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FOREWORD

The Fifth Annual Wiley A. Branton-Howard Law Journal Symposium Thurgood Marshall: His Life, His Work, His Legacy*

First of all, I would like to thank Sidley Austin and the Howard University School of Law for again sponsoring this annual Wiley A. Branton Symposium, with today's theme being "Justice Marshall: His Life, His Work, His Legacy." I would like to express my deepest thanks to Sheryll Cashin, who served as a law clerk for Justice Marshall—Thurgood—during the 1990-91 term, and who agreed to be our keynote speaker. I also would like to express my thanks to all who agreed to participate as panelists—some of whom also have served as Thurgood's law clerks. Last, but not least, my thanks to everyone who took the time out of their busy schedules to attend this symposium.

Thurgood's relationship with Wiley began in the mid-1950s when their paths would cross during local and state NAACP conferences. Their friendship—along with our families—flourished during the Little Rock school case. Thurgood would stay at the Branton home in Pine Bluff or Wiley would stay with us while he would be in New York. I remember the legal fund bringing the entire Branton family to New York City for a weekend of relaxation from all the stresses and strains that the Little Rock case wrought. Thurgood would always call on Wiley to confer and discuss different cases involving the South, including many sit-in cases. I remember so many times after Wiley left us, Thurgood would say, "I wish Wiley were here," to get his opinion on one case or another.

Many more memories of Thurgood will be discussed during today's symposium, so I will end my remarks by quoting excerpts from one of his last speeches when he received the National Constitution Center's Liberty Medal on July 4, 1992:

America must get to work. In the chilled climate in which we live, we must go against the prevailing winds. We must dissent from the indifference. We must dissent from the apathy. We must dissent from the fear, the hatred, and the mistrust. We must dissent from a

* The wife of the late Justice Thurgood Marshall. These opening remarks were given at the 2008 Wiley A. Branton-Howard Law Journal Symposium at the Howard University School of Law on October 24, 2008.

nation that buried its head in the sand waiting in vain for the needs of its poor, its elderly, and its sick to disappear and just blow away. We must dissent from a government that has left its young without jobs, education, or hope. We must dissent from the poverty of vision and timeless absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.

The legal system can force open doors, and even knock down walls, but it cannot build bridges. That job belongs to you and me. The country can't do it. Afro and white, rich and poor, educated and illiterate, our fates are bound together. We can run from each other, but we cannot escape from each other. We will only attain freedom if we learn to appreciate what is different, and muster the courage to discover what is fundamentally the same. America's diversity offers so much richness and opportunity. Take a chance, won't you? Knock down the fences which divide. Tear apart the walls that imprison you. Reach out. Freedom lies just on the other side. We shall have liberty for all.

Again, many thanks for the opportunity to share in this Symposium.

CECILIA A. MARSHALL
October 24, 2008

From the Editor-in-Chief

In this final issue of Volume 52 of the *Howard Law Journal*, we are proud to showcase a number of articles from the Fifth Annual Wiley A. Branton—*Howard Law Journal* Symposium entitled Thurgood Marshall: His Life, His Work, His Legacy. The Symposium, held at the Howard University School of Law on October 24, 2008, is an annual symposium generously sponsored by Sidley Austin LLP in celebration of civil rights activist and former dean of the Howard University School of Law, Wiley A. Branton.

This year's symposium marks the 100th anniversary of Justice Marshall's birth and the 75th anniversary of his graduation from Howard University School of Law. In order to honor the life and legacy of Justice Marshall, this issue opens with Sheryll D. Cashin's keynote address, entitled *Justice Thurgood Marshall: A Race Man's Race-Transcending Jurisprudence*, which argues that Justice Marshall's jurisprudence and civil rights advocacy was colored by his "race-man" tendencies. Next, Carol S. Steiker's article, entitled *The Marshall Hypothesis Revisited*, critically examines Justice Marshall's capital punishment jurisprudence and argues that alternative means of assessing the death penalty can offer direction to the Court in its capital punishment jurisprudence. Lisa A. Crooms's article, entitled *A Stone's Throw to Justice: Liberty, Equality, and Women's Rights in the Supreme Court Opinions of Justice Thurgood Marshall*, examines how women feature in Justice Marshall's views about liberty and equality under the Fifth and Fourteenth Amendments of the Constitution. Next, Jordan M. Steiker's article, entitled *Brown's Descendants*, explores the competing claims by the various opinions presented in *Parents Involved in Community Schools v. Seattle School District No. 1* as being the true heir to *Brown v. Board of Education*.

The concluding four articles and essays focus on the influence and legacy of Justice Marshall and the future of the Supreme Court. Susan Low Bloch's article, entitled *Celebrating Thurgood Marshall: The Prophetic Dissenter*, considers what Justice Marshall would think of the Supreme Court's jurisprudence during the seventeen years since his retirement. Next, Rebecca Brown's article, *Deep and Wide: Justice Marshall's Contributions to Constitutional Law*, summarizes the profound impact Justice Marshall had on constitutional law. Professor Elizabeth Garrett's article, *New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics*, examines how Justice Marshall's view of an independent judiciary served as a way to ensure that the

political branches are not allowed to adopt laws and institutions that shut out those with dissenting perspectives. Finally, this issue includes Mark Tushnet's essay, entitled *The Meritocratic Egalitarianism of Thurgood Marshall*, which examines several of Justice Marshall's opinions for indications of Marshall's meritocratic egalitarianism and suggests that the structure of Justice Marshall's overall equality jurisprudence—the “sliding scale” approach to the Equal Protection Clause—is compatible with meritocratic egalitarianism.

In addition to the excellent articles and essays produced for the symposium, we are proud to present three student comments. First, Omar A. Hashmi's comment, *Islamic Home Financing in the United States: Solution or Deception?*, examines the increasing role of Islamic financing in the United States housing market. Next, our Senior Notes and Comments Editor, Erica D. Roberts's comment, entitled *When the Storehouse is Empty, Unconscionable Contracts Abound: Why Transplant Tourism Should Not Be Ignored*, explores the current trend of transplant tourism, how transplant tourism exploits indigent individuals, and offers legislative solutions for dissuading citizens from participating in transplant tourism. Finally, our Senior Solicitations and Submissions Editor, Darla D. Woodring's comment, *Approaching Placements with Caution: A Child's Right to an Advocate in Adoption Proceedings*, argues that at a minimum, all states should adopt statutory language requiring the appointment of a guardian ad litem in all adoption proceedings in order to further the best interests of adoptees.

As you can see, we have an excellent collection of legal scholarship in this issue. On behalf of the *Howard Law Journal*, faculty, business manager, and student staff, we thank the law firm of Sidley Austin LLP for their continued and generous support of the Branton Symposium, and you, the reader, for your patronage of the *Howard Law Journal*. As outgoing Editor-in-Chief I would be remiss to not stress how hard all members of the *Howard Law Journal* have worked to produce Volume 52 of the *Howard Law Journal*. We have had a productive, enjoyable year and I am extremely proud to have served on this editorial board. We hope you find the issue thought provoking, and we thank you for your continued support and readership of our journal.

VALERIE L. COLLINS
Editor-in-Chief,
2008-2009



WILEY AUSTIN BRANTON

Justice Thurgood Marshall: A Race Man's Race-Transcending Jurisprudence

SHERYLL D. CASHIN*

I. INTRODUCTION

The historic 2008 presidential election and the debates that have swirled around Barack Obama remind me of the generational transition that is taking place. A new generation of leadership is emerging, another is receding, and yet another is dying off. In celebrating and contemplating the 100th Anniversary of the birth of Thurgood Marshall and his life and legacy, I wish to pay homage to a passing breed of African-American leader, commonly known among black people as the “race man.”

First, what is a “race man” and was Thurgood Marshall such a man? In common parlance, a race man or race woman is simply someone “whose identity [is] clearly defined as [b]lack,” and who acts to bring about the progression of black people.¹ Most black folks smile when you say, “Oh, he’s a race man.” They understand your meaning, and, for them, this is a positive stereotype. Although I have not yet discovered who actually coined the term, often it is associated with W.E.B. DuBois, who was first among 20th century race men in the minds of many.²

* Professor of Law, Georgetown University Law Center, author of *THE AGITATOR'S DAUGHTER: A MEMOIR OF FOUR GENERATIONS OF ONE EXTRAORDINARY AFRICAN-AMERICAN FAMILY* (2008), and former law clerk to Justice Thurgood Marshall. This Essay commits to paper an edited version of the keynote address Professor Cashin delivered at the Fifth Annual Wiley A. Branton-Howard Law Journal Symposium on October 24, 2008.

1. Richard McCulloch, *The Burden of the New “Race Man,”* THE BROWARD TIMES, Feb. 16, 2007. Clearly President Barack Obama is not a race man, nor should he be. He represents an emerging cadre of “post-civil rights” black politicians that necessarily must connect with and represent a wide range of racial, ethnic, and ideological groups in order to win state and national elections and govern effectively. See generally GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA* (2009).

2. See *ENCYCLOPEDIA OF THE HARLEM RENAISSANCE* 1011 (Cary D. Wintz & Paul Finkelman eds., 2004); Ayumu Kaneko, *A Strong Man to Run a Race: W. E. B. DuBois and the Politics of Black Masculinity at the Turn of the Century*, 14 JAPANESE J. AM. STUD. 105 (2003);

Whatever its origin, the term is clearly grounded in a race consciousness that, in turn, was born of racial oppression. In their 1945 seminal study of the Chicago southside, *Black Metropolis* sociologist St. Clair Drake and researcher Horace Cayton, described respectable race men and “race heroes” of the Bronzeville community.³ They described them as men who felt “impelled to prove to themselves continually that they [were] not the inferior creatures which their minority status implie[d].”⁴ In so doing, these men continued a tradition begun by a prior generation of agitators. “[E]ver since emancipation,” Drake and Cayton wrote, “Negro leaders have preached the necessity for cultivating ‘race pride.’”⁵ And a particular breed of race man, the race hero, seemed to feel this need intensely. According to Drake and Cayton:

If a man “fights for The Race,” if he seems to be “all for the The Race,” if he is “fearless in his approach to white people,” he becomes a Race Hero. Similarly any Negro becomes a hero if he beats the white man at his own game and forces the white world to recognize his talent or service or achievement.⁶

In the realm of sports, Jackie Robinson and Joe Louis come to mind as exemplars of the race hero. Whether or not they self-identified as such, like Tiger Woods today, these sports figures engendered within the black community this distinct cultural status.

But in the realm of social agitation, does Thurgood Marshall come to mind as a race man or race hero? In current popular discourse, his name does not usually appear in any lists of prototypical race men. Notably, the term “race man” does not always have a positive connotation. Frederick Douglass, W.E.B. DuBois, Booker T. Washington, Ida B. Wells, Martin Luther King, Jr., Malcolm X, Jesse Jackson, Sr., and Al Sharpton are names that might be associated with the term “race man” or “race woman,” and the connotation varies depending on the person referenced. And yet, Thurgood Marshall, in his life as a civil rights advocate and his clear achievements in liberat-

Monica L. Miller, *W.E.B. Du Bois and the Dandy as Diasporic Race Man*, 26 *CALLALOO* 738 (2003).

3. Bronzeville, alternatively known as “the Black Metropolis,” is the neighborhood on the south side of Chicago where many of the great migrants of the 1910s and 1920s located. A black city within a city, Bronzeville was second only to Harlem in black population. *See generally* ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 12 (Univ. of Chicago Press 1993) (1945).

4. *Id.* at 390.

5. *Id.*

6. *Id.* at 395.

A Race Man's Race-Transcending Jurisprudence

ing black people from the shackles of Jim Crow subordination, was the quintessential twentieth century race man. In the 1940s, he was widely known as “Mr. Civil Rights” among black people, who claimed him as their litigator and hero.⁷ This Essay argues that Justice Marshall’s jurisprudence was colored by his race-man tendencies, as was his civil rights advocacy before he ascended to the bench. I wish to begin, however, by explaining why I think of Justice Marshall as a race man.

There are two main values or attributes I discern in the most positive examples of 20th century race men or women. First, race men or women are strivers who achieve, often in the realm of higher education, and their achievements flow from a confidence in their own innate abilities and that of their brethren.⁸ Second, race men or women are agitators who are committed to uplifting their people. DuBois, for example, was a learned man, a prodigious scholar, a poet, and an intellectual. But he was also a *political organizer* who was not content to stay within the ivory tower of Harvard. He used his prestige to help lead and found the Niagara movement and the NAACP.⁹ Both of these traits—of striving and agitation—derived from a race consciousness—a positive Negro or Afro-American identity.¹⁰

7. See, e.g., HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 69-72 (1998). “By the early 1940s, Marshall became widely known in black communities as ‘their’ litigator. African American newspapers across the nation, lauding his courage, good looks, bravery, and legal victories, helped him become known as ‘Mr. Civil Rights.’ The magical words to communities that were struggling against racial segregation were simply, ‘Thurgood’s coming.’” *Id.* at 72.

8. By 1903, DuBois had begun his intellectual assault on Booker T. Washington’s industrial pragmatism, offering his conception of the “Talented Tenth”: black freedom would come from the work of exceptional men dedicated to serving the race, and such men would be formed only in an educational system that offered the Negro the highest learning and culture. See generally W.E.B. DuBois, *THE SOULS OF BLACK FOLK* (1903). For a recitation of how these values coursed through generations of my own family, rendering me a third-generation valedictorian and the fourth generation of colored Cashin to become a lawyer, see generally SHERYLL CASHIN, *THE AGITATOR’S DAUGHTER: A MEMOIR OF FOUR GENERATIONS OF ONE EXTRAORDINARY AFRICAN-AMERICAN FAMILY* 67-73, 90, 112-13, 240, 247, 251-53 (2008).

9. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 317-20 (7th ed. 1994).

10. For Justice Marshall’s generation, “black” was a pejorative term. I kept a diary during my year of clerking for him and one entry explains why he preferred the terms Negro or Afro-American. “When I asked [the Justice] whether he would be interested [in using the relatively new term] African-American, he said ‘Absolutely not.’ He went on to say that he had worked for years to get people to say Negro with a capital ‘N’ and he would be happy with anything but ‘black’ with a little ‘b,’ but that ‘Afro-American’ was in the dictionary and had been in use for 95 years. He said he had even represented a [news]paper called the Afro-American. Then he blamed Adam Clayton Powell for introducing the word ‘[b]lack.’” Marshall then proceeded to tell us a story that I will not recount that gave me a sense of how he felt about Powell. Personal diary entry of Sheryll Cashin (Oct. 16, 1990) (on file with author).

Justice Marshall's race consciousness evolved at Lincoln University. I became aware of this in my conversations with the Justice about his antics with my grandfather, Dr. Marcus Carpenter, who was a classmate, a fraternity brother, and an ardent race man. Thurgood Marshall pledged Alpha Phi Alpha while at Lincoln and was president of his chapter for two years.¹¹ Although for him the fraternity was mostly about fun and pranks, in pledging he took a step toward black kinship, joining an organization that modeled black manhood and citizenship and inculcated a collective Afro-American identity in its members. He would eventually join the black Freemasons and become a 33rd degree mason, participating in a near-century-old tradition of free black men who, through their lodges, bound themselves together for mutual social and economic advancement.¹²

While studying at Lincoln, Marshall befriended an older student named Langston Hughes. One of my fondest memories of clerking for the Justice is the stories he would tell me of going to Greenwich Village with Hughes to party with a "hip" literary crowd. I was surprised though, when, one day, Marshall told me forthrightly that it was Hughes who had stimulated his race consciousness. When they were undergraduates, the Lincoln faculty was completely white and the Justice admitted to me that he had been doubtful about whether the faculty should be integrated. This was a part of Thurgood Marshall's past with which I was not familiar. It was stunning for me to contemplate that the chief oral advocate in *Brown v. Board of Education*¹³ had once voted with fellow students against integrating the Lincoln faculty.¹⁴

"Hughes convinced me to change my mind," he told me. After an unpleasant encounter at a segregated movie theater, Hughes had confronted Marshall about his lax attitude about race issues. Through several intense conversations with Hughes, he began to see Negro faculty not just as a positive, but as an imperative, and he personally led a successful second referendum on the question.¹⁵

11. Alpha Phi Alpha, founded in 1906, is the first intercollegiate fraternity established by African Americans and has been open to men of all races since 1945. See Alpha Chapter of Alpha Phi Alpha Fraternity, Inc., *Fraternity History*, http://www.rso.cornell.edu/alpha/frat_history.html (last visited June 17, 2009).

12. See generally *Franklin & Moss*, *supra* note 9, at 176-77.

13. 347 U.S. 483 (1954).

14. See JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 48 (1998).

15. *Id.* at 48-49.

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His consciousness was piqued even more when he entered Howard University School of Law under the tutelage of Charles Hamilton Houston, the epitome of a race man. Houston, the valedictorian of his class at Amherst College, a graduate of Harvard Law School, and a former member of the *Harvard Law Review*, had intentionally sought to remake Howard University School of Law as an engine of social change when he became its dean. Marshall always said in his chambers that he did not “get serious” until he entered Howard Law. At the time he was talking about his commitment to academics, but I also think he was talking about his commitment to “the race.”

At Howard, Marshall embraced the twin values of academic striving and agitation that Houston and earlier generations of race men emulated. Houston demanded that his students excel and thoroughly master the law. Marshall followed his example, worked harder than he ever had in his life, and ultimately graduated first in his class.¹⁶ Houston, the agitator, also prepared his students to lead. “The social justification for the Negro lawyer,” he argued, “is the service he can render the race as an interpreter and proponent of its rights and aspiration[s].”¹⁷ He hammered this idea into his students: as lawyers either they would be social engineers or they would be parasites.¹⁸

Marshall’s early partnership with Houston and storied success as a civil rights lawyer clearly fulfilled Houston’s vision. But, this model of civil rights advocate that they invented was not preordained and they sometimes encountered resistance within the black community. Since the first African landed involuntarily in this country in 1619, each generation has had to choose whether and how to take up the race’s struggle. One of my diary entries underscores the choice involved:

Justice Marshall spoke of “old man Houston”—Charles Hamilton Houston’s father. “Old man Houston used to say, ‘You guys are trying to save all the colored folks, uplift the Negro race. We both believe in it, but I have a different method. I believe in saving one at a time and as soon as I get through with this one (pointing to self) I will work on somebody else.’”¹⁹

16. *Id.* at 59.

17. Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49, 49 (1935).

18. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 128 (First Vintage Books 2004) (1976).

19. Personal diary entry of Sheryll Cashin (Aug. 16, 1990) (on file with author).

II. THE RACE MAN'S JURISPRUDENCE

Much has been written about Marshall's career before ascending to the bench.²⁰ I want to turn now to Marshall's jurisprudence, much of which is embodied in the many passionate dissents he wrote during his twenty-four years on the Court. In those dissents, I discern the voice of a race man, the same insistent voice of controlled outrage that sometimes colored his oral arguments when he was standing *in front* of the bench. This voice was evident in his oral argument in *Brown v. Board of Education*. In his closing, he made a statement that encapsulated his core theory in *Brown*:

[W]e submit that the only way to arrive at [a] decision [adverse to the plaintiffs] is to find that for some reason Negroes are inferior to all other human beings. . . . [W]hy of all of the multitudinous groups of people in this country [do] you have to single out Negroes and give them this separate treatment[?]²¹

Reading the flat transcript, even without the benefit of his leathery voice, his anger is palpable. A race man looks at his people and sees the opposite of what society sees. He sees greatness, and sometimes superiority—greatness in enduring virulent oppression with dignity; greatness in the ability of many Negroes not just to survive, but to *thrive* in the face of daily insults to their humanity. And this is a sentiment that usually transcends class. Most race men and women identify with the common man. And, in my view, no Supreme Court Justice in American history was more empathetic to the plights of ordinary Americans than Thurgood Marshall.²²

At the onset of his long tenure on the Supreme Court, Marshall explicitly stated a race man's judicial philosophy, one that mirrored the creed he had learned from Charles Hamilton Houston. In a speech he gave at Wisconsin Law School in 1968, one year after he became an Associate Justice, he argued for "a new kind of activism, an activism in the pursuit of justice" in order to realize and maintain the promise of the Fourteenth Amendment.²³ He said in another speech he gave a year later at New York University, "True justice re-

20. See, e.g., BALL, *supra* note 7; KLUGER, *supra* note 18; CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL (1993); WILLIAMS, *supra* note 14.

21. OLIVER BROWN, ARGUMENT: THE COMPLETE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-55, at 239 (1969).

22. See *infra* Part III of this essay.

23. Thurgood Marshall, *The Continuing Challenge of the 14th Amendment*, 1968 Wis. L. Rev. 979, 980.

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quires that the ideals expressed in [the Reconstruction Amendments] be translated into economic and social progress for all of our people.”²⁴ A decade later, when a law clerk from another chambers asked him to describe his judicial philosophy, he characterized his approach to judging more plainly. According to Deborah Rhode, one of his clerks at the time, he said, “You do what you think is right and let the law catch up.”²⁵

Above all for Marshall, doing what was right meant trying to get his colleagues to face up to and redress America’s tortured history of racial discrimination. Race men remember the history that others would like to forget. For them the hurts of past centuries are as fresh as if they occurred this morning. Historical memory was central to Marshall’s jurisprudence and was the source of the anger that sometimes showed up in his opinions and speeches.

He played the role of race hero when he brought the blithe celebrations of the Constitution’s Bicentennial to a pause with a pointed, widely publicized speech that reminded the nation of the Framers’ hypocrisy: “I [do not] find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound,” he said.²⁶ “Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought. . . .”²⁷

Other times, Marshall used humor to make his historical point. When Chief Justice Burger proposed that the Court celebrate the Bicentennial with a pageant in which members of the Court would reenact the original signing of the Constitution, Marshall said he would participate only if the pageant was faithful to racial history, meaning “he would appear in livery and kneebritches, carrying trays.” Needless to say, the reenactment did not take place.²⁸

In the major cases involving race-related issues in which Marshall opined, he always brought a race man’s historical perspective. If a case involved an issue affecting African Americans, inevitably he

24. Thurgood Marshall, *Group Action in the Pursuit of Justice*, 44 N.Y.U. L. REV. 661, 662 (1969), quoted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 227 (Mark V. Tushnet ed., 2001).

25. Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992) (internal quotation marks omitted).

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

27. *Id.*

28. Rhode, *supra* note 25, at 1264.

viewed it through the lens of slavery and Jim Crow. Until all vestiges of America's peculiar institutions were eradicated, he reasoned, the government had a duty to act affirmatively to help Afro-Americans obtain opportunities equal to those enjoyed by other Americans. This approach is most evident, for example, in his dissent in *Regents of the University of California v. Bakke*.²⁹ In his view, a rigid quota system that set aside sixteen places for minority applicants to University of California Davis Medical School was not unconstitutional; therefore, he dissented from the Court's contrary conclusion.

After treating his colleagues to an extended recitation on what he termed "the sorry history of discrimination" in the United States—from slavery to Reconstruction to the Jim Crow segregation that endured through the mid-20th century—he carefully explained this history's "devastating impact on the lives of Negroes. . . ."³⁰ Given this history and its contemporary impact, he argued, "bringing the Negro into the mainstream of American life should be a state interest of the highest order."³¹

Other participants in this symposium will expound on the doctrinal validity, *vel non*, of Justice Marshall's approach to judging and equal protection law. My point is to underscore that his was a race man's project. He intended through avowed judicial activism to create *genuine* equality rather than the kind of formal, abstract equality embraced by his more conservative brethren. He reasoned that the differences in the historical experience of African Americans should entitle them to greater protection under the 14th Amendment. "The experience of Negroes in America has been different in kind, not just in degree from that of other ethnic groups," he wrote in *Bakke*.³² And, he continued, "[i]t is because of this legacy of unequal treatment that we must now permit the institutions of this society to give consideration to race in making decisions about who will hold . . . positions of influence, affluence, and prestige in America."³³

This is consistent with the judicial philosophy he espoused in his NYU speech. There he stated: "From the perspective of history . . . the crucial task is not so much to define our rights and liberties, but to establish institutions which can make the principles embodied in our

29. 438 U.S. 265, 396 (1978) (Marshall, J., concurring in part and dissenting in part).

30. *Id.* at 396.

31. *Id.*

32. *Id.* at 400.

33. *Id.* at 401.

Constitution meaningful in the lives of ordinary citizens.”³⁴ Obviously one of the institutions Marshall cared deeply about was public education. I had the privilege of helping him craft his dissent in a 1991 case, *Board of Education of Oklahoma Public Schools v. Dowell*.³⁵ It was especially poignant working with him, in the twilight of his career, on the issue for which he was best known. And it was also very painful. I did not know it then, but he was halfway through his last active year on the Court. It was abundantly clear to him that his vision for a law and an Equal Protection Clause that produces genuine equality had not come to pass. His brother Justice Brennan, had retired before the start of the term, and been replaced by Justice Souter, whom Marshall jokingly referred to in chambers as “Junior.” Marshall was eighty-two years old and feeble, despite his ample body and still very active mind.

Not since his powerful dissent in *Milliken v. Bradley*,³⁶ when the Court’s consensus on enforcing the imperatives of the *Brown* decision first disintegrated, had he had such a pointed opportunity to reflect publicly on his life’s work.³⁷ The *Dowell* case involved a school desegregation order that was entered against the Oklahoma City school district in 1972—18 years after the *Brown* decision—although the school district had maintained segregated schools since its inception in 1907.³⁸ The plan *had* produced integrated schools, but once the federal court retreated from supervising the desegregation order, not surprisingly, local autonomy resulted in a neighborhood school’s plan that recreated several separate, racially identifiable “black” and “white” elementary schools.³⁹

Marshall’s assessment of the case reflected a typically realist, race man’s perspective, and again, an angry one. As he dryly put it in his dissent, the real issue in the case was whether, after sixty-five years of

34. Marshall, *supra* note 24, at 662. In Part III, below, I address how Marshall’s vision of justice transcended race, as this quote attests.

35. 498 U.S. 237 (1991).

36. 418 U.S. 717 (1974).

37. In *Milliken*, he had issued a prophetic warning: “Today’s holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution’s guarantee of equal justice than it is the product of neutral principles of law. In the short run, it 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.” *Milliken v. Bradley*, 418 U.S. 717, 814-15 (1974) (Marshall, J., dissenting). For an explanation of *Milliken*’s role in contributing to race and class segregation in housing, see SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 212 (2004).

38. *Dowell*, 498 U.S. at 251.

39. *Id.* at 263.

intentional segregation, “13 years of desegregation was enough.”⁴⁰ In working on the case, I spent a good deal of time with the Justice, talking about the history of school desegregation litigation and the major “race” cases. It was very interesting for me to contemplate why a race man who himself had benefited greatly from studying at two racially identifiable universities would care so much about the integration ideal. At the time, a proposal to create a public school exclusively for black boys had received considerable attention in the news media. I wrote in my diary about our exchange:

Marshall said [such a school] would only make black kids vulnerable. “When a budget cut is required, where would the ax fall first?” he argued. He offered an analogy to World War II. When the U.S. military was contemplating a very dangerous mission in which it expected 2/3 of the unit to suffer casualties, “what unit would get picked first?” he said.⁴¹

Clearly the Justice did not harbor any of the nostalgia that some blacks, especially black elders, expressed about the segregated black institutions that flourished in the Jim Crow era. And it did not matter to the Justice that modern racial segregation in schools mirrored racial segregation in neighborhoods. In the *Dowell* case, he emphasized, the school board’s prior manipulations in creating all-black schools had contributed to white parents’ preferences about where to live.⁴² In his dissent he stated: “I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions.”⁴³ For Marshall, no condition perpetuated stigmatic injury more than racially identifiable schools. He knew all too well that “all-Afro-American schools” risked the “relative indifference of school boards. . . .”⁴⁴ He cited empirical evidence that many black schools “suffer from high student-faculty ratios, lower quality teachers, inferior facilities and physical conditions, and lower quality course offerings and extracurricular programs.”⁴⁵

In his chambers, while deliberating *Dowell*, he was very upset. He had rehearsed with us, his clerks, the arguments he intended to use in the conference room with his colleagues. And they were a race

40. *Id.*

41. Personal diary entry of Sheryll Cashin (Apr. 3, 1991) (on file with author).

42. *Dowell*, 498 U.S. at 265.

43. *Id.* at 252.

44. *Id.* at 260 n.5.

45. *Id.*

man's arguments; the kind of truth telling that makes some people uncomfortable. "Am I obliged to keep saying that things are going to get better?" he said. He worried aloud about what he would say to a poor black kid about his life chances, given the schools and neighborhoods such kids were relegated to. "They are now re-establishing on another basis the same [Jim Crow segregation that Brown was supposed to eradicate]. Before they used the law, now they are using residential segregation. Negroes are not that stupid," he said in exasperation. Then he proceeded to tell us a heart-wrenching story about a black man he once encountered who told him he wanted to be reborn a white person because of all the privileges white people enjoyed. "The only way to be superior is to have someone inferior and your subconscious prevents you from telling the truth," he said aloud.⁴⁶

This was my toughest day on the job. This normally humorous man, so full of joy despite his gruff exterior, was at a loss as to how to stop the inevitable. He was partially effective, though. In *Dowell*, the Court merely hinted at what would be necessary to end a school desegregation order.⁴⁷ The Court waited until Marshall had died before it declared, essentially, that it was time for federal courts to retreat altogether from policing school desegregation.⁴⁸

III. RACE-TRANSCENDING JURISPRUDENCE

I would be remiss if I failed to explain how Marshall's race-man perspectives compelled him to be an ardent advocate for other disadvantaged groups. A race man cares about and is an advocate for his people, but that does not mean that he cannot or will not advocate for others. On the contrary, a race man or woman should be able to see other peoples' oppression clearly because he or she has had so much experience observing its weight on his or her own people. A race man also tends to look at his own people as the nation's canary. In his

46. All of the quotations in this paragraph are supported by: Personal diary entry of Sheryll Cashin (Apr. 3, 1991) (on file with author).

47. 498 U.S. at 243-45.

48. *See Missouri v. Jenkins*, 515 U.S. 70, 102-03 (1995) (holding that the district court exceeded its remedial authority when it required across-the-board salary increases and continued funding for remedial education as part of a desegregation decree); *Freeman v. Pitts*, 503 U.S. 467, 490-91 (1992) (holding that a district court may incrementally turn over supervision of a school district before total compliance had been reached); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (holding that certain voluntary, non-court-ordered school racial integration plans were unconstitutional).

view, an America that truly treats African Americans fairly necessarily will have embraced a fundamental principle of universal fairness.

Marshall understood this. He spoke explicitly of the linkage between “minority” and “majority” rights in a speech he gave to the Second Circuit judicial conference in 1989:

History teaches that when the Supreme Court has been willing to shortchange the equality of minority groups, other basic personal civil liberties like the rights of free speech and to personal security against unreasonable searches and seizures are also threatened. We forget at our peril [the historical lesson that] . . . the fates of equal rights and liberty rights are inexorably intertwined.⁴⁹

Thurgood Marshall’s commitment to lift up his own people inexorably led him to espouse an equal opportunity vision for the Reconstruction Amendments, particularly in the realm of education. In his dissent in *San Antonio School District v. Rodriguez*, he spoke of “the right of every American to an equal start in life, so far as the provision . . . of education is concerned.”⁵⁰ His experiences with racism and racial segregation also led him to reject *any* caste system.⁵¹ For him, the central principle animating the Reconstruction Amendments was to eradicate any state actions that relegated human beings to second-class citizenship. For this reason, he was by far the most consistent advocate on the Court for the poor.

His brand of equal justice can be seen in his dissent in *Kadrmas v. Dickinson Public Schools*,⁵² a case in which the Court upheld a North Dakota statute that authorized some school districts to charge fees for school bus services. “The intent of the Fourteenth Amendment was to abolish caste legislation,” he argued.⁵³ “When state action has the predictable tendency to entrap the poor and create a permanent underclass, that intent is frustrated.”⁵⁴ Once again, it took a race man’s

49. Thurgood Marshall, *Remarks at the Annual Conference of the Second Circuit [The Future of Civil Rights]*, quoted in THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 218 (Mark V. Tushnet ed., 2001). Cf. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting) (noting that while in that case railroad workers subjected to involuntary drug tests were the victims of the majority’s ruling, “ultimately, today’s decision will reduce the privacy all citizens may enjoy”); *Trans World Airlines v. Hardison*, 432 U.S. 63, 96-97 (1977) (Marshall, J., dissenting) (noting that “[a]ll Americans will be a little poorer” as a result of the court’s decision to not respect the religious freedoms of the respondent).

50. 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

51. See Cass R. Sunstein, *On Marshall’s Conception of Equality*, 44 STAN. L. REV. 1267, 1270 (1992).

52. 487 U.S. 450 (1988).

53. *Id.* at 469 (Marshall, J., dissenting).

54. *Id.*

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realist perspective to comprehend how a bus fee could entrap poor folks. A man who had personally experienced impecuniosity and worked for and among poor people, understood how even a modest fee was a very real barrier to education for children like Sarita Kadrmas.

In a series of opinions, Marshall argued for heightened scrutiny under the Equal Protection Clause of any conditions that suggested caste status. These opinions suggest a view that “no one should be deprived, without good reason, of adequate education, police protection, food, shelter, or medical care.”⁵⁵ As eminent legal scholar and former Marshall clerk, Cass Sunstein, put it, “[c]ertainly Marshall believed that poor people could not be deprived of access to the basic institutions of a democratic society, including the political process, the judicial process, and education.”⁵⁶ Not surprisingly, a litany of non-black, non-poor litigants also benefited from Marshall’s vision of justice, including prisoners, minors, the elderly, persons with disabilities, Native Americans, religious minorities, immigrants, fathers, women, students, protestors, and other racial minorities.⁵⁷

55. Sunstein, *supra* note 51, at 1272 (citing *Harris v. McRae*, 448 U.S. 297, 337 (1980) (Marshall, J., dissenting); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259-62 (1974); *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

56. *Id.* (citing *United States v. Kras*, 409 U.S. 434, 458 (1973) (Marshall, J., dissenting)). In *Kras*, Marshall expressed indignation at the majority’s minimizing of the impact of a \$2.00 filing fee, stating:

I cannot agree with the majority that it is so easy for the desperately poor to save \$ 1.92 each week over the course of six months. The 1970 Census found that over 800,000 families in the Nation had annual incomes of less than \$1,000 or \$19.23 a week. . . . I see no reason to require that families in such straits sacrifice over 5% of their annual income as a prerequisite to getting a discharge in bankruptcy.

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. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future. A pack or two of cigarettes may be, for them, not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have—like attempting to provide some comforts for a gravely ill child, as *Kras* must do.

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.

409 U.S. at 459-60 (citation omitted) (emphasis added).

57. Martha Minow, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 66, 67 (1991). *A Tribute to Justice Thurgood Marshall* categorizes Marshall’s dissenting opinions as follows:

Prisoners: *see* *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 465 (1989) (Marshall, J., dissenting); minors: *see* *Schall v. Martin*, 467 U.S. 253, 281 (1984) (Marshall, J., dissenting); older people: *see* *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 182 (1989) (Marshall, J., dissenting); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); persons with disabilities: *see*

And, as he had suggested in his Wisconsin Law School speech, Marshall believed that the courts were supposed to aggressively promote equal opportunity and equal justice.⁵⁸ Today we know that his vision for an activist Court did not prevail, and at the end of his career he knew that he had been losing this battle for some time. For most of his tenure on the Court, he and his brother Brennan had fought against the counterrevolution led by Justice Rehnquist, especially after Rehnquist became Chief of the Court. As the “Great Dissenter”⁵⁹ he had repeatedly decried the Court’s undermining of the optimistic, equal justice vision for American law that had been suggested by *Brown*. He “made a career of protesting” not just the roll-back of school desegregation, but also “the dismantling of procedural protections for the accused, the erection of new barriers to affirmative action, the disregard for free speech, and the reinstatement of the death penalty.”⁶⁰

CONCLUSION: VICTORY IN THE FIGHT

One wonders how Justice Marshall dealt with being on the losing side so often. Although his dissents were often passionate, Marshall, the man, did not stay angry. He couldn’t. His sense of humor prevented that. In preparing for this symposium, I re-read my diary from my year of clerking and often found myself chuckling. Marshall was also a race man in the sense that he appreciated both the highs and lows of his people’s culture. Many of the jokes he shared with us in chambers are not appropriate for polite company. For me, his most

United States Dep’t of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 613 (1986) (Marshall, J., dissenting); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part); Native Americans: see Or. Dep’t of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 775 (1985) (Marshall, J., dissenting); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 615 (1977) (Marshall, J., dissenting); members of religious minorities: see Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 71 (1986) (Marshall, J., concurring in part and dissenting in part); Trans World Airlines v. Hardison, 432 U.S. 63, 85 (1977) (Marshall, J., dissenting); immigrants: see Jean v. Nelson, 472 U.S. 846, 858 (1985) (Marshall, J., dissenting); INS v. Lopez-Mendoza, 468 U.S. 1032, 1060 (1984) (Marshall, J., dissenting); fathers: see Fiallo v. Bell, 430 U.S. 787, 800 (1977) (Marshall, J., dissenting); women: see Rostker v. Goldberg, 453 U.S. 57, 86 (1981) (Marshall, J., dissenting); Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting); students: see Vill. of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974) (Marshall, J., dissenting); protestors: see Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 301 (1984) (Marshall, J., dissenting); members of racial minorities: see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Marshall, J., dissenting).

58. See *supra* note 23 and accompanying text.

59. Owen Fiss, *Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 52 (1991) (citing Kathleen M. Sullivan, *Marshall, the Great Dissenter*, N.Y. TIMES, June 29, 1991, at A23).

60. *Id.*

delicious anecdotes were the ones in which humor became its own form of subversion of racial oppression.⁶¹

Marshall knew, as many race men and women must, that there was victory in the fight. He, like other justice fighters before him, had to grieve over losses but keep fighting. "There are only two choices in life," he once said.⁶² "[S]top or go on. You tell me, what would you pick?"⁶³

While the Rehnquist Court did not embrace Marshall's activist vision, politics in America may be catching up with this vision. The multi-racial, multi-class coalition that seems poised to form a political majority and elect Barack Obama president *is* premised on the kind of optimistic, equal opportunity vision that Justice Marshall sought for the law.⁶⁴ But Marshall, like most race men, seemed to believe that the fight for justice would never be over in America. When the City of Baltimore erected a statue of him in 1980, he said at the unveiling: "I just want to be sure that when you see this statue, you won't think that's the end of it. I won't have it that way. There's too much work to be done."⁶⁵

I suspect, were he still with us, he would have said the same thing at the renaming of Baltimore-Washington International Thurgood Marshall Airport. And were he here, he would offer a similar observation if our nation elects an African-American president. Oh he would celebrate. He would be tickled, I think, at this dramatic acceleration of the possibilities for his people. But after the celebrations he would also remind us of the inequality in urban public education, of the disproportionate incarceration of young black men, perhaps of the

61. Among his many such anecdotes, one of my favorites concerned his involvement with drafting the Kenyan constitution. Another of my diary entries includes the story.

TM said he went to a meeting of some of the country's leaders in Nairobi and a crowd of 1,000 or more was standing outside of the meeting. At that time, there were rules in Kenya limiting the number of people who could meet inside a building to twenty. He asked if he could say something to the crowd and the authorities objected but after his insistence, said he could say one word. He got up on top of a station wagon and yelled the one word, "Uhuru," the Swahili word, according to TM, for "freedom now." The crowd roared and the authorities were outraged. They told TM he could be put in prison for that. He said he got polite real fast.

Personal diary entry of Sheryll Cashin (Oct. 16, 1990) (on file with author).

62. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1220 (1992) (quoting a story told to her by Justice Marshall).

63. *Id.*

64. Again, the speech from which this Essay derives was delivered on October 24, 2008, before the historic election had occurred. Sheryll Cashin, Keynote Address at the Fifth Annual Wiley A. Branton-Howard Law Journal Symposium (Oct. 24, 2008).

65. Dale Russakoff, *Tribute to Marshall: City of Baltimore Dedicates Statue to 1st Native Son on High Court*, WASH. POST, May 17, 1980 at C1, cited in Sunstein, *supra* note 51, at 1275.

HIV/AIDS crisis in black communities, and the health and wealth disparities suffered by his fellow Afro-Americans. Marshall the race man, the agitator, would say, again, “don’t ‘think that’s the end of it. . . . There’s [still] too much work to be done.’” And it is my hope that the next generation, those in the audience who are currently suffering through law school, will heed his message and choose to be social engineers and engage in the racial and social justice issues of their time.

Marshall and the Criminal Justice System

From the disproportionate representation of African-American males in the nation's prisons, to the disparate impact of the federal drug sentencing guidelines, criminal law has long impacted a host of civil rights issues. Carol S. Steiker of Harvard Law School will analyze Justice Marshall's opinions on substantive criminal law issues and the constitutional implications of his positions.

The Marshall Hypothesis Revisited

CAROL S. STEIKER*

“In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable.”¹—Thurgood Marshall

Any of his former clerks can tell you that a clerkship with Justice Thurgood Marshall necessarily entailed engagement with the American death penalty. During Justice Marshall’s very first Term on the Supreme Court (October Term 1967), the Court decided one of its first important constitutional cases regarding capital punishment. In *Witherspoon v. Illinois*,² the Court held unconstitutional the prevailing practice of striking from capital juries all prospective jurors who expressed any religious or conscientious scruples about the death penalty, leading some to predict the imminent demise of the practice of capital punishment. In each of the next three Terms, the Court addressed another major capital case,³ after decades of virtual silence on the issue of the constitutionality of capital punishment. Finally, during Marshall’s fifth Term as Justice, the Court decided the landmark case of *Furman v. Georgia*.⁴ In *Furman*, the Court struck down (albeit by a bare five to four majority) not merely an individual death sentence, but the death penalty as it was then practiced across the United States. The Court constitutionally reinstated capital punishment only a few years later in *Gregg v. Georgia*⁵ and its accompanying cases,⁶ which

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1. *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

2. 391 U.S. 510 (1968).

3. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Maxwell v. Bishop*, 398 U.S. 262 (1970); *McGautha v. California*, 402 U.S. 183 (1971). Justice Marshall took no part in the consideration or decision of *Maxwell*.

4. 408 U.S. 238 (1972).

5. 428 U.S. 153 (1976).

considered a new generation of capital statutes passed in response to *Furman*. But Justice Marshall refused to accept the Court's turn-around on the constitutional status of the death penalty: he not only dissented in *Gregg*, but also continued to reaffirm his commitment to constitutional abolition in his dissents from every death sentence affirmed by the Court until his retirement nearly twenty years after *Furman*. I would wager that every clerk from the post-*Gregg* period can type out the opening line of every Marshall death penalty opinion: "Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments"⁷

The "view" to which Justice Marshall "adhered" for two decades had its roots in his solo opinion in *Furman*—the longest of the nine opinions engendered by the case. Each of the five Justices in the *Furman* majority issued his own solo opinion and declined to join any other (the four dissenters each wrote their own opinions as well, but they also joined in each others' dissents). Justice Marshall first discussed the history of the Eighth Amendment's ban on "cruel and unusual" punishment and the development of the Court's Eighth Amendment jurisprudence. His opinion then developed a multi-factored analysis for determining whether a punishment violates the Eighth Amendment: (1) the degree of physical pain and suffering inflicted; (2) the extent to which the punishment is new; (3) whether the punishment is excessive and serves no valid legislative purpose; and (4) whether "popular sentiment abhors it."⁸ This framework mirrored to a substantial degree Justice Brennan's four-factored analysis for determining whether a punishment violated "human dignity," which Brennan argued lay at the core of the Eighth Amendment's protection.⁹

Justice Marshall's opinion, however, broke new ground in two particulars. First, Marshall completely rejected retribution, which he equated with "retaliation" and "vengeance," as a valid legislative purpose of criminal punishment.¹⁰ Reasoning that maintenance of the

6. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

7. *See, e.g., McCleskey v. Bowers*, 501 U.S. 1282, 1282 (1991) (Marshall, J., dissenting from denial of a stay of execution and from denial of certiorari) (emphasis omitted). This was Marshall's last dissent in a death penalty case.

8. *Furman*, 408 U.S. at 330-32 (Marshall, J., concurring).

9. *Id.* at 270 (Brennan, J., concurring).

10. *Id.* at 343 (Marshall, J., concurring).

death penalty would not substantially advance any purposes of punishment aside from retribution (such as deterrence or prevention of recidivism), Marshall concluded that capital punishment constituted “excessive” punishment under the Eighth Amendment.¹¹ Marshall’s second distinctive contribution in *Furman*—and the focus of this paper—is his claim that even if the death penalty did not constitute “excessive” punishment, it nonetheless violated the Eighth Amendment because “it is morally unacceptable to the people of the United States at this time in their history.”¹²

In light of substantial evidence to the contrary, both in public opinion polls and existing legislative enactments (more than three-quarters of the states authorized capital punishment at the time of the *Furman* decision), Marshall’s argument about the “unacceptability” of capital punishment faced some obvious difficulties. In response to these anticipated objections, Marshall asserted that “the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available.”¹³ What information did Marshall have in mind that would influence an “informed” citizen’s attitude toward the death penalty? He offered a long list:

that the death penalty is no more effective a deterrent than life imprisonment; that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become lawabiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.¹⁴

These facts would convince “the average citizen” that the death penalty was “unwise,” in Marshall’s view.¹⁵ But Marshall identified further considerations that would convince “even the most hesitant of

11. *Id.* at 359.

12. *Id.* at 360.

13. *Id.* at 362.

14. *Id.* at 362-63.

15. *Id.* at 363.

citizens”¹⁶ that the death penalty was “morally reprehensible”¹⁷—namely, that “capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence could be proven; and the death penalty wreaks havoc with our entire criminal justice system.”¹⁸

This prediction about what the American public would believe about the death penalty, if fully informed, has become known as “the Marshall hypothesis.” My interest in revisiting the Marshall hypothesis lies in my longstanding discomfort with it. The claim has always struck me as among the weakest of the arguments made in the multiple, lengthy *Furman* concurrences. I have poked gentle fun at it over the years in my course on “Capital Punishment in America”—deriding it as either naïve wishful thinking or antidemocratic paternalism. I am not alone; Michael Mello, an anti-death penalty litigator, activist, and law professor recently described his own similar reaction: “I have never felt comfortable arguing the Marshall hypothesis. It strikes me as arrogant to contend that those who disagree with me must be ignorant and that if they only knew the true facts, they would agree with me.”¹⁹ Moreover, any student of the history of capital punishment in America knows something that Justice Marshall could not have known in 1972—the public’s subsequent reaction to the *Furman* decision. The immediate and overwhelming backlash in favor of capital punishment led the vast majority of states to pass new death penalty legislation as quickly as possible, flouting the expectations of many that *Furman* represented the end of the American death penalty.²⁰ Assuming that the publicity surrounding the litigation of *Furman* and the Court’s decision brought to the public’s attention at least some of the facts that Marshall deemed dispositive, it is hard to argue that greater knowledge about the death penalty moved public opinion against it, at least in the short term. In light of these developments, Justice Marshall himself moderated his reliance on the Marshall hypothesis in his dissent in *Gregg* four years later:

16. *Id.* at 364.

17. *Id.* at 363.

18. *Id.* at 364.

19. Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 876 (2008).

20. See Carol S. Steiker, *Furman v. Georgia: Not an End, But a Beginning*, in CAPITAL PUNISHMENT STORIES (John Blume & Jordan Steiker, eds., forthcoming 2009) (describing the unexpectedness of the extent of the backlash to *Furman*).

The Marshall Hypothesis Revisited

Since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people.²¹

Nonetheless, Marshall insisted that there continued to be good reason to believe that the public remained poorly informed about the death penalty; he thus stopped short of repudiating or modifying the Marshall hypothesis in *Gregg*. However, he quickly turned his attention back to his Eighth Amendment “excessiveness” argument, which provided the more fully elaborated basis for his *Gregg* dissent.

Despite Justice Marshall’s own acknowledgement in 1976 that the immediate public reaction to *Furman* might undermine to some extent his reasoning in that case, the passage of time has offered new developments by which to assess the Marshall hypothesis. First, quite a number of social scientists have sought to “test” the Marshall hypothesis in various experimental settings. While the results of such testing are not wholly supportive of the Marshall hypothesis—indeed, they are decidedly mixed—the body of experimental research produced in response to Marshall’s opinion in *Furman* does offer some modest support for his claims. Second, the three-plus decades since *Furman* have provided us with more opportunities to assess what the public knows about the death penalty, and what conditions generate shifts in public opinion about the death penalty. These experiential (as opposed to experimental) data support, to some extent, both Marshall’s claim of widespread public ignorance about the death penalty and Marshall’s belief in the mutability of public opinion in response to certain kinds of information. Finally, while movement in the great tide of the opinion of “the public” is hard to measure and harder still to explain, the change in the views of members of the Supreme Court is both (1) easier to see because there are, after all, only nine Justices at any one time, and they tend to sit for decades, and (2) easier to explicate because they elaborate their views in written opinions. It is on the Court itself that the Marshall hypothesis has found its strongest support; indeed, it is ironic that Justice Marshall’s predictions in *Furman* have been most fulfilled in the transformation over time of

21. *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting) (citation omitted).

the views of several of the key Justices who disagreed with Marshall in *Furman* and *Gregg*.

In what follows, I will review the empirical studies, the more general changes in death penalty attitudes and practices from 1972 until today, and the changes in the views of individual members of the Supreme Court over the same period. These different grounds of assessment, considered together, do not by any means lead to an unqualified endorsement of Marshall's argument in its entirety. However, they do suggest that there is more to say on behalf of the Marshall hypothesis than the easy dismissal it sometimes invites. Moreover, these assessments may not only help to explain some of the developments in death penalty attitudes and practices from *Furman* to the present, but they may also offer some direction to the Court in its continuing role of regulating capital punishment practices under the Eighth Amendment.

I. THE MARSHALL HYPOTHESIS IN THE LABORATORY

The ink was barely dry on the *Furman* opinion when social scientists began to try to test the Marshall hypothesis. Indeed, the very first such effort was cited by Marshall himself in his *Gregg* dissent as grounds for believing that "the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty."²² That first study was conducted in 1975 and published in 1976 by Austin Sarat and Neil Vidmar (two young scholars of political science and social psychology, respectively). The study provided something of a template for a number of further efforts to test the Marshall hypothesis in experimental settings. Sarat and Vidmar conducted interviews of a random sample of subjects drawn from a single town in Massachusetts. The subjects were asked to fill out questionnaires about their knowledge about and attitudes toward the death penalty. The subjects were then asked to read short essays containing information about the lack of deterrence provided by the death penalty and problems of unfairness, unreliability, and discrimination in its administration. The subjects were then questioned again about their attitudes toward the death penalty. Sarat and Vidmar found that their results supported the Marshall hypothesis in two respects. First, the subjects generally lacked knowledge about the

22. *Id.* (citing Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171).

administration and effects of the death penalty prior to exposure to the experimental intervention. Second, the subjects' exposure to "knowledge" in the form of the essays provided by the experimenters led some subjects who supported the death penalty prior to the experiment to change their views. However, the researchers acknowledged that their study's vindication of the Marshall hypothesis was qualified: it was only information about the death penalty's purported lack of utilitarian value that caused a change in support for the death penalty; information about the lack of fairness in the administration of the death penalty, though credited by the subjects (they reported viewing the death penalty as less "fair"), did not change their overall support for it. Moreover, the change in support engendered by the utilitarian information was observed only among those subjects most marginally supportive of the death penalty at the start. Finally, the exposure to information merely reduced the number of death penalty supporters; it did not result in a majority of subjects opposing capital punishment, as predicted by the Marshall hypothesis.

The design of the Sarat and Vidmar study invites a number of critiques that raise questions about the validity of its findings and their relevance to other settings. First, the residents of a college town in Massachusetts may not be a representative sample from which to draw any general conclusions. Moreover, the timing of the study (during a period in which there had been no executions in the entire country for almost a decade) made ignorance about the administration of the death penalty more likely and rendered the question of support for the death penalty abstract rather than concrete. In addition, the subjects' acquisition of "knowledge" was done through the reading of two short essays in less than an hour. On the one hand, this minimal exposure could be viewed as understating the effect of true knowledge acquisition because "knowledge" usually is the product of a more active learning process that involves the processing of a variety of sources of information, followed by discussion and reflection. On the other hand, the subjects might have been *overly* influenced by the experimental intervention because they may have been swayed as much by their perceptions of the experimenters' status and expertise as by the information presented in the essays. Additionally, the study did not purport to measure the effect of the experimental intervention over time. Finally, the study raised difficult questions about precisely how much knowledge the Marshall hypothesis assumed would be nec-

essary to move opinion and what sort of questions would most accurately capture support or opposition to the death penalty.

Several subsequent studies also found significant decreases in support for the death penalty among subjects exposed to materials describing its effects and implementation,²³ with one even producing a majority of “informed” subjects expressing opposition to the death penalty (in full accord with the Marshall hypothesis).²⁴ These later studies were of roughly similar experimental design to the Sarat and Vidmar study in that they involved a pre-test, an exposure to information about the death penalty, and a post-test. However, they also departed from Sarat and Vidmar’s design in ways that both ameliorated and exacerbated some of the criticisms raised above. The later studies expanded on the very brief exposure to information that Sarat and Vidmar had employed. One study offered its subjects much lengthier materials to read and a longer time (two weeks) to read them, followed by the subjects’ participation in small discussion groups.²⁵ The series of studies conducted by Professor Robert Bohm and his colleagues²⁶ went even further: the subjects were college students who took a course on the death penalty that met for a total of forty hours during a semester. These studies ameliorated the problem of brief and passive exposure to information by offering the subjects much more extended and active engagement with both data and ideas about the death penalty. This improvement, however, was balanced by some other deficiencies. The two-weeks-plus-discussion study involved a small and non-random sample, and the discussions were unsupervised and only an hour long. The studies involving college students who took a course about the death penalty obviously provided the most active learning setting. However, questions arise about whether college students are representative of the general public and whether the

23. See, e.g., Robert M. Bohm, Louise J. Clark, & Adrian F. Aveni, *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypotheses*, 28 J. RES. CRIME & DELINQUENCY 360 (1991); Robert M. Bohm, Ronald E. Vogel & Albert A. Maisto, *Knowledge and Death Penalty Opinion: A Panel Study*, 21 J. CRIM. JUST. 29 (1993); Robert M. Bohm & Ronald E. Vogel, *A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions*, 22 J. CRIM. JUST. 125 (1994); Neil Vidmar & Tony Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CANADIAN J. CRIMINOLOGY 43 (1981); Harold O. Wright, Robert M. Bohm & Katherine M. Jamieson, *A Comparison of Uninformed and Informed Death Penalty Opinions: A Replication and Expansion*, 20 AM. J. CRIM. JUST. 57 (1995).

24. See Vidmar & Dittenhoffer, *supra* note 23.

25. See *id.*

26. See the three Bohm studies listed in note 23.

status or charisma of the instructor may influence the students as much as (or even more than) the information presented.

Concerns about the design of the studies supporting the Marshall hypothesis have been reinforced by the results of other experimental studies that either qualified the strength of the effects found in supporting studies or flatly contradicted them. The researchers who studied the effects of a college course on students' death penalty views followed up by examining the views of the same students two, three, and ten years later. These longitudinal studies found that the change in views that had been observed at the conclusion of the course was not sustained over time. In the two- and three-year follow-ups, the researchers found that the subjects' abstract support for the death penalty had "rebounded" to near their initial pre-test positions.²⁷ The ten-year follow-up found a further slight increase in abstract support for the death penalty.²⁸ Moreover, a different study presented forty-eight college students (twenty-four supporters and twenty-four opponents of capital punishment) with detailed information about two studies regarding the death penalty's deterrent effect—one on each side of the deterrence debate. This information did not have the effect of changing the subjects' views about the death penalty even in the short term. Rather, the researchers observed a "polarization" effect—supporters of the death penalty tended to favor it more strongly and opponents tended to oppose it more strongly after receiving information about it.²⁹ The researchers attributed this response to "biased assimilation"—the selective integration of information so as to confirm pre-existing beliefs: "[J]udgments about the validity, reliability, relevance, and sometimes even the meaning of proffered evidence are biased by the apparent consistency of that evidence with the perceiver's theories and expectations."³⁰

Both the "rebound" and the "biased assimilation" effects observed in studies of responses to exposure to information about the death penalty suggest, contrary to the Marshall hypothesis, that factors beyond mere information—such as emotional or cultural commitments—are at work in the maintenance of support for capital

27. See Bohm et al., *Knowledge and Death Penalty Opinion: A Panel Study*, *supra* note 23.

28. See Robert M. Bohm & Brenda L. Vogel, *More Than Ten Years After: The Long-Term Stability of Informed Death Penalty Opinions*, 32 J. CRIM. JUST. 307 (2004).

29. See Charles G. Lord, Less Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

30. *Id.* at 2099.

punishment. These commitments not only work against the lasting impact of information on belief over time (hence the rebound effect), they also provide the lenses through which information is received and evaluated in the first instance. A burgeoning sociological literature supports the general phenomenon of “cultural cognition”—the view that “culture is prior to facts” in the sense that “what citizens believe about the empirical consequences of [public] policies derives from their cultural worldview.”³¹ Death penalty opinion researchers outside of the context of testing the Marshall hypothesis have found strong correlations between death penalty attitudes and attributes such as race³² and political affiliation,³³ and personality characteristics such as emotionality,³⁴ authoritarianism,³⁵ and personal attributional style.³⁶ The most recent attempt to study the Marshall hypothesis in an experimental setting finds evidence, consistent with these correlations, that death penalty attitudes are often “value-expressive” in the sense that they should be viewed as “an expression of underlying values rather than a more rational or instrumental assessment of policy.”³⁷

This study of large, though non-random, samples of college students in Texas and California asked the subjects to answer questionnaires indicating the rationales (i.e., moral vs. instrumental) for their death penalty attitudes and the relative strength of those rationales. The researchers then constructed a scale to measure the “value-expressive” nature of the subjects’ support for the death penalty. The subjects were then asked to read a number of statements about the

31. Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE & POL’Y REV.* 149, 150 (2006).

32. See, e.g., B. Keith Payne & V. Coogle, *Examining Attitudes About the Death Penalty: Race and Political Affiliation Are Factors Most Likely to Influence Opinion*, 23 *CORRECTIONS COMPENDIUM* 1 (1998) (finding that whites more likely to support capital punishment).

33. See *id.* (finding that Republicans more likely to support capital punishment).

34. See, e.g., Mona Lynch, *Capital Punishment as a Moral Imperative: Pro-Death Penalty Discourse on the Internet*, 4 *PUNISHMENT & SOC’Y*, 213 (2002) (emotionality positively correlated with support for capital punishment).

35. See, e.g., Steven Stack, *Authoritarianism and Support for the Death Penalty: A Multivariate Analysis*, 36 *SOCIOLOGICAL FOCUS* 333 (2003) (finding that authoritarianism positively correlated with support for capital punishment).

36. See, e.g., John K. Cochran, Denise P. Boots & Kathleen M. Heide, *Attribution Styles and Attitudes Toward Capital Punishment for Juveniles, the Mentally Incompetent, and the Mentally Retarded*, 20 *JUST. Q.* 65 (2003) (finding that dispositional attributional style—tendency to attribute blame on the basis of dispositional rather than situational factors—positively correlated with support for capital punishment).

37. Scott Vollum, Stacy Mallicoat & Jacqueline Buffington-Vollum, *Death Penalty Attitudes in an Increasingly Critical Climate: Value-Expressive Support and Attitude Mutability*, 5 *S.W. J. CRIM. JUST.* 221, 224 (2009).

administration of the death penalty in the United States and to answer questions about the degree to which they found the information compelling (“receptivity”) and whether the information was likely to impact their opinion of the death penalty (“mutability”). The researchers found that while a large proportion of subjects found information critical of the death penalty compelling (i.e., were “receptive”), a much smaller proportion of subjects indicated that such information was likely to change their attitudes about the death penalty (i.e., were “mutable”). Those scoring higher on the “value-expressiveness” scale were significantly less likely to be either receptive or mutable to information regarding the death penalty. Interestingly, however, the samples from the two states varied substantially in degrees of value-expressiveness: Texans were more likely to hold value-expressive death penalty attitudes, and thus were less likely than Californians to be either receptive or mutable.

Where do these conflicting studies leave the Marshall hypothesis? On the one hand, several studies were able to bring about significant changes in subjects’ reported attitudes about the death penalty simply by exposing them, in a variety of ways, to exactly the kind of information that Marshall predicted would move them to oppose the death penalty. These results suggest that at least some people, in some settings, may be moved by the transmission of information, at least temporarily. On the other hand, the rebound and polarization findings suggest that emotional or cultural influences on death penalty attitudes may often outweigh purely cognitive input, and that death penalty attitudes thus are likely to be more resistant to lasting change through rational argument than the Marshall hypothesis allows. To be fair to Marshall, he recognized in putting forth his hypothesis that the mutability of people’s attitudes through information was likely to depend on the basis of their support for the death penalty in the first instance. He recognized that those who support the death penalty on retributive grounds, which Marshall equated with vengeance and rejected as constitutionally unacceptable, might be less inclined to persuasion by information:

This information [about the effects and administration of the death penalty] would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public’s desire for retribu-

tion . . . might influence the citizenry's view of the morality of capital punishment.³⁸

Indeed, some refer to this recognition of the role of retribution in buttressing attitudes supporting capital punishment as the third "Marshall hypothesis" (the first two being 1) the claim that most people are ignorant about the operation of the death penalty, and 2) the claim that "the great mass"³⁹ of citizens would oppose the death penalty if fully informed).⁴⁰ The same study that found that "value-expressiveness" was positively correlated with resistance to "receptivity" and "mutability" also tested and confirmed Marshall's prediction that retributive support for the death penalty was linked to greater immutability of death penalty attitudes.

In short, the central Marshall hypothesis about the likely effects of information on death penalty attitudes has found some—but only quite modest—support in the laboratory largely because Marshall's subsidiary hypothesis about the relative imperviousness of certain types of attitudes has proven to be a much more powerful and widespread phenomenon than he initially judged it.

II. THE MARSHALL HYPOTHESIS IN THE WIDER WORLD

The social scientist's experimental setting is only one way to "test" the validity of the Marshall hypothesis. In the more than thirty-five years since *Furman*, we have learned a great deal more about the American public's understanding and opinions regarding the death penalty in settings outside of the laboratory. Moreover, during this period, there have been some substantial swings in the degree of public support for capital punishment. The experiential insights that these decades offer about the nature and mutability of public opinion regarding the death penalty provide additional grounds to accept some particular aspects of Marshall's account.

A. Public Ignorance

The Marshall hypothesis rests upon an assumption (sometimes treated as a separate hypothesis in itself) that the public is generally

38. *Furman*, 408 U.S. at 363 (Marshall, J., concurring).

39. *Id.*

40. See Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 27, 34-35 (James R. Acker, Robert M. Bohm & Charles S. Lanier, eds., 2003).

not well-informed about the operation of the death penalty in the United States. One important aspect of public ignorance that has been confirmed by empirical study and whose implications have been litigated in the Supreme Court is the widespread public underestimation of the amount of time that a defendant would spend in prison if sentenced to a “life” sentence instead of a sentence of death. Both public opinion polls⁴¹ and interviews with capital jurors⁴² have revealed widespread public ignorance about the meaning of life sentences. In states that have authorized sentences of “life without parole”—currently every death penalty state except for New Mexico⁴³—evidence has shown that “jurors either do not know about it, or do not believe it really means the defendant will, in fact, never be released on parole.”⁴⁴ The degree of public ignorance on this score was likely even greater in the first decade or two following *Furman*, before “life-without-parole” statutes attained their current status of near-universal adoption. Before the 1970’s, defendants serving “life” sentences *were*, in fact, routinely released after relatively short periods of incarceration.⁴⁵ This practice changed radically in the post-*Furman* era, but citizen knowledge did not keep pace with changing practices and still has not caught up.⁴⁶ The persistent gap between the law and

41. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 159 (1994) (plurality opinion) (citing statewide public-opinion survey conducted by the University of South Carolina’s Institute for Public Affairs showing that the vast majority of jury-eligible adults at the time of petitioner’s trial did not believe that an inmate sentenced to life imprisonment would actually be required to spend the rest of his life in prison).

42. *See, e.g.*, William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998) (conducting interviews with capital jurors that revealed that jurors grossly underestimate the amount of time that capital murderers not sentenced to death typically spend in prison); Benjamin D. Steiner, William J. Bowers & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC’Y REV. 461 (1999) (examining juror misperceptions about the length of time that capital murderers not sentenced to death spend in prison as a form of “folk knowledge”).

43. *See* DEATH PENALTY INFORMATION CENTER: LIFE WITHOUT PAROLE, <http://www.deathpenaltyinfo.org/life-without-parole>.

44. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 373 (2001).

45. *See* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1839-40 (2006) (tracing the recent rise of “life-without-parole” statutes).

46. The extent to which ignorance or skepticism about the finality of a “life-without-parole” sentence has not dissipated in more recent times is revealed by continuing litigation of this issue in the 1990’s and 2000’s. For examples, see the South Carolina cases cited *infra* at note 48. Moreover, just this past summer, the Governor of Oklahoma granted clemency in a case in which the sentencing jury had requested but was denied clarification about the defendant’s parole eligibility under Oklahoma’s “life without parole” statute. *See Oklahoma Governor Commutes Death Sentence at Juror’s and Parole Board’s Request*, DEATH PENALTY INFORMATION

the public's perceptions of it reflects what some observers have lamented as "a failure of democratic education."⁴⁷

Jurors' lack of knowledge about the meaning of a life sentence poses a special problem when capital statutes allow a defendant's future dangerousness to be a factor in the jury's sentencing deliberations. If the jury erroneously believes that the defendant will some day be eligible for release on parole, it might sentence him to death based on that erroneous assumption. In a series of cases from South Carolina, the Supreme Court overturned death sentences on Due Process grounds when state trial judges refused to allow defendants to rebut evidence of their future dangerousness by correcting the jury's misapprehension of their future parole eligibility.⁴⁸ The Court's decisions in these cases recognize on an individual level what Marshall argued for on a general level: ignorance of crucial information can distort evaluations of the necessity or wisdom of the death penalty.

Granted, information about the true consequences of a "life without parole" sentence was not one of the specific kinds of information that Marshall identified in *Furman* as key to moving public opinion regarding the death penalty. But Marshall could not have been expected to have this item on his list in 1972, before such sentences proliferated (indeed, they proliferated at least partly in response to *Furman*).⁴⁹ Rather, Marshall focused on information related to the same general theme—the public's over-estimation of the risk of future danger posed by convicted murderers sentenced to incarceration rather than death. Marshall argued that the public was not aware "that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison."⁵⁰ If Marshall were writing his list today, after the widespread adoption of "life without parole" statutes, he undoubtedly would amend it to read something like "murderers who receive life sentences usually are model prisoners, and that they will never be released from confinement." The point is the same: well-informed citizens would realize that foregoing the death penalty would produce negligible risks,

CENTER, <http://www.deathpenaltyinfo.org/oklahoma-governor-commutes-death-sentence-jurors-and-parole-boards-request>.

47. Eisenberg, et al., *supra* note 44, at 373.

48. See *Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Simmons v. South Carolina*, 512 U.S. 154 (1994).

49. See Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, *supra* note 45, at 1841.

50. *Furman*, 408 U.S. at 363 (Marshall, J., concurring).

to either prison personnel or the community at large, of future violence by life-sentenced inmates.

B. Alternatives to Death

The widespread ignorance about the meaning of a “life” sentence is so important because “life without parole” statutes have emerged as one of the most powerful forces undermining support for the death penalty—not only in the individual sentencing decisions of capital juries, but also in the realm of public opinion and public policy. It is often said that public support for capital punishment is “a mile wide but an inch deep.” This quip captures the phenomenon that a steady and substantial majority of people declare themselves “in favor” of capital punishment in the abstract when asked, but that this apparently solid support can shift substantially in response to reframing the context (to address particular cases) or the question (to include alternatives).

The relative steadiness of public support for the death penalty is nowhere more evident than in Gallup polling on the issue: Gallup pollsters asked the same question in the same way for most of the 20th century, and continue to do so in the 21st century: “Are you in favor of the death penalty for a person convicted of murder?”⁵¹ With one exception (the 1966 poll), more respondents favored than opposed the death penalty, and generally by a substantial majority. In recent years, however, a striking phenomenon has emerged: when the abstract support question is modified to include the alternatives of “life without parole” (“LWOP”) and “life without parole” with the convicted murderer working in prison to provide restitution for the victim’s family (sometimes called LWOP+), the traditional steady and substantial support for the death penalty disappears. Numerous state public opinion polls from around the country over the past several years reveal consistent precipitous drops in support for the death penalty when LWOP and LWOP+ are offered as alternatives, and sometimes even majorities who *prefer* such alternatives to the death penalty.⁵² National polling as well has yielded similar results.⁵³ In-

51. See Gallup.com, Death Penalty, <http://www.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Apr. 19, 2009).

52. See generally DEATH PENALTY INFORMATION CENTER, LIFE WITHOUT PAROLE NEWS AND DEVELOPMENTS (organizing news stories by year), available at <http://www.deathpenalty-info.org/life-without-parole>.

53. See Frank Newport, *Sixty-Nine Percent of Americans Support Death Penalty*, Oct. 12, 2007, <http://www.gallup.com/poll/101863/Sixty-nine-Percent-Americans-Support-Death-Penalty>.

deed, a typical recent poll is reported in the pages of the *Washington Post* on the very day of this writing, revealing that while a bare majority (fifty-three percent) of those polled in the state of Maryland favored the death penalty in the abstract, a much greater number (sixty-five percent) agreed that “life in prison without possibility of parole is an acceptable alternative to the death penalty as a punishment for murder.”⁵⁴

This responsiveness of public opinion to a simple shift in the framing of the polling question supports at least the spirit of the Marshall hypothesis, and possibly some of its particulars as well. The large and consistent “LWOP shift” observable in public opinion polls shows that stated public support for the death penalty is contingent on an artificially limited set of punishment options. When the public is exposed to a broader array of options—some of which are actually already in wide use—reported support for the death penalty declines precipitously. The predictability of the “LWOP shift” across jurisdictions, the size of the shift, and the ease with which it can be generated (simply by reframing the abstract question about support for the death penalty to include alternatives) all bolster at least the spirit of the Marshall hypothesis by suggesting that the apparent broad public support for the death penalty is illusory.

It is also possible to view the LWOP effect as bolstering two particular aspects of the Marshall hypothesis. First, Marshall believed that the uninformed public overestimated the risk of future violence by incarcerated murderers in prison and after their release; consequently, he hypothesized that information correcting that faulty judgment would turn public opinion against the death penalty. On the one hand, the “LWOP shift” could be viewed as rebutting this aspect of Marshall’s argument because the enormous public support for LWOP may reflect an immovable judgment that incarcerated murderers can never be safely released. On the other hand, as argued above in the “Public Ignorance” subsection,⁵⁵ Marshall’s argument reflects the recognition that concerns about the risk of future violence underlie public resistance to abolition of the death penalty. The “LWOP shift” confirms this intuition about the likely source of public resistance—

aspx (while sixty-nine percent of respondents favored the death penalty in the abstract, when life without parole was offered as an alternative in a variety of polls conducted over the most recent decade, support for the death penalty typically fell to the forty-seven to fifty-four percent range).

54. John Wagner, *Md. Death Penalty Is No Easy Target*, WASH. POST, Feb. 18, 2009, at B01.

55. See *supra* page 536-39.

and its responsiveness not to new information about the magnitude of the risk, but rather to new information about alternatives that offer greater risk reduction.

Second, the Marshall hypothesis was founded on the rejection of retribution as a basis for maintaining the death penalty—not only on Marshall’s rejection of retribution as a constitutionally permissible purpose of punishment, but also on Marshall’s belief that “at this stage in our history, the American people would [never] knowingly support purposeless vengeance.”⁵⁶ The “LWOP shift,” and especially the even greater shift observed when “LWOP+” is offered as an alternative to capital punishment,⁵⁷ suggest that the public is indeed willing to forego retributive goals. The two goals most furthered by LWOP and LWOP+ are incapacitation and restitution, which the public appears to value as much or more than the retributive satisfaction of demanding “an eye for an eye.”

Had he lived to see it, Justice Marshall may well have been dismayed by the triumph of LWOP as a matter of public policy, believing as he did that convicted murderers “almost always become law-abiding citizens upon their release from prison.”⁵⁸ However, the degree to which public opinion about the death penalty has proven to be responsive to LWOP as an alternative vindicates Marshall’s general belief in the mutability of public support for capital punishment, as well some of the particular grounds that Marshall articulated for his belief.

C. The Innocence Revolution

Quite apart from the shifts in public opinion that can be observed when LWOP is offered as an alternative, there has also been an absolute shift in public opinion away from supporting the death penalty in the past decade, even in response to questions that do not include the LWOP alternative. The Gallup polling data shows that for first two decades following the Supreme Court’s reinstatement of the death penalty in 1976, public support for the death penalty rose very significantly above pre-*Furman* levels. In the dozen years preceding *Furman*, the Gallup polling average on the question regarding abstract support for the death penalty was forty-nine percent in favor, whereas no post-reinstatement poll has yielded less than sixty percent

56. *Furman*, 408 U.S. at 363 (Marshall, J., concurring).

57. See Eisenberg, et al., *supra* note 44, at 391-93, tbl. 6.

58. *Furman*, 408 U.S. at 363 (Marshall, J., concurring).

in favor, and support during the decade 1985-95 averaged seventy-six percent in favor.⁵⁹ In the most recent decade (1998-2008), however, support for the death penalty in the Gallup polling data has fallen to an average of sixty-seven percent.⁶⁰ This recent decline has been consistent for nearly a decade, with only a very modest bump up in support for a couple of years following the events of 9/11. Moreover, during the same period in which public opinion polls revealed a drop in support for the death penalty, death verdicts and actual executions also substantially declined, suggesting that the elected public officials involved in prosecuting, reviewing, and carrying out death sentences have been responding to decreasing public support for capital punishment.⁶¹ Although one could debate all of the factors that might have contributed to this striking decline in death penalty opinion and practices,⁶² there is widespread consensus that the “innocence revolution” and the concern it has generated about the likelihood of erroneous capital convictions have been central in generating greater public skepticism about the death penalty.

The “innocence revolution” refers to the impact of the large number of highly publicized exonerations of those convicted of serious crimes, made possible largely by the recent refinement of DNA technology. DNA testing first came into forensic use in the late 1980’s and its use in authoritatively exonerating previously convicted inmates accelerated throughout the 1990’s, spurred by the establishment of The Innocence Project at Cardozo Law School in 1992. To date, 232 people in the United States have been exonerated by DNA evidence, including seventeen who have served time on death row.⁶³ The total number of people released from death row based on evidence of their innocence (not limited to the use of DNA evidence) is much larger, with a recent accounting totaling 130, more than half of which have

59. See Gallup.com, Death Penalty, *supra* note 51 (listing polling results on the death penalty from 1936 to 2008).

60. *Id.*

61. See DEATH PENALTY INFORMATION CENTER, SIZE OF DEATH ROW BY YEAR, <http://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>; DEATH PENALTY INFORMATION CENTER, EXECUTIONS BY YEAR, <http://deathpenaltyinfo.org/executions-year>.

62. For example, the fact that homicide rates fell nationwide throughout the 1990’s might have contributed to the decline in public support for the death penalty, but it is not likely that homicide rates were the most significant driving force, given the significant gap in time between the fall in homicide rates and the fall in public support for the death penalty, as measured in polls, capital verdicts, and executions. See Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 102-09 (2002).

63. See The Innocence Project: Mission Statement, available at <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Mar. 8, 2009).

occurred in the years since 1995.⁶⁴ The problem of wrongful convictions in capital cases received widespread public attention in 2003, when Republican Governor George Ryan granted mass clemency to the more than 150 inmates on death row in the state of Illinois in response to a string of exonerations of death-sentenced inmates in that state—including the exoneration of one inmate, Anthony Porter, only hours before his scheduled execution.⁶⁵

Recent scholars who have studied the phenomenon of wrongful convictions have argued convincingly that the rate of wrongful conviction is likely especially high in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the “death qualification” of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilty phase to avoid death during the sentencing phases, and the lessening of the perceived burden of proof because of the heinousness of the offense.⁶⁶

There is broad consensus among knowledgeable observers that there was a turn in abolitionist advocacy in the mid-1990’s away from “general moral issues relating to the state’s power to take life” and toward “focusing on wrongful convictions” and “the particular horror of executing an innocent person.”⁶⁷ These observers attribute the substantial recent decline in public support for the death penalty

64. The Death Penalty Information Center, an anti-death penalty organization, keeps a list of exonerated capital defendants that now totals 130 for the years since 1973. For inclusion on the DPIC’s innocence list, a defendant must have been convicted and sentenced to death and subsequently either: a) their conviction was overturned and i) they were acquitted at retrial or ii) all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence. See <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

65. See *Excerpts from Governor’s Speech on Commutations*, N.Y. TIMES, Jan. 12, 2003.

66. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996); see also D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778-80 (2007) (deriving an innocence rate for capital rape-murder convictions in the 1980’s of 3.3% to 5%).

67. Lawrence C. Marshall, *Litigating in the Shadow of Innocence*, 68 U. PITT. L. REV. 191, 193 (2006) (reviewing WELSCH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (2006)); see generally Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005) (evaluating the turn to innocence-based advocacy).

largely to the new focus on innocence, and there is substantial anecdotal and empirical support for this attribution. On the anecdotal level, there has been a recent upsurge of books, movies, public intellectuals, and public officials identifying heightened concern about executing the innocent as grounds for opposing the death penalty.⁶⁸ On the empirical level, recent public opinion polls indicate that respondents overwhelmingly report that concerns about innocence have affected their views regarding capital punishment.⁶⁹ In addition, researchers using test subjects in an experimental setting found that dissemination of information on the innocence issue reduces support for the death penalty and does so more than information on lack of deterrence (which previous studies had suggested was a powerful mover of reported opinion).⁷⁰

This powerful impact of concerns about executing the innocent on public support for the death penalty supports Marshall's emphasis on the likely execution of innocents as one of the three key pieces of information (along with discrimination in application and effects on the broader criminal justice system) that would move "even the most hesitant of citizens" to oppose the death penalty.⁷¹ This focus on innocence in the Marshall hypothesis seems unremarkable, even obvious, at this point in time, read against the backdrop of the "innocence revolution" of the past decade or so. However, what is truly extraordinary about Marshall's focus on innocence is how far from central that focus was in the death penalty debates of the time, either on or off the Court. The constitutional attack on the death penalty mounted in *Furman* was of a piece with other legal challenges to the administration of criminal justice in the 1960's; it focused on the ways in which unfettered discretion in the criminal justice system—beginning with the work of police and extending to the work of prosecutors and juries—contributed to an inequitable and unjust use of coercive

68. See generally *Innocence and the Crisis of the American Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty> (collecting such sources).

69. See, e.g., *A Crisis of Confidence: Americans' Doubts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/node/2105> (reporting national poll of 1000 people in 2007 in which eighty-seven percent reported that they believed that an innocent person had been executed, fifty-five percent of whom reported that this belief "affected" their views on the death penalty).

70. See Alan W. Clarke, Eric Lambert & Laurie Anne Whitt, *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309 (2000-2001).

71. *Furman*, 408 U.S. at 364 (Marshall, J., concurring).

and punitive power.⁷² Moreover, none of the other key members of the *Furman* majority focused on the innocence issue; rather, they focused either on the problem of discrimination (Douglas), the incompatibility of death with a robust conception of human dignity (Brennan), or the sheer infrequency of the use of the penalty without any guidance in its application or likely benefit from its imposition (Stewart and White). Nor did the public debate about the death penalty in the United States, in the years leading up to *Furman*, focus primarily or even substantially on the problem of innocence (unlike death penalty debates in some other countries that were sparked by concerns about specific wrongful executions⁷³). Rather, the debate in the United States was largely a moral and/or religious debate about state authority to take life, strongly inflected with concerns about arbitrariness and discrimination.

Thus, while Marshall's claim that information about innocence was key to moving public attitudes about the death penalty may seem a mere banality today, his focus on the wrongful conviction of the innocent looks absolutely prescient when considered against the backdrop of the death penalty debate of his time. Whether concerns about the execution of the innocent will eventually move "the great mass"⁷⁴ of citizens, as Marshall predicted, is a different question. Neither the "innocence revolution," nor the "LWOP shift," nor correcting public ignorance about the meaning of LWOP—whether considered individually or together—has moved "the great mass" of citizens to categorically oppose the death penalty up to this point. But the extent to which these developments have measurably moved what many have thought to be immovable—the mile-wide support for capital punishment—requires a contemporary reader to accord Marshall's predictions some degree of respect.

III. THE MARSHALL HYPOTHESIS ON THE COURT

It is a delicious irony—and one that I suspect Justice Marshall himself would have savored—that the Marshall hypothesis has fared the best not in the laboratory, and not in the wider world, but rather

72. See Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 164 (2009).

73. See, e.g., Brian P. Block & John Hostettler, *Hanging in the Balance: A History of the Abolition of Capital Punishment in Britain* (1997) (addressing impact of concerns about execution of the innocent in British abolition of capital punishment).

74. *Furman*, 408 U.S. at 364 (Marshall, J., concurring).

on the Supreme Court itself. Arguably, the Justices of the Supreme Court are an excellent sample to study the effects of information on death penalty attitudes. The Justices, who generally serve for a substantial number of years, get a very detailed and panoramic view of the administration of capital punishment across the country, because every contested death sentence makes its way to the Court before the execution may be carried out. Moreover, the Justices are forced to confront and articulate their own views about capital punishment because the Eighth Amendment calls upon the Court to decide whether the administration of the death penalty in any particular context conforms to the “evolving standards of decency that mark the progress of a maturing society,”⁷⁵ which in turn requires the Court to consider not only evidence of societal consensus but also its “own judgment”⁷⁶ on the issue. The experience of reviewing capital cases from around the country over the course of several decades led three of the Justices (Powell, Blackmun, and Stevens) who disagreed with Justice Marshall in either *Furman* or *Gregg* (or both) later to conclude that Justice Marshall was correct about the unconstitutionality of the death penalty. Moreover, the reasons offered by these Justices for their changes of heart suggested that they had been moved by some of the information that Justice Marshall thought was key to shifting public attitudes.

Justice Lewis F. Powell was a steady and central player in the defense of the death penalty during the tumultuous years in which the Court evaluated *per se* challenges to its constitutionality. In 1972, Justice Powell, along with Justice Blackmun, was one of the block of four Nixon appointees who dissented in *Furman* from the Court’s invalidation of the death penalty. Four years later, Justice Powell, along with Justices Stewart and Stevens, co-authored the plurality opinions reinstating the death penalty in *Gregg* and its companion cases (Blackmun concurred in the judgment in these cases). Thus, Powell was the only one of the three later defectors who *both* dissented in *Furman* and formed part of the key plurality in *Gregg*.

In *Furman*, Powell authored the longest and most comprehensive of the four dissents, rejecting all of the various arguments made in the five different majority opinions against the constitutionality of capital punishment. In response to arguments about the discriminatory appli-

75. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

76. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008); *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

cation of the death penalty, emphasized by both Marshall and Douglas, Powell expressed confidence that “standards of criminal justice have ‘evolved’ in a manner favorable to the accused” and concluded that therefore “discriminatory imposition of capital punishment is far less likely today than in the past.”⁷⁷

The plurality opinions reinstating the death penalty in *Gregg* and its companion cases similarly expressed faith in the efficacy of the procedures mandated by the new statutes passed in response to *Furman* to guard against arbitrariness and discrimination.⁷⁸ Justice Powell’s views on the relevance of evidence of discriminatory imposition of capital punishment took center stage a decade later, when the Court reviewed a challenge to the death penalty based on empirical evidence of the effects of race on capital sentencing in the jurisdiction in which the defendant had been tried and sentenced to death. In *McCleskey v. Kemp*,⁷⁹ Justice Powell cast the crucial fifth vote to reject the constitutional challenge, and he authored the majority opinion for the Court. Accepting for the sake of argument the validity of the empirical study that showed that both the race of the perpetrator and the race of the victim had played statistically significant roles in the distribution of death sentences in the jurisdiction in which McCleskey had been sentenced to death (with black defendants and the killers of white victims both facing heightened chances of death verdicts), Powell nonetheless concluded that such findings did not undermine the constitutional validity of McCleskey’s death sentence. Powell reasoned that the defense had shown only that race effects were prevalent in the jurisdiction in which McCleskey was sentenced, not that his particular jury had actually been motivated by either his (black) race or the (white) race of his victim. The Court’s ruling in *McCleskey* effectively foreclosed future challenges to racial discrimination in the imposition of the death penalty because the only available evidence of such discrimination is generally statistical evidence of race effects over time, rather than the sort of individual, “smoking gun” evidence that Powell’s opinion for the Court seemed to require.

Justice Powell, unlike Justices Blackmun and Stevens, did not experience any change of heart regarding the death penalty while he was

77. *Furman*, 408 U.S. at 450 (Powell, J., dissenting).

78. *See, e.g., Gregg*, 428 U.S. at 195 (plurality opinion) (maintaining that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance”).

79. 481 U.S. 279 (1987).

still sitting on the Court. Indeed, he retired from the Court very shortly after authoring the majority opinion in *McCleskey*. However, several years after his retirement, Powell's official biographer asked him in an interview if there were any votes that he would change from his tenure on the Court, and Powell responded, "Yes, *McCleskey v. Kemp*."⁸⁰ Powell's reconsideration of the death penalty went beyond *McCleskey*'s particular case to the underlying constitutionality of capital punishment in general; Powell explained to his biographer that he had come to believe that the death penalty cannot be enforced fairly and therefore that it "brings discredit on the whole legal system."⁸¹

Powell's epiphany regarding the death penalty, though it occurred too late to become part of his Supreme Court legacy, supports the Marshall hypothesis in both spirit and particulars. At the level of general spirit, Powell is the classic example of someone whose position on the death penalty changed as new information undermined the basis for his initial support. Contrast Powell's confidence in the "evolved" fairness of the legal process expressed in his *Furman* dissent and the concerns about fairness and "discredit" expressed in his post-retirement interview. What happened in the interim between these two views was prolonged exposure to the manner in which capital punishment was implemented in jurisdictions all around the country. Of course, in Powell's case, as in the cases of Blackmun and Stevens discussed below, what changed was his view of the *constitutionality* of the death penalty, rather than its moral permissibility or attractiveness as a policy choice. But, the constitutional question under the Eighth Amendment, as explained above, overlaps substantially with the moral question—whether the death penalty comports with "evolving standards of decency that mark the progress of a maturing society."⁸² Moreover, the explicit grounds for Powell's (and the other Justices') change of heart on the constitutional question were exactly the grounds that Marshall predicted would shift public opinion on the moral permissibility of the death penalty. In particular, discrimination

80. David Von Drehle, *Retired Justice Changes Stand on Death Penalty; Powell Is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1 (based on an interview with John C. Jeffries, Jr., Justice Powell's biographer).

81. *Biography of Justice Lewis Powell Draws on Personal Files, Interviews for Inside Look at Supreme Court and New Information About Powell's Views*, UNIV. OF VA. TOP NEWS, May 18, 1994, available at http://www.virginia.edu/topnews/textonlyarchive/May_1994/94-05-18_Biography_of_Justice_Lewis_Powell_Draws_on_Personal_Files_Interviews_for_Inside_Look_at_Supreme_Court.txt.

82. See *Kennedy*, 128 S. Ct. at 2658; *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 312; *Coker*, 433 U.S. at 597; *Trop*, 356 U.S. at 101.

in the application of the death penalty was one of the “big three” pieces of information (along with the execution of the innocent and the pernicious effects on the broader criminal justice system) that Marshall predicted would move “even the most hesitant” proponent of capital punishment to reject it as “morally reprehensible.”⁸³ Additionally, Powell’s view that the unfairness of the death penalty “brings discredit on the whole legal system” echoes the concern about the effects of capital punishment on the broader criminal justice system (another of Marshall’s “big three” points of information).⁸⁴

Justice Harry A. Blackmun’s later repudiation of the constitutionality of the death penalty is perhaps the least surprising of the three defections, in light of the intense personal distaste for capital punishment expressed in his *Furman* dissent. In *Furman*, Blackmun described the “excruciating agony of the spirit” that he suffered in facing the clash between his personal beliefs about capital punishment and his views about the limits of the judicial role. Wrote Blackmun, “I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty. . . . For me, it violates childhood’s training and life’s experiences”⁸⁵ Despite these strong feelings, Blackmun concluded in *Furman*, “Although personally I may rejoice at the Court’s result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped.”⁸⁶ Blackmun’s conviction that the issue of capital punishment lay within the purview of the political branches of government rather than the judiciary led him to uphold numerous capital convictions against constitutional challenge through the 1970’s and 1980’s, though with increasing reservations (for example, Blackmun dissented from Powell’s majority opinion in *McCleskey*).

For Blackmun, unlike Powell, the definitive turn away from the death penalty occurred before, rather than after, his retirement from the Court. In a lengthy and impassioned dissent from denial of certiorari in a capital case in 1994 shortly before his retirement,⁸⁷ Blackmun asserted that his position was now categorical and explained the

83. *Furman*, 408 U.S. at 363-64 (Marshall, J., concurring).

84. *Id.* (arguing that the fact that “the death penalty wreaks havoc with our entire criminal justice system” would convince “even the most hesitant of citizens” to oppose it).

85. *Id.* at 405 (Blackmun, J., dissenting).

86. *Id.* at 414.

87. See *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from denial of certiorari). Blackmun retired from the Court at the end of the Term in which he dissented in *Callins*.

grounds for his complete constitutional rejection of capital punishment. In Blackmun's view, the Court's twin constitutional commands that, on the one hand, capital sentencing discretion must be legislatively guided to avoid arbitrary sentencing, and, on the other hand, the consideration of all potentially mitigating evidence must be unfettered to promote individualized sentencing, could not possibly be reconciled. Because proper guidance and sufficient individualization were both crucial to the administration of capital punishment and yet could not simultaneously be achieved, Blackmun concluded that the death penalty could not stand: "Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing."⁸⁸ Like Powell, Blackmun saw the question as one of fundamental fairness: "The death penalty must be imposed fairly, and with reasonable consistency, or not at all."⁸⁹

Blackmun's repudiation of the death penalty echoed some of the specific concerns that Marshall had emphasized in *Furman*—in particular, issues of discriminatory application and the risk of executing the innocent. Regarding discriminatory application, Blackmun specifically cited the Court's failure to address the "staggering evidence of racial prejudice" presented in *McCleskey*, and accused the Court of "turn[ing] its back"⁹⁰ on the issue of racial discrimination in the application of the death penalty. Regarding innocence, Blackmun lamented the fact that "the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants."⁹¹ Although Justice Marshall passed away the year before Blackmun's dissent, he would have been especially gratified that Blackmun took a similar categorical stance and refused to affirm any more death sentences during the (brief) remainder of his tenure on the Court; as Blackmun announced in *Callins*: "From this day forward, I no longer shall tinker with the machinery of death."⁹² Indeed, a search for the phrase "Adhering to my view" in proximity to "death penalty" turns up not only Justice Marshall's (and Justice Brennan's)

88. *Id.* at 1144 (citations omitted).

89. *Id.* (citations omitted).

90. *Id.* at 1154.

91. *Id.* at 1145-46. Blackmun also criticized the Court's decision in *Herrera v. Collins*, 506 U.S. 390 (1993), for failing to recognize a claim of factual innocence as a constitutional claim cognizable on federal habeas corpus review. *Id.* at 1157.

92. *Id.* at 1145.

decades of dissents in all of the Court's capital cases from the post-*Gregg* era, but also Justice Blackmun's dozens of dissents from the latter part of the 1993-94 Term of Court, articulated, no doubt self-consciously, in the same language.

Justice John Paul Stevens, the third and most recent defector, did not participate in the Court's consideration of *Furman* because his appointment to the Court came several years later, just shortly before the Court's consideration of *Gregg*. Despite his newcomer status, Stevens joined *Furman* veterans, Stewart (*Furman* majority) and Powell (*Furman* dissent), in crafting the plurality opinions that would bring the death penalty back from its brief constitutional banishment. Stevens' journey from architect of the death penalty's revival to constitutional abolitionist was the longest of the three Justices, taking more than three decades. Although Stevens voted to uphold numerous death sentences against constitutional challenge in the 1970's, 1980's, and 1990's, he, like Blackmun, became a more and more frequent dissenter. Like Blackmun, Stevens dissented from Powell's majority opinion in *McCleskey*. Moreover, Stevens joined all three of the Court's recent opinions, issued long after the retirements of Powell and Blackmun, cutting back on the scope of the death penalty by invalidating its imposition on offenders with mental retardation or juvenile offenders, or for the crime of child rape.⁹³ However, just last Term, in a concurrence upholding a death sentence against a constitutional claim challenging the state's lethal injection protocol, Stevens announced that he had come to the conclusion that the death penalty could no longer be constitutionally tolerated.

In *Baze v. Rees*,⁹⁴ Stevens explained that after "exhaustive exposure to countless cases for which death is the authorized penalty," he came to the conclusion on the basis of his "own experience" that the Court's original decision in *Furman* had been correct and the death penalty is "'patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'"⁹⁵ Stevens first grounded his rejection of the death penalty in its failure to contribute measurably to the goals of either deterrence or retribution.⁹⁶ But Stevens went on to

93. See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (ruling death penalty unconstitutional for the crime of child rape); *Roper v. Simmons*, 543 U.S. 551 (2005) (ruling death penalty unconstitutional for juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (ruling death penalty unconstitutional for offenders with mental retardation).

94. See *Baze v. Rees*, 128 S. Ct. 1520, 1542 (2008) (Stevens, J., concurring).

95. *Id.* at 1551 (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

96. *Id.* at 1546-49.

explain that of “decisive importance”⁹⁷ to his judgment that the death penalty was unconstitutional was the fact that it is irrevocable and thus renders the legal system unable to respond to the problem of “the real risk of error”⁹⁸ in its application—a risk created by the inadequacy of current procedures to guarantee a fair cross section of view on capital juries, to protect against emotion overcoming reason in capital deliberations, or to prevent discriminatory application of the death penalty.⁹⁹

Stevens’ reliance on his long experience on the bench as the grounds for his rejection of the constitutionality of capital punishment offers eloquent support for Marshall’s conviction that those who are truly informed about the death penalty will inevitably come to reject it. The primacy of concerns about innocence and discriminatory application in Stevens account also supports Marshall’s views about the kinds of information that are most important in changing views. Despite Stevens’ conviction that the death penalty should be constitutionally rejected, however, Stevens concurred rather than dissented in the Court’s rejection of Baze’s lethal injection challenge. Stevens—unlike Marshall, Brennan, and Blackmun—felt bound by the doctrine of *stare decisis* to continue to apply the Court’s death penalty doctrine, and he concluded that application of the Court’s doctrine required affirmance of Baze’s death sentence.¹⁰⁰ At age eighty-nine (before the end of the 2008-09 Term), Stevens is unlikely to find a majority to give effect to his death penalty views before his retirement from the Court. But like Blackmun, Stevens has planted the seed for future majorities to consult in his lengthy opinion detailing the grounds for his intellectual defection from the death penalty.

As powerful as Stevens and Blackmun’s opinions are in explaining the grounds for their ultimate rejection of the constitutionality of the death penalty, the cumulative effect of Powell, Stevens, and Blackmun’s conversions is even more compelling. These three Justices together formed half of *Furman*’s dissenting block and two-thirds of *Gregg*’s plurality reviving the modern American death penalty as we now know it. Their slow by steady attrition from their original starting point is an eloquent testament to the power of knowledge gained

97. *Id.* at 1551.

98. *Id.*

99. *Id.* at 1550-51.

100. *Id.* at 1552 (“The conclusion that I have reached with regard to the constitutionality of the death penalty itself . . . does not , however, justify a refusal to respect precedents that remain a part of our law.”).

through experience—the power of “information” in Marshall’s terms—in shaping deeply held views about capital punishment.

IV. IMPLICATIONS

At the simplest level, reviewing what can be said in defense of the Marshall hypothesis is a sort of personal *mea culpa*—a recognition that my off-hand dismissal may have been too quick. Undoubtedly, it remains highly unlikely that the Marshall hypothesis can ever be fully vindicated, both because of the powerful phenomenon of “cultural cognition” and because only some of the information that Marshall identified has been shown to have substantial power in moving public opinion. However, Marshall’s conviction that death penalty attitudes would be responsive to certain kinds of information has turned out to find support in all kinds of places—from the laboratory, to the wider world, to the Supreme Court itself. Moreover, Marshall’s intuitions about what kinds of information would be most powerful in moving people turned out to be remarkably accurate—indeed prescient in the case of innocence, which was not at the center of the death penalty debates of his time. In short, there is simply less to laugh at and more to respect in the Marshall hypothesis than first met my (and maybe your, the reader’s) eye.

At the level of legal doctrine, the various sources of support outlined above for the Marshall hypothesis may offer some modest grounding for the most controversial aspect of the Court’s current Eighth Amendment jurisprudence. In the Court’s recent opinions rejecting the death penalty for mentally retarded and juvenile offenders and for the crime of child rape, the Court has resuscitated and reinvigorated an aspect of its early post-*Furman* jurisprudence that had appeared to be abandoned in the 1980’s—the idea that the Court should give content to the touchstone of “evolving standards of decency” by consulting not merely objective evidence of societal consensus (such as the decisions of legislatures and juries), but also its “own judgment.”¹⁰¹ Resorting to the Court’s own judgment helped the Court bolster its conclusion that there was a societal consensus that the death penalty was a disproportionate punishment for offenders with

101. See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (relying on the Court’s “own judgment” in evaluating Eighth Amendment challenges). The Court had briefly appeared to reject this reliance in the late 1980’s. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989) (“In determining what standards have ‘evolved,’ however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole.”).

mental retardation and juvenile offenders, even though only eighteen states specifically prohibited these practices, out of the thirty-eight states that authorized capital punishment (while twelve states banned the death penalty altogether). The powerful role that the Court's "own judgment" has played in its recent Eighth Amendment cases has led to its attack, most scathingly by Justice Scalia, as nothing more than a transparent ruse for displacing permissible legislative choices with the Court's own preferences. In response to Justice Stevens' resort to his "own judgment" in rejecting the constitutionality of capital punishment in his recent concurrence in *Baze*, Scalia declared: "Purer expression cannot be found of the principle of rule by judicial fiat."¹⁰²

The force of this objection to "judicial fiat" is undercut by the support for the Marshall hypothesis marshaled above. To the extent that various Justices' partial or total rejection of capital punishment is grounded in their deeper knowledge about the death penalty developed through their long-term exposure to its implementation, then perhaps their "own judgment" is a helpful guide for discerning "evolving standards of decency" rather than an evasion of that duty. Marshall's special emphasis on knowledge about problems in the *implementation* of the death penalty (such as the risks of error and discrimination), rather than the essential moral permissibility of the practice, places judges in the category of those most representative of "informed" judgment. And the Justices of the Supreme Court are uniquely positioned, even among judges, with regard to information about the implementation of the death penalty, in light of their exposure to a continuous flow of information from jurisdictions across the country. Of course, Justices of the Supreme Court are no more immune from "cultural cognition" than the rest of us,¹⁰³ and it is possible that their discernment of "facts" about the implementation of the death penalty will "needlessly burden the law with partisanship, detracting from its legitimacy."¹⁰⁴ But the Marshall hypothesis represents a counterweight to the story of cultural cognition in that it suggests that views about the death penalty are not as culturally contentious as many might think and more prone to change through rational discernment and deep experience.

102. *Baze*, 128 S. Ct. at 1555 (Scalia, J., concurring).

103. See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (demonstrating the polarizing effects of "cultural cognition" on the Court).

104. *Id.* at 902.

The Marshall Hypothesis Revisited

Quite apart from any doctrinal implications that the Marshall hypothesis might have, at a predictive level, it surely helps us to better understand the recent decade of declining use and growing skepticism of the death penalty. The current moment of fragility in the American death penalty's long history—the first such moment since the decade immediately preceding *Furman*—raises important and contested questions about causes and consequences. The causal role of the triumph of “LWOP” and the “innocence revolution” are suggested—and indeed, might have been forecasted by—the Marshall hypothesis. Moreover, the Marshall hypothesis continues to be relevant in predicting what might ultimately move either the Supreme Court or “the great mass of citizens” to a different equilibrium on the ultimate punishment.

Advocate and Jurist: Marshall and the Equal Protection Doctrine

The Equal Protection Clause of the Constitution could be considered the most important legal provision in the career of Thurgood Marshall, as both advocate and jurist. This section looks at Justice Marshall's career with reference to that important constitutional provision. Authors will discuss Thurgood Marshall's judicial nomination hearings and opine on his work as it relates to the equal protection of women, affirmative action, and school integration.

A Stone's Throw to Justice: Liberty, Equality, and Women's Rights in the Supreme Court Opinions of Justice Thurgood Marshall

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Few would dispute the claim that Justice Thurgood Marshall was the quintessential “race man.”¹ His life as a lawyer for the NAACP Legal Defense and Educational Fund, Solicitor General, and Supreme

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1. In her book, *Race Men*, Hazel Carby traces the concept of race men to St. Clair Drake and Horace Clayton's 1945 work, *Black Metropolis* in which they “attempted to account for the emergence of the idea of a race man.” According to Drake and Clayton, “[r]ace consciousness . . . is not the work of ‘agitators’ or ‘subversive influences’ – it is forced upon Negroes by the very fact of their separate-subordinate status in American life.” Carby continues, “[s]ince emancipation . . . black people have had to prove, actively and consistently, that they were not the inferior beings that their status as second-class citizens declared them to be: hence an aggressive demonstration of their superiority in some field of achievement, either individually or collectively, was what established race pride: ‘the success of one Negro’ was interpreted as ‘the success of all.’ The result of the pursuit of ‘race consciousness, race pride, and race solidarity’ was the emergence of particular social types, among which was the Race Man.” HAZEL V. CARBY, *RACE MEN* 4 (1998). Carby makes two additional observations about the race man concept. First, she notes that the influence of race on perception and designation means that “[w]hat a race man signifies for the white segments of our society is not necessarily how a race man is defined for various black communities.” *Id.* As a contemporary matter, she attributes these differences to the fact that we live “in a society where the mass media all too eagerly assign to a few carefully chosen voices the representation of the racialized many, and the chosen rarely reject their designation and transient moment of glory.” *Id.* Second, Carby interrogates the gender-norming inherent in limiting this type of racial representation to men. According to Carby, “[w]hile Drake and Clayton effectively situate the subtleties and complexities produced by and through the processes of racialization in the United States, they, along with most contemporary black male intellectuals, take for granted the gendering at work in the other half of the concept ‘race man’ . . . we have inherited from them and from others . . . a rarely questioned notion of masculinity as it is connected to ideas of race and nation.” *Id.* at 4-5.

Court Justice demonstrate his commitment to racial uplift and constitutional equality.² His work made him the best known “social engineer” trained by Charles Hamilton Houston at Howard University School of Law.³ While some of Justice Marshall’s work advanced the struggle for racial justice representing female plaintiffs, there has been relatively little analysis of Justice Marshall’s women’s rights jurisprudence.⁴ This essay ventures into largely uncharted territory to examine how women feature in Justice Marshall’s views about liberty and equality under the Fifth and Fourteenth Amendments of the Constitution.⁵ Based on a selected group of Justice Marshall’s opinions, this essay posits that he analyzed women’s constitutional rights in two ways. Both ways rely, in part, on Justice Harlan Fiske Stone’s footnote four in *United States v. Carolene Products Corp.*⁶ First, Justice Marshall focused on the fundamental nature of the rights being asserted and assessed government action in terms of its impact on those fundamental rights. Second, he advanced a view of women as minori-

2. *E.g.*, THURGOOD MARSHALL, HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS AND REMINISCENCES (Mark V. Tushnet, ed., 2001); THURGOOD MARSHALL, SUPREME JUSTICE: SPEECHES AND WRITINGS (J. Clay Smith, Jr., ed., 2003).

3. *See* GENNA RAE McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

4. *Sipuel v. Regents of the Univ. of Okla.*, 332 U.S. 631 (1948); Symposium, *The Life and Jurisprudence of Thurgood Marshall: A Tribute to Thurgood Marshall: A Man Who Broke With Tradition on Issues of Race and Gender*, 47 OKLA. L. REV. 127 (1994); Randall Kennedy, *Thurgood Marshall and the Struggle for Women’s Rights*, 17 HARV. WOMEN’S L.J. 1 (1994).

5. My chosen method may be imperfect. For example, in *The Brethren: Inside the Supreme Court*, Bob Woodward’s description of Justice Marshall’s methods of work and strengths might lead one to conclude that his opinions might not be the best evidence of his jurisprudence. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979). In addition, focusing on the Fifth and Fourteenth Amendment women’s rights cases leaves unaddressed arguably important cases and analyses that do not rely on those Amendments such as *Dothard v. Rawlison*, 433 U.S. 321 (1977) (holding that Title VII of the Civil Rights Act of 1964 prohibited application of Alabama’s facially neutral height and weight statute, but Alabama’s regulation barring the hiring of women as guards in “contact positions” at men’s prisons was a bona fide occupational qualification because the prisons were violent, twenty percent of the prison population was comprised of sex offenders, and the women’s sex made them especially vulnerable to attack thereby compromising prison security) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that sovereign immunity barred a civil action brought by two female members of the Santa Clara Pueblo Tribe claiming the tribe’s ordinance that denied tribal membership to the children of female tribe members who married outside the tribe, while extending membership to the children of male members who married outside the tribe, violated the provision of Title I of the Indian Civil Rights Act and its guarantee of equal protection of the laws). Notwithstanding these criticisms, examining these opinions is a useful exercise for the limited purposes of this essay.

6. 304 U.S. 144 (1938); *see also infra* Part I.

ties entitled to extra judicial solicitude when government actions adversely affected their constitutional rights.⁷

The remainder of this essay is organized as follows. Part I discusses footnote four's analytical framework which stands as the jurisprudential basis for liberty and equality as matters of due process and equal protection, respectively. Part II then considers Justice Marshall's opinions which are divided into three categories: (1) fundamental and enumerated constitutional rights cases that explicate due process' liberty; (2) non-discrimination cases at the heart of which is equal protection's equality; and (3) fundamental rights and non-discrimination cases which implicate both liberty and equality. In this third group of cases, Justice Marshall focuses on poor women of color and how the Fifth and Fourteenth Amendment's privacy aspect of the liberty provisions permits them to be treated unequally. The mandates of constitutional equality subjects these types of discriminatory laws to the lowest level of equal protection scrutiny, virtually guaranteeing they will pass constitutional muster.

I. *UNITED STATES V. CAROLINE PRODUCTS*: THE BEDROCK ON WHICH CONSTITUTIONAL LIBERTY AND EQUALITY STAND

United States v. Carolene Products Corp. involved a corporation indicted for violating the Filled Milk Act.⁸ The corporation challenged the indictment, contending the law was beyond Congress' Commerce Clause authority and more properly a matter within states' Tenth Amendment police power to regulate in the interest of the health, safety, and welfare of state residents. The corporation also claimed the law failed to meet the minimum due process standards, thereby violating the Fifth Amendment. Specifically, the corporation contended the Filled Milk Act "deprive[d] it of its property without

7. See, e.g., Symposium, *Of John Brown: Lawyers, the Law, and Civil Disobedience: Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 ALA. L. REV. 959 (2003).

8. Section 61 of the Act defined "filled milk" as "any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated." 21 U.S.C.A. § 61 (2009). Section 62 "declared that filled milk . . . is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public." It made it "unlawful for any person to . . . ship or deliver for shipment in interstate or foreign commerce, any filled milk." 21 U.S.C.A. § 62 (2009).

due process of law, particularly in that the statute . . . [made] binding and conclusive . . . the legislative declaration that appellee's product 'is an adulterated article of food injurious to the public health and its sale constitutes a fraud on the public.'"⁹

The Court disagreed. The plenary nature of Congress' Commerce Clause power meant it could "be exercised to its utmost extent" subject to "no limitations other than are prescribed by the Constitution."¹⁰ Faced with the tensions that arise when Congress and states both appear to have a constitutional basis on which to regulate the same thing, the Court concluded that Congress's plenary power to regulate interstate commerce meant it was "free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, or which contravene the policy of the state of their destination."¹¹ Therefore, Congress—not individual states—was empowered to regulate the shipment of filled milk as a commodity flowing through the channels and instrumentalities of interstate commerce.

In discussing how the Court should approach its assessment of the constitutionality of laws such as the Filled Milk Act, Justice Stone noted that the power of judicial review meant that this type of legislation was, under most circumstances, entitled to a presumption of constitutionality. This presumption was based, in part, on Supreme Court precedent that interpreted the Fourteenth Amendment to permit states to regulate similarly harmful items. He cited to *Hebe Company v. Shaw* in which the Court rejected a challenge to § 12725 of the General Code of Ohio.¹² Justice Holmes set forth the Fourteenth Amendment inquiry as follows:

[W]hether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat. If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained

9. *Carolene Prods.*, 304 U.S. at 147 (citation omitted).

10. *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

11. *Id.*

12. *Hebe Co. v. Shaw*, 248 U.S. 297 (1919); see also *Carolene Prods.*, 304 U.S. at 148.

and that it is impossible for this Court to say that they might not be believed to be necessary in order to accomplish the desired ends.¹³

Discussing Justice Holmes' opinion in *Hebe*, Justice Stone noted,

The power of the legislature to secure a minimum of particular nutritive elements in a widely used article of food and to protect the public from fraudulent substitutions, was not doubted; and the Court thought that there was ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.¹⁴

The opinion continued, “[w]e see no persuasive reason for departing from that ruling here, where the Fifth [rather than the Fourteenth] Amendment is concerned; and since none is suggested, we might rest [our] decision wholly on the presumption of constitutionality.”¹⁵

Justice Stone found additional support for this presumption in the legislative process by which the statute was enacted. Stone observed,

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.¹⁶

Stone was willing to be highly deferential to congressional determinations involving the regulation of “ordinary commercial transactions” the constitutionality of which required only some rational justification for the legislation under review.¹⁷

At this point, Justice Stone includes a footnote to distinguish the commercial cases involving presumptively constitutional regulations from those in which the legislature might not be entitled to as much judicial deference. Reading both above and below the line in Justice Stone's opinion reveals a two-tiered framework to guide the Court in exercising its power of judicial review. In the opinion's “footnote four,” Justice Stone identifies four types of government action that might trigger a higher level of judicial review than the majority used to resolve the issue in *Carolene Products*. These government actions can be summarized in the following way:

13. *Hebe Co.*, 248 U.S. at 303-04 (citation omitted).

14. *Carolene Prods.*, 304 U.S. at 148.

15. *Id.*

16. *Id.* at 152 (citation omitted).

17. *Id.*

1. If, on its face, legislation targets constitutionally-enumerated rights, then “[t]here may be a narrower scope for the operation of the presumption of constitutionality;”¹⁸
2. If legislation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” then “more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment” might be warranted;¹⁹
3. If discriminatory legislation is “directed at particular religious, or national, or racial minorities,” then a “correspondingly more searching review” may be required;²⁰ and
4. If government action is motivated by “prejudice against discrete and insular minorities [that] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” then a “correspondingly more searching review” may be necessary.²¹

This list has been the source of a considerable amount of discussion and analysis.²² Much of the footnote four scholarship and jurisprudence seems to ignore the divisions between the four situations Justice Stone identified, elevating his “discrete and insular minorities” language in ways the text of the footnote does not seem to support.²³ While interpreting footnote four as a basis for both due process and equal protection is correct, reading discreteness and insularity as a necessary element for entreaties for minority protection unnecessarily limits the footnote’s reach. The footnote can be read to support the conclusion that it reaches two different types of minorities under two scenarios, only one of which is explicitly linked to failures in the political process. “Religious, national and racial minorities” are protected without explicit regard for the political process that yielded the chal-

18. *Id.* at 152 n.4.

19. *Id.*

20. *Id.*

21. *Id.*

22. *E.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Khan & Ken I. Kersch eds., 2006); J.M. Balkin, *Symposium: Law and Social Theory: The Footnote*, 83 *Nw. U. L. REV.* 275 (1988); Martin S. Flaherty, *Symposium: The Constitution Outside the Courts and the Pursuit of a Good Society: Constitutional Asymmetry*, 69 *FORDHAM L. REV.* 2073 (2001); Alan James Kluegel, *The Link Between Carolene Products Popular Practices from Democratic Failures*, 42 *U.S.F. L. REV.* 715 (2008); Neil A. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive Complex Society*, 86 *MICH. L. REV.* 657 (1988).

23. Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 *COLUM. L. REV.* 1093 (1982).

lenged legislation. “Discrete and insular minorities” which may or may not be the same “religious, national and racial minorities” are protected if the legislation in question is based on prejudice that severely distorts the normal political process.²⁴ Parsing the language in this way enables footnote four to reach minorities that are, “anonymous and diffuse”.²⁵ Those minorities would be able to prevail upon the Court to use heightened judicial review if they were found to be sufficiently similar to the minorities to which the footnote refers. The fact that they are not “discrete and insular would no longer be fatal to their entreaties for constitutional protection and heightened judicial review.”²⁶

What we know about the drafting of the footnote supports this type of reading. Professor Louis Lusky was Justice Stone’s clerk during the term in which *Carolene Products* was decided. Based on information to which his position made him privy, Professor Lusky has written about the footnote’s drafting and purpose. According to Lusky, Justice Stone’s first draft included the three scenarios set forth in the final footnote’s last two paragraphs. Chief Justice Hughes responded to his colleague’s draft with the following query, “[D]oes the difference [in the appropriate level of judicial review] lie . . . in the nature of the right invoked?”²⁷ According to the Chief Justice, “the text [of the Bill of Rights and the Fourteenth Amendment] or any fair interpretation” of that text “legitimizes extraordinarily intrusive judicial review as implementing the intent of the Framers themselves.”²⁸ Justice Stone agreed with Chief Justice Hughes and added the final footnotes first paragraph to answer the Chief Justice’s query. Justice Stone offered the final footnote, according to Lusky,

not as a settled theorem of government or court-approved standards of judicial review but as a spirit of Enlightenment . . . [I]t “did not purport to decide anything; it merely made some suggestions for future consideration.” On its face, it did no more than identify questions – the right questions, to be sure, as history has shown but mere questions nevertheless. It did not even pretend to cover the entire field of major civil liberties concerns; such major areas as

24. *But see* Gabriel J. Chin and Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008) (challenging the minority paradigm in analyzing the effect of *de jure* racial segregation in southern states where African Americans were the majority rather than a minority).

25. Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

26. *Carolene Prods.*, 304 U.S. at 152 n.4.

27. Lusky, *supra* note 23, at 1097.

28. *Id.*

criminal procedure and church-state separation were untouched by [Justice] Stone's thesis and were treated only incompletely by [Chief Justice] Hughes's.²⁹

Justice Marshall's treatment of women's constitutional claims is consistent with what Lusky claims footnote four's drafters intended. Laws that targeted liberty and the privacy included by way of a "fair interpretation" of the Due Process Clause, legitimized [the] extraordinarily intrusive judicial review" to which Chief Justice Hughes referred. Laws that discriminated against women triggered the same type of searching judicial review because women were similar to Justice Stone's "national, . . . religious, or racial minorities" whose rights to equal protection of the laws were sometimes violated based on their minority status. Those cases assessing the constitutionality of laws that took aim at the constitutionally-enumerated rights of poor women as a minority group appear to rely on three of the footnote's four scenarios. The nature of the right to privacy justified searching judicial review under Chief Justice Hughes' contribution to the footnote. Poverty and femaleness rendered poor women sufficiently similar to Justice Stone's "religious, . . . national, or racial minorities" to trigger a correspondingly more searching review under the footnote's third scenario. The overrepresentation of women of color within the group of poor women and the foreseeability of the impact of a law on this discrete and often insular minority is evidence of "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."³⁰

II. MARSHALL'S OPINIONS AND WOMEN'S CONSTITUTIONAL CLAIMS

A. Constitutionally-Enumerated Rights, Due Process and Liberty; *Carolene Products'* First Scenario

Between 1971 and 1990, Justice Marshall authored opinions that appear to rely on footnote four's first scenario. These cases challenged the constitutionality of legislation which, on its face, targeted constitutionally-enumerated rights. While the Constitution enumerates neither of these specific rights, they are both the result of fair judicial interpretations of the text, generally, and the Due Process Clause, specifically. As such, the level of judicial review is contingent

29. *Id.* at 1099.

30. *Carolene Prods.*, 304 U.S. at 152 n.4.

on the nature of the right involved rather than on the group adversely affected by the laws. Justice Marshall's opinions demonstrate his view that liberty and liberty-based rights were universal in that everyone was entitled to enjoy the full extent of the liberty interests protected by the Constitution. Consequently, age and poverty were bases for compromising those interests that, according to Justice Marshall, should not withstand constitutional scrutiny.

The constitutional right to interstate travel was first recognized in *Shapiro v. Thompson*, a 1968 case in which durational residency requirements that prohibited poor people who moved to a jurisdiction and were categorically eligible for public assistance from receiving welfare.³¹ The requirements created two categories of poor residents—those who lived in the state long enough to satisfy the durational residency requirement and those who had not yet lived in the state long enough to satisfy the durational residency requirement. The Court found this distinction was constitutionally untenable and struck down the residency requirements as violating the Fifth and Fourteenth Amendments' equal protection guarantees. The law amounted to invidious discrimination that could not be justified by the government's asserted interests in maintaining fiscal integrity and discouraging welfare-eligible people from migrating to the jurisdictions in question. While the majority refused to "ascribe the source of [the] right to travel interstate to a particular constitutional provision," it found support for the right in "the nature of our Federal Union *and* our constitutional concepts of personal liberty."³² According to this interpretation, liberty supported the "require[ment] that all citizens . . . be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."³³

The same right to interstate travel was at issue in *Memorial Hospital v. Maricopa County*.³⁴ Rather than a residency requirement for welfare benefits, *Memorial Hospital* involved a residency requirement for poor people in need of medical care. Justice Marshall wrote a majority opinion that struck down the residency requirement because it

31. 394 U.S. 618 (1968).

32. *Id.* at 629-30 (emphasis added).

33. *Id.*; see also *id.* at 642 (Stewart, J., concurring) (noting that the "constitutional right [to travel], which includes the right of 'entering and abiding in any State in the Union,' is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards").

34. 415 U.S. 250 (1974).

amounted to an invidious classification that impinged on the fundamental right to travel, in general, and the right to travel for the purposes of interstate migration, in particular.³⁵ Like the residency requirement struck down in *Shapiro*, the requirement at issue in *Memorial Hospital* triggered strict scrutiny because it penalized the poor for exercising their liberty-based right to travel. Singling out the poor for this type of treatment amounted to inequality that, at the very least, stripped the government action of any presumption of constitutionality. In this way, the guidance for judicial review took Justice Marshall below the line, into the scenarios set forth in *Carolene Products* footnote four. The government's asserted interest in managing the financial impact of having poor people relocate within its borders was insufficient to turn the residency requirements into a commercial regulation which, according to *Carolene Products*, would be presumptively constitutional and, therefore, subject to less-searching judicial review. Justice Marshall's opinion used the rule announced in *Shapiro*, concluding that the state failed to demonstrate "that in pursuing legitimate objectives, it had chosen means which did not unnecessarily impinge on constitutionally protected interests."³⁶

The second aspect of liberty about which Justice Marshall wrote was privacy. *Wyman v. James*³⁷ challenged the practice of unannounced caseworker visits to public assistance recipients' homes. In the words of one commentator, the case asked, "Even if one concedes that the state must be able to place reasonable conditions on those who receive its funds, are there limits on what the state can ask?"³⁸ The Court concluded that the Fourth Amendment and its probable cause requirement were not among the limits the Constitution demanded. The majority was willing to require the poor to give up parts of their constitutional right to privacy in exchange for the public benefits on which their survival depended.

In a dissenting opinion, Justice Marshall contended that the state's asserted interests in preventing child abuse and welfare fraud were not weighty enough to permit a state employee to intrude into a poor woman's home. In other words, while the state's interests might have been significant, the state's chosen means to further those inter-

35. See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (defining the fundamental right to travel as including travel for the purposes of interstate migration).

36. *Memorial Hosp.*, 415 U.S. at 269.

37. 400 U.S. 309 (1971).

38. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 203, 211-18 (4th ed. 2005).

ests were unjustified. The Fourth Amendment's probable cause requirement was necessary to ensure the poor woman's constitutional right to privacy was adequately protected. Justice Marshall concluded:

This Court has occasionally pushed beyond established constitutional contours to protect the vulnerable and to further basic human values. I find no little irony in the fact that the burden of today's departure from principled adjudication is placed upon the lowly poor. Perhaps the majority has explained why a commercial warehouse deserves more protection than does this poor woman's home. I am not convinced; and, therefore, I must respectfully dissent.³⁹

This language harkens to the distinction Justice Stone used footnote four to make. Justice Marshall appears to be concerned about distorting judicial review in ways that treat fiscally-related government decisions as if they are the commercial regulations that are presumptively constitutional and triggered a low level of judicial review.

Justice Marshall's dissent in *Wyman* was based, in large part, on his views about privacy which he articulated in *Stanley v. Georgia*.⁴⁰ His majority opinion identified privacy as not only an essential aspect of liberty, but also a basis on which a consenting adult had a right to consume obscene materials in his or her home.⁴¹ As Justice Marshall saw it, "[i]f the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read, what films he must watch."⁴²

While other cases had refused to extend *Stanley's* privacy to a right to view such materials outside of one's home, *James* stood for the proposition that home-based privacy could be limited in exchange for public assistance. The fact that the case involved regulations associated with a social welfare program and its fiscal matters was enough

39. *Wyman*, 400 U.S. at 347 (Marshall, J., dissenting).

40. 394 U.S. 557 (1969).

41. See *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1985); *Doe v. Commonwealth's Att'y for Richmond*, 425 U.S. 901 (1976) (Marshall dissented because "[p]rivacy interests acknowledged explicitly in earlier opinions . . . should protect . . . adults in [consensual sodomy]"). "Marshall found it ridiculous that the state should exercise such police power." WOODWARD, *supra* note 5, at 516, at 241-44. Compare *Stanley*, 394 U.S. 557, with *Rabe v. Washington*, 405 U.S. 313 (1972) (While *Stanley* was extended, the limits of that line of cases were that the privacy and the First Amendment did not permit the private right to view pornography to follow the rights-holders into the public sphere).

42. *Stanley*, 394 U.S. at 565; see also WOODWARD, *supra* note 5, at 233, 235. Unlike Justice White who analyzed obscenity cases with an understanding "that these were things for his son's eyes, perhaps, but never for his wife's or daughters." Marshall expressed no particularly gendered understanding of obscenity and was apparently more amused than shocked by the obscenity the Justices reviewed.

for the majority to conclude that the social worker home visits were presumptively constitutional decisions that implicated the government fisc. The majority analyzed the regulation as if it involved an “ordinary commercial transactions,” which, according to Justice Stone, was presumptively constitutional. Justice Marshall, however, cast the case as one involving the fundamental right of privacy which, under footnote four’s first scenario, would trigger heightened judicial review.

In *Zablocki v. Redhail*,⁴³ Justice Marshall continued to articulate that the poor were entitled to the same level of decisional liberty to make intimate choices as was enjoyed by the non-poor. *Zablocki* challenged the constitutionality of a Wisconsin statute that required those with child support arrears to secure court permission to marry. The Court found the statute to be unconstitutional, and Justice Marshall, writing for the majority, characterized the law as an absolute bar for those who, like Redhail, wanted to marry but lacked the financial resources to meet their outstanding child support obligations.⁴⁴ The opinion reasoned that marriage was an important vehicle through which people formed families, the members of which enjoy a right to privacy that creates a space in which to make intimate decisions without unwarranted government interference.⁴⁵ Justice Marshall considered the impact of Wisconsin’s statute on both Redhail and his fiancé, both of whom had constitutionally-protected rights to chose to marry and to form a family. He reasoned that the decision to marry should be treated like other intimate decisions such as “decisions relating to procreation, childbirth, child rearing, and family relationships.”⁴⁶ He elaborated further, using Redhail’s fiancé to demonstrate further how the statute intruded on intimate decisions that could naturally flow from being able to marry without the restrictions of the challenged statute. According to Justice Marshall:

[t]he woman who appellee desired to marry had a fundamental right to seek an abortion of their expected child, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings. Surely, a decision to raise the child in a traditional family setting must receive equivalent protection and, if appellee’s right to procreate means anything at all, it must imply

43. 434 U.S. 374 (1978).

44. *Id.* at 386.

45. *Id.*

46. *Id.*

some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.⁴⁷

If the right to marry was, indeed, a fundamental right, then the right could only be interfered with if the means chosen were narrowly tailored to serve a compelling state interest. This was the strictest form of judicial review supported by footnote four. *Zablocki* established that both poor and rich have a constitutionally protected right to marry that the state cannot frustrate without meeting the requirements of strict judicial review.⁴⁸

One aspect of privacy to which Justice Marshall referred in *Zablocki* was at the center of some of the most controversial cases decided during his tenure on the court. After recognizing abortion and reproductive choice as constitutional rights in *Roe v. Wade*,⁴⁹ the Court found itself thrust in the middle of government attempts to limit and clarify those rights. Justice Marshall's opinions in these abortion and reproductive choice cases are largely unaffected by the politically, and morally contentious nature of the rights at issue.

Among the ways government sought to limit *Roe v. Wade* was taking aim at the constitutionally-permissible distinction between the rights held by adults and those held by minors. States asserted their Tenth Amendment police powers in the interest of preserving family integrity and protecting adolescent girls from the dangers that might result from giving young women complete control over decisions whether to terminate pregnancies during the first trimester or at least before the point of fetal viability. A majority of the Court was willing to uphold restrictions so long as they did not grant parents absolute veto power over their daughters' reproductive choices.⁵⁰

Justice Marshall, however, advanced a drastically different view of the effect of age on constitutional privacy and liberty, as well as the scope of government power to legislate to preserve public health,

47. *Id.* (internal citations omitted).

48. *See, e.g.,* *Boddie v. Conn.*, 401 U.S. 371 (1971) (holding that Connecticut could not impose filing fees on poor people who sought divorces in part because the state enjoys a monopoly over divorce and the poor would have no other options to dissolve a marriage).

49. 410 U.S. 113 (1973). According to Woodward, Marshall's dissatisfaction with Justice Blackmun's trimester framework was attributed to his concerns about the framework's rigidity and the impact of this rigidity on "poor and undereducated" women. Differences in access to medical technology meant *Roe's* "viability" benchmark was not universal. WOODWARD, *supra* note 5, at 279; *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (Marshall, J., concurring) (criticizing the Court's three-tiered Equal Protection framework).

50. *See* *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (upholding a dual approach offered by parental notification requirements with a judicial by-pass for mature or emancipated minors).

safety, and welfare. Like his opinions in *Stanley, James* and *Zablocki*, Justice Marshall's dissenting opinions in *H.L. v. Matheson*⁵¹ and *Hodgson v. Minnesota*⁵² demonstrate how seriously he took the fundamental right to privacy. According to Justice Marshall, choosing either to carry a child to term or to terminate a pregnancy was a "deeply intimate decision" that was "guarded from unwarranted state intervention by the right to privacy."⁵³ As he interpreted the Constitution, the Fourteenth Amendment "protect[ed] both the woman's 'interest in independence in making certain kinds of important decisions' and her 'individual interest in avoiding disclosure of personal matters'".⁵⁴ If the woman's right to reproductive choice was truly fundamental, then, Justice Marshall believed, the state had the burden of articulating a compelling interest that the statute was narrowly tailored to achieve.⁵⁵ Without such an interest, the types of statutes challenged in these cases:

force[d] . . . young wom[en] . . . to choose between two fundamentally unacceptable alternatives: notifying a possibly dictatorial or even abusive parent and justifying her profoundly personal decision in an intimidating judicial proceeding to a black-robed stranger. For such a woman, this dilemma is more likely to result in trauma and pain than in an informed and voluntary decision.⁵⁶

Impermissibly intruding on a young woman's privacy in this way was more than Justice Marshall could countenance. *Stanley's* privacy was an essential part of the bedrock on which young women's rights to make these types of reproductive decisions rested. For Justice Marshall, age, like poverty, was largely irrelevant to the scope of the constitutional right to privacy to which all people were entitled.

B. Equality and Extending Protection for Minorities Beyond Those Enumerated in Footnote Four: *Carolene Products'* Third Scenario

In *Dandridge v. Williams*,⁵⁷ the Court upheld a Maryland rule that capped Aid to Families with Dependent Children ("AFDC") grants thereby denying to large families benefit levels based on family

51. 450 U.S. 393 (1981) (Marshall, J., dissenting).
52. 497 U.S. 417 (1990) (Marshall J., dissenting).
53. *H.L.*, 450 U.S. at 414 (Marshall, J., dissenting).
54. *Id.*
55. *Hodgson*, 497 U.S. at 462.
56. *Id.* at 479.
57. 397 U.S. 471 (1970).

need.⁵⁸ The majority concluded the rule was constitutional because it was a distinction based on class which, like *Carolene Products*' regulation of ordinary commercial transactions, was presumptively constitutional. The rule was justified as long as it was reasonably related to a legitimate government interest. Justice Marshall, however, disagreed. His analysis reflected his belief that general economic regulation of commercial intercourse was constitutionally distinguishable from regulations that singled out individuals based on their poverty. This case "involv[ed] the literally vital interests of a powerless minority—poor families without breadwinners" which made it "far removed from the area of business regulation."⁵⁹

Continuing, he wrote:

It is the individual interests here at stake that . . . most clearly distinguishes this case from the 'business regulation' equal protection cases. AFDC support to needy dependent children provides the stuff that sustains those children's lives: food, clothing, shelter. And this Court has already recognized several times that when a benefit, even a 'gratuitous' benefit, is necessary to sustain life, stricter constitutional standards, both procedural and substantive, are applied to the deprivation of that benefit.⁶⁰

As articulated by Maryland, the interests served by the cap included encouraging employment and self-sufficiency for AFDC household heads.

58. AFDC was a federal welfare program that provided federal monies for public assistance in state-administered programs. Under most circumstances, grant amounts were contingent on family size. Larger families received larger grants than did smaller families. The addition of another child to an eligible family incrementally increased the family's grant amount. Rarely, however, would this increase fully cover the additional expenses associated with raising the family's newest dependent. Despite this reality, many believed this formula created a perverse incentive for allegedly economically rational childbearing. The vast majority of the program's recipients lived in poor families headed by single mothers. Beginning with the work of Daniel Patrick Moynihan, these female-headed households were branded pathological and the government experimented with "punitive social policies that [sought] to regulate the lives of low-income women of color and white women whose sexual and reproductive behavior deviate[d] from the middle-class nuclear family norm." In this discourse, the visible poverty of black and brown, urban-dwelling people supported a narrative in which a "bad mother" was epitomized by "one who is seeking public funds or services to support and maintain her family and no legitimate claim to these resources because she does not conform to traditional family values." Bonnie Thornton Dill et al. *Race, Family Values and Welfare Reform, in A NEW INTRODUCTION TO POVERTY* 265 (1999). In 1996, AFDC was replaced with the Temporary Assistance for Needy Families Program ("TANF") which made the benefits formerly provided under the AFDC program time-limited and contingent on participation in approved work activities. See generally Lisa A. Crooms, *The Mythical, Magical Underclass: Constructing Poverty In Race and Gender, Making the Public Private and the Private Public*, 5 J. GENDER RACE & JST., 87 (2001).

59. *Dandridge*, 397 U.S. at 522 (Marshall, J., dissenting).

60. *Id.* (internal citations omitted).

According to Justice Marshall, however, the benefits cap was insufficiently related to these objectives. Indeed, “[t]he basis of that discrimination—the classification of individuals into large and small families—is too arbitrary and too unconnected to the asserted rationale, the impact on those discriminated against—the denial of even a subsistence existence—too great, and the supposed interests served too contrived and attenuated to meet the requirements of the Constitution.”⁶¹ Justice Marshall treated this as a case of constitutional equality that involved a minority sufficiently similar to footnote four’s “religious, . . . national, or racial minorities” to warrant a more searching review than what might be triggered by a commercial regulation. Unlike the majority, Justice Marshall is unwilling to give lawmakers the benefit of the presumption of constitutionality merely because of the state’s asserted economic interests. As an example of interpretation based on footnote four’s third rather than fourth scenario, Justice Marshall’s analysis requires neither discreteness nor insularity. It also does not turn on demonstrated a failure in the political processes that render the poor politically powerless.

*James v. Valtierra*⁶² demonstrates how failures in the political process allow for unwarranted discrimination against the poor which, if assessed using the lowest level of scrutiny more appropriate for business regulations, permit the poor to be singled out for unfavorable treatment with virtually no recourse. In that case, California voters passed a referendum restricting where low-income housing could be built.⁶³ The referendum’s restrictions did not apply to “[p]ublicly assisted housing developments designed to accommodate the aged, veterans, state employees, persons of moderate income, or any class of citizens other than the poor.”⁶⁴ The majority claimed “referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.”⁶⁵ Justice Marshall disagreed. He concluded the referendum was “neither ‘a law of general applicability that [might] affect the poor more harshly than it [did] the rich’ nor an ‘effort to redress eco-

61. *Id.* at 529-30 (Marshall, J., dissenting).

62. 402 U.S. 137 (1971).

63. The referendum defined “low income” as “persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.” *Id.* at 139.

64. *Id.* at 144 (Marshall, J., dissenting).

65. *Id.* at 141.

conomic imbalances.’”⁶⁶ Rather, it explicitly targeted the poor for unfavorable treatment.

At this point, Justice Marshall’s opinion could be read as falling under footnote four’s scenario three or scenario four. Similar to his position in *Dandridge v. Williams*, Justice Marshall’s opinion could be read to advocate expanding the third scenario’s minority protection beyond Stone’s “religious, national, or racial minorities” to include the poor. As Justice Marshall noted, “[i]t is far too late in the day to contend that the Fourteenth 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.”⁶⁷ Recognizing the broadened scope of the Fourteenth Amendment as being about more than racial discrimination, Justice Marshall rejects the racial exclusivity of the Amendment without ignoring the importance of its racial specificity. Race is the paradigm according to which constitutional equality for other suspect classifications is judged. It is not the only such class. In this way, Justice Marshall’s opinion treats the list in footnote four’s third scenario as illustrative rather than exhaustive. He uses a type of realism to make the case for poverty as creating such a minority, thereby requiring the Court to examine more closely legislation and policies that discriminate against poor people.⁶⁸

As an example of scenario four, the success of the referendum stood as the best evidence of the political powerlessness necessary to trigger more searching judicial review. While poverty and insularity may not necessarily be correlative, the referendum itself was intended to limit where the poor could live, thereby making them eventually, if not inevitably, insular. The opinion, however, does not support an assumption of discreteness. Consequently, the law operated against the poor, who in this case constituted a minority entitled to heightened judicial review. While Justice Marshall seems to focus on the failures of the political system, the fact that the poor are per se neither discrete nor insular makes it difficult to fit within footnote four’s fourth scenario.

66. *Id.* at 144 (Marshall, J., dissenting).

67. *Id.* at 145 (Marshall, J., dissenting).

68. *Selective Serv. v. Minn. Pub. Interest Research Group*, 468 U.S. 841 (1984); *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988); *see also* Symposium Honoring Justice Thurgood Marshall, *Choices and Constraints: For Justice Thurgood Marshall*, 80 *Geo. L.J.* 2093 (1992).

Like the poor, women found their rights to liberty and equality inadequately protected. The sex equality cases decided by the Court during Justice Marshall's tenure yielded the type of heightened review for which Justice Stone advocated even though women, as a class, were more properly characterized as discrete and diffuse rather than discrete and insular.⁶⁹ This can be reconciled with footnote four only if sex joins religion, national origin, and race as a constitutionally impermissible basis for discrimination.

In both *Personnel Administrator of Massachusetts v. Feeney*⁷⁰ and *Rostker v. Goldberg*,⁷¹ Justice Marshall addressed sex equality in the context of military service. *Feeney* involved a challenge to Massachusetts' veterans' preference for civil service jobs. The Court concluded the gender-neutral preference was chosen in spite of, rather than because of, its disparate impact on otherwise qualified women. This conclusion was consistent with the Court's decision the year before in *Washington v. Davis*, in which the Court concluded the race equality required by the Fifth and Fourteenth Amendments was not coextensive with the statutory race equality of Title VII.⁷² While disparate impact evidence could make out a *prima facie* case of racial discrimination under Title VII, the same evidence would not support a claim under the Constitution. A year later, the Court decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁷³ which clarified that the bar it had erected in *Washington v. Davis* was not insurmountable. In *Village of Arlington Heights*, the Court stated, "*Davis* [did] not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes."⁷⁴ In the absence of a "[stark] pattern" of the discriminatory effect of facially-neutral measures, there were "subjects of proper inquiry in determining whether racially discriminatory intent existed."⁷⁵ These subjects included "[t]he historical background of the [government's] decision," "[t]he

69. 1972 marks the beginning of the push to ratify the Equal Rights Amendment. In the ten years between 1972 and 1982, some of the justices treated women's equality cases as raising issues that might be better resolved by allowing the political process to play out. According to this view, judicial intervention risked subverting the democratic process. See McCLOSKEY, *supra* note 38, at 180.

70. 442 U.S. 256 (1979).

71. 453 U.S. 57 (1981).

72. *Washington v. Davis*, 426 U.S. 229, 252 (1976).

73. 429 U.S. 252 (1977).

74. *Id.* at 265.

75. *Id.* at 268. This type of formulation purports to use circumstantial evidence to prove discriminatory intent rather than to recognize disparate impact as a separate form of discrimination prohibited by the Constitution. See also *McCleskey v. Kemp*, 481 U.S. 279 (1987) (clarifying

specific sequence of events leading up to the challenged decision,” “[d]epartures from the normal procedural sequence,” and the decision’s “legislative or administrative history.”⁷⁶ While “[t]he Arlington Heights decision did not speak directly to whether foreseeability of disproportionate consequence could be a basis for establishing discriminatory purpose,” the Court rejected this argument in *Personnel Administrator of Massachusetts v. Feeney*.⁷⁷ In that case, the Court refused to see the sex discrimination in the choice and the operation of a civil service veteran’s preference that had a foreseeably disparate impact on women seeking employment with the state.⁷⁸ The fact that the military is not only gendered male, but also based on a model in which men are the norm and women are the anomaly had no bearing on the majority’s analysis.

Justice Marshall, however, analyzed the case quite differently. He found Massachusetts’ choice of an absolute preference, combined with the statutory exemption for traditionally female civil service jobs, evidenced purposeful gender-based discrimination.⁷⁹ According to Justice Marshall, Massachusetts had “created a gender-based civil service hierarchy, with women occupying low-grade clerical and secretarial jobs and men holding more responsible and remunerative positions.”⁸⁰ He was so concerned about “the foreseeable impact of a facially neutral policy [that] is so disproportionate,” he favored placing “the burden . . . on the State to establish that the sex based considerations played no part in the choice of the particular legislative scheme.”⁸¹ In Justice Marshall’s words “[w]here a particular statutory scheme visits substantial hardship on a class long subject to discrimination, the legislation cannot be sustained unless carefully tuned to alternative considerations. Here there are a wide variety of less discriminatory means by which Massachusetts could affect its compensatory purposes.”⁸² The degree of preference was not, in Justice Marshall’s opinion, constitutionally permissible.

what kind of stark pattern will not support a Fourteenth Amendment disparate impact claim). *But see* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

76. *Id.* at 267.

77. 442 U.S. 256 (1979); RUSSELL L. WEAVER ET AL., *CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES* (3d ed. 2006).

78. *Feeney*, 442 U.S. at 274-75.

79. *Id.* at 281-82 (Marshall, J., dissenting).

80. *Id.* at 285 (Marshall, J., dissenting).

81. *Id.* at 284 (Marshall, J., dissenting).

82. *Id.* at 287 (Marshall, J., dissenting) (quoting *Trimble v. Gordon*, 430 U.S. 762, 772 (1977)) (internal quotation marks omitted).

In *Rostker v. Goldberg*,⁸³ the Court considered a Fifth Amendment challenge to exclusively male selective service registration. According to the claimants, requiring only men to register violated the Amendment's equality guarantee.⁸⁴ The Court concluded that both gender-exclusive selective service registration and the funding to facilitate that registration passed constitutional muster. Justice Marshall dissented, contending the proper level of judicial scrutiny required there be "a close and substantial relationship" between the sex-based classification and the achievement of "important governmental objectives."⁸⁵ As applied by Justice Marshall to the instant case, there was not "a close and substantial relationship" between excluding women from selective service registration and Congress' combat-restriction.⁸⁶ He went on to conclude that while there appeared to be no military justification for not drafting women, both equality and equity were competing non-military justifications for drafting them.⁸⁷

C. Liberty and Equality: Does One Plus Three Always Equal Four?

The limits of the privacy on which the fundamental right to reproductive choice was based came into sharp relief when poor women who relied on the Medicaid program were denied the ability to use that program for the types of abortions *Roe v. Wade*⁸⁸ had made central to reproductive liberty. Both *Beal v. Doe*⁸⁹ and *Harris v. McRae*⁹⁰ addressed the specific reproductive needs of poor women for whom the right to choose was an empty promise with no attendant state duties to provide the resources poor women might need to secure abortions. Denied benefits for medically necessary abortions by either state or federal law, these women discovered that privacy insulated them and their reproductive needs from any government duty to make those privacy-based rights real and meaningful. By framing the funding choice as merely a fiscal decision that incidentally burdened poor women's reproductive choices, the majorities in these cases treated the government action as if it was no more than a commercial

83. 453 U.S. 57 (1980).

84. *Id.* at 62.

85. *Id.* at 89-90 (Marshall, J., dissenting).

86. *Id.*

87. *Id.* at 88.

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

89. 432 U.S. 438 (1977).

90. 448 U.S. 297 (1980).

regulation, thereby giving the government wide latitude to make the decision without being subjected to anything more than the lowest level of judicial review. The government's choice would stand if it was reasonably related to a legitimate government interest. It made no difference to the majority that the government's funding decision implicated the otherwise constitutionally-protected fundamental rights of a group of women whose poverty made them eligible for the medical benefits being restricted in these cases.⁹¹ The government bore no responsibility for their poverty. Therefore, it had no obligation to relieve the effects of that poverty on the poor women's ability to make reproductive choices.

Justice Marshall found these types of funding decisions to be much more pernicious than the majorities opined. The government's decision to use its money to favor childbirth over abortion was coercive in ways that the Constitution should not permit. It demonstrated little regard for the importance of the poor women's fundamental rights at points before fetal viability. According to *Roe*, this was the point at which the women's rights were paramount. The types of funding decisions upheld in *Beal* and *Harris* compromised the poor women's fundamental rights to decisional liberty and choice. These rights were essential to both the personhood and the citizenship the Constitution sought to guarantee.

Justice Marshall's opinions in *Beal* and *Harris* reiterated his view that fundamental constitutional rights such as privacy and liberty could not be made contingent on factors such as poverty. In this way, the opinions followed the analysis he employed in cases such as *Wyman* and *Zablocki*, as well as *Matheson* and *Hodgson*.

In addition to his concerns about the fundamental nature of the rights affected by the government restrictions at issue in *Beal* and *Harris*, Justice Marshall saw the poor women's reproductive rights cases as raising two distinct equality issues. First, it created a sex-based division among the poor who relied on Medicaid for medically

91. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (prohibiting the government from denying "benefits . . . on a basis that infringes . . . constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited."); see also Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15 (1994); Dorothy E. Roberts, *In the Context of Welfare and Reproductive Rights: The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995).

necessary procedures. Restrictions such as the Hyde Amendment⁹² allowed poor women to access Medicaid benefits for all medically necessary procedures but one—abortion. Poor men, however, were not similarly limited and enjoyed government financial assistance for all medically necessary procedures.

Second, it singled out a group in which women of color were overrepresented and subjected them to treatment that effectively frustrated their ability to exercise their fundamental right to choose. In Justice Marshall's view, "[if] there is any state interest in potential life before the point of viability, it certainly [did] not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women."⁹³ The particulars of the class were relevant for any assessment of whether the government funding decision offended the Constitution. Justice Marshall noted, "the fact that the burden of the Hyde Amendment falls exclusively on financially destitute women suggests 'a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.'"⁹⁴ For Justice Marshall, this was clearly a case involving a discrete and insular minority whose interests were subject to the vagaries of a political process in which "elected leaders cover[ed] before public pressure"⁹⁵ at the expense of a politically powerless minority. While discreteness and insularity might prove to be problematic for bringing the poor within the scope of footnote four's fourth scenario, this was not necessarily the case for poor women of color. For this specific group of women, hyper-segregated poor communities of color might very well permit them to meet the footnote's discrete and insular requirement without contorting either term beyond its common understanding.⁹⁶ Justice Marshall noted

92. 42 U.S.C.A. § 1396d(a)(1-28) (2008).

93. *Beal*, 432 U.S. at 461 (Marshall, J., dissenting); see also *Harris*, 448 U.S. at 343 (Marshall, J., dissenting) (reiterating this point two years later when he characterized "[t]he class burdened" by the Hyde Amendment's restrictions as "consist[ing] of indigent women, a substantial proportion of whom are members of minority races.").

94. *Harris*, 448 U.S. at 343-44 (Marshall, J., dissenting) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

95. *Beal*, 432 U.S. at 462.

96. This is increasingly likely where poverty and racial segregation converge to create communities in which poor women of color and their families are overrepresented. See, e.g., John A. Powell, *Symposium: The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation: Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 *IND. L. REV.*, 605, 608-09 (2008) (discussing high rates of residential segregation and the fact that African Americans are "the most racially segregated population in the

that “‘a showing that state action has a devastating impact on the lives of minority racial groups must be relevant’ for equal protection analysis.”⁹⁷ Government officials should be made to justify why they enacted laws with an obvious and foreseeable racially disparate impact. This was a situation in which prejudice should be presumed and political actors should be required to articulate a compelling governmental interest in order to survive this type of constitutional challenge. This type of state action should not “be treated with the same deference given to legislation distinguishing among business interests.”⁹⁸ To do so would signal a complete abdication of what Justice Marshall saw as the Court’s constitutional duty of judicial review. As an alternative to the approach endorsed by the majorities in these two cases, Justice Marshall examined the practical effects of the funding decisions upheld by the majority. He discussed how the poverty that made the affected women eligible for the benefits in question would most assuredly be exacerbated by the state’s decision to favor childbirth over abortion. As Justice Marshall saw things, the “right to life” enjoyed by these mothers and their children was, “under present social policies, a bare existence in utter misery.”⁹⁹

CONCLUSION

The essential point of this essay is to demonstrate how Justice Marshall’s constitutional gender jurisprudence grew from seeds planted by Justice Stone in *Carolene Products* footnote four. Both Justices saw a space in which the constitutional presumption to which government conduct might be entitled should yield to countervailing constitutional concerns based on either the nature of the right involved or the disfavored minority status of those affected by the government’s action. Under these extraordinary circumstances, Article III courts and judges have a duty to subject the decisions made by either the federal political branches or the states to more exacting

nation,” and “[i]n 2000, nearly three out of four people living in neighborhoods of concentrated poverty were black or Latino.”); BARBARA GAULT ET AL., *THE WOMEN OF NEW ORLEANS AND THE GULF COAST: MULTIPLE DISADVANTAGES AND KEY ASSETS FOR RECOVERY-PART I. POVERTY, RACE, GENDER AND CLASS* (Institute for Women’s Policy Research, Briefing Paper, 2005) (assessing the impact of Hurricanes Katrina and Rita on women of color who are most likely to be poor).

97. *Harris*, 448 U.S. at 344 (Marshall, J., dissenting) (internal quotation marks omitted). In *Harris*, Marshall cited statistics that showed “nonwhite women obtain[ed] abortions at nearly double the rate of whites.” *Id.* at 343.

98. *Id.* at 342.

99. *Beal*, 432 U.S. at 456-57 (Marshall, J., dissenting).

scrutiny than might normally be justified. Rather than encroaching on territory the Constitution intended to reserve to other government actors, this type of judicial review exemplifies the types of checks and balances the framers found necessary to guard against the accretion of unchecked power by any governmental branch.

The opinions discussed in this essay reveal an internal logic and consistency for which Justice Marshall has rarely been given credit. His was not a shallow, unmoored jurisprudence tainted by the subjectivity of his experiences and his willingness to bring to the Court's attention the effects of government actions on real people. His was an experiential jurisprudence that echoed the intellectual work of women of color and the epistemology on which that intellectual work is often based.¹⁰⁰ Justice Marshall's contribution to our understanding of fundamental rights and constitutional equality relies on the basic premise that personhood, citizenship and humanity, as matters of constitutional law, require a vigilant court intent on achieving the lofty objectives of the Reconstruction Amendments for "those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."¹⁰¹ Far from being the uninformed and intellectually lazy musings of a man who was at times either enthralled with a captive audience forced to listen to his war stories or embittered by his increasing marginalization on the Court,¹⁰² Justice Marshall's opinions in the cases discussed in this essay represent a principled attempt to fully discharge the Court's duty to "say what the law is"¹⁰³ that takes it lead from the discourse Justice Stone sought to encourage with his *Carolene Products* opinion and its famous fourth footnote.

100. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* (2000).

101. MARSHALL, *SUPREME JUSTICE: SPEECHES AND WRITINGS*, *supra* note 2, at 284.

102. E.g., WOODWARD, *supra* note 5, at 343; JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 25 (2007) (describing Marshall's Supreme Court tenure as "unhappy," in large part because "[t]he causes he cared about were in eclipse for most of those years.").

103. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Brown's Descendants

JORDAN M. STEIKER*

Thurgood Marshall's most widely-recognized achievement as a lawyer is *Brown v. Board of Education* ("*Brown I*").¹ Along with his colleagues at the NAACP Legal Defense Fund ("LDF"), Marshall devised and implemented a strategy attacking segregation, first in higher education and then in the elementary and secondary schools. Marshall, of course, did much more over his career. He fought racial discrimination in many contexts, including his early work bringing pay equalization suits for African-American public school teachers (insisting on the "equal" part of "separate but equal"), his challenges to racial discrimination in housing, and his involvement in criminal litigation defending African Americans facing grave punishment in hostile proceedings. As Mark Tushnet writes in his illuminating biography,² Marshall in many ways invented (or at least elevated to a new level) the occupation of "civil rights lawyer"—an attorney committed to achieving social justice through litigation, despite extraordinary obstacles and disappointments along the way.

Notwithstanding all of his involvements, Marshall and *Brown* are linked in a deeper and more profound way than probably any other case and any other lawyer.³ The case required years of preparatory activism and litigation, and the announcement of *Brown* remains one of the most profound moments in American political, legal, and social history. We are just a few years past the fiftieth anniversary of the

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1. 347 U.S. 483 (1954).

2. See MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* 3-8 (1994).

3. Second place perhaps belongs to Louis Brandeis and his advocacy in *Muller v. Oregon*, 208 U.S. 412 (1908); *Muller* has much less significance along many dimensions, but the effort of Brandeis to persuade via empirical and social argument rather than formalist invocation of doctrine marks an important moment in constitutional history. Indeed, Marshall's own advocacy in *Brown* undoubtedly reflects the influence of the "Brandeis Brief."

decision, an anniversary justly observed and celebrated in many quarters. The anniversary was also the source of much critical discussion and reflection in light of what we now know of the complicated and troubled half century that followed—a history in which divisions along racial lines still plague public education. Given the rich and vast literature on *Brown*, and the additional contributions wrought by the recent anniversary, there is reason to be cautious about revisiting the decision or its legacy.

But the U.S. Supreme Court's decision last year in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*⁴—striking down the voluntary race-based efforts of Seattle and Jefferson County (Louisville, Kentucky) to promote racial balance and reduce racial isolation within their public schools—justifies further reflection on *Brown*. These cases are certainly part of the same story, raising similar questions about local authority, the desirability and permissibility of state race-based decisionmaking, and the role of the courts in enforcing a guarantee of equality. But more than that, the Court's resulting opinions offer an extraordinary array of views about the “true” meaning of *Brown*. Indeed, all five of the Justices who author opinions in the case emphasize their fidelity to *Brown* (and the infidelity of some of their colleagues). More than simply viewing *Brown* as a relevant precedent, these opinions seek moral legitimacy by claiming *Brown's* mantle. The opinions constitute the most sustained effort by members of the Court to assess *Brown's* significance and collectively they invite reexamination of what, exactly, *Brown* permits or requires.

This essay will examine the challenged programs in the Seattle and Jefferson County litigation, the Court's rejection of those programs as violative of equal protection, and the competing claims by the respective opinions to be *Brown's* true heir. The essay will separately evaluate the interpretive methodologies employed by the opinions and the substantive commitments they embrace. Ultimately, the opinions supporting the Court's judgment share a greater methodological affinity to *Brown* but have less of a claim to substantive fidelity. On the methodological side, the opinions supporting the judgment place little weight on history or precedent and rely instead on intuitive moral perceptions about the harm caused by race-based student placements. In this respect, the opinions supporting the judgment—like *Brown*—are ungrounded and rather unconventional as a

4. 127 S. Ct. 2738 (2007).

matter of judicial craft. At the same time, the dissenting opinions can claim somewhat greater substantive fidelity to *Brown*. The central substantive commitments in *Parents Involved*—to colorblindness as a constitutional aspiration, to strict scrutiny of race-based classifications, and to the prohibition of race-based assignments designed to reduce racial isolation—find little support in *Brown* itself. But the substantive commitments of *Brown* are notoriously elusive; neither side in the debate can fully claim to speak for *Brown* because on many of the important questions *Brown* failed to speak for itself.

I. THE HISTORY AND OPERATION OF THE CHALLENGED PLANS

The common feature shared by the Seattle and Jefferson County programs is that in each case the school district sought to increase the racial balance of the local schools by including a child's race as a factor in school placement. In the Seattle School District plan, incoming ninth graders listed their preferences for high school placement.⁵ The process was not merit-based, and the district would honor all choices if available.⁶ In cases of space constraints, the first tie-breaker was to prefer applicants with a currently-enrolled sibling and the second tie-breaker depended on the race of the applicant and the racial composition of the school.⁷ If the oversubscribed school departed more than ten percent from the white/non-white racial balance of the district as a whole (approximately forty-one percent white, fifty-nine percent non-white), students whose enrollment would lessen the departure from the district balance were preferred.⁸ A third tie-breaker considered the applicants' geographical proximity of students (based on their residence) to the particular school.⁹

Under the Jefferson County plan, all of the non-magnet schools within the district were required to maintain a minimum black enrollment of fifteen percent and a maximum black enrollment of fifty percent (which allowed roughly a fifteen percent deviation in any school from the overall black student population of thirty-four percent in the

5. *Id.* at 2746-47.

6. *See id.* at 2747 (students are placed according to their preference, however, if schools are oversubscribed, the district utilizes a series of non-merit based tiebreakers to decide admission).

7. *Id.*

8. *Id.*

9. *Id.*

district).¹⁰ The Jefferson County approach generally permitted students to attend any elementary school within the “cluster” of schools in their area, but denied students the ability to transfer if a particular school had reached the “extremes of the racial guidelines” and the transfer would exacerbate the departure from the guidelines.¹¹

The key question in both cases was whether the *voluntary* use of race to increase racial balance (or to achieve particular racial distributions of students) is constitutionally permissible. Both districts had previously been accused of intentionally separating students on the basis of race. Prior to *Brown*, Jefferson County had maintained a racially-segregated system pursuant to Kentucky law.¹² In 1973, a federal appellate court held that the district had not succeeded in establishing unitary schools (and failed to disprove that the remaining racial identifiability of its schools was attributable to its prior *de jure* system).¹³ In 2000, though, Jefferson County was released from the desegregation decree that had been entered in 1975.¹⁴ The next year, the County voluntarily adopted the challenged plan.¹⁵

The Seattle School District never operated a *de jure* system of segregated schools and was never subject to court-ordered desegregation remedies.¹⁶ But in the 1970s, in response to claims that the Board intentionally contributed to the racial separation of students via facially race-neutral policies (such as decisions where to build schools and how to draw school boundary lines), the Board sought to increase racial balance through mandatory busing.¹⁷ Political and popular opposition to busing ultimately led the Board to abandon busing and to adopt its challenged plan of student choice in high school placement, subject to the racial tiebreaker described above. In its operation, the tiebreaker applied to both white and minority students, and a relatively small number of both were denied their chosen schools because of their race.¹⁸

10. *Id.* at 2755 (plurality opinion).

11. *Id.* at 2749-50.

12. *Newburg Area Council, Inc. v. Bd. of Educ.* 489 F.2d 925, 927 (6th Cir. 1973), *vacated and remanded*.

13. *Id.* at 932, 418 U.S. 918, *reinstated with modifications*, 510 F.2d 1358, 1359 (6th Cir. 1974).

14. *Parents Involved*, 127 S. Ct. at 2749.

15. *Id.*

16. *Id.* at 2747.

17. *Id.* at 2803 (Breyer, J., dissenting).

18. *Id.* at 2803-06.

II. THE INVALIDATION OF THE PLANS

The Court found both plans unconstitutional. Chief Justice Roberts, writing for the majority on this point, applied strict-scrutiny to the districts' use of racial criteria in school placement.¹⁹ On the "compelling interest" side, the majority rejected any claim that the plans could be justified as remedying the effects of past intentional discrimination.²⁰ Jefferson County had been released from its prior desegregation decree, which required a finding that the County "had 'eliminated the vestiges associated with the former policy of segregation and its pernicious effects,' and thus had achieved 'unitary' status."²¹ The Seattle public schools, the majority noted, had never been segregated by law or subject to court-ordered desegregation decrees.²²

The majority likewise rejected the school districts' assertion of a compelling goal in fostering diversity within their schools akin to the affirmative action admission program upheld in *Grutter v. Bollinger*.²³ The majority distinguished affirmative action efforts in the higher education context, both because of the purportedly distinct features of university education and because of the broader notion of diversity pursued in the *Grutter* plan (in which race was one of many factors used to select a diverse student body).²⁴ Most significantly, writing only for a plurality, Chief Justice Roberts refused to endorse the districts' claim of a compelling interest in a "racially diverse learning environment."²⁵ The plurality faulted the districts for lacking any workable theory about "the level of racial diversity necessary to achieve the asserted educational benefits."²⁶ Instead, the plurality viewed the plans as merely trying to achieve racial balance for its own sake, particularly because the percentages sought in the two districts corresponded so closely to local demographics rather than some educational ideal. In the end, the plurality rejected as patently unconstitutional a specific interest in "racial" diversity in the public schools untethered to some broader, non-racial conception of diversity.

Justice Kennedy, concurring in part and concurring in the result, declined to join this portion of the opinion because he expressly would

19. *Id.* at 2742.

20. *Id.* at 2752.

21. *Id.*

22. *Id.*

23. 539 U.S. 306 (2003).

24. *Parents Involved*, 127 S. Ct. at 2753-54.

25. *Id.* at 2755-56.

26. *Id.* at 2756.

affirm “diversity” as a compelling interest in the public school context.²⁷ More particularly, Justice Kennedy rejected the implication of the plurality opinion that school boards lack power to combat racial separation and isolation in their schools absent an identified and continuing constitutional violation.²⁸ In this respect, Justice Kennedy acknowledges that de facto racial separation could undermine equal educational opportunity, and that school boards have compelling reasons for attempting to redress such separation. But in Justice Kennedy’s view, while school boards could pursue this interest via race-conscious *decisions* (e.g., strategic site selection of new schools, drawing attendance zones with awareness of racial demographics, resource allocation, recruitment efforts), they could not do so through “crude system[s] of individual racial classifications.”²⁹ Overall, Justice Kennedy is sympathetic to the ends sought by the Seattle and Jefferson County plans (whereas the plurality disparagingly characterizes the goal as mere “racial balancing”), but he would severely limit race-based assignments as the means of achieving those ends. Justice Thomas’ separate concurrence went further than the plurality in condemning as misguided the school boards’ goal of achieving racial balance, given what he regarded as the “tenuous relationship between forced racial mixing and improved educational results for black children.”³⁰

Both dissents took issue with the Chief Justice Roberts’ characterization of the governing law. At the most general level, both Justices Breyer and Stevens insisted that the Court inappropriately subjected the voluntary plans to extraordinary scrutiny. According to Justice Breyer, courts should allow greater flexibility when state decisionmakers “use race-conscious criteria to achieve positive race-related goals.”³¹ Justice Stevens, who has never endorsed the Court’s rigid tiers of equal protection scrutiny, similarly rejected the plurality’s decision to treat as irrelevant the fact that the school plans did not impose burdens on one race alone and did not stigmatize or exclude.³² More specifically, both Justices insisted that the Court’s decision was inconsistent with earlier pronouncements by the Court endorsing voluntary efforts to achieve racial balance in public schools,

27. *Id.* at 2791-93 (Kennedy, J., concurring in part and concurring in the judgment).

28. *Id.* at 2791-92.

29. *Id.* at 2792.

30. *Id.* at 2778 (Thomas, J., concurring).

31. *Id.* at 2811 (Breyer, J., joined by Stevens, Ginsburg, and Souter, JJ., dissenting).

32. *Id.* at 2798-99 (Stevens, J., dissenting).

most notably the Court's pronouncement in *Swann v. Charlotte-Mecklenburg*,³³ albeit in dicta, that school authorities might well decide to prescribe an appropriate racial ratio in each school within a district "in order to prepare students to live in a pluralistic society."³⁴ Indeed, the bulk of the lengthy opinions (both supporting and opposing the Court's judgment) were devoted to the question whether the desegregation-era decisions which enthusiastically endorsed the "affirmative duty" doctrine had been supplanted by the Court's more recent decisions, particularly *Adarand Constructors, Inc. v. Peña*,³⁵ calling for strict scrutiny of all racial classifications. The plurality and Justice Kennedy clearly sought to confine race-based placements of students to the narrow circumstance of remedying identified constitutional violations whereas the dissenters rejected the notion that such use of race was constitutionally permissible only where constitutionally compelled.

III. CLAIMING BROWN

The various opinions, as described above, reflect the expected divide among the Justices along two dimensions—whether and when "affirmative" uses of race are constitutionally permissible, and to what extent contemporary racial identifiability is fairly attributable to past discriminatory practices. The most arresting feature of the various opinions, though, is their effort to legitimize their approaches and conclusions through appeals to *Brown* itself. *Brown* has, of course, received an extraordinary amount of scholarly attention, and many Justices have made claims about its "true" meaning. But the various opinions in *Parents Involved* constitute the Court's most sustained reflections regarding the lessons of *Brown* and the significance of *Brown* for contemporary constitutional interpretation.

Chief Justice Roberts fired the first shot across the bow, insisting that *Brown* itself compelled the invalidation of the challenged programs: "when it comes to using race to assign children to schools, history will be heard."³⁶ He characterized both *Brown* and *Brown II*³⁷ as opposing racial classification and imposing a duty on schools to make assignments on a non-racial basis. In support of this claim, he quoted

33. 402 U.S. 1 (1971).

34. *Id.* at 16.

35. 515 U.S. 200 (1995).

36. *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

37. *Brown v. Bd. of Educ.* ("*Brown II*"), 349 U.S. 294 (1955).

from the plaintiffs' oral argument in *Brown I*, in which Robert Carter insisted "that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens."³⁸ Ultimately, Chief Justice Roberts claimed an equivalency between the use of race by segregationists and the use of race by schools seeking racial balance: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."³⁹ Justice Thomas went even further, contending that the "constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking."⁴⁰

Justice Stevens described the plurality's reliance on *Brown* as a "cruel irony"⁴¹ because it ignored the fact that segregation was designed to exclude and burden African-American children. The problem, in Justice Stevens' view, was not racial classification itself, but the desire to withhold from one race the same opportunities accorded the majority. The claim that racial classification was the targeted evil, in Justice Stevens' account, amounts to a rewriting of history—a projection onto *Brown* of the commitments reflected in more recent (and in his view less satisfying) decisions, such as *Adarand*. As for "history," Justice Stevens offers his own assessment, claiming that no member of the Court he joined in 1975 would have agreed with the plurality's decision.⁴²

Recognizing the enormous practical and jurisprudential significance of the case, Justice Breyer justified his decision to write at "exceptional length"⁴³ (seventy or so pages) to defend the challenged programs and to specifically refute the Court's claim to *Brown's* mantle. He began by characterizing *Brown's* promise as the "bring[ing] about" of "racially integrated education."⁴⁴ He offered an extensive history of school desegregation efforts and of the court's repeated support for both voluntary and compelled efforts to achieve unitary schools, especially in the 1960s and 1970s. According to Justice

38. *Parents Involved*, 127 S. Ct. at 2767-68 (plurality opinion) (quoting Tr. of Oral Arg. in *Brown I*, O.T. 1952, No. 1, p. 7).

39. *Id.* at 2768 (plurality opinion).

40. *Id.* at 2774 (Thomas, J., concurring).

41. *Id.* at 2797 (Stevens, J., dissenting).

42. *Id.* at 2800.

43. *Id.* at 2834 (Breyer, J., dissenting).

44. *Id.* at 2800.

Breyer, the Court should not subject racial classifications to the most demanding scrutiny when they neither stigmatize a particular group, nor “pit the races against each other,”⁴⁵ nor allocate scarce goods or services that are otherwise distributed on the basis of merit.⁴⁶ Responding to the insistence that universities have a better claim to diversity as a compelling interest, Justice Breyer quoted Justice Marshall’s dissent in *Milliken v. Bradley*: “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”⁴⁷ More pointedly, Justice Breyer reminded the Court that *Brown* itself was a primary and secondary school case, and that its rejection of separate education was deemed much more significant than the Court’s earlier decisions requiring the integration of law schools and graduate programs.

In his concluding section, Justice Breyer offered an alternative “history” to the one offered by the Court. *Brown* was not, in his view, the culmination of a campaign against racial classification as such. It was part of a broader struggle for the inclusion of a people within American society. Using language more common to President Obama than to conventional Supreme Court opinions, Justice Breyer described the overarching goal of the Reconstruction Amendments as a promise “to make citizens of slaves.”⁴⁸ The “history” of *Brown*, in Justice Breyer’s account, includes the history of resistance to its mandate, the lamentable failure of courts and communities to bring children of different races together, and the emerging, voluntary efforts of “the very school districts that once spurned integration [to] now strive for it.”⁴⁹

Just as the opinions of Justice Stevens and Breyer are directed toward the majority’s invocation of *Brown*, Justice Thomas’ opinion is a response to the dissenters. Indeed, his opinion aims to show that the arguments of the dissenting Justices are rehashes of the claims segregationists advanced in *Brown*—in particular, the dissenters’ appeals to flexibility, precedent, current societal practice, and local autonomy. Justice Thomas faults their effort to “contextualize” the question whether race can be used to assign students, and instead defends a more “theoretical” approach to equal protection that essentially re-

45. *Id.* at 2818.

46. *Id.*

47. *Id.* at 2822 (quoting *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting)).

48. *Id.* at 2836.

49. *Parents Involved*, 127 S.Ct. at 2837.

quires “colorblindness.”⁵⁰ Indeed, Justice Thomas is remarkably candid in his insistence that history and circumstances are simply irrelevant to the permissibility of race-based decisionmaking: “None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards’ race-based plans because no contextual detail—or collection of contextual details, can ‘provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.’”⁵¹ Justice Thomas maintains that his defense of a “colorblind” Constitution finds firm support in *Brown*, but less because *Brown* actually insisted on colorblindness than because Thurgood Marshall treated Justice Harlan’s dissent in *Plessy v. Ferguson*⁵² as his “Bible” during the most trying moments of the *Brown* litigation⁵³ (and many of the NAACP LDF briefs submitted in *Brown* insisted that the Fourteenth Amendment did not tolerate the allocation of educational resources on the basis of race).⁵⁴ Ultimately, Justice Thomas is skeptical of the purported benefits of “state-compelled racial mixing”⁵⁵ and would preclude any judicial deference toward apparently “benign” race-based decisions (absent extraordinary circumstances—such as preventing anarchy or preventing violence).

Finally, Justice Kennedy, who occupies the middle ground in the decision, offers the most conflicted version of what *Brown* sanctions. Whereas Chief Justice Roberts and Justice Thomas essentially accuse the Seattle School Board and Jefferson County School Boards of engaging in racism comparable to the segregationists (and accuse the dissenting Justices of supporting such racism), and the dissenting Justices view the Court’s decision as astonishingly indifferent to the resegregation of American schools, Justice Kennedy finds some truth in both positions. He joins the dissenters in viewing the schools’ goal

50. *Id.* at 2786-87 (Thomas, J., concurring).

51. *Id.* at 2786 (quoting *Adarand*, 515 U.S. at 240).

52. 163 U.S. 537, 553-64 (1896) (Harlan, J., dissenting).

53. *Parents Involved*, 127 S. Ct. at 2782-83 (citing IN MEMORIAM: HONORABLE THURGOOD MARSHALL, PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES X (1993) (remarks of Judge Motley)).

54. *Id.* at 2782 (citing Brief of Appellants at 65, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (Nos. 1, 2, and 4); Brief of Appellants at 5, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (No. 1)).

55. *Id.* at 2780. Justice Thomas’ use of “race-mixing” seems to deliberately echo the segregationists’ use of that term. As used by segregationists, “race-mixing” was synonymous with miscegenation; supporters of Jim Crow emphasized the inevitable connection between the end of segregation in schools and interracial marriage. It is odd for Justice Thomas to decry the effort to reduce racial isolation in schools as a form of “state-compelled race-mixing” given the ugliness of the term’s pedigree.

of interracial education as laudable and faithful to *Brown*, and for that reason refuses to join the plurality opinion in its entirety (“The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* segregation in schooling. I cannot endorse that conclusion.”).⁵⁶ At the same time, Justice Kennedy rejects the assignment of students on a racial basis as the means of achieving greater racial balance. In the end, Justice Kennedy appears less willing than his colleagues to claim that his views follow from *Brown* itself, and much of his argument is prudential and normative rather than attributed to *Brown-as-oracle*.

What should we make of these competing claims to *Brown*'s mantle? The fact that the Justices uniformly claim fidelity to *Brown* confirms its status as the ultimate “iconical” case⁵⁷—one that all constitutional interpreters must accept, defend, and accommodate in whatever other interpretive conclusions they reach. Part of its iconic status is no doubt attributable to the place *Brown* occupies in the public imagination as a symbol of the Constitution's triumph over evil and tyranny. *Brown* allows Americans to view their constitutional order as essentially just because it collapsed the divide between what the Constitution (via *Plessy*) would permit and what justice requires. For this reason, it is unsurprising that judges would want to claim that their preferred interpretive theory leads to the “correct” result in *Brown*, because the contrary conclusion would necessarily require rejection of the redemptive power of the Constitution. Judges rarely are willing to concede that the Constitution, properly read, tolerates extraordinary injustice, and the risks of doing so are particularly great in cases such as *Brown* where the challenged practice departs so far from our professed ideals.

The divergent appeals to *Brown*'s status also confirm another critical aspect of the opinion—its elusiveness, reflected in its failure to frame its judgment within a broader theory of equal protection or to take sides on the question of segregation's true role in American life. Indeed, not only does *Brown* refuse to adopt or defend a grand theory of equal protection, it leaves opaque the answers to several of the critical questions raised by the case, including the exact nature of the constitutional violation and the remedy or remedies required to correct it.

56. *Id.* at 2791.

57. JACK M. BALKIN, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATIONS TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 3 (2002).

Brown's own minimalism has transformed the decision into a sort of inkblot or Rorschach test, which allows interpreters to search for its hidden meaning and ensures that the resulting interpretation reveals more about the interpreter than the decision itself. In this respect, one of the striking features of the various appeals to *Brown* in the five *Parents Involved* opinions is that none of them makes much reference at all to the actual language of *Brown* and instead the Justices argue for *Brown's* true meaning based on the conflicting aspirations they ascribe to it.

Nonetheless, it is useful and revealing to evaluate closely the various implicit and explicit claims made by the *Parents Involved* opinions about the meaning and significance of *Brown*. *Brown* does not answer every one of the questions asked of it, but neither is it entirely a blank slate. The remainder of this essay will examine the central interpretive and substantive commitments of the *Parents Involved* opinions and examine their faithfulness to *Brown*.

IV. COMPARING INTERPRETATIVE APPROACHES: *PARENTS INVOLVED* AND *BROWN*

On interpretive methodology, the *Parents Involved* opinions are deeply divided about the appropriate roles of history, precedent, and prudential considerations in constitutional interpretation. Interestingly, the opinions supporting the judgment (authored by Chief Justice Roberts, Justice Thomas, and Justice Kennedy) are closer methodologically to *Brown* than the dissents. That closeness, though, is a mixed blessing, because *Brown* has never been regarded as satisfying from a methodological perspective. Indeed, a central project of constitutional law both in the immediate aftermath of *Brown* and in contemporary commentary has been to offer a more convincing defense of *Brown's* judgment.

A. History

The significance of history to constitutional interpretation is extraordinary complex. "History" can refer to quite divergent sources of meaning, ranging from the analysis of the original expectations of the founders or ratifiers at the time of the adoption of the constitutional provision, to the study of the accumulation of practices and experiences in the area subject to constitutional challenge which might reflect governmental and popular assumptions about the permissibil-

ity of such practices (such as the historical experience with the National Bank in the quarter-century prior to *McCulloch v. Maryland*⁵⁸), to the examination of the deeper social and political forces contributing to particular governmental practices (such as segregation) which might reveal their underlying purpose or meaning.

As to originalism, only Justice Breyer makes an appeal to the original expectations and practices of the framers of the Fourteenth Amendment, arguing that it is well-established that “the basic objective of those who wrote the Equal Protection Clause [was to forbid] practices that lead to racial exclusion.”⁵⁹ Although Chief Justice Roberts insists that “history will be heard,”⁶⁰ the history he invokes goes back only so far as *Brown*, and Chief Justice Roberts does not claim that the plurality’s presumptive rejection of racial classifications is itself traceable to the framers or ratifiers of the Fourteenth Amendment. Justice Thomas likewise makes no effort to ground his endorsement of “colorblindness” as an operative standard to the Reconstruction era; he defends it as a moral imperative and is content to associate himself with other actors, such as Justice Harlan, who embraced that ideal. Methodologically, Justice Thomas and Chief Justice Roberts can claim a greater affinity to *Brown* in this regard, given *Brown*’s explicit refusal to “turn the clock back to 1868”⁶¹ to discern the commands of equal protection. The obvious irony, of course, is that Justice Thomas is otherwise an enthusiastic adherent of originalism as a guide to constitutional meaning whereas Justice Breyer is decidedly more ecumenical in his interpretive approach.⁶²

Justice Breyer’s opinion is historical along several other dimensions. He clearly believes that segregation must be understood as part of a broader system of racial hierarchy stretching back to slavery: “segregation policies did not simply tell schoolchildren ‘where they could and could not go to school based on the color of their skin,’ they perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination.”⁶³ Given segregation’s roots, Justice Breyer views *Brown* as condemning the practice because it perpetuated social caste and was designed to exclude and harm African

58. 17 U.S. 316 (1819).

59. *Parents Involved*, 127 S. Ct. at 2815 (Breyer, J., dissenting).

60. *Id.* at 2767 (plurality opinion).

61. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

62. See generally STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

63. *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting).

Americans. Viewed in this light, *Brown* would not necessarily condemn the racial assignment of students to combat racial separation and exclusion. Neither Chief Justice Roberts nor Justice Thomas focuses at all on the connection between slavery and segregation. Just like *Brown*, these opinions evaluate segregation without describing or evaluating its overarching social meaning or legacy. *Brown* famously avoided any suggestion that segregation was ill-intended or the product of illegitimate theories of white supremacy. Instead, *Brown* was written as though segregation was the product of a monumental but inadvertent misunderstanding in which we simply failed to appreciate the harm it caused. Chief Justice Warren's decision to deliver a "non-accusatory"⁶⁴ opinion meant that *Brown* would appear in a social and political vacuum. In this respect, Chief Justice Roberts' insistence that "history will be heard" is deeply ironic. He obviously refers to the history surrounding the decision in *Brown*—not the history of slavery, caste, and segregation—and the history presented in *Brown* itself was deeply and deliberately ahistorical.

The other sort of history pursued by Justice Breyer—indeed the bulk of his dissent—is the post-*Brown* history of the effort to overcome the segregationist past. Justice Breyer marshals two aspects of this history to support the Seattle and Jefferson County plans: first, he documents the failure of non-race-based plans to produce unitary or racially balanced schools, and he describes at length the failed efforts in Seattle, Jefferson County, and other parts of the country to solve the problem of racial identifiability and racial isolation in the public schools through such means; second, he details how a whole range of institutional actors, from Congress, to the courts, to school boards, have acted on the assumption that school boards may use race-based assignments of students to achieve greater racial balance in the public schools. This history, Justice Breyer insists, must be accounted for in any decision addressing the constitutionality of the challenged programs. Indeed, Justice Breyer decries the extent to which *Parents Involved* disrupts the "settled expectations"⁶⁵ of numerous institutions and actors who have assumed that race could be used by elementary and secondary schools voluntarily seeking greater racial balance.

64. See Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 222 n.96 (2008) (citing Memorandum from Earl Warren to Members of the Court (May 7, 1954)); Earl Warren Papers, Container 571, Manuscript Division, Library of Congress, Washington, D.C. (describing his goal that the *Brown* opinion was to be "non-rhetorical, unemotional and, above all, non-accusatory").

65. 127 S. Ct. at 2836 (Breyer, J., dissenting).

Both Chief Justice Roberts and Justice Thomas offer a much different (and much less historical) narrative. They recast the effort in *Brown* as the effort to defeat race-based decisionmaking (borrowing from the briefs in *Brown*), and they spend little time on the actual efforts or attitudes of institutional actors outside of the courts. In this respect they seem to regard the several decades of desegregation litigation as an obstacle to the fulfillment of *Brown*'s promise—the elimination of race from governmental decisions. The only relevant “history” recounted by these opinions traces the relatively recent judicial adoption of strict scrutiny for all racial classifications whether invidious or benign (primarily in the context of affirmative action).⁶⁶ Overall, these opinions are less interested in what school boards, politicians, and judges have thought about voluntary efforts to achieve racial balance than they are in the truth of the moral proposition condemning race-based decisions.

Moreover, Justice Thomas likens the reliance on past practice and settled expectations to the claims of segregationists at the time of *Brown*.⁶⁷ While it might be true that contemporary actors have assumed the ability to use race as a basis of their decisions, Justice Thomas insists that the assumption must yield to the higher moral imperative of colorblindness and race-neutrality. Put in its most dramatic form, Justice Thomas declares that “state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession.”⁶⁸

In this respect, again, the opinions supporting the judgment are methodologically closer to *Brown*. Just as *Brown* refused to turn back the clock to 1868, *Brown* accorded little significance to the enduring institutional practices and beliefs that supported segregation. History—particularly as a means of explaining the role and significance of segregation—was notably absent in *Brown*,⁶⁹ and the dissenters' ef-

66. *Id.* at 2751-53 (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200; *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978)); *Parents Involved*, 127 U.S. at 2770-82 (Thomas, J., concurring).

67. *Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring) (“This approach is just as wrong today as it was a half-century ago.”); *id.* at 2783 (“Though *Brown* decisively rejected those [segregationist *Plessy*] arguments, today’s dissent replicates them to a distressing extent.”); *id.* at 2785 (“The similarities between the dissent’s arguments and the segregationists’ arguments do not stop there.”).

68. *Id.* at 2786.

69. *Brown* did employ history in one respect—to highlight the changing role of education in public life (though even this use of history was used to explain why the Court should not be

forts to weave history into their analysis reflects an interpretive departure from *Brown*.

B. Precedent

One of the most remarkable aspects of *Brown* was its failure to offer the strongest precedential case for the overruling of *Plessy*. Although *Plessy* represented a formidable obstacle to *Brown*, there were numerous decisions both pre- and post-*Plessy* that pointed a different path.⁷⁰ But *Brown* contained virtually no discussion of prior cases. The Court referenced the higher education cases (*Missouri ex rel. Gaines v. Canada*,⁷¹ *Sipuel v. Board of Regents of University of Oklahoma*,⁷² *Sweatt v. Painter*,⁷³ and *McLaurin v. Oklahoma State Regents for Higher Education*⁷⁴) but did so primarily to say that in none of those cases was it necessary to reconsider the separate-but-equal doctrine. Notably absent was any discussion of cases like *Buchanan v. Warley*,⁷⁵ *Shelley v. Kraemer*,⁷⁶ the white primary cases, or the Japanese curfew and exclusion cases (*Hirabayashi v. United States*⁷⁷ and *Korematsu v. United States*⁷⁸), that had in different ways and to different degrees called into question the deference accorded official actors when they discriminated against minorities. One of the reasons *Brown* was greeted with skepticism and contempt in some quarters was its failure to justify its conclusion in light of the larger legal landscape, or to even attempt to do so, which lent support to the charge of the opponents that the decision merely reflected the normative commitments of the Court rather than the command of “law.”

In *Parents Involved*, the precedential landscape was a complicated one. *Brown* had clearly condemned racial separation that produced harm by reinforcing the inferiority of a stigmatized group. The *Brown II* line of cases, particularly *Green v. School Board of New Kent County*⁷⁹ and *Swann v. Charlotte-Mecklenburg Board of Educa-*

constrained by past understandings and practices and should treat the constitutional question as an open one).

70. Jordan Steiker, *American Icon: Does It Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 325-26 (2002).

71. 305 U.S. 337 (1938).

72. 332 U.S. 631 (1948).

73. 339 U.S. 629 (1950).

74. 339 U.S. 637 (1950).

75. 245 U.S. 60 (1917).

76. 334 U.S. 1 (1948).

77. 320 U.S. 81 (1943).

78. 323 U.S. 214 (1944).

79. 391 U.S. 430 (1968).

tion,⁸⁰ permitted—indeed in some cases required—race-based assignments of children as part of judicial remedies for violations of *Brown I*. The affirmative action line of cases, from *Regents of the University of California v. Bakke*⁸¹ to *Adarand*⁸² to *Grutter v. Bollinger*,⁸³ made clear that even purportedly benign race-based decisions would be subject to strict scrutiny where individuals were disadvantaged on the basis of race in the competitive allocation of opportunities. Apart from these lines of cases, there was strong dicta in *Swann* that the voluntary efforts by school boards to achieve racial balance was within the discretion of local actors,⁸⁴ and several other judicial decisions, mostly from the 1960s and 1970s, appeared to implicitly or explicitly recognize the legitimacy of such local decisionmaking.⁸⁵ From the perspective of the dissenters, the Court had never called into question the power of local authorities to use race in such circumstances, and the decision to overturn the Seattle and Jefferson County plans therefore represented a marked departure from its prior decisions.

Chief Justice Roberts and Justice Thomas placed little weight on the opinions and practices emerging from the height of the desegregation era. In many of those cases, the school districts were in any case operating in the shadow of *Brown* violations. More importantly, in their view, whatever deference was afforded in the earlier era was fa-

80. 402 U.S. 1 (1971).

81. 438 U.S. 265 (1978).

82. 515 U.S. 200 (1995).

83. 539 U.S. 306 (2003).

84. 402 U.S. at 16 (“School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is well within the broad discretionary powers of school authorities.”).

85. See, e.g., *Bustop, Inc., v. Los Angeles Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (Rehnquist, J., opinion in chambers) (“While I have the gravest doubts that [a state supreme court] was required by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was permitted by that Constitution to take such action.”); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (“[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”); see also, e.g., *Crawford v. Bd. of Educ.*, 458 U.S. 527, 535-36 (1982) (“[S]tate courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation . . . [S]chool districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.”); *Bd. of Educ. v. Harris*, 444 U.S. 130 (1979) (finding no constitutional problem where federal statute required school district to remedy faculty segregation, even though the racial disparities were purely de facto); *School Commissioner v. Bd. of Educ.*, 389 U.S. 572 (1968) (per curiam) (dismissing for want of a federal question a challenge to a voluntary statewide integration plan using express racial criteria).

tally undermined by the Court's subsequent embrace of its global and uncompromising standard of strict scrutiny. In the end, though, the opinions supporting the judgment seem to rest less on the claim that reversal is *dictated* by precedent than by their view of the soundness of the moral imperative underlying their suspicion of race-based classifications and their rejection of racial-balancing as a compelling interest.

All of the *Parents Involved* opinions make significant efforts to ground their conclusions in available precedent. In this respect, they all depart from *Brown*'s strangely ungrounded decision. But the emphasis and tone of the opinions supporting the judgment, particularly the concurrence of Justice Thomas, are closer to *Brown* in emphasizing the moral rightness of their position irrespective of governing precedent. It is in this spirit that Justice Thomas equates the dissenters' passionate appeal to stare decisis with the segregationists' reliance on *Plessy*: in both cases, Justice Thomas argues, the power to make decisions on the basis of race cannot be taken by adverse possession.⁸⁶

C. Prudential Considerations

At the same time that *Brown* eschewed reliance on history and precedent, it elevated prudential considerations regarding the costs of segregation. The opinion famously (or infamously) claimed that newly-developed sociological research had confirmed that segregation imposed high costs on African-American schoolchildren by undermining their self-esteem.⁸⁷ Rather than condemn segregation as *designed* to foster racial hierarchy, or as inappropriate because of its mere use of racial classification, the opinion suggested that segregation was unconstitutional because of its demonstrable negative effects on the ground.

Justice Breyer's dissenting opinion pursues something of the same path, offering extensive evidence to support the empirical claim that racially-balanced schools provide important educational and socialization benefits to schoolchildren.⁸⁸ One set of studies suggest that African-American students fare better along several dimensions when educated in "integrated" rather than "racially isolated" schools, in-

86. *Parents Involved*, 127 S. Ct. at 2786 ("What was wrong in 1954 cannot be right today. Whatever else the Court's rejection of the segregationists' arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession.").

87. *Brown*, 347 U.S. at 494-95 n.11.

88. *Parents Involved*, 127 S. Ct. at 2820-22 (Breyer, J., dissenting).

cluding academic performance, job opportunities, and income levels.⁸⁹ Another set of studies suggest that both black and white students harbor less prejudice than those educated in racial isolation, and that increased inter-racial exposure in school might reduce racial separation after graduation.⁹⁰ Justice Breyer does not offer these studies to *prove* that racial balance in schools is an unalloyed social good, but to defend the right of local decisionmakers to pursue such balance as a “compelling” interest. Justice Thomas, in contrast, cites studies which question the value of “racial mixing” in schools and touts the successes of African-American students educated in racially homogenous (e.g., virtually all African-American) settings.⁹¹ More fundamentally, Justice Thomas insists that the question whether the interest in racially balanced education is compelling is solely for the judiciary. In an undisguised swipe at *Brown*, Justice Thomas rejects the notion that constitutional principles should turn on the findings of a few sociologists, because such reliance “would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists.”⁹²

Part of Justice Thomas’ rejection of social science stems from his distrust of local officials who claim good intentions. Toward the end of his opinion, he recounts the decision of the Seattle School District to send a delegation of high school students to a “White Privilege Conference” in which such privilege was described by one participant as “an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious.”⁹³ Justice Thomas does not explain why, exactly, participation in this conference demonstrates the bad judgment of the school district, but his critical attitude is clear (and he directs the reader to a newspaper story about the conference entitled “School District’s Obsessed with

89. *Id.* at 2821 (citing Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741-42 (1998)).

90. *Parents Involved*, 127 S. Ct. at 2822 (citing Hallinan, *supra* note 89 at 745; Lincoln Quillan & Mary E. Campbell, *Beyond Black and White: The Present and Future of Multiracial Friendship Segregation*, 68 AM. SOC. REV. 540, 541 (2003); Marvin P. Dawkins & Jomills H. Braddock III, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO. EDUC. 394, 401-03 (1994); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 550 (1994)).

91. *Parents Involved*, 127 S. Ct. at 2776-77 (Thomas, J., concurring).

92. *Id.* at 2778.

93. *Id.* at 2788 n.30.

Race”).⁹⁴ There is some irony in Justice Thomas rejecting this conference as beyond the pale, given his reliance on the dissent in *Plessy* as the model for his constitutional ideal. Most lawyers and judges remember *Plessy* for the plaintiff’s attack on “separate-but-equal” railway car facilities. But a substantial portion of Homer Plessy’s brief to the Court rested not on equal protection but due process, and Plessy argued that his racial misclassification deprived him of the privilege and “property” associated with his whiteness:

How much would it be worth to a young man entering upon the practice of law, to be regarded as a white man rather than a colored one? Six-sevenths of the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. . . . Probably most white persons if given a choice, would prefer death to life in the United States as colored persons. Under these conditions, is it possible to conclude that the reputation of being white is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?⁹⁵

Perhaps Justice Thomas regards the “race-as-property” idea as wrong, or inappropriately tilted ideologically, but the school district’s decision to expose students to it hardly demonstrates, as Justice Thomas argues, that the Seattle school board should not be “entrusted with the power to make decisions on the basis of race.”⁹⁶

In the end, the disagreement among the Justices about the value of racial balance comes down to a deeply held intuition regarding the desirability of race-based decisionmaking. Whereas the dissenters would defer to local authorities who believe that the costs of racial separation are in some cases greater than the costs of race-based decisionmaking, especially in light of expert opinion regarding the costs of separation, the plurality, Justice Kennedy, and Justice Thomas are simply not persuaded. They remain convinced that race-based decisionmaking virtually never does more good than harm, and no amount of empirical evidence would change their minds; social science cannot trump first principles. In this respect, Justice Breyer’s invocation of social science seems more similar to the interpretive approach of *Brown*, although the Court in *Brown* used social science to confirm its

94. *Id.* (citing Danny Westneat, *School District’s Obsessed with Race*, SEATTLE TIMES, Apr. 1, 2007, at B1).

95. Brief of Appellant at *9, *Plessy v. Ferguson*, 1893 WL 10660 (1893).

96. *Parents Involved*, 127 S. Ct. at 2788 n.30.

own judgment about the dangers of racial separation (and to override the contrary view of local officials).

D. *Parents Involved* as Constitutional Interpretation

Overall, the opinions supporting the *Parents Involved* judgment bear a greater resemblance to *Brown* in their approach to constitutional interpretation. They are uninterested in the Reconstruction era as a source of constitutional meaning; they place little weight on the accumulated expectations and experience of local authorities who seek greater racial balance in their schools; they are disinclined to treat as binding prior judicial pronouncements implicitly or explicitly permitting voluntary race-based school assignments to achieve greater racial balance. In the end, they subordinate all of these considerations to a unifying principle that they regard as morally sound: racial classification is itself an evil and should be avoided at (virtually) all costs.⁹⁷

The resemblance to *Brown*-as-interpreter stems not just from the use or disuse of particular modalities of constitutional argument. The opinions supporting the judgment face the same critique *Brown* did: they appear to reach a conclusion based on the Justices' own moral lights and they do not pretend that constitutional text, history, or practice compels overriding local authority. Although the opinions rely to a greater extent on precedent, all of the cases invoked are themselves recent decisions derived from the same moral imperative (and in conflict with the desegregation-era cases specifically focused on the use of race in school assignments). However, unlike *Brown*, they have not and will not encounter the same crisis of legitimacy. The opinions read like typical contemporary constitutional opinions. The moral imperative prohibiting racial classifications is surrounded by references to the standard of review and the careful parsing of dozens of cases. More importantly, they do not challenge an existing order. Voluntary race-based assignments in schools are not an entrenched practice supporting an entire way of life: they reflect a relatively modest effort to increase racial balance at the margins, and in many districts they are undertaken with significant ambivalence and with recognition of countervailing costs.

97. Of the opinions supporting the judgment, Justice Kennedy's bears the greatest affinity to *Brown* in one additional respect: his opinion is the least argumentative of all of the opinions in the case (including the dissents), and the non-accusatory tone makes his opinion the temperamental heir to *Brown*.

V. FIDELITY TO THE SUBSTANTIVE
COMMITMENTS IN *BROWN*

The larger struggle in *Parents Involved* concerns the appropriate substantive commitments to attribute to *Brown*. Does *Brown* condemn all racial assignments of students or only those that promote racial separation in the schools? Is “colorblindness,” strict scrutiny, or reasonableness the appropriate standard to apply to voluntary, race-based efforts to secure racial balance? Is the eradication of racial identifiability a “compelling interest” in public elementary and secondary education?

A. *Brown* and Colorblindness

The decision in *Brown* did not embrace “colorblindness” as a constitutional requirement and this choice was not an oversight. The entire edifice of segregation was not before the Court, and the Court was painfully aware of the potential hostility to a decision rejecting race-based decisionmaking altogether. Indeed, nothing in the Court’s opinion cast doubt on state-mandated segregation in numerous other spheres (including prisons, hospitals, and public swimming pools), notwithstanding the Court’s subsequent per curiam opinions rejecting segregation in several non-educational contexts.⁹⁸ In particular, the Court was wary of casting doubt on state anti-miscegenation statutes, a wariness that caused the Court to let stand a miscegenation conviction and the annulment of a marriage in the immediate wake of *Brown*.⁹⁹

98. *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam), *aff’g* 252 F.2d 122 (5th Cir. 1958) (public parks); *Gayle v. Browder*, 352 U.S. 903 (per curiam), *aff’g* 142 F.Supp. 707 (M.D. Ala. 1956) (public buses and public transportation); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam), *vacated* 223 F.2d 93 (5th Cir. 1955) (public golf course); *Mayor v. Dawson*, 350 U.S. 877 (1955), *aff’g* 220 F.2d 386 (4th Cir. 1955) (public bath houses and beaches).

99. *See Naim v. Naim*, 350 U.S. 985 (1955); *Jackson v. Alabama*, 348 U.S. 888 (1954); *see also* Peter Wallenstein, *Freedom: Personal Liberty and Private Law: Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 *CHI.-KENT L. REV.* 371, 415-16 (1994) (“Harvey M. Grossman, law clerk to Justice William O. Douglas, expressed his conflicted response when advising his boss on the Jackson case. ‘It seems clear that the statute involved is unconstitutional,’ he wrote on November 3, 1954. And yet, he continued, ‘review at the present time would probably increase the tensions growing out of the school segregation cases and perhaps impede solution to that problem, and therefore the Court may wish to defer action until a future time. Nevertheless, I believe that[,] since the deprivation of rights involved here has such serious consequences to the petitioner and others similarly situated [,] review is probably warranted even though action might be postponed until the school segregation problem is solved.’”).

Chief Justice Roberts and Justice Thomas appear to recognize that *Brown* itself did not embrace colorblindness so they shift attention to the arguments of the plaintiffs' advocates in *Brown*.¹⁰⁰ The pleas of such advocates provide only marginal support for colorblindness as an ideal. First, and most obviously, the litigants were operating at a time when race-based classifications were almost exclusively used to harm and exclude racial minorities.¹⁰¹ The plea for colorblindness was a plea to allow African Americans full access to all areas of political, economic, and social life. So-called "affirmative" uses of race to further enhance the opportunities or access of African Americans (or for the mutual benefit of the races) were simply no part of the prevailing state practices regarding race. To attribute to *Brown*'s supporters a disapproval of benign race-based classifications based on their appeal to a "color blind" constitution is thus ahistorical and unpersuasive. Second, the plaintiffs' attorneys in *Brown* moved quickly toward race-based remediation after *Brown II* denied the plaintiffs immediate individual relief. The same LDF lawyers who litigated *Brown* were extremely critical of the disingenuous use of race-neutral criteria (e.g., "freedom of choice" plans) in response to *Brown II*, and they accordingly sought race-based placements of students to achieve non-racially identifiable schools. Given this sequence of events, it seems sensible to conclude that the "colorblindness" sought by the plaintiffs' advocates in *Brown* did not speak to affirmative uses of race; to conclude otherwise requires attributing a sudden change of heart to those advocates in the immediate years after *Brown*. In short, "colorblindness" might be an attractive constitutional ideal, but it is not fairly attributable to *Brown*, at least not in the sense that it is deployed in the opinions supporting the *Parents Involved* judgment.

100. *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion) ("[T]he position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: 'The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.'" (quoting Brief of Appellants at 15, *Brown v. Board of Educ., Shawnee County, Kan.*, 344 U.S. 1 (1953) (Nos. 1, 2, and 4 and for Respondents in No. 1 on Reargument)(Summary of Argument)); *id.* at 2782 (Thomas, J., dissenting) ("And my view was the rallying cry for the lawyers who litigated *Brown*.")) (quoting Brief of Appellants at 65, *Brown v. Board of Educ., Shawnee County, Kan.*, 344 U.S. 1, (1953), (Nos. 1, 2, and 4) ("That the Constitution is color blind is our dedicated belief"))).

101. Robert Carter, cited in the plurality opinion, *see supra* note 38, now a senior federal judge in New York, made precisely this point the day after *Parents Involved* was announced: "All that race was used for at that point in time was to deny equal opportunity to black people. . . . It's to stand that argument on its head to use race the way they use it now." Adam Liptak, *The Same Words, But Differing Views*, N.Y. TIMES, June 29, 2008, at A24.

B. *Brown* and Strict Scrutiny

Although many lawyers and scholars might regard *Brown* as ushering in the modern era of constitutional law, with its rejection of *Plessy* (at least in the context of schools), its foreshadowing of the Warren Court's expansive protection of individual liberty vis-à-vis the states, and its inauguration of institutional reform litigation, the opinion is distinctly "unmodern" in one important respect. The Court did not invoke heightened scrutiny as it adjudged the constitutionality of state-imposed racial segregation of the public schools.¹⁰² In some respects, this omission is surprising. The concept of heightened scrutiny was not novel, and the most famous exposition of when it might be triggered, offered by Chief Justice Stone in footnote four of *United States v. Carolene Products*,¹⁰³ specifically referenced laws targeting racial minorities.¹⁰⁴ Moreover, although both *Hirabayashi*¹⁰⁵ and *Korematsu*¹⁰⁶ had upheld disabilities imposed distinctly on persons of Japanese descent, they did so only after declaring a strong presumption against such classifications.¹⁰⁷ Apart from this precedential support, the use of heightened scrutiny would have shifted the burden back to the states, and would have allowed the Court to interrogate the purported justifications for segregation rather than defend its own affirmative (and controversial) argument about segregation's costs.

Perhaps the Court avoided heightened scrutiny for the same reason it made no mention of "colorblindness"—it would have represented a full-scale assault on Jim Crow rather than a measured strike against segregation in the public schools. Or perhaps the Court did

102. One paradox is the Court's decision to invoke heightened scrutiny in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the companion case to *Brown* concerning federally-imposed segregation in the District of Columbia. See *id.* at 499 ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."). The invocation of heightened scrutiny in *Bolling* perhaps explains the relative brevity of the opinion (less than two pages). Once the question was framed in terms of segregation's purposes, the Court simply declared that segregation "is not reasonably related to any proper governmental objective." *Id.* at 500. *Bolling* rested on the Due Process Clause of the Fifth Amendment, but presumably the same considerations would have justified invalidating state-imposed segregation under the Fourteenth Amendment's Due Process Clause; in this respect, *Bolling* rendered all that was said in *Brown* unnecessary.

103. 304 U.S. 144 (1938).

104. *Id.* at 152 n.4.

105. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

106. *Korematsu v. United States*, 323 U.S. 214 (1944).

107. *Hirabayashi*, 320 U.S. at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people"); *Korematsu*, 323 U.S. at 215 ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and should be given "the most rigid scrutiny").

not want to examine closely the claims for segregation because to do so would have required abandonment of its “non-adversarial” tone. Whatever its cause, the absence of heightened scrutiny in *Brown* makes it difficult for the opinions supporting the judgment in *Parents Involved* to claim *Brown* as their own. The overriding commitment in the three opinions is their commitment to strict scrutiny, and strict scrutiny is the organizing principle on which all of their other arguments depend. Chief Justice Roberts and Justice Thomas reject the goal of racial balance as insufficiently compelling, and, together with Justice Kennedy, they view the use of racially-based student assignments as insufficiently tailored to that goal. Without the requirement of a compelling interest and narrow tailoring, such plans would be essentially immune to challenge. The Justices supporting the judgment could not credibly claim that the use of racial assignments generates the type of harm condemned by *Brown*: telling students of all races that they might have to sacrifice their first choice in schools to preserve racial balance cannot plausibly be said to “affect their hearts and minds in a way unlikely ever to be undone.”¹⁰⁸

C. *Brown*'s Promise: The End of Race-Based Assignments or The End of Racial Separation?

The most difficult and important substantive question raised by *Parents Involved* is whether *Brown* should be read to prohibit all race-based student assignments or only those designed to separate racial groups rather than bring them together. An answer requires a precise account of the constitutional harm *Brown* identified. Was the evil in *Brown* the fact that the *state* mandated the separation of students on racial lines, or was it merely the fact that students of different races were educated in separate schools? *Brown* itself suggested both possibilities, and the two most memorable lines in *Brown* point in different directions. The first condemns the state's hand in separating schoolchildren: “*To separate* them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁰⁹ The second declares the necessary inequality of racially-divided schools: “*Separate* educational facilities are inherently unequal.”¹¹⁰ Indeed, the Court approv-

108. *Brown I*, 347 U.S. at 494.

109. *Id.* (emphasis added).

110. *Id.* at 495 (emphasis added).

ingly quoted from the District Court in the Kansas case, which suggested that racial separation itself was detrimental to African-American children but that the impact was “greater when it has the sanction of the law[.]”¹¹¹

The lack of clarity on this question was likely attributable to the widely-held assumption that the end of state-enforced segregation would ultimately produce racially unitary schools. Many of the communities in which segregation was most adamantly pursued lacked significant racial separation along residential lines. The plaintiffs believed that a shift from state-enforced segregation to neighborhood schools (with neutrally-drawn school boundaries) would produce racially diverse schools. As Thurgood Marshall stated in response to a question from Justice Frankfurter about the difficulty of framing a decree (in the initial, 1952, *Brown* argument), “I do know that in most of the southern areas—it might be news to the Court—there are few areas that are predominantly one race or the other.”¹¹²

The question of what *Brown* forbade or required was brought into focus during the arguments over remedy in *Brown II*. That there was a “*Brown II*” did not portend well for the plaintiffs, because the background assumption in constitutional law—which required no additional briefing or argument—was that the plaintiffs’ demonstration of a constitutional violation entitled them to immediate, personal relief and an injunction against future constitutional misconduct. But the Court’s palpable discomfort with the implications of a conventional remedy prompted Marshall and the LDF lawyers to offer something of a compromise—an immediate remedy for the named plaintiffs (which would have entitled them to attend schools previously reserved for white children), and a remedy for all other children in due course;¹¹³ such an approach would have achieved “integration” immediately, in the sense that the color barrier would be broken, but it would also have allowed some time before the schools would become unitary. On the other side, the states emphasized the complicated administrative task of reshaping their schools without racial assignments, though most observers understood that the complications were political and not administrative: their constituents would

111. *Id.* at 494.

112. Transcript of Oral argument at 15, *Briggs v. Elliott*, 342 U.S. 350 (1952) (No. 101), reprinted in PHILIP B. KURLAND & GERHARD CASPER, EDs., 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 307, 322 (1975).

113. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 53 (2000).

not accept racially-integrated schools. The Court, fearing that an order requiring immediate integration would provoke an intense backlash, especially in the deep South, chose to deny individual relief and to place the question of remedy in the hands of local school boards and the lower federal courts. *Brown II*'s famous directive to frame a remedy for the plaintiffs "with all deliberate speed" was an invitation to delay the dismantling of dual systems in areas hostile to the Court's decision.

In this respect, *Brown II* rejects a fundamental premise of Chief Justice Roberts' opinion speaking for a majority in *Parents Involved*: the claim that constitutional rights are *personal* and belong to individuals not groups.¹¹⁴ *Brown II*'s refusal to give personal, immediate relief to the plaintiffs converted the question of remedy into a *structural* question of how to dismantle segregation rather than a question of *individual* right. Once the question was so framed, *Brown* and *Brown II* became less concerned with how *individuals* were harmed by segregation than with how to address on a *societal* basis the consequences of segregation. Now the Court's duty was not to ensure that individuals were admitted to school without regard to race, it was to judge whether the ambitious "administrative" restructuring—sought by segregationists to bide time—achieved the yet-to-be-defined objectives of *Brown*. As Mark Tushnet observed, *Brown II* "made the Constitution a mere instrument to accomplish socially valuable ends, not a commitment to the immediate vindication of fundamental—present and personal—rights."¹¹⁵ This was not the first time in American constitutional history that the desire to avoid protections for individual liberty perceived as too radical or intrusive ultimately spawned an even greater disruption of the existing order. Indeed, the decision to frame the Fourteenth Amendment's protections in terms of the twin guarantees of "due process" and "equal protection" rather than as a specific prohibition of racial discrimination (because such a prohibition might have barred segregation or anti-miscegenation statutes) ultimately produced a much greater reversal of federalism than otherwise would have occurred.

114. 127 S. Ct. at 2765 (plurality) ("[T]his approach to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause 'protects persons not groups[.]'" (quoting *Adarand*, 515 U.S. at 227).

115. Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 *FORD. L. REV.* 23, 27 (1992).

Brown II thus provided the framework for a *societal* remedy, though it was not inevitable that such a remedy would require anything more than the elimination of racially-based assignments of students. But the decade following *Brown II* saw extraordinary efforts to avoid integrated education, as many districts deliberately manipulated their ostensibly race-neutral placement criteria to keep children in the schools to which they had formerly been assigned on the basis of their race. At that point, the Court was unwilling to accept the “race-neutrality” of school placement rules as dispositive of a district’s compliance with *Brown II*. The Court instead measured success not simply by the rules of student placement but by the achievement of “unitary,” non-racially identifiable schools.¹¹⁶ So was born the “affirmative duty” requirement that formerly segregated schools “convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”¹¹⁷ And, importantly for present purposes, that duty ultimately included court-ordered race-based placement of students to achieve unitary status.¹¹⁸

This story of *Brown II*’s embrace of a societal remedy, Southern resistance, and the adoption of the affirmative-duty requirement, poses a problem for the Justices in the *Parents Involved* majority—especially for their claim that the Constitution forbids race-based assignments of students designed to achieve racial balance. As a doctrinal matter, the Justices in the majority argue that the affirmative-duty requirement applies only to districts under continuing supervision for *Brown* violations; it represents an exception to the general prohibition of racial classifications, because “remedying past discrimination” is an acknowledged compelling interest supporting race-based decisionmaking.¹¹⁹

116. *Green v. County School Bd.*, 391 U.S. 430, 441 (1968) (requiring effective “conversion of a state-imposed dual system to a unitary, nonracial system”).

117. *Id.* at 442.

118. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 n.8 (1971) (upholding limited use of court-mandated racial ratios as within equitable remedial discretion of the District Court).

119. *See Parents Involved*, 127 S. Ct. at 2752 (“[I]t suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. Yet the Seattle public schools have not shown that . . . Jefferson County [also] does not rely upon an interest in remedying the effects of past intentional discrimination . . . Nor could it.”) (citation omitted); *id.* at 2768, 2770 (Thomas, J., concurring) (finding “no present interest in remedying past segregation”); *id.* at 2775 (Thomas, J., concurring) (“For the reasons explained above, the records in these cases do not demonstrate that either school board’s plan is supported by an interest in remedying past discrimination.”); *id.* at 2775 (Kennedy, J., concurring) (“[T]he records in these cases do not demonstrate that either school board’s

The problem, though, is deeper and more conceptual. Why is the achievement of racial balance an appropriate “remedy” for past state-enforced racial separation? If the “harm” of school segregation was, as the majority insists, the denial of the right of individuals to attend their chosen school because of their race, how does the establishment of a general racial balance in the schools vindicate their interests? Why do such individuals have an interest in eliminating the racial identifiability of particular schools? For the dissenters, the answer is much simpler. Part of the harm caused by segregation was the overall racial isolation of the minority community. Such isolation not only undermined the self-esteem of particular individuals, it also diminished positive opportunities for interracial interactions in school. The benefits of interracial interaction are both educational, in the sense of improving the learning environment, and civic and economic, because of the greater promise for interracial interaction in the world outside of school. The affirmative-duty requirement, in the dissenters’ view, appropriately sought to mitigate the group-based and societal-based costs of state-enforced racial separation in the schools.

In short, *Brown II* and its aftermath provide strong support for the notion that unitary schools are an affirmative good and that the Constitution protects group interests as well as individual ones. This remedial history is in significant tension with the normative vision of a “colorblind” Constitution protecting individual rights endorsed by several Justices in the majority, because they must modify their commitments to colorblindness and the focus on individual interests in the remedial context. In the end, their “support” for the *Brown II* line of cases might simply be instrumental. They might well believe that the effort to achieve unitary schools post-*Brown* was ill-advised, or even unfaithful to the Constitution, but that it was easier to defend their invalidation of the Seattle and Jefferson County Plans without calling into question all of the Court’s prior efforts to implement *Brown*.

VI. CONCLUSION

Fifty-five years ago, *Brown* invalidated segregation in the public schools, though it did so for reasons that were neither entirely clear

plan is supported by an interest in remedying past discrimination.”); *id.* at 2793 (“[T]he compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination As the Court notes, we recognized the compelling nature of the interest in remedying past intentional discrimination”).

nor persuasive. The Court, having invited the parties to brief the intent and understanding of the framers of the Fourteenth Amendment, placed no reliance on that history; despite having suggested in prior cases that race-based classifications deserve careful scrutiny, the Court declined to impose it; though segregation was clearly the product of a caste system intended to marginalize African Americans, the Court made no mention of segregation's lineage or social meaning. Ultimately, the Court's judgment relied on two claims: the purported distinctiveness of education (though the Court implicitly retreated from this argument in its per curiam opinions reversing segregation in other contexts), and the Court's conviction, undoubtedly true by lamely supported by social science research, that segregation harmed minority children. The Court followed this landmark decision with its refusal to grant personal, immediate relief to the plaintiffs (a marked departure from ordinary constitutional principles), and the Court instead vaguely suggested that a remedy could reasonably account for "administrative" concerns that no one was quite able to specify. Notwithstanding these shortcomings, and the fact that the decision was unable to alter the largely segregated landscape for more than a decade, *Brown* has come to represent the Court at its finest—as the heroic defender of deeply-held American values. Now, fifty-five years later, as public schools remain identifiable by race, and bitter disagreement persists about whether and how to respond to racial imbalance, the courts are required yet again to discern whether state assignments to school on the basis of race are consistent with a constitutional guarantee of equal protection. Given *Brown*'s dubious opinion, its failure to persuade, and the Court's morally suspect reluctance to grant meaningful relief, it is somewhat astonishing that all sides in the contemporary controversy want to claim adherence to *Brown*.

Ultimately, the effort to find the substantive heir to *Brown* is complicated by the elusive meaning of the core terms of the debate. In the fifty intervening years, the entire vocabulary surrounding the use of race has changed markedly. "Integration" in the 1950s meant breaking the color barrier (American baseball, for example was "integrated" when Jackie Robinson joined the Dodgers and Ole Miss was "integrated" by the enrollment of James Meredith). When the plaintiffs' lawyers sought "integration," they sought access to the better-tended white schools. Fifteen years after *Brown*, well after the color barrier was broken in many schools throughout the South, "integration" came to mean something closer to "unitary" schools, in which *all*

schools, including the formerly all-black schools, had racial diversity. The same lawyers seeking “integration” in the late-1960s were seeking something quite different from what was sought at the time of *Brown*. Whereas a decade earlier they hoped that the official barriers to entry would be removed, they now sought to limit the persistent presence of racially-isolated, virtually all-black schools. Perhaps at the time of *Brown*, they expected that the breaking of the color line would inevitably eradicate pronounced racial separation (and the costs of such separation for the African-American community). But years of experience demonstrated that “integration” of the old sort did not ensure “unitary” schools (much less “racial balance,” in which demographics in particular schools approximate the demographics of the community at large). So the effort to achieve “integration” in the decades after *Brown* was a significantly different project than achieving integration in the 1940s and 1950s.

“Segregation,” too, has acquired a quite different meaning over the past half-century. At the time of *Brown*, “segregation” was Jim Crow—the official policy of the state and private businesses to prohibit African Americans from entering the social and economic space of whites in the public sphere, including schools, parks, restaurants, and transportation. But long after judicial decisions and the Civil Rights Act of 1964 invalidated “segregation” in this sense, advocates of racial equality used the term “segregation” to describe the continued separation of the races, whether attributable to past segregative decisions, contemporary discrimination, or private “choices.” “Segregation” does not mean what it used to mean, so asking whether the advocates or judges in *Brown* would support voluntary race-conscious decisions to combat contemporary “segregation” is to ask them a question that literally makes no sense: “segregation” was the instrument of state decision-makers, so why would those decision-makers have any need to combat it?

In the end, asking whether *Brown*'s fundamental commitment is formal equality or the eradication of race as a meaningful marker in contemporary institutions is to ask a question that its supporters (and the opinion itself) neither faced nor anticipated. Formal equality was thought to be the path to a racially inclusive society, and it undoubtedly has been a disappointment for the lawyers and activists in *Brown* to discover that formal equality, fifty or so years later, did not eliminate the racial divide in American schools. Claiming that *Brown*'s supporters made such a choice fifty years ago is disingenuous, and the

most that either side can claim is the normative value of their present-day commitments. History should be heard, but the most relevant history in the end cannot be found in snippets from the briefs or opinion in *Brown*. It is a longer and more complicated story of the interaction between legal and political institutions, the efforts to achieve racial equality in a society that remains divided along racial lines, and the difficulty of projecting commitments to an era that lacks our exposure to intervening events.

Influence and Legacy: The Future of the Post-Marshall Court

Thurgood Marshall left a profound footprint on the American legal system. From his revolutionary work culminating in the *Brown* decision to his poignant dissents on the Supreme Court, he stands among the greatest and most well-regarded jurists in this country's history. These articles and essays explore that legacy through subsequent Supreme Court decisions on issues ranging from affirmative action to the political process.

Celebrating Thurgood Marshall: The Prophetic Dissenter

SUSAN LOW BLOCH*

Thurgood Marshall was born 100 years ago into a country substantially divided along color lines. Marshall could not attend the University of Maryland School of Law because he was a Negro;¹ he had trouble locating bathrooms that were not for “whites only.”² Today, by contrast, we celebrate his life and accomplishments. Broadway has a play called *Thurgood* devoted to him;³ Baltimore/Washington International Airport is now BWI Thurgood Marshall Airport;⁴ even the University of Maryland renamed its law library in his honor.⁵ How did we come this far? How far do we still have to go? This article will consider what Justice Marshall would think of the Supreme Court’s jurisprudence during the seventeen years since his retirement. In my opinion, he would be “appalled, but not surprised,” particularly by those decisions involving affirmative action, an area about which he was especially passionate. Justice Marshall would be “appalled, but not surprised” because he foresaw the future direction of the Court and did not like it. In his last dissent, issued only hours

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1. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 52-53 (1998).

2. *Id.* at 23 (noting the prevalence of Jim Crow laws at the time of Marshall’s birth, and, in particular, a Maryland law requiring segregated public bathrooms).

3. See Charles Isherwood, *Trials and Triumphs on the Road to Justice*, N.Y. TIMES, May 1, 2008, at E1; see also Zachary Pincus-Roth, *Next on His Docket: A Supreme Challenge*, N.Y. TIMES, Apr. 27, 2008, at AR7.

4. See Jamie Stiehm, *Civil Rights Pioneer’s Legacy Takes Flight at BWI Airport Marshall Name Change is Effective Starting Tomorrow*, BALT. SUN, Sept. 30, 2005, at 1A; see also Baltimore/Washington International Thurgood Marshall Airport: Thurgood Marshall, http://www.bwiairport.com/about_bwi/thurgood_marshall/ (last visited Feb. 11, 2009).

5. See WILLIAMS, *supra* note 1, at 371; see also Susan Kinzie, *Tracking Marshall’s Steps to the Supreme Court; Exhibit Reveals Justice’s Diplomacy*, WASH. POST, Sept. 20, 2008, at B3; see discussion *infra* at n.63.

before his surprising announcement that he would retire immediately, Justice Marshall blasted the Court as it overruled two recent precedents:

Power, not reason, is the new currency of this Court's decision making. Four Terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. . . . By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. . . . Nevertheless, having expressly invited respondents to renew the attack, today's majority overrules [both prior cases] and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting [those cases] underwent any change in the last four years. Only the personnel of this Court did. . . .

. . . In dispatching [these two recent cases] to their graves, today's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store. . . . [T]he majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree. . . .⁶ . . . [T]he continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court.⁷

. . . [T]his impoverished conception of *stare decisis* cannot possibly be reconciled with the values that inform the proper judicial function. . . . [*S*]tare decisis is important not merely because individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of "the judiciary as a source of impersonal and reasoned judgments. . . ." [T]he "strong presumption of validity" to which "recently decided cases" are entitled "is an essential thread in the mantle of protection that the law affords the individual. . . . It is the unpopular or beleaguered individual—not the man in power—who has the greatest stake in the integrity of the law."⁸

. . . [T]he majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly

6. *Payne v. Tennessee*, 501 U.S. 808, 844-45 (1991) (Marshall, J., dissenting) (citations omitted).

7. *Id.* at 851.

8. *Id.* at 852-53.

expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind.⁹

Marshall's words were prophetic. Since his retirement, the Court has overturned more than twenty-six cases. And this number does not include those cases where the Court, rather than overturning a precedent outright, distinguished it with such unpersuasive rationales that even those who agreed with the majority on the results were outraged. In fact, Justice Scalia essentially called Chief Justice Roberts "a wimp and a hypocrite" for this very reason.¹⁰ In Scalia's words:

[T]he principal opinion's attempt at distinguishing *McConnell* [*v. FEC*] is unpersuasive enough, the change in the law it works is substantial enough, that seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so. . . . This faux judicial restraint is judicial obfuscation.¹¹

Scalia added, in a companion case:

Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold sure promise of engendering further meaningless and disingenuous distinctions in the future. The rule of law is ill served by forcing lawyers and judges to make arguments that deaden the soul of the law which is logic and reason.¹²

One area in which the Court has changed direction dramatically and with which Marshall would be very distressed is the issue of affirmative action. He would be particularly unhappy with the Court's movement away from the real world foundations of *Brown v. Board of Education*¹³ and toward an increased reliance on sterile formalisms so distrusted by Marshall.

The Court first considered an affirmative action case in 1974 when Marco DeFunis, a prospective law student rejected by the University of Washington School of Law, brought suit alleging that less

9. *Id.* at 853.

10. Linda Greenhouse, *Even in Agreement, Scalia Puts Roberts to Lash*, N.Y. TIMES, June 28, 2007, at A1 ("It's not every day that one Supreme Court justice, even one as rhetorically unrestrained as Justice Antonin Scalia, characterizes another justice, let alone the chief justice of the United States, as a wimp and a hypocrite. Yet, Scalia did something very close to that, not once but twice, in separate opinions on Monday.").

11. *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2684 n.7 (2007) (Scalia, J., concurring) (citations omitted).

12. *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2582 (2007) (Scalia, J., concurring).

13. 347 U.S. 483 (1954).

qualified applicants had been admitted as part of an affirmative action program.¹⁴ That affirmative action would be a difficult issue for the Court became immediately apparent when the majority chose to avoid the issue. Five Justices voted to dismiss the case as moot because the lower court had ordered that plaintiff DeFunis be admitted and by the time the case reached the Supreme Court, DeFunis was about to graduate.¹⁵ This decision to evade the issue triggered an angry dissent by Marshall, Douglas, Brennan, and White, who believed the majority was simply avoiding a difficult issue that would undoubtedly recur:

[I]n endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six amicus curiae briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. . . . Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. . . . Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases.¹⁶

Not surprisingly, the dissenters were correct. Only three years later, in 1977, a virtually identical lawsuit was brought by a prospective medical student, Allan Bakke, who had been denied admission to the University of California Medical School at Davis.¹⁷ This time, the Court agreed to hear the case. In a very complicated decision, five Justices, including Marshall, held that the University could consider race in its effort to increase the diversity of the class.¹⁸ However, a

14. *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974).

15. *Id.*

16. *Id.* at 348-50 (Brennan, J., dissenting).

17. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

18. *Id.* The Justices disagreed on whether the case should be decided on a constitutional basis, relying on the Fourteenth Amendment, or on a statutory basis relying on § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Four Justices—Stevens, Burger, Stewart, and Rehnquist—said that Title VI prohibited the affirmative action program at issue, that it was therefore unnecessary to reach the constitutional issue, and that therefore Bakke should be admitted. *Id.* at 408-21. Four Justices—Brennan, White, Marshall, and Blackmun—found that the program was permissible under both the statute and the Constitution, and thus, that Bakke was properly rejected. *Id.* at 324-79. Powell provided the critical fifth vote, holding that the Constitution permitted the consideration of race, but that the particular program at issue involved an unconstitutional quota. *Id.* at 269-320.

different group of five Justices, with Justice Powell again the key fifth vote, held that the particular program of the University of California was unlawful because it included a quota. Thus, there were five votes in favor of Bakke's admission. But, more importantly, there were five votes supporting the concept of affirmative action. Marshall was pleased with that aspect of the opinion, as he indicated in a separate opinion:

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.¹⁹

Justice Harry Blackmun also supported the Court's approval of the concept of affirmative action, observing succinctly: "In order to get beyond racism, we must first take account of race. There is no other way."²⁰ The Court's very fractured line-up in *Bakke* confirmed that this issue was very controversial and not likely to go away anytime soon.

After *Bakke*, additional affirmative action cases came to the Court—some in the educational domain, others in business settings. The biggest source of contention among the Justices was deciding the appropriate standard of review for these cases. Should the standard be strict scrutiny because the government was using race-based classifications? Or, should it be intermediate scrutiny because the intent behind the programs was benign, not malevolent? No standard could garner five votes so each Justice applied his or her own standard. The result was a jurisdictional mess.

Justices Marshall and Brennan argued passionately for intermediate scrutiny. In their view, there was a marked difference between programs that hurt minorities and those that were adopted to ameliorate the effects of past discrimination.²¹ Thus, in *City of Richmond v. J. A. Croson Co.*,²² when the majority of the Court appeared to adopt a strict scrutiny standard, at least for affirmative action plans adopted

19. *Id.* at 401-02 (Marshall, J., writing separately).

20. *Id.* at 407 (Blackmun, J., writing separately).

21. *Id.* at 401 (Marshall, J., writing separately).

22. 488 U.S. 469 (1989).

by states and municipalities,²³ Marshall dissented. Criticizing those who were advocating strict scrutiny, Marshall said:

A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism. . . . Racial classifications “drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism” warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation’s history and continues to scar our society. As I stated in *Fullilove*: “Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization . . . such programs should not be subjected to conventional ‘strict scrutiny’—scrutiny that is strict in theory, but fatal in fact.”²⁴

Then, in *Metro Broadcasting v. FCC*,²⁵ one of Justice Brennan’s last opinions for the Court, it looked as if the Court finally had five votes to adopt an intermediate scrutiny standard, at least for federal programs.²⁶ In an opinion written by Justice Brennan, and joined by Justices Marshall, White, Blackmun, and Stevens, the Court upheld a federal regulation designed to enhance minority participation in radio and television ownership.²⁷ The Court distinguished *Croson* on the basis that the constitutional limitation on city and state use of race as a distinguishing factor among businesses comes from the Fourteenth Amendment, while the Fifth Amendment governs federal programs.²⁸

But *Metro Broadcasting* turned out to be a fleeting victory for Marshall and Brennan’s intermediate scrutiny standard. In 1995, a few years after both had retired, the new Court, with Clarence Thomas taking Marshall’s seat and David Souter replacing Brennan, voted 5-4 to reject the intermediate scrutiny standard for all govern-

23. *Id.* at 508 (holding that the plan was not narrowly tailored enough to be constitutional).

24. *Id.* at 551-52 (Marshall, J., dissenting) (citations omitted).

25. 497 U.S. 547 (1990).

26. *See id.* at 566. As noted above, one year before *Metro Broadcasting*, the Court used strict scrutiny to find unconstitutional a plan by the city of Richmond to increase the participation of minority subcontractors in city contracts.

27. *Id.*

28. *Id.* at 605-06.

ment programs.²⁹ In *Adarand Constructors, Inc. v. Peña*,³⁰ the Court announced, “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”³¹ Henceforth, the standard of review for all affirmative action programs—federal, state, and local—would be strict scrutiny. Thus, to pass constitutional muster, affirmative action programs must be narrowly tailored to meet a compelling governmental interest.³²

How have affirmative action programs fared under strict scrutiny? In a word: Badly. Once again, Marshall had been prophetic. As he suggested in his dissenting opinion in *Croson*, strict scrutiny has turned out to be strict in theory, but virtually fatal in fact.³³ Marshall predicted the Court would strike down more affirmative action programs,³⁴ and he was correct: it has. In 2005, in one of Justice Sandra Day O’Connor’s last significant decisions before her retirement, she provided the crucial fifth vote to decide the constitutionality of the University of Michigan’s affirmative action admission programs. The Court decided, 5-4, to strike down the undergraduate school’s program;³⁵ it was not narrowly tailored enough.³⁶ In the companion law school case, O’Connor provided the crucial fifth vote to uphold that program, because, in her view, the law program utilized sufficiently individualized consideration.³⁷ Unfortunately for the supporters of affirmative action, the undergraduate case has proven to be the more

29. Since Thomas voted differently from Marshall and Souter voted the same way that Brennan had in these cases, the outcome changed. It was still 5-4, but in the opposite direction.

30. 515 U.S. 200 (1995).

31. *Id.* at 224.

32. *Id.* at 227.

33. 488 U.S. at 552 (Marshall, J., dissenting) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 518-19 (1980)).

34. *Id.* at 561 (“The new and restrictive tests [the Court] applies scuttle one city’s effort to surmount its discriminatory past, and imperil those of dozens more localities.”).

35. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

36. *Id.* at 276-77 (“Unlike the law school admissions policy . . . , the procedures employed by the . . . Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants. . . . The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. . . . By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. . . . The selection index thus precludes . . . the type of individualized consideration the Court’s opinion in *Grutter* . . . requires”) (O’Connor, J., concurring) (citations omitted).

37. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

durable precedent. The law school's victory for affirmative action was short-lived.

Just two years after the Michigan cases, in the spring of 2007, the Court considered the constitutionality of two race conscious programs designed by local school boards in Seattle and Louisville to keep the local schools from becoming more segregated.³⁸ By this time, Justice O'Connor had been replaced by Justice Samuel Alito, who joined those Justices opposed to race-based programs. Writing for a plurality including Scalia, Thomas, and Alito, Chief Justice Roberts applied strict scrutiny and said, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."³⁹ Justice Kennedy provided the fifth vote to strike these programs down, but was careful not to rule out the possibility that some "race conscious programs" might still be constitutional. According to Kennedy:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to a different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.⁴⁰

But because the programs at issue in the Seattle and Louisville cases classified students on the basis of race, they required strict scrutiny. And under such scrutiny, they were unconstitutional because, in Kennedy's view, they were not narrowly tailored enough.⁴¹

38. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2007).

39. 127 S. Ct. at 2768.

40. *Id.* at 2792 (Kennedy, J., concurring).

41. *Id.* at 2791-92. In Kennedy's view:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

Id. at 2797.

The dissenters—Stevens, Breyer, Ginsburg, and Souter—agreed with Kennedy that strict scrutiny need not be applied to all race-conscious programs. But they assumed that *Adarand* and *Grutter* required that strict scrutiny be applied in these cases; nonetheless, even under that strict standard, the dissent found these programs constitutional. Given the programs’ purpose—to encourage integration and decrease segregation—the scrutiny, while “strict,” should not be “fatal in fact.”⁴² As Justice Breyer noted for the dissenters:

[These programs do not use race] to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply. [They do not] stigmatize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.⁴³

That is where the law stands today. Race-conscious methods designed to fight segregation and increase integration are not per se unconstitutional. However, they are on thin-ice. In order to survive judicial scrutiny today, schools desiring to avoid becoming more racially segregated must design programs that accommodate Justice Kennedy’s idiosyncratic view.

Looking more philosophically at the arguments for and against affirmative action, it is clear that both sides agree on the ultimate goal. Ideally, all people should be treated the same, regardless of race; racial distinctions should generally be irrelevant. The disagreement is whether we have reached the point when, given our history and the effects of past discrimination, we can, should, and must abandon all such distinctions. Justice Marshall described the dispute well in his address to the Second Circuit Judicial Conference in September 1986:

I believe all of the participants in the current debate about affirmative action agree that the ultimate goal is the creation of a color-blind society. From this common premise, however, two very different conclusions have apparently been drawn: The first is that race-conscious remedies may not be used to eliminate the effects of past discrimination in American society. This conclusion has been expanded into the proposition that courts and parties entering into

42. *Id.* at 2817-18 (Breyer, J., dissenting).

43. *Id.* at 2818.

consent decrees are limited to remedies which provide relief to identified individual victims of discrimination only. But the second conclusion which may be drawn from our common preference for a color blind society is that the vestiges of racial bias in America are so pernicious, and so difficult to remove, that we must take advantage of all the remedial measures at our disposal. The difference between these views may be accounted for, at least in part, by difference of opinion as to how close we presently are to the 'color-blind society' about which everybody talks.⁴⁴

As Justice Marshall said, all agree the ultimate ideal goal is a colorblind society, but they differ on what path to take to get there. Justice Marshall clearly believed in what he called "the second conclusion." As he said in his Second Circuit address:

Justice Harlan, . . . dissenting in *Plessy v. Ferguson*, gave the first expression to the judicial principle that 'our constitution is color-blind and neither knows nor tolerates classes among citizens.' If Justice Harlan's views had prevailed, and *Plessy* been decided upon the principle of race neutrality, our situation now, 90 years later, would be far different than it is. Affirmative action is an issue today precisely needed because our constitution was not color-blind in the 60 years which intervened between *Plessy* and *Brown*.

Obviously, I too believe in a colorblind society; but it has been and remains an aspiration. It is a goal toward which our society has progressed uncertainly, bearing as it does the enormous burden of incalculable injuries inflicted by race prejudice and other bigotries which the law once sanctioned, and even encouraged. Not having attained our goal, we must face the simple fact that there are groups in every community which are daily paying the cost of the history of American injustice. The argument against affirmative action is but an argument in favor of leaving that cost to lie where it falls. Our fundamental sense of fairness, particularly as it is embodied in the guarantee of equal protection under the law, requires us to make an effort to see that those costs are shared equitably while we continue to work for the eradication of the consequences of discrimination. Otherwise, we must admit to ourselves that so long as the lingering effects of inequality are with us, the burden will be borne by those who are least able to pay.⁴⁵

44. Thurgood Marshall, Associate Justice, Supreme Court of the United States and Circuit Justice for the Second Circuit, Address at the *Annual Judicial Conference, Second Judicial Circuit of the United States* (Sept. 5, 1986), in 115 F.R.D. 349, 351-52 (1987).

45. *Id.* at 352-53.

Yet Marshall did not blindly approve all affirmative action programs. He understood the downside of using racial differences and believed there should be some judicial scrutiny of such programs. In Marshall's words:

This is not to say, of course, that affirmative remedies such as the establishment of goals, time tables, and all of that, in hiring, in promotion, or for protection of recently hired minority workers from the disproportionate effects of layoffs, are always necessary or appropriate. Where there is no admission or proof of past discriminatory conduct, or where those individuals whose existing interests may be adversely affected by the remedy have not had an opportunity to participate, serious questions arise which must be carefully scrutinized.⁴⁶

Thus, Marshall advocated careful, or intermediate, scrutiny.⁴⁷ Strict scrutiny was too demanding and rational review was too lenient. Intermediate—careful—scrutiny was just right. Under this standard of review, affirmative action programs are constitutional if the government proves the classification “serve[s] important governmental objectives and is substantially related to the achievement of those objectives.”⁴⁸

Justice Thomas has spoken for those who disagree with Marshall. In *Adarand*, Thomas wrote:

[T]here is a “moral [and] constitutional equivalence” . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated . . . by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.

46. *Id.* at 353.

47. *Id.*

48. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (announcing the standard of intermediate scrutiny and applying it to assess the constitutionality of gender-based classifications).

. . . [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination.⁴⁹

Over time, many of the Justices who believed in what Marshall called the “second conclusion”—that is, those believing that affirmative action was still necessary—began to retire from the Court. At the same time, those who believed in the “first conclusion”—those generally opposed to governmental use of racial classifications—gained ascendancy. That is the best explanation for the results in the recent Seattle and Louisville school cases. As Justice Stevens noted in his dissent in the Seattle case: “It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”⁵⁰

An essential difference between those like Marshall, who generally favor affirmative action, and those like Thomas, who oppose it,⁵¹ is a fundamental disagreement over *Brown v. Board of Education*⁵² and its interpretation of the Fourteenth Amendment’s requirement for “equal protection of the laws.”⁵³

For Thomas, *Brown* means the law should be colorblind. As he wrote in the Seattle case:

What was wrong in 1954 cannot be right today. Whatever else the Court’s rejection of the segregationists’ arguments in *Brown* might have established, it certainly made clear that state and local governments cannot take from the Constitution a right to make decisions on the basis of race by adverse possession. The fact that state and local governments had been discriminating on the basis of race for a long time was irrelevant to the *Brown* Court. The fact that racial discrimination was preferable to the relevant communities was irrelevant to the *Brown* Court. And the fact that the state and local governments had relied on statements in this Court’s opinions was irrelevant to the *Brown* Court. The same principles guide today’s decision. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards’ race-based

49. *Adarand*, 515 U.S. at 240-41 (Thomas, J., concurring in part and concurring in the judgment).

50. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 (2007) (Stevens, J., dissenting).

51. Included among those Justices who favor affirmative action are Marshall, Brennan, Blackmun, Ginsburg, Breyer, Souter, Stevens, and White. Included among those opposed are Scalia, Rehnquist, Thomas, Roberts, Alito, Burger, and Stewart. As noted, Powell, O’Connor and Kennedy held somewhat intermediate views.

52. 347 U.S. 483 (1954).

53. U.S. CONST. amend. XIV, § 1.

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plans because no contextual detail . . . can “provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”⁵⁴

For Marshall (who had successfully argued for the plaintiffs in *Brown*) and his supporters, *Brown* means there should be no more discrimination and no more segregation; remedies should be aimed at integration. It does not mean there can be no race conscious efforts to promote integration. As Stevens said in his dissent in *Seattle*:

There is a cruel irony in The Chief Justice’s reliance on our decision in *Brown v. Board of Education* . . . The first sentence in the concluding paragraph of [Robert’s] opinion states: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.” This sentence reminds me of Anatole France’s observation: “[T]he majestic equality of the la[w] forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.⁵⁵

Justice Breyer, in his *Seattle* dissent, asked:

What of the hope and promise of *Brown*? For much of this Nation’s history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court’s finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of a true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.

. . . Today, almost 50 years later, attitudes toward race in this Nation have changed dramatically. Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it. The long history of their efforts reveals the

54. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2786 (Thomas, J., concurring) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995)).

55. *Id.* at 2797-98 (Stevens, J., dissenting).

complexities and difficulties they have faced. And in light of those challenges, they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their modest request.

The plurality is wrong to do so. The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.⁵⁶

As noted earlier, all agree that, ideally, a colorblind society is the ultimate goal. The disagreement concerns what we can, and should, do now. Marshall and those voting like him assert we are not there yet and, accordingly, we may use race conscious methods, if necessary. Thomas and those voting with him assert that, whether or not we are there, the use of discrimination to get to a colorblind state is fundamentally wrong and unconstitutional.⁵⁷

What accounts for the two different views articulated by Marshall and Thomas? Without attempting to be a psychoanalyst, I would suggest that different life experiences are highly relevant. Both Marshall and Thomas had confronted racial discrimination and both hated

56. *Id.* at 2836-37 (Breyer, J., dissenting).

57. Justice O'Connor characteristically took a somewhat modified position in these affirmative action cases, one closer to Marshall's than to Thomas's. In the University of Michigan Law School case, writing for the majority, O'Connor expressed the hope that in 25 years, such programs would no longer be necessary. As she said:

We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. . . . It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (citations omitted).

Thomas tried to make this reference to 25 years a deadline, saying: "It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Id.* at 394 (Thomas, J., dissenting). But Justice Ginsburg made it clear that the majority had simply expressed a hope, not a deadline: "As lower school education in minority communities improves, an increase in the number of . . . students [who can meet admission standards without the need for affirmative action] may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Id.* at 346 (Ginsburg, J., concurring). See CARL COHEN & JAMES P. STERBA, *AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE* (2003) (discussing the pros and cons of affirmative action).

those encounters. Marshall knew firsthand the experience of not being able to find a men's restroom in downtown Baltimore or a hotel in most of the South.⁵⁸ He was barred from the University of Maryland Law School because he was black.⁵⁹ As he traveled the country litigating against "separate but equal," he had trouble finding places to stay and to eat.⁶⁰ Thomas, too, had experienced the pain of discrimination. Growing up in the heavily segregated deep-South of the 1940s and 50s, the "second class status [of blacks] was so firmly accepted," Thomas said, "that no unpleasantness was needed to enforce it."⁶¹ Like Marshall, he had experienced separate water fountains and exclusions from whites-only "parks, schools, restaurants, movie theaters, and libraries."⁶²

But, because Clarence Thomas was born 40 years after Marshall, his life experiences were different. Both had experienced racial discrimination, but Thomas, unlike Marshall, had personally experienced the downsides of affirmative action in his education, including its costs.⁶³ As he said in his autobiography, Thomas believed that affirmative action devalued his law degree from Yale University.⁶⁴ Describing his search for a job, Thomas explained:

58. See WILLIAMS, *supra* note 1, at 60 (describing a trip Marshall and Charles Hamilton Houston took to the south to investigate school facilities during which they stayed in private residences); see also *id.* at 106 (explaining how hotels would not accept black travelers on Marshall's trips to the South on behalf of the NAACP).

59. It is fitting to note that Howard University School of Law was the beneficiary of that decision by Maryland. Instead of Maryland, Marshall enrolled at Howard and graduated in 1933, first in his class. Fittingly, one of Marshall's first legal actions after graduation was to sue the University of Maryland, challenging its discriminatory policies. And he won. See *Pearson v. Murray*, 169 Md. 478 (1936). Years later, when the University of Maryland dedicated its law library in Marshall's honor and invited him to attend the opening, Marshall refused to attend. See WILLIAMS, *supra* note 1, at 371-73 ("[Justice Marshall] told [the dean of the law school] that since there had been no place for the young Thurgood Marshall at the school, he would not have anything to do with it now."). When the dean invited other members of Court to the ceremony, Marshall wrote to his colleagues: "I will not go there. I am very certain that Maryland is trying to salve its conscience for excluding the Negroes from the University of Maryland for such a long period of time." Juan Williams, *Poetic Justice*, N.Y. TIMES, Jan. 18, 2004, at A4.

60. One of my favorite Marshall stories is his account of a southern trip in which he had stopped off at a small Mississippi town and was contemplating an overnight stay: "I was out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip comes up. 'Nigguh,' he said, 'I thought you oughta know the sun ain't nevah set on a live nigguh in this town.' So I wrapped my constitutional rights in cellophane, tucked 'em in my hip pocket . . . and caught the next train out of there." RICHARD KLUGER, *SIMPLE JUSTICE* 224 (1976).

61. CLARENCE THOMAS, *MY GRANDFATHERS SON: A MEMOIR* 31-35 (2007); see also KEVIN MERIDA AND MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* 61 (2007).

62. THOMAS, *supra* note 61, at 32.

63. *Id.* at 86-87.

64. *Id.*

One high-priced lawyer after another treated me dismissively, making it clear that they had no interest in me despite my Ivy League pedigree. Many asked pointed questions unsubtly suggesting that they doubted I was as smart as my grades indicated. A firm in Atlanta briefly seemed interested in me, then started to blow hot and cold, stringing me along with expressions of interest but refusing to make a commitment. . . . By late December I had yet to receive a single job offer. Now I knew what a law degree from Yale was worth when it bore the taint of racial preference. I was humiliated—and desperate.⁶⁵

Thomas concluded: “Those blacks who benefited from [affirmative action] were being judged by a double standard. . . . But it was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements.”⁶⁶

Those experiences clearly influenced Justice Thomas’s views of affirmative action throughout his years on the bench. In the University of Michigan Law case, he wrote:

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. . . . Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.⁶⁷

Speaking more generally about affirmative action, Thomas opined in his separate opinion in *Adarand*:

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal

65. *Id.*

66. *Id.* at 74-75.

67. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting).

protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "invidious [racial] discrimination is an engine of oppression," . . . It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society." But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.⁶⁸

What can we learn from these observations? If nothing else, it seems clear that the life experiences of a judge affect his or her judicial views. In particular, experiencing discrimination and affirmative action seems to influence one's opinions.⁶⁹ Thus, diversity on the Court, especially diverse life experiences, is extremely important. And of course, the ability to share those experiences is vital. Justice O'Connor explicitly applauded and appreciated Marshall's stories about his experiences. In *Thurgood Marshall: The Influence of a Raconteur*,⁷⁰ Justice O'Connor noted:

Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and estab-

68. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (citations omitted).

69. That seems clear, looking not only at the views of Marshall and Thomas, but also at those of Justices O'Connor and Ginsburg, especially in the areas of discrimination, affirmative action, and abortion. See Craig Joyce, *Afterword: Lazy B and the Nation's Court: Pragmatism in Service of Principle*, 119 HARV. L. REV. 1257, 1267 (2006) ("Her common sense approach to issues, while perhaps first formed in ranch days, had been honed . . . by her experience as a legislator and state court judge."); see also Brenda Kruse, *Women of the Highest Court: Does Gender Bias or Personal Life Experiences Influence Their Opinions*, 36 U. TOL. L. REV. 995, 1003 (2005) ("Although life experiences may not be overwhelmingly influential in Justice O'Connor's and Justice Ginsburg's opinions, the fact that both women were victims of sex discrimination may be the reason why the Justices frequently agree on Title VII cases."). But exploring the views of Justices O'Connor and Ginsburg must be left to another paper.

70. Sandra D. O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

lished safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them voice.⁷¹

Justice O'Connor illustrated her point with a typical Thurgood Marshall story:

I was particularly moved by a story Justice Marshall told during the time the Court was considering a case in which an African American defendant challenged his death sentence as racially biased. Something in the conversation caused his eyebrows to raise characteristically, and with a pregnant pause, to say: "That reminds me of a story." And so it began, this depiction of justice in operation.⁷²

In conclusion, as we celebrate Thurgood Marshall's 100th birthday, it is important to appreciate and applaud his uniquely valuable contributions to the Court. As one of the only members of the Court who had personally experienced race discrimination, who had defended real people on death row, who had seen innocent people convicted and poor people starve, Marshall was able to remind his brethren of the real world and its complexities.⁷³ Sterile formulas de-

71. *Id.* at 1217.

72. *Id.* at 1218. According to O'Connor, Marshall then told of a client who was accused of raping a white woman. The government offered a life sentence in prison, instead of the death penalty, if the defendant agreed to plead guilty. Marshall recounted that the client adamantly refused to plead guilty. "Raping that woman? You gotta be kidding. I won't [plead]." According to Marshall, that is when he knew his client was an innocent man. Nonetheless, the man was convicted. "But," said Marshall, "he never raped that woman Oh well," Marshall added, "he was just a Negro." *Id.* That story helps to explain Marshall's abhorrence of the death penalty. As he stated in *Furman v. Georgia*:

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death. . . . We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

408 U.S. 238, 366-68 (1972) (Marshall, J., concurring). Marshall believed that the death penalty was inherently cruel and unusual and thus a violation of the Eighth Amendment. Ultimately, Brennan, Blackmun, and Stevens agreed. See Linda Greenhouse, *Death Penalty Is Renounced By Blackmun*, N.Y. TIMES, Feb. 23, 1994, at A1 ("'From this day forward, I no longer shall tinker with the machinery of death,' Justice Blackmun, the Court's 85-year-old senior member, wrote in an emotional, highly personal and solitary dissent from the Court's refusal to hear the appeal of a Texas inmate. . . . Justice Blackmun's tone was urgent, as if in the twilight of his career he wanted to reopen a dialogue on the death penalty that had all but disappeared from the Court with the retirements of Justices William J. Brennan Jr. and Thurgood Marshall, who both believed that the death penalty was inherently unconstitutional."); see also Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22.

73. When the Court upheld the imposition of a fifty dollar filing fee for a bankruptcy petition by minimizing the magnitude of the fee, Marshall dissented angrily. Noting that the "desperately poor almost never go to see a movie," while the majority assume it to be "an almost

tached from reality were, in his view, inadequate for the difficult issues that come before the Court. As Justice Byron White noted:

Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past. He characteristically would tell us things that we know but would rather forget; and he told us much that we did not know due to the limitation of our own experience.⁷⁴

Marshall, said Justice Kennedy, reminded his brethren of their “moral obligation as a people to confront those tragedies of the human condition which continue to haunt even the richest and freest of countries.”⁷⁵ Marshall’s best friend, Justice Brennan, summed it up best:

Justice Marshall’s persuasive voice made all of us more sensitive to the legacy of discrimination. As President Johnson predicted at the time of his nomination, placing Thurgood Marshall on the Court was “the right thing to do, the right time to do it, the right man and the right place.” This was true not only in the desegregation era, but also in later years, when questions such as affirmative action reached the Court.⁷⁶

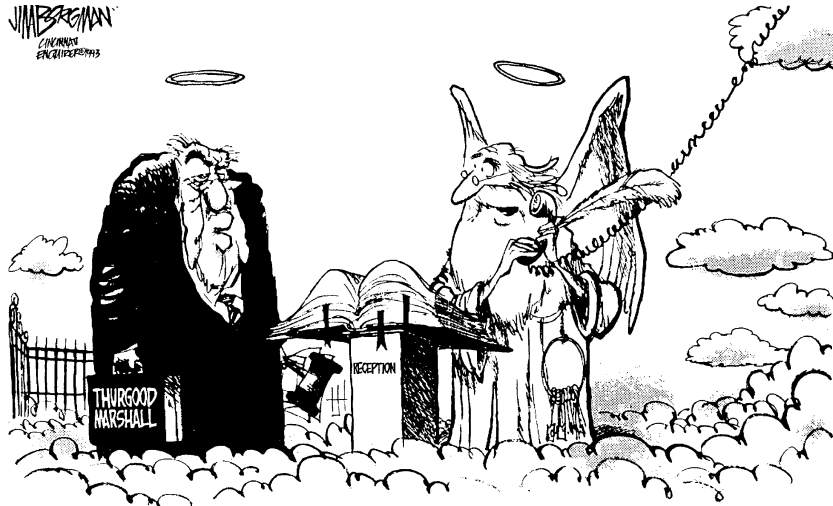
Let us hope that our future Presidents choose their appointees as wisely, nominating individuals with the breadth of knowledge, experience, and wisdom that Thurgood Marshall brought to the Court. Such appointments will be the ones that pay true homage to the legacy of Thurgood Marshall.

weekly activity.” Marshall complained: “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 . . . 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.” See Susan Low Bloch, *Foreword: Do What You Can*, 47 OKLA. L. REV. 1, 2 (1994) (citing *United States v. Kras*, 409, 434, 460 (1973) (Marshall, J., dissenting)); Susan Low Bloch, *Foreword: Thurgood Marshall: Courageous Advocate, Compassionate Judge*, 80 GEO. L.J. 2003, 2004-05 (1992).

74. Byron White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992); see also O’Connor, *supra* note 70, at 1217 (“At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.”).

75. Anthony Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1221 (1992).

76. *Id.*



"HE WANTS TO KNOW, 'CAN YOU GET USED TO WRITING THE MAJORITY OPINION?'"

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

REBECCA BROWN*

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

He had seen that the anti-lynching measures pressed by the NAACP were not succeeding in Congress; and that the massive New Deal legislative revolution of the 1930's had, in large measure, left racial injustice to one side.² He had been disappointed in the Justice Department's progress toward federal prosecution of lynchings³ and he had worked unsuccessfully with the Executive Branch to end discrimination in the military.⁴

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

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

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

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

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

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

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

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

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

6. *Id.* at 172.

7. *Id.*

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

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

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

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

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

10. See U.S. CONST. art. 1, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2.

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

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

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

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

11. See *infra* note 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. See Rubinfeld, *supra* note 22, at 437.

28. See ELY, *supra*, note 21, at 146.

29. *Rodriguez*, 411, U.S. at 99 (Marshall, J., dissenting).

30. *Id.* at 16 (majority opinion).

31. See *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

32. See *id.*

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

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

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

34. *Id.* at 110.

35. See *id.*

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

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

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

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

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

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

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

41. *Id.* at 86.

42. *Id.* at 89.

43. *Id.* at 98.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. *Id.* at 450.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics

ELIZABETH GARRETT*

When asked in 1977 which cases he litigated for the NAACP Legal Defense Fund that “meant the most” to him, Thurgood Marshall began his list with *Smith v. Allwright*,¹ one of the white primary cases, which was “the first real big one I had.”² Marshall later told Carl Rowan that he was not certain which case, *Smith v. Allwright* or *Brown v. Board of Education of Topeka*,³ affected Americans more. “I don’t know whether the voting case or the school desegregation case was more important,” Marshall told his biographer. “Without the ballot you’ve got no goddamned citizenship, no status, no power, in this country. But without the chance to get an education you have no capacity to use the ballot effectively. Hell, I don’t know which case I’m proudest of.”⁴

Although the white primary cases tend to be studied as part of the larger struggle to end racial discrimination,⁵ they also reveal the complexities of political parties and underscore the relationship between access to the vote and political change. Marshall’s work in these cases and throughout his legal career also reveals his commit-

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1. 321 U.S. 649 (1944).

2. *The Reminiscences of Thurgood Marshall*, Columbia Oral History Research Office (1977), in THURGOOD MARSHALL: HIS SPEECHES, ARGUMENTS, OPINIONS, AND REMINISCENCES 411, 426 (Mark V. Tushnet ed., 2001) [hereinafter THURGOOD MARSHALL SPEECHES].

3. 347 U.S. 483 (1954).

4. CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL 129 (1993).

5. See, e.g., Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001).

ment to the objective that all people, regardless of their race, ethnicity or economic class, should have an equal opportunity to participate in the political process. His notion of participation emphasized not only its instrumental value, but also Marshall's belief that participation is intrinsically valuable to participants and the larger society. He saw the foremost constitutional principle as equality; "[a] related principle is participation in the governing process. . . . [P]articipation recognizes the moral worth of each individual, and in this way shows again that all persons are equal."⁶ The Justice also understood, from the white primary cases and other experiences, that entrenched interests within the parties and elsewhere would use every weapon to keep new voices from being heard and would resist expanded public involvement in the political process. New voices and new voters mean uncertainty for incumbents and the possibility of disrupting the status quo that those in power work hard to maintain and protect. Justice Marshall knew concretely and personally, however, that without those new voices in politics and without that broad participation in elections and governance, a lasting and profound change in a democracy is impossible.

Because so much of Justice Marshall's legacy as a litigator and jurist lies in the realm of the fight for civil rights, scholars and biographers have usually dealt with these political process issues as they relate to the struggle in the courts and legislatures for equal rights, particularly for racial minorities. However, Marshall's jurisprudence includes several important opinions concerning political parties and campaign finance regulations that are not explicitly focused on race, as the white primary cases were. In particular, the Justice authored majority and dissenting opinions related to the laws structuring political parties which reveal his distinct and compelling vision of the roles of minor parties, major parties, and voters.⁷ I believe his relatively sophisticated and very realistic view of parties was shaped in part by his involvement in the white primary cases, which may well have sparked an interest in political parties generally, leading him to write with some frequency in this realm. His support for minor parties as a way to bring new voices and change into the democratic system

6. *Remarks at the Second Circuit Judicial Conference, The Judiciary and Fundamental Human Liberties (May 1980)*, in THURGOOD MARSHALL SPEECHES, *supra* note 2, at 183-84.

7. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1968); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (Marshall, J., dissenting); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989).

showed a tolerance for the “chaos” of the political process that many of his colleagues did not share.⁸ In light of his courtroom experience and first-hand knowledge of politics, he could appreciate the positive consequences of a more open political process, while at the same time understanding the need for structure, through, among other things, the use of voting cues provided by political parties, so that voters can navigate their way through a cacophony of messages.

Just as his political party cases reveal an eagerness to ensure the engagement of many people with different views, his campaign finance cases, including the majority opinion in *Austin v. Michigan Chamber of Commerce*,⁹ express his belief that those without access to substantial financial resources lack a meaningful voice in the political debate of campaigns and therefore are denied an equal chance to influence political outcomes. *Austin* is the most sustained articulation of concerns that are clearly about equality even though, to maintain his majority, they are (barely) dressed in the garb of corruption. Nevertheless, this case and a few other minor opinions in campaign finance cases, taken together with the political party cases, reveal a coherent, unique and important perspective on the political process.¹⁰

I will begin examination of that perspective in Part I, discussing the passages of Justice Marshall’s opinions that reveal his view of the role of minor parties and other forces in ensuring that new perspectives and outsider views influence the political agenda. The key cases here are those describing the importance of minor parties in the American political process, but Marshall also sounds these themes in cases dealing with residency requirements in voting registration laws as well as in his dissent in a case involving felon disenfranchisement. Of course, new voices must have access to the political process to ef-

8. See Elizabeth Garrett, *The Impact of Bush v. Gore on Future Democratic Politics*, in *THE FUTURE OF AMERICAN DEMOCRATIC POLITICS: PRINCIPLES AND PRACTICES* 141, 148-50 (G.M. Pomper & M.D. Weiner eds. 2003); see also Richard A. Pildes, *Democracy and Disorder*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 140, 160 (C.R. Sunstein & R.A. Epstein eds., 2001).

9. 494 U.S. 652 (1990).

10. These cases have not yet received sustained scholarly attention. The most comprehensive treatment of Justice Marshall’s jurisprudence is MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW* (1997), but Tushnet discusses only one of the cases that are my focus in this essay. He briefly touches on *Dunn v. Blumstein*, 405 U.S. 330 (1972), as an example of the Justice’s approach to equal protection cases, an approach set forth most completely in the brilliant dissent in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972). See *Tushnet, supra*, at 98. Daniel Lowenstein provides a critical assessment of *Tashjian* and *Eu* in an article questioning the need for judicial protection of the associational rights of major political parties, but he does not analyze these cases as part of Marshall’s legacy. See generally Daniel Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 *TEX. L. REV.* 1741 (1993).

fect change, and Marshall's commitment to equality of opportunity to take part in politics can be seen in these cases and also those to which I will turn in Part II: the campaign finance cases. *Austin* is his most significant campaign finance case, but his egalitarian approach shapes other opinions, including his concurrence and dissent in part in *Buckley v. Valeo*.¹¹ Finally, in Part III, I will discuss aspects of Marshall's jurisprudential approach that demonstrate his awareness that entrenched players, particularly those in the legislature and at the helm of the major parties, will resist these new voices and seek to manipulate institutions to protect the status quo. Marshall viewed the independent judiciary as a way to ensure that the political branches are not allowed to adopt laws and institutions that shut out those with dissenting perspectives. His distrust of some actions of the major parties was balanced, however, by an appreciation of the role they play in structuring political discourse and helping citizens cast votes that reflect their priorities.

I. MINOR PARTIES: EXPANDING THE POLITICAL AGENDA

The modern Supreme Court has been relatively hostile to minor parties; indeed, some decisions seem aimed at protecting the two-party system because of the stability it is seen as providing to the political process.¹² For Justice Marshall, stability was over-rated if it meant continuing to keep the same people and interests in power and silencing others whose views might be different. After all, he had been excluded from the political process, so he did not necessarily fear the addition of new voices and the strengthening of peaceful outlets for dissatisfaction. In his dissent in *Richardson v. Ramirez*,¹³ he referred to that exclusionary tendency in American jurisprudence in his description of the vibrant process that allowed democratic change:

Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change law considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. . . . The ballot is

11. 424 U.S. 1, 286 (1976) (per curiam).

12. See generally *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); see also Pildes, *supra* note 8, at 154-55 (noting the importance of preserving political "stability" for the majority in *Timmons*); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 686 (1998).

13. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition.¹⁴

Although he welcomed reform to further open the political system, Marshall was no radical advocating abrupt or destabilizing political change. Rather, he believed that the democratic process, with institutions such as separation of powers, bicameralism, and congressional committees that make rapid change difficult, can translate voter preferences into policies in a way consistent with stability. The legitimacy of any democratic process, however, requires that all voters are involved in selecting representatives and making their voices heard.

Minor parties can facilitate this relatively orderly process of change because they provide a structure to bring new ideas into the political debate, particularly during campaigns when voters are more likely to be attentive to politics. Unlike others on the Court who viewed minor parties, like their major party counterparts, as primarily interested in electing their members to office,¹⁵ Marshall understood that minor parties participate in campaigns to “disseminat[e] ideas as well as attain[] political office.”¹⁶ The effect of minor parties on the content and breadth of the political agenda has been an important part of the nation's political development, even if such parties have not always succeeded in electing their members to office. As examples of such influential parties, Marshall listed, in unsurprising order, Abolitionists, Progressives, and Populists.¹⁷ In some ways, minor parties are more like organized interest groups than major political parties: they are collections of individuals with intense preferences who seek to influence the policy debate without enough clout to dominate institutions of governance. Unlike most interest groups, however, they field candidates, as well as using other forms of political action like lobbying, organizing rallies, and encouraging grassroots activism.¹⁸ Some minor parties may actually hope to elect officials, partic-

14. *Id.* at 82-83 (Marshall, J., dissenting).

15. *See, e.g., Timmons*, 520 U.S. at 363 (majority stating that “[b]allots serve primarily to elect candidates, not as fora for political expression”); *see also* Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 360, 358-63 (1993) (critiquing Court's instrumentalist approach).

16. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979); *see also* STEVEN J. ROSENSTONE, ROY L. BEHR & EDWARD H. LAZARUS, *THIRD PARTIES IN AMERICA* 8 (2d ed. 1996) (1984) (“Minor parties, historically, have been a source of important policy innovations.”) [hereinafter ROSENSTONE].

17. *Illinois State Bd. of Elections*, 440 U.S. at 185-86.

18. *See* Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 110 (2002); *see also* ROSENSTONE, *supra* note 16, at 222 (noting that minor parties are

ularly on the local or state level, but for many “getting votes is merely a sideline”;¹⁹ they use campaigns primarily to gain public attention for their policy positions.

Marshall’s defense of minor parties is articulated most thoroughly in his powerful dissent in *Munro v. Socialist Workers Party*.²⁰ Under Washington’s blanket primary system, candidates of minor parties could appear on the ballot for the general election only if they had been nominated at their parties’ conventions and had received at least one percent of all the votes cast in the primary election. Before 1977, minor party candidates who had been nominated by their conventions, held on the same day as the state’s primary elections, could appear on the general election ballot if they filed a certificate with the signatures of at least 100 registered voters who had participated in the convention but had not voted in a primary. Under this earlier ballot access law, minor party candidates appeared regularly on the ballot, with twelve on the ballot in 1976; after 1977, only one of twelve minor-party candidates qualified for the general election ballot for statewide office. The Socialist Workers Party nominee for the U.S. Senate and two voters argued that the more restrictive ballot access provision violated their rights under the First and Fourteenth Amendments.²¹

Exhibiting its usual reaction to laws burdening minor parties, the Court was not sympathetic to these claims, and the restrictive ballot access law survived attack. Justice Marshall, however, took vigorous exception to the majority’s cursory treatment of the associational rights of members of minor parties. In his dissent, he defended the role of minor parties in the American political system, demonstrating his generally supportive view of their traditional role in opening up the system to new voices:

The minor party’s often unconventional positions broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority, in some instances ultimately becoming majority positions. And its very existence provides an outlet for voters to express dissatisfaction with the candidates or platforms of the major parties.²²

one form of aggregating and promoting citizen preferences and that they may be used to check major parties when other forms of action have not succeeded).

19. MARJORIE RANDON HERSHEY, *PARTY POLITICS IN AMERICA* 39-40 (13th ed. 2009).

20. 479 U.S. 189 (1986).

21. *See id.* at 191-92.

22. *Id.* at 200 (Marshall, J., dissenting).

This vision includes the two vital communicative roles minor parties play. First, they have historically been voices of dissent by providing an outlet for those dissatisfied with the lack of responsiveness of the major parties but still engaged enough to participate politically.²³ More positively, they have also been able to elevate issues to prominence on the political agenda, thereby forcing the major party candidates and officials to address them. Marshall attacked the majority's "fundamental misconception of the role minor parties play in our constitutional scheme," that is, by believing that their sole objective is to elect their candidates.²⁴ Instead, minor parties serve to "expand and affect political debate,"²⁵ and to do so effectively, they must have the ability, in some significant number of campaigns, to participate in the general election.²⁶

Marshall recognized that some minor parties will reflect extreme dissenting views, and those parties may face backlash from opponents, as well as from government efforts to undermine them. He was particularly aware that the FBI engaged in surveillance and other tactics to monitor and destabilize groups with views J. Edgar Hoover questioned. After all, Marshall himself had been the subject of the FBI's scrutiny.²⁷ Moreover, some opponents of civil rights sought to undermine the movement, the NAACP, and Marshall's achievements through accusations of communist and other "subversive" influences. This experience, coupled with his first-hand knowledge of the hostility that NAACP members sometimes faced during the civil rights era,²⁸ made him a natural to write the majority opinion in *Brown v. Socialist Workers '74 Campaign Committee*.²⁹ Marshall's opinion affirmed the need to protect from disclosure the names of those who contributed to the Party and those who received expenditures from it. His opinion detailed not only the negative reaction that the Socialist Workers Party sparked in some citizens, including hate mail, shots fired into Party offices, and destruction of members' property, but also the sys-

23. See ROSENSTONE, *supra* note 16, at 9.

24. *Id.* at 202.

25. *Id.*

26. *Id.* at 201-02.

27. See THURGOOD MARSHALL SPEECHES, *supra* note 2, at 440-41 (quoting an excerpt from interview where Marshall discusses his reaction to the surveillance); ROWAN, *supra* note 4, at 115-23.

28. See generally NAACP v. Alabama, 357 U.S. 449 (1958) (although Marshall did not argue this case, he appeared on the brief for the NAACP).

29. See generally Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

tematic and “massive” government harassment aimed at the Socialist Workers Party and the affiliated Young Socialist Alliance.³⁰

Three of his colleagues were not willing to go as far as Justice Marshall, seeing an insufficient threat posed to people who received contributions from the Socialist Workers Party; they therefore would have required disclosure with regard to recipients of expenditures from the Party. However, Marshall’s own familiarity with the situation of groups espousing unpopular views doubtlessly contributed to his support for the broad protection necessary to allow this Party to survive. Marshall’s opinion is noteworthy because he was not sympathetic to the views of any relatively radical political movement; nonetheless, his commitment to the survival of a set of diverse minor parties as part of a robust democracy inevitably led him to the view that anonymity must be provided to the Socialist Workers Party’s supporters and others associated with it.

Marshall’s objective of structuring the political process so that new views are heard was not limited to his resisting laws that weakened, and perhaps eviscerated, minor parties. It is also a theme sounded in some of his opinions in cases dealing with rules determining who can vote. In the case upholding the constitutionality of California’s ex-felon disenfranchisement law, Marshall dissented, arguing that the law violated the Fourteenth Amendment by depriving ex-felons of their fundamental right to vote without a sufficiently compelling state interest.³¹ He was particularly outraged by the state’s argument that former felons were likely to vote in ways that were “subversive of the interests of an orderly society”³² and that this somehow justified excluding them from the voting booth. He strongly rejected the notion that people’s right to vote could be conditioned on the substance of the views that were likely to inform their votes.

Justice Marshall likened the state’s argument to discredited Supreme Court precedents that had allowed the disenfranchisement of people who had been part of bigamous or polygamous marriages on the ground that they were likely to oppose laws criminalizing such behavior.³³ Instead, Marshall argued that people who opposed certain criminal laws—for example, those who favored legalizing marijuana—

30. *Id.* at 98-100.

31. *Richardson v. Ramirez*, 418 U.S. 24, 77-78 (1974).

32. *Id.* at 81.

33. *Id.* at 81-82 (referring to *Murphy v. Ramsey*, 114 U.S. 15 (1885) and *Davis v. Beason*, 133 U.S. 333 (1890)).

could not be deprived of their fundamental right to vote merely because they might vote for people who shared their view and would work within the democratic process to achieve change.³⁴ Similarly, ex-felons, who might have certain views about criminal laws and the severity of sanctions imposed on lawbreakers, could not be disenfranchised because they might support parties and candidates sympathetic to those views.

For Marshall, the relevant precedents in the ex-felon disenfranchisement cases were not the old cases allowing discrimination against some Mormons, but the cases drawing into question requirements that voters be residents of an area for a relatively long time before they could register to vote. In *Dunn v. Blumstein*,³⁵ Marshall authored the unanimous decision striking down Tennessee's requirement that only people who had lived in the state for a year and in the county for three months could register to vote. The state justified this durational residency requirement in part because it furthered the goal of having only "knowledgeable" voters participate in elections. Although the Court accepted that the state could legitimately require that voters be residents of the geographic divisions in which they sought to vote, it was not convinced that the durational requirement was necessary to achieve this goal. More troubling for Marshall was the state's argument that requiring a relatively lengthy residency ensured that voters were aware of and influenced by the "local viewpoint."³⁶ This state interest was just another way to condition the right to vote on the viewpoints and opinions that might be expressed through that vote: people were being excluded from the franchise because they might have opinions different from the majority of voters in an area.³⁷ To Marshall, the infusion of new residents is one way to increase the breadth of perspectives represented in the polity, to bring new issues to the forefront, and to allow for local political change that better reflects developments in other parts of the nation.

Of course, Marshall was well aware that the new voices that the state wished to muffle were often those of "undesirables, immigrants, and outsiders with different ideas."³⁸ Marshall rejected the argument

34. *Id.* at 82-83.

35. 405 U.S. 330 (1972).

36. *Id.* at 334-35.

37. *Id.* at 355-56.

38. *Id.* at 355 n. 27 (quoting David Cocanower & David Rich, *Residency Requirements for Voting*, 12 ARIZ. L. REV. 477, 484 (1970)).

that a voter must live in an area for a relatively lengthy time in order to be knowledgeable and engaged. As he noted:

[R]ecent migrants who take the time to register and vote shortly after moving are likely to be those citizens . . . who make it a point to be informed and knowledgeable about the issues. Given modern communication, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is “necessary” to reside for a year in the state and three months in the county [to be a knowledgeable voter].³⁹

Marshall continued to fight against significant durational requirements for voting registration, which he believed were designed mainly to keep new voices with a more national or unorthodox regional perspective from being heard, even when the rest of the Court was willing to accept restrictions shorter than those in *Dunn*.⁴⁰ Another aspect of his jurisprudence also reflects his commitment to designing democratic institutions to maximize the number of different opinions heard, even at the cost of restraining some voices that are disproportionately loud. These cases are his campaign finance opinions, most notably his majority opinion in *Austin v. Michigan Chamber of Commerce*.

II. CAMPAIGN FINANCE: EQUALITY INTERESTS DISGUISED AS CORRUPTION

Dissatisfaction with Supreme Court jurisprudence in the campaign finance arena is widespread (perhaps universal) and expressed both by those who advocate for more room for regulation and by those who object to virtually any regulation of campaign spending. In part, the problem lies in the tension between the liberty values embedded in the Bill of Rights, and the principles of equality sounded in the Declaration of Independence and articulated to some extent in the Fifth and Fourteenth Amendments.⁴¹ If liberty interests are paramount, then the state arguably should be loath to restrict the ability of individuals or groups to spend money to make their political views known and to express the intensity of those views. A problem of political inequality arises, however, when those with access to wealth are able to exert influence over political outcomes, and others with fewer

39. *Id.* at 358 (footnotes omitted).

40. *See, e.g.,* *Hall v. Beals*, 396 U.S. 45 (1969).

41. *See generally*, L.A. Powe, Jr., *Mass Speech and the First Amendment*, 1982 SUP. CT. REV. 243, 279-84 (1983) (pointing out the tension in cases including campaign finance cases).

financial resources cannot. Unless we think economic resources correlate to political views that should be privileged in some way, this inequality of opportunity to be heard leads to the appearance of a corrupt democratic system.

A. Marshall's Embrace of Equality in *Buckley v. Valeo*

Justice Marshall departed from the views of most of his colleagues in the campaign finance cases because he tended to resolve the tension between liberty and equality principles in favor of the latter. In contrast, the Supreme Court has consistently rejected any explicitly egalitarian argument that campaign restrictions are necessary to amplify the voices of those without substantial economic resources. In *Buckley v. Valeo*,⁴² the majority opined about provisions limiting campaign expenditures:

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.⁴³

Similarly, the Roberts' Court was not sympathetic to an egalitarian rationale for campaign finance regulation when it overturned the provision of the Bipartisan Campaign Reform Act that raised contribution limits for a candidate facing a self-financed millionaire.⁴⁴ Supreme Court jurisprudence has limited the acceptable compelling state interests supporting regulation in this realm to combating actual quid pro quo corruption or the appearance of such, or arguments that can be framed as targeting some sort of similar political corruption that undermines public confidence in government.⁴⁵

42. 424 U.S. 1 (1976) (per curiam).

43. *Id.* at 48-49 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 266, 269 (1964), which in turn quotes *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

44. *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759 (2008); see also *infra* text accompanying notes 114-20.

45. See David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369-75 (1994) (arguing that the quid pro quo corruption rationale boils down to a concern about political equality).

Justice Marshall approached campaign finance cases with his view that equality of opportunity is the foremost constitutional principle, and that differences in wealth should not affect the ability to participate in politics. When Marshall considered the country's democratic framework he began with the Declaration of Independence's "self-evident truth" that all people are created equal.⁴⁶ Because he was well aware that the original Constitution departed from this egalitarian commitment in its acceptance of slavery, he viewed the Constitution as an evolving document—evolving to better exemplify the primary democratic principle of equality. When he helped draft the Kenyan Constitution's Bill of Rights, he insisted that "the starting point, upon which other rights were built, was equality, not liberty."⁴⁷

Marshall's commitment to equality of opportunity to participate was not necessarily a commitment to equal influence over political outcomes.⁴⁸ Those with greater intelligence or rhetorical ability are apt to exert disproportionate influence over political outcomes, for example, and those with more time to take part may have a greater ability to promote their views. These are not necessarily illegitimate differentiating factors, and they can appropriately affect the ability to influence, although they should not play a role in the opportunity to participate. Although it is not articulated in these terms, the main disputes in the campaign finance cases are whether inequality of economic resources is a legitimate or illegitimate factor as it relates to political access and if it is an illegitimate factor, the debate then concerns what the state can do to redress the inequality. Few justices other than Marshall have been willing to use equality to frame the debate, however, perhaps because of their fears that any remedy to unequal economic resources would inevitably require some sort of redistribution of economic resources among participants. Many justices would oppose such measures because of their interpretation of the liberty principles set out in the Constitution.

In *Buckley v. Valeo*, Justice Marshall took issue with the Court's rejection of a compelling state interest based on equality. He approved of the state's interest to promote "the reality and appearance

46. See, e.g., Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987); *The Judiciary and Fundamental Human Liberties*, *supra* note 6.

47. Mary L. Dudziak, *Thurgood Marshall's Bill of Rights for Kenya*, 11 GREEN BAG 2d 301, 307 (2008).

48. See ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 74-75 (2007).

of equal access to the political arena.”⁴⁹ Accordingly, he dissented from the majority’s decision to invalidate restrictions on how much of a candidate’s own money he could spend in a campaign. He understood that if the contributions that others could provide to a candidate were restricted while the wealthy candidate could spend as much private money as he wanted, then “immediate access to a substantial personal fortune may give him an initial advantage that his less wealthy opponent can never overcome.”⁵⁰ Not only does that lead to a political environment that discourages people without great wealth from running for political office, but it also “undermine[s] public confidence in the integrity of the electoral process.”⁵¹

Memos relating to *Buckley* in Justice Marshall’s papers suggest that he always accepted equality of opportunity as a rationale for state regulation, but he changed his thinking about how egalitarian principles should be applied to some provisions of the Federal Election Campaign Act during deliberations. In his conference notes, he underlined a statement that he appeared to attribute to Potter Stewart: “[l]imitation on personal money of candidate – is OK – to equalize ability.”⁵² It seems unlikely that this was Stewart’s position in conference given what we know from other notes;⁵³ in my view, it is more likely to have been a statement of Marshall’s thoughts during conference deliberations. However, when he returned from conference, Justice Marshall told his clerks that he was “closer to holding [the limitation on expenditures by candidates from personal resources] unconstitutional than constitutional.”⁵⁴ A memo from his clerks after Potter Stewart’s draft of this portion of the *Buckley* opinion that was circulated reflects internal discussions in Marshall’s chambers that took place as he made his decision to write separately about the use of the candidate’s own resources. According to this memo, the clerk

49. *Buckley v. Valeo*, 424 U.S. 1, 287 (Marshall, J., concurring in part and dissenting in part); see also Cass R. Sunstein, *On Marshall’s Conception of Equality*, 44 STAN. L. REV. 1267, 1269 (1992) (noting that Marshall’s concern was not equalizing resources or outcomes, but providing all a “fair chance”).

50. *Buckley*, 424 U.S. at 288.

51. *Id.*

52. Justice Thurgood Marshall Notes, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (Justice Thurgood Marshall Papers, Box 173, Folder 6, Manuscript Division, Library of Congress) [hereinafter Justice Thurgood Marshall Papers].

53. See generally Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241 (2003).

54. Justice Thurgood Marshall Conference Notes, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (Justice Thurgood Marshall Papers, *supra* note 52, Folder 3).

KTB⁵⁵ argued that the limitations were constitutional because they “serve the vital governmental interest of equalizing access to the political process.”⁵⁶ By striking down the limitation, “[P]otter [S]tewart ‘constitutionalizes’ the gross inequalities in wealth that characterize our society.”⁵⁷ Ultimately, these arguments form the backbone of Marshall’s dissent in *Buckley*.

When the *Buckley* opinions were released, Marshall revealed his disagreement with the Court only on the permissibility of restrictions on the candidate’s use of her own money. Internal Court documents reveal that he indicated in the conference on *Buckley* that he believed the limitation on independent expenditures was constitutional, but he finally joined the majority opinion striking them down.⁵⁸ It seems likely that Marshall was never entirely comfortable with this aspect of the decision, and nearly a decade later, he publicly rejected the idea that any difference between contributions and expenditures has constitutional significance. In *Federal Election Commission v. National Conservative Political Action Committee*, Marshall’s dissent began with his acknowledgment that he had changed his view and now joined Justice White’s long-held position that the government should be allowed to regulate both campaign contributions and expenditures.⁵⁹ He explained this shift largely because experience since *Buckley* demonstrated that the bifurcated regime led to the use of independent expenditures to gain disproportionate influence over candidates. Strategic political actors had reacted to the regulatory regime and were using the avenues open to them to try to circumvent restrictions on campaign contributions. As Justice Marshall pragmatically observed:

It does not take great imagination . . . to see that, when the possibility for direct financial assistance is severely limited, [an individual seeking a special benefit like an ambassadorship] will find other ways to financially benefit the candidate’s campaign. It simply belies reality to say that a campaign will not reward massive financial assistance in the only way that is legally available Surely an eager supporter will be able to discern a candidate’s needs and

55. KTB is Kevin T. Baine, now an attorney with Williams & Connolly.

56. Justice Thurgood Marshall Conference Notes, *supra* note 54.

57. *Id.*

58. *Id.*

59. *Fed. Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 518-19 (1985) (Marshall, J., dissenting).

desires; similarly, a willing candidate will notice the supporter's efforts.⁶⁰

However, Marshall's view was not only based on his common-sense understanding of the ways those seeking access and influence can circumvent restrictions on contributions to spend as much as they want in the political arena. It was also supported by his willingness to consider as ample justification for regulation the desire to promote equality of political access, a state interest that he saw as separate from the traditional one of preventing quid pro quo corruption and its appearance.⁶¹

B. *Austin v. Michigan Chamber of Commerce*: Hiding Equality behind the Mask of Corruption

It should come as no surprise, then, that Justice Marshall's most significant campaign finance opinion has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the language of "political corruption" and without any explicit statement that egalitarian principles are the foundation for this campaign finance regulation.⁶² *Austin v. Michigan Chamber of Commerce*⁶³ concerned the constitutionality of a Michigan law prohibiting corporations from making, directly from their general treasury funds, contributions or independent expenditures in connection with state candidate races. Corporations could use segregated funds for such purposes; money for these segregated funds was solicited expressly for political purposes.⁶⁴ The Michigan Chamber of Commerce, a nonprofit corporation with 8000 members, three-quarters of them for-profit corporations, sought to use its general treasury funds to pay for an advertisement supporting a particular candidate.⁶⁵ The Court held that the regulation was constitutionally permissible, and that the Chamber of Commerce had to use a segregated fund to pay for such an advertisement.⁶⁶

60. *Id.* at 519-20.

61. *Id.* at 521 (quoting his opinion in *Buckley*).

62. See, e.g., Gerald G. Ashdown, *Controlling Campaign Spending and the "New Corruption": Waiting for the Court*, 44 VAND. L. REV. 767 (1991); Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105 (1991).

63. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990).

64. *Id.* at 654, 655.

65. *Id.* at 656.

66. *Id.* at 655.

Justice Marshall identified a different sort of political corruption, not the traditional quid pro quo corruption, to support the state law prohibiting this type of expenditure: “the corrosive and distorting effect of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”⁶⁷ He emphasized that the purpose of the segregated fund was to ensure that the money used by a corporation to fund political speech accurately reflected the support of its shareholders for those political positions.⁶⁸ He further clarified that the justification is limited to regulation of corporations and cannot be applied to any wealthy entity because “the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures.”⁶⁹ Justice Marshall framed his majority opinion so that it did not explicitly rely on equality arguments, but rather on the political corruption that occurs when the amount of money spent in campaigns by corporations distorts the political dialogue because it does not accurately reflect the intensity of the views held by those who created the wealth.

As I will discuss below, and as others have pointed out, this idea of corruption caused by the potentially “corrosive” and “distorting” effects of campaign expenditures of corporations from their general treasury funds is hard to understand sensibly as anything other than an equality argument. However, the Justice had no choice but to draft the opinion as he did, even if he might have been comfortable with more openly embracing equality of access as the compelling interest, for two related reasons. Before describing those reasons, let me be clear: I am not claiming that the Justice considered, and then rejected, writing an opinion finding the Michigan law constitutional because it furthered the legitimate democratic interest in equality of opportunity to participate in the political process, regardless of a person’s economic resources.⁷⁰ Rather, I am arguing that the Justice would not have been disturbed by the observation that the corruption rationale in *Austin* was merely the wolf of equality dressed in sheep’s clothing.

67. *Id.* at 660.

68. *Id.*

69. *Id.*

70. I was the clerk with primary responsibility to work with Justice Marshall on this opinion. This description of the negotiations about the various drafts is based on my recollections and personal notes, as well as on documents available from the Marshall papers at the Library of Congress.

Moreover, had Marshall thought that *Austin* might someday lead the Court to embrace an equality of opportunity rationale explicitly—a development that has yet to occur and seems less likely with the current Court—he would likely have approved.

One reason the opinion is drafted as it is stems from a lesson we all teach in first-year courses: majority opinions are written using reasoning from precedent and prior analysis and seldom are presented as abrupt breaks with the past. In the campaign finance arena, the primary controlling precedent was *Buckley*, with its firm rejection of the idea that some voices could be muffled in the political process in order to enhance the voices of those with less economic resources. Instead, only some notion of political corruption, not substantially different from quid pro quo corruption used by the *Buckley* court, could support state regulation of the campaign process. *Austin* was particularly tricky because it concerned independent expenditures; the Court had been much less willing to allow restrictions of independent expenditures than of contributions. For example, in *Federal Election Commission v. National Conservative Political Action Committee* (“NCPAC”),⁷¹ the Court had struck down a federal law limiting to \$1000 the annual independent expenditures a political action committee (“PAC”) could make to a presidential candidate receiving public funds. A PAC is a segregated fund raised for political purposes, so in this respect the context was different than in *Austin*, which dealt with general treasury funds. In *First National Bank of Boston v. Bellotti*,⁷² the Court struck down a rule prohibiting corporations from directly making expenditures in ballot measure campaigns that did not materially affect their business or assets. The case established that corporate spending for political speech triggers the same First Amendment scrutiny as spending by individuals in campaigns. *Austin* differed from *Bellotti* in that it arose in the context of candidate elections, where more regulation had been allowed, and provided corporations the outlet of spending through a segregated fund rather than prohibiting expenditures entirely. Finally, in *Federal Election Commission v. Massachusetts Citizens for Life* (“MCFL”),⁷³ the Court had struck down a segregated-fund requirement as applied to nonprofit ideological corporations that were formed for the express purposes of promoting political ideas. In the case of these particular nonprofit

71. 470 U.S. 480, 500-01 (1985).

72. 435 U.S. 765 (1978).

73. 479 U.S. 238 (1986).

corporations, their general treasury funds are accurate reflections of the political views of those who provide the funds. One question in *Austin* was whether the Chamber of Commerce was more like the pro-life nonprofit corporation or more like a traditional for-profit corporation. This was the jurisprudential landscape Marshall faced. In all these opinions, the Court had refused to make the argument that regulation could be justified on the ground that some corporations are wealthy and therefore have a relative advantage in funding political communications that disseminate their perspectives on candidates or ballot measures.⁷⁴

Second, as he drafted his opinion, Justice Marshall found that keeping his majority was challenging, so he had to recast and redraft to keep his colleagues—who had different views about the best way to approach the case—from defecting and writing separately. In the days following the initial circulation of the draft, only two justices signaled unambiguously that they would join his majority. Justice White was perhaps most firmly on board; he had dissented in *Buckley*, *NCPAC*, and *Bellotti* and had long been a proponent of allowing states to regulate independent expenditures as well as campaign contributions.⁷⁵ Moreover, White’s dissent in *Citizens Against Rent Control v. City of Berkeley*⁷⁶ expressed his view that regulation of corporate spending in ballot measure campaigns can be justified by a showing that substantial spending by corporations in political campaigns has distorted the political debate.⁷⁷ “Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.”⁷⁸ Chief Justice Rehnquist’s support was also certain as long as the opinion was drafted to apply only to corporations; he had taken the position in *Bellotti* that corporate political speech did not trigger the same strict scrutiny as political speech by individuals,⁷⁹ and he continued to hold that view. In the days following the circulation of

74. See, e.g., *Id.* at 257-60); *Nat’l Conservative Political Action Comm.*, 470 U.S. at 498-99; *Bellotti*, 435 U.S. at 789-92.

75. *Austin*, 494 U.S. at 678 (Stevens, J., concurring) (not only had Marshall come to agree with this position, but Justice Stevens’ concurrence in *Austin* suggests that he also saw no distinction between the two kinds of expenditures when a corporation was involved).

76. 454 U.S. 290 (1981).

77. *Id.*

78. *Id.* at 308 (White, J., dissenting).

79. *Bellotti*, 435 U.S. at 822-28 (Rehnquist, J., dissenting).

the first draft of *Austin*, White joined immediately.⁸⁰ Rehnquist joined a day later, after first asking for a change in the opinion's discussion of labor unions.⁸¹

Although Brennan, Blackmun, and Stevens directly and through their clerks indicated to the Marshall Chambers that they were likely to sign onto the opinion, they also continued to raise issues for the majority opinion to address. Justice Stevens' initial reaction was that "[a]lthough I am presently disposed to join your opinion, I think I shall wait to see what the dissenters have to say before actually doing so."⁸² Justice Blackmun's memo, written on the same day, mirrored this reaction: "I am about where John is. I am presently disposed to join, but I would like to see what is produced by other writings."⁸³ Both chambers signaled through the clerks that it was likely their bosses would ultimately join the opinion.⁸⁴ Indeed, the memo that Justice Stevens sent to Justice Marshall a few days after he indicated he was waiting to see the dissent, strongly indicated that he would join the majority. He was concerned that the draft suggested that *Buckley's* holding with respect to independent expenditures by individuals should be extended to corporations, an issue that the *Austin* opinion did not need to resolve.⁸⁵ Instead, his memo offered language that left open the possibility that corporate spending in elections might pose a special danger of quid pro quo corruption that could support restricting independent expenditures, an argument he made explicitly in his short concurrence.⁸⁶

Perhaps the most frustrating negotiation from Justice Marshall's perspective was with Justice Brennan, the author of the majority opin-

80. Letter from Justice Byron White to Justice Thurgood Marshall, copied to the Conference (Dec. 11, 1989), *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (Justice Thurgood Marshall Papers, *supra* note 52, Box 52, Folder 7).

81. Letter from the Chief Justice to Justice Thurgood Marshall, copied to the Conference (Dec. 11, 1989), *supra* note 80 (asking for a discussion of the line of cases stemming from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), that requires labor unions to let members opt out of the part of their dues going to political activities); Memorandum from the Chief Justice to Justice Thurgood Marshall, copied to the Conference (Dec. 12, 1989), *supra* note 80 (joining after paragraph had been added).

82. Letter from Justice Paul Stevens to Justice Thurgood Marshall, copied to the Conference (Dec. 11, 1989) *supra* note 80.

83. Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall, copied to the Conference (Dec. 11, 1989), *supra* note 80.

84. *See, e.g.*, Memorandum from bg to Justice Thurgood Marshall (Dec. 18, 1989), *supra* note 80 ("JPS's clerk assured me that his vote was secure and he is waiting for the dissent as a courtesy.") I am the author "bg".

85. Letter from Justice John Paul Stevens to Justice Thurgood Marshall (Dec. 19, 1989), *supra* note 80, Folder 1.

86. *See Austin*, 494 U.S. at 678.

ion in *MCFL* and a justice who should have been sympathetic to the concept of equality of access that *Austin* furthered, albeit silently. Marshall's *Austin* opinion was drafted to follow the reasoning in *MCFL* and to make clear why the Michigan Chamber of Commerce, with its many dues-paying for-profit corporate members, was more like a for-profit corporation than a nonprofit ideological corporation. There were intense discussions at the clerk level between the two chambers, with memos exchanged in mid-December explaining concerns that had been discussed with Justice Brennan and the responses that Justice Marshall's clerks hoped would be persuasive.⁸⁷ By December 18, Brennan had still not joined the opinion, and Brennan's clerk told the Marshall chambers that Justice Kennedy had convinced Brennan to wait to see his dissent before joining, something Brennan's clerk learned about only when preparing the join memo to circulate.⁸⁸ Thus, the draft opinion was changed slightly during these weeks as Marshall learned of some of the concerns of Brennan, Stevens, and Blackmun and worked to accommodate them.

In the end, all three joined the opinion, although with some separate opinions, shortly after Kennedy's dissent was circulated to the full Court.⁸⁹ While assisting the Justice with this opinion and others from that term, I grew to admire Marshall's political skill and ability to make pragmatic changes in opinions to preserve his majority. *Austin* was an example of this; Justice Marshall would have viewed it as irresponsible to write an opinion that boldly staked out a rationale based on equality that no one other than perhaps Justice White would have even considered joining. But, as often occurs when compromise is necessary to achieve a result, the rationale of the opinion which ultimately garnered six votes is unsatisfactory and at times incoherent.

87. See, e.g., Memorandum from Justice Marshall's clerks to Jonathan *supra* note 80. Jonathan, Justice Brennan's clerk, is Jonathan Massey. For example, Marshall changed his opinion slightly in early December to accommodate Brennan's request for a change to "state more clearly that the special elements conferred by the corporate structure provide a unique basis for State regulation that is not immediately applicable to all types of aggregations of money (wealthy individuals and groups, for example)." Memorandum from Justice William J. Brennan, Jr. to Justice Thurgood Marshall (Dec. 18, 1989), *supra* note 80, Folder 1.

88. Memorandum from bg to Justice Thurgood Marshall (Dec. 18, 1989), *supra* note 80. Nonetheless, Brennan's clerk assured his colleagues in the Marshall chambers that "WJB's vote is still solid—don't worry about that." *Id.* (quoting message that Justice Brennan's clerk sent to Justice Marshall's clerk).

89. Brennan joined January 23, but wrote Marshall a private memo explaining that he felt he had to write a separate concurrence "emphasizing my feeling that this case is controlled by *Massachusetts Citizens for Life, Inc.*" Memorandum from Justice William J. Brennan, Jr. to Justice Thurgood Marshall, (Jan. 23, 1990) *supra* note 80. Justice Stevens, who also wrote separately, joined January 31, and Justice Blackmun joined the majority formally on February 6.

To understand why this is so, it is necessary to probe the reasoning supporting the political corruption that Marshall's opinion introduced into the campaign finance jurisprudence.

Marshall's majority opinion identified a "different type of corruption" from *Buckley's* quid pro quo corruption: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁹⁰ It is interesting – and not coincidental⁹¹ – that "corrosive" and "distorting" were adjectives used several times by Judge J. Skelly Wright in his often-cited article *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*⁹² Wright's argument was unabashedly egalitarian. "Concentrated wealth . . . threatens to distort political campaigns and referenda. The voices of individual citizens are being drowned out in election campaigns."⁹³ "The corrosive influence of money blights our democratic processes."⁹⁴ The *Austin* opinion does not cite Wright and eschews the enhancement theory also rejected in *Buckley*, but the adjectives used throughout Marshall's opinion draw from Wright's article and seem best suited to describe reform efforts designed to provide equality of access to the political arena for all citizens, regardless of their wealth.

Thus, Marshall appropriated the language used to describe an egalitarian justification for campaign finance regulation, but he expressed that state interest in the acceptable corruption terminology. The corruption described in *Austin* has two related parts: it is tied to wealth amassed through the corporate form, and it is framed as a way

90. *Austin*, 494 U.S. at 660. Scholars have observed that "corruption" is a strange word to use for this situation; certainly, it is not the typical meaning of corruption. See Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMM. 127, 136 (1997).

91. See Brief for the Center for Public Interest Law as Amicus Curiae Supporting Appellee, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), 1989 WL 1126839 (citing Judge Wright's article for proposition that spending during a campaign can be constitutionally regulated to ensure that the values of self-government are maintained).

92. See generally J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609 (1982).

93. *Id.* at 609.

94. *Id.* at 645 (quoting *Buckley v. Valeo*, 519 F. 2d 821, 897 (D.C. Cir. 1975), *rev'd in part*, 424 U.S. 1 (1976)). The lower court in *Buckley* had been willing to accept an equality rationale to justify provisions of the campaign finance law. See, e.g., 519 F.2d at 841 ("By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear a variety of views.").

to protect shareholders who disagree with the political views funded by a corporation from having their investment used for political expenditures. Neither part of this corruption rationale is particularly persuasive as a concern apart from an equality-based argument that some groups with economic wealth have disproportionate political power solely by virtue of their access to money.

First, the *Austin* opinion tried to limit its conception of corruption to corporate wealth, an unsurprising move since concern about corporate involvement in candidate elections and the use of corporate funds to dominate political campaigns has historically undergirded campaign finance laws at the federal and state levels.⁹⁵ Marshall's opinion consistently linked the immense aggregations of wealth to corporate war chests facilitated by state-conferred benefits, and he also clarified that the relevant state-conferred benefits were those that encouraged the formation of corporate wealth, such as limited liability for corporate shareholders.⁹⁶ Yet this limitation is not persuasive. As Justice Scalia's stinging dissent pointed out, wealthy individuals and unincorporated groups often thrive because of state-conferred benefits like tax expenditures, government subsidies, and the like.⁹⁷ These state-conferred benefits are designed to facilitate the creation and accumulation of economic wealth just like laws providing benefits to corporations. Not all people who are eligible for such state-conferred benefits become rich; similarly, not all corporations that enjoy the benefit of the corporate form are able to amass substantial political war chests. Moreover, if the majority in *Bellotti* was right and corporate political speech should receive the same protection as other political speech, it is not clear why one sort of state-conferred benefit triggers restrictions on independent political expenditures and another does not.⁹⁸ It seems to turn on the nature of the entity benefitted, yet *Bellotti* ruled that difference is not constitutionally significant for purposes of First Amendment protection, and *Austin* cites that aspect of *Bellotti* with approval.⁹⁹

95. See, e.g., Adam Winkler, *Other People's Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004).

96. The only formal request from Justice Brennan for a change in the majority opinion was to make clear that the reasoning of the opinion could not be applied to wealthy individual and groups. Memorandum from Justice Brennan to Justice Marshall (Dec. 18, 1989) (on file with The Library of Congress).

97. See *Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

98. See Eule, *supra* note 62, at 115-16.

99. *Austin*, 494 U.S. at 657.

Second, the *Austin* corruption rationale was based on the argument that corporate expenditures from general treasury funds in candidate campaigns “have little or no correlation to the public’s support for the corporation’s political ideas.”¹⁰⁰ As Brennan wrote in his concurrence, people invest in corporations to make money, and “a shareholder might oppose the use of corporate funds drawn from the general treasury – which represents, after all, *his* money – in support of a particular political candidate.”¹⁰¹ The requirement of using a segregated fund for political expenditures operates to ensure that the money collected accurately reflects the donors’ *political* views. Thus, the Michigan law could be seen as a protection of minority shareholders who valued the return from their investment but disagreed with the corporation’s political stances. This is the crucial difference between a for-profit corporation and the kind of nonprofit ideological corporation identified in *MCFL*; those who contribute to the latter presumably do so because they share the political aspirations and purposes of those who manage the nonprofit.¹⁰² Thus, the general treasury funds of an ideological nonprofit are an accurate indicator of the views of those who provide the money.

The main weakness in the shareholder protection rationale is that it is not clear why shareholders receive special protection here, but not in other arenas of corporate activity, even corporate political activity, where there are likely to be similar agency problems. For example, corporations often lobby elected officials, and it is possible that some shareholders will not support such lobbying efforts but nonetheless still choose to retain ownership in the firm. Similarly, corporations make charitable contributions to a variety of cultural and educational institutions; it would not be surprising if some shareholders either disagreed with the need for such expenditures or with the choice of the recipients. Yet the law does not require corporations to form segregated funds for these activities. No special protection is provided, because presumably the managers and board of the company believe that the lobbying or charitable contribution serves the greater economic interest of the firm and its owners. In the same way, political contributions by corporations must be consistent with the corporation’s economic interest, or management will face questions by board members and disgruntled shareholders. Why the need for additional

100. *Id.* at 660.

101. *Id.* at 670 (Brennan, J., concurring).

102. *Fed. Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 264 (1986).

protections against principal-agent slack in only the latter circumstances? Again, Scalia's dissent is persuasive in his treatment of this argument.¹⁰³

In short, in *Austin* Marshall valiantly tried to articulate a state interest supporting the regulation of corporate expenditures in candidate elections that was somewhat consistent with the traditional quid pro quo corruption accepted by a majority of the Court. Close examination of the *Austin* corruption rationale demonstrates that it is not persuasive on its own terms, but it is coherent if understood as an argument supporting regulation to better ensure equality of participation in campaigns for all Americans, no matter what their economic resources. Marshall masked this equality principle in order to maintain his majority, but it clearly animated his decision, and it flowed naturally from his conviction that the preeminent constitutional value was equality of opportunity.

C. The Influence of *Austin* on Subsequent Campaign Finance Jurisprudence

No doubt in part because *Austin*'s corruption rationale was not entirely disguised and its commitment to egalitarian principles rested uneasily with *Buckley*'s rejection of them, Marshall's opinion did not have much influence on succeeding Supreme Court cases, although it has been cited by lower courts in their consideration of city and state election laws.¹⁰⁴ *Austin* burst back on the jurisprudential landscape when it served as one of the major precedents supporting the Court's decision to uphold the provisions of the Bipartisan Campaign Reform Act ("BCRA") that require corporations and labor unions to fund electioneering communications only through segregated accounts.¹⁰⁵ In *McConnell v. Federal Election Commission*, the Court identified the corruption rationale articulated by Marshall in *Austin* as a state interest supporting BCRA's segregated-fund requirement¹⁰⁶ It also

103. See *Austin*, 494 U.S. at 685-87.

104. Before *McConnell*, the Supreme Court cited *Austin* only six times. The most significant use of the *Austin* precedent during this time occurred in *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), where language from *Austin* was used in the argument that the special benefits accorded to corporations allowing them to amass wealth justified campaign finance regulation. *Id.* at 154. Lower courts have relied on *Austin* more frequently, citing it over 150 times, and in some cases using it as a primary authority to justify campaign finance restrictions on corporations. See, e.g., *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) (upholding ban on corporations from using general treasury funds in campaigns).

105. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 204-05 (2003).

106. *Id.* at 205.

noted that new restrictions were required because gaps in the rules applying to corporations in elections had allowed circumvention of contribution limits.¹⁰⁷ Just as he had in *Austin*, Justice Scalia took aim again at this rationale justifying restrictions on corporate speech; he also disagreed with any regulation seeking to eliminate “distortions” in the electoral realm that burdens the speech of entities with access to wealth.¹⁰⁸ “Given the premises of democracy,” he wrote in his dissent, “there is no such thing as *too much* speech.”¹⁰⁹ He did not, however, consider whether there might be too little speech by those without sufficient economic resources; nonetheless, because of his view of the liberty interest embedded in the Constitution, he is unlikely to be any more sympathetic to enhancing the speech of some than he is to restricting the speech of others.

Austin’s resurgence in *McConnell* was short-lived, because the Roberts Court had demonstrated substantially greater hostility toward campaign finance regulation than the Burger or Rehnquist Courts. In *Federal Election Commission v. Wisconsin Right to Life (“WRTL II”)*,¹¹⁰ the Court made it clear that *Austin* should not be understood broadly, but should be restricted to campaign speech by corporations. It pointedly quoted language from the concurrences in *Austin* that provided limiting language, including a passage from Brennan’s concurrence stating that *Austin* cannot be used to restrict corporate spending in issue campaigns.¹¹¹ Moreover, rather than emphasizing that the law merely channeled corporate spending into segregated accounts, as *Austin* and *McConnell* did, Roberts repeatedly described the regulation as a ban on corporate speech.¹¹² Thus, the framing of the discussion signals that the authors of the three opinions had very different perspectives on essentially the same provision. Scalia once again took the opportunity to attack *Austin* as “flawed,” and “wrongly decided,”¹¹³ and a jurisprudential outlier; time has not lessened Justice Scalia’s outrage about *Austin*.

107. *Id.* at 205.

108. *Id.* at 257-59 (Scalia, J., concurring in part and dissenting in part).

109. *Id.* at 259.

110. Fed. Election Comm’n v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).

111. *Id.* at 2673-74.

112. See Richard Briffault, *WRTL II: The Sharpest Turn in Campaign Finance’s Long and Winding Road*, 1 ALB. GOV’T L. REV. 101, 125 (2008); see also Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1092 (2008).

113. *Id.* at 2679.

The Court recently considered a provision of BCRA and struck down the “millionaire’s amendment” that increased contribution limits applied to opponents of candidates who spend more than \$350,000 of their own money in their campaigns.¹¹⁴ In disapproving the amendment, the Court explicitly justified its position by using an equality of opportunity rationale. The professed congressional objective was to “level electoral opportunities” for candidates facing wealthy, self-financing opponents.¹¹⁵ The majority’s main precedents are, not surprisingly, *Buckley* and *Bellotti*. *Austin* is mentioned only as one of many precedents requiring strict scrutiny in this context.¹¹⁶ Justice Kennedy’s dissent in *Austin* is also cited for a passage underscoring the rejection of any provision that restricts the quantity of political speech in the pursuit of egalitarian objectives.¹¹⁷ It is not difficult, reading *Davis*, to imagine Justice Marshall’s very different reaction to arguments that campaign finance reform is required to allow average people without great wealth a real opportunity to compete for an elected office. This was the point he made when he wrote separately in *Buckley* and indicated his support for the first attempt to level the electoral field by limiting the amount of a candidate’s personal wealth that could be spent in the quest for political office.

In Justice Stevens’ dissent in *Davis*, Justice Stevens relied on *Austin* as support for protection of the political system from the “undue influence of aggregations of wealth.”¹¹⁸ Most significantly, he stated clearly what scholars have said of *Austin* for years: although *Austin* and other precedents have been limited to corporate wealth, there is no principled basis to restrict the reasoning because the concern is with the malign effects on democratic institutions of concentrated wealth deployed in a political campaign.¹¹⁹ Stevens embraced equality as a legitimate goal of campaign finance regulation, noting the “clear truth” that there is no “good reason to allow disparities in wealth to be translated into disparities in political power.”¹²⁰ At long last, *Austin* has been linked to Justice Marshall’s conception of equal-

114. *Davis v. Fed. Election Comm’n*, 128 S. Ct. 2759 (2008).

115. *Id.* at 2773 (quoting brief for appellee).

116. *Id.* at 2772.

117. *Id.* at 2773.

118. *Id.* at 2781 (Stevens, J., concurring and dissenting in part).

119. *Id.* at 2781-82.

120. *Id.* at 2782 (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994)).

ity of access in the pages of the *United States Reports*, a development that the Justice would likely have welcomed.

Although it seems likely that *Austin* will fall back into disuse as a precedent, it will not be wholly forgotten, nor is it without continuing relevance. Marshall's egalitarian vision has some similarities to the approaches of Justices Breyer and Stevens in campaign finance opinions and other writings. Justice Breyer has identified encouraging participatory self-governance as a persuasive state rationale for some campaign finance regulation. Campaign finance laws can "seek to democratize the influence that money can bear upon the electoral process, broadening the base of a candidate's meaningful financial support, and encouraging greater political participation."¹²¹ Breyer has specifically diagnosed one of the problems of campaign finance as equality-based, noting the rising campaign costs coupled with "the vast disparity in ability to make a campaign contribution."¹²² Breyer's emphasis on broad participation in self-governance and his argument that government can intervene in the political process to enhance the scope and breadth of grassroots political activity are consistent with Marshall's view of a normatively attractive democratic process: a process that facilitates broad participation as it is a concrete signal that all members of society are accorded equal respect.¹²³ This notion of participatory democracy also promises to change electoral outcomes by wresting power away from the wealthy and entrenched interests and opening the process to new voices.

Justice Souter seems also to be pursuing an *Austin*-like approach to campaign finance jurisprudence, to the extent that Richard Hasen has called him the Court's "emerging egalitarian" in the area.¹²⁴ In his dissent in *WRTL II*, Souter embraced the corruption rationale of *Austin*, noting that the distortion of campaigns caused by expenditures of large wealth can serve as a compelling interest, thus supporting a requirement like that in BCRA that certain independent expenditures be made from a segregated fund.¹²⁵ Much of his dissent discussed the particular dangers posed by corporate spending and the long history of regulation of corporations with respect to their campaign activi-

121. STEPHEN BREYER, *ACTIVE LIBERTY* 47 (2005).

122. *Id.* at 43.

123. See THURGOOD MARSHALL SPEECHES, *supra* note 6.

124. Richard L. Hasen, *Justice Souter: Campaign Finance Law's Emerging Egalitarian*, 1 *ALB. GOV'T L. REV.* 169, 171 (2008).

125. 127 S. Ct. at 2696 (Souter, J., dissenting).

ties.¹²⁶ However, the problem that Souter identified—the effect of large aggregations of wealth on the integrity of our democratic institutions—is not limited to corporate war chests. Indeed, he explicitly expanded it to labor unions (also a target of regulation by BCRA, but not the Michigan law in *Austin*), acknowledging that “the value of democratic integrity justifies a realistic response when corporations and labor organizations commit the concentrated moneys in their treasuries to electioneering.”¹²⁷ Like the majority in *Austin*, Justice Souter’s dissent offered no good reason why his interest in democratic integrity would not also be implicated by the deployment of large amounts of money by wealthy individuals¹²⁸—or at least he provided no better reason than Marshall did in *Austin* seventeen years earlier.

III. COMBATING ENTRENCHED PLAYERS THAT SEEK TO SILENCE NEW VOICES

As the previously-discussed cases indicate, Justice Marshall was very aware that entrenched political players would work assiduously to maintain their influence over the status quo and to marginalize new voices and perspectives. He also understood that sophisticated political players seeking to preserve their positions and power could manipulate institutions that were designed to open the democratic system. His experience with the white primary cases had forcefully demonstrated that reality. In an article discussing how the Democratic Party in Texas structured the primaries to exclude black voters, he noted:

It is one of those little ironies of which Southern politics is full, that the primary movement which was motivated, at least in part, by democratic motives and a desire for wider participation in the representative process was turned into a device for eliminating millions of Negroes from participation in government.¹²⁹

Aspects of his approach to the law of politics cases reflect his realistic appraisal of the political process and those who dominate it. In this section, I will first describe how his skepticism about the motives of those who seek to regulate the political process affected his opinions in the political process cases, perhaps most notably the majority opinion in *Tashjian v. Republican Party of Connecticut*.¹³⁰ This skepticism

126. See, e.g., 127 S. Ct. at 2689-90.

127. *Id.* at 2697.

128. See Hasen, *supra* note 124, at 186-87.

129. Thurgood Marshall, *The Rise and Collapse of the “White Democratic Primary,”* 26 J. NEGRO EDUC. 249, 250 (1957).

130. See generally, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

led Justice Marshall to support aggressive judicial intervention in both inter- and intra-party disputes, an unsurprising response given his own history of using litigation as a way to promote equality and to reform institutions. Nothing in Justice Marshall's experience with political parties or election laws would have convinced him that the courts had a different role in these cases than he believed they should play in cases designed to ensure equality of opportunity in education, housing or other arenas.

Notwithstanding his unwillingness to trust established political players to support structures that welcome new voices, Marshall understood the important role that major political parties play in our political system, most notably in providing information to voters. Given Marshall's objective to transform campaigns and elections so that they include significantly more parties and candidates, voting cues like those of partisan affiliation and party endorsement are particularly important to help voters cast their ballots competently. Again, his jurisprudence reveals his support for rules that allow the major parties to better serve their informative function.

When the state seeks to regulate political activity, First Amendment jurisprudence requires that the state articulate some significant interest to justify the regulation and that it demonstrate a close and logical connection between the justification and the method of regulation. In many political process cases, the justices have been willing to accept legislative assertions of the facts used to support the regulation without much by way of proof—rigorous or otherwise—that the assumptions are accurate. For example, in ballot access cases, claims that voters will be confused by too many candidates on the ballot or by institutions like fusion candidates are often accepted by the Court as valid without any proof of actual confusion.¹³¹ In contrast, Marshall was not willing to defer so readily to legislative pronouncements—which he understood to be made by partisan actors who may be working for their own interests rather than the public interest, particularly in structuring the system that affects their political careers.¹³² Although his opinions do not use the language of “partisan lockup” or

131. See, e.g., *Munro*, 479 U.S. at 195-96 (“To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the ‘evidence’ marshaled by a State to prove a predicate.”); see also *Garrett*, *supra* note 18, at 124-25 (making this point in the context of fusion candidacies).

132. See *Tashjian*, 479 U.S. at 224 (describing the state as “to some extent . . . one political party transiently enjoying majority power”).

“conflict of interest” that now characterizes some law and politics scholarship that shares the Justice’s skepticism,¹³³ Marshall’s jurisprudence resounds some of the same themes relating to competition in the political realm. Several of Marshall’s opinions question the quantum of evidence adduced by the state to support a particular regulation of the political process.¹³⁴ By insisting on more persuasive evidence, the Justice clearly implied that the regulators’ objective might be less public-minded than they claim.

There are several examples of Marshall’s demand for evidence. In his dissent in *Richardson*, he discounted California’s assertion that ex-felon disenfranchisement is required to prevent voting fraud, noting that “there has been no showing that ex-felons generally are more likely to abuse the ballot than the remainder of the population.”¹³⁵ Also, in sharp contrast to the majority opinion, Marshall’s dissent in *Munro* relied on empirical arguments that the less restrictive ballot access regulation in place before 1977 did not result in ballot overcrowding or voter confusion.¹³⁶ Moreover, he noted that the evidence clearly showed that the limitation enacted in 1977 “acts as an almost total bar to minor-party access to statewide general election ballots.”¹³⁷ A footnote in *Tashjian* hinted that the difficulty in showing any evidence of party raiding that is often a rationale for ballot access restrictions might “attenuate[] the asserted state interest in preventing the practice.”¹³⁸ Marshall’s majority opinion in *Eu v. San Francisco County Democratic Central Committee*,¹³⁹ striking down a ban on party endorsements of candidates during primaries, repeatedly pointed out that the asserted state interests were not sustained by any evidence of voter confusion or undue influence by political parties.¹⁴⁰ He noted that the support of a legislator for the ban might have been motivated by “her understanding of the public good *or her interest in*

133. See, e.g., Issacharoff & Pildes, *supra* note 12; Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (1997); see also Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 788-91 (2000) (describing the political markets paradigm).

134. *Id.*

135. *Ramirez*, 418 U.S. at 79.

136. *Munro*, 479 U.S. at 203.

137. *Id.* at 206.

138. *Tashjian*, 479 U.S. at 219 n.9.

139. 489 U.S. 214 (1989).

140. *Id.* at 228-29, 232-33.

reelection.”¹⁴¹ Whether the court can competently assess empirical arguments can be debated,¹⁴² but Marshall’s repeated insistence on better evidence was one way he sought to unmask the state’s true anti-competitive objectives in some regulatory schemes.

Marshall’s majority opinion in *Tashjian* is informed by his unwillingness to accept at face value the benign motives that the state legislature articulated. Connecticut required that only registered members of a political party be allowed to participate in the party’s primary.¹⁴³ The Republican Party adopted a rule that allowed independent voters also to vote in its primary; the Party hoped that the addition of independent voters, an increasingly important part of the electorate in the state, would increase the chance that the Republican nominee would appeal to those voters in the general election.¹⁴⁴ Republicans, a minority in the legislature, proposed to amend the laws regulating primaries to allow independents to vote in party primaries when allowed by party rules; the bill was defeated in a party-line vote.¹⁴⁵ Justice Marshall’s opinion ruled that the legal restriction on who could participate in party primaries unconstitutionally burdened the members’ right of political association.¹⁴⁶ Although such a holding could have been supported by a view of political parties as largely private organizations that should be free of state interference,¹⁴⁷ Justice Marshall’s experience with the white primary cases and with politics generally led him to reject this characterization of parties and primaries. In another case, he observed: “The State is intertwined in the [primary election] process at every step, not only authorizing the primary but conducting it, and adopting its result for use in the general election. In these circumstances, the primary must be regarded as an integral part of the general election.”¹⁴⁸

141. *Id.* at 225 n.15 (emphasis added).

142. See Garrett, *supra* note 18, at 136 (I have been skeptical of the judicial capacity to make these determinations); see also Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO ST. L.J. 849 (2007) (arguing that using evidence to determine the effectiveness and necessity of campaign finance laws is often speculative and subjective).

143. See generally *Tashjian*, 479 U.S. 208.

144. *Id.*

145. *Id.*

146. *Id.*

147. Some analyses of the majority in *Tashjian* have viewed it in this light. See Lowenstein, *supra* note 10, at 1751 (concluding that “in *Tashjian* the party was treated as a bearer of First Amendment rights and therefore presumably private rather than public”).

148. *O’Brien v. Brown*, 409 U.S. 1, 13 (1972) (application for stay granted) (Marshall, J., dissenting); see also Marshall, *supra* note 130, at 249 (indicating that he disagreed with the notion

Instead of viewing political parties as essentially private groups, Marshall looked to see if those with power in the political system were impermissibly manipulating rules and institutions to maintain their power to the exclusion of new voices and perspectives. In *Tashjian*, the partisans in the state legislature—the Democrats in the majority—were seeking to retain rules that they hoped would allow them to continue to dominate the Republican Party in elections. Republicans’ best chance of wresting power in the state lay in appealing to the significant block of independent voters, and the Party was more likely to do that with a candidate selected with some input by independents in the primary election.

Of course, one problem with these cases is that political parties are complicated; each major party encompasses numerous interests that it seeks to reconcile into an effective governance organization. Consider the complexities of the situation in *Tashjian*. Although Marshall was concerned that those in the Republican Party who wished to shape the party to be more inclusive of independents—and thus more centrist in its platform—had been silenced by the competing major party, Justice Scalia saw a different sort of silencing. He worried that the party elite, eager to seize the reins of power at any ideological cost, were squelching the voices of party activists who might value policy purity over electoral success.¹⁴⁹ Given the complexities of parties with their many diverse interests, and the possibility that the political process may allow interests that lose today’s battle to win tomorrow, I have contended in other work that courts should be hesitant to intervene in political party cases.¹⁵⁰ Similarly, Lowenstein argues against intervention in intraparty cases and even in many interparty cases, including *Tashjian*.¹⁵¹

Marshall, however, advocated for judicial intervention when necessary to combat the self-interest of established political players. He supported judicial involvement to protect new voices in cases of regulations burdening minor parties, in interparty disputes like *Tashjian*, and also in intraparty disputes where members of the party-in-govern-

that the political party is a “voluntary association of citizens” because of its public role in elections).

149. 479 U.S. at 236 (Scalia, J., dissenting); see also Garrett, *supra* note 18, at 119.

150. See Garrett, *supra* note 18, at 143-52 (also identifying factors that would overcome judicial restraint).

151. See Lowenstein, *supra* note 10, at 1789.

ment disagreed with members of the party-organization¹⁵² (as in *Eu*). In his dissent in *O'Brien v. Brown*,¹⁵³ he took issue with the majority's decision to stay out of an internal party squabble about which delegates to seat at the 1972 Democratic convention. Characterizing the party as a "voluntary association[] of individuals," the Court had determined that the convention was the appropriate forum to determine intraparty disputes about credentialing delegates. Although it did not rule out subsequent intervention, the majority understood that its decision "may well preclude any judicial review of the final action of the Democratic National Convention on the recommendation of its Credentials Committee."¹⁵⁴

In contrast, Marshall would have allowed the case to go forward because the allegations implicated the rights of the voters who elected the delegates to "full participation in the electoral process as guaranteed by the United States Constitution."¹⁵⁵ He was not hesitant about judicial intervention even in this very internal matter of a political party due to the importance of the convention, as well as the primaries that selected the convention delegates, to the election of the president. He advocated for a quick resolution of the controversy because delay was untenable. Unless the Court ruled quickly, it would be faced with halting the convention before a nominee was selected to review the credentialing decision or, if it found a constitutional infirmity in the selection process after the nominee had been determined, requiring that the convention be held again. He rejected the notion that the case would become moot through the passage of time because of the important interest at stake: "the right to *participate* in the machinery to elect the President of the United States."¹⁵⁶

Although he was comfortable with aggressive judicial intervention in the affairs of political parties and he saw them more as public than private institutions, Marshall was not hostile toward the major parties, and he did not support regulation that would substantially weaken them. Rather, he understood that they played an important role in shaping the political process. Indeed, because he acknowl-

152. These designations of the aspects of a political party are taken from Key's classic study of political parties that identified three elements of a political party: party-in-the-electorate, party-organization, and party-in-government. V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 163-64 (5th ed. 1964).

153. 409 U.S. 1 (1972).

154. *Id.* at 5.

155. *Id.* at 6-7 (Marshall, J., dissenting).

156. *Id.* at 10.

edged the public benefits that parties provide, he was adamant that there should be an equal opportunity for all citizens to participate in these democratic institutions. His dissent in *Renne v. Geary*,¹⁵⁷ which dealt with party endorsements in nonpartisan elections, includes a sophisticated discussion of the importance of political party voting cues.¹⁵⁸ He rejected the state's argument that partisan endorsements in nonpartisan campaigns would allow parties to exert disproportionate influence over outcomes in such races. He noted that parties were inevitably influential in our system, even in nonpartisan races, because "voters look to others, including parties, for information relevant to exercise of the franchise."¹⁵⁹ As long as the state chooses to use elections to select officials (rather than appointing them), it cannot then enforce an environment of "state-imposed voter ignorance." He concluded, "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process – voters, candidates, and parties – the First Amendment rights that attach to their roles."¹⁶⁰

Marshall's dissent in *Renne* is also interesting because the state had relied on his opinion in *Austin* to equate political parties with corporations and argued that party involvement in nonpartisan elections resulted in corruption of the political process. Marshall strongly rejected that reading of *Austin*. Unlike corporations, which build their resources as people make economic decisions to invest, political parties accumulate political capital through voter support that the parties then expend through their endorsements.¹⁶¹ "In sum . . .," Marshall wrote, "the prospect that voters might be persuaded by party endorsements is not a *corruption* of the democratic political process; it *is* the democratic political process."¹⁶² This passage demonstrates that while Marshall supported a more robust political system with stronger minor parties and more candidates in each election, he also understood the vital role major parties play in structuring elections and government and providing informational shortcuts to voters.

Renne was not a difficult case in Marshall's view because it was controlled by *Eu v. San Francisco Democratic Central Committee*, a

157. 501 U.S. 312 (1991).

158. See Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011 (2003) (describing the literature in law and politics about voting cues).

159. *Renne*, 501 U.S. at 349 (Marshall, J., dissenting).

160. *Id.*

161. *Id.* at 348-49.

162. *Id.* at 349.

unanimous decision by the Court penned by Marshall.¹⁶³ The California law at issue in *Eu* prohibited parties from endorsing candidates in primary elections, and some county committees of both major parties and some organizations of minor parties attacked this regulation as unconstitutional. Marshall claimed he saw this as censorship of the party that hindered its ability to spread its message, but this cannot be his main reason for opposing the law. This line of argument in *Eu* cannot be reconciled with his willingness to limit speech in the campaign finance cases in order to improve the overall political discussion and debate. Although he did not cite those campaign finance cases for this proposition, he warned that “a State’s claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.”¹⁶⁴ This sentiment is not consistent with his view that campaign finance laws could restrict the money that well-heeled corporations, groups and individuals spend in political campaigns when that spending distorts the dialogue to reduce the influence of ordinary voters. Moreover, if protecting the political party was the main impetus of the Court’s decision in *Eu*, it is not clear that striking down the law is the response the leaders of the parties or even a majority of party members would want. *Eu* is the quintessential intraparty dispute where some active in the parties, including those in the legislative branches, supported the endorsement ban while others in some party committees sought the ability to endorse candidates in the primary.¹⁶⁵

Instead, the primary reason that Marshall disapproved of the ban on party endorsements is that he believed this information is crucial for voters to cast informed ballots. Although Marshall thought that broad participation in democracy is important to demonstrate that all citizens are worthy of equal respect, he was also intensely pragmatic. Only if voters know what they are doing on Election Day can their votes result in policy change that a majority prefers. He was aware that voters do not develop encyclopedic knowledge about each of their electoral choices, but that they rely on shortcuts like party affiliation and endorsements by trusted sources of information. Thus, in *Eu*, Marshall indicted the endorsement ban as “hamstring[ing] voters

163. *Id.* at 347 (stating “In my view, this case is directly controlled by *Eu*.”).

164. *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 228 (1989) (quoting *Tashjian*, 479 U.S. at 221, which in turn is quoting *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983)).

165. *See* Lowenstein, *supra* note 10, at 1783-85.

seeking to inform themselves about the candidates and the campaign issues.”¹⁶⁶ He was especially concerned because of evidence that other groups had been appropriating the party label in order to mislead voters who sought to rely on this generally credible voting cue.¹⁶⁷ He understood that major parties worked to develop meaningful political capital that could then provide voters credible and accurate information.¹⁶⁸

It is not sufficient that a candidate in the general election would carry the party’s affiliation on the ballot; trustworthy information that can serve as the basis for a voting cue is important in primary elections which Marshall consistently characterized as vital parts of the electoral process. If democratic institutions are properly designed and open to broad participation by many citizens, then the integrity of political parties and voting cues must be protected to ensure that they can vote in ways that influence policy in directions they support.

IV. CONCLUSION

Thurgood Marshall’s life—as a litigator and a jurist—is a testament to his commitment to the words engraved above the entrance to the Supreme Court building: Equal Justice Under Law. His jurisprudence relating to law and politics—elections, campaigns, and political parties—provides his vision of a well-functioning democracy where all citizens have the equal opportunity to participate, and change occurs in a somewhat orderly, but also somewhat chaotic, process through political institutions, overseen by an active independent judiciary. Regulation of the political process is necessary, he believed, to ensure that the voices of all Americans, even those without substantial economic resources, are heard by our elected officials and can play a role in influencing policy change. Although the country has fallen short of Justice Marshall’s aspirations in this realm, as we have in other realms where he worked toward equality of opportunity, the arguments he made in these cases can continue to guide us as we work to design democratic institutions that allow opportunities for the full diversity of America’s voices to be heard.

166. *Eu*, 489 U.S. at 223.

167. *Id.* at 228-29, 228 n.18.

168. *See Renne*, 501 U.S. at 349; *Eu*, 489 U.S. at 227-28.

ESSAY

The Meritocratic Egalitarianism of Thurgood Marshall

MARK TUSHNET*

I. INTRODUCTION

One of the Enlightenment's greatest legacies was the slogan, "Careers open to talent."¹ The slogan captured the idea of meritocracy—that important social positions should be awarded not on the basis of ascriptive characteristics, such as ancestry or inherited wealth, but only on the basis of demonstrated ability. Meritocracy is sometimes thought to be incompatible with equality because meritocracy implies hierarchy: some people are simply more able than others at specified tasks, and they will properly be placed higher up in the social order than the less able, sometimes because greater social rewards are thought necessary to motivate them to use their talents, and sometimes because they are thought to deserve those rewards.²

Thurgood Marshall rejected the assumed association of meritocracy and inequality.³ He was, I will argue in this Essay, a mer-

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1. See JOHN RAWLS, *A THEORY OF JUSTICE* 66 (1971) (referring to "the traditional phrase, careers . . . open to talents").

2. The classic account of the inconsistency between meritocracy and equality is MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY, 1870-2033: AN ESSAY ON EDUCATION AND EQUALITY* (Penguin Books 1961) (1958). Young coined the term and used it in a critical way.

3. Anyone who writes about Marshall's jurisprudence as revealed in his opinions must deal with the fact that much of the detail in those opinions came from his law clerks. Yet, clerks were told to ensure that what they wrote was consistent with Marshall's prior opinions, and he directed the clerks to include specific points that were particularly important to him. That process yielded something that I think can fairly be called a personal jurisprudence that can be extracted from the opinions. But, of course, Marshall was a judge, not a philosopher in the formal sense, and it is not surprising that neither he nor his opinions work out in detail how to reconcile

itocratic egalitarian.⁴ The reasons for his commitments were several. He was sensitive to the wide range of talents people actually had: a person who was good at one thing might not be as good as another person at another equally valuable thing, and if so, neither should be in a superior position to the other. He was also skeptical about claims that talents in any field were distributed in a steep pyramid, with many less talented at the base and only a few highly talented at the top. For him, there was a meritocratic pyramid, but it was flat rather than steep. All but the very best at most things were only slightly better and only somewhat less numerous than those who had ordinary ability in the field. The “better” were certainly not numerous enough to justify large differences in social rewards based on what Marshall believed to be relatively small differences in ability.

But—and this is an important qualification—Marshall was also extremely sensitive to the range of bad reasons people gave for perpetuating hierarchies ordered by ascriptive characteristics—race most obviously, but also gender, class, and disability.⁵ A real meritocracy required the elimination of all those bad reasons so that careers, broadly defined, really would be open to talent. Governments could not use ascriptive characteristics to perpetuate hierarchies that interfered with the prospect of a person pursuing a career suitable to his or her talents. And, conversely, policies aimed at eliminating the use of ascriptive characteristics to perpetuate such hierarchies—what has come to be known as affirmative action—were entirely proper.

Finally, as to race in particular, Marshall early on believed that the metaphor President Lyndon Johnson used in his famous Howard University Commencement Address was accurate. The goal was a world full of meritocratic hierarchies, each relatively flat and none towering over any other. As Johnson put it,

You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has

meritocracy and equality. Rather, the opinions provide the basis for seeing meritocratic egalitarianism as a critical account of contemporary society.

4. I emphasize at the outset that I am offering a revisionist interpretation of Marshall's equality jurisprudence. I think the more conventional view is that he was a simple egalitarian, willing to admit some departures from equality only if they were well-justified by important social interests. As this Essay suggests, I believe that the conventional view has difficulty dealing with at least some aspects of Marshall's thought.

5. I believe, though without much evidence to support that belief, that Marshall was less concerned about the impact of past gender discrimination on the present status of women, perhaps because he believed that ongoing discrimination was enough to account for that status.

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been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.⁶

Interferences with meritocracy in the past continued to obstruct the achievement of an egalitarian meritocracy today because, as economists might say, those interferences denied people the opportunity to develop the human capital needed for each person to reach the place on the meritocratic pyramid appropriate to her or his talents.⁷

The meritocratic component of Marshall’s egalitarianism matters because it helps explain why some of Marshall’s statements—particularly as an advocate before he joined the Supreme Court—can fairly be read as simply rejecting any use of ascriptive characteristics, including race, in awarding social benefits.⁸ Throughout the *Brown v. Board of Education of Topeka*⁹ arguments, Marshall and his colleagues insisted that what they sought to eliminate was the use in student assignments of race as an ascriptive characteristic.¹⁰ Marshall articulated his meritocratic commitment in the oral argument on the remedial issue in *Brown*.¹¹ Responding to assertions by his segregationist adversaries that placing black and white children in the same classrooms would inevitably lower the quality of instruction, Marshall said, “They give tests to grade children so what do we think is the solution? Simple. Put the dumb colored children in with the dumb white children, and put the smart colored children with the smart white children. . . .”¹² Real meritocracy, though, was what mattered, not some simulacrum that rested either on a history of discrimination or on assumptions about how large were the differences among people.

6. Lyndon B. Johnson, President, Commencement Address at Howard University: To Fulfill these Rights (June 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 635, 636 (1966).

7. Among much else, the Howard University Commencement Address helps explain why Marshall always referred to Johnson as “my President,” and—at least during the 1972-73 Term during which I was a law clerk—to Richard Nixon as “your President.”

8. Because this is a fair—though not the only—reading of some of Marshall’s positions, it was well within bounds for Chief Justice Roberts to invoke the NAACP’s positions in *Brown v. Board of Education* to support his argument against any use of ascriptive characteristics in assigning children to schools in *Parents Involved in Comm’y Sch. v. Seattle Sch. Dist. No. 1*, 55 U.S. 701 (2007). To say only that, though, is to overlook the complexity of at least Marshall’s position.

9. 347 U.S. 483 (1954).

10. Marshall offered as a vivid example of a plainly unconstitutional statute one that said “that because a person who is as white as snow with blue eyes and blond hair has to be set aside.” MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 at 176 (1994).

11. *Id.* at 225.

12. *Id.* (internal quotations omitted).

Taken as a whole, Marshall's meritocratic egalitarianism was strongly critical both of the distribution of social benefits and harms in the United States, which did not conform to meritocratic principles, and of the widespread ideas about meritocracy, which placed too much weight on differences that a real meritocrat would regard as minor. Asked at a news conference held after his retirement had been announced how he would like to be remembered, Marshall answered, "That he did what he could with what he had."¹³ That was what he thought everyone should be able to say. "What he could" is an indication of Marshall's meritocratic commitments; "what he had" expresses Marshall's appreciation of the diversity of talents that meritocracy must reward.

The remainder of this Essay examines several of Justice Marshall's separate opinions—dissents and concurrences—to tease out of them indications of Marshall's meritocratic egalitarianism. After discussing what are conventionally called cases involving classifications, the use of which is "suspect," I turn to cases dealing with what are conventionally called fundamental interests. I conclude the analysis of Marshall's opinions by suggesting how the structure of Marshall's overall equality jurisprudence—the "sliding scale" approach to the Equal Protection Clause—is compatible with meritocratic egalitarianism. I then examine why Marshall's position on affirmative action is consistent with meritocratic egalitarianism even though affirmative action programs use ascriptive characteristics as the basis for awarding social benefits. In the Essay's conclusion I speculate on the sources of Marshall's meritocratic egalitarianism, and suggest that we would profit from retrieving it.

II. MERITOCRATIC EGALITARIANISM IN MARSHALL'S OPINIONS

Marshall's most extensive treatment of discrimination on the basis of gender came in *Rostker v. Goldberg*,¹⁴ in which the Court rejected constitutional challenges to a statute imposing only on men the obligation to register for the military draft. The Court's rationale was that the primary reason for a draft was to satisfy the military's need to fill combat positions, and that women were disqualified by statute

13. MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991 (1997) (internal quotations omitted).

14. 453 U.S. 57 (1981).

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from doing so.¹⁵ Marshall objected to this “categorical” exclusion of women “from a fundamental civic obligation.”¹⁶ The statute’s background is significant: President Carter proposed to reinstate draft registration, and officials from the Department of Defense, both civilian and military, supported a gender-neutral draft registration system.¹⁷ Congress objected, though, and substituted the male-only system.¹⁸ Relying heavily on statements by executive branch officials, Marshall provided an extensive discussion of whether there was a “military need to draft women.”¹⁹ In the course of that discussion, he referred to statements in which “military experts acknowledged that female conscripts can perform as well as male conscripts in certain positions, and that there is therefore no reason why one group should be totally excluded from registration and a draft.”²⁰ The phrase “perform as well” is what a meritocrat would say: performance, not ascriptive characteristics, should be the basis for awarding social benefits and imposing civic obligations.

The Court came to acknowledge that statutes discriminating on the basis of gender required significantly heightened scrutiny.²¹ This is not so for other bases for classification, such as age and disability.²² I discuss Marshall’s general rejection of the Court’s two- or three-tier approach to equal protection laws below, but take up here two areas in which the Court purported to apply its lowest level of review, again to bring out the ways in which Marshall’s position reflected meritocratic egalitarianism.

After a significant internal debate about the standard of review,²³ the Court upheld against constitutional challenge a Massachusetts statute requiring that state police troopers retire at the age of fifty.²⁴ It accepted the state’s justification that the physical abilities of people decline with age.²⁵ Thus, the Court could presume that after age fifty

15. *Id.* at 76-77.

16. *Id.* at 86 (Marshall, J., dissenting).

17. *Id.* at 60.

18. *Id.* at 61.

19. *Id.* 102-03 (Marshall, J., dissenting).

20. *Id.*

21. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996) (requiring that gender-based discrimination have an “exceedingly persuasive justification”).

22. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319 (1993) (holding that distinctions based on mental retardation must satisfy only the rational-basis test); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (holding that distinctions based on age must satisfy only the rational-basis test).

23. *See TUSHNET, supra* note 13, at 108-11.

24. *Mass. Bd. of Ret.*, 427 U.S. at 308, 317.

25. *Id.* at 315.

a trooper's physical abilities were inadequate, and that the state did not have to give individuals an opportunity to demonstrate that their physical abilities were unimpaired (or at least no less impaired than those of some younger troopers who were not forced into retirement). For Marshall, the statute should have been held unconstitutional. His description of the statute signals his commitment to meritocratic egalitarianism: the statute "tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession. . . ."26 In context, merit here consisted of physical ability. And, as Marshall pointed out, the state required annual physical examinations of all troopers older than forty:

Thus, the only members of the state police still on the force at age 50 are those who have been determined repeatedly by the Commonwealth to be physically fit for the job. Yet all of these physically fit officers are automatically terminated at age 50. . . . [T]he Commonwealth is in the position of already individually testing its police officers for physical fitness, conceding that such testing is adequate to determine the physical ability of an officer to continue on the job, and conceding that that ability may continue after age 50. In these circumstances, I see no reason at all for automatically terminating those officers who reach the age of 50; indeed, that action seems the height of irrationality.²⁷

For Marshall, the troopers the state forced into retirement *were* qualified for their jobs. Meritocracy required that they be allowed to continue to perform them.

These gender and age cases involved statutes that, as Marshall saw them, were simply inconsistent with meritocracy because they denied social benefits to people who were fully qualified to perform what was needed to obtain them: doing the job. The final case I discuss in this line involves discrimination against people with disabilities, which raises a somewhat different question. One might think that such cases pose the most serious challenge to meritocratic egalitarianism because the very disabilities that define the class limit its members' ability to demonstrate the "merit" that gives rise to greater social rewards. This might indeed be true with respect to some social rewards, but consider *City of Cleburne v. Cleburne Living Center*.²⁸ There, the city had denied a permit for a group-living facility for peo-

26. *Id.* at 321 (Marshall, J., dissenting).

27. *Id.* at 326-27 (Marshall, J., dissenting).

28. 473 U.S. 432 (1985).

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ple with mental disabilities.²⁹ Although the denial was almost certainly motivated by hostility to or distaste for close associations with such people, the city did offer facially plausible justifications for its decision.³⁰ The best of these justifications was that the facility's location would make an emergency evacuation difficult in light of the possibility that the residents would, because of their disabilities, fail to cooperate with the evacuation effort.³¹ Justice White, writing for the Court, responded that this justification seemed weak because the city allowed group-living facilities for the elderly in the same area, and the elderly might be difficult to evacuate for precisely the same reasons.³²

Justice Marshall agreed with the result, though not with the Court's refusal to hold that statutes singling out persons with mental disabilities for discriminatory treatment should be subjected to "searching scrutiny."³³ According to Justice Marshall, "[t]he Equal Protection Clause requires attention to the capacities and needs of retarded people as individuals."³⁴ He emphasized the importance of group-living facilities for those with mental disabilities, and the history of discrimination against such people.³⁵ For present purposes, Marshall's most important statement was this: "that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist."³⁶ This suggests that Marshall believed that the classification could be used where merit matters; but where it does not, egalitarianism must prevail. Housing for persons with mental disabilities was an important social good. Criticizing Justice White for purporting to invalidate the permit denial by using traditional rational-basis scrutiny, Justice Marshall asserted—accurately—that the concerns about evacuations in emergencies would be enough to justify the denial were traditional standards to be used honestly.³⁷ However, for a meritocratic egalitarian, there was not enough difference between the risks presented by emergency evacuations to those

29. *Id.* at 436-37.

30. *Id.* at 449-50.

31. *Id.* at 449 (noting that the facility "'was located on a five hundred year flood plain'" (internal citations omitted)).

32. *Id.*

33. *Id.* at 455-56, 460 (Marshall, J., concurring in the judgment in part and dissenting in part).

34. *Id.* at 456 (Marshall, J., concurring in the judgment in part and dissenting in part).

35. *Id.* at 461-64 (Marshall, J., concurring in the judgment in part and dissenting in part).

36. *Id.* at 468 (Marshall, J., concurring in the judgment in part and dissenting in part).

37. *See id.* at 458-59 (Marshall, J., concurring in the judgment in part and dissenting in part).

with mental disabilities, the elderly, and everyone else to justify the city's action. Put another way, with respect to the risks posed by emergencies, the meritocratic pyramid was relatively flat.

The foregoing analysis of *Cleburne* implicates not only the use of statutory classifications, which centrally raises the question of the extent to which individuals' claims of merit ought to be respected, but also the allocation of a particular social good—housing. The meritocratic pyramid in *Cleburne* was relatively flat because people do not differ much with respect to whether they have the qualifications—or merit—necessary for the allocation of housing. Marshall's equal protection jurisprudence captured this aspect of meritocratic egalitarianism through its treatment of fundamental interests. I believe that his basic point was the same as in *Cleburne*: the differences among people, while real, are rarely large enough to justify significant differences in the allocation of important social goods.

Marshall first articulated his approach to fundamental interests in *Dandridge v. Williams*,³⁸ where the Court upheld a state regulation capping the amount of public assistance large families could receive, notwithstanding the state's determination that, even according to its own measures of need, the cap was lower than what such families needed. The Court ruled that the cap was a reasonable method of encouraging employment and of treating families receiving public assistance in a manner roughly equivalent to its treatment of the working poor through minimum wage laws.³⁹ Marshall saw the case differently. The discrimination he perceived was between large families receiving public assistance and small ones.⁴⁰ The social good at issue was public aid to families so that they could fulfill their material needs. For Marshall, large families and small ones were not different enough with respect to that social good to justify a fixed cap on public assistance benefits.⁴¹ Consider his treatment of the state's claim that the cap on public assistance was justified as a method of encouraging heads of families to seek employment. After a detailed and skeptical examination of the facts regarding whether the adults heading families receiving public assistance were available to work in the paid economy, Marshall observed that, whatever those facts were, they had almost no bearing on the state's regulation: "There is simply no

38. 397 U.S. 471 (1970).

39. *Id.* at 486.

40. *Id.* at 518 (Marshall, J., dissenting).

41. *Id.*

indication whatever that heads of large families, as opposed to heads of small families, are particularly prone to refuse to seek or to maintain employment.”⁴²

A similar theme can be found in Marshall’s treatment of education as a fundamental right in *San Antonio Independent School District v. Rodriguez*.⁴³ The Court rejected a challenge to the constitutionality of Texas’s system of financing public education largely through local property taxes. Marshall’s long dissent dealt with a large number of issues, and I focus only on his treatment of education as a fundamental right and the effects of property-tax financing on education. Working within the structure that previous cases had established, the dissent argued that to determine whether a right was fundamental for purposes of equal protection analysis, courts had to determine “the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.”⁴⁴ Education, Marshall argued, was obviously closely connected to the ability to exercise the franchise effectively and to engage in the kinds of civic discourse at the heart of the First Amendment: “Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes.”⁴⁵ Just as merit plays no role in allocating opportunities to speak, so should it play no role in allocating access to the basic elements of education, Marshall asserted.⁴⁶

Earlier in his dissent, Marshall addressed the issue of whether property-tax financing actually affected the quality of education that communities were able to provide, a point that the majority had put into question.⁴⁷ His paragraph containing the observation that it was “an inescapable fact” that a community with more resources available to fund education than another would have a greater range of choices available to it concluded with an open invocation of the idea of merit:

That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a

42. *Id.* at 527 (Marshall, J., dissenting).

43. 411 U.S. 1 (1973).

44. *Id.* at 102 (Marshall, J., dissenting).

45. *Id.* at 113 (Marshall, J., dissenting).

46. That is the gravamen of Marshall’s response to the majority’s criticism that his position would require access to an education of sufficient quality to ensure that everyone had “the most effective speech or the most informed electoral choice.” *See id.* at 115-16 (Marshall, J., dissenting) (arguing that his position required only that the state end a form of discrimination “that affects the quality of . . . education”).

47. *Id.* at 83-84 (Marshall, J., dissenting).

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 talents wasted for want of a broader, more enriched education?⁴⁸

The implication was clear: Public education should be available so that each child could achieve what she or he was capable of achieving. The emphasis on capacity is precisely what one would expect of a meritocrat.

III. MERITOCRATIC EGALITARIANISM AND AFFIRMATIVE ACTION

The meritocratic elements of Marshall's egalitarianism led him repeatedly to insist that individuals be given a chance to demonstrate their ability to do what society regards as necessary to obtain social goods, or that people be evaluated as individuals and not as members of groups when society limits their ability to obtain such goods. Conservatives rely on similar meritocratic ideas in their opposition to affirmative action, which, they say, denies social goods to people based on ascriptive characteristics, such as race and gender.⁴⁹ How did Marshall fit affirmative action into his meritocratic egalitarianism?

I start by insisting that the frame in which Marshall set affirmative action programs was important to him. First, he never said that such programs were constitutionally mandated.⁵⁰ They were matters for legislative choice. Second, I believe that he was fully aware of the underside of affirmative action, which, as emphasized by his successor Clarence Thomas, whites often regarded as the providing of benefits to those who were not qualified for them.⁵¹ Third, and probably most important, Marshall's capacious view of "merit" and his skepticism about claims that meritocratic pyramids were steep, led him to con-

48. *Id.* (citations omitted).

49. *See, e.g., Adarand Constructors v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

50. He understood, as some of his colleagues did not, that programs awarding social benefits to those who themselves had been discriminated against were not properly described as affirmative action programs, but were simply individual-level remedies for discrimination. In addition, one can generate the proposition that affirmative action is constitutionally required out of some of his positions, particularly on the question of whether a statute is unconstitutional solely because of its disparate racial impact. Still, he never directly asserted that affirmative action programs were constitutionally required in any setting.

51. For an indication of this view of Marshall by conservatives, see TUSHNET, *supra* note 13, at 63 (describing an article by Terry Eastland and a cover sketch on the *National Review*).

clude that the tension between meritocracy and affirmative action was weak indeed.

The best way to understand Marshall's approach to affirmative action is through his treatment of discrimination *against* African Americans, which was the pivot of all of his thinking about discrimination. For me, his most revealing opinion is his dissent in *City of Memphis v. Greene*,⁵² where the Court found no constitutional violation in a city's decision to erect a barrier to entry on to a road through a neighborhood that historically had homes owned by whites only, to prevent what one resident called "undesirable traffic."⁵³ As the majority read the record, it was the traffic itself—its volume—that was undesirable.⁵⁴ For Marshall, though, the term had a different resonance. It was not the traffic, but the drivers, who were undesirable.⁵⁵ As everyone agreed, the new traffic obstruction would force drivers from a predominantly African-American neighborhood to take a new, indirect route to their destinations in other African-American neighborhoods: the city, "acting at the behest of white property owners, ha[d] closed the main thoroughfare between an all-white enclave and a predominantly Negro area of the city."⁵⁶ Or, as Marshall put it later in the dissent, "the Negro drivers are being told in essence: 'You must take the long way around because you don't live in this *protected* white neighborhood.'"⁵⁷ Marshall interpreted the term "undesirable traffic" in light of history: "Too often in our Nation's history, statements such as these have been little more than code phrases for racial discrimination."⁵⁸ As contemporary legal theorists might put it, Marshall was concerned about the social and expressive meaning of law—how ordinary people would understand the messages legal rules sent.⁵⁹

Interpreting those messages required a sensitive appreciation of history, which Marshall found sorely lacking in the Court's treatment of affirmative action. As Marshall saw it, too many of his colleagues

52. 451 U.S. 100 (1981).

53. *Id.* at 115 (internal quotations omitted).

54. *Id.* at 116 (referring to "the 'undesirable' character of the traffic flow").

55. *Id.* at 136 (Marshall, J., dissenting) (referring to "statements such as these" as "little more than code words for racial discrimination").

56. *Id.* at 135 (Marshall, J., dissenting).

57. *Id.* at 138 (Marshall, J., dissenting).

58. *Id.* at 136 (Marshall, J., dissenting).

59. *See also id.* at 147 ("Respondents are being sent a clear, though sophisticated, message that because of their race, they are to stay out of the all-white enclave of Hein Park and should instead take the long way around in reaching their destinations to the south.").

saw affirmative action programs through a white racial lens, thereby interpreting programs aimed at overcoming both the continuing legacy of past discrimination and subtle forms of contemporary discrimination as programs that denied whites social benefits despite their qualifications. For the Court's majorities, affirmative action programs were inconsistent with meritocracy. For Marshall, in contrast, they were efforts to ensure that a true meritocracy could replace the racial hierarchies that characterized the United States in the past and today.

Although references to past discrimination pervade Marshall's opinions,⁶⁰ his most biting comment on why history matters in affirmative action cases is the first sentence of his dissent in *City of Richmond v. J.A. Croson Co.*,⁶¹ where the Court struck down the city's affirmative action program for awarding city contracts. Marshall's dissent began, "[i]t is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst,"⁶² and his introductory comments continued in the same vein.⁶³ Similarly, in the earlier case, *Regents of University of California v. Bakke*,⁶⁴ he began his separate opinion, "during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro," and again continued with a long essay on the history of racial discrimination in the United States.⁶⁵

In *J.A. Croson Co.*, the majority used "strict scrutiny" to assess Richmond's program, saying that this standard was appropriate when legislatures used racial classifications because the nation's history of racial discrimination made it essential for the courts to "smoke out"

60. Such references are an important component in his analysis of gender discrimination, for example, and a long passage in the school financing case explains that a legislature's use of a particular classification can be "suspect" if the members of the affected group have been subjected to reasonably widespread discrimination in the past. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105, 107 (1973) (Marshall, J., dissenting) ("[L]ines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. . . . Discrimination on the basis of past criminality and on the basis of sex posed for the Court the specter of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences.").

61. 488 U.S. 469 (1989).

62. *Id.* at 528 (Marshall, J., dissenting).

63. See *id.* at 529 (Marshall, J., dissenting) ("As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination.").

64. 438 U.S. 265 (1978).

65. *Id.* at 387-95 (1978) (Marshall, J., concurring in part and dissenting in part) (discussing the history of racial discrimination).

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invidious uses of racial classifications for the very purpose of imposing disadvantages on a disfavored racial group.⁶⁶ Marshall thought that this view was completely backwards in affirmative action cases. The record showed that prior to adopting its affirmative action program, Richmond awarded minority-owned businesses only 0.67% of the city's prime construction contracts.⁶⁷ To Marshall this suggested that the city continued to engage in or at least reinforce impermissible racial discrimination.⁶⁸ But the word "suggests," as used by Marshall, is the right one. He did not think that the record showed unconstitutional discrimination, or that it needed to. In light of history, a suspicion of on-going discrimination was sufficient to overcome constitutional objections to affirmative action programs.

Marshall formulated his position by referring to the permissibility of affirmative action as a means of "eradicating the effects of past racial discrimination" and of "preventing the city's own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination."⁶⁹ This was precisely President Lyndon Johnson's point in his Howard Commencement Address: past discrimination had continuing effects.⁷⁰ Consider, for example, the construction contracts at issue in *J.A. Croson*. Past discrimination meant that minority-owned businesses, as a class, had smaller and fewer opportunities to build up the human and reputational capital needed to compete head-to-head with businesses that had benefited from discrimination.

Past discrimination increased the cost estimates minority-owned businesses had to make when submitting bids. Consider the problem of a lack of reputational capital. When a minority-owned business approached banks for loans to be used during construction projects, lending officers would ask, "What other projects have you worked on?" Receiving the answer, "None," or "Only a few," the officers would say, "Well, we don't know how reliable you are, so you'll have to pay a higher interest rate for the loan than someone who had successfully completed many more projects." Justice O'Connor's opinion

66. 488 U.S. at 493 ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . .").

67. *Id.* at 479-80.

68. *See id.* at 549-50 (Marshall, J., dissenting) ("The virtual absence of minority businesses from the city's contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars, strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity.").

69. *Id.* at 536-37 (Marshall, J., dissenting).

70. *See supra* note 6 and accompanying text.

for the majority suggested that the city had alternative methods of addressing the fact that relatively few contracts went to minority-owned businesses.⁷¹ It could, for example, use a race-neutral program of providing subsidies to undercapitalized small businesses.⁷² Yet, such a response was overbroad as a response to the problem of undercapitalization *caused by* racial discrimination, and it might not have even been possible as an administrative matter where the problems arose from deficiencies in reputational capital.

Marshall's emphasis on history, like President Johnson's, was in the service of real meritocracy. Perhaps at the moment construction contracts were awarded, a minority-owned firm could only put in a bid to perform the job at a higher cost than some majority-owned firm. That did not mean that the minority-owned firm would do a worse job in carrying out the contract—which, on at least one understanding, was what “merit” means in paving streets and erecting buildings. Nor did it mean that the minority-owned firm would *always* have higher costs—which might be a component of “merit” understood in a different way—because the very experience it would accumulate performing the contract, the human and reputational capital it would acquire, would enable it to submit lower bids in the future.

Affirmative action in education raised another issue, which has become known as the “diversity” rationale for affirmative action. Initially proposed by Justice Lewis Powell in *Regents of the University of California v. Bakke*,⁷³ and eventually accepted by a majority in *Grutter v. Bollinger*,⁷⁴ the diversity rationale focuses on the educational benefits of having a wide range of talents represented in university classes. I believe that Marshall accepted the diversity rationale in this form, if only because it was the best he could get from enough of his colleagues while he was on the Court. But “diversity” really meant something else—either different or in addition—to Marshall. The debate over affirmative action proceeded as if something wrong occurred, something that needed special justification, if a black person with lower test scores and grades was admitted to a university when a white person with higher scores and grades was rejected. Marshall thought that position ridiculous, because numerical indicators such as scores on admissions tests did no more than identify *one* form of merit

71. *J.A. Croson*, 488 U.S. at 509-10.

72. *Id.* at 507.

73. 438 U.S. 265 (1978).

74. 539 U.S. 306 (2003).

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relevant to higher education. I believe that what mattered to him was the fact that the beneficiaries of affirmative action were qualified, in the sense that they met whatever minimum standards universities set for admission. People would differ substantially above that threshold, but each could be excellent in her or his own way. Race-based affirmative action programs were not so inconsistent with meritocracy properly understood as to require special justification, and they were consistent with equality in light of the nation's history of invidious discrimination against African Americans.

IV. A NOTE ON THE SLIDING-SCALE APPROACH AND MERITOCRATIC EGALITARIANISM

I have proceeded piecemeal, attempting to show the points in numerous opinions that can be read as indicating Marshall's meritocratic egalitarianism. Marshall assembled all of the pieces into his celebrated "sliding scale" approach to equal protection law. Marshall offered several slightly different formulations of this approach,⁷⁵ but they all insisted that the evaluation of statutes challenged as discriminatory should make realistic judgments about the nature of the classifications employed. Such judgments would include attention to the extent to which the classification had historically been used without much reason to impose social disadvantages on a group; the importance of the social interests promoted by using the classification rather than some other, perhaps more individual-level technique; and the extent to which those interests would be impaired were the government required to use some other technique.

The sliding-scale approach was not inherently egalitarian, but it was in relation to the alternative to which the Court was committed while Marshall was a member. That alternative was what Marshall referred to as a "rigid two-tier model . . . of the equal protection test."⁷⁶ The two-tier model purported to restrict the number of cases in which inequalities would be subjected to close examination.⁷⁷ Mar-

75. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) ("[T]he constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."); *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting) ("[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.").

76. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

77. For a while it seemed as if the Court had moved in Marshall's direction by adopting what came to be called intermediate scrutiny for classifications based on gender, opening up the

shall argued forcefully and correctly that the two-tier model failed to describe what the Court actually did, and that the Court's behavior was a better guide to proper interpretation of the Equal Protection Clause than were its words.⁷⁸ More skeptical than most of his colleagues of statutes that distributed social benefits and imposed social harms differentially, Marshall was an egalitarian.

A similar, though I concede somewhat weaker, argument can be made for the view that the sliding-scale approach was meritocratic. Here what matters is the fact that the sliding-scale approach diminished the importance of labeling some interests as fundamental and others as not, while treating some interests as more important than others. People have varied capacities to pursue specific interests and, perhaps more important, different desires regarding the importance of pursuing one or another interest. Ranking interests rather than slotting them into two categories recognizes these facts, and allows the courts to invalidate statutes that interfere with a person's ability to achieve what she or he wants to achieve in connection with a specific interest.

CONCLUSION

I can only speculate on the reasons for Marshall's commitment to meritocratic egalitarianism—other than the merits of the position, of course. For myself, I would attribute the commitment to a combination of psychological and biographical elements. Marshall had a truly generous spirit, one which was open to the fact that people differed and amusedly tolerant of their foibles and peculiarities. Like all of us, he had his moments of dyspepsia and grumpiness, but they passed and were not part of his deepest self. So, for example, he occasionally expressed (mild) criticisms of Martin Luther King, Jr., as a leader of the black community.⁷⁹ A story Marshall told reflects his real views. As I recall it, the story dealt with a cab ride Marshall took on either the day when or after the Supreme Court announced its decision in

possibility of a three-tier structure. *United States v. Virginia*, 518 U.S. 515, (1996), narrowed the difference between intermediate and strict scrutiny for gender-based classifications by requiring that such classifications be supported by an "exceedingly persuasive justification," which does not seem much different from the requirement that race-based classifications be supported by a "compelling state interest."

78. For perhaps the clearest expression of Marshall's judgment on this matter, see *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 456-60 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

79. In my view people have made too much of those criticisms.

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the Little Rock school desegregation case.⁸⁰ The African-American cab driver, Marshall said in an arch and amused tone, turned to him and said, “Did you see what Martin Luther King did for us today [or yesterday]?” Marshall’s generosity of spirit helped him see excellences—merit—in nearly everyone.

His experiences had the same effect. As a leading figure in Harlem social circles, Marshall entertained and was entertained by artists, writers, and musicians of every sort, which made him sensitive to the diversity of talents and the existence of many meritocracies. Traveling through the South to organize litigation and speak on behalf of the NAACP, Marshall met people whose names would never have made the national news, unless they were, like Harry Moore of Florida, killed because of their activism.⁸¹ He knew that they, too, were fully capable of succeeding in a real meritocracy, that their successes were not in principle different from those of more celebrated people (which I have tried to capture in the metaphor of a relatively flat pyramid), *and* that many of them were happy to have the opportunity to succeed within their communities. The plurality of meritocratic pyramids and their flatness made Marshall an egalitarian meritocrat.

I have been told this story about Marshall’s nomination to the Supreme Court: The morning after President Lyndon Johnson announced Marshall’s nomination, Johnson was at the breakfast table and observed to his wife that all over the country that morning, Negro mothers were serving their children breakfast and thinking to themselves, “Hmmm, could be”⁸² It is one of the most moving stories about Marshall—and Johnson—of which I know. And yet, a decade later Marshall spoke at the installation of his friend Wiley Branton as the dean of Howard University School of Law, and made comments that put Johnson’s observation in a different light. He quoted people who told him, “You ought to go around the country and show yourself to Negroes; and give them inspiration.”⁸³ Marshall said his response was, “For what? These Negro kids are not fools. They know to tell

80. *Cooper v. Aaron*, 358 U.S. 1 (1958).

81. See BEN GREEN, *BEFORE HIS TIME: THE UNTOLD STORY OF HARRY T. MOORE, AMERICA’S FIRST CIVIL RIGHTS MARTYR* (1999).

82. As told to me, the story was more gestural than verbal, but I believe that my account captures its essence.

83. Thurgood Marshall, *The Fulcrum of Pressure*, Address Before Howard University School of Law (Nov. 18, 1978), in *SUPREME JUSTICE: SPEECHES AND WRITINGS: THURGOOD MARSHALL* 253, 255 (J. Clay Smith, Jr. ed., 2003) (internal quotations omitted).

them there is a possibility that someday you'll have a chance to be the o-n-l-y Negro on the Supreme Court, those odds aren't too good."⁸⁴

These stories are about the vision of meritocratic equality that Johnson shared with Marshall—a critical vision that the nation may have perceived only dimly over the past generation or so, but that may be in the process of becoming clear once again.

84. *Id.* (internal quotations omitted).

COMMENT

Islamic Home Financing in the United States: Solution or Deception?

OMAR A. HASHMI*

Homeownership in the United States is a central part of the American dream, a sign of accomplishment and success. However, due to the high cost of housing, not all Americans can realize the dream of homeownership. To facilitate homeownership, the western banking system lends money to those who wish to purchase a home, generating revenue by requiring repayment of the principal with interest, and as a precautionary measure obtaining collateral against the loan. The primary concern of the bank is to earn a profit from the interest and not from reclaiming collateral. For many conservative Muslims this credit arrangement creates a dilemma because under certain interpretations of the Qur'an they believe that Islam prohibits collecting and paying interest on money-based loans.

The Muslim home purchasers who adhere to the principles of their faith want to comply with Islamic law, or *shari'ah*, which prohibits the payment or collection of *riba*, commonly interpreted as usury and, by most Muslim jurists as simple interest. The *shari'ah* also prohibits *gharar*, generally interpreted as uncertainty or risk. In response to these prohibitions, and to help Muslim consumers circumvent the use of interest, financial institutions developed several methods for carrying out interest-free home financing transactions under the name

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of Islamic finance. These Islamic Financial institutions purport to provide financial products and services in accordance with the *shari'ah*¹ by gaining approval from a *shari'ah* advisory board.

A *shari'ah* advisory board is an independent body comprised of distinguished scholars from around the world who have established themselves, through their work, as the most widely experienced in the field of Islamic Law.² These *shari'ah* advisory boards actively participate in developing and overseeing a financial institution's products and provide verdicts on the validity of these products based on juristic rulings of the past.³ The boards are also responsible for certifying financial products to ensure strict adherence to the principles of *shari'ah*.⁴

Due to the absence of a universally accepted central religious authority, *shari'ah* boards frequently hold different views on key *shari'ah* issues, and have considerable discretion in the interpretation of the *shari'ah* and may choose any school of thought to inform their decision-making process.⁵ The various interpretations of the *shari'ah* and opinions on the permissibility of *riba* have caused uncertainty about the acceptable way to conduct business in the Islamic finance system. This uncertainty among various *shari'ah* boards has caused many Muslim Americans to question the legitimacy and permissibility of the existing Islamic modes of home finance offered in the United States.

This comment will cover the controversy concerning the prohibition of *riba*, examine the differing opinions concerning the religious legitimacy of Islamic home finance in the United States, and discuss whether these financing methods are a true solution for Muslim consumers or merely a deception. Part I of this comment will provide a brief overview of Islamic law, describing its origins and sources. Part II explains the conservative, moderate, and liberal interpretations of *riba* and *gharar*, and their relation to Islamic home finance in the United States. Part III describes the current practices of Islamic home financing in the United States by: (1) summarizing Islamic home fi-

1. Mahmoud A. El-Gamal, *Incoherence of Contract-Based Islamic Financial Jurisprudence in the Age of Financial Engineering*, at 1 (May 2007) (unpublished, Rice University), <http://www.ruf.rice.edu/~elgamal/files/islamic.html>. [hereinafter El-Gamal, *Incoherence*].

2. El Waleed M. Ahmed, *A Unified Voice: The Role of Shariah Advisory Boards in Islamic Finance*, BUSINESS ISLAMICA, Oct. 2007.

3. *Id.*

4. *Id.*

5. *Id.*

nance products offered by several representative financial institutions, and the extent to which the various practices comply with the *shari'ah*, followed by; (2) an explanation of the various views on their compliance under the three main approaches to interpretations of *riba*, leading to; (3) a presentation of a solution that provides for a more honest approach to avoiding *riba* and *gharar*. Part IV concludes with a brief restatement of the key arguments.

I. BRIEF OVERVIEW OF ISLAMIC LAW

Islamic Law or *shari'ah* is the body of legal principles derived from the Qur'an, and the teachings of Prophet Mohammad also known as the *sunnah*.⁶ *Shari'ah* is composed of two primary sources and two secondary sources.⁷ The primary sources, the Quran and the *sunnah*, "provide the basic evidence and indications from which detailed rules may be derived."⁸ The two secondary sources, analogy (*qiyas*)⁹ and consensus (*ijma*),¹⁰ "provide the methodology and procedural guidelines to ensure correct utilization of the source evidence."¹¹ Similar to other sacred laws, the *shari'ah* provides legal guidance on almost every aspect of daily life, from marriage to crimi-

6. MERVYN K. LEWIS & LATIFA M. ALGAOUD, *ISLAMIC BANKING* 20 (2001).

7. The Qur'an provides textual proof of the sources of *shari'ah* and their order of priority. One passage in particular points out all the principal sources; it reads "[y]ou who believe, obey God and the Messenger, and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger." THE QUR'AN 4:59 (M.A.S. Abdel Haleem trans., Oxford University Press 2004); "[O]bey God" refers to obeying the Qur'an, which is the principle source of *shari'ah*; because, it contains the divine word of God. See MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 64 (Islamic Texts Society 2003) (1989). "[O]bey the Messenger" refers to the second source of *shari'ah*, the *sunnah*. *Id.* Obedience to "those from among you who hold command" is held to refer to *ijma* (consensus), and finally the last part which requires the referral of quarrels to God and to the messenger authorizes, *qiyas* (analogy). *Id.* at 10.

8. KAMALI, *supra* note 7, at 1.

9. *Qiyas* is essentially an extension of the existing law, and must conform to the Qur'an and the *sunnah*. "Islamic legal analogy is different from rational analogy because it is expected to conform with the Qur'an and the Sunna in recognizing the reality of life, whereas rational *qiyas* . . . is based solely on the activity of the mind to do so." MAWIL IZZI DIEN, *ISLAMIC LAW* 52 (2004). *Qiyas* may be resorted to in cases where a solution cannot be found in the other three sources. LEWIS & ALGAOUD, *supra* note 6, at 23.

10. *Ijma* is different from the first two sources in that it is not a divine revelation rather it is rational proof that is binding based on absolute and universal consensus. KAMALI, *supra* note 7, at 228. *Ijma* is used more for applying *shari'ah* to worldly affairs, than it is for "matters of faith or fundamental observances." LEWIS & ALGAOUD, *supra* note 6, at 22. *Ijma* is "important to Islamic finance because models of Islamic banking are not mentioned in either the Qur'an or the *hadith*, although the basic principles which govern the system are." *Id.*

11. KAMALI, *supra* note 7, at 1.

nality, to the economic life of the community, for those living in a community using an Islamic-based legal system.¹²

The Qur'an is the central religious text of Islam and source of divine guidance from God; it not only includes Islamic law, but also includes directions and clarification on general matters.¹³ The *sunnah* is a set of examples or the laws that are deduced from the teachings of the Prophet Muhammad¹⁴ and comes in the form of words, actions, approvals or even silence.¹⁵ The Qur'an contains general criteria for judging between right and wrong as well as instructions of individual and collective conduct.¹⁶ The general criteria and instructions stated in the Qur'an leave the application to be clarified by the *sunnah* of the Prophet Muhammad.¹⁷ For example, the Qur'an prescribes rituals such as daily prayers and alms giving; however, it only states these rituals as a duty, leaving the details of time, form, and frequency to the *sunnah*.¹⁸ The Qur'an has priority over the *sunnah*, and one may only refer to the *sunnah* when guidance from the Qur'an is not found.¹⁹

The study of *shari'ah* is *fiqh* or Islamic jurisprudence, which is the methodology used to deduce and apply the law.²⁰ In many instances, the Qur'an and the *sunnah* leave several social and ethical matters untouched; for these, Islamic jurists must look to *fiqh* to demonstrate the practical application of the *shari'ah*.²¹ The four methods of reasoning under *fiqh* are: (1) the extraction of Qur'anic injunctions and principles based on interpretations of it; (2) the application of the principles reflected through the *sunnah*; (3) the consensus of the most religious and scholarly members of the community; and (4) argument through analogy, that is, by using established truths of the sacred law to deduce rules or judgments for matters not covered in the sacred law.²²

12. LEWIS & ALGAOUD, *supra* note 6, at 20.

13. DIEN, *supra* note 9, at 37.

14. KAMALI, *supra* note 7, at 16; *see also* SAYYID ABDUL ALA MAWDUDI, TOWARDS UNDERSTANDING ISLAM 95 (New Era Publications 1994, Kurshid Ahmad, Ed. & Trans.) (1960) (also known as the narration of the conduct of the Prophet Muhammad preserved by those present in his company).

15. DIEN, *supra* note 9, at 38.

16. MAWDUDI, *supra* note 14, at 11.

17. DIEN, *supra* note 9, at 39.

18. *Id.*

19. KAMALI, *supra* note 7, at 78-79.

20. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSIC TO CONTEMPORARY 3 (Hisham M. Ramadan ed., Alta-Mira Press 2006).

21. *Id.* at 5.

22. *Id.* at 5-6.

Because there is no generally accepted codification of Islamic jurisprudence, the *shari'ah* is open to interpretation and *shari'ah* scholars frequently hold varying views on key issues.²³ Furthermore, precedent does not bind Islamic jurisdiction, and legal opinions may deviate from previous decisions made by other scholars.²⁴ Therefore, a *shari'ah* advisory board has considerable discretion in interpreting *shari'ah*, and each scholar will have a unique method of defining the permissibility of *riba* and Islamic finance. This lack of standardization results in various interpretations among scholars and causes uncertainty of the acceptability of the Islamic finance system. Therefore, for a Muslim consumer a basic understanding of the issues is required, because Islam requires every Muslim to seek knowledge before making decisions, and it condemns all forms of ignorance.²⁵ Muslim consumers should not enter into a contract or business arrangement blindly; they need to be aware of the agreement's terms as well as the prohibitions specified by the Qur'an.

The *shari'ah* also places certain regulations on contracts to ensure that neither party is wronged during the formation and implementation of an agreement.²⁶ The theory is that every contract should be fair and just, and "no party should be allowed to suffer any undue burden."²⁷ Along with fairness and honesty, the Qur'an is quite clear on requiring each party to fulfill all obligations and uphold promises to their fullest.²⁸ All parties have freedom of contract and free will when involved in a transaction.²⁹ However, the latter is subject to the prohibitions against *riba* and *gharar*.³⁰ A party can lawfully enter into a contract for any transaction, unless that contract contains a prohibited feature; then it is deemed void or invalid.³¹ The burden is on the party who considers the contract unlawful to prove his case. For ex-

23. Ahmed, *supra* note 2.

24. *Id.*

25. The Prophet Mohammad said "If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise." Quran Explorer, Dawud, Book 25, Hadith 3634, Narrated Abud Darda, <http://www.quranexplorer.com/Hadith/English/Index.html> (follow "Dawud" hyperlink on left, then follow "25: Knowledge" hyperlink, then follow "3634").

26. NABIL A. SALEH, UNLAWFUL GAIN AND LEGITIMATE PROFIT IN ISLAMIC LAW 145 (2nd ed. Graham & Trotman 1992) (1986).

27. *Id.*

28. "Fulfill any pledge you make in God's name and do not break any oaths after you have sworn them, for you have made God your surety." THE QUR'AN, *supra* note 7, at 17:28.

29. Noor Mohammed, *Principles of Islamic Contract*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSIC TO CONTEMPORARY 103 (Hisham M. Ramadan ed., AltaMira Press 2006).

30. *Id.*

31. *Id.*

ample, a bank is not required to show that its mortgage product is permissible; rather, it is for the critic to show that the product contains a prohibited feature such as *riba* or *gharar*.

Fairness in contracts and business dealings is highly valued because it is a requirement in Islam to eliminate all types of exploitation of humans by other humans, whether at the level of individual, group, or institution. Therefore, anything, including Islamic economics, finance, or banking, that is oppressive, is a serious and fundamental concern and cannot be ignored. The perspective of justice is essential to the prohibition of *riba* because it is considered unjust to pay or collect any additional dollar amount over that which was originally loaned.

II. ISLAMIC PROHIBITION OF *RIBA* AND *GHARAR*

*“You who believe, do not consume usurious interest, doubled and redoubled. Be mindful of God so that you may prosper.”*³²

This verse, translated from The Holy Qur’an, is one of five that reveals the prohibition of *riba* in Islam. The Qur’an mentions *riba* and prohibits it but does not provide context for its application in modern transactions. In the Arabic language, *riba* literally means excess or increase over and above the principal sum loaned.³³ This increase or excess in payment is due to time delay or deferment in returning a principal amount, resembling a modern interest-bearing loan.³⁴ Certain passages of the Qur’an are ambiguous on the question of whether *riba* refers to all types of interest, including an interest-bearing loan, or only usury.³⁵ This ambiguity has caused *riba* to be one of the most confusing and controversial topics in Islam. Under-

32. THE QUR’AN, *supra* note 7, at 3:130.

33. Talib Siraaj Abdus-Shahid, *Interest, Usury, and the Islamic Development Bank: Alternative, Non-interest Financing*, 16 LAW & POL’Y INT’L BUS. 1098, 1100 (1984); *see also* LEWIS & ALGAOUD, *supra* note 6, at 34 (The formal definition of *riba*, also known as *riba-al-nasiah*, is “a monetary advantage without counter-value which has been stipulated in favor of one of the two contracting parties in an exchange of two monetary values.”).

34. MUANAWAR IQBAL & PHILIP MOLYNEUX, THIRTY YEARS OF ISLAMIC BANKING: HISTORY PERFORMANCE AND PROSPECTS 7 (2005).

35. A. L. A. ABDUL GAFOOR, INTEREST, USURY, RIBA AND THE OPERATIONAL COSTS OF A BANK 29 (A. S. Noordeen 2005) (2004) (“[T]he Qur’an did not define . . . [*Riba*]. . . . And the Prophet (pbuh) did not explain every possible aspect of *riba*”); *see also* Aaron MacClean, *Islamic Banking: Is it Really Kosher?*, THE AMERICAN, Mar.-Apr. 2007, available at <http://www.american.com/archive/2007/march-april-magazine-contents/islamic-banking-is-it-really-kosher/> (“This ambiguity was a practical problem for the early Muslim jurists, who formalized religious rules in a code called *sharia*. They were divided on the subject, but as time went on, the weight of consensus came to rest on the side of prohibiting all interest collection.”).

standing the concept of *riba* is an important step before attempting to analyze its place in Islamic home financing.

A general principle of the *shari'ah* is that unjustified enrichment is forbidden on ethical grounds.³⁶ *Riba* is simply a form of unjustified enrichment or a consumption of property of another for no good reason.³⁷ The prohibition of *riba*, however, does not imply that *shari'ah* compliant financing be transacted at no cost. The *shari'ah* permits and encourages profiting from financial transactions, but such profits must arise from permissible contracts.³⁸ Profits can be earned in three ways: by using one's capital, by employing one's labor, and by bearing a liability for loss.³⁹ The use of contracts for trade, leasing, or partnership may yield returns in the form of sale proceeds, rentals, or dividends, but never *riba*. These transactions are valid when the seller and buyer mutually agree to exchange an offer and acceptance with specific terms.⁴⁰

Islam has placed restrictions on *riba* for reasons that are not clearly mentioned in the Qur'an or *sunnah*. Islamic scholars clarified this ambiguity by providing five explanations.⁴¹ First, *riba* is an exacting of another's property without any counter-value.⁴² Unlike a business investment, where the profits are uncertain and there is risk of loss or low returns, the excess amount a creditor receives is fixed and guaranteed. Therefore, an insistence upon a sum certain in return for what is uncertain is harm to the debtor.⁴³ Second, *riba* could result in laziness. For example, income from *riba* becomes easy, and the lender abandons the idea of working hard for money and furthering the prosperity of society.⁴⁴ Third, *riba* could lead to strained relationships be-

36. LEWIS & ALGAOUD, *supra* note 6, at 34.

37. *Id.*

38. See Dzuljastri Abdul Razak et al., *Consumers' Acceptance on Islamic Home Financing: Empirical Evidence on Bai Bithaman Ajil (BBA) in Malaysia*, at 5-6 (paper presented at IIUM International Accounting Conference IV (INTAV), Marriot Putrajaya Hotel 24-26 June, 2008), available at http://www.isra.my/index.php?option=com_content&view=article&id=224&Itemid=72. ("Iwad (Counter-value) is required by the *Shari'ah* to be a lawful profit in Islam. Three elements of *iwad* that should exist are risk (*ghorm*), work and effort (*ikhtiar*) and liability (*daman*). . . . According to Ibn al-'Arabi (d.543H/1148), every increase which is without an *iwad* or equal counter value, is *riba*. *Iwad* is the necessary requirement to be fulfilled in trading (*al-bay*) as it brings along a sense of equity and justice into a business that rendered it superior to an interest-bearing system.").

39. LEWIS & ALGAOUD, *supra* note 6, at 40.

40. A verse in the Qur'an reads "[y]ou who believe, do not wrongfully consume each other's wealth but trade by mutual consent." THE QUR'AN, *supra* note 7 at 4:29.

41. IQBAL & MOLYNEUX, *supra* note 34, at 10.

42. LEWIS & ALGAOUD, *supra* note 6, at 38.

43. *Id.*

44. *Id.*

tween men (i.e., in situations where the borrower is unable to repay the principal or interest).⁴⁵ Fourth, *riba* leads to injustice and duress.⁴⁶ Lenders take advantage of borrowers by charging an excess return and this, depending on the circumstances, may eventually lead to greater poverty.⁴⁷ Finally, *riba* is prohibited because “God says so”— illegality is provided in the text of Qur’an and Muslims should not question this.⁴⁸

Shari’ah also prohibits *gharar*, which is generally translated as an unacceptable level of risk or uncertainty.⁴⁹ *Gharar* is prohibited in order to prevent risk and uncertainties in contractual obligations,⁵⁰ and to protect parties from exposure to duress and manipulation.⁵¹ The assumption is that all business transactions will have certain elements of risk and no business outcome can ever be certain. Some ventures may never gain a profit due to uncertainties in the markets or business outcomes, also known as *ghorm*.⁵² Market or business risk or uncertainty is acceptable, and people are encouraged “to participate in ventures involving both risk and reward.”⁵³ Ambiguous contract terms (i.e., the buyer and seller, the object of sale, price, etc.) and any discrepancies in the elements of a given transaction give rise to the prohibited uncertainty or risk.⁵⁴

Due to the ambiguities regarding *riba* in the Qur’an, it is difficult for any person to speak with authority regarding the Islamic permissibility or prohibition of any modern day banking transaction. Nevertheless, many scholars and jurists have opined their views, categorized as liberal, moderate, and conservative on whether *riba* covers all forms of interest or only usurious interest, as well as whether using

45. *Id.*

46. Mahmoud A. El-Gamal, *A Basic Guide to Contemporary Islamic Banking and Finance*, at 2 (June 2000) (unpublished, Rice University), <http://www.ruf.rice.edu/~elgamal/files/islamic.html>. (“[The] objective served by the prohibition of *Riba* is the avoidance of injustice (in the sense of exploitation of the poor debtor by the rich creditor).”)

47. COUNCIL OF ISLAMIC IDEOLOGY, *ELIMINATION OF RIBA FROM THE ECONOMY & ISLAMIC MODES OF FINANCING* 10 (Islamabad, Pakistan, 2nd ed. 2002) (2006).

48. LEWIS & ALGAOUD, *supra* note 6, at 38.

49. SAIFUL AZHAR ROSLY, *CRITICAL ISSUES ON ISLAMIC BANKING AND FINANCIAL MARKETS* 73 (2005).

50. *Id.* at 70 (“No elements of risk and uncertainty must exist in the terms and conditions of the contracts, otherwise, the contract is deemed null and void.”).

51. *Id.* (“[P]erfect information is the rule such that none of the parties are exposed to duress (*ikroh*) and manipulation (*al-khilabah*).”)

52. *Id.* at 76 (“No one is free from the vagaries of price volatilities arising from market movement.”).

53. *Id.* at 74 (an Islamic Legal maxim “no reward without risk”).

54. SALEH, *supra* note 26, at 145.

contemporary Islamic finance to purchase a home is a legitimate practice under the *shari'ah*.

A. Liberal Views of Riba

Proponents of the liberal view recommend a lenient treatment for bank interest that is either charged for lending activities or paid for deposits.⁵⁵ Their central argument is that interest-based commercial transactions result from modern business, and their history does not date more than 400 years.⁵⁶ Therefore, the prohibition of interest does not cover modern transactions and it refers only to usurious interest.⁵⁷ U.S. laws also support this liberal view, as the National Bank Act penalizes banks for the “taking, receiving, reserving, or charging” of usurious interest.⁵⁸ Liberal scholars provided five lines of reasoning that support their central argument.⁵⁹

First, *riba* should be prohibited only if money is loaned at exorbitantly high interest rates,⁶⁰ which in itself is exploitative and forbidden

55. See Abdus-Shahid, *supra* note 33, at 1102 n.31.

56. MUHAMMAD TAQI USMANI, THE TEXT OF THE HISTORIC JUDGMENT ON INTEREST ¶ 3 (2001), available at http://www.albalagh.net/Islamic_economics/riba_judgement.shtml#The%20Nature%20of%20Loan.

57. *Id.* at ¶¶ 3, 6.

58. 12 U.S.C.A § 86 (2008). Section 86 reads, “Usurious interest; penalty for taking; limitations.” The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.” This section was intended to protect borrowers from paying excess interest. See *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992 (S.D.N.Y. 1973).

59. The five different arguments were presented in an appeal to the Federal Shariat Court (“FSC”) of Pakistan and are supported by other scholars. The appeal came from a FSC judgment on November 14, 1991 that declared a number Pakistani laws repugnant to the Injunctions of Islam because they provided for charging or paying interest, which according to the findings of the FSC, falls within the definition of *riba* clearly prohibited by the Holy Qur’an. STATE BANK OF PAKISTAN ANN. REP. FY02, at 190, available at <http://sbp.org.pk/reports/annual/arFY02/chap10.pdf>.

60. Abdus-Shahid, *supra* note 33, at 1102. Abdus-Shahid notes that “during the time of the Prophet Muhammad, financial practices were extremely harsh, and that the original definition of usury was the asking for or demanding of extremely high returns on loaned money.” Liberalist (or Modernist) such as Imam Warith Deen Muhammad “note that these circumstances are not necessarily present in the modern banking system.” *Id.* at 1102 n.31. See also Muhammad Mazhar Iqbal, *A Broader Definition of Riba*, PAKISTAN INST. OF DEV. ECON., at 2, <http://www.pide.org.pk/pdf/psde%2018AGM/A%20Broader%20Definition%20Of%20Riba.pdf> (“[A] liberal view entails the narrowest definition of *riba*; it equates *riba* with usury, which is defined as an exorbitant rate of interest compounded at short intervals. Interest rate paid and charged by financial intermediaries, henceforth called bank interest, is considered to be outside the ambit of *riba*.”).

by the Qur'an.⁶¹ Liberal scholars justify this argument by reasoning that "conventional banking interest is a share in the profits of growth-inducing investments, and not the forbidden *riba*" of the past, which was usurious.⁶² Therefore, Islamic jurists should legitimize conventional bank interest even if it falls under the scope of Qur'anic *riba*.

A second argument is that no firm definition of the term *riba* can be found in the Qur'an or the *sunnah* because the verses of the Qur'an, which prohibit *riba*, were revealed in the last days of the life of Prophet Muhammad, and he did not have an opportunity to provide a proper interpretation.⁶³ According to this argument, the prohibition of *riba* should be restricted to the limited transactions expressly mentioned in the *sunnah*, thus, the principle should not be extended to the modern banking system, which was not in place at the times the verses were revealed.

Third, liberals distinguish between commercial loans, which are permissible, and consumption loans, which are "unlawful and unenforceable."⁶⁴ According to this argument, the word *riba* as used in the Qur'an is restricted to the increased amount charged on consumption loans, which the poor used for their day-to-day needs. The rich exploited the condition of the poor by charging excessive interest or usury on these loans. Commercial loans, however, were not utilized in the days of the Prophet Muhammad, thus, the Qur'an has not addressed them in the prohibition of *riba*.⁶⁵ In the case of commercial loans, the debtors were usually wealthy and the loans taken by them were generally used for generating profits.⁶⁶ Therefore, any increase gained from them by the creditors cannot be injustice; one of the rationalizations for prohibiting *riba*.⁶⁷

61. "You who believe, do not consume usurious interest, doubled and redoubled. Be mindful of God so that you may prosper." THE QUR'AN, *supra* note 7, at 3:130. (The doubling and redoubling of money was one of the practices of pre-Islamic societies and ancient nations.)

62. Mahmoud A. El-Gamal, *An Economic Explication of the Prohibition of Riba in Classical Islamic Jurisprudence*, at 2. (May 2, 2001) (unpublished, Rice University), <http://www.ruf.rice.edu/~elgamal/files/islamic.html>. [hereinafter El-Gamal, *An Economic Explication*] (El-Gamal argues that this reasoning is "built on a partial understanding of the prohibition of *Riba* based [solely] on exploitation and it is also deficient in ignoring the fact that much of the *Riba* which was used in pre-Islamic Arabia was indeed for commercial and business financing." *Id.*)

63. Dr. Ahmad Shafat, *Riba in the Quran*, Mar. 2005, <http://www.islamicperspectives.com/Riba1.htm>.

64. David A. Suratgar, *Foreward: The Impact of Islamic Banking on World Financial and Commercial Relations*, 16 LAW & POL'Y INT'L BUS. 1089, 1092 (1984).

65. TAQI USMANI, *supra* note 56, ¶ 7.

66. *Id.*

67. *Id.*

The fourth argument is that even if the modern interest-based transactions are considered *riba* and thereby prohibited, few people can financially survive without being involved in interest-based transactions and it would be a suicidal act to abolish interest from domestic and foreign transactions.⁶⁸ Finally, liberal scholars apply the Islamic principle of necessity to interest. For example, it is permissible to eat a prohibited food in an extreme situation where one cannot live without eating it.⁶⁹ According to liberal practitioners, because of the relationship of loans to survival (i.e., using the money to purchase a home, run a business, etc.), the principle of necessity should be applied to interest-based transactions, and the charging of interest per se should not be declared repugnant to the injunctions of Islam.⁷⁰

B. Moderate Views of Riba

Proponents of the moderate view contend that *riba* refers to both usury and bank interest,⁷¹ and that the *shari'ah* recognizes time value of money.⁷² Thus, a merchant may sell an item for one price in a spot sale and sell the same item for a higher price in a credit sale as long as there is mutual assent to timing and amount.⁷³ When a purchaser buys an asset with cash, there can never be *riba* even if there is a delay in time and an increase in payment because the purchaser is allowed to pay an increase for a deferred payment; making this a credit sale.⁷⁴ The increased amount in the credit sale is fully justified as compensation to the merchant for the opportunity cost of deferring the receipt of his payment.⁷⁵ Thus, every transaction has its conditions relating to

68. *Id.* at ¶ 194.

69. *See, e.g., THE QUR'AN, supra* note 7, at 2:173 (“He has only forbidden you carrion, blood, and pig’s meat, and animals over which any name other than God has been invoked. But if anyone is forced to eat such things by hunger, rather than desire or excess, he commits no sin: God is most merciful and forgiving.”).

70. TAQI USMANI, *supra* note 56, ¶ 194.

71. Mazhar Iqbal, *supra* note 60, at 2 (“The mainstream view is that any contractual increase, whether small or large, is *riba*. Hence, *riba* encompasses bank interest as well.”).

72. El-Gamal, *An Economic Explication supra* note 62, at 3.

73. *Id.* at 4. The conditions for *Bai Mujal* or credit sale are time and amount, both to be agreed upon by both parties and specified at the time of the sale agreement. *Id.*

74. LEWIS & ALGAOUD, *supra* note 6, at 34 (Although Muslims are prohibited from fixing a predetermined rate on money lent, a borrower is permitted to pay an “extra amount” to the principal sum borrowed, while repaying his debt, provided it is given of his own free will and is not stipulated as a condition of the borrowing.).

75. For example, when a merchant sells items on credit as opposed to cash; he will postpone current ability to consume and resell, and will lose the opportunity to earn income. The longer the credit remains unpaid the greater the loss the merchant suffers. Therefore, he must be compensated for benefits forgone today, and the merchant may set a higher charge for a credit transactions than for a cash transactions. ROSLY, *supra* note 49, at 42. This would encourage

the nature of the transaction. One cannot take the conditions of one type of transaction and apply those conditions to another without corrupting the transaction. To add unjustified conditions or an excess to a transaction is *riba*.⁷⁶

Another moderate view is that all transactions should be free from strict interpretation, otherwise they will “have no relevance to current world trade or commerce.”⁷⁷ Moderate scholars further argue that the state of time, public interest, and spirit of the *shari’ah* should all play a role in contracts in order to make *shari’ah* adaptable to transactional realities while maintaining Islamic ideals.⁷⁸

Because of the above reasons, moderate Muslims generally support contemporary Islamic home financing. They believe that paying interest is a sin, and they have faith in the Islamic banks that are accommodating their religious beliefs and their dreams.⁷⁹

C. Conservative Views of Riba

Proponents of the conservative view contend that in addition to usury and fixed interest, “[r]iba also includes all forms of economic exploitation of the poor by the rich like profiteering and paying of subsistence wages to laborers.”⁸⁰ Conservative Muslims claim that borrowing money is not a desirable option unless it is necessary to satisfy a basic human need or to fulfill a financial obligation.⁸¹ Loans for homeownership are not a necessity as there are other alternatives, such as renting or paying with cash. In addition, conservative Muslims feel that avoiding all types of *riba* is the only way for them to realize a

cash transactions and would compensate the merchant for the lost income and opportunity to run his business. However, this deferred payment cannot be made to a moneylender. GAFOOR, *supra* note 35, at 23. For a lender, the passage of time does not add value to capital as it does for a merchant. *Id.* During the passage of time for a lender, there is no opportunity or income until a “borrower turns up promising to pay a positive interest.” *Id.* The lender’s money enjoys the time value of money the moment it leaves his hands and not until then. *Id.* at 24.

76. Umar Ibrahim Vadillo, *The Judgment on Riba*, Dec. 3, 2005, http://www.shaykhabdalqadir.com/content/articles/Art037_12032005.html.

77. Mohammed, *supra* note 29, at 103.

78. *Id.*

79. N.C. Aizenman, *A Higher Law for Lending*, WASH. POST, May 13 2008, at D01.

80. Mazhar Iqbal, *supra* note 60, at 2.

81. COUNCIL OF ISLAMIC IDEOLOGY, *ELIMINATION OF RIBA FROM THE ECONOMY & ISLAMIC MODES OF FINANCING* 65 (Islamabad, Pakistan, 2d ed. 2002) (2006) (borrowings for lavish expenditure, artificial standard of living or conspicuous consumption are considered highly undesirable); see also Brad Mielke, *Mortgages Test Muslim Faith*, DAILY NEWS, Aug. 2007, available at http://www.nydailynews.com/money/2007/08/13/2007-08-13_mortgages_test_muslim_faith.html (“Only in a case of absolute necessity may you pay interest or receive interest”) (quoting Imam Omar Abu-Namous of New York’s Islamic Cultural Center).

just and equitable economic system.⁸² To justify their opinions conservative scholars make sure to gain support from the Qur'an and the *sunnah*,⁸³ unlike liberal scholars who usually turn only to selected verses of the Qur'an. For example, the *sunnah* indicates that Prophet Muhammad not only cursed the usurer, but also the payor of the *riba* amount, the scribe who recorded the transaction, and the two witnesses thereof.⁸⁴

Conservative scholars argue that the Qur'an prohibits any loan or financial activity that contains interest. A loan is the main method for conventional financing "which uses interest as a time factor for borrowed money."⁸⁵ These scholars' arguments imply "that money in itself has no intrinsic value and can only serve as a medium of exchange."⁸⁶ Furthermore, they contend that under Islamic principles money cannot be traded as a commodity as it can in "conventional financing where money is treated as a commodity and loans are lent out with interest as its pricing mechanism."⁸⁷ They also contend that lending money is not meant for business purposes but for charity; "no interest may be charged, and the principal must be forgiven if the debtor cannot pay."⁸⁸ Thus, Muslims should not borrow in order to invest or lend in order to make a profit.

Conservative Muslims object to the home financing methods provided by Islamic financial institutions. Although conservative Muslims would like to enjoy the benefits of purchasing a home through permissible means, they still feel that it is impossible to avoid interest, and they refuse to sign any contract that contains the word interest, which still appears in Islamic financing contracts for secular legal purposes.⁸⁹ Some conservative scholars see a paradox in the Islamic banking system noting that pre-specified profit margins or mark-ups in cost-plus and lease-to-own transactions look very similar to interest, and that these excess costs may be a thinly veiled version of it.⁹⁰

82. Mazhar Iqbal, *supra* note 60, at 13.

83. Abdus-Shahid, *supra* note 33, at 1102.

84. *Id.*

85. Razak, *supra* note 38, at 4.

86. *Id.*

87. *Id.* at 4-5.

88. El-Gamal, *Incoherence*, *supra* note 1, at 9.

89. Dina ElBoghady, *Purists' Reservations*, WASH. POST, Oct. 21, 2006, at F01. ("I looked into Islamic financing a while back when it was just catching on. But, to me, it still seems like they're charging interest but calling it by another name.")

90. Mahmoud A. El-Gamal, *Interest and the Paradox of Contemporary Islamic Finance*, 27 FORDHAM INT'L L.J. 108, 125 (2004) ("the mark-up is explicitly based on a market interest rate

III. ISLAMIC HOME FINANCING IN PRACTICE

In response to the Islamic prohibition on *riba* and *gharar*, Islamic jurists and financial practitioners developed several permissible alternatives to interest-based lending that are applicable for purchasing assets. These financing methods have been “studied extensively by jurists over the centuries” and their “validity is well established by the actions of the Prophet Muhammad and by consensus or *ijma*.”⁹¹ These methods are based on the legal concepts of partnership and profit/loss sharing,⁹² and are transacted using sales, lease, and other pre-modern contracts.

Although the growing Muslim population in the United States⁹³ has taken advantage of conventional banking,⁹⁴ many Muslims who wish to conduct lawful business transactions are demanding *shari’ah* compliant financial products.⁹⁵ In response to the growing demand, Islamic financial institutions in the United States and abroad have used permissible methods of financing to develop several interest-free home-financing products that Islamic scholars claim to be *shari’ah* compliant. However, according to liberal and conservative views, these contemporary home-financing methods may be more of a deception than a solution to the dilemma faced by Muslims because they may not contain all the requisites of permissible *shari’ah* compliant financing methods.

This article will focus on three Islamic financial institutions that offer three distinct Islamic home financing products. LaRiba Ameri-

such as LIBOR, and jurists have defined this practice on the basis of LIBOR serving only as a benchmark.”) [hereinafter El-Gamal, *Interest and the Paradox*].

91. El-Gamal, *A Basic Guide*, *supra* note 46, at 10.

92. J. Michael Taylor, *Islamic Banking—The Feasibility of Establishing an Islamic Bank in the United States*, 40 AM. BUS. L.J. 385, 394-95 (2003).

93. *Id.* at 400. “The Muslim religion is the fastest growing faith in the United States (the number of Muslims in the US . . . is put at 5 to 6 million.” *Id.*

94. Yahia Abdul-Rahman & Mike Maguid Abdelaaty, *Islamic Home Financing in the United States*, at 4 <http://www.lariba.com> (follow “Knowledge Center” hyperlink; then follow “Articles” hyperlink). “It is believed that the ISLAMIC FINANCIAL system, as it develops and becomes more publicized and popularized, will be in great demand, not only by members of the Muslim community, but by people of all faiths in the community at large.” *Id.* They take advantage of FDIC insured bank deposits, borrow money for buying homes (*Riba* based mortgages), use credit cards with delayed payment terms, and take out home equity lines of credit.

95. Shirley Chiu et al., *Islamic Finance in the United States: A Small but Growing Industry*, CHICAGO FED LETTER (Fed. Reserve Bank of Chicago, Chicago, IL) May 2005, available at http://www.chicagofed.org/publications/fedletter/cflmay2005_214.pdf (“[d]rawing largely on interviews with regulators, practitioners, and experts in the field, we find that the few financial entities that offer formal Islamic finance in the United States are often motivated by strong grassroots demand in their local service areas.”).

can Finance House (“LaRiba”)⁹⁶ uses a lease-to-own financing structure, Guidance Residential (“Guidance”)⁹⁷ uses the declining balance co-ownership program, and University Islamic Financial Corporation (“UIFC”)⁹⁸ offers a cost-plus sale model.

LaRiba claims that in their version of a *riba*-free transaction money is not the object of rent; instead, a tangible asset or service is rented and the customer is charged an actual market-defined rate.⁹⁹ Lariba’s model is derived from the *shari’ah* compliant lease-to-own model, also known as *al-Ijarah wa iqtina*, which is composed of two separate contracts: (1) the contract of lease (*al-ijarah ‘ain*) and (2) the contract of sale (*al-bay*).¹⁰⁰ This model is common for modern day transactions making it easier to purchase large assets on a cash basis.¹⁰¹ The two contracts are executed in succession and must be governed by the *shari’ah*.

The Guidance Declining Balance Co-Ownership Program is similar to the *shari’ah* compliant diminishing partnership or *Musharakah Mutanaqisah*. This Declining Balance Co-Ownership Program establishes a partnership, through a limited liability corporation, with a customer who wishes to purchase a home.¹⁰² A co-ownership agreement spells out the rights and responsibilities of both parties. The customer’s initial down payment determines each parties share in the home. The customer will make periodic payments through which the bank’s share in the property decreases while the customer’s share increases. The payment consists of two portions: (1) a profit payment,

96. LaRiba, based in Pasadena, CA, was established in 1987 and is the oldest of the Islamic financial institutions in the U.S. The bank specializes in single-family home financing and in small and medium size business financing using the “lease-to-purchase” model (*ijara wa iqtinaa*) and the joint venture model (*musharakah*). The eventual growth of LaRiba has led the company to extend its line of financial products for auto, trade, equipment, and home construction. *Id.*

97. Aizenman, *supra* note 79. Guidance Residential, based in Reston, VA, has been offering products all over the United States since 2002 and it offers a unique declining balance co-ownership program (*musharakah mutanaqisah*) that is a more like a partnership agreement and not a conventional loan. GUIDANCE RESIDENTIAL, THE DECLINING BALANCE CO-OWNERSHIP PROGRAM, AN OVERVIEW, GUIDANCE WP SERIES ONE 1 (2004).

98. UIFC, a subsidiary of University Bank, is a privately owned community bank based out of Ann Arbor, Michigan. UIFC serves the needs of the Muslim community by offering *shari’ah* compliant Deposits of University Bank and Mortgage Alternative (“MALT™”) products. University Islamic Financial Home page, <http://www.universityislamicfinancial.com/IBDMain.html> (last visited March. 22, 2009).

99. LaRiba American Finance House, Knowledge Center, FAQ- Frequently Asked Questions, <http://www.lariba.com/knowledge-center/faqs.htm> (last visited Jan. 11, 2009) [hereinafter LaRiba FAQ].

100. ROSLY, *supra* note 49, at 112.

101. *Id.* at 113.

102. GUIDANCE RESIDENTIAL, *supra* note 97, at 2.

in exchange for the customers' exclusive right to enjoy the home, and (2) an acquisition payment, which allows the customer to acquire an increasing share of ownership in the home.¹⁰³

UIFC's cost-plus sale model is derived from the *shari'ah* compliant *Murabaha*¹⁰⁴ financing. In this sales contract, a bank purchases the property and resells it to a client with an agreed premium or profit margin. The client will pay the price of the property in installments over several years and mortgage the property to the bank in order to secure the installments. At the closing, the client makes a down payment toward the acquisition price, which represents the client's initial investment in the property. Monthly payments include profit from the mark-up and a payment towards the investment, thereby increasing the client's investment in the home.

These Islamic banks have synthesized sales, lease, and other *shari'ah* compliant contract forms to provide the growing number of *shari'ah* sensitive households the opportunity to access financial products that are competitive with conventional mortgages without having to compromise their beliefs and principles. These financing methods are not free from criticism since *shari'ah* scholars have various opinions and interpretations of the Qur'anic text regarding financial matters. By thoroughly examining the financial intuitions described above, the next section will focus on arguments presented by proponents and opponents regarding the permissibility of Islamic home financing.

A. Various Opinions and Interpretations of the Permissibility of Contemporary Islamic Home Financing

Conservative and liberal scholars are not convinced that Islamic home financing is much different from conventional loans. Many critics, economists, and clerics describe these contemporary home financing methods as a "casuistic bait-and-switch"¹⁰⁵ or even legal trickery, "that can produce a usurious loan from otherwise permissible con-

103. *Id.*

104. IQBAL & MOLYNEUX, *supra* note 34, at 22; *see also* El-Gamal, *A Basic Guide*, *supra* note 1, at 10 ("In this sale, the buyer knows the price at which the seller obtained the object to be financed, and agrees to pay a premium over that initial price."); SALEH, *supra* note 26, at 117 ("*Murabaha* is generally defined as the sale of a commodity for the price which the vendor has purchased it, with the addition of a state profit known to both the vendor and the purchaser.").

105. DRAKE BENNETT, *The Zero Percent Solution*, BOSTON GLOBE, Nov. 4, 2007, available at http://www.boston.com/news/education/higher/articles/2007/11/04/the_zero_percent_solution/?page=1.

tracts.”¹⁰⁶ These skeptics argue that the Islamic banks disguise interest by calling it “a fee or profit,” and they are essentially “operating like conventional banks.”¹⁰⁷

Liberal Muslims further assert that Islamic home financing may be more expensive than conventional mortgages, leading to injustice.¹⁰⁸ A secular group, Muslim Canadian Congress, has openly criticized Islamic products as more expensive than conventional financial options.¹⁰⁹ This liberal group claims “Islamic banking is nothing more than an attempt by Islamists, with backing from Middle Eastern financial institutions and their Western partners, to scare Muslim Canadians into believing that they should pay more to the banks and demand less in return, as an act of religiosity.”¹¹⁰ One client’s mortgage, structured like a lease-to-own system, costs about 0.60 percentage points more than a conventional mortgage. In addition, while profit margins on *shari’ah*-compliant products are comparable with interest rates on non-Islamic investments, they often cost more to set up.¹¹¹

One conservative scholar argues that these Islamic finance practitioners have simply created legal arbitrage opportunities.¹¹²

First, a prohibition is invoked to create market demand for an “Islamic” [banking] alternative. Then, using the methods of financial engineering, practitioners bundle or unbundle various contracts, possibly using multiple steps, to synthesize the ostensibly forbidden practice. Finally, the “Islamic” brand name for the synthetic alternative is established by using Arabic names for the products and contracts that are marketed, as well as for the institutions that market them, and retaining the consulting services of religious scholars, whose names may be familiar to potential customers prior to their involvement in Islamic finance or by virtue of marketing campaigns to establish their legitimacy. Finally, a host of legal risks are inherent in all new structures, and thus potential social harm is increased,

106. Haitham al-Haddad & Tarek El Diwany, *The Islamic Mortgage: Paradigm Shift or Trojan Horse?*, Nov. 18, 2006, http://www.islamic-finance.com/Islamic_mortgages.pdf.

107. Bennett, *supra* note 105 (“According to Timur Kuran, a professor of political science and economics and chair of the Islamic Studies program at Duke University, Islamic banks come up with these convoluted ways of lending money that make interest look like something else, when in fact they’re really just operating like conventional banks.”).

108. Omar Sacirbey, *Are Finance Charges In Islam’s Interest?*, WASH. POST, July 28, 2007, at B08.

109. Tavia Grant, *Halt Islamic Banking Study, Group Says*, GLOBE & MAIL UPDATE, Jan. 29, 2008.

110. Bennett, *supra* note 105.

111. Assif Shameen, *Islamic Banks: A Novelty No Longer*, BUSINESS WEEK, Aug. 8, 2005, available at http://www.businessweek.com/print/magazine/content/05_32/b394614.

112. El-Gamal, *Incoherence*, *supra* note 1, at 10.

not reduced, by the exercise of financially engineering modern transactions from premodern contracts.¹¹³

According to this scholar, Islamic finance is more of a deception than the solution Muslim consumers had hoped would solve their dilemma; this is just one view.

Proponents of these methods argue that it is not a bait-and-switch but a difference that Islamic law recognizes.¹¹⁴ Proponents agree to some extent that Islamic banks may be operating like conventional banks, but the fact that the fees or profits serve the same purpose as interest, does not mean they are forbidden by Islam.¹¹⁵ These moderate Muslims find Islamic finance to be a true solution; this is evidenced by the continuous growth of the industry. For example, Guidance's revenues were up seven percent in the first quarter of 2008 from the first quarter of 2007, and UIFC expanded its operations to Maryland, Virginia and five other states in 2007, and applications quadrupled from March 2007 to March 2008.¹¹⁶ In March 2009, "while the stock market plunged to its lowest point in a dozen years," UIFC recorded one of its best periods ever completing 11 home sales, more than twice the weekly average.¹¹⁷ Moderate Muslim consumers cite their trust of the Islamic brand and the *Shari'ah* boards, peace of mind, and the distrust of subprime mortgage lenders, for choosing the Islamic alternative.¹¹⁸ In addition, these consumers believe that the Islamic finance system, although not completely immune,¹¹⁹ offers a built-in protection from the current financial crisis that has afflicted so many institutions and individuals.¹²⁰

113. *Id.*

114. Bennett, *supra* note 105.

115. Sacirbey, *supra* note 108 ("It's possible, as it is in many ethical and legal systems, for two different actions to have the same outcome but, because of the way they're done, for one to be wrong or illegal in that ethical or legal system, and for the other to be permissible or lawful.")

116. Aizenman, *supra* note 79.

117. Samuel G. Freedman, *A Hometown Bank Heeds a Call to Serve Its Islamic Clients*, N.Y. POST, Mar. 6, 2009.

118. Aizenman, *supra* note 79.

119. Although there are a number of factors that helped Islamic finance avoid some of the most egregious products in the credit crisis, they are not immune from spillover effects in the property and equity markets, as well as general economic conditions. This is mostly "due to a shortage of liquid instruments and the lack of an Islamic interbank market." Frederik Richter, *Islamic Finance No Longer Immune to Crisis*, REUTERS, Dec. 8, 2008, available at <http://www.reuters.com/article/ousiv/idUSTRE4B21UM20081203>.

120. One example is "the use of financial instruments such as derivatives – blamed for the downfall of banking, insurance, and investment giants – combined with excessive risk-taking is banned. Faiza Saleh Ambah, *Islamic Banking: Steady in Shaky Times*, WASH. POST, Oct. 31, 2008, at A16.

In determining whether Islamic home financing is a solution or deception, Islamic scholars have considered many factors, six that will be discussed here. Scholars consider these factors to be the difference between a permissible and an impermissible transaction. The factors discussed below are: (1) the requirement of substance and form; (2) use of the word interest in contracts and other documents; (3) methods used to determine a rate of return; (4) requirement of ownership and possession of an asset before selling it; (5) profit and loss sharing among a financier and consumer; and (6) the impermissibility of securitized loans.

1. Islamic finance remains subject to fierce criticism for putting form over substance

For a transaction to be *shari'ah* compliant, it must be valid, based on the form¹²¹ of the contract and permissible, based on the substance¹²² of the contract and intention¹²³ of the contractors.¹²⁴ Substance and form should parallel each other and not conflict; if there is a conflict, *shari'ah* places greater importance on substance rather than form.¹²⁵ When a transaction is structured in such a way that it secures a guaranteed profit to the financier without taking any risks or when the financier acts as a creditor who provides funding without being involved in the investment (i.e., when the substance is interest-bearing debt), the transaction will be impermissible regardless of its legal form (e.g., sale, lease, etc.).¹²⁶ The rationale is that money should not generate money by itself; profits should be obtained by virtue of real economic activities, not by lending.¹²⁷

121. Form is the structure of something. See Asyraf Wajdi Duski, International Shari'ah Research Academy for Islamic Finance, *Modern Islamic Finance from Shariah Perspectives*, Presentation at the Colloquium on Islamic Finance: Shariah and Operational Issues in Implementing Contemporary Products, at slide 14 (Dec. 16-17, 2008).

122. See *id.* ("Substance is the essence or essential nature of something.").

123. Malaysian Accounting Standards Board, Financial Reporting from an Islamic Perspective, (draft Statement of Principles i-1) Nov. 17, 2008, at 85, http://www.masb.org.my/index.php?option=com_content&view=article&id=1304&Itemid=58. [hereinafter MASB] ("[T]here is a principle in *fiqh* that the intention behind an action is an important consideration in passing judgment on the action.").

124. Duski, *supra* note 121, at slide 11.

125. MASB, *supra* note 123, at 94. This principle is "based on the *fiqh* methodology which states that "the weight of a contract is on its purpose and meaning, not on its words and form." See Duski, *supra* note 121, slide 16 ("1. Form can be compromised if the substance is sound; 2. The objective of form is to help ensure compliance of the substance with the shari'ah; 3. Form has been compromised in the past by classical jurists.").

126. Duski, *supra* note 121, at slide 15.

127. *Id.*

Substance, measured by the economic effect of a contract, should bring some type of benefit or prevent harm to the contractors.¹²⁸ In order to determine the benefits, Islamic jurists claim that economic analysis must be conducted to determine the harmful effects of having a conventional mortgage, and then establish if the Islamic alternative eliminates any of them:

Perhaps the value of the property may depreciate substantially and the mortgagor will be left with a massive debt. Perhaps the payments may be so steep as to make it difficult for the customer to meet other financial obligations. Perhaps the interest rate that was charged was too high relative to the true cost of funds in the economy.¹²⁹

After conducting this benefits analysis, if there is no true benefit to the homeowner or any departure from a conventional mortgage, then, based on the economic analysis, whatever harmful effects existed in the original (forbidden) product are by necessity present in the modified Islamic alternative, there is no difference in the transactions. “[I]f the Islamic mortgage is permitted, then so must the conventional mortgage, and vice versa.¹³⁰ Islamic Jurists have argued that substance should be the basis of a contract and not simple language or form.¹³¹ One specific jurist “built his case for the prohibition of . . . ruses that use permissible contracts to mimic forbidden ones,”¹³² including the contemporary financing methods used to today.

In contemporary Islamic home finance, most contracts that form the basis of financial products, especially home financing, are innovative contracts. “In such [innovative contracts], there is a combination of elements from various [traditional contracts] where the elements are bound to each other in a certain form. If any one of the elements were to be absent, it would cause the purpose of the agreement to be

128. THE QUR’AN, *supra* note 7, at 64:16. (“Be conscious of God as best you can” and the valid Prophetic tradition “Whatever order I give, follow it as much as you can” to argue that: “The requirement is to maximize benefits and to minimize harm. When there is a tradeoff to be made, the Law dictates taking the greater of two benefits or the lesser of two harms.”)

129. El-Gamal, *Incoherence*, *supra* note 1, at 10 (quoting contemporary jurist Abdulwahab Khallaf: “Benefit analysis and other legal proofs may lead to similar or different rulings . . . Maximizing net benefit is the objective of the Law for which rulings were made. Other [juristic] legal proofs are means to attaining this legal end, and objectives should always have priority over means.”).

130. *Id.* at 6.

131. *Id.*

132. *Id.* at 4-5 (“The great legal theorist Al-Shatibi stated this prohibition of ruses . . . Legal ruses in religion are generally illegal . . . In this regard, legal rulings are not ends in themselves, but means to legal ends, which are the benefits intended by the law. One who follows legal forms while squandering the substance does not follow the Law.”).

imperfect.”¹³³ One finance practitioner noted that “[t]he tendency in [contemporary] Islamic finance has been to replicate conventional financial products, sometimes by increasingly liberal interpretations of shari’a.”¹³⁴ These contemporary bankers believe *shari’ah* “compliance to be a question of structuring the desired form rather than a change in substance.”¹³⁵ Another scholar accuses providers of contemporary finance of “acknowledg[ing] that they are using multiple sales and/or leases to mimic the amortization schedule of a conventional mortgage.”¹³⁶

For example, critics are uneasy about the use of the cost-plus financing method, offered by UIFC, because it “is a border-line transaction and a slight departure from the prescribed procedure makes it step on the prohibited area of interest-based financing.”¹³⁷ Thus, even if the cost-plus financing method is permissible in legal form, there is an “over-riding legal maxim that anything leading to something prohibited stands prohibited.”¹³⁸ The Federal Shariat Court of Pakistan¹³⁹ has not invalidated this transaction in principle, but has expressed its apprehension that this method of financing may be subject to misuse and may be applied without fulfilling its necessary conditions to comply with the *shari’ah*.¹⁴⁰

In 1997, the Office of Comptroller of the Currency (“OCC”) under the U.S. Department of Treasury, in an interpretive letter concluded that an Islamic residential Net-Lease home finance product is functionally equivalent to, and in substance has the characteristics of a conventional real estate mortgage.¹⁴¹ Additionally, in 1999, the OCC

133. MASB, *supra* note 123, at 94.

134. *Shari’a and Islamic Finance Need to Build on Early Appeal*, GLOBAL INVESTOR MAG., DAILY NEWS, Feb. 17, 2009.

135. *Id.*

136. El-Gamal, *Incoherence*, *supra* note 1, at 6.

137. El-Gamal, *Interest and the Paradox*, *supra* note 90, at 128 (quoting Justice M. Taqi Usmani: “The Murabahah when used as a mode of trade financing is borderline transaction with very fine lines of distinction as compared to an interest bearing loan. These fine lines of distinction can be observed only when all the basic requirements already explained are fully complied with. To ignore any one of them makes it an interest-bearing financing, therefore, it should always be effected with due care and precaution.”).

138. Mazhar Iqbal, *supra* note 60, at 2.

139. The Federal Shariat Court of Pakistan was established by virtue of the President’s Order No.1 of 1980 as incorporated in the Constitution of Pakistan, 1973 under Chapter 3-A. The court is a unique institution backed by powerful provisions of the Constitution. The Court consists of eight Muslim Judges including the Chief Justice and Ulema Judges who are well versed in Islamic Law. The Federal Shariat Court of Pakistan, <http://www.shariatcourt.gov.pk/Est.html> (last visited Mar. 18, 2009).

140. TAQI USMANI, *supra* note 56, ¶ 219.

141. O.C.C. Interpretive Ltr. 806 (Dec. 1997), at 8-9.

concluded that an Islamic Cost-Plus or *murabaha* transaction is also a permissible home financing method because the “economic substance is functionally equivalent to . . . a real estate mortgage transaction.”¹⁴² In making these conclusions, the OCC used three general principles to determine that an Islamic bank’s activities are within scope of the “business of banking” as provided by the National Bank Act.

The three general principles used to determine whether an activity is within the scope of the “business of banking”: (1) is the activity functionally equivalent to or a logical outgrowth of a recognized banking activity; (2) would the activity respond to customer needs or otherwise benefit the bank or its customers; and (3) does the activity involve risks similar in nature to those already assumed by banks.¹⁴³

The OCC also reasoned that U.S. commercial laws also follow the substance over form approach, specifically in the bankruptcy context,¹⁴⁴ and that the economic substance of the transaction, rather than its form, guided their analysis of whether national banks can engage in a particular activity.¹⁴⁵ Similar to the *shari’ah* perspective, the Court in *Omini Partners II* stated, “it may consider the parties’ intent and look through the form to the substance of the transaction to determine the rights of the parties.”¹⁴⁶ For example, the “court found that the economic substance of a sale-leaseback transaction that included a “triple Net Lease” was not a disguised financing transaction.¹⁴⁷ From this analysis, the OCC concluded that (1) the Islamic bank’s risks under the Net Lease real estate and Cost-Plus programs are similar to the risks of traditional mortgage loans,¹⁴⁸ and (2) it is apparent that both programs are functionally equivalent to, and in substance have the characteristics of a conventional financing transaction.¹⁴⁹

142. O.C.C. Interpretive Ltr. 867 (Dec. 1999), at 1-2.

143. O.C.C. Interpretive Ltr. 806 (Dec. 1997), at 3-4 (citing *Merchants’ Bank v. State Bank*, 77 U.S. 604 (1871); *M & M Leasing Corp. v. Seattle First Nat’l Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *American Ins. Ass’n v. Clarke*, 865 F.2d 278 (2d Cir. 1988)).

144. O.C.C. Interpretive Ltr. 806 (Dec. 1997), at 8.

145. *Id.* at 4; O.C.C. Interpretive Ltr. 867 (Nov. 1999), at 6.

146. O.C.C. Interpretive Ltr. 806 (Dec. 1997), at 8 (citing *In re Omini Partners II*, 67 Bankr. 793, 795-797 (Bankr. D.C.N.H. 1986)).

147. O.C.C. Interpretive Ltr. 806 (Dec. 1997), at 8.

148. *Id.* at 11; O.C.C. Interpretive Ltr. 867 (Nov. 1999), at 3.

149. O.C.C. Interpretive Ltr. 806, (Dec. 1997) at 8; O.C.C. Interpretive Ltr. 867 (Nov. 1999), at 1-2.

Critics of the Islamic banks argue that, the OCC, by enabling the use of cost-plus and lease financing, confirmed that contemporary Islamic home financing is not materially different from a conventional loan.¹⁵⁰ Proponents counter by arguing that these Islamic transactions are different and do not lead to a prohibited transaction because, in the case of cost-plus, it is a credit sale, which is permissible,¹⁵¹ and the rate of interest used in both cost-plus and lease-to-own, is only used as a benchmark. Proponents also make a distinction between Islamic finance and a conventional mortgage by stating that Islamic finance is asset-based as opposed to money-for-money financing.¹⁵²

However, in the M & M Leasing decision, the court noted that in appropriate circumstances, a lease transaction may constitute a loan of money secured by the property leased, and that these transactions are “functionally interchangeable.”¹⁵³ The court determined that when the economic characteristics of a lease are substantially similar to a loan, the lease may be considered to be functionally equivalent to the loan.¹⁵⁴ The court used substance of the transaction, rather than its form, to guide its analysis.¹⁵⁵

Contemporary “Islamic finance remains subject to fierce criticism for putting form over substance.”¹⁵⁶ Using the form of a marked-up sale, lease, or partnership may not change the nature of the transaction unless the terms, or substance, of the transaction are altered to differentiate it from a conventional loan, leading to a prohibited transaction under *shari’ah*.

150. El-Gamal, *Incoherence supra* note 1, at 3.

151. “Sarakasi, a well-known eleventh century jurist, proves the permissibility of credit sale directly from Qur’an . . . clearly acknowledges that a credit price is usually higher than cash price. ‘Proof that selling for credit is an absolute feature of trade is found in His statement, may He be exalted, ‘unless it be local trade that ye are conducting amongst you.’ This shows that trade can also be long distant, and this latter type of trade cannot come about except selling on credit.” Mazhar Iqbal, *supra* note 60, at 2.

152. El-Gamal, *Interest and the Paradox supra* note 90, at 129.

153. O.C.C. Interpretive Ltr. 806 (Dec. 1997) at 4 (citing M & M Leasing Corp. v. Seattle First Nat’l Bank, 563 F.2d 1377, 1382 (9th Cir. 1977)).

154. *Id.*

155. *Id.*; see also Am. Ins. Ass’n v. Clarke, 656 F.Supp. 404 (D.D.C. 1987). The District of Columbia Circuit court emphasized that bank powers analysis should focus on the substance of the transaction and not proceed from the narrow and artificially rigid view of both the business of banking and the statute that governs that business. The court endorsed the OCC’s position that in determining whether an activity constitutes part of the business of banking, the Comptroller may “look beyond the label given to a certain activity to determine whether or not it is permissible.”

156. *Shari’a and Islamic Finance Need to Build on Early Appeal*, GLOBAL INVESTOR MAG., Daily News, Feb. 17, 2009.

2. A pre-determined rate of profit must be set in ratios, not in absolute terms

Many conservative Islamic economists and scholars have concluded that any transaction involving a pre-determined rate of return is prohibited;¹⁵⁷ therefore, the three types of home financing transactions mentioned above may be invalid because the provider of funds earns a pre-determined and fixed rate of profit. The pre-determined profit rate assures the provider of a guaranteed return, while the customer faces uncertainty of profit and a possibility of loss.

Guidance determines its profit payment by matching it to competitive interest rates, such as the London Interbank Offered Rate (“LIBOR”).¹⁵⁸ The profit payment may even be modified and linked to an interest rate index.¹⁵⁹ Although this transaction has the appearance of a loan in form, Guidance claims that it is different from a conventional mortgage because the model is derived from the *shari’ah* compliant *diminishing musharaka* model.¹⁶⁰ Their main argument is that they form a partnership with a customer and do not lend money that would “involve an exchange of cash for a greater amount of future cash, which would give rise to *riba*.”¹⁶¹

Guidance also asserts that their model provides customers with benefits that are equivalent to a conventional mortgage, “but in a manner that complies with Sharia.”¹⁶² They cite to the *sunnah* for support:

The Companion Bilal (*r*) once informed the Prophet (*s*) that he exchanged two measures of low-quality dates for one measure of high-quality dates. To this, the Prophet (*s*) replied: “Woe! This is the essence of *riba*. Do not do so, but if you want to buy the [high-quality] dates, sell [the low-quality dates] in a separate bargain and then buy [the high-quality dates] with its proceeds.”¹⁶³

157. Razak, *supra* note 38. Thus it must be emphasized that the basic and most important characteristic of *Islamic financing* is that it does not deal with fixed interest or pre-determined profits. See Shamim Ahmad Siddiqui, *Understanding and Eliminating Riba: Can Islamic Financial Instruments be meaningfully implemented?*, 1 J. MGMT. & SOC. SCI. 187, 193 (2005) (“In an Islamic system of humane relationship and social justice, it is unethical on the part of some of the providers of the business funds to ask for fixed return irrespective of the outcome of the business.”)

158. GUIDANCE RESIDENTIAL, *supra* note 97, at 4.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at n.1; see also al-Haddad & El Diwany, *supra* note 106. “[S]cholars have argued that setting rental levels in line with market interest rates is not in itself *haram*. They argue this by

According to this *sunnah*, although the two transactions lead to similar results, purchase of high-quality products, exchanging two measures of low-quality products for one measure of high-quality products is prohibited because there is a risk that the person seeking this barter may be at a disadvantage and may not fetch the fair market value of the low-quality products. Therefore, Guidance analogizes this Islamic principle to argue that their financing method, although set at a fixed rate of return, is “permissible even though it provides a similar benefit to another transaction of a prohibited type.”¹⁶⁴

UIFC determines their profit rate by using market conditions at any given period and by determining the amount of profit an investor wishes to make on the transaction.¹⁶⁵ They also state that the client is free to accept it or reject it under the Islamic principle of offer and acceptance.¹⁶⁶ UFC has not clearly stated their method of determining a profit rate, although it seems as if the use of varied market conditions is simply benchmarking of market interest rates, similar to the method used by Guidance. The latter statement regarding the investor seems very vague, because there seems to be no specific method on how an investor goes about determining a desired profit.

LaRiba claims that they do exactly the opposite of Guidance and UFC. While most Islamic banks take the interest rate of the day and call it rent, service fee, or index, LaRiba has a patented system where they survey the rent of similar properties in the neighborhood; documented rents are obtained from six different real estate agents—three by the bank and three by LaRiba.¹⁶⁷ Both parties then negotiate and agree upon a fair rent for the property, called the Rate of Return on Invested Capital.¹⁶⁸ LaRiba claims that, “[t]his rate differs from market to market depending on the supply and demand of the tangible asset/property being financed,” unlike interest where the rate is set and “defined for all markets regardless of the economic environment of the particular market.”¹⁶⁹ Many scholars have advocated for the lease-to-own system over the conventional interest-based loan system

analogy, on the basis that it is permitted for a Muslim shopkeeper to make the same percentage profit selling lemonade as the non-Muslim shopkeeper makes selling alcohol. *Id.*

164. GUIDANCE RESIDENTIAL, *supra* note 97, at n.1.

165. University Islamic Financial Corporation, Frequently Asked Questions <http://www.universityislamicfinancial.com/faq.html> [hereinafter UFC FAQ] (last visited Mar. 9, 2009).

166. *Id.*

167. LaRiba FAQ, *supra* note 99.

168. *Id.*

169. *Id.*

by stating that it provides security from fluctuating interest rates that could cause problems in repayment.¹⁷⁰

Conservative scholars argue that since the interest rate index will be unknown for any period starting the next day or on subsequent days, clients whose “profit payments” depend upon that interest rate are in a position of ignorance as to what their future rental payments will be,¹⁷¹ leading to an unacceptable level of uncertainty or *gharar*. Furthermore, the fee or rate of return of a diminishing partnership should be determined by local market rental values and not by market interest rates.¹⁷² This rate should not be fixed and should be adjusted “based on negotiation[s] between the partners.”¹⁷³ The purchaser or bank can respond to interest rate volatility by renegotiating lease renewal agreements every few years.¹⁷⁴

In a *shari’ah* complaint Islamic financing contract, a pre-determined rate of profit must be set in ratios, not in absolute terms.¹⁷⁵ With respect to the actual distribution of profits, there are three views.¹⁷⁶ The first view is that each partner gets the profit exactly in the proportion of his initial investment.¹⁷⁷ If A has invested forty percent of the total capital, he must get forty percent of the profit. Any agreement to the contrary which makes A entitled to get more or less than forty percent will render the contract invalid in *shari’ah*.¹⁷⁸ The second view is that the ratio of profit may differ from the ratio of investment if the partners agree upfront with mutual consent.¹⁷⁹ Therefore, it is permissible that a partner with forty percent of investment gets sixty or seventy percent of the profit, while the other partner with sixty percent of the investment gets only forty or thirty percent.¹⁸⁰ The third view, a middle view of the two opinions men-

170. Nicholas Van Zandt, *Shari’a Banking and the Financial Mainstream: An Outlook on Compatibility*, Jan. 18, 2008.

171. al-Haddad & El Diwany, *supra* note 106.

172. Noreeta Mohd Nor, *Musharakah Mutanaqisah as an Islamic Financing Alternative to BBA*, MIF MONTHLY, Sep. 2008.

173. ROSLY, *supra* note 49, at 142.

174. *Id.*

175. *Id.* at 183; *See also* IQBAL & MOLYNEUX, *supra* note 34, at 20 (“Profits . . . can be distributed in any proportion by mutual consent. However, it is not permissible to fix a lump sum profit for anyone.”).

176. ROSLY, *supra* note 49, at 183.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

tioned above, says that the ratio of profit may differ from the ratio of investment.¹⁸¹

None of the three financial institutions discussed above adhere to the three views. They all determine their respective rates or fees based on an absolute value, giving them a guaranteed profit, which is not allowed under the *shari'ah*.

3. The Interest Label: Deceiving the U.S. Government or the Consumer?

According to conservative scholars, labeling a product as interest in order to satisfy government standards, yet telling the customer that it is not interest may be perceived as a deceptive practice¹⁸² or legal trickery. Conservative Muslims refuse to sign any contract that contains the word interest.¹⁸³ The three types of home financing transactions mentioned above may be invalid because in order to satisfy state and federal government requirements, LaRiba, Guidance, and UIFC will label their respective fees as interest on the contract and other documents.

The late Arab scholar Ibn Uthaymeen described modern day Islamic banking as the “usury of deception.”¹⁸⁴ He viewed this as a more serious sin than usury on its own, for the former entails deception as well as usury, while the latter does not attempt to present itself as anything other than what it is.¹⁸⁵ Another top scholar noted that labeling a fee as interest is an issue of substance over form, and that intention and substance are what matters in the contract, “not words and forms.”¹⁸⁶ This scholar has reached a conclusion that there is no objection to using the term “interest” as an alternative to the term “profit” or “rate of return,” as long as the intention of the parties is

181. *Id.* at 183-84.

182. Islam rejects deceiving and deceivers in all transactions and dealings whether those transactions were material or moral. (“The Apostle of Allah (peace be upon him) having said: Allah, Most High, says: I make a third with two partners as long as one of them does not cheat the other, but when he cheats him, I depart from them.”) Quran Explorer Book 22, Hadith 3377 Narrated by AbuHurayrah, <http://www.quranexplorer.com/> (“Launch Hadith Explorer” follow “Dawud” hyperlink on left, follow “22: Commercial Transactions” hyperlink, follow “3377” hyperlink).

183. ElBoghdady, *supra* note 89.

184. al-Haddad & El Diwany, *supra* note 106.

185. *Id.*

186. Sheikh Dr. Yusuf Al-Qaradawi, Al-Baraka Seminars, Algiers, Algeria, 1990, (Trans. Mahmoud El-Gamal) at Lariba.com, *Shari'aa Opinions and Methodology*, <http://www.lariba.com/fatwas/qaradawi.htm>.

not to collect or pay *riba*.¹⁸⁷ He justifies his opinion by emphasizing that it is imperative to ensure that the term “interest” in the sense described above, is used only in the documentation required by entities other than the bank (e.g. tax declaration forms for depositors, or special forms used in various financing cases).¹⁸⁸ However, if the intent is to change the nature of the transaction and to make it an interest-bearing loan, then such transaction will be fundamentally impermissible.¹⁸⁹

4. *Shari’ah* requires ownership and possession of an asset

Another principle that should be observed in an Islamic sale transaction is that the seller must have possession of the asset and should take liability of it before selling it to the buyer; “Prophet Muhammad . . . mentioned that *profits belong to him who bears responsibility*.”¹⁹⁰ According to the *shari’ah*, for a sales contract to be valid the good being sold must exist at the time of the sale, must be in ownership of the vendor, and must be in the “physical or constructive possession” of the vendor.¹⁹¹ The fact that a bank or a vendor takes ownership of the good for some time, exposing itself to risk, is what makes the transaction legitimate.¹⁹²

Islamic banks use multiple sales and/or leases to mimic the amortization schedule of a conventional mortgage, and some institutions benchmark prevailing interest rates to determine their “profit payments” or “rent.” They argue that Islamic financing may look like a conventional mortgage in form, but the nature of the transaction is determined by the legal effect it has on the relations of the party.¹⁹³ Nevertheless, the question remains: which law governs the legal effect? Under the *shari’ah* it is clear that a bank must own the asset before it sells or leases it. However, a provision in the National Bank Act of 1864 prohibits banks from the purchase, holding of legal title,

187. *Id.*

188. *Id.*

189. *Id.*

190. Razak, *supra* note 38 (emphasis added).

191. IOBAL & MOLYNEUX, *supra* note 34, at 23.

192. TIMUR KURAN, ISLAM AND MAMMON: THE ECONOMIC PREDICAMENTS OF ISLAMISM 10 (2004).

193. See GUIDANCE RESIDENTIAL, *supra* note 97, at 4 (“The Declining Balance Co-ownership Program differs from a mortgage loan primarily by the nature of the transaction, in particular the relationship between the parties involved The relationship between Guidance and the customer is that of co-owners in a property and not one of lender-borrower. The initial financing provided by Guidance is applied to acquire a share in the property and not to provide a loan.”).

or possession of real estate to secure any debts due to it for a period exceeding five years.¹⁹⁴ The OCC broadly interpreted this provision and demonstrated how the U.S. regulatory framework can accommodate Islamic finance. The OCC believes that “a narrow view of the statute would elevate form over substance because, in this case, *having legal title is largely cosmetic* and the actual indicia of ownership are borne by the Lessee.”¹⁹⁵ The OCC reasoned that the bank “does not, and will not actually hold real estate,” and “although the bank may hold legal title to the property it will not take actual possession of the property at any point during the . . . [contract] term.”¹⁹⁶

Because there is no required minimum time interval for UIFC to own the property before selling it to their client the typical interval is under a millisecond; therefore, “this infinitesimal ownership period makes cost-plus financing method equivalent to an interest-based loan: the bank bears no risk, and the client pays for the time-value of money.”¹⁹⁷ By carefully examining the transaction, the above premise may be true. The bank immediately transfers ownership of the asset to its client, assuming no risk. The client still pays a fixed mark-up at a later date, “a payment that is usually secured by some sort of collateral or by other forms of contractual coercion;”¹⁹⁸ therefore, in form it looks a lot like a conventional loan. Because the bank does not own the property for any meaningful amount of time, the transaction is merely one of “money now for more money later.”¹⁹⁹ The Federal Shariat Court of Pakistan has ruled that if a “*murabahah* [or cost-plus financing] transaction is effected with all its necessary conditions, it is

194. See 12 U.S.C. § 29 (2003). Section 29 reads, “A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.”

195. O.C.C. Interpretive Ltr. 806, (Dec. 1997), at 11 (emphasis added).

196. *Id.*

197. KURAN, *supra* note 192; see also Bennett, *supra* note 105. “Sohrab Behdad, an economics professor at Denison University and another critic, sees *murabahah* as particularly egregious. He sees no difference between entering into a *murabaha* and simply taking out a loan and buying the car outright, especially since the title to the car is often transferred from the bank to the customer almost immediately. To economists like Behdad, the bank’s service charge is simply a disguised interest payment.” *Id.*

198. MacClean, *supra* note 35.

199. al-Haddad & El Diwany, *supra* note 106. The authors assert that “In effect, the property is used as a means of lending money at interest.” But also note that “the possibility that contracts of sale could be used in such a way was well recognised by ibn ‘Abbas. When asked about a piece of silk that was sold for a deferred price of 100 and re-purchased for a payment of 50 in cash, Ibn ‘Abbas commented: ‘dirhams for dirhams, with a piece of silk in between. *Id.*”

not impermissible in *Shar'iah*.²⁰⁰ The court established that all the basic requirements of *murabaha* must be fully complied with, and to ignore any one of them makes it an interest-bearing financing.²⁰¹

The LaRiba lease-to-own transaction works in the same way, where LaRiba does not own the home for any meaningful amount of time. LaRiba agrees to form a conceptual partnership with client to buy the property together. Once the home is purchased, ownership percentage is based on the down payment amount chosen by the client (i.e., for a \$300,000 home with twenty percent down, the client pays \$60,000 and owns a twenty percent share of home).²⁰² In the same contract the client agrees to buy the bank's share of the home for the same value (\$300,000-60,000 = \$240,000). LaRiba claims that this way they do not own the home in compliance with U.S. banking rules and regulations.²⁰³ The client, based on his cash flow, agrees to buy the shares owned by LaRiba at the \$1 per share price and to pay back the bank's share interest free over a period of thirty years or \$80,000 per year. The client and LaRiba, independently, survey the market to find a fair leasing rate for the house. They negotiate a fair lease and agree on it; the lease is divided between the client (twenty percent in the beginning and rising to 100% over thirty years) and the Bank (eighty percent in the beginning and declining to zero percent over thirty-year term.). LaRiba claims that as long as they conceptually own the shares in their name (as expressed as a lien on the property) then they are entitled to receive a proportion of the rent in the percent ownership level. LaRiba does not wait until the end of the lease term to give the client the option to purchase; instead, the option is given following the lease agreement.

Some Muslim jurists have concluded that the lease-to-own model offered by LaRiba contains *gharar* or uncertainty "because, from a Shariah perspective, the dual nature of the payments makes the ownership of the subject item and the rights and obligations of the contracting parties ambiguous;" therefore, making this transaction impermissible.²⁰⁴ The jurists offer a permitted alternative where the transaction is separated into a lease contract followed by a sale contract, "thus clearly defining at any point of time the ownership of the

200. TAQI USMANI, *supra* note 56, ¶ 219.

201. *Id.* at ¶ 227(a).

202. LaRiba FAQ, *supra* note 99. (LaRiba requires a minimum five percent down payment. If the down payment is less than twenty percent, a Private Mortgage Insurance is required.)

203. *Id.*

204. MASB, *supra* note 123, at 89.

subject item and the parties' rights and obligations."²⁰⁵ During the lease period, the lessee is deemed to be only renting the home, and the lease contract would have been negotiated with a promise by the bank to sell the item to the lessee and/or a promise by the lessee to purchase the home from the lessor by, or at the end of the lease period, thereby giving the client an option to purchase. "If and when both parties agree to honor the promise(s), a separate sale and purchase agreement is entered into."²⁰⁶ If the transaction is conducted in the manner above, the bank will have ownership of the property and will assume liability, as required by *shari'ah*.

5. *Shari'ah* requires profit and loss sharing for all transactions

In each of the three financing methods discussed, it is clear that each party shares some type of reward. All of the banks gain a profit or fee, and the homeowner gains the benefit of a home and the possibility of a profit when he sells. However, this reward-sharing must be related to risk-sharing, and the Islamic banks do not fully participate in risk-sharing as required by the *shari'ah*.²⁰⁷ Some jurists claim that in a lease transaction, the Islamic bank bears the risk throughout out the life of the lease, and in the case of cost-plus financing, the bank bears a risk during the period between purchasing the property and reselling it to the customer.²⁰⁸

Guidance declares that they do share in some of the risks, for example, in the case of a natural disaster or the government's exercise of eminent domain, Guidance will share in the monetary loss that may occur.²⁰⁹ Also, in situations where the proceeds provided by an insurance company or the government fall short of the original property value, Guidance will share the loss based upon the percentage of ownership at the point of the loss.²¹⁰ In a similar situation, conventional mortgage providers will most likely demand repayment of the full financing amount provided. In addition, Guidance offers non-recourse mortgages in all states; in the event of default, the customer is only at

205. *Id.* at 90.

206. *Id.*

207. Siddiqui, *supra* note 157, at 194 ("The Islamic sense of social justice requires all parties directly or indirectly financing in a business [or transaction] should share the risk of the business.").

208. El-Gamal, *Interest and the Paradox*, *supra* note 90, at 129.

209. Guidance Residential, http://www.guidanceresidential.com/index.php?option=com_content&task=view&id=8 (last visited Mar. 22, 2009).

210. *Id.*

risk for their equity position in the property.²¹¹ In many states, mortgage lenders may offer recourse mortgages where all personal assets are subject to seizure in the event of a default.

LaRiba also acknowledges that it is an Islamic requirement to share the risk; however, they simply make a generic statement that they take the risk of not benefiting from higher rents.²¹² They also determined that after polling a large number of community members, over ninety percent did not want LaRiba to participate in the profit.²¹³ LaRiba also states that due to past experiences and lengthy court proceedings regarding this subject they decided to not participate in profit/loss sharing.²¹⁴ UIFC does not participate in any profit/loss sharing; they simply state that the property belongs to the customer, so the customer is entitled to all the proceeds from the sale of the property.²¹⁵

6. Securitized Loans may allow Islamic banks to pay disguised interest

Critics argue that while Islamic banks have invested their funds in “fixed-interest cost-plus and lease financing [products], thus nearly perfectly mimicking the asset side of conventional banks,”²¹⁶ they have not been able to mimic the conventional bank’s interest bearing deposit accounts. To balance the assets with liabilities, the banks replace paying interest on deposit accounts and money market instruments with an “Islamic securitization fiction.”²¹⁷ Securitization consists of the pooling and packaging of loans into securities that are then sold to investors. Securitization is often used to market small loans that would otherwise be difficult to sell on a stand-alone basis. These securitized loans allow Islamic banks to “pay disguised interest to providers of funds who are characterized as buyers of lease certificates.”²¹⁸ For example, Guidance obtains external funding for their program through an agreement with Freddie Mac.²¹⁹

211. *Id.*

212. LaRiba FAQ, *supra* note 99.

213. *Id.*

214. *Id.*

215. UIFC FAQ, *supra* note 165.

216. El-Gamal, *Interest and the Paradox*, *supra* note 90, at 132.

217. *Id.*

218. *Id.* at 134.

219. GUIDANCE RESIDENTIAL, *supra* note 97, at 5.

In this agreement, Freddie Mac makes investments to take a co-ownership stake in properties financed under the Program. At a second stage, Freddie Mac creates Sharia-compliant securities invested in the co-ownership assets. These securities will be offered by Guidance to Islamic banks and other Islamic capital market participants around the world. These securities constitute a significant innovation that contributes to the development of the international Islamic finance market.²²⁰

Moderate Islamic jurists contend that “there is a fundamental difference between an Islamic securitized loan and an interest-bearing instrument by viewing the investor’s interest as a direct ownership of the underlying asset.”²²¹

LaRiba claims that they do not borrow money, nor sell loans to Freddie Mac or Fannie Mae, instead, those companies are investors and approve LaRiba financed homes.²²² If approved, LaRiba transfers the money from its own funds to purchase the house; within a week, Freddie Mac or Fannie Mae repays LaRiba the same amount. LaRiba claims that they do not charge Freddie Mac or Fannie Mae interest at any point during the transaction.²²³

UIFC states that they use the funds of “[s]haria depositors to purchase the selected home from the seller.”²²⁴ This structure is similar to a conventional bank’s interest bearing deposit account, however, UIFC does not pay interest to their depositors but offers clients a unique profit sharing account. The yield on the profit sharing deposit is based on the gross operating profits of a business line and therefore is not set in advance.²²⁵ The assets of the business line, in which UIFC invests, must be *shari’ah* compliant.²²⁶

220. *Id.*

221. El-Gamal, *Interest and the Paradox*, *supra* note 90, at 133 (“It should be remembered, however, that the [lease] certificate must represent ownership of an undivided part of the asset with all its rights and obligations. Misunderstanding this basic concept, some quarters tried to issue *ijarah* certificates representing the holder’s right to claim certain amount of rental only without assigning him any kind of ownership in the asset. . . . This type of securitization is not allowed in Shari’ah.”)

222. LaRiba FAQ, *supra* note 99.

223. *Id.*

224. UIFC FAQ, *supra* note 165.

225. University Islamic Financial, Deposit Products, <http://www.universityislamicfinancial.com>. (last visited Mar. 22, 2009). The yield is based upon a true calculation of the actual yield of qualifying assets, business performance of the underlying assets, multiplied by a factor. The factor allows University Bank to arrange for a fair division of profits from the qualifying assets. This formula is free of gharar. The return on your deposit, which could go up or down; even fall to zero, is free from any form of riba. *Id.*

226. UIFC FAQ, *supra* note 165.

B. Proposed Solution to the Islamic Home Financing Dilemma

The difficulty in making a judgment on whether contemporary Islamic home financing is a deception or solution is due to the split opinions of Islamic jurists and practitioners on the permissibility of Islamic home finance. Below is a proposed solution that complies with the *shari'ah*, that may satisfy pious consumers, and one that could possibly end predatory lending habits.

A potential solution to the dilemma presented above is a true profit-loss sharing model that complies with the *shari'ah* and satisfies the Muslim consumer. Islamic economists contend that the profit-loss sharing theory is desirable in an Islamic context, wherein reward or profit sharing is related to risk or loss sharing between transacting parties.²²⁷ Under the profit/loss-sharing structure, a financial institution enters into a joint venture with a client in order to provide capital.²²⁸ The risk assumed, and agreement to take part in the loss, by the financial institution in the joint venture justifies any profit made from the transaction.²²⁹ Optimal sharing of risk and return would lead to “(i) a better income distribution pattern, (ii) increased financial stability, and (iii) a more humane attitude among all parties concerned.”²³⁰

The proposed solution would work in the following manner. The customer and financier would purchase the home together with the ownership share determined by the initial amount invested by each party. The home would be treated as an asset rather than collateral. Under most *shari'ah* compliant financing models “the [profit] ratio is set on project risks, value-addition, and liabilities”²³¹ and cannot be expressed as a percentage of the capital invested.²³² Therefore, this agreed profit-sharing ratio must be set according to predetermined terms and conditions. For example, if the customer agrees to pay all taxes, insurance, and other associated fees, and agrees to be responsible for maintenance of the property, his proportion of profit may be higher than his initial investment. The bank would bear the losses with the homeowner in the same ratio that it agrees to share in the profits. In order for the customer to obtain 100% ownership of the

227. HUMAYON A. DAR & JOHN R. PRESLEY, LACK OF PROFIT LOSS SHARING IN ISLAMIC BANKING: MANAGEMENT AND CONTROL IMBALANCES, ECONOMIC RESEARCH PAPER No. 00/24, Department of Economics, Loughborough University (2000-2001).

228. Chiu, *supra* note 95.

229. *Id.*

230. Siddiqui, *supra* note 157, at 201.

231. Rosly, *supra* note 49, at 188.

232. Lewis & Algaoud, *supra* note 6, at 42.

home, he would pay the principal amount on a monthly basis in addition to an agreed upon rental fee based on the market and type of property. The customer would pay the fee in exchange for exclusively enjoying full benefits of the home (i.e., the right to live in it, the right to make improvements, and the option to sell without permission), and because the bank gains no other benefit for holding on to the asset. The fee should not be as high as the current profit, rent or fee collected by existing Islamic banks. When the customer plans to sell the home and if there is a gain, both parties share the profits according to the equity ownership at the time of the sale. In the case of a loss (i.e. the home is destroyed, government exercises eminent domain, or a decrease in home value) both parties will share in that loss.

For example, suppose that a customer and bank form a thirty-year partnership, and agree to purchase a home costing \$100,000. The customer's initial payment is \$30,000, yielding a thirty percent equity stake in the home for the customer and a seventy percent stake for the bank. The customer has thirty years to pay off \$70,000, which comes out to approximately \$194 per month, plus the agreed fee. Let us assume that after sixty months, the customer decides to sell the home for \$140,000. The customer has a 41.64% equity stake as he has paid the bank \$41,640 to date. The customer will retain \$16,656 (plus the \$41,640) and the bank will retain \$23,344 (plus the \$58,360) on the total \$40,000 profit. If there is a loss on the value of the home, both parties will equally share in the loss. For example if the home sold for \$90,000, then the customer would get \$37,476 (loss of \$4164) and the bank would get \$52,524 (loss of \$5836), or whatever percentage the parties agreed to share in the loss.

Using this solution, many concerns discussed above may be addressed. First, there will be no "legal trickery," because the fee would not be based on prevailing interest rates or disguised as interest. The home would be an asset for the bank so they may share in the profit or loss therefore assuming risk. This model would also include the non-recourse commitment and the risk of loss feature offered by Guidance. The customer would be given the option to pay his or her own insurance and taxes rather than give money to the bank for escrow. This way the customer would benefit by investing the money in a savings or money market account and earning some profit. Finally, because of the low fee and sharing of profits, the cost of the home would not be more than it would cost with a conventional mortgage and it could possibly be less.

Due to reasons such as greed, many homeowners may not want to share the profits with the bank in exchange for paying interest. Unlike a true business venture, a home will not generate annual dividends or revenue. Therefore, banks will not want to risk losing a fixed income stream generated by interest, in exchange for a profit or possibility of loss.

CONCLUSION

In a *riba* transaction a lender is prohibited from receiving any benefit or increase for the giving of a loan. The conservative and moderate view is that modern interest falls under the scope of the *riba* prohibition; liberals disagree. The prohibition of *riba* is the underlying difference between an Islamic banking system and a conventional banking system.²³³ Therefore, in the western economy where conventional banks fund the majority of transactions, it becomes difficult for Muslims to abide by the tenets of their religion while attempting to achieve the “American dream” of purchasing a home or car, or funding an education.

A known legal maxim of Islamic jurisprudence is that where the text is clear, there is no room for interpretation.²³⁴ As noted earlier, the text of the Qur’an and the *sunnah* are not clear on the nature or definition of *riba*. Therefore, there is room for interpretation, and it may be up to Islamic jurists and scholars to determine a reasonable application of *riba* that is more applicable to modern transaction. However, due to the various interpretations of *shari’ah*, there is not a true consensus, leading to differing views and interpretations of the permissibility of *riba* in a financial transaction. Among the three major views on *riba* and Islamic home finance discussed above, Islamic scholars have not come to a consensus on a definitive or correct interpretation; therefore, it is up to each individual consumer to develop a conclusion based on the facts.

Muslim consumers must understand that “most Islamic economists contend that [profit/loss sharing] . . . is desirable in an Islamic context wherein reward-sharing is related to risk-sharing between

233. LEWIS & ALGAOUD, *supra* note 6, at 2.

234. AL-MAJALLAH AL-AHKAM AL-ADALIYYAH, AN ‘UTHMANI HANAFI SHARI’AH-COURT TEXT, PART II—MAXIMS OF ISLAMIC JURISPRUDENCE, http://www.ummah.com/Al_adaab/fiqh/majalla/introduction.html; *see also* KAMALI, *supra* note 7, at 118 (“Normally the mujtahid will not resort to interpretation when the text itself is evident and clear.”).

transacting parties.”²³⁵ However, contemporary Islamic banks have so far failed to adopt true profit/loss sharing modes of financing in their business, and as noted in the solution above the profit/loss sharing model may be unattractive to home purchasers and financiers. Conservative and liberal Muslims assert that “[b]ankers, lawyers and scholars have devised financing tools that change the structure, but not the underlying economics, of a conventional mortgage.”²³⁶ Therefore, there is a “problem because these deals are trying to fit a modern transaction into the framework of medieval contracts,”²³⁷ and in many Muslim’s eyes they have not been successful in implementing a true *shari’ah* compliant solution.

Islamic home financing schemes seem equivalent to a conventional interest-bearing loan mostly because Islamic banks have to offer relatively less risky modes of financing, compared to the risky nature of profit/loss sharing, in the wake of severe competition from conventional banks and other financial institutions, which are already established and hence more competitive. Again, these banks have come under scrutiny from conservative and liberal Muslims and to some it seems as if these contemporary financing methods are more of a deception than a solution.

It is difficult to say whether Islamic home financing transactions are truly compliant with the *shari’ah* based on the ambiguities of the Qur’an and *sunnah*. However, in order to comply with the *shari’ah*, Islamic banks should agree to participate in both the gain and the loss that may result from such a transaction. It can be argued that any contract that is missing this clause is “not acceptable” from a *shari’ah* perspective. In summary, with the benchmarking of interest rates, the securitized leases, and the goal to maximize profits, it may be difficult for any Islamic bank to completely avoid interest. It seems as if the Prophet Muhammad was correct when he said, “[a] time is certainly coming to mankind when only the receiver of usury will remain, and if he does not receive it, some of its dust will reach him.”²³⁸

235. DAR & PRESLEY, *supra* note 227.

236. ElBoghdady, *supra* note 89.

237. *Id.*

238. Quran Explorer, Dawud, Book 22, Hadith 3325, Narrated by AbuHurayrah, <http://www.quranexplorer.com/> (follow “Launch Hadith Explorer” hyperlink, then follow “Dawud” hyperlink on left, then follow “22: Commercial Transactions” hyperlink, then follow “3325”).

COMMENT

When the Storehouse is Empty, Unconscionable Contracts Abound: Why Transplant Tourism Should Not Be Ignored

ERICA D. ROBERTS*

“Several years after the operation, Rani is still unable to resume her job as a manual construction laborer because of the pain in her side. When asked whether or not it was worth it she replied: ‘The brokers should be stopped. My real problem is poverty—I shouldn’t have to sell my kidney to save my daughter’s life.’”†

INTRODUCTION

In the world today, individuals expect to be able to find and buy whatever they need. A few years ago, my brother purchased a used Toyota Camry with over 200,000 miles on the odometer. Consequently the Camry needed a new engine. So, my brother went to the computer, typed in the web address for eBay, and began shopping for the best deal. eBay and similar websites have become ideal marketplaces for consumers and sellers. Millions of items, from the routine

* J.D. Candidate, Howard University School of Law, 2009; Senior Notes and Comments Editor, *Howard Law Journal*, 2008-2009. God, I thank you for ordering my steps. Professor Alice Thomas, thank you for all of your suggestions and for seeing this project through to its completion. Professor Cynthia Mabry, thank you for your feedback and for being a constant mentor. Taryn Mitchell, my senior editor, I appreciate you. Chinué Richardson, thank you for constantly encouraging me. Shara Chang and the *Howard Law Journal* editorial staff, thank you. Nina Frant, thank you for always believing in my article even when I had my doubts. Dad and Mom, thank you for always believing in me, supporting me, praying for me, and encouraging me. P.J., thank you for always being proud of me. Tonya, Mya, and Chloe, I love you.

† Scott Carney, Inside ‘Kidneyville’: Rani’s Story, http://www.wired.com/print/medtech/heath/news/2007/05/india_transplants_rani.

to the unconventional, are bought and sold each day. In September 1999, an online user initiated an unorthodox auction on eBay. The item up for bid: one healthy kidney.¹

Every year thousands of people choose to donate their organs to others. Such a perfect gift, the gift of life, has been encouraged, facilitated, and supported in the United States and other nations since organ transplantation became a viable option for individuals suffering from terminal diseases.² However, this perfect gift soon became a political struggle and legislative nightmare.³ Conflicts raged over the priority-based waiting list criteria.⁴ Should organs go to the sickest person, or a person residing in the same state as the donor? Should children have greater consideration over adults? Should a transplant recipient receive multiple organs? Are people who were not born in the United States eligible for an organ transplant? These and other debates continue to flood the minds of potential policy makers;⁵ however, one of the most hotly debated issues surrounding organ transplantation involves the moral and ethical implications of providing financial compensation to organ donors.⁶

1. “[The kidney] brought in bids of more than \$5.7 million before the company intervened to block the sale. . . . The seller, who gave his home as Sunrise, Florida, posted the following notice: ‘Fully functional kidney for sale. You can choose either kidney. Buyer pays all transplant and medical costs. Of course only one for sale, as I need the other one to live. Serious bids only.’” CNN.com, *Online Shoppers Bid Millions for Human Kidney*, <http://www.cnn.com/TECH/computing/9909/03/ebay.kidney/> (last visited May 2, 2008).

2. United Network For Organ Sharing: Donate Life, <http://www.unos.org/> (last visited Nov. 2, 2008). The UNOS official website offers information about organ donation to potential organ recipients and donors. “Every day, UNOS works to ensure donated organs save as many lives as possible. You have the power to donate life by becoming an organ and tissue donor.” *Id.*

3. Organ Procurement and Transplantation Network Amendments of 1999, H.R. Con. Res. 2418, 106th Cong. § 1(a)(1) (1999) (proposing amendments to the Public Health Service Act in an effort to improve organ procurement in the United States).

4. H.R. 2418.

5. “[W]e cannot ignore the persistent flaws and unfairness in the system. The most medically urgent patients do not always receive priority. Patients with similar levels of disease may have different outcomes, depending on where they live or [where they are on the waiting list]. Distrust among transplant surgeons and hospital Administrators sometimes impedes broader sharing of organs.” *Organ Procurement and Transplantation Network Amendments of 1999: Hearing on H.R. 2418 Before the H. Comm. on Commerce and the Subcomm. on Health and Environment*, 106th Cong. (1999) (statement of William F. Raub, Deputy Assistant for Science Policy, U.S. Department of Health and Human Services).

6. “Another integral aspect of organ transplantation in the United States is the prohibition on the sale of organs that exists at both the federal and state level. . . . [S]ince the prohibition, strategists and advocates have initiated [market-based . . . proposals to overhaul [these] existing U.S. laws to permit the sale of solid organs.” Lilianna M. Kalogjera, *New Means of Increasing the Transplant Organ Supply: Ethical and Legal Issues*, 34 HUM. RTS. Q. 19, 19 (2007).

Monetary compensation for organ donors was a current topic of conversation in the 1980s. As organ transplantation became more commonplace, the number of individuals seeking transplants increased.⁷ Demand began to exceed supply; and, the methods established for organ procurement failed to combat the ever increasing gap between recipients and donors.⁸ As organ transplant waiting lists grew longer, and the death rates for individuals waiting for an available organ increased,⁹ some desperate potential recipients and opportunistic observers began to explore the option of private, commercial organ transactions.¹⁰

The once-charitable institution of organ donation became susceptible to capitalism. Soon private advertisements from living donors willing to sell their kidneys began appearing in newspaper classifieds.¹¹ Several states began enacting anti-organ selling legislation to combat the growing trend.¹² Congress settled the growing debate in the United States by enacting legislation that prohibited the sale of human organs.¹³ Beginning in late 1989, several other nations enacted similar legislation.¹⁴ In some nations, however, such as Iran, selling an

7. RONALD MUNSON, RAISING THE DEAD: ORGAN TRANSPLANTS, ETHICS, AND SOCIETY 109 (2002). Kidney transplantation in particular increased in part because the End-Stage Renal Disease Act provided that the government would cover the costs of kidney transplantation for patients suffering from end-stage renal kidney failure. *Id.*

8. *Id.* “The organ shortage continues to grow despite multifaceted efforts to increase the transplant organ supply.” Kalogjera, *supra* note 6, at 20.

9. Hearing on H.R. 2418, 106th Cong., *supra* note 5. In 1998, more than 4000 potential donor recipients died waiting for an organ transplant. *Id.* “As these [waiting] lists grow, many more will die as the system continues to strain under the demand for organs.” *Id.*

10. MUNSON, *supra* note 7, at 109.

11. ALEXANDER M. CAPRON & FRED H. CATE, TREATISE ON HEALTH CARE LAW § 21.02 n.185 (2008).

‘Man will sell any portion of body for financial remuneration to person needing an operation. Write Box 1211-630, Covina.’ San Gabriel (CA) Tribune, May 9, 1968, at D8, col. 4. ‘EYES for sale for transplant. \$50,000 each—Help someone you care for see and in return you’ll be helping others. Only sincere parties call please. 344-7118.’ L.A. Times, Jan. 26, 1969, at (classified) 1, col. 1. ‘Cornea transplant offered. Submit prop. to P.O.B. 127, Ontario, Calif.’ *Id.*, Feb. 9, 1969, at (classified) 2, col. 4. ‘30 YEAR old man in excellent health desires to donate a kidney for fee. Negotiable. 274-2750.’ N.Y. Times, July 13, 1975, *quoted in* Hastings Cen. Rep., Aug. 1975, at 2. In 1983, the *Detroit Free Press* ran a front-page story describing an individual who had advertised to sell one of his kidneys for \$25,000 in an effort to save his failing real estate business. May, *Donors Offer Gift of Life—At a Price*, *Detroit Free Press*, Sept. 21, 1983, at 1A. ‘KIDNEY FOR SALE—From 32 yr. old Caucasian female in excellent health. Write to PO Box 654, Wrightstown, NJ 08562.’ Burlington County (NJ) Times, Dec. 25, 1983.

12. “[T]he state of Virginia . . . [passed] legislation specifically prohibiting the sale of human organs. Within a few months, California, Maryland, and New York passed similar laws, and several other states were soon lined up to follow.” MUNSON, *supra* note 7, at 111.

13. 42 U.S.C. § 274(e) (2008).

14. Human Organ Transplant Act, 1989, c. 31 (Eng.); Transplantation of Human Organs Act, 1994, No. 42, Acts of Parliament, 1994 (India); Human Tissue Amendment Act 51 of 1989 (South Africa).

organ is not illegal.¹⁵ In other countries—most notably India—individuals continue to sell their kidneys despite prohibitive laws.¹⁶

Commercialization of organ procurement is illegal in the United States and several other nations worldwide; but disparities in international policies and procedures allow black market organ transactions to flourish. Today, U.S. citizens are able to purchase kidneys from foreign hosts. The transplant operations are usually performed in countries where “suspect” organ procurement goes unquestioned. U.S. citizens are then able to re-enter the United States without having to deal with the consequences of violating U.S. law. Most importantly, although the affluent recipient’s life is saved, the underprivileged donor is often exploited. It is important for the United States to take legislative action to address the growing trend of “transplant tourism,” to re-enforce the rules it has promulgated, and to seek solutions to the organ procurement problem in order to quell the continued exploitation of indigent individuals worldwide.¹⁷

Section I of this Comment will summarize two methods of organ procurement. It also will provide a history of organ transplantation and the process for receiving an organ in the United States. Section II will discuss the current trend of transplant tourism and explain the effects of this trend on legal organ procurement methods. Section III will discuss how transplant tourism exploits indigent individuals. Section IV will suggest ways that the United States can dissuade citizens from participating in transplant tourism. The final section will con-

15. Tim Batchelder, *Organs, Commodities, Technologies*, TOWNSEND LETTER, Oct. 2005, available at http://findarticles.com/p/articles/mi_m0ISW/is_267/ai_n15795060/pg_1. “[T]wo NGOs, Charity Association for the Support of Kidney Patients (CASKP) and the Charity Foundation for Special Diseases (CFSD), work to put donors and recipients in touch with each other. . . . The CFSD must pay the donor 1,000,000 Tomans (\$1219) after the transplant which comes from government funds.” *Id.*

16. India’s Transplantation of Human Organs Act provides for “the prevention of commercial dealings in human organs and for matters connected therewith or incidental thereto.” Transplantation of Human Organs Act, *supra* note 14. The law prohibits living donors from donating an organ to a non-relative. *Id.* However, the law has a loophole. A non-related donor can donate if the Authorization Committee approves the donation. *Id.* As a result, unrelated donors have filed affidavits before the Authorization Committee claiming that the donor and the recipient are “emotionally related” and the donation is essentially altruistic. Dr. Sanjay Negral, *The Indian Kidney Bazaar*, available at <http://www.indiatogether.org/combatalaw/vol4/issue4/organ.htm>. “Figures show that nine out of ten times, the committees grant such requests.” *Id.*

17. Whether the United States should yield to the growing support for legalization of non-vital organ sales is not the focus of this article. Nor does this article attempt to resolve the organ procurement shortage problem. Also, while this article provides information about organ procurement and transplantation generally, the primary focus is on kidney procurement from living donors.

clude that the United States must take legislative action in order to prevent transplant tourism.

I. ORGAN DONATION AND PROCUREMENT

Understanding why a system of transplant tourism is attractive to potential organ recipients in the United States and worldwide begins with an understanding of the current organ procurement shortage. A complete picture of the organ procurement shortage must start with a discussion of how organ transplantation first became a viable treatment option for individuals suffering from organ degrading diseases, such as renal kidney failure, and the methods used in organ procurement.

Organ donation is the process of giving one's organ(s) to another, in many cases for the purpose of transplantation.¹⁸ In 1954, a kidney was the first human organ transplant performed in the United States.¹⁹ The transplant was performed in Boston at the Peter Bent Brigham Hospital. The kidney was procured from a living donor—the twenty-three-year-old recipient's twin brother.²⁰ Subsequent kidney transplants were performed worldwide. In 1959, China's first kidney transplant was performed.²¹ In 1964, a kidney transplant was performed in Rio de Janeiro, Brazil.²² In 1965, India's first successful kidney transplant was performed using a cadaver organ; and in 1971, the first successful transplant using two living patients was performed in India.²³ Transplants of other organs soon followed—pancreas, liver, lung, and eventually a human heart transplant.²⁴

With the success of organ transplantation, methods of organ procurement had to be refined and organized. Eventually two prevailing methods of organ procurement emerged: the altruistic method and the presumed consent method.

18. MUNSON, *supra* note 7, at 20.

19. RUSSELL SCOTT, *THE BODY AS PROPERTY* 17 (1981).

20. *Id.*

21. Charlotte Ikels, *Ethical Issues in Organ Procurement in Chinese Societies*, 38 *CHINA J.* 95, 96-97 (1997).

22. I.L. Noronha, et al., *Nephrology, Dialysis and Transplantation in Brazil*, 12 *NEPHROLOGY DIALYSIS TRANSPLANTATION* 2234, 2240 (1997).

23. V.N. Acharya, *Status of Renal Transplant in India*, 40 *J. POSTGRADUATE MED.* 158 (1994).

24. United Network For Organ Sharing: Organ Donation and Transplantation, <http://www.unos.org/whoWeAre/history.asp> (last visited Nov. 2, 2008).

A. The Altruistic Method

A widely used method of organ procurement is the altruistic method.²⁵ Altruism is defined as the “unselfish interest in the welfare of others.”²⁶ Altruism became associated with organ donation because individuals were encouraged to gift an organ in order to save another person’s life, even if that person were a stranger. The altruistic method is an expressed consent method of organ procurement.²⁷ Under this method, cadaver organs and organs procured from living donors are only received with the expressed consent of the donor or, with cadaver organs, the consent of the donor’s family.²⁸ Some nations use the altruistic method of procurement exclusively, while others use the altruistic method in addition to using other procurement methods.²⁹

The altruistic method of organ donation was used long before organ transplantation became a viable option for terminally ill patients.³⁰ As early as the fourteenth century, medical students used cadavers to learn about human anatomy.³¹ Cadavers were procured altruistically; there was no compensation provided to the donor’s family.³² Beginning as early as 1832 with the English Anatomy Act, individuals could place provisions in their wills allowing for legal donation of body parts for medical research after death.³³ This practice of voluntary donation of organs continued after organ transplantation was developed.

The United States has adopted the altruistic or expressed consent method as its primary method of organ procurement.³⁴ Within the

25. NORA MACHADO, USING THE BODIES OF THE DEAD: LEGAL ETHICAL AND ORGANISATIONAL DIMENSIONS OF ORGAN TRANSPLANTATION 44 (1998); see also James Blumstein, *The Use of Financial Incentives in Medical Care: The Case of Commerce in Transplantable Organs*, 3 J. L. MED. 1, 4 (1993).

26. THE MERRIAM-WEBSTER DICTIONARY (6th ed. 2004).

27. MACHADO, *supra* note 25, at 44.

28. Sheldon Zink, *Presumed Versus Expressed Consent in the US and Internationally*, 9 VIRTUAL MONITOR (2005), available at <http://virtualmentor.ama-assn.org/2005/09/pfor2-0509.html>.

29. MACHADO, *supra* note 25, at 44.

30. SCOTT, *supra* note 19, at 84.

31. *Id.* at 4.

32. *Id.*

33. *Id.* at 84. The act, although promulgated to regulate the use and procurement of cadaver bodies and organs, was also promulgated in part to address the illegal procurement of cadavers. *Contra* SCOTT, *supra* note 19, at 58 (“[O]ne must ask whether it is really necessary to create laws solely to regulate the activities associated with the removal and therapeutic use of human tissues. Perhaps the community and its medical profession could achieve a good working relationship without a surrounding web of legal regulations.”).

34. Zink, *supra* note 29.

boundaries of the altruistic method, several procedures have been established to facilitate organ donation. After the first successful organ transplant, the United States passed the Uniform Anatomical Gift Act of 1968 (“UAGA”).³⁵ The UAGA provided that individuals could donate all or part of their bodies by will.³⁶ It also gave family members the ability to consent to organ donation after an individual’s death.³⁷

In addition to this legislation, and in an effort to promote the altruistic giving of human organs, the United States adopted a system of donor cards.³⁸ A donor card contained the name of the potential donor and stated an intention to make an anatomical gift, either of all viable organs or the organs specified on the card.³⁹ Organizations also were developed to assist in organ procurement. In 1968, the Southeast Organ Procurement Foundation (“SEOPF”) was formed to facili-

35. See UNIF. ANATOMICAL GIFT ACT OF 1968, 8A U.L.A. 69 (2003).

The Uniform Anatomical Gift Act herewith presented by the National Conference of Commissioners on Uniform State Laws carefully weighs the numerous conflicting interests and legal problems. Wherever adopted it will encourage the making of anatomical gifts It will provide a useful and uniform legal environment throughout the country for this new frontier of modern medicine.

Id. at 71. The Uniform Anatomical Gift Act was revised in 1987 and again in 2006. See UNIF. ANATOMICAL GIFT ACT OF 1987, 8A U.L.A. 3 (2003); REVISED UNIF. ANATOMICAL GIFT ACT OF 2006, 8A U.L.A. 27 (2008).

36. “Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purpose . . . the gift to take effect upon death.” UNIF. ANATOMICAL GIFT ACT § 2(a) (1968).

37. “Any of the following persons . . . when persons in prior class are not available at the time of death, and in absence of actual notice of contrary indications of the decedent . . . may give all or any part of the decedent’s body for any purpose” *Id.* § 2(b). “Persons” include a spouse, adult children, parents, siblings, guardians, and any other authorized persons. *Id.*

38. MACHADO, *supra* note 25, at 44. Donor cards also ensured that organ procurement from a donor could be expedited. SCOTT, *supra* note 19, at 85. The Uniform Anatomical Gift Act initially allowed donors to gift an organ in a will, but organ procurement for a living recipient proved problematic because wills must be probated and, additionally, wills are often not read until several days after the donor’s death. *Id.* at 84. However, “[t]he employment of wills for gifts of tissue for transplant and general therapy should not be discouraged”, because a body gifted for anatomy purposes can be preserved for several months. *Id.*

39. SCOTT, *supra* note 19, at 85. Currently, an individual can provide for an altruistic gift of his organs when he receives a driver’s license. REVISED UNIF. ANATOMICAL GIFT ACT § 5, 8A U.L.A. 46 (2008). Checking the organ donor box on a driver’s license application, however, does not make an individual legally bound to donate his organs; instead, by checking the box an individual expresses an interest in donating and the individual’s family can later refuse to donate the individual’s organs. MACHADO, *supra* note 25, at 45. The Revised Uniform Anatomical Gift Act, addressed this issue:

‘[A]n anatomical gift that is not revoked by the donor before death is irrevocable’ For many years, however, it was the practice . . . for procurement organizations to seek permission from donor families before parts could be removed from deceased donors. This practice, however, is inconsistent both with the 1987 Act and, more importantly, the respect due to donors who have made anatomical gifts during their lives. Furthermore, that practice could result in unnecessary delays in the recovery of organs.

REVISED UNIF. ANATOMICAL GIFT ACT § 8 cmt.

tate continued scientific research and organ sharing.⁴⁰ In 1977, the first computer-based organ matching system was formed as a part of the SEOPF: the United Network for Organ Sharing (“UNOS”), a non-profit organization.⁴¹

In 1984, the United States Congress established the Organ Procurement and Transplantation Network (“OPTN”).⁴² The purpose of the network is to promote efficiency in and unify the allocation of human organs in the United States and to establish initiatives effective in increasing the supply of human organs.⁴³ Under federal contract, the OPTN must be operated by a non-profit organization.⁴⁴ UNOS received the first OPTN federal contract in 1986.⁴⁵ Under that contract, UNOS manages and operates the waiting list for organ transplantation in the United States by matching potential donors with recipients.⁴⁶ In addition, UNOS monitors all the transplants performed in the United States, maximizes the limited supply of organs, maintains a record for transplant clinical data, and ensures that each recipient has an equal opportunity to receive an organ.⁴⁷ Several criteria are used to determine the order of potential recipients on the national waiting list. UNOS’s computerized matching system considers such aspects as: “medical urgency, tissue typing, time waiting,

40. United Network For Organ Sharing: Donate Life, *supra* note 24. See also ORGAN AND TISSUE DONATION: ETHICAL, LEGAL, AND POLICY ISSUES 6 (Bethany Spielman ed., 1996) (“In the early years of organ transplantation, [organ] distribution was a local matter wholly under the control of local transplant surgeons.”).

41. United Network For Organ Sharing: Organ Donation and Transplantation, *supra* note 24. In 1984, UNOS became a non-profit organization and officially separated from the SEOPF. *Id.*

42. United Network For Organ Sharing: Organ Donation and Transplantation, <http://www.unos.org/whoWeAre/theOPTN.asp> (last visited Nov. 2, 2008). The OPTN was established as a part of the National Organ Transplant Act. See 42 U.S.C.S. § 274 (LexisNexis 2008).

43. United Network For Organ Sharing: Organ Donation and Transplantation, *supra* note 42.

44. *Id.*

45. *Id.*

46. *Id.* However, “[t]he federal government . . . has a legitimate and appropriate role to play in ensuring that the organ procurement and transplantation system serves the public interest, especially the needs and concerns of patients, donors, and families affected by it. . . . [W]eak governance tends to undermine the effectiveness of the system.” Hearing on H.R. 2418, 106th Cong., *supra* note 5.

47. CAPRON, *supra* note 11, at § 21.02 [3][b][ii]. A booklet prepared by UNOS does not assert that race is an excluded matching criteria. U.S. DEP’T OF HEALTH AND HUMAN SERVS., PARTNERING WITH YOUR TRANSPLANT TEAM: THE PATIENT’S GUIDE TO TRANSPLANTATION 13 (Health Res. and Servs. Admin, Special Programs Bureau, Div. of Transplantation 2004), available at http://www.unos.org/SharedContentDocuments/TransplantationGuide_Final-3-04-04.pdf (“Criteria that are *not* used in the computer matching system are gender, religion, celebrity, and financial status.”) (emphasis added).

height and weight of the candidate, and size of the donated organ.”⁴⁸ Geographic location is also a factor when transplanting extremely “time sensitive” organs, such as a human heart.⁴⁹

Although UNOS oversees the distribution and sharing of organs, hospital review boards and physicians play an instrumental role in determining which individuals will be placed on the organ donor list.⁵⁰ Hospitals that operate transplant programs, also known as transplant centers, are members of UNOS and are responsible for uploading or placing a patient’s name on the national list.⁵¹ Many hospitals use two main criteria to make this determination.⁵² The first is overall medical fitness and readiness for the procedure.⁵³ The second is financial ability—who has the money or the insurance to pay for the procedure.⁵⁴ These medical review boards may also consider age, character, and general likeability of the potential organ recipient.⁵⁵ Every precaution is used to avoid discrimination, but “[i]n most cases, in most hos-

48. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 47, at 13. “‘Medical urgency’” is still a major selection criterion, but mere closeness to death isn’t an automatic qualifier” CHARLES R. MORRIS, *THE SURGEONS: LIFE AND DEATH IN A TOP HEART CENTER* 65 (2007).

49. “[I]n practice, especially for hearts, which are the most perishable, a qualified recipient will have to be within the zone imposed by cold ischemic time limitations.” MORRIS, *supra* note 48, at 66.

50. *Id.* at 67.

51. United Network For Organ Sharing: Donate Life, <http://www.unos.org/whoWeAre/transplantCenters.asp> (last visited Feb. 19, 2009); ORGAN AND TISSUE DONATION, *supra* note 40, at 10. Hospital transplant waiting lists are often operated by local organ procurement organizations (“OPOs”). Each OPO may service an area covering 9 million people. MORRIS, *supra* note 48, at 66.

52. SCOTT MCCARTNEY, *DEFYING THE GODS: INSIDE THE NEW FRONTIERS OF ORGAN TRANSPLANTATION* 128 (2003).

53. *Id.*

Patients are proposed who satisfy specific medical criteria such as ‘no confounding ailments’ or ‘likelihood that the patient will survive the operation.’ . . . Non-medical criteria such as age and life style (for example, no drug or alcohol dependency, capacity to follow a strict drug regime, etc.). . . . [e]ven personal conditions – such as degree of support – may be initial selection factors

MACHADO, *supra* note 25, at 63.

54. MCCARTNEY, *supra* note 52, at 128. Transplants can be very expensive and insurance coverage may not cover the cost of a transplant. According to UNOS “few patients are able to pay all the costs of transplantation from a single source” like insurance proceeds. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 47, at 22. The UNOS Handbook encourages patients to “keep [their] transplant center social workers and financial coordinators informed of [their] progress in obtaining funds.” *Id.* The United States government will cover the costs associated with an individual receiving a kidney transplant, but will not cover the cost of other transplants; according to Sheldon Zink, “[i]n a country with private health care, [it seems that] only those with insurance [are] eligible (or able to afford) other transplants” Zink, *supra* note 29. See also JOHN Q (New Line Cinema 2002) (hospital administrators refuse to put a child’s name on a transplant waiting list because his father, John Q, is not able to pay for the surgery).

55. MORRIS, *supra* note 48, at 70-71 (discussing how character and personal discipline enter into review board decisions; the author also recounts a story told by Dr. Mehmet Oz about class bias in medical decisions).

pitals, even after a patient has passed those two tests, the decision still boils down to the selection committee [doctors, a psychologist, social worker, and administrative official], a group set up to make the tough calls with whatever impartiality and objectivity they can muster.”⁵⁶

Traditionally organs have been distributed according to states’ regulations, some of which require donor organs to be offered to residents of that state first, and any excess will be made available to non-residents.⁵⁷ However, the Department of Health and Human Services, as of April 2, 1998, issued regulations requiring the OPTN to formulate a new system that assesses priority based on need rather than residency.⁵⁸ With this new legislation, UNOS officials insisted that donation rates could decrease because many states hold fast to procedures requiring that residents have preference over non-residents.⁵⁹ Contrary to belief, a UNOS survey concluded that, “66% of the public would be more strongly influenced to sign a donor card under a policy of national distribution than local distribution. But regardless of how many organs are available, the issue of fairness to all patients must be foremost in allocation policies.”⁶⁰

Potential organ recipients must answer a series of questions that include blood type, tissue type, entire medical history, and physical status.⁶¹ Following consultation and evaluation, a potential recipient is placed on the UNOS organ donor list.⁶² When an organ match is located for a potential recipient, a team of surgical doctors harvest the donor’s organs. Antibiotics, steroids, and blood treatments may be administered to the donor to aid in the harvesting or preserving of the organ if he or she is still alive.⁶³ After the organ has been successfully harvested, it is transported and transplanted into the donor recipi-

56. MACHADO, *supra* note 25, at 66; *see also* U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 47, at 4-5 (stating that a transplant team will include one or more of the following: transplant surgeon, physician, nurses, coordinator, social worker, primary physician, and financial coordinator.); MORRIS, *supra* note 48, at 66-72 (recounting a variety of issues discussed during an organ transplant committee meeting).

57. John Fung, *Survival of the Sickest*, MODERN HEALTHCARE, Aug. 17, 1998, at 29.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See* MACHADO, *supra* note 25, at 63-66.

62. United Network For Organ Sharing: Organ Donation and Transplantation, <http://www.unos.org/whatWeDo/organCenter.asp> (last visited Feb. 19, 2009).

63. J. Elliot, *Brain Death*, 5 TRAUMA 23, 34 (2003); Donate Life America, Understanding Donation: Living Donation, <http://www.donatelife.net/UnderstandingDonation/LivingDonation.php> (last visited March 7, 2009).

ent.⁶⁴ Organ transplantation, however, encompasses more than matching an organ donor with a recipient. When there are no organ donors available, no organ procurement and subsequent transplant can take place.

The shortage of human organs began to increase globally in the 1980s, and organ procurement developed into a major problem in most countries.⁶⁵ As organ transplantation increased, organ procurement became a hotly debated issue. Some nations adopted approaches similar to the United States—complete reliance on the altruistic method of organ donation—while other nations provided alternatives to the altruistic method in an attempt to cure the organ shortage dilemma.⁶⁶

B. Presumed Consent Method

While the United States, along with England, Canada, and Australia primarily uses the altruistic method of organ procurement, several U.S. states and nations have adopted a non-altruistic method of organ procurement.⁶⁷ Organ procurement, through presumed consent, is the direct opposite of an expressed consent or altruistic method.⁶⁸ Presumed consent laws and policies differ among countries,⁶⁹ however, generally presumed consent laws provide that each

64. See generally MARGARET LOCK, *TWICE DEAD: ORGAN TRANSPLANTS AND THE REINVENTION OF DEATH* 17-22 (2002) (chronicling the organ procurement process).

65. AUSTEN GARWOOD-GOWERS, *LIVING DONOR ORGAN TRANSPLANTATION: KEY LEGAL AND ETHICAL ISSUES* 20-21 (1999).

66. *Id.* at 25.

67. MACHADO, *supra* note 25, at 44; CAPRON, *supra* note 11, at § 21.02 [2][c][i]. States that have some form of presumed consent laws include: California, CAL. GOV'T CODE § 27491.47 (Deering 2009); Connecticut, CONN. GEN. STAT. § 19a-281 (2008); Delaware, DEL. CODE ANN. tit. 29, § 4712 (2009); Florida, FLA. STAT. ANN. § 765.5185 (LexisNexis 2009); Georgia, GA. CODE ANN. § 31-23-6 (2008) (repealed 2008); Illinois, 755 ILL. COMP. STAT. ANN. § 50/5-30 (LexisNexis 2009); Kentucky, KY. REV. STAT. ANN. § 311.187 (LexisNexis 2009); Maryland, MD. CODE ANN., EST. & TRUSTS § 4-509.1 (LexisNexis 2009); Massachusetts, MASS. ANN. LAWS ch.113 § 14 (LexisNexis 2008) (repealed 2006); Michigan, MICH. COMP. LAWS SERV. § 333.10202 (LexisNexis 2008); Mississippi, MISS. CODE ANN. § 41-61-71 (2008) (repealed 2005); Nebraska, NEB. REV. STAT. § 71-4813 (2009); New York, N.Y. PUB HEALTH LAW § 4222 (Consol. 2009); Ohio, OHIO REV. CODE ANN. § 2108.60 (LexisNexis 2009) (repealed 2009); and Texas, TEX. HEALTH & SAFETY CODE ANN. § 693.006 (Vernon 2008).

68. Zink, *supra* note 29.

69. According to Nora Machado, countries that use the presumed consent method usually have a history of authoritarian rule. MACHADO, *supra* note 25, at 45. Citizens of these countries are accustomed to the government “regulating social life” and “are more disposed to accept legislation that effectively gives the state control over and use of their bodies after death.” *Id.* This is not always true, however, because several U.S. states have presumed consent statutes. HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 140 (2006). Presumed consent laws in the United States are, in practice, usually limited to corneas. MICHELE

adult male and female is an organ donor at death.⁷⁰ Under presumed consent laws, individuals may avoid organ donation only by expressly refusing to donate.⁷¹ It has been argued that the effectiveness of presumed consent depends upon public ignorance, because if individuals wanted to donate their organs they would do so expressly.⁷²

The presumed consent method is a widely used method of organ procurement.⁷³ This method of organ procurement, however, is subject to criticism. Several nations have taken the position that organ donation should not be a choice once a person has died because the dead can provide extended life for the living.⁷⁴ Critics of the presumed consent method argue that a person has an inalienable right to choose what should happen to her body after death.⁷⁵ But, proponents of presumed consent contend that no person should have the right to say what happens to her body after death. The body is simply a vessel that is loaned to the individual for the purpose of life, and if possible, in the case of death, should be used to preserve the life of another.⁷⁶ Thus, every individual has a right to any available organ from the deceased, whether or not the person wanted to donate her

GOODWIN, BLACK MARKETS 120 (2006). According to the UAGA, presumed consent is only applicable in cases of mandatory autopsy—usually those surrounding violent crimes. *Id.*

70. Zink, *supra* note 29.

71. “[I]ndividuals are presumed to agree to the donation of their organs unless, at some time during their life, they have indicated otherwise. The burden is on the individual . . . to ‘opt-out’ of the system if they do not wish to donate their organs.” MACHADO, *supra* note 25, at 45.

72. GOODWIN, *supra* note 69, at 124. “[P]resumed consent operates on the principle of silence. It manipulates the notion of intent with regard to donations in the most dramatic death cases. Remember, the presumed consent laws [in the United States] operate pursuant to mandatory autopsy laws (i.e., cases of homicide and catastrophic deaths, such as drowning, poisoning, etc.)” *Id.* at 119.

73. Zink, *supra* note 29. Countries using the presumed consent method of organ procurement include: Austria, Belgium, Bulgaria, Columbia, Cyprus, Denmark, Finland, France, Greece, Hungary, Italy, Luxembourg, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, and several U.S. states. MACHADO, *supra* note 25, at 46; GOODWIN, *supra* note 69, at 119; Zink, *supra* note 29.

74. *See generally* MACHADO, *supra* note 25, at 180-82 (“[I]n general, the more serious or important the public or collective interest in the medical action, the more likely that the individual rights are compromised or surrendered. . . . [E]xceptions to the basic rationality [of personal autonomy] are made because of ‘necessity,’ ‘emergency,’ or practicality.”).

75. “[T]he right to bodily integrity is regarded as fundamental, and a key attribute of the person, who is entitled to exercise control over it. Consequently, she has the freedom to refuse authorities or persons to infringe on her body.” *Id.* at 179.

76. In essence, “the community asserts a right to recover needed organs.” ORGAN AND TISSUE DONATION, *supra* note 40, at 45. Michele Goodwin describes this position as social contract theory. “[T]he only way to justify compulsory donation would be through a theory of social contract.” GOODWIN, *supra* note 69, at 119. Nora Machado agrees: “[i]nstead of altruism, one articulates a notion of a quasi-civic duty in donating organs, grounded on notions of social solidarity in society.” MACHADO, *supra* note 25, at 193.

organs because a person's right to live should outweigh the wishes of the dead.⁷⁷

In the 1990s, Brazil adopted the presumed consent method of organ procurement.⁷⁸ Dialysis treatments became available in Brazil in 1949 to patients suffering from renal kidney failure.⁷⁹ Dialysis remained the prominent treatment for the disease until 1964 when the first kidney transplant was performed in Rio de Janeiro.⁸⁰ In 1965, the University of Sao Paulo implemented the country's first transplantation program, but Brazil did not create a national program until 1986: the Brazilian Organ Transplantation Association ("ABTO").⁸¹ Over one hundred program centers were established and operated under the ABTO.⁸² Procurement from cadavers produced low quantities of organs; thus, the national program was created partly to combat the organ procurement shortage.⁸³

After initiating the ABTO, Brazil's largest source of kidneys came from living donors. Those transplants usually were performed between a related donor and recipient.⁸⁴ Initially, this practice proved successful because of the commonality and substantial size of extended families.⁸⁵ Organ shortages, however, continued to be a problem in Brazil. Non-related recipient-donor transplants began to be performed in the transplant centers.⁸⁶ In 1993, Brazil passed legislation requiring that all non-related donor-recipient transplants must first receive official authorization from the government.⁸⁷

77. See MACHADO, *supra* note 25, at 46. Some countries go so far as to not consult the family of the deceased before the organs are harvested. *Id.* Although the United States is not listed as one of these countries, many people are not aware that certain U.S. states have presumed consent laws. WASHINGTON, *supra* note 69, at 140. Further, because most organs are harvested after mandatory autopsies are performed, the families may not be informed. *Id.* See also Georgia Lions Eye Bank Inc. v. Lavant, 335 S.E.2d 127 (Ga. 1985) (a mother sued an eye bank for removing the corneas of her infant son without her consent; the eye bank defended the removal on the basis of Georgia's presumed consent statute); State v. Powell, 497 So. 2d 1188 (Fla. 1986) (parents brought an action to have Florida's presumed consent statute declared unconstitutional after their sons' corneas were removed without their consent).

78. Claudio Csillag, *Brazil Abolishes "Presumed Consent" in Organ Donation*, 352 THE LANCET 1367 (1998).

79. Noronha, *supra* note 22, at 2237.

80. *Id.* at 2240.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Noronha, *supra* note 22, at 2240.

86. *Id.*

87. *Id.* Government officials probably believed that many of the organs given by non-related donors were commercially obtained.

In 1997, Brazil adopted a system of presumed consent.⁸⁸ Under this model, all adult men and women were deemed organ donors. Upon an individual's death, all of his or her healthy organs were harvested and distributed to matched recipients. The response from the community was less than favorable.⁸⁹ Brazil also received much criticism for this approach from medical associations and professionals.⁹⁰ Many argued that the organ shortage did not warrant such an invasion of personal autonomy.⁹¹ Others also raised concerns that presumed consent harvesting had the potential of violating a person's religious beliefs.⁹² One member of the House of Commons, S. Dorrell, declared:

We must accept that nobody has a right to anybody else's organs. If something untoward happens, our organs may be of value to someone else but that should be the result of an altruistic decision about how we want our bodies to be used when we die. It should not be as a result of a right of the recipient. . . . It is the responsibility of the living whose organs may be of use to someone else; it is not anyone else's job to claim the organs.⁹³

Brazil repealed its presumed consent law a year later and now requires officials to receive the consent of the decedent's family members before organs can be harvested.⁹⁴ In effect, Brazil again instituted an altruistic method of organ procurement.

Although Brazil's presumed consent legislation was rejected by its citizens, several other countries have had success with this method of organ procurement.⁹⁵ For example, since adopting the method in 1979, Spain has maintained the highest rate of organ donation.⁹⁶

88. Csillag, *supra* note 78, at 1367.

89. *Id.*

90. "[M]ost doctors were unwilling to remove the organs without family consent, even if the law demanded them to do so." Zink, *supra* note 29.

91. "[A]utonomy was viewed as an important protection against abuse or coercion either of potential donors while alive or of family members once a death had occurred. . . . [Proponents] hoped to ensure that the individuality and dignity of the donor would be protected against professional or community interests in obtaining organs." ORGAN SUBSTITUTION TECHNOLOGY: ETHICAL, LEGAL, AND PUBLIC POLICY ISSUES 62-63 (Deborah Mathieu ed., 1988).

92. "Certain cultural expectations and religious doctrines emphasize human dignity, the sacredness of the body, and preservation of life, even when medically the body may be considered 'dead.'" GOODWIN, *supra* note 69, at 128.

93. M. D. D. Bell, *The UK Human Tissue Act and Consent: Surrendering a Fundamental Principle to Transplantation Needs?*, 32 J. MED. ETHICS 283, 285 (2006).

94. Zink, *supra* note 29.

95. *Id.*

96. *Id.* "Once death has been declared, any individual who has not formally registered an opposition is considered a potential donor. This system, combined with a societal respect for organ donors, has contributed to Spain's successful organ procurement program." *Id.*

Spain's presumed consent law provides that all of an individual's viable organs will be donated after brain death is declared by at least three physicians, unless the individual has registered an express objection to organ donation.⁹⁷ Similarly, Belgium has used the presumed consent method since 1986.⁹⁸ Belgium's legislation provides that citizens as well as residents living in the country for at least six months prior to their death become organ donors; and, Belgian law does not require the consent of a donor's family before harvesting organs.⁹⁹

Most of the countries that instituted the presumed consent method still experienced organ shortages.¹⁰⁰ For example, when the presumed consent method was instituted in many European countries, "[p]hysicians and hospital personnel were reluctant, despite the enactment of laws granting them authority to remove organs and tissues unless an objection was made, to do so without explicit permission from family members."¹⁰¹ As with Brazil, "[i]n practice, organ procurement in nations with presumed consent policies followed voluntaristic, altruistic models along U.S. lines."¹⁰²

C. The Limitations of Altruistic and Presumed Consent Methods:
What Happens When Demand Exceeds Supply?

As medical research advanced and organ transplantation became a more viable and reliable choice for individuals with terminal illness, organ waiting lists reached excessive levels.¹⁰³ The problem in most countries was not transplant technology, but organ procurement.¹⁰⁴ The amount of potential organ recipients exceeded the amount of al-

97. *Id.*

98. *Id.*

99. *Id.*

100. Generally, however, countries that have initiated presumed consent laws experience an increase in organ donation that exceeds donation in countries with expressed consent methods of organ procurement. Zink, *supra* note 29. In Denmark, organ donation decreased by 50 percent after the country stopped using a presumed consent method of organ procurement and began using an expressed consent method of organ procurement. *Id.*

101. ORGAN SUBSTITUTION TECHNOLOGY, *supra* note 91, at 64. For example, "in Italy, despite presumed consent laws, organs may only be removed once it has been determined that the donor's relatives do not object." Zink, *supra* note 29.

102. ORGAN SUBSTITUTION TECHNOLOGY, *supra* note 91, at 64.

103. "Over time, researchers have found ways to make transplants more successful. As a result, more people can be helped by transplantation. However, the number of organ donors has not grown as fast as the number of people who need organs. Therefore, there are not enough organs for everyone." U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 47, at 12.

104. *Id.* The majority of individuals' reluctance to become organ donors, "has caused the ever-growing gap between supply and demand that so vexes the sponsors of transplant programs." LESLIE FIEDLER, TYRANNY OF THE NORMAL: ESSAYS ON BIOETHICS, THEOLOGY, & MYTH 136 (1996).

truistic and non-altruistic organ donors.¹⁰⁵ As early as 1967, the U.S. Surgeon General estimated that 8000 recipients were in need of a kidney transplant.¹⁰⁶ However, during that year only 450 kidney transplants were performed.¹⁰⁷ National transplant organizations and specialists began to explore ways of increasing the organ supply.¹⁰⁸ Because, in the past, individuals had turned to the public marketplace to buy and sell “a range of human biological materials,” newspaper advertisements became mediums used by potential donors to connect with potential recipients.¹⁰⁹ Advertisements for the sale of human organs were reported across the nation and around the world.¹¹⁰ In 1983, this advertisement appeared in the *New Jersey Times*:

Kidney for Sale
From 32-yr.-old Caucasian female
in excellent health.
Write to P.O. Box 654 . . .¹¹¹

Similar advertisements were reported in California, Georgia, Michigan, and New York.¹¹²

In the same year, Dr. H. Berry Jacobs, a physician, posed the idea of selling organs as a solution to the organ supply problem by establishing an International Kidney Exchange.¹¹³ For some, the idea of

105. Ikels, *supra* note 21, at 98.

106. SCOTT, *supra* note 19, at 17.

107. *Id.* (“By the mid-1970s, the number had risen to 2,000 a year, and the American Medical Association was projecting an annual need of 10,000-20,000 kidneys.”). As of February 13, 2009, there are 100,792 patients on the UNOS transplant waiting list. United Network For Organ Sharing, *supra* note 2. According to UNOS, 25,625 transplants have been performed between January and November of 2008, with the organs being harvested from 12,931 donors. *Id.*

108. Beginning in 1985, some states began enacting “required request” statutes. The statutes required hospitals to ask patients if they were willing to donate an organ and family members if they wished to donate the organs of loved ones. CAPRON, *supra* note 11, at § 21.02[2][b]. “By January 1992, 46 states and the District of Columbia had enacted some form of required request legislation.” *Id.* Others encouraged the United States to provide tax incentives to organ donors. ORGAN SUBSTITUTION TECHNOLOGY, *supra* note 91, at 64.

109. GOODWIN, *supra* note 69, at 175. See also CAPRON, *supra* note 11.

110. MUNSON, *supra* note 7, at 110-112; Mario Osava, *Poor in Brazil Selling Corneas*, GLOBE & MAIL, (Canada), Sept. 3, 1981; Robert Whyman, *Debtors Sell Their Kidneys to Pay Loans*, GUARDIAN, (London), Nov. 23, 1984; *World News Tonight* (ABC television broadcast Sept. 22, 1983).

111. MUNSON, *supra* note 7, at 110.

112. *Id.* at 110-12; CAPRON, *supra* note 11, at n.185. Kidneys, however, are not the only organs that can be transported from living patients. MACHADO, *supra* note 25, at 190. “Living organ transplantation includes the . . . lobes of the lung, and segments of [the] pancreas, liver, and the small intestine.” *Id.*

113. Donald Joralemon, *Shifting Ethics: Debating the Incentive Question in Organ Transplantation*, 27 J. MED. ETHICS 30, 30 (2001). Under Jacob’s proposal, he would act as a broker between a living kidney donor and a recipient. The recipient would pay the price set by the donor,

inserting financial gains into the organ donation process was unthinkable.¹¹⁴ Individuals and lawmakers alike responded with vehement opposition.¹¹⁵ Opponents argued that commercial contracts for human organs would negate the altruistic method of organ procurement completely, exploit the underprivileged, reduce the quality of donated kidneys, and diminish the inestimable value of the human body by treating organs like commodities to be bought and sold to the highest bidder.¹¹⁶ This belief was supported around the globe in almost every country.¹¹⁷ Opponents also argued that paid donation could open the door to organ commerce, and even a black market for organ trading.¹¹⁸ The chief concern was that paid organ donation would lead to commercialization providing spoils for the rich, but a shortage for the poor, leading to discord among those unable to pay.¹¹⁹ Opponents suggested that, effective paid donation should be non-directed; distribution should be eliminated from the control of the donor family; and, donation should be monitored by an organization, such as UNOS.¹²⁰

One supporter of Dr. Jacob's plan, however, described him as an "umbrella salesman in a rainstorm."¹²¹ Proponents argued that commercialized organ sales would provide a reasonable and effective solution to organ shortages.¹²² Organ contracts could be regulated in an effort to avoid exploitation of the poor.¹²³ Moreover, individuals have

in addition to a brokerage fee: \$2000 - \$5000. S.H.D., *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1021 (1985).

114. "[T]he American Society of Transplant Surgeons, the Association of Independent Organ Procurement Agencies, the American Society of Transplant Physicians, and the National Kidney Foundation . . . condemned [Jacob's] proposal." *Id.* at 1022.

115. MUNSON, *supra* note 7, at 112; *see also* Robyn Shapiro, *Legal Issues in Payment of Living Donors for Solid Organs*, <http://www.abanet.org/irr/hr/spring03/livingdonors.html>. According to then Congressman Albert Gore, "[p]utting organs on a market basis is abhorrent to our system of values." Margaret Engel, *Va. Doctor Plans Company to Arrange Sale of Human Kidneys*, WASH. POST, (London), Sept. 19, 1983, at A9. In August of 1983, Gore introduced a bill to prohibit the sale of human organs. *Id.* Prohibition of organ sales has become the source of heated debate in the past two decades. *See generally* TECHNOLOGY AND SOCIETY: OPPOSING VIEWPOINTS 84-92 (Auriana Ojeda ed., 1998); THE ETHICS OF ORGAN TRANSPLANTS: THE CURRENT DEBATE 224-30 (Arthur L. Caplan & Daniel H. Coelho eds., 2001).

116. MUNSON, *supra* note 7, at 112.

117. Joralemon, *supra* note 113, at 30.

118. Hans Schlitt, *Paid Non-related Living Organ Donation: Horn of Plenty or Pandora's Box*, 359 THE LANCET 906, 906-07 (2002).

119. *Id.*

120. *Id.*

121. Joralemon, *supra* note 113, at 30.

122. *See generally* TECHNOLOGY AND SOCIETY, *supra* note 115, at 77-83 (arguing that commercial organ sales are ethical).

123. *Id.*

been buying and selling human tissue for many years—most notably blood, sperm, and eggs.¹²⁴ Proponents also compared critics' beliefs that organ sales would contribute to a reduced quality of organs as analogous to the initial opposition for providing financial compensation to individuals that donated blood.¹²⁵

In 1984, the United States responded to Jacob's proposal and passed the National Transplantation Act ("NOTA"), which made it a federal crime to intentionally acquire, accept, or transfer a human organ for the purpose of financial gain and/or commerce.¹²⁶ "Legislative history reveals that NOTA passed with very little debate. The Senate Labor and Human Resources Committee simply concluded that 'individuals or organizations should not profit by the sale of human organs for transplantation,' and that because the law was uncertain on that point, legislation was necessary."¹²⁷ NOTA's prohibition against the sale of human organs, however, did not entirely prevent donors from receiving financial compensation for organ donation.¹²⁸

By 1989, at least twenty countries had passed legislation prohibiting the sale of human organs; and the World Health Organization

124. GOODWIN, *supra* note 69, at 160, 175.

125. Some authors compared the debate over commercialization of human organs with the debate waged in the 1960s and 1970s surrounding compensation for blood. In 1970, Richard Titmuss' book, *The Gift Relationship*, reinforced fears surrounding financial compensation for blood. GOODWIN, *supra* note 69, at 155. Titmuss alleged that the danger of transmitting disease through blood should act as a deterrent from allowing blood to be sold. *Id.* He believed that limiting blood to altruistic procurement would dissuade "skid row" donors from contaminating society with their "bad blood." *Id.* Policy makers, courts, and many Americans initially agreed with Titmuss. SCOTT, *supra* note 19, at 191. "American courts accepted evidence some years ago that 'the risk of transmitting hepatitis is much higher when blood is taken from paid donors.'" *Id.*

126. 42 U.S.C. § 274(e) (2006) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organs for valuable consideration for use in human transplantation if the transfer affects interstate commerce."); *see also* National Organ Transplant Act of 1984, Pub. L. No. 98-507, § 301 (1984).

(1) The term 'human organ' means the human kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin, and any other human organ specified by the Secretary of Health and Human Services by regulation.

(2) The term 'valuable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

(3) The term 'interstate commerce' has the meaning prescribed for it by section 201(b) of the Federal Food, Drug, and Cosmetic Act.

§ 301(c).

127. Shapiro, *supra* note 115.

128. In 1999, for example, Pennsylvania initiated a pilot program which would allow the families of organ donors to receive a three hundred dollar stipend to go directly to the funeral home. Joralemon, *supra* note 113, at 30.

(“WHO”) endorsed the prevailing view that buying or selling human organs from the living or the dead was unethical.¹²⁹ The WHO’s conclusion may have resulted from the fact that the world was becoming interconnected; thus, local policies of organ procurement could have international impacts. Essentially, “what may be adequately controlled locally may lead to major problems if applied on a larger scale.”¹³⁰ But Pakistan, South Africa, Peru, Romania, Bolivia, India, and Brazil continued to allow commercial organ sales to persist without legislative intervention.¹³¹ However, after India became the target of much international criticism in the early 1990s for failing to prohibit organ sales, it enacted the Transplantation of Human Organs Act in 1994.¹³² The act made it illegal to sell non-vital organs.¹³³ In 1997, Brazil also responded to international pressures and passed legislation that prohibited the sale of human organs. Any individual guilty of organ trafficking would be subject to eight years in prison.¹³⁴

II. TURNING TO THE UNDERGROUND: TRANSPLANT TOURISM

In the opening episode of *Star Trek: Voyager*, a powerful life form hurls the ship into another quadrant of the galaxy, 70,000 light years from Earth. It will take the crew more than twenty years to return home. Within months of their long journey home, one of the crew members discovers that the inhabitants of a particular planet possess technology that could instantly transport Voyager 40,000 light years closer to home. But, there is one problem: the law prohibits

129. ORGAN AND TISSUE DONATION, *supra* note 40, at 146. There are several ethical implications that have been raised in support of the prohibition on a market in human organs: (1) some believe that it is morally wrong for a person to sell his or her organs or to allow a person’s family to profit from the “parts” of their deceased loved one; (2) only the poorer members of society would be providing organs at the benefit, no doubt, of the rich; and (3) a market in human organs would likely have an “adverse impact . . . on the public’s perception of and trust in the medical profession.” ORGAN SUBSTITUTION TECHNOLOGY, *supra* note 91, at 65-66.

130. Schlitt, *supra* note 118, at 907.

Financial compensation for donors would probably differ between transplant centers and would inevitably differ between countries according to their individual economic strengths. These differences could lead to a financial competition between countries for living donors, with subsequent ‘donation tourism’ from poor to wealthy areas of the world. In the end, an international ‘market’ for paid organ donation could result and be difficult to control.

Id.

131. GOODWIN, *supra* note 69, at 185.

132. See Transplantation of Human Organs Act, *supra* note 14.

133. *Id.*

134. See Constitution of the Federative Republic of Brazil 5 Oct. 1988 § 199; see also Mario Osava, *Brazil Poor Sell Organs to Trans-Atlantic Trafficking Ring*, <http://ipsnews.net/interna.asp?idnews=22524> (last visited Feb. 23, 2009).

the inhabitants from sharing the technology. Voyager's captain tries to negotiate a trade with one of the planet's leaders. Since the inhabitants have a special interest in literary stories, she offers to download Voyager's entire literary database in exchange for the technology. Unfortunately, the planet's leaders decline the offer; but, one of the planet's inhabitants is willing to make the exchange, secretly. After considering the legal and moral implications, the captain decides not to make the "underground" trade. Several crew members, however, are unwilling to accept the captain's decision. They want to go home! They need to go home! They would not normally violate the law. But, this is the only way to obtain the technology they desperately need.¹³⁵

An individual suffering from end-stage renal kidney failure likely expresses a sentiment similar to the Voyager crew members. I want a new kidney! I need a new kidney! I wouldn't normally violate the law. But, this is the only way to obtain the kidney I desperately need.

A. Underground Economy¹³⁶

Since ancient times, individuals have sought escape from unfavorable government control and regulation of commodities by participating in underground markets operated in the shadows of the law.¹³⁷ This trend has continued into the modern era. Individuals dissatisfied with government mandates and rules of law who are unwilling to relinquish ideologies and beliefs or yield to social norms (but who are also unwilling to openly defy the law and be subject to its consequences), will often turn to the underground market.¹³⁸

135. *Star Trek Voyager: Prime Factors* (UPN television broadcast March 20, 1995). The paragraph is a paraphrase based on the television episode. It is in no way intended to make light of the tough decisions that potential transplant recipients face when trying to secure a vital organ.

136. See Hans F. Sennholz, *The Underground Economy* (Ludwig von Mises Institute), 1984, at 3-4, available at <http://www.hacer.org/pdf/Sennholz01.pdf>.

The underground economy must be distinguished clearly and unmistakably from the criminal activities of the underworld. . . . Both groups are knowingly violating laws and regulations and defying political authority. But they differ radically in the role they play in society. The underworld comprises criminals who are committing acts of bribery, fraud, and racketeering, and willfully inflicting wrongs on society. The underground economy involves otherwise law-abiding citizens who are seeking refuge from the wrongs inflicted on them by government.

Id.

137. "In the ancient world, most rulers were tyrants who commanded the laws and lorded over their subjects. They set just and "fair" prices for labor and commodities, and enforced them with arbitrary power and terror. The people either suffered degrading submission or sought escape . . . [M]any went 'underground'. . . ." *Id.* at 3.

138. *Id.*

There is an important distinction between the black market and the underground market. Author Hans Sennholz explains that the black market involves economic transactions that take place in an effort to avoid price regulations instituted by government.¹³⁹ In the underground market, political laws, decrees, or statutes are ignored or circumvented through cash transactions of commodities, goods, or services.¹⁴⁰ In essence, the underground market is not concerned with avoiding price regulation or taxes; instead, the market facilitates individuals seeking to avoid prohibitive laws of commodities not available on the open market. In the late 1970s, medical professionals in the United States and abroad predicted that the rising value of human body parts combined with an increase in organ shortages would steer organ procurement into the underground market.¹⁴¹

Organ shortages have become a major problem worldwide.¹⁴² Thus, individuals seeking a kidney and indigent individuals willing to sell a kidney turn to an underground market that “fills in the gaps” of legal organ procurement systems.¹⁴³ Participating in underground markets, however, is risky business. Underground transactions usually consist of inadequate information, insufficient remedies when disagreements arise or fraud occurs, and a destructive combination of desperation and greed.¹⁴⁴ The underground market of human organs often is unfair and disputes are certain to arise.¹⁴⁵ In organ sales, the disputes frequently involve the donor and the broker; and, the donor is often left disadvantaged in underground organ transactions.¹⁴⁶

139. *Id.*

140. *Id.*

141. SCOTT, *supra* note 19, at 181.

142. Yosuke Shimazono, *The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information*, 85 Bulletin of the World Health Organization 901 (December 2007), available at <http://www.who.int/bulletin/volumes/85/12/06-039370/en/>.

143. GOODWIN, *supra* note 69, at 169. “Organ traffickers and the transplant tourism industry are secondary players in our national transplantation system.” *Id.*

144. *Id.* at 170; Department of Health and Human Services, Centers for Disease Control and Prevention, *Traveler’s Health: Yellow Handbook* (2008), <http://wwwn.cdc.gov/travel/yellowBookCh2-HealthCareAbroad.aspx>.

145. SCOTT, *supra* note 19, at 181.

146. Laura Meckler, *Kidney Shortage Inspires A Radical Idea: Organ Sales—As Waiting List Grows, Some Seek to Lift Ban; Exploiting the Poor?*, WALL ST. J., Nov. 13, 2007, at A1. *See also*, GOODWIN, *supra* note 69, at 170. (“These transactions are best described as *Pareto inferior*, that is, there is always one party that is worse off. The victims are third-world indigent men, women, and sometimes children who are exploited by organ tourism.”).

B. What Is Transplant Tourism?

A conventional method used to transport organs across national borders is through transplant tourism.¹⁴⁷ The World Health Organization Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region (“WHO Consultation Meeting on Transplantation”) defined transplant tourism as “the purchase of a transplanted organ abroad, including access to an organ [while] bypassing national laws, rules or processes of any or all countries involved.”¹⁴⁸ In some cases, both the recipient and the donor—both from different countries—unite in a third country where the organ transplant will be performed. For example, between 2001 and 2002, of the 100 illegal kidney transplants performed in South Africa, many of the donors originated from Eastern Europe and Brazil, while the recipients were residents of Israel.¹⁴⁹

Transplant tourism is a highly organized process. There are several internet sites that advertise “transplant packages” ranging from \$70,000 to \$160,000, which can include the organ, transplant, travel, hotel stay, and medical care.¹⁵⁰ The countries in which the transplantations are performed facilitate the operations. Often the transplant is performed in a hospital environment with a qualified physician. It has

147. Shimazono, *supra* note 142.

148. World Health Org. [WHO], Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region, Manila Philippines, Nov. 7-9, 2005, Summary ¶ 18, (WP)HSD/ICP/HRF/6.4/001 (Sept. 2006).

149. Shimazono, *supra* note 142.

150. *Id.*; see also GOODWIN, *supra* note 69, at 185 (“Often, buying an organ is a ‘package deal,’ which includes travel for a companion or nurse, excursions, and fine accommodations. In these instances, buying an organ comes with a vacation.”); Department of Health and Human Services, *supra* note 144 (“Companies offering vacation packages bundled with medical consultations and financing options provide direct-to-consumer advertising over the internet. Enter ‘medical tourism’ into any internet search engine and one will find a variety of tourism packages from travel agencies and health-care facilities worldwide.”). MediTours, an India based company, advertises medical packages online. Medical-tours online.com, <http://www.medical-tours online.com/services.asp>. The website, while listing kidney transplants as a part of the services that they offer, does not contain any specific information about the policies and procedures for receiving a kidney. *Id.* The website, however, does contain general information about the accommodations that the company provides.

MediTours offers you a comprehensive range of medical tourism packages. We have a widespread network that spans travel agencies, hotels, resorts, car rental agencies and transport companies. So once you sign us on, we will take care of everything because we appreciate the fact that international patients have special needs and requirements. In order to provide a highly specialized service, MediTours offers seamless patient services of world-class quality - from greeting you at the airport, to your registration, discharge, and recuperation and rejuvenation tours.

Medical-tours online.com, http://www.medical-toursonline.com/travel_packages.asp.

also been alleged that embassy officials in some countries have facilitated international kidney sales.¹⁵¹

As the organ trade continues, trends have been identified between countries where donor organs are obtained and the organ recipients' country of origin.¹⁵² Nations that contain high numbers of organ donors include: Pakistan,¹⁵³ India, China, the Philippines, Bolivia, Brazil, Peru, Iraq, Israel, Turkey, and the Republic of Moldova.¹⁵⁴ In India, the Voluntary Health Association reports that, each year, approximately 2000 citizens sell a kidney.¹⁵⁵ In Pakistan, the Sindh Institute of Urology reported that of the 2000 kidney transplants performed in 2005, two-thirds of the recipients were foreigners.¹⁵⁶ Of the 468 kidney transplants performed by the Philippines' National Kidney Transplant Institute in 2002, 110 were for foreign nationals.¹⁵⁷ Media reports indicate that of the 900 transplants performed at one particular transplant center in China, more than half were performed on foreigners from nineteen countries.¹⁵⁸

At the other end of the spectrum, nations where most purchasers and recipients of organs originate include: the United States, Japan, Israel, Saudi Arabia, Canada, Australia, and Oman.¹⁵⁹ In fact, "in some countries the number of patients going overseas for kidney transplantation outweighs the number of patients undergoing kidney transplantation locally."¹⁶⁰ For example, in 2006, Saudi Arabian transplant centers performed approximately 300 kidney transplants.

151. Shimazono, *supra* note 142.

152. *Id.* The author refers to two categories of organ tourism states: "organ-exporting countries" and "organ-importing countries." *Id.*

153. Pakistan does not prohibit the sale of organs through official legislation, even though kidney sales are rising in the country. Often citizens are driven by poverty and the need to pay debts. Fakhar Rehman & Carol Grisanti, *Pakistan's Kidney Bazaar*, NBC News (Sept. 5, 2007), <http://worldblog.msnbc.msn.com/archive/2007/09/05/345490.aspx>.

154. Shimazono, *supra* note 142.

155. *Id.*

156. *Id.*

157. *Id.* In 2002, the Philippines government passed Administrative Order No. 124, which placed a ten percent cap on organ transplants performed for foreign recipients. National Kidney and Transplant Institute, http://www.nkti.gov.ph/news&events/news_details.php?news_id=211 (last visited Nov. 13, 2008). But, in 2006, 690 kidney transplants were performed in the Philippines, of these transplants, 158 or twenty-three percent were performed for foreign recipients. *Id.* In 2007, 1046 kidney transplants were performed, of these transplants, 536 or fifty-one percent "were done in the 13 private hospitals that strongly objected and ignored the 10% limit mandated by AO 124." *Id.*

158. Shimazono, *supra* note 142.

159. *Id.*

160. *Id.*

More than 600 citizens, however, received transplants outside of Saudi Arabia in the same year.¹⁶¹

C. Organ Exporting Countries: A Buyer's Market

1. Brazil

In 2003, Jane Doe, a 49-year-old American woman,¹⁶² purchased a kidney from Alberty Jose da Silva, a 37-year-old Brazilian man.¹⁶³ Jane Doe suffered from renal failure and used dialysis as treatment for the disease for 15 years.¹⁶⁴ When Jane's health began to deteriorate, however, she and her husband sought the help of a kidney broker.¹⁶⁵ The broker secured a kidney through an Israeli network. The cost of the service was \$60,000. However, her kidney donor, Alberty Jose da Silva, received only \$6000 for his kidney.¹⁶⁶ "The middleman who coordinated the organ purchase was part of an international organ trafficking ring that spanned four continents. The organ traffickers flew da Silva to South Africa, which bans organ selling, where he signed documents stating that he and Jane Doe were cousins."¹⁶⁷

Jane Doe and Alberty Jose da Silva were able to contract for the sale of a kidney despite the illegality of the contract and the kidney broker was able to organize and facilitate the exchange without interception.¹⁶⁸ This transaction and many others continue even though the WHO Consultation Meeting on Transplantation has set guidelines on organ transplantation prescribing that organ tourism should be prohibited including "all potential parties: recipients, donors, service providers and brokers."¹⁶⁹ Illegal organ transactions like this one are not unusual even though organ sales are illegal in Brazil.¹⁷⁰

161. *Id.* at Table 2.

162. GOODWIN, *supra* note 69, at 187.

163. *Id.* at 188.

164. *Id.* at 187.

165. *Id.*

166. *Id.* at 188.

167. *Id.*

168. *Id.* South African law enforcement authorities later investigated the organ trafficking organization and those involved were arrested. *Id.*

169. World Health Org. [WHO], Consultation Meeting on Transplantation with National Health Authorities in the Western Pacific Region, *supra* note 148, at ¶18.

170. Shimazono, *supra* note 142.

2. China: Procurement from Executed Criminals

The most notable example of a nation procuring organs from executed prisoners is in China.¹⁷¹ Chinese officials claim that organ procurement from prisoners is completed only after express consent has been given, but it is alleged that consent is rarely sought.¹⁷² Whether consent can ever be given expressly by an individual facing execution is questionable.¹⁷³

Prior to China's first kidney transplant in 1959, dialysis was the predominant treatment in cases of kidney failure.¹⁷⁴ Dialysis remained the predominant method of treatment until the mid-1980s, when improved pharmaceuticals aimed at anti-rejection decreased mortality rates in transplant cases.¹⁷⁵ At that time, patient participation in transplantation increased and China began to experience the organ shortage dilemma.¹⁷⁶ Common barriers to organ procurement (including pain and discomfort, recovery time, long-term complication possibilities, and adequacy of medical care) were further aggravated by Chinese societal norms, specifically, the spiritual belief that the kidney is the source of *yin* and *yang*.¹⁷⁷ Thus, donations from living donors were extremely rare. Despite the organ shortage, China generally did not promote organ donation through widely accepted methods.¹⁷⁸ Other territories, however, including Hong Kong, Singapore, and Taiwan utilized most of these methods including: programs encouraging people to consent to organ donation, celebrity endorsement campaigns, media exposure, and promotional sports competitions.¹⁷⁹

China sought to solve its organ procurement problem, not by sanctioning organ sales, but as early as 1981, the country began harvesting organs from executed prisoners when family members did not

171. ORGAN AND TISSUE DONATION, *supra* note 40, at 37.

172. Human Rights Watch, *China: Organ Procurement and Judicial Execution in China*, (1994), http://www.hrw.org/legacy/reports/1994/china1/china_948.htm (last visited Mar. 20, 2009).

173. *Id.* "Consent means a voluntary, *uncoerced* decision, made by a sufficiently competent or autonomous person on the basis of adequate information and deliberation, to accept rather than reject some proposed course of action." (emphasis added) STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE 76 (2003).

174. Ikels, *supra* note 21, at 96-97.

175. *Id.* at 97.

176. *Id.*

177. *Id.* at 98. "[C]itizens are very reluctant to make organ donation . . . [b]oth for reasons of religion and . . . for reasons of 'filial respect,' donation is deemed inappropriate." ORGAN AND TISSUE DONATION, *supra* note 40, at 38.

178. Ikels, *supra* note 21, at 98.

179. *Id.* at 108.

claim the prisoner's body within a reasonable amount of time.¹⁸⁰ Initially this method of organ procurement went unnoticed in the international community.¹⁸¹ When attention was focused on the practice, Chinese government officials denied the practice.¹⁸² But the government soon admitted and defended the practice proclaiming that organ "donation" was conducted with the consent of the executed prisoner.¹⁸³

Individuals opposing this practice have indicated that China's executions have risen since 1983.¹⁸⁴ Presently, China executes hundreds to thousands of prisoners each year;¹⁸⁵ most of the organs used in transplants are harvested from executed prisoners.¹⁸⁶ In fact, experts estimate that the percentage of organs obtained from executed prisoners remains consistently high.¹⁸⁷ According to one Western transplant surgeon, who left China in the 1990s, over ninety percent of all the kidneys used for transplantation are obtained from executed prisoners.¹⁸⁸ Reports also indicate that executed prisoners are shot in the head in order to preserve all viable organs for transplantation.¹⁸⁹ A coroner is present at all executions to make an official declaration of death, which occurs when the heart stops beating.¹⁹⁰ The body is quickly transported to a facility adequate to harvest all of the prisoner's viable organs.¹⁹¹

180. Human Rights Watch, *supra* note 172. Taiwan, Singapore, and the Philippines adopted a similar system. The Philippines took steps to further in this process by offering incentives to executed prisoners for consent to organ donation. Usually a prisoner could avoid the death penalty in exchange for donating a kidney. Ikels, *supra* note 21, at 112.

181. Human Rights Watch, *supra* note 172.

182. ORGAN AND TISSUE DONATION, *supra* note 40, at 37.

183. *China*, *supra* note 172; Ikels, *supra* note 21, at 117.

184. Human Rights Watch, *supra* note 172.

185. *Explorer: Inside the Body Trade* (National Geographic Channel television broadcast Nov. 11, 2007). "China executes more people than all other countries in the world, combined." *Id.*

186. Human Rights Watch, *supra* note 172.

187. Reports show that the number of executed prisoners could be as many as 10,000 per year. *Explorer*, *supra* note 185.

188. Human Rights Watch, *supra* note 172.

189. ORGAN AND TISSUE DONATION, *supra* note 40, at 37. Reportedly, prisoners that consent to organ donation are shot in the head while those that do not are shot in the heart. *Id.*

190. Human Rights Watch, *supra* note 172. Doctors are often involved with prisoners prior to an execution; they perform tests to match a prisoner with a potential organ recipient and schedule transplants to coincide with execution dates. *Id.* "Before the execution, the physician may intubate the prisoner and insert an intravenous line; immediately after, the physician may move to stem the blood flow and maintain respiration and cardiac functioning (so as to keep the organs profused)." ORGAN AND TISSUE DONATION, *supra* note 40, at 37.

191. *Explorer*, *supra* note 185. According to one doctor, the organs are harvested in an ambulance, immediately after the execution. *Id.*

These practices have received various criticisms.; Chinese officials' claims that all organs are received according to an informed consent law have been questioned,¹⁹² yet this method of organ procurement continues. Since developing this system, China's organ shortage has dramatically decreased. In fact, individuals who are unable to procure organs in their own countries now solicit China for transplantable organs.¹⁹³ China has consistently supplied organs to residents of Singapore and Hong Kong.¹⁹⁴ While there has been no express admission that the Chinese government receives financial compensation for organs harvested from executed prisoners, "[g]iven the worldwide shortage of organs and more specifically, the shortage of organs for transplantation in Hong Kong, Taiwan, and Singapore [countries that receive a number of organs from China], . . . transplantation is a very profitable enterprise."¹⁹⁵ Chinese hospitals likely receive much needed revenues for the organs they provide and transplants they perform.¹⁹⁶

3. India

India's first successful kidney transplant was performed in 1965, but the country's first successful kidney transplant using two living patients was not performed until 1971.¹⁹⁷ Initially, organ procurement in India was limited to cadaver organs. When procurement became possible between live donors, it was usually restricted to a related recipient and donor because close familial relationships decreased the likelihood of organ rejection.¹⁹⁸ In 1982, the State of Maharashtra enacted the Maharashtra Kidney Transplantation Act to establish and regulate the procurement of cadaver organs.¹⁹⁹ No legislation was developed to monitor and regulate the procurement of kidneys from liv-

192. "[I]n a culture that is so opposed to [organ] donation, one has to ask why prisoners would be so uniquely prepared to violate the cultural norm." *ORGAN AND TISSUE DONATION*, *supra* note 40, at 39.

193. *Explorer*, *supra* note 185. Americans are often among the foreigners seeking organs in China. *Id.*

194. Human Rights Watch, *supra* note 172.

195. *ORGAN AND TISSUE DONATION*, *supra* note 40, at 38.

196. *Id.* at 38-39. Transplants in China cost about \$20,000 - \$30,000. *Id.*

197. Acharya, *supra* note 23.

198. Negral, *supra* note 16.

199. Acharya, *supra* note 23. The law, however, lacked criteria for brain death. *Id.* "Cardinal findings in brain death include coma or unresponsiveness, absence of cerebral motor responses to pain in all extremities, absence of brain stem reflexes, and apnea." Jacqueline Sullivan, Debbie L. Seem, & Franki Chabalewski, *Determining Brain Death*, 19 *CRITICAL CARE NURSE* 37, 37 (1999).

ing donors.²⁰⁰ In 1983, medical advances increased the success rate for organ transplants between unrelated donors with the creation of cyclosporine—a new drug.²⁰¹ Despite efforts and new advances, India began to experience a shortage of organs.²⁰²

Kidney donation in exchange for value flourished in India.²⁰³ The disparity among the rich and the poor within the country compounded the practice of organ sales.²⁰⁴ From 1983 to 1994, commercial kidney transactions in India persisted uninhibited by government.²⁰⁵ Many Indian residents donated non-vital organs, specifically kidneys, to both domestic and international recipients.²⁰⁶ The sources of these organs usually were the underprivileged and indigent citizens of Indian society.²⁰⁷

India has a large number of poor residents and those residents have been the source of living non-related kidney donations since the 1980s.²⁰⁸ The average annual income in India is approximately \$950.²⁰⁹ Thus, kidney sales proved a viable method of increasing wealth in poor families.²¹⁰ Although some individuals are able to demand “top dollar” or competitive prices for their organs,²¹¹ selling organs in India is frequent and individuals there do not receive the amount of money usually associated with the trade. Some sources suggest that kidneys have been purchased in India for as little as \$1000.²¹²

200. Acharya, *supra* note 23.

201. *Id.*; see also GOODWIN, *supra* note 69, at 113 (“In the advent of cyclosporine, organ transplantations became more common and demand grew.”).

202. Acharya, *supra* note 23.

203. ORGAN AND TISSUE DONATION, *supra* note 40, at 39.

204. *Id.*

205. See generally Acharya, *supra* note 23 (discussing kidney transplantation and procurement in India).

206. ORGAN AND TISSUE DONATION, *supra* note 40, at 39. “There are also reports of persons from Third World countries being brought to developed countries in order to sell their kidneys . . . Indians were brought to England for that purpose.” *Id.*

207. Acharya, *supra* note 23.

208. Negral, *supra* note 16. “Because India has a large socially disadvantaged population and because its hospitals and clinics often lack dialysis machines and respirators, surgeons prefer to transplant a kidney from a living donor.” ORGAN AND TISSUE DONATION, *supra* note 40, at 39.

209. The World Bank, India: Data & Statistics, Poverty “At a Glance,” http://devdata.worldbank.org/AAG/ind_aag.pdf (last visited Feb. 19, 2009).

210. Jeffrey P. Kahn, *Studying Organ Sales: Short-term Profits, Long-term Suffering*, CNN.COM/HEALTH, <http://archives.cnn.com/2002/HEALTH/10/01/ethics.matters.selling.organs/>.

211. GOODWIN, *supra* note 69, at 189.

212. Kahn, *supra* note 210. Malacca, a woman profiled on the National Geographic Special *Inside the Body Trade* received only \$700 for her kidney. *Explorer*, *supra* note 185.

India passed legislation in 1994 that prohibited the sale of human organs, but the country's previously deficient organ policies had allowed for the development of an organ "market." After the sale of organs was made illegal, commercial organ transactions simply went underground and the black market organ trade thrived because the country's legislation had a "loophole."²¹³ Non-vital organ sales were only illegal when they involved individuals that were not related; and, in practice, medical officials do not question the source of available organs or inquire into how organs are procured. Therefore donors and recipients only have to assert that they are related for a transplant to be performed.²¹⁴

After the devastation of the Tsunami in 2004, an Indian reporter published a story about a local woman who sold her kidney to help defray the costs of her daughter's medical treatments:

Rani knew how to make fast cash. In Ernavoor, a desperate refugee camp on the north side of Chennai, that meant selling a kidney. . . . [A] broker named Dhanalakshmi ran a tea shop outside of Devaki Hospital in Chennai as a front for her real business: proffering organs on the black market. Dhanalakshmi gave Rani \$900 upfront to cover her daughter's expenses and promised \$2,600 more when the procedure was over. . . . Before the 2004 transplant, Rani had to give blood and urine to be sure she was compatible with the buyer—a wealthy Muslim woman from Chennai. She also had to pass a review by the Transplant Authorization Committee. Her blood work showed she was a match and she was soon on her way to GH Hospital to talk to the committee. With the paperwork out of the way, she checked into Devaki Hospital a few days later for the surgery. The surgery went according to plan, but the recovery was more difficult than she had expected. . . . When she went back to the hospital a week later for a checkup, the doctors pretended not to recognize her. Her broker vanished in the time it took Rani to recover. She soon realized she'd been cheated when she saw Dhanalakshmi's vacant tea stall. . . . When asked whether or not it was worth it she replied: 'The brokers should be stopped. My real problem is poverty—I shouldn't have to sell my kidney to save my daughter's life.'²¹⁵

213. Negral, *supra* note 16.

214. *Id.*; see also Scott Carney, Inside 'Kidneyville': Rani's Story, http://www.wired.com/print/medtech/health/news/2007/05/india_transplants_rani (recounting a local woman's story about selling her kidney).

215. *Id.*

Similar stories have been reported by many Indian residents. Nations following the altruistic method of organ procurement have enacted prohibitive organ sales legislation, in part, to avoid exploitation of individuals like Rani.²¹⁶ Citizens of these nations, however, are many times the recipients of these organs.²¹⁷

D. International Regulation of Transplant Tourism

International regulation has addressed the dangers of organ procurement through transplant tourism. Beginning in 1989, the World Health Assembly (“WHA”) addressed the growing problem of organ trafficking that persisted despite prohibitive national laws.²¹⁸ To create a unified standard, the WHA promulgated legislation encouraging member nations to prohibit the trafficking of human organs domestically and internationally.²¹⁹ The WHA’s position was that commercial organ sales posed significant health risks to donors and recipients.²²⁰ The 42nd Resolution of 1989 represented the WHA’s endeavor to “prevent the exploitation of human distress, particularly in children and other vulnerable groups, and to further the recognition of the ethical principles which condemn the buying and selling of organs for purposes of transplantation.”²²¹

The 42nd Resolution was repealed in 2004, when the WHA again promulgated guidelines surrounding organ transplantation among its member States. The 57th Resolution did not condemn organ sales directly.²²² However, the guidelines encouraged members to establish safeguards to shelter the poorest and most vulnerable members of society from the consequences of transplant tourism.²²³ The resolution also encouraged members to more actively address the international trafficking of human organs.²²⁴ This revised legislation was probably a response to the continued and expanding human organs market. Similar to the WHA, the WHO has also adopted guidelines to address organ trafficking. However, these and similar guidelines, while impor-

216. See MUNSON, *supra* note 7, at 112.

217. GOODWIN, *supra* note 69, at 186. “[R]eports . . . testimony to Congress, and narratives from suppliers, provide a comprehensive picture that the black market not only exists, but thrives off of American, Canadian, and British dollars.” *Id.*

218. W.H.A. Res. 42.5 (May 1989).

219. *Id.*

220. *Id.*

221. *Id.*

222. W.H.A. Res. 57.18 (May 24, 2004).

223. *Id.* at ¶ 5.

224. *Id.*

tant to the regulation of organ trafficking, are not binding on member states;²²⁵ and although 192 nations have adopted the WHO organ transplantation guidelines, organ trafficking continues to flourish and has only increased since the WHO guidelines were promulgated.²²⁶

E. The Effects of Transplant Tourism

One of the potential dangers in allowing an underground trade in organs to persist unregulated is transmission of communicable disease.²²⁷ Reports for the Center of Disease Control (“CDC”) indicate that communicable disease can be transported during organ transplants. In July of 2004, a CDC bulletin reported that rabies had been transmitted to three organ recipients at Baylor University Medical Center in Dallas, Texas. Health officials in Alabama, Arkansas, Texas, and Oklahoma were contacted and instructed to investigate contacts of the organ donor and recipients.²²⁸ A week after the diagnosis had been confirmed the investigation identified 916 individuals that had come in contact with the organ recipients.²²⁹ In September of 2005, a CDC bulletin confirmed that an organ donor had transmitted West Nile Virus to three of four organ recipients. The recipients of the donor’s lung and liver tested positive for West Nile Virus and remain in comas; one of the kidney recipients was also diagnosed with West Nile Virus and underwent treatment with some success; and the other kidney recipient remained in good health after the transplant.²³⁰

Both diseases were transmitted from donors residing in the United States and discovered and contained, in part, due to the monitoring and procedures of the CDC.²³¹ But, the CDC does not monitor underground transplant tourism transactions.²³² Thus, the potential for spreading disease across national borders through transplant tourism is not implausible.²³³ The CDC *Traveler’s Health: Yellow Hand-*

225. “[The WHO] protocols were adopted by 192 countries, including the United States. However, the guidelines have no force or power.” GOODWIN, *supra* note 69, at 185.

226. *Id.* “This, in part, is due to the fact that the WHO antitrafficking protocols are nonbinding, with no enforcement powers or funding to help smaller nations track illegal organ sales.” *Id.*

227. *Id.* at 169.

228. CDC Dispatch, July 9, 2004, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm53d709.htm>.

229. *Id.*

230. CDC Dispatch, October 5, 2005, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm54d1005a1.htm>.

231. *Id.*; CDC Dispatch, *supra* note 228.

232. GOODWIN, *supra* note 69, at 170.

233. “Many . . . studies . . . report a heightened frequency of medical complications, including the transmission of HIV and hepatitis B and C viruses.” Shimazono, *supra* note 142.

book warns travelers seeking medical treatment abroad that “health care in developing countries is highly variable.”²³⁴ The CDC also warns that there is little follow-up care for individuals participating in “medical tourism” abroad and when complications do occur, they are usually the responsibility of the patient’s country.²³⁵

Possible transmission of communicable disease is only one of the hazards associated with transplant tourism. Underground organ transactions can also negatively affect legal procurement methods, particularly participation in the altruistic method and potentially the presumed consent method as well. Organ procurement is already often cloaked in mystery and myth.²³⁶ For example, there is a distrust of organ procurement procedures among ethnic groups, particularly African Americans. In a study conducted over a two-year period in Chicago, Illinois, African Americans expressed distrust with the organ donation system, citing undervaluation by physicians as one reason for failure to become organ donors.²³⁷ The core of this fear may in part be the “conspiracy theory” surrounding organ donation. Some individuals fear that if they register as an organ donor and are presented in the hospital with potentially serious injuries, a physician might be more concerned with harvesting their organs than saving their life.²³⁸

234. Department of Health and Human Services, *supra* note 144. A 1994 article in an Indian medical journal asserted that many local donors that are paid for their kidneys “are not even properly investigated for transmissible diseases like hepatitis, AIDS, malaria and others.” Acharya, *supra* note 23.

235. “CDC received a number of reports of nontuberculous mycobacterial infections after elective cosmetic surgery abroad. In addition to these postoperative complications, procedures that result in significant blood loss and require transfusion subject the traveler to greater risk for blood-related complications, including compatibility errors and infection with hepatitis viruses or HIV.” Department of Health and Human Services, *supra* note 144.

236. GOODWIN, *supra* note 69, at 50.

237. *Id.* at 48.

238. “Doctors acquired the authority to pronounce death because lay people did not have the required expertise or objectivity. . . . [L]arge segments of the European and North American public became deeply fearful of medical authority [A]nxieties abounded about premature pronouncement of death” LOCK, *supra* note 64, at 35.

Fears such as these are often reinforced by television sitcoms²³⁹ and urban legends.²⁴⁰ In 1991, an episode of *Law & Order* brought the urban legend of organ theft to the forefront. In the episode, a man awoke to find that his kidney had been extracted without his consent.²⁴¹ A surgeon performed the illegal surgery after the man was identified as a match for a wealthy man's son who was suffering from end-stage renal kidney failure.²⁴² But, while both of the previous concerns are legitimate and serious, the most important reason that transplant tourism should not be ignored is that it fosters criminal activity: activity which exploits primarily indigent individuals.²⁴³

III. "THE EXPLOITATION METHOD?"

*"[P]eople who are exploited suffer some (negative) 'disparity in the value of an exchange of goods and services.' They are . . . under-rewarded for something which they provide for the person or institution which exploits them."*²⁴⁴

239. *Law & Order: Harvest* (NBC television broadcast Oct. 29, 1997) (in an effort to advance his career, an overzealous doctor harvested a woman's organs before she was officially brain dead); see also *Grey's Anatomy: Enough is Enough (No More Tears)* (ABC television broadcast Oct. 2, 2005) (a woman is pronounced brain dead but she is discovered to in fact have some brain function, just in time to prevent her organs from being harvested); *Smallville: Cure* (The CW television broadcast Oct. 18, 2007) (a doctor plans to kill his patient and harvest her heart); cf. *CSI: NY: Live or Let Die* (CBS television broadcast Mar. 29, 2006) (a medical transport helicopter is hijacked and a liver is stolen for a doctor's wife). See generally Press Release, The James Redford Institute, Hollywood Gets it Wrong in Organ Donation: New Research Shows Inaccuracies in Television Storylines may Cost Lives (July 31, 2007) (on file with author) ("Viewers . . . were highly influenced by what they saw on TV . . .").

240. The traditional urban legend asserts that: a man awakes in a bathtub full of ice with a note stating that his kidney has been removed and he should seek medical care. Andrew Lawless, *Dispelling the Myth. The Realities of Organ Trafficking*. Professor Nancy Scheper-Hughes in *Interview*, Nov. 2004, available at http://www.threemonkeysonline.com/threemon_article_organ_trafficking_interview_nancy_schepper-Hughes.htm. "[D]octors . . . are portrayed . . . as accomplices after the fact. . . . [These legends] serve to foster similar fears and resentment of the medical profession. . . . To make matters worse, they have passed into the lore of the streets, in which they are reported as having actually happened." FIEDLER, *supra* note 104, at 139. However, variations of the urban legend have been reported as true in some countries. *Id.* For example in Pakistan, "hundreds of patients have complained that they have unknowingly had a kidney removed while undergoing another type of surgery." Rehman, *supra* note 153.

241. *Law & Order: Sonata for a Solo Organ* (NBC television broadcast Apr. 2, 1991).

242. *Id.* Ben Stone: "Please believe me, I'm glad you're healthy again. I know how close to death you were. But, Mr. Woodleigh, do you really think your father would have acted any differently, if you had needed a heart instead of a kidney?" Similarly, in a 1995 episode of *Voyager*, an alien race suffering from a debilitating disease that affected their organs, forcefully removed Neelix's lungs during an away mission. *Star Trek Voyager: Phage* (UPN television broadcast Feb. 6, 1995).

243. Shimazono, *supra* note 142.

244. WILKINSON, *supra* note 173, at 79.

An individual has a basic right to enter into a contract.²⁴⁵ Under the theory of classical contract law, a contract is a voluntary agreement in which a bargained-for exchange imputes a contractual obligation.²⁴⁶ In the United States, contracts formed in the “marketplace” are considered to be “arms-length” transactions because the bargained-for exchange is between individuals that “are not otherwise obligated to each other.”²⁴⁷ Because a central tenet of contract law is voluntary choice, courts generally do not inquire into the wisdom of a bargain.²⁴⁸ This general practice does not exclude courts from refusing to give legal effect to bargains that are fundamentally inequitable.²⁴⁹

A discussion of contract defenses will likely include the doctrine of unconscionability.²⁵⁰ The doctrine “has been widely embraced.”²⁵¹ “It is generally held that the unconscionability test involves the question of whether the provision [in a contract] amounts to the taking of an unfair advantage by one party over the other.”²⁵² The doctrine of unconscionability consists of two elements: the absence of meaningful choice by one party and contract terms which are unreasonably favorable to the other party.²⁵³ In transplant tourism transactions, a broker usually negotiates a kidney sale between a donor and a recipient.²⁵⁴ The terms of the agreement often mirror unconscionable contracts.²⁵⁵

Most kidney donors abroad are motivated by extreme poverty.²⁵⁶ Consider the following example: “if someone very poor is forced to

245. U.S. CONST. art. I, § 10.

246. AMY KASTELY, DEBORAH WAIRE POST, NANCY OTA, *CONTRACTING LAW* 6 (4th ed. 2006).

247. *Id.* at 31.

248. *Id.* at 3, 351.

249. *See generally* Ryan v. Weiner, 610 A.2d 1377, 1380 (Del. Ch. 1992) (“[B]ut not every writing purporting to contain a promise or every document purporting to make a transfer will be given legal effect.”).

250. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable terms as to avoid any unconscionable result.

251. KASTELY, *supra* note 246, at 473.

252. J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540, 552 (Del. 1977).

253. Ryan, 610 A.2d at 1385.

254. *Explorer*, *supra* note 185.

255. *Id.*

256. *Id.*; *see also* GOODWIN, *supra* note 69, at 170 (“[T]here is considerable economic pressure for indigent people of color . . . to participate in organ tourism”); Kahn, *supra* note 210 (“The vast majority [of people] reported selling a kidney to pay off debts”); Rehman, *supra*

work in a factory for \$1 per day in order to avoid starvation for her family, then she is probably being both under-rewarded and exploited by her employer.”²⁵⁷ The woman working in the factory has in fact consented to the arrangement with her employer: she shows up for work everyday and she accepts the salary. But is her consent really valid? Did she have a meaningful choice? In “classic cases of exploitation,” a person chooses to enter into the exploitative contract, but only in lieu of some other undesirable alternative: in this instance, the alternative is starvation.²⁵⁸ Some argue that the absence of desirable alternatives does not render the woman’s consent invalid.²⁵⁹ But, under the circumstances, the consent may not reflect a meaningful choice.²⁶⁰ For, “when the inequality is so great as to shock the conscience, the mind cannot resist the inference that the bargain must in some way have been improperly obtained.”²⁶¹

In many instances kidney donors receive less than one-third of the price charged to the organ recipient.²⁶² According to traditional principles, “inadequacy of price” indicates the presence of fraud in contract terms.²⁶³ Consider the following example: a person suffering from end-stage renal failure is willing to pay \$20,000 for a new kidney. She contacts a kidney broker who then finds a poor woman and promises to give her \$1000 in exchange for her kidney. After the transplant is completed, the broker pays the woman \$500 and collects \$10,000 for himself. The broker received twenty times the amount of money that the kidney donor received, the recipient received a new kidney, and the donor received half of what she was promised. The

note 153 (“[In Pakistan] [t]housands of laborers . . . are believed to have sold kidneys to pay off debts.”).

257. WILKINSON, *supra* note 173, at 79.

258. *Id.* at 74.

259. *Id.* “[T]hese victims of exploitation are likely to be all too willing to be exploited, . . . and hence ‘exploitation is often voluntary’ and we oughtn’t to make defective consent part of our definition of exploitation.” *Id.* at 79.

260. *Ryan v. Weiner*, 610 A.2d 1377, 1382 (Del. Ch. 1992). In *Ryan v. Weiner*, the court found that although Ryan was vulnerable and unsophisticated, that alone did not prevent him from entering into the contract with Weiner. *Id.* at 1385. However, the surrounding circumstances, including Ryan’s “obvious *lack of sophistication*, his *poverty*, his *distress*, and his fear of being dispossessed,” were factors that Weiner should have considered before entering into an agreement to buy Ryan’s home, in order to insure that Ryan’s consent was “made knowingly and with due consideration.” *Id.* (*emphasis added*).

261. *Id.* at 1382.

262. GOODWIN, *supra* note 69, at 188; *Live With Dan Abrams* (MSNBC television broadcast Nov. 6, 2007); Rehman, *supra* note 153. During an interview with Lisa Ling, a woman named Malacca explained that a kidney broker promised her \$3500 for her kidney, but after the transplant she only received \$700. *Explorer*, *supra* note 185.

263. *Ryan*, 610 A.2d at 1382.

broker is satisfied, so is the kidney recipient, but the woman that sold her kidney did not get the entire benefit of her bargain. In circumstances like this, it is not difficult to see that the contract was unreasonably favorable to the broker and the recipient. Contract terms do not have to be equal in order to be valid; however, “there may be such unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or undue influence.”²⁶⁴

Consider the following hypothetical. The poor woman who promised to sell her kidney to the broker for \$1000 changed her mind. The kidney broker decides to sue her. He files a complaint against her in a United States court, seeking specific performance. The woman offers a defense: unconscionability. If the court finds that the contract was unconscionable, the court “may refuse to enforce the contract” or “it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”²⁶⁵ The court will likely find that the contract was unconscionable because “[t]he financial aspects of the sale are shocking.”²⁶⁶ The broker would receive ten times the amount promised to the woman. The woman’s kidney is certainly worth more than \$1000—evidenced by the amount of money the recipient is willing to pay for the kidney: \$20,000. The inadequacy of price also demonstrates that the bargain is unreasonably “one-sided.” The court could consider the circumstances and conclude that the woman’s “obvious lack of sophistication, [her] poverty, [her] distress and [her] fear of being [impoverished], indicate that the deal was not entered ‘knowingly and with due consideration.’”²⁶⁷ Unfortunately, the agreements that impoverished people enter into to sell their kidneys cannot be overturned because the financial compensation to the donor was unfair or unequal. The agreement cannot be reversed and the kidney returned because the donor was misinformed. The donor has no recourse because these transactions are a part of an unregulated, underground network.

Current transactions with paid kidney donors frequently involve fraud, abuse, and coercion and the financial benefits obtained from selling a kidney usually are short lived.²⁶⁸ “[I]t is the lack of and need for money which are most likely to motivate people to sell parts of

264. *Id.* at 1381.

265. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

266. *Ryan*, 610 A.2d at 1385.

267. *Id.*

268. Shimazono, *supra* note 142.

their bodies for relatively modest sums.”²⁶⁹ Donors seldom receive follow-up care due to financial difficulties,²⁷⁰ often are unable to return to work following a transplant, or experience medical emergencies within their own families.²⁷¹ Exacerbating this financial impediment is the fact that individuals often are promised one price for their kidneys, but are paid another.²⁷² In some instances, people have been forced to relinquish their kidneys to pay their debts.²⁷³ Others are promised jobs as a method of enticing them to known “kidney areas.” Once they arrive they “find themselves imprisoned in private houses and ‘persuaded’ to donate their kidneys.”²⁷⁴ Prisoners are executed but “kept alive” so that their organs are more viable and can be harvested while the prisoner is alongside the recipient in the operating room.²⁷⁵ Transplant tourism is marked by a “complete absence of regulation and supervision, the coercion and underpayment of vendors, and—in the most appalling cases—the theft of organs and murder of ‘donors.’”²⁷⁶ These practices “shock the conscience.”

IV. DISCOURAGING TRANSPLANT TOURISM

Currently, there are no active efforts to prevent U.S. citizens from engaging in transplant tourism. The contracts for organs that United States citizens enter into around the world are not only illegal: if the contracts were legal, the doctrine of unconscionability would most certainly invalidate these contracts. It is funny how our system of laws will not allow an unconscionable contract to be given legal effect within our borders, but will not prohibit our citizens from entering into unconscionable contracts in other nations.

269. WILKINSON, *supra* note 173, at 130.

270. Shimazono, *supra* note 142.

271. See Carney, *supra* note 214 (“Several years after the operation, Rani is still unable to resume her job as a manual construction laborer because of the pain in her side.”); *Live With Dan Abrams*, *supra* note 262 (“Just a few weeks before our interview, her son became sick. Jaundiced, swollen legs, his kidneys are failing and Malacca has no kidney left to give.”); Rehman, *supra* note 153 (“Masih . . . has pain and no longer has the strength to go to work every day. The family will soon have to borrow money again—an elder brother is thinking of selling a kidney.”).

272. *Explorer*, *supra* note 185.

273. “[M]oneylenders, who subsequently pocket most of the fee, force people who are heavily in debt into selling organs.” WILKINSON, *supra* note 173, at 105.

274. *Id.*

275. “[T]heir hearts keep beating until they are adjacent to the organ recipients. . . . Since brain death is not recognized in China, prisoners’ organs are usually removed while they are technically alive” *Id.* at 101.

276. *Id.* at 132.

There are three devices that the United States can employ to discourage citizens from participating in transplant tourism: (1) amend NOTA to include transplant tourism as an illegal practice that will have both criminal and civil penalties; (2) sanction countries that permit and perform transplants for U.S. citizens that have obtained a human organ illegally; and (3) actively pursue new methods of organ procurement in order to increase organ donation within the United States.

Currently, under 42 U.S.C. § 274e, an individual is prohibited from purchasing a human organ. Section 274e provides that:

Prohibition. It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. . . .

Penalties. Any person who violates subsection (a) shall be fined not more than \$50,000 or imprisoned not more than five years, or both.²⁷⁷

Section 274e regulates the sale and purchase of human organs within the United States but does not contain a specific prohibition against U.S. citizens purchasing human organs in other countries. The current statute could be interpreted as prohibiting U.S. citizens from obtaining organs outside of the United States, because the statute prohibits any person from acquiring, receiving, or transferring a human organ if the transfer affects interstate commerce. The act of purchasing a commodity in another country and returning that commodity, such as an organ, back into the United States could be classified as affecting interstate commerce.²⁷⁸ But, if the statute prohibits U.S. citizens from participating in transplant tourism because of the interstate commerce effect, why have there been no federal cases²⁷⁹ imposing criminal penalties under § 274e(a) against a U.S. citizen for obtaining an organ outside of the United States for valuable consideration? It is

277. 42 U.S.C.S. § 274e.

278. Under section 274e(c), the definition of interstate commerce is the same as the definition prescribed in the Federal Food, Drug, and Cosmetic Act. 42 U.S.C.A § 274e(c). Under the Federal Food, Drug, and Cosmetic Act, interstate commerce means “commerce between any State or Territory and any place outside thereof.” 21 U.S.C.A § 321(b).

279. However, *United States v. Wang*, is a federal case brought against two individuals (one was a Chinese national and former prosecutor in China) for engaging in a conspiracy to sell human organs obtained from executed Chinese prisoners. *United States v. Wang*, No. 98 CR. 199 (DAB), 1999 WL 138930, at *1-2 (S.D.N.Y. Mar. 15, 1999). The defendants allegedly planned to sell the organs to individuals in the United States. *Wang*, 1999 WL 138930, at *1. The defendants were arrested during a meeting they arranged in New York. *Wang*, 1999 WL 138930, at *1.

arguable that either transplant tourism is covered under § 274e and the federal government has simply failed to enforce the statute or transplant tourism is not prohibited under § 274e. As currently drafted, it is unclear how § 274e should be interpreted.

Thus, § 274e(a) should be amended to include an express prohibition on transplant tourism. Such an amendment is the first step in implementing the WHA resolution “to take measures to protect the poorest and vulnerable members of society from ‘transplant tourism’ and the sale of tissues and organs.”²⁸⁰ A possible amendment to § 274e(a) could read:

Prohibition. It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. . . . *It shall be unlawful for any person to participate in transplant tourism by knowingly, acquiring, receiving, or otherwise transferring any human organ for valuable consideration for use in human transplantation even if the person acquires, receives, or otherwise transfers any human organ for valuable consideration in a country that permits such a transfer.*²⁸¹

This amendment would also require legislators to include a definition of “person” in section 274e(c). “Person” could be defined as any citizen or permanent resident alien of the United States. The penalties in section 274e(b) for violating subsection (a) could remain unchanged. As an added incentive, the United States could implement economic sanctions against countries that continue to perform organ transplants for U.S. citizens participating in transplant tourism.

Implementing sanctions is one avenue of international diplomacy. A country can impose sanctions, both economic and political, in an effort to elicit a certain response from another country.²⁸² The United States has been implementing economic sanctions since World War I.²⁸³ For example, in 1986, sanctions were instituted against South Africa in an effort to diplomatically compel the country to end apartheid.²⁸⁴ The United States presently has economic sanctions against several countries, including Cuba, North Korea, Syria, and

280. W.H.A. Res. 57.18, ¶ 5 (May 24, 2004).

281. Additional language and emphasis added.

282. GARY CLYDE HUFBAUER, JEFFERY J. SCHOTT & KIMBERLY ANN ELLIOT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 10 (2d ed. 1990).

283. *Id.* at 5.

284. *See* Pub. L. 99-440 (1986).

Zimbabwe.²⁸⁵ In addition, the U.S. has instituted sanction programs to combat illegal proliferation, narcotics, and diamond trades.²⁸⁶

Economic sanctions imposed against countries that engage in transplant tourism could create a powerful deterrent both for individuals and countries. A sanction program aimed at identifying known organ traffickers abroad could also prove to be a powerful deterrent. As a part of the U.S. initiative to prohibit illegal narcotic sales, for example, the United States instituted the Kingpin Act which prohibits any U.S. citizen from “engaging in any transaction or dealing in property or interest in property of [specifically designated narcotics traffickers] and from engaging in any transaction that evades or avoids the prohibitions of the Kingpin Act.”²⁸⁷ A similar initiative could be instituted for organ trafficking by making it a crime for any U.S. citizen or permanent resident alien to engage in any transactions with known organ traffickers, specifically known organ brokers.

By implementing sanctions against countries that permit transplant tourism and by amending NOTA to reflect a prohibition of transplant tourism, the United States will be actively instituting the World Health Organization’s guidelines:

Each jurisdiction [should] determine the details and method of the prohibitions it will use, including sanctions which may encompass joint action with other countries in the region. The ban on paying for cells, tissues and organs should apply to all individuals, including transplant recipients who attempt to circumvent domestic regulations by traveling to locales where prohibitions on commercialization are not enforced.²⁸⁸

Amending NOTA and implementing sanctions on countries that permit transplant tourism are two approaches to discouraging U.S. citizens from purchasing organs in other countries. The best approach, however, to combating a U.S. citizen’s involvement in transplant tourism is for the United States to continue to pursue legalized methods of

285. United States Department of the Treasury, Office of Foreign Assets Control, <http://www.treas.gov/offices/enforcement/ofac/programs/> (last visited Nov. 22, 2008).

286. *Id.*

287. United States Department of the Treasury, Office of Foreign Assets Control, What You Need To Know About U.S. Sanctions Against Drug Traffickers, <http://www.treas.gov/offices/enforcement/ofac/programs/narco/drugs.pdf> (last visited Jan. 11, 2009).

288. WORLD HEALTH ORGANIZATION, GUIDING PRINCIPLES ON HUMAN CELL, TISSUE, AND ORGAN TRANSPLANTATION, U.N. Doc. EB123/5 (2008).

increasing organ procurement domestically.²⁸⁹ As discussed earlier, purchasers on the underground market are not individuals seeking to avoid price regulations or taxes; instead they are individuals in search of life-saving organs that are unavailable to them in their country of residence. Most individuals that participate in transplant tourism are otherwise law-abiding citizens that have been unable to legally obtain an organ through UNOS. They seek organs in other countries, because there is a severe organ shortage in the United States. Faced with the reality that thousands of individuals die each year waiting for a transplant in the United States, it is understandable why an individual would be willing to circumvent the law and engage in an illegal and oftentimes risky procedure in another country. In such a situation, a civil and criminal sanction might not be enough to dissuade an individual facing the possibility of a premature death.

In 2006, the United States amended the UAGA to make it easier for people to altruistically donate an organ and to implement procedures that would facilitate an increase in organ procurement.²⁹⁰ Efforts such as this one are important and necessary to eliminate transplant tourism. But, while amending the UAGA was a step in the right direction, the United States must do more to address the organ shortage problem. More plans have to be implemented and new methods of organ procurement must be identified and other rejected forms of organ procurement may need to be reconsidered. Because, it is only when individuals are able to receive the life-saving treatment they need domestically, that they will abandon illegally purchasing organs internationally.

CONCLUSION

What began as a new frontier in medicine evolved into a life-saving treatment potentially available to any individual suffering from end-stage renal kidney failure. As technology developed participation increased, and a renewed hope resonated among potential recipients. But, the newness and vigor that surrounded this new life-saving treatment soon faded. Thousands of Americans began to die each year unable to benefit from this medical miracle: organ transplantation. Greater demand combined with lack of supply created an atmosphere

289. "The black market organ industry will continue to thrive until it is replaced with a viable alternative. Bans will be ineffective because most will not address the root problem" GOODWIN, *supra* note 69, at 190.

290. See REVISED UNIF. ANATOMICAL GIFT ACT OF 2006, 8A U.L.A. 27 (2008).

of conflict and an urgent push for development of solutions to organ procurement shortages. The United States held fast to altruistic giving while other nations, in addition to several U.S. states, instituted methods of presumed consent to increase organ procurement. Organ shortages, however, continued worldwide. Transplant tourism emerged and began to “fill in the gaps” for many individuals wanting to benefit from organ transplantation.

Transplant tourism has become a popular method of obtaining kidneys for organ transplants. Kidney brokers foster deals between potential donors and recipients. Hospitals allow physicians to perform transplants with organs that have been purchased by the organ recipient from a living donor. Organ-exporting countries, while openly condemning organ sales, fail to employ the safeguards they have implemented in order to combat transplant tourism. Review boards “rubber stamp” organ transplants between unrelated donors and recipients or accept affirmations from donors that they are related to the recipients, without making further inquiry. Internet sites openly advertise and encourage individuals to participate in transplant tourism. International committees continue to condemn the practice and member states adopt the prohibitions; yet, incidents of transplant tourism steadily increase.

Underground commercial organ transactions have flourished independent of legal organ procurement methods. Numerous articles have been written about transplant tourism,²⁹¹ news reports that include video interviews of foreign donors have been broadcast,²⁹² and books have been written;²⁹³ nonetheless, individuals are hesitant to acknowledge the international trade of human organs.²⁹⁴ However,

291. See K.A. Bramstedt and Jun Xu, *Checklist: Passport, Plane Ticket, Organ Transplant*, 7 AM. J. TRANSPLANTATION 1698 (2007); Nancy Scheper-Hughes, *The Ends of the Body—Commodity, Fetishism and the Global Traffic in Organs*, 22 SAIS REV. 61 (2002); Andrew Batson and Shai Oster, *Change of Heart: China Reconsiders Fairness of ‘Transplant Tourism’*, WALL ST. J., Apr. 6, 2007, at A1; Michael Finkel, *Complications*, N.Y. TIMES, May 27, 2001, § 6, at 26; Jeffery Fleishman and Noha El-Hennawy, *When the Body Becomes an ATM: In Cairo, a Thriving Black Market Matches Men Desperate for Money With Those Desperate for an Organ Transplant*, L.A. TIMES, Mar. 13, 2008, at A1 (Foreign Desk); Jeneen Interlandi, *Not Just Urban Legend*, NEWSWEEK, Jan. 19, 2009, at 41; Celia Milne, *The Perils of Transplant Tourism*, GLOBE & MAIL, Jan. 6, 2009, at L4.

292. *Explorer*, *supra* note 185; *Live With Dan Abrams*, *supra* note 262.

293. In addition to the books already mentioned in this article, see COMMODYING BODIES (Nancy Scheper-Hughes & Loïc Wacquant eds., 2002); RAINER W.G. GRUENNER & ENRICO BENEDETTI, *LIVING DONOR ORGAN TRANSPLANTATION* 109-110 (McGraw-Hill Professional 2007); DAVID PRICE, *LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION* 367-418 (Cambridge University Press 2000).

294. GOODWIN, *supra* note 69, at 169, 170.

an international organ trade does exist and Americans are among the recipients who travel abroad to obtain human organs.²⁹⁵ The potential risks and consequences of organ tourism and the role Americans play in the trade affects not only donors and recipients and is not simply shrouded in ethical and moral criticism, but potentially affects the United States' organ procurement method, and individuals domestically and abroad. Turning a blind eye to the underground market in organs only exacerbates the organ shortage problem. Instead of solving the organ procurement shortage, transplant tourism adds a problematic dimension to organ procurement: poor health conditions, fraud, and manipulation of the sick. It also impedes legal organ procurement methods of the United States and other nations, in turn further limiting the availability of organs for potential recipients.

The United States has condemned the sale of human organs since the practice was first suggested in the 1980s. But prohibiting the sale of human organs domestically is not enough to dissuade citizens from participating in transplant tourism. In turn, it is not enough to prevent citizens from actively participating in the exploitation of indigent individuals and from actively violating the laws of other countries. The United States should amend present legislation to include a prohibition of transplant tourism, consider implementing sanctions against countries that permit and facilitate transplant tourism, and continue to seek out solutions to the current organ shortage in an effort to dissuade U.S. citizens from engaging in transplant tourism abroad.

295. *Id.* at 170.

COMMENT

Approaching Placements with Caution: A Child's Right to an Advocate in Adoption Proceedings

DARLA D. WOODRING*

INTRODUCTION

Five-year-old Lucas' sad wide eyes gazed at the ceiling. He sat at the table with adults who discussed his fate as if he was not present in the room. He had already suffered so much pain in his short life. A year ago, Lucas was removed from his birth mother's custody after his mother's boyfriend abused him, and subsequently killed her.¹ Lucas attended the adoption hearing without an adult to represent his interest. Lucas was silent. His foster mother exhorted the judge to finalize the adoption even though a home study was not conducted by the agency. As a result, no one asked Lucas what he wanted, and even worse, no adult sufficiently investigated to ensure the adoption was in his best interest. The court finalized the adoption.

Two years later, Lucas's adoptive parents, the Ciambrones, took him to the emergency room—he weighed just twenty-six pounds and had a body temperature of eighty-four degrees—Lucas died. The medical examiner's report cited more than 200 injuries covering his

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1. Hypothetical is based off the case of Lucas Ciambrone. See John Gibeaut, *Lucas Deserved Better*, 83 A.B.A. J. 52 (1997), for a discussion of the Ciambrone tragedy.

body, including rib fractures and scars on his penis. The cause of death was a blow to the head—a homicide. His adoptive parents were convicted of murder.² A child advocate could have helped prevent this tragedy by thoroughly investigating whether the adoption was in Lucas’s best interest before it was finalized.³

Adoption law is governed by statute and varies from state to state.⁴ According to the United States Census Bureau, in 2000 over two million children lived in adoptive homes.⁵ Adoption can be the greatest gift for foster children because it places them in a permanent stable home. However, “[a]doption cannot take place until a court terminates parental rights”⁶ because biological parents have a fundamental right to raise their children.⁷ “[M]any states do not provide counsel for children in proceedings to terminate parental rights,”⁸ nor do they provide counsel or a guardian ad litem (“GAL”) for children in adoption proceedings.⁹ Generally, a GAL advocates for the best interests of the child even if those interests conflict with the child’s preference.¹⁰ The GAL’s role differs from that of a traditional attor-

2. *Id.*; see also Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 793 (2004) (arguing that the court should have appointed an attorney for Lucas at the termination of parental rights proceeding).

3. A child advocate may have helped prevent another misfortune in the recent case of Renee Bowman who killed her two adopted daughters and placed them in a freezer; she severely abused her third adopted daughter who escaped and notified police. Although Bowman filed for bankruptcy and was charged with a misdemeanor of “threatening bodily harm” to an elderly man, a private agency cleared her as an adoptive parent. See Matt Zapotosky & Aaron C. Davis, *More Tests are Needed to ID Girls in Freezer*, WASH. POST, Oct. 2, 2008, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/01/AR2008100101733.html>.

4. Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29, 36 (2005); see also CYNTHIA R. MABRY & LISA KELLY, *ADOPTION LAW THEORY, POLICY, AND PRACTICE* xxix (2006) (“[A]doption rights and procedure solely are created from statutory laws.”).

5. U.S. CENSUS BUREAU, *ADOPTED CHILDREN AND STEPCHILDREN: 2000* (2003), <http://www.census.gov/prod/2003pubs/censr-6.pdf>.

6. Blinn, *supra* note 2, at 798; see also MABRY & KELLY, *supra* note 4, at 15 (“Unless both biological parents of a child are deceased, parental rights must either be surrendered or terminated before an adoption can occur.”).

7. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

8. Blinn, *supra* note 2, at 798.

9. See *Chart 7: Appointment Laws in Adoption, Guardianship, Unmarried Parent, and Divorce Cases*, 40 FAM. L.Q. 601 (2007); *APPOINTMENT PROVISIONS IN ADOPTION CASES* (Jan. 2007), available at http://www.abanet.org/legal/services/probono/childcustody/adoption_chart.pdf.

10. Barry J. Berenberg, *Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases*, 36 N.M. L. REV. 533, 538 (2006) (“The judgment of the guardian ad litem takes precedence over the child’s expressed wishes.”).

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ney who has a duty to follow the client's wishes.¹¹ A GAL is not always a licensed attorney and state statutes define a GAL's role.¹² Only a handful of states require the appointment of a GAL or counsel in adoption proceedings.¹³ For example, in Missouri "[t]he court shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem . . . to represent the person sought to be adopted."¹⁴ Many states merely require the appointment of a GAL or attorney if the adoption is contested.¹⁵ Finally, even states that require representation in contested adoption proceedings leave the appointment of a GAL to the discretion of the judge in all other adoption proceedings.¹⁶

Inconsistencies in the laws regarding whether GALs and attorneys should be appointed create unnecessary confusion. This Comment will define the various child advocate roles as a guardian ad litem, a best interests attorney, or a child's attorney. Part II examines the history of a child's right to an attorney in legal proceedings. Part III examines the role of child advocates and the different interests involved in dependency, termination of parental rights (TPR), and custody proceedings. Part IV presents the arguments for and against the appointment of attorneys in dependency, TPR, and custody proceedings. Part V explores the role of child advocates and the different

11. See AMERICAN BAR ASSOCIATION SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § II B (2003), http://www.abanet.org/family/reports/standards_childcustody.pdf (discussing traditional attorney role) [hereinafter ABA CUSTODY CASE STANDARDS].

12. See, e.g., IND. CODE ANN. § 31-9-2-50 (West 2008) ("[A GAL is an] attorney, a volunteer, or an employee of a county program . . . who is appointed by a court to: (1) represent and protect the best interests of a child; and (2) provide the child with services requested by the court, including: (A) researching; (B) examining; (C) advocating; (D) facilitating; and (E) monitoring; the child's situation.").

13. See 750 ILL. COMP. STAT. ANN. 50/13 (West 2008) ("[The court] shall appoint some licensed attorney."); MO. REV. STAT. § 453.025 (2008) (stating that the court shall appoint a guardian ad litem which will be a "legal advocate" for the child); N.D. CENT. CODE § 14-15.1-03 (2008) ("A guardian ad litem must be appointed for the child.").

14. MO. REV. STAT. § 453.025.

15. See, e.g., ALA. CODE § 26-10A-22 (2008) ("In the event of a contested adoption, a guardian ad litem shall be appointed."); MASS. GEN. LAWS ch. 210, § 3(b) (2008) ("The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party."); N.M. STAT. § 32A-5-33 (2008) ("In any contested proceeding, the court shall appoint a guardian ad litem for the adoptee."); VT. STAT. ANN. tit. 15A, § 3-201(b) (2008) ("The court shall appoint a guardian ad litem for a minor adoptee in a contested proceeding . . . and may appoint a guardian ad litem for a minor adoptee in an uncontested proceeding.").

16. See, e.g., ALASKA STAT. § 25.23.125(b) (2008) ("The court may appoint a guardian ad litem or attorney, or both . . . for a minor who is to be adopted."); MINN. STAT. § 259.65 (2008) ("In any adoption proceeding, the court may appoint an attorney or a guardian ad litem, or both, for the person being adopted."); WASH. REV. CODE § 26.33.070 (2008) ("The court may appoint a guardian ad litem for a child adoptee . . .").

interests involved in adoption proceedings. Part VI presents the arguments supporting the need for advocates in child adoption cases. Finally, this Comment will conclude that all states should adopt the Illinois and Missouri statutory language, requiring at a minimum, the appointment of a guardian ad litem in *all* adoption proceedings. In contested adoption proceedings, all states should appoint an attorney and, when appropriate (in the judge's discretion), the court should appoint both a GAL and an attorney. For example, it would be appropriate to appoint both a GAL and an attorney when the child's preference differs from the GAL's recommendation; under this scenario, the attorney could advocate for the child's preferences while the GAL could represent the child's best interests.

I. DEFINING THE VARIOUS CHILD ADVOCATE ROLES

In the past, standards for the legal representation of children were unclear.¹⁷ This lack of clarity is, in part, due to the fact that advocates' duties vary depending on the role in which they are serving the child. In 1996, the American Bar Association ("ABA") mandated Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Proceedings (ABA Abuse and Neglect Standards) which define the role of a "child's attorney" and a "guardian ad litem."¹⁸ In 2003, the ABA issued Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards) which distinguishes the role of a "child's attorney" from that of a "best interests attorney."¹⁹

The scope of the ABA Custody Standards expressly mentions "contested adoptions," but explains that the standards are not limited to the actions enumerated in the section.²⁰ Thus, the standards logically extend to all adoption proceedings. The ABA Custody Standards do not use the term "guardian ad litem" because "it has become too muddled through the different usages in different states."²¹ This Comment will utilize the terms "child's attorney," "best interests at-

17. See, e.g., Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 309-10 (1998) (discussing how in *Knock v. Knock*, 621 A.2d 267 (Conn. 1993), the court "acknowledged that the state legislature failed to inform lawyers" of the standards for representing children).

18. AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES §§ A-1, A-2 (1996), <http://www.abanet.org/child/repstandwhole.pdf> [hereinafter ABA ABUSE AND NEGLECT STANDARDS].

19. ABA CUSTODY CASE STANDARDS, *supra* note 11.

20. *Id.* § II A.

21. *Id.* § II B cmt.

torney,” and “GAL.” Although they are distinguishable, all three terms fit into the general category of child advocate. The definition of GAL will capture more of the traditional notion of a court volunteer who may or may not be an attorney. This diverges from the older ABA Abuse and Neglect Standards’ requirement that a GAL be an attorney. The roles and duties of each are detailed below.

A. The Role of the GAL or Court Appointed Special Advocate

Typically, a GAL is “an officer of the court appointed to protect the child’s interests without being bound by the child’s expressed preferences.”²² Many GAL programs use trained community volunteers,²³ while some jurisdictions only appoint lawyers as GALs. For example, in the District of Columbia all GALs are attorneys. The D.C. Code provides that “the Court may appoint a guardian ad litem who is an attorney to represent the child in an adoption proceeding.”²⁴ This Comment’s definition of GAL shall include non-lawyers who cannot perform legal functions on behalf of a child.

A non-attorney child advocate is referred to as a court appointed special advocate (“CASA”) in some jurisdictions. CASAs volunteer to “monitor foster children and provide independent feedback to the court on the welfare of those children.”²⁵ Adoption statutes in some states use the term CASA when referring to a non-attorney best interests advocate and GAL to denote an attorney best interests advocate. For example, in Delaware a judge decides whether to appoint an attorney GAL, or a non-attorney CASA. The statute provides:

Any child who is the subject of . . . adoption or other related proceeding . . . should have a guardian ad litem . . . to represent the best interests of the child. . . . The guardian ad litem shall be an attorney authorized to practice law in the State or a Court-Appointed Special Advocate.²⁶

Clearly, each state applies different labels to these best interest advocates. Whether the GAL is a lawyer or a non-lawyer, his duty

22. ABA ABUSE AND NEGLECT STANDARDS, *supra* note 18, § A-2.

23. Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769, 798 (2001).

24. D.C. CODE § 16-316(b) (2008).

25. Blinn, *supra* note 2, at 831.

26. DEL. CODE ANN. tit. 13, § 701(c) (2008).

does not change. The GAL's primary role is to represent the best interest of the child.²⁷

The role of the GAL is not to give legal representation to the child, "but to investigate, report, and to recommend to the court what would be in the best interests of the child."²⁸ The Oklahoma adoption statute lays out the role of a GAL. It provides:

[A] guardian ad litem shall have the following responsibilities: (a) review relevant documents, reports and other information, (b) meet with and/or observe the child, (c) consider the child's wishes, as appropriate, (d) interview parents, caregivers and others with knowledge relevant to the case, (e) advocate for the minor's best interests by participating in appropriate aspects of the case and advocating for appropriate community and other services when necessary, (f) maintain the confidentiality of information related to the case, (g) monitor the minor's best interests throughout any judicial proceeding, and (h) advise the court of his or her findings and recommendations, if any, and the facts upon which they are based.²⁹

Thus, GALs in Oklahoma do not perform legal duties such as presenting evidence or cross-examining witnesses.

Non-lawyer GALs need to understand their unique role and also the role of the child's attorney (if the child has one).³⁰ Sometimes the roles are unclear because when the court appoints the advocate it fails to define his role. Also, at the outset, a GAL must inform the child of his role in the proceeding. A GAL reports back to the court and may be called as a witness, thus he must explain to the child that their communication is not confidential.³¹

B. The Role of the Child's Attorney

The child's attorney, or a traditional attorney, is a "lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representa-

27. Blinn, *supra* note 2, at 831; *see also* D.C. CODE § 16-316(b) ("The guardian ad litem shall in general be charged with the representation of the child's best interest.").

28. Dale, *supra* note 23, at 797-98; *see also* Helen W. Gunnarsson, *Guardian Ad Litem, Attorney for the Child, Child Representative: How is the New System Working?*, 95 ILL. B.J. 352, 353 (2007) ("[The GAL] act[s] as an investigator (interviewing the client and parties), make[s] recommendations in the child's best interest, and . . . submit[s] a written report as to those recommendations.").

29. OKLA. STAT. tit. 10, § 7505-1.2(B)(3) (2008).

30. *See* ABA ABUSE AND NEGLECT STANDARDS, *supra* note 18, § G-3 (noting that CASAs and other non-lawyer GALs need to "understand the role of the child's attorney").

31. Gunnarsson, *supra* note 28, at 354; *see also id.* § B-2 cmt. (noting that GAL-client communication may not be confidential).

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tion as are due an adult client.”³² The child’s attorney consults with the child, investigates facts, and interviews and cross-examines witnesses. The child’s attorney should never testify, nor make independent recommendations to the court, but rather the attorney must advocate the child’s position.³³

The child’s attorney solely advocates for the child’s position. Although the attorney must follow the child’s express wishes, “[a]s with any client, the child’s attorney may counsel against the pursuit of a particular position sought by the child.”³⁴ For example, the child’s attorney may advise the child against remaining with his biological mother and explain that it may be in his best interest to live with his aunt because she is more equipped to provide for his welfare and safety. A child’s attorney must realize that because of their youth, children can be manipulated more easily than adult clients, thus attorneys must ensure that they are representing the child’s preference and not their own.³⁵ When an effective child’s attorney advocates zealously, a judge would not be able to tell if a lawyer is advocating for a particular outcome because the lawyer thinks it is best or because it is the client’s choice.³⁶

C. The Role of the Best Interests Attorney

A best interests attorney, sometimes referred to as a child representative, “provides independent legal services for the purpose of protecting the child’s best interests, without being bound by the child’s directives or objectives.”³⁷ The best interests attorney serves as a hybrid of the GAL and the child’s attorney. The best interests attorney has the “authority to participate in the litigation,” “may not disclose confidential communications from the child,” and “may not be called as a witness.”³⁸ This attorney can interview witnesses, examine and cross-examine witnesses, and make recommendations to the court.³⁹ However, the attorney advocates what he believes to be in the child’s best interest even if it is against the wishes of the child client.⁴⁰ In

32. ABA CUSTODY CASE STANDARDS, *supra* note 11, § II B 1.

33. *Id.* § III B cmt.

34. ABA ABUSE AND NEGLECT STANDARDS, *supra* note 18, § A-1 cmt.

35. *Id.*

36. Guggenheim, *supra* note 17, at 334.

37. ABA CUSTODY CASE STANDARDS, *supra* note 11, § II B 2.

38. Gunnarsson, *supra* note 28, at 353.

39. *See* OKLA. STAT. tit. 10, § 7505-1.2(A)(2).

40. Gunnarsson, *supra* note 28, at 353.

most jurisdictions, the judgment of the best interests attorney “takes precedence over the child’s expressed wishes.”⁴¹

Most advocates described in state statutes fit into one of the three categories described above, but confusion arises because states use different labels when referring to the same advocate type. It is imperative that the court, responsible for appointing the advocate, explain to the lawyer or layperson his role and that the advocate explain his role to the child at the outset of the representation.⁴² It would also be helpful if states adopted uniform labels, or at least clearly define by statute the duties of each type of advocate in order to avoid uncertainty.

D. Contrasting the Advocates’ Roles

Scholars have identified pros and cons of appointing the different types of advocates. It may be better to appoint one type of advocate over another, depending on the presence of certain factors, such as a young child, or based upon the particular circumstances of the case.

1. GALs and CASAs

Some judges prefer appointing GALs or CASAs because these advocates can report freely. They are “subject to cross examination and, therefore, they are accountable for everything they say.”⁴³ CASAs also can help to provide consistency for the child in the face of a revolving door of social workers. In Oklahoma, between 2001 and 2004, about eighty-two percent of children had the same CASA throughout the adoption process, but only fifty-one percent had the same social worker.⁴⁴ “[T]he point at which the child is preparing to reenter the world with a new and different family is arguably the point at which the CASA is needed the most”⁴⁵ because the child is losing the tie to his biological parent and gaining a new relationship. The GAL or CASA ensures that the new relationship is in the child’s best interest. Critics argue that with the appointment of a CASA or GAL, the child’s wishes are not represented. They also argue that the sys-

41. Berenberg, *supra* note 10, at 538.

42. See ABA CUSTODY CASE STANDARDS, *supra* note 11, § III G cmt. (“Even though the appointment order states the nature of the appointment, judges should be reminded, at each hearing, which role the lawyer is playing.”).

43. Gunnarsson, *supra* note 28, at 354.

44. Cara Rodriguez, *Oklahoma’s Parentless Child: Determining the Best Interests of the Child by Making Multilateral Adoption Decisions*, 59 OKLA. L. REV. 319, 340 (2006).

45. *Id.*

tem is not adversarial because a child's communication with a GAL is not confidential and the GAL can be called as a witness.⁴⁶

2. Child's Attorney

The ABA Abuse and Neglect Standards "express a clear preference for the appointment" of a child's attorney⁴⁷ although most states do not endorse this model.⁴⁸ Proponents of appointing a child's attorney argue that "[l]awyers are ill-trained to make best interests decisions and well-trained to serve as zealous advocates for their clients' positions."⁴⁹ They also argue that traditional attorneys empower young clients.⁵⁰ The child's attorney is the only advocate who represents the child's voice because the GAL and the best interests attorney are not bound by the child's preference. Finally, proponents argue that a child's attorney improves the court's fact-finding ability by fully presenting the child's position, which allows the court to make a "more informed decision."⁵¹

Critics fear that a child's attorney will keep important information from the court when upholding the attorney-client privilege and advancing their client's position.⁵² Others worry that a child's attorney may face a dilemma in advocating a position that is not in the child's best interest. However, a lawyer still is bound by Rule 1.14 of the Model Rules of Professional Conduct.⁵³ Under the rules of professional responsibility, when a lawyer "reasonably believes that the client has diminished capacity" the lawyer may take "protective action" which includes "seeking the appointment of a guardian ad litem."⁵⁴ It would be appropriate for a lawyer to seek the appointment of a GAL when a child wants to return to an abusive home, but it is clearly not in the child's best interest.

46. See Gunnarsson, *supra* note 28, at 353 ("The GAL . . . is subject to cross-examination.")

47. ABA ABUSE AND NEGLECT STANDARDS, *supra* note 18, § A-2 cmt.

48. "Very few jurisdictions have adopted a client-directed model, in which a traditional attorney essentially treats the child client as an adult client . . . States that follow some form of the client-directed model include Michigan, Massachusetts, Minnesota, Connecticut, and Maine." Berenberg, *supra* note 10, at 538.

49. Jacob Ethan Smiles, *A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings*, 37 FAM. L.Q. 485, 500 (2003) (citations omitted).

50. Rebecca E. Baneman, *Who Will Speak for the Children?: Finding a Constitutional Right to Counsel for Children in Foster Care*, 9 U. PA. J. CONST. L. 545, 553 (2007); Guggenheim, *supra* note 17, at 337.

51. Smiles, *supra* note 49, at 501.

52. Berenberg, *supra* note 10, at 561.

53. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

54. *Id.* 1.14(b).

3. Best Interests Attorney

Children often face pressure in child welfare proceedings and may need assistance in determining what is in their best interest. Some scholars argue that because children lack maturity and cognitive capacity, appointing a best interests attorney can ensure that a competent adult represents the child's best interests.⁵⁵ A best interests attorney encourages candid communication with the child because, unlike communicating with a GAL, the information conveyed to the attorney will be kept confidential. Also, some argue that best interests lawyers are able to "present the whole picture [better] than a traditional advocate[] who might withhold information adverse to her case."⁵⁶

Critics worry that because the attorney may advocate a position opposite the child's position, the judge will confuse the attorney's voice with the child's voice.⁵⁷ Also, critics note that "an attorney who determines the child's best interests necessarily relies on his or her own values and biases."⁵⁸

In some situations it may be best to appoint both a GAL and a child's attorney because often times "[c]hildren's wishes and their best interests may not be the same, and both should be presented to the court."⁵⁹ A child's attorney is most effective in representing older children who can express their preferences.⁶⁰ Many scholars argue that younger children should have a GAL or a best interests attorney.⁶¹ The concern is that a child's attorney will manipulate a young child and, after influencing the child, the lawyer will essentially advocate his own position rather than the child's.⁶² Understanding the difference between the various advocate roles allows one to comprehend the responsibilities of the various advocates that are appointed for children in legal proceedings. Any of these advocates can help to protect a child like Lucas in an adoption proceeding.

55. Baneman, *supra* note 50, at 552.

56. *Id.* at 553.

57. Guggenheim, *supra* note 17, at 317.

58. Berenberg, *supra* note 10, at 553.

59. Blinn, *supra* note 2, at 832.

60. Guggenheim, *supra* note 17, at 311 ("[W]henver a child client is old or mature enough to express a preference on the outcome of the case, the child should control the choices of the lawyer . . .").

61. *See, e.g.,* Blinn, *supra* note 2, at 831 ("[A] younger child is best represented by a law guardian.").

62. Gunnarsson, *supra* note 28, at 354.

II. HISTORY OF CHILDREN'S RIGHT TO COUNSEL

Before 1967, children “were rarely represented” by attorneys in court.⁶³ The state assumed that it could protect children who were not in their parent’s care, by having the judge act as *parens patriae* or as the minor’s surrogate parent.⁶⁴ Today, children still are not afforded the same rights as adults, however, “the Supreme Court has established that children are persons within the meaning of the Constitution, which entitles them to the protection of both the Bill of Rights and the Due Process Clause.”⁶⁵

In the United States Supreme Court landmark decision of *In re Gault*,⁶⁶ the Court held that a child has a due process right to counsel in juvenile delinquency proceedings (where a juvenile is accused of a crime).⁶⁷ In *Gault*, the Court reasoned that children need the assistance of attorneys to investigate their case, help prepare their defense, and ensure the proper execution of the proceeding.⁶⁸ The Court noted that even informal court proceedings are “technical” and that because “few adults without legal training can . . . understand them; certainly children cannot.”⁶⁹ The Court emphasized that children need counsel especially in informal proceedings because these “loose procedures” and ad hoc methods can deprive “some juveniles of fundamental rights” resulting in “a denial of due process.”⁷⁰

Following the Supreme Court’s decision in *Gault*, courts and legislatures began extending more protection to children in other areas of the law, particularly, in the child welfare context.⁷¹ In 1974, Con-

63. Guggenheim, *supra* note 17, at 301; *see also* Jennifer Walter, *Averting Revictimization of Children*, 1 J. CENTER FOR CHILD. & CTS. 45, 49 (1999).

64. Walter, *supra* note 63.

65. Smiles, *supra* note 49, at 487. “[T]he Supreme Court has recognized children as persons under the Constitution. This recognition brings with it some due process rights, but the Court has limited the circumstances in which due process rights apply to children. Children have far less protection than their parents under the Constitution.” Blinn, *supra* note 2, at 803.

66. 387 U.S. 1 (1967).

67. *Id.* at 41.

68. *Id.* at 36.

69. *Id.* at 41.

70. *Id.* at 19 (citation omitted).

71. Guggenheim, *supra* note 17, at 302 (“[C]ourts and legislatures have dramatically expanded the circumstances in which lawyers for children are assigned[;] . . . today lawyers commonly represent children in a variety of legal matters including child protection, custody, and visitation proceedings.”); *see also* Samuel M. Davis, *The Role of the Attorney in Child Advocacy*, 32 U. LOUISVILLE J. FAM. L. 817, 817-18 (1994) (noting that after *Gault* courts and legislatures extended the right to counsel “far beyond” what the “decision actually required”); Walter, *supra* note 63, at 49 (“Over the years . . . courts have found it necessary to appoint counsel for children in more and more cases.”).

gress passed the Child Abuse Prevention and Treatment Act (“CAPTA”),⁷² which “established a statutory right to representation, although not necessarily by counsel, for all children who are the subjects of child protection proceedings.”⁷³ Under CAPTA a child has the right to, at a minimum, the appointment of a GAL or a CASA.⁷⁴ CAPTA provides some protection to children, but does not guarantee the right to an attorney. Commentators have noted that *Gault* “produces a strange result: children in the juvenile-justice system have more constitutional guarantees of procedure than children in the child-welfare system.”⁷⁵ They note that the “Supreme Court has not yet recognized a constitutional right to counsel for children who are the subject of foster-care proceedings despite the grave liberty interests at stake.”⁷⁶

Scholars have argued that the rationale of *Gault* “logically extends to child protective proceedings, including the right to counsel”⁷⁷ because children face similar obstacles in such proceedings. A majority of the scholarship focuses on a child’s right to an attorney in dependency (abuse and neglect), TPR, and custody proceedings.⁷⁸ The following section discusses the rights and interests of the parties involved in these types of proceedings, which will later be compared with the rights and interests of the parties involved in adoption proceedings.

72. 42 U.S.C. §§ 5101-07 (2000).

73. Baneman, *supra* note 50, at 551; *see also* Amanda George Donnelly, *Child Welfare Law: Legal Specialty with Attorney Certification*, 36 COLO. LAW. 83, 83 (2007) (“[CAPTA] mandated guardian ad litem (GAL) representation for children in dependency and neglect proceedings and tied representation to federal funding.”).

74. § 5106a(b)(2)(A)(xiii) (“In every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem . . . who may be an attorney or a court appointed special advocate . . . (or both), shall be appointed to represent the child in such proceedings . . .”).

75. Baneman, *supra* note 50, at 554.

76. *Id.*

77. Blinn, *supra* note 2, at 806.

78. *See, e.g.*, Jennifer Bellah, *Appointing Counsel for the Child in Actions to Terminate Parental Rights*, 70 Cal. L. Rev. 481 (1982); Berenberg, *supra* note 10; Dale, *supra* note 23; Erik Pitchal, *Children’s Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663 (2006).

III. DEPENDENCY, TPR, AND CUSTODY PROCEEDINGS

A. History of Advocate Appointment in Dependency, TPR, and Custody Proceedings

The United States Supreme Court has never decided whether a child has a right to counsel in dependency or TPR proceedings.⁷⁹ The Court of Appeal of California, Fourth Appellate District, Division Two noted that “dependency proceedings may work a unique kind of deprivation [because] they are frequently the first step on the road to permanent severance of parental ties.”⁸⁰ A TPR proceeding often follows a dependency proceeding and is the final step in severing the legal ties between parents and their children.⁸¹

A majority of states require attorneys to represent children in dependency proceedings.⁸² For example, in New Jersey, “[a]ny minor who is the subject of a child abuse or neglect proceeding . . . must be represented by a law guardian to help protect his interests and to help him express his wishes to the court.”⁸³ Many states also extend the requirement of representation to TPR proceedings as well.⁸⁴

*Kenny A. v. Perdue*⁸⁵ was the first federal district court case to announce that children have “fundamental liberty interests at stake in deprivation [i.e. abuse and neglect] and TPR proceedings.”⁸⁶ *Kenny A.* was a class action suit brought on behalf of foster children from DeKalb and Fulton Counties in Georgia. There were 439.2 children per one attorney in Fulton County and 182.8 children per attorney in DeKalb County. The plaintiffs alleged that this scarcity of attorneys resulted in the counties’ failure to provide effective legal representa-

79. Dale, *supra* note 23, at 782.

80. *In re Emilye A.*, 12 Cal. Rptr. 2d 294, 301 (Cal. Ct. App. 1992); *see also* Walter, *supra* note 63, at 49 (quoting *Emilye A.*).

81. Pitchal, *supra* note 78, at 674-75; *see also* Theresa Hughes, *Discovering the Undiscoverable in Child Protective Proceedings: Safety Planning Conferences and the Abuse of the Right to Counsel*, 10 U.C. DAVIS J. JUV. L. & POL’Y 429, 463 (2006) (“Child neglect and abuse findings can lead to the filing of a termination of parental rights (TPR) petition, and eventually a finding terminating a mother or father’s parental rights—a permanent loss of custody.”).

82. Dale, *supra* note 23, at 801; *see also* Berenberg, *supra* note 10, at 537 (“Today almost all states require children to be represented throughout an abuse and neglect proceeding.”).

83. N.J. STAT. ANN. § 9:6-8.23 (West 2008).

84. *See, e.g.*, VA. CODE ANN. §16.1-266 (“Prior to the hearing by the court of any case involving a child who is alleged to be abused or neglected or who is the subject of an entrustment agreement or a petition seeking termination of residual parental rights . . . the court shall appoint a discreet and competent attorney-at-law as guardian ad litem to represent the child . . .”).

85. 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

86. *Id.* at 1360.

tion for foster children.⁸⁷ The defendants argued that the Georgia statute only required counsel for children in TPR proceedings and not in abuse and neglect proceedings.⁸⁸ The court rejected this argument and found that foster children have a statutory and constitutional right to counsel in both TPR and deprivation proceedings.⁸⁹ The court noted that there is “an inherent conflict of interests between the child and his or her parent, guardian, or custodian, which requires appointment of separate counsel for the child.”⁹⁰

The court went further, recognizing that even when the state has taken custody of a child through its Division of Family and Children Services (“DFCS”) there is still a conflict between the child and DFCS. The state has its own concerns in placing the child. It may face a shortage of foster homes and may have to move the child frequently or place him or her in an overcrowded facility.⁹¹ The court ruled that foster children have fundamental liberty interests at stake which include “a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.”⁹² The court found that this conflict entitles a child to separate representation by counsel throughout the entire proceeding.⁹³

The *Kenny A.* court found that the right to counsel in deprivation and TPR proceedings stemmed from the Due Process Clause of the Georgia Constitution, which states that “[n]o person shall be deprived of life, liberty, or property except by due process of law.”⁹⁴ The court applied the *Mathews v. Eldridge*⁹⁵ balancing test to weigh the interests involved.⁹⁶ The *Mathews* test determines if a party has been denied due process by considering: 1) the importance of the private interest, 2) the risk of an erroneous deprivation of such interest, and 3) the government’s interest.⁹⁷ In examining the first prong of the test, the court reiterated a foster child’s important liberty interests in “health,

87. *Id.* at 1355-56.

88. *Id.* at 1357.

89. *Id.*

90. *Id.* at 1359.

91. *Id.* at 1359 n.6.

92. *Id.* at 1360.

93. *Id.* at 1359 n.6.

94. GA. CONST. art. I, § I, para. I (1976).

95. 424 U.S. 319 (1976).

96. *Kenny A.*, 356 F. Supp. 2d at 1360.

97. *Mathews*, 424 U.S. at 335.

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safety, and family integrity.”⁹⁸ On the second prong, the court found a significant risk of an erroneous decision because such proceedings involve great judicial discretion. Finally, the court concluded that the government’s interest as *parens patriae* outweighed any financial burden of appointing counsel—the court emphasized the importance of the state’s duty in protecting children because they are the most vulnerable and innocent members of the population.⁹⁹

B. The Competing Interests in Dependency and TPR Proceedings

The court’s reasoning in *Kenny A.* includes many of the arguments that scholars have made regarding a child’s right to an attorney in dependency and TPR proceedings. Much of the focus is on the competing interests of the parties in such proceedings. The interests involved in a termination proceeding include those of the birth parents, the child, the de facto parent (foster or otherwise), and the state.¹⁰⁰ Each participant has unique interests which are often contrary to the interests of the other participants.¹⁰¹

1. The Biological Parents’ Rights and Interests

The United States Supreme Court has afforded constitutional protection to parents to raise their own children¹⁰² and has found that “a parent’s right to her child is fundamental.”¹⁰³ The Supreme Court has traditionally given a “high degree” of deference to “parents in controlling the details of their children’s upbringing.”¹⁰⁴ Early American law equated children with private property.¹⁰⁵ Some commenta-

98. *Kenny A.*, 356 F. Supp. 2d at 1360.

99. *Id.* at 1361.

100. Bellah, *supra* note 78, at 484.

101. Baneman, *supra* note 50, at 550 (“[T]he parent, who is often represented by counsel, has interests that do not necessarily align with the child’s in a dependency proceeding.”); Blinn, *supra* note 2, at 839 (“Children’s interests differ substantially from those of their parents and those of the state in expedited termination proceedings[;] [t]he state and often parents have their own lawyers in those proceedings, but federal law does not similarly provide counsel for children.”).

102. *See, e.g.*, *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (noting that parents have a right “to direct the upbringing and education” of their children).

103. Baneman, *supra* note 50, at 561.

104. Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State’s Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 *FORDHAM URB. L.J.* 1151, 1164 (2001) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1974) and *Pierce*, 268 U.S. at 510).

105. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (detailing the right of parents to control their children); *Pierce*, 268 U.S. at 535 (noting that children are under the “control” of their parents).

tors still argue that courts treat children like property.¹⁰⁶ Although children have gained the status of persons under the United States Constitution,¹⁰⁷ the Constitution still affords parents “privacy rights and protection from state intrusion regarding domestic matters.”¹⁰⁸ Parents have a liberty interest in directing how they raise their children,¹⁰⁹ as well as the right to care for and have access to their children.¹¹⁰ “However, this protected interest must be balanced against the state’s compelling interest in the health, welfare, and safety of its citizens.”¹¹¹

In dependency and TPR proceedings parents have “an interest in not being held inadequate parents” i.e. unfit parents and “in preserving their ties to the child.”¹¹² When separated from their children, parents suffer psychologically from the loss. Parents often want the child returned to their custody even when they cannot properly care for the child.¹¹³

In *Lassiter v. Department of Social Services*,¹¹⁴ the United States Supreme Court identified the parents’ important privacy interest as the “right to ‘the companionship, care, custody, and management of his or her children.’”¹¹⁵ The Court applied the *Eldridge* balancing test and found that this “extremely important” interest “did not overcome the presumption against the right to appointed counsel,”¹¹⁶ because there was no risk that the “litigant may lose his physical liberty if he loses the litigation.”¹¹⁷ Thus, the Court held that indigent parents do not have a right to counsel in TPR proceedings.¹¹⁸

Despite the Court’s decision in *Lassiter*, many state courts and legislatures appoint counsel for indigent parents at TPR and dependency proceedings¹¹⁹ due to the parents’ strong interest in retaining

106. Guggenheim, *supra* note 17, at 313 (noting that commentators make the argument that children are like property); *see also* Blinn, *supra* note 2, at 810 (“Americans reject the idea of ownership of human beings, yet children are often relegated to the status of property.”)

107. *See In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”)

108. Bonstelle & Schessler, *supra* note 104, at 1156.

109. Donnelly, *supra* note 73, at 83.

110. Bellah, *supra* note 78, at 484.

111. Bonstelle & Schessler, *supra* note 104, at 1156-57.

112. Bellah, *supra* note 78, at 498.

113. Dale, *supra* note 23, at 808.

114. 452 U.S. 18 (1981).

115. *Id.* at 27 (citations omitted).

116. *Id.* at 31.

117. *Id.* at 25.

118. *Id.* at 31.

119. *Id.* at 30 & n.6.

custody of their child. At a minimum, parents have a right to a reasonable degree of privacy in raising their children. If the state interferes, parents must receive notice of the hearing and may obtain counsel. In many cases counsel will be appointed for indigent parents.¹²⁰

2. The De Facto Parents' Interests

A de facto parent is

[a]n adult who (1) is not the child's legal parent, (2) has, with consent [either express or implied] of the child's legal parent, resided with the child for a significant period, and (3) has routinely performed a share of the caretaking functions at least as great as that of the parent who has been the child's primary caregiver without any expectation of compensation for this care. . . .¹²¹

A de facto parent essentially functions as the child's actual parent, but typically does not enjoy the same rights as the legal parent.¹²² Some states, however, afford almost the same rights to de facto parents as legal parents.¹²³ For instance, "in Washington, a *de facto* parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise."¹²⁴

De facto parents may be foster parents or other adults who assume the care and guardianship of the child prior to the dependency or TPR proceeding.¹²⁵ These parents may want to continue contact with the child; if parental rights are terminated, de facto parents will have the opportunity to adopt the child.¹²⁶ A possible conflict of interest arises between the de facto parents and the biological parents

120. Bellah, *supra* note 78, at 485.

121. BLACK'S LAW DICTIONARY 1144-45 (8th ed. 2004). The Supreme Court of Washington adopted similar criteria to establish that an adult was a de facto parent: "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature." Carvin v. Britain (*In re* Parentage of L.B.), 122 P.3d 161, 176 (Wash. 2005).

122. BLACK'S LAW DICTIONARY, *supra* note 121, at 1145 ("[T]he status of [a] de facto parent is subordinate to that of [a] legal parent . . .").

123. See, e.g., *In re* Herenia C., 22 Cal. Rptr. 2d 443, 448 (Cal. Ct. App. 1993) ("It is well settled that a de facto parent of a dependent minor has standing to participate as a party in juvenile court proceedings in which decisions about the care, custody, and control of the child will be made."). *But see* Jones v. Barlow, 154 P.3d 808, 819 (Utah 2007) (holding that a de facto parent did not have standing, thus the court refused to adopt the "de facto parent doctrine").

124. *In re* Parentage of L.B., 122 P.3d at 177.

125. Bellah, *supra* note 78, at 486.

126. *Id.* at 487.

because each may want custody and exclusive legal rights to the child.¹²⁷

3. The State's Interests

The state's interests compete with the parents' interests. In its role as *parens patriae*,¹²⁸ the state seeks to preserve and promote the welfare of its citizens,¹²⁹ especially those "who are unable to protect their own interests."¹³⁰ Children are vulnerable because they are under the exclusive control of their parents. The state as *parens patriae* protects children when their parents abuse, neglect, or abandon them.¹³¹ In child welfare proceedings, the court in its *parens patriae* role "assure[s] the best interest of the minor child at every stage of the proceeding."¹³²

In addition, the state often has funding conflicts. States want to provide services and protection in the most cost efficient manner possible, and some families have significant needs.¹³³ A state that forms contracts with private entities to provide child welfare services may have incentives to keep its contractors in business so it does not have to find replacement contractors.¹³⁴ Also, state agencies may be interested in gaining more funding through adoption subsidies and other incentive programs.¹³⁵ A state agency may feel pressure from large case loads and overcrowded facilities, or pressure to meet quotas and fill beds in foster care facilities in order to receive funding.¹³⁶ A state

127. See Alexandra Maravel, *Intercountry Adoption and the Flight from Unwed Fathers' Rights: Whose Right is it Anyway?*, 48 S.C. L. REV. 497, 564 (1997) (noting the conflict of interest between the de facto parents and the biological parents).

128. BLACK'S LAW DICTIONARY, *supra* note 121, at 1144 ("[T]he state in its capacity as provider of protection to those unable to care for themselves.").

129. Smiles, *supra* note 49, at 498.

130. Bellah, *supra* note 78, at 487; see also Blinn, *supra* note 2, at 823-24 ("The most obvious state interest in a proceeding to terminate parental rights is the duty to protect citizens who cannot protect themselves, the traditional role of *parens patriae*.").

131. Bellah, *supra* note 78, at 488.

132. *In re J.J.Z.*, 630 A.2d 186, 194 (D.C. 1993).

133. Pitchal, *supra* note 78, at 689 ("[S]tate child welfare agencies are interested in operating a system that is as cost-efficient as possible."); Smiles, *supra* note 49, at 498 (noting that that state has an "administrative interest" in "reducing the cost and burden" of dependency proceedings).

134. Pitchal, *supra* note 78, at 689.

135. Blinn, *supra* note 2, at 824.

136. See Walter, *supra* note 63, at 50 ("These conflicting interests include (1) legal interests, such as obtaining jurisdiction through a court finding that the child is described as abused, neglected, or abandoned under the code; (2) financial interests, such as minimizing costs; (3) quasi-political, legal, and financial interests, such as meeting adoption quotas; and (4) institutional pressures to handle an ever-increasing number of cases.")

usually bears the burden of paying for the representation of the child, unless the attorney or GAL is a volunteer. The state tries to efficiently manage its duty to provide public goods (protection and welfare) within its budget.¹³⁷

4. The Child's Rights and Interests

Children, because of their minority are “typically seen as incompetent under the law,” “cannot sue on their own behalf,” and “generally cannot be held liable in tort for their actions.”¹³⁸ Children have a right to associate freely and have contact with their birth parents.¹³⁹ In custody cases, however, courts have found that even when their preference is heavily weighted, “children have neither the substantive right to live without adults, nor the substantive right to pick which adults rear them.”¹⁴⁰ A child has an interest in being cared for adequately, which includes the absence of abuse or neglect.¹⁴¹ In abuse and neglect proceedings children have a right to either “live with their parents unless a court finds the parents unfit or, alternatively, has the right to be separated from their parents whenever their parents are actually unfit.”¹⁴²

Children need permanent, secure, and stable homes.¹⁴³ Permanence is essential to a child's development of normal familial connections and avoiding “anxiety and developmental problems that can be caused by uncertainty in care and custodial arrangements.”¹⁴⁴ As a result, children have an interest in expedited proceedings to avoid any uncertainty in their domestic relationships. If a court terminates parental rights, the love and bond between a child and his parents and siblings cannot easily be transferred to a new family.¹⁴⁵ The child may have an interest in the termination of parental rights if his parents are unfit, but the child may also have an interest in reunification or visita-

137. Pitchal, *supra* note 78, at 689.

138. *Id.* at 684-85.

139. Walter, *supra* note 63, at 47 (noting that children have “[a]n interest in growing up with their families”).

140. Guggenheim, *supra* note 17, at 335 (citing *In re Marriage of Thompson*, 651 N.E.2d 222, 226 (Ill. App. Ct. 1995)).

141. Walter, *supra* note 63, at 47.

142. Berenberg, *supra* note 10, at 559.

143. Blinn, *supra* note 2, at 827; *see also* Bellah, *supra* note 78, at 488 (“[C]hildren have a strong interest in having a secure and stable home.”)

144. Bellah, *supra* note 78, at 488-89.

145. Blinn, *supra* note 2, at 828; *see also id.* at 501 (“[T]he longer the uncertainty about his or her status, the greater the harm to the child.”).

tion with the biological family because of his attachment to them.¹⁴⁶ Thus, in a TPR proceeding, it is essential that the court carry out its duty expeditiously to provide the child with a stable home environment.

A child's liberty interest is implicated in a dependency proceeding. As such, an incorrect decision or oversight by the court or a state agency could result in neglect, abuse, or even death.¹⁴⁷

Children have a greater liberty interest at stake in the [dependency/TPR] proceeding than their parents do because the risk of harm they face is irreparable. Parents and children equally face the likelihood of trauma from separation, but the depth and pain of this trauma is arguably more acute . . . for the child. . . . [P]arents are better equipped to understand the proceedings . . . [which] enables them to survive the trauma.¹⁴⁸

The parent and child will face the separation in different ways; a child may have to leave the familiarity of his or her community, school, church and friends. The child may be placed in an overcrowded facility, be shifted from foster home to foster home, or suffer abuse or neglect.¹⁴⁹ Clearly, the child through no fault of his or her own has a great deal at stake in a TPR proceeding.

IV. ARGUMENTS FOR AND AGAINST THE APPOINTMENT OF ATTORNEYS IN DEPENDENCY, TPR, AND CUSTODY PROCEEDINGS

A. The Argument for Attorneys in Dependency, TPR, and Custody Proceedings

The competing interests described above create the urgent need for the appointment of counsel to children in such proceedings. Many in the legal community support this notion.¹⁵⁰ Children have their own voices and need help expressing them. The opportunity to be heard is a basic concept and children, as well as their parents, are entitled to this right.¹⁵¹ The National Association of Counsel for Children ("NACC") advocates that all parties, including children, should have

146. Bellah, *supra* note 78, at 489.

147. Smiles, *supra* note 49, at 496.

148. Pitchal, *supra* note 78, at 676-77.

149. *Id.* at 677.

150. See generally ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* (1993); Guggenheim, *supra* note 17.

151. Pitchal, *supra* note 78, at 695 (citations omitted).

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counsel in abuse and neglect related proceedings.¹⁵² Since 1989, the ABA has endorsed the use of both a GAL and an attorney in abuse and neglect proceedings.¹⁵³

Because children have enormous liberty interests at stake in such proceedings, they need attorneys to protect such interests.¹⁵⁴ “Providing legal counsel for children is a procedural safeguard that . . . substantially decrease[s] the likelihood of error by enhancing the court’s fact-finding ability.”¹⁵⁵ With the attorney advocating for the child, the court can understand the child’s “unique perspective” and make a “more informed and accurate decision.”¹⁵⁶ In abuse/neglect cases “independent counsel who will investigate the allegations . . . and examine the agency’s position will ensure greater protection of children.”¹⁵⁷ The only way a child’s interest is truly represented is if that child has an attorney.¹⁵⁸

Even if given the opportunity, children could not navigate the court proceeding on their own. As the Supreme Court pointed out in *Gault*, legal proceedings are complicated to adults and thus even more perplexing to children.¹⁵⁹ Because of their incapacity, children who are not represented by counsel cannot participate in the proceeding in a meaningful way (such as calling witnesses) while an adult without counsel may represent himself.¹⁶⁰ Dependency proceedings are often informal and subject to more judicial discretion. Thus, counsel for a child can provide a check on this power.¹⁶¹ Because of the financial

152. Dale, *supra* note 23, at 806.

153. Walter, *supra* note 63, at 48.

154. Smiles, *supra* note 49, at 486.

155. *Id.* at 497.

156. *Id.*; see also Baneman, *supra* note 50, at 546 (“Law guardians—counsel for the children in foster care—are often vital to informing the court of both the facts and the child’s preferences”); Donnelly, *supra* note 73, at 84 (“Providing parties with legal counsel increases the likelihood that the court will have access to all relevant facts in the case, thus improving their ability to make more accurate and informed decisions that will be in a child’s best interests.”).

157. Walter, *supra* note 63, at 49.

158. Smiles, *supra* note 49, at 500 (“Since a child will likely not be able to fully present his own opinions, feelings, concerns, and wishes to the court on his own, the child needs an attorney to act as legal counsel so that the child is given a meaningful opportunity to be heard.”); Blinn, *supra* note 2, at 821 (“An attorney is vital to presentation of the child’s individual interests . . . [otherwise] [c]ourts will be unable . . . to balance the competing interests in child protection cases.”).

159. Pitchal, *supra* note 78, at 685.

160. *Id.* at 683.

161. See *id.* at 688 (“[D]ependency judges [sometimes] make . . . important decisions in an ad hoc, chaotic environment without reference to any discernible, meaningful standard.”).

and other institutional pressures upon the state, “the state is an imperfect guardian” of the child’s interests.¹⁶²

“The mere context of the abuse and neglect proceeding can make it more difficult for the child to understand what is happening. Pressures from families [and] the court process . . . can lead children to misidentify or misarticulate their own interests.¹⁶³ The lawyer’s and the GAL’s “sole interest is protecting the child from harm” while all other parties involved have interests that differ from the child’s interest.¹⁶⁴ The lawyers for the state agency or the parent will not represent the child’s interests because the child is not their client¹⁶⁵ and because their client’s interests may conflict with the child’s best interests. Thus, each party needs its own representation.¹⁶⁶

B. The Argument Against Attorneys in Dependency, TPR, and Custody Proceedings

Critics articulate a few arguments against providing lawyers for children in dependency proceedings, namely “disruption of the dependency court proceeding, advocating inappropriate goals for the child, and cost.”¹⁶⁷ The first concern is that the lawyers will disrupt the efficiency and flow of the court proceeding by taking an adversarial position. Another concern is that lawyers will seek what the child (their client) wants rather than what is in the child’s best interest.¹⁶⁸ Finally, critics fear that the mandatory appointment of attorneys in such cases will be a financial burden to the state and taxpayers.

“Some scholars even consider the presence of attorneys for the child as creating an adversarial system in the Family Court that potentially harms children by presenting additional obstacles for the parents to confront.”¹⁶⁹ The Supreme Court in *Gault* provided a response to this accusation recognizing that it may actually be beneficial to make the proceedings more adversarial. The Court held:

162. *Id.* at 692; *see also* Walter, *supra* note 63, at 50 (“One might expect that the agency, since it is charged with the protection of all children under its care, would be able to safeguard each child’s interests, but its many conflicting interests make this expectation unrealistic.”).

163. Berenberg, *supra* note 10, at 554-55.

164. Dale, *supra* note 23, at 808.

165. *See* Bellah, *supra* note 78, at 497 (“[In TPR proceedings][p]arents’ counsel is ill-suited to advocate the child’s interests.”).

166. Blinn, *supra* note 2, at 823 (“[E]ach set of players in [a dependency proceeding] requires its own attorney to present its interests effectively to the court.”).

167. Dale, *supra* note 23, at 808.

168. *Id.* at 809.

169. Bonstelle & Schessler, *supra* note 104, at 1200.

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Fears have been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for. . . . [J]uveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests[.] . . . Fears also have been expressed that the formality lawyers would bring into juvenile court would defeat the therapeutic aims of the court. But informality has no necessary connection with therapy It is quite possible that in many instances lawyers, for all their commitment to formality, could do more to further therapy for their clients than can the small, overworked social staffs of the courts.¹⁷⁰

The Court dismissed these concerns reasoning that rather than disrupting these informal proceedings, the child's attorney will ensure that the child has adequate protection. In addition, cost is an important factor to consider, but it is outweighed by the need for safeguards for children.¹⁷¹

V. ADOPTION PROCEEDINGS

A. Present State of the Law

Currently, only a few states require the appointment of a GAL or attorney to children in adoption proceedings.¹⁷² For example, in Missouri “[t]he court shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem . . . to represent the person sought to be adopted.”¹⁷³ Under Illinois law,

[t]he court shall appoint some licensed attorney other than the State's attorney acting in his or her official capacity as guardian ad litem to represent a child sought to be adopted. Such guardian ad litem shall have power to consent to the adoption of the child, if such consent is required.¹⁷⁴

170. *In re Gault*, 387 U.S. 1, 39 n.65 (1967).

171. *See Smiles*, *supra* note 49, at 498 (“[T]hrough the cost of providing attorneys for children is significant and deserves consideration, that interest is significantly outweighed by the State's interest in achieving the proper outcome and providing for the child's best interests.”).

172. *See supra* note 13.

173. MO. REV. STAT. § 453.025.

174. 750 ILL. COMP. STAT. 50/13.

Many states only require the appointment of a GAL or attorney if the adoption is contested. For example in Vermont, “[t]he court shall appoint a guardian ad litem for a minor adoptee in a contested proceeding . . . and may appoint a guardian ad litem for a minor adoptee in an uncontested proceeding.”¹⁷⁵ In most states the appointment of counsel or a GAL is “authorized but not required.”¹⁷⁶ For example, in Minnesota, “[i]n any adoption proceeding, the court may appoint an attorney or a guardian ad litem, or both, for the person being adopted.”¹⁷⁷ If states adopted a uniform mandatory appointment approach in all adoption proceedings, it would ensure that adoptees in all states receive the same protection by the court.

Some courts have held that even when a child has a statutory right to counsel in a dependency proceeding, which may result in the termination of parental rights, the child has no right to counsel in the adoption proceeding which follows.¹⁷⁸ In *In re D*,¹⁷⁹ the Oregon Court of Appeals noted that a child’s and parents’ interests were equally implicated in a TPR proceeding initiated for abuse or neglect and an adoption proceeding, which results in the termination of parental rights.¹⁸⁰ The court, citing numerous Supreme Court cases, asserted that children have a significant interest in the outcome of TPR proceedings: “The basic human right to maintain and enjoy the relationship which normally exists between the parents and the children is held no less by the children than by the parents.”¹⁸¹ However, the court overruled its earlier position in *In re Wade*,¹⁸² in which it held that children must be represented by counsel in *all* termination proceedings, because of the inherent conflict of interest among the child, state, and parent.¹⁸³ The court decided that its earlier ruling was too

175. VT. STAT. ANN. tit. 15A, § 3-201(b).

176. Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 UMKC L. REV. 337, 343 (2003).

177. MINN. STAT. § 259.65.

178. Davis, *supra* note 71, at 821.

179. 547 P.2d 175 (Or. Ct. App. 1976).

180. *Id.* at 179 (“[W]e agree, that no valid distinction may be made between the proceeding at bar—a ‘Chapter 109’ adoption proceeding—and an action for the termination of parental rights . . .”).

181. *Id.* at 179 n.6 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *May v. Anderson*, 345 U.S. 528 (1953); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

182. 527 P.2d 753 (Or. Ct. App. 1974), *overruled by In re D*, 547 P.2d 175 (Or. Ct. App. 1976).

183. *Id.* at 757 (“We find that in *all* termination proceedings there are potential conflicts between the interests of the children and those of both the state and the parents, and thus hold that independent counsel must represent the children in all termination proceedings.”).

broad and retreated to a permissive appointment standard to be applied on a case-by-case basis.¹⁸⁴

Clearly, courts and legislatures have recognized that there is a grave interest at stake in termination proceedings, which free the child for adoption. The adoption proceeding essentially eliminates any chance for the child to be raised by his biological family which he has a fundamental right to associate with by virtue of his birth. Thus, because of the competing interests, as pointed out by the court in *Wade*, children should have at least a GAL to protect them in the proceeding because their fundamental liberty interests are in jeopardy.

B. The Adoption Triad

Just as in dependency proceedings, the child, the state, and the parents have different interests in adoption proceedings. The many competing interests in the adoption process are reflected in the adoption triad which includes the rights of the birth parents, the child, and the prospective parents.¹⁸⁵ Also, because the state often facilitates this triad, it can be considered a fourth party. Each party has unique interests which can be contrary to the interests of the other parties.¹⁸⁶ When neither an attorney nor a GAL represents the interests of the child throughout the adoption process, the interests of a major participant in the process are not presented to the court.¹⁸⁷

1. The State's Interests

As previously noted, the state has two primary interests—protecting the welfare of the child and reducing any costs associated with this duty.”¹⁸⁸ In its role as *parens patriae*, the state has a duty to find suitable homes for children who are in its care either because the children's parents voluntarily relinquished their rights or because the

184. *In re D*, 547 P.2d at 181 (“We have, therefore, upon reconsideration concluded that the *Wade* rule ought to be replaced by a more flexible approach which permits the trial court to determine on a case-by-case basis whether separate counsel for the child is required in any given termination or adoption proceeding.”).

185. *MABRY & KELLY*, *supra* note 4, at xxix.

186. *Id.* at 205.

187. *See id.* (“Ideally, each participant in the adoption process should have access to independent counsel who is loyal to that participant and exercises independent professional judgment in behalf of that participant.”).

188. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (“Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.”).

state involuntarily terminated parental rights. A suitable home for a child is one that allows the child “to develop as a healthy and productive member of society.”¹⁸⁹

The state regulates the adoption process through its statutes,¹⁹⁰ and facilitates and oversees each step of the process. A “public adoption agency is generally located within the state department or agency responsible for child and family welfare.”¹⁹¹ A state must maintain the integrity of the adoption process and regulate adoptions, which includes maintaining standards for public and private placements. It must ensure that all parties follow the proper procedures including conducting a home assessment and obtaining consent from the birth parents.¹⁹² Thus, adoption statutes and the resulting procedures are “strictly construed.”¹⁹³

The states’ interest in protecting the child is juxtaposed with its interest in reducing costs. The state has a financial interest in adoption because it is relieved of long-term foster care when a family adopts a child, although the state may be required to pay an adoption subsidy.¹⁹⁴ Also, the federal government provides monetary incentives to place certain children in adoptive homes, including older children and children with special needs.¹⁹⁵

2. The Birth Parents’ Interests

Just as in dependency and TPR proceedings, courts recognize that birth parents have fundamental rights with respect to their children. They have the right to raise their children and control their children’s upbringing. The birth parents also have a constitutional right to privacy which includes the right to be left alone.¹⁹⁶ Most parents want to

189. MABRY & KELLY, *supra* note 4, at 629.

190. *Id.* at 151 (“The formal process of adoption is governed by a system of state laws and regulations . . .”).

191. *Id.* at 152.

192. *Id.* at 154-55.

193. *Id.* at 15.

194. See HARALAMBIE, *supra* note 150, at 201-02 (discussing subsidized adoptions); NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, THE VALUE OF ADOPTION SUBSIDIES HELPING CHILDREN FIND PERMANENT FAMILIES (May 2008), <http://www.nacac.org/adoptionssubsidy/valueofsubsidies.pdf> (discussing the benefit of adoption subsidies).

195. See Reauthorization of the Adoption Incentive Payments Program, <http://www.ncsl.org/programs/cyf/adoptact.htm> (last visited March 11, 2009).

196. See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters [that] so fundamentally affect[] a person”); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding the right to privacy in the third, fourth, fifth, and ninth amendments).

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raise their children without government interference or intrusion, and they have the right to do so.

When a birth parent, frequently a birth mother, chooses to place her child for adoption and thus gives up her rights to the child, she experiences a tremendous amount of pain and guilt.¹⁹⁷ Often birth mothers find the loss of the child more unbearable than they had anticipated. “[P]sychiatrist Arthur Sorosky likened the psychological wound of birth mothers to a physical amputation. The research makes plain that, for most birth mothers, ‘adoption is not the end of a painful chapter, but the beginning of a lifetime of wondering, worrying, and missing the child.’”¹⁹⁸ Birth mothers seek therapy more than the average population, but rarely mention the adoption as the reason for treatment.¹⁹⁹

Because of the pain associated with placing the child for adoption, a birth mother may have an interest in protecting her privacy and may want to seal the adoption.²⁰⁰ Some birth mothers will want to put the embarrassment of pregnancy behind them, and others may feel it is a private decision and want to remain anonymous.²⁰¹ A birth mother may also have an interest in a longer statutory period during which she can change her mind and revoke her prior consent to the adoption. Alternatively, the adoptee, the state, and the prospective parents will want to finalize the process as soon as possible.²⁰²

A majority of studies focus on birth mothers, but birth fathers encounter other struggles. The birth mother may block the non-marital or putative father²⁰³ from participating in the decision to place a child by concealing her pregnancy. A birth mother may have a strained relationship with the father. She may attempt to handle the situation on her own and hide the pregnancy from the father because of the emotional stress associated with an unplanned pregnancy.²⁰⁴ She may also choose to conceal her location from the father to pre-

197. Howell, *supra* note 4, at 31.

198. *Id.* at 44-45 (citation omitted).

199. *Id.* at 45.

200. *Cf.* Adoption Associates Inc., Semi-Open Adoption, http://www.adoptassoc.com/domestic/semi_open_adoption/ (last visited Oct. 23, 2008) (noting the many advantages to semi-open adoptions including less uncertainty, less guilt, reduced mourning process etc.).

201. MABRY & KELLY, *supra* note 4, at 627-28.

202. *See id.* at 64-65 (discussing revocation of consent).

203. BLACK'S LAW DICTIONARY, *supra* note 121, at 641 (“The alleged biological father of a child born out of wedlock.”)

204. Howell, *supra* note 4, at 31.

vent access to the child. For these reasons it can be difficult for some putative fathers to establish a relationship with their children.

Before entering an adoption decree, a court must give notice to non-marital fathers who establish a parent/child relationship.²⁰⁵ However, it can be difficult for non-marital fathers to claim paternity when the mother refuses to disclose the father's identity or when the father is unaware of the statutory requirements to claim paternity. In *Friehe v. Schaad*,²⁰⁶ an unwed father did not claim paternity within the statutorily mandated time. The Nebraska statute required an unwed father who had notice of the birth of his child to file a "Notice of Objection to Adoption and Intent to Obtain Custody" with the biological father registry within five days after the birth of the child.²⁰⁷ The father visited the child the day after the child's birth and expressed to the mother that he wanted to make a "joint decision" about adoption.²⁰⁸ Three weeks later, the mother unilaterally placed the son for adoption. Although the father objected, the court finalized the adoption because he failed to file a notice with the biological father registry and thus failed to claim paternity within five days.²⁰⁹

Generally, birth fathers have the same fundamental rights as birth mothers to rear their children, but an unwed birth father may have to comply with additional steps such as signing paperwork in a statutorily mandated time period to claim paternity.²¹⁰ Like birth mothers, birth fathers have similar interests in privacy and confidentiality. Whether birth parents voluntarily surrender their rights to the child or the court terminates their rights, the effects of the adoption can continue for a lifetime because the process permanently alters their legal relationship with the child even if they choose an open adoption.

3. Prospective Adoptive Parents' Interests

Many families await the joy of having a child, either biologically, through artificial techniques, or by adoption.²¹¹ Deciding to adopt is

205. MABRY & KELLY, *supra* note 4, at 15.

206. 545 N.W.2d 740 (Neb. 1996).

207. NEB. REV. STAT. § 43-104.02 (2008).

208. *Friehe*, 545 N.W.2d at 743.

209. *Id.* at 748-49.

210. Howell, *supra* note 4, at 46.

211. *See, e.g.*, American Adoptions, http://www.americanadoptions.com/family_profile/browse?offset=60 (last visited Mar. 11, 2009) (providing a list of over one hundred American families waiting to adopt a child).

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one of the most important decisions an individual makes in his lifetime. When a child is identified for adoption by a prospective family they eagerly await the addition to their family. Agencies may place children with prospective parents before adoptions are finalized. “An interlocutory order is entered prior to filing the final adoption order and after the adoption has been initiated in order to allow for a temporary placement.”²¹² A waiting period then ensues until the court finalizes the adoption.²¹³ This waiting period can be stressful on the prospective parents because they begin to bond with the child and they may fear that the child will be taken away. Waiting periods vary, but they usually last about six months.²¹⁴ The prospective parents have an interest in the speedy resolution of the proceeding to avoid any uncertainty and to affirm the security of their relationship with the child.²¹⁵

The United States Court of Appeals for the Tenth Circuit noted in *Spielman v. Hildebrand*,²¹⁶ that “[p]readoptive parents have not yet attained the status of adoptive parents, who like natural parents, have a protected liberty interest in their familial relationships with their children.”²¹⁷ However “the status of preadoption may be viewed as conferring a more significant relationship than foster care because of the possibility of developing a permanent adoptive relationship.”²¹⁸ In *Spielman*, an agency temporarily removed a child from her adoptive parents’ home during the preadoptive placement.²¹⁹ The court recognized that there are “emotional ties between children and unrelated adults [that] may give rise to a constitutionally protected liberty interest, [but] such an interest is limited by state law when the requisite emotional ties ‘have their origins in an arrangement in which the State has been a partner from the outset,’ ”²²⁰ such as in a pre-adoption agreement.

Prospective parents have interests directly opposite to those of the birth parents when birth parents contest the proceeding. In addi-

212. MABRY & KELLY, *supra* note 4, at 171.

213. *Id.*

214. *Id.* at 172.

215. *See id.* at 171 (“The prospective adoptive parents should be advised that a child placed with them prior to proper consent . . . may be subject to removal and the process disrupted.”).

216. 873 F.2d 1377 (10th Cir. 1989).

217. *Id.* at 1384.

218. *Id.*

219. *Id.* at 1379-80.

220. *Id.* at 1384 (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977)).

tion, they have interests contrary to the state's interest when the state, after conducting a home assessment, determines that the prospective parents are not suitable, or that the adoption is not in the child's best interest.²²¹ Also, the prospective parents have an interest in learning as much information as possible about the child and the child's family background, including medical history and other information that will be useful when raising the child.²²²

4. The Child's Interests

Adoption provides a child with a new family that, presumably, would be better able to care for the child; however, in the absence of a post-adoption contact agreement, it may forever isolate the child from his or her biological family. Children have a right to be cared for by their biological parents unless the state terminates parental rights or the parents voluntarily surrender their rights.²²³ A child also has an interest in a secure, stable, and permanent home.²²⁴ As discussed in the context of TPR proceedings following the adoption, a child who has bonded with parents, siblings and other relatives may be removed from his school, neighborhood, and church—everything that is familiar to him.²²⁵ After adoption, many adoptees miss their biological families²²⁶ and suffer long-term consequences:

Studies consistently reflect that adoptees are in therapy in disproportionately high numbers. While only two percent of people in the United States are adopted, *ten to twenty percent* of people who are undergoing therapy are adoptees. Adopted children are more likely to have learning disabilities, drug and alcohol abuse problems, and an alarmingly high number of mental health patients are adoptees as well.²²⁷

Many of the issues that adoptees experience center around “loss, separation, abandonment, trust, betrayal, rejection, worth and identity.”²²⁸

221. See MABRY & KELLY, *supra* note 4, at 155 (noting that prospective parents must obtain a home study in order to adopt a child).

222. See Adoptive Parent Rights, <http://life.familyeducation.com/adoption/adoptive-parents/45782.html> (last visited Mar. 11, 2009) (explaining that medical and genetic information can be useful to adoptive parents).

223. Berenberg, *supra* note 10, at 559.

224. See *supra* note 143.

225. Pitchal, *supra* note 78, at 677.

226. MABRY & KELLY, *supra* note 4, at 607.

227. Howell, *supra* note 4, at 39 (citations omitted).

228. MABRY & KELLY, *supra* note 4, at 608 (quoting Adele Jones, *Issues Relevant to Therapy with Adoptees*, 34 PSYCHOTHERAPY 64, 64 (1997)).

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If a child becomes the subject of a custody battle between the prospective parents and the biological parents, the child has an interest in its speedy resolution. “Children are the innocent victims of such litigation and the grief that it inflicts. They should not be awarded to the ‘winner’ as if they were a prize, whether that winner is an adoptive parent or a biological parent.”²²⁹

Children may have interests that compete with their biological parents and the state when they wish to continue the relationship with their birth parents and the birth parents are surrendering their rights or the state is terminating parental rights. A child has an interest in the full disclosure of his birth parents’ medical history which may conflict with the birth parents’ right to privacy.

A child may also have interests opposite to those of the prospective parent, if, for instance, the child dislikes the prospective parent, and, therefore may not consent to the adoption. The child also may not want to consent for fear of losing contact with birth relatives. The child may have a conflict with a prospective parent who wishes to limit the child’s contact with the biological relatives. In extreme cases, the child’s interests may conflict with both the state’s and the prospective parent’s interests when the child opposes the adoption, but is under the statutory age for consent. In that situation, the state may finalize the adoption against the child’s wishes.²³⁰

Clearly, the state, the birth parents, the prospective parents, and the child have competing interests. Except for the child, all of the participants are adults, and often then, it is only the child who does not have a voice. Consequently, the court must appoint an advocate to speak for the child in every adoption and protect the child’s unique interests.

VI. THE ARGUMENT FOR THE MANDATORY APPOINTMENT OF CHILD ADVOCATES IN ADOPTION PROCEEDINGS

Divergent interests arise in adoption proceedings, and if a child is not represented by a GAL or counsel, the child’s particular interests are not protected to the same extent as the other participants’ inter-

229. American Academy of Adoption Attorneys, AAAA Position on Children’s Rights in Adoption Proceedings, http://www.adoptionattorneys.org/information/children_rights.htm (last visited Mar. 11, 2009).

230. *See, e.g.*, IOWA CODE § 600.7 (2008) (only requiring consent if the person is fourteen years of age or older).

ests. The “child is a separate individual with potentially discrete and independent views.”²³¹ An advocate must articulate the child’s position to ensure that the child’s voice is heard.²³² The state, the biological parent, and the prospective parent all may have lawyers; yet, in most adoption proceedings, no one is truly representing the best interests of the child or focusing on what the child wants. In many instances, no one asks the child his preference. Even if some of the parties are not represented by counsel, they have the option to obtain counsel and *they are all adults*. Again, because of their incapacity, children cannot participate in court proceedings. Under Rule 17 of the Federal Rules of Civil Procedure, a guardian “may sue or defend” on behalf of a minor, but a child may not sue or defend in his individual capacity.²³³ If the child is unrepresented in an action, the court must appoint a guardian ad litem.²³⁴

The law treats children differently than adults for a reason—their youth makes them vulnerable. Generally, a child lacks the capacity to make informed, rational decisions that are in his best interest because brain development is not complete until the child reaches his mid-twenties (well after the age of legal majority).²³⁵ The final stages of brain growth involve the ability to make rational decisions.²³⁶ Therefore, children enjoy special legal protection because of their biological circumstances. Children’s immaturity makes them defenseless and susceptible to harm. Adults could potentially exploit a child’s immaturity. Thus, because children are less rational and enjoy fewer rights than adults, they need advocates to protect their interests when their parents are unwilling to protect them because the parents’ interests conflict with those of the child or the parents do not consider the child’s interests at all.

A trend to appoint attorneys in dependency and TPR proceedings has emerged, and almost all states appoint a GAL in such proceedings. Adoption proceedings often follow termination proceedings

231. ABA ABUSE AND NEGLECT STANDARDS, *supra* note 18, § A-1 cmt.

232. *Id.*

233. FED. R. CIV. P. 17(c)(1).

234. *Id.* 17(c)(2).

235. Dr. Jesus Pujol et. al., *When Does Human Brain Development End? Evidence of Corpus Callosum Growth Up to Adulthood*, 34 ANNALS OF NEUROLOGY 71, 73 (1993) (“[T]he corpus callosum grows up to the age of 25.45 years.”).

236. See *Adolescent Brain Development* 1 (2002), <http://www.actforyouth.net/documents/may02factsheetadolbraindev.pdf> (“New findings show that greatest changes to the parts of the brain that are responsible for functions such as self-control, judgment, emotions, and organization occur between puberty and adulthood.”).

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and unless a post adoption contact agreement exists, adoption is the final step that severs any legal connection to the biological parents. Because children have a fundamental liberty interest (in the absence of abuse or neglect) in associating with their biological families, they should have some form of protection at such proceedings.

Adults provide guidance, protection, advice, and support to minors. If advocates are appointed, they can explain the proceeding to the child, investigate the surrounding circumstances, advise the child, answer questions, and, most importantly, ensure the adoption is in the child's best interest. If Lucas Ciambrone had an advocate, the advocate would have certainly objected to the court finalizing the adoption in the absence of a home assessment.

Also, the GAL would provide an extra set of eyes and ears to the procedure. Often, child welfare agencies are understaffed and social workers have huge caseloads.²³⁷ The advocate should fulfill a role similar to that of a GAL in Oklahoma.²³⁸ In determining whether the adoption is in the child's best interest, the GAL should interview the child, teachers, caregivers, prospective parents and others, and inspect the prospective parents' home.²³⁹ After interviewing the child, the advocate will determine whether the child's stated choice is reasonable by deciding if the child will be safe and well cared for. If the GAL's recommendation differs from the child's preference then the court should appoint an attorney to represent the child in addition to the GAL, or at a minimum, the GAL should present the child's preference to the court when reporting his findings and making his recommendation.

It is possible that an advocate would have gotten a negative impression from the Ciambrone family. There may have been signs of the abuse considering Lucas lived with the family before the adoption was finalized. Neighbors alleged that the Ciambrones locked Lucas in his room and he was not allowed to play outside.²⁴⁰ After investigating Lucas's case, an advocate may have observed something unusual and could have relayed this information to the court. Also, it is unclear from the reports that Lucas wanted to be adopted. Despite his age at adoption—five years old—children have strong instincts about their caretakers. Perhaps he would have told the advocate that he

237. Baneman, *supra* note 50, at 549.

238. OKLA. STAT. tit. 10, § 7505-1.2(B)(3).

239. *Id.*

240. Gilbeaut, *supra* note 1.

disliked his prospective parents. A child advocate could have protected Lucas by presenting the entire picture to the court so it could determine conclusively what was in his best interest.

Moreover, a child advocate can help protect the rights of biological fathers. The advocate should inquire about the status of a birth father if the birth mother gives consent to adoption and claims she does not know the father's whereabouts. The advocate would conduct a probing interview of the mother, asking if she knows who the birth father is, if he has seen the child, or if he has provided any support. An advocate could also investigate the mother's answers if there is reason to believe that she is concealing a putative father who potentially objects to the adoption.

Thus, a child advocate could help alleviate some of the problems when unwed fathers only have constructive notice of the adoption or no notice at all by inquiring about the father and helping the child locate the father. A child has a right to be raised by a fit and willing biological father. It is an "insupportable position that adoption by an 'approved' adoptive parent is better for a child than growing up in the care of a fit birth parent."²⁴¹

The arguments against the appointment of a GAL in adoption proceedings would fail for many of the same reasons the arguments against the appointment of counsel in dependency/TPR proceedings fail. The strongest argument against the mandatory appointment of child advocates in all adoption proceedings is funding.

There are different options for allocating costs. In Minnesota for example, "[t]he court may order the adopting parents to pay the costs of services rendered by guardians or attorneys" that are appointed by the court.²⁴² Many child advocate programs are staffed by trained community volunteers so court costs will not increase by requiring the mandatory appointment of GALs throughout the adoption process. Some cities have experimented with an "inclusive appointment/buy out option model," which is comparable to a "mandatory pro-bono" program where appointments are made from a pool of attorneys residing in a geographic area.²⁴³ Legislation alone cannot create these programs. "Rather, the system works because there is within the legal community a culture in which the duty to accept appointed represen-

241. Howell, *supra* note 4, at 65.

242. MINN. STAT. § 259.65.

243. See Fines, *supra* note 176, at 362.

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tation is accepted as directive”²⁴⁴ A mixture of trained volunteer advocates and advocates paid by either the state or the adoptive parents may be required to fulfill the needs of a particular jurisdiction.

CONCLUSION

Congress should provide financial incentives²⁴⁵ to states that adopt statutes similar to Illinois and Missouri, which require the appointment of a guardian ad litem in *all* adoption proceedings to safeguard the child’s best interest.²⁴⁶ Thus, states would not be required to appoint an attorney, and this is similar to the requirement of CAPTA, but in the adoption realm. States should clearly define a child advocate’s role in the statute and include duties similar to that of a GAL in Oklahoma.²⁴⁷ States may add additional responsibilities, but those enumerated in the Oklahoma statute should be included in all state statutes as minimum requirements.

In contested adoption proceedings, all states should appoint a “child’s attorney.” When appropriate (in the judge’s discretion), the court should appoint both a GAL and a “child’s attorney,” such as when the child’s preference differs from the GAL’s best interests determination. Every adult involved in the process should empower children. Even the consent of very young adoptees should be considered. Courts should require the consent of children over ten. If an adoptee is under ten, but has “the intelligence to state desires concerning the adoption,”²⁴⁸ the court should consider the child’s wishes, and it should be the GAL’s responsibility to inform the court of the child’s viewpoint.

By appointing a child advocate in every adoption proceeding and clearly outlining the advocate’s duties, states will provide consistency and help judges make more informed decisions. A child advocate, representing the child’s best interest, will provide the added protection that a voiceless and defenseless child like Lucas deserves.

244. *Id.* at 363.

245. Blinn, *supra* note 2, at 834.

246. *See, e.g.,* MO. REV. STAT. § 453.025 (“The court shall, in all cases where the person sought to be adopted is under eighteen years of age, appoint a guardian ad litem.”).

247. *See* OKLA. STAT. tit. 10, § 7505-1.2(B)(3).

248. ALASKA STAT. § 25.23.125.

