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The Jurisprudence of Justice Marshall

WILLIAM W. FISHER, III*

Thurgood Marshall merits commendation for many things. With the possible exception of his mentor, Charles Hamilton Houston, he did more to advance the cause of racial justice than any other American lawyer. He served with distinction as Solicitor General and a judge of the Court of Appeals for the Second Circuit. And for the last twenty-two years, as Associate Justice of the Supreme Court, he has been a consistent and effective supporter of freedom of speech, the rights of Blacks, women, Native Americans, and other disadvantaged groups, the procedural rights of criminal defendants, and the entitlements of workers. His accomplishments in these dimensions are detailed and deservedly honored in several of the other essays in this volume. In an era in which many of the ideals to which Justice Marshall has dedicated his life are threatened, his achievements are well worth recalling and celebrating.

This essay addresses a narrower topic; it attempts to identify the central features of Justice Marshall's jurisprudence — the ways in which he approaches and resolves disputes of all sorts.¹ The paper contends that, in the area of judicial method as well as that of legal doctrine, Justice Marshall has made an important contribution to American law.

At its best, Justice Marshall's decisionmaking has three characteristics: frank pursuit of a substantive conception of a just and humane society; a set of related attitudes toward abstraction, generalization, and doctrinal form best described as "Legal Realist"; and devotion to the ideal of the rule of law. The following three sections examine these features in turn. The conclusion of the paper briefly considers the relationship between them.

I

A vision of what American society could and should look like informs most of Justice Marshall's decisions. Central to that vision is a conception of the liberties and opportunities that all persons should enjoy. First, they should be free of all forms of invidious discrimination.² Second, they should have access to decent educations,³ decent housing,⁴ and decent jobs.⁵ Third, they should enjoy a mini-

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1. If "jurisprudence" is taken to mean a formal philosophy of law, Justice Marshall would almost certainly deny that he has one. Nevertheless, implicit in his votes and sometimes explicit in his opinions and speeches are certain consistent, general attitudes toward the proper functions of law and adjudication. This Article seeks to explicate those attitudes.
2. See Carter, *Mr. Justice Marshall: Some Private Reflections*, 6 BLACK L.J. 12, 14 (1978).
3. Cases in which Justice Marshall has spoken strongly in favor of children's interests in education include *Martinez v. Bynum*, 461 U.S. 321 (1983) (Marshall, J., dissenting) and *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (Marshall, J., dissenting) (characterizing access to educa-

mal standard of living.⁶ Fourth, they should be free from interference in their “personal” affairs — their consensual sexual practices,⁷ their decisions whether to marry⁸ or bear children,⁹ their choices of housemates¹⁰ and reading material,¹¹ and their conduct in their own homes.¹²

Various propositions radiate from this conception of personal freedoms. For example, to defend their entitlements, Justice Marshall believes, persons should enjoy full and equal access to the legal system and to the effective assistance of counsel essential to make that access meaningful.¹³ Persons should not be put to Hobson’s choices — i.e., they should not be forced to renounce one right to enjoy another.¹⁴ And the federal government should enjoy broad powers to provide or

tion as a fundamental right). *See also* Plyer v. Doe, 457 U.S. 202 (1982) (Marshall, J., concurring) (extending access to public education to children of illegal aliens).

4. Although Justice Marshall joined the opinion of the Court in *Lindsay v. Normet*, 405 U.S. 56 (1972), which held that persons are not constitutionally guaranteed access to housing of a particular quality, his sensitivity to the importance of affording persons decent places to live has influenced his votes in a variety of other doctrinal contexts. *See, e.g.*, *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988) (upholding against constitutional challenge a rent-control ordinance designed in part to favor low-income tenants); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 271 (1977) (Marshall, J., dissenting in part) (arguing that the case should have been remanded for a determination whether the exclusionary zoning ordinance in question had been racially motivated).
5. *See, e.g.*, *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting) (emphasizing “the right of the individual . . . to engage in any of the common occupations of life”) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting) (arguing that the “liberty to work” is essential to the freedom secured by the fourteenth amendment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 324 (1970) (Marshall, J., dissenting) (arguing that the importance of employment rendered age discrimination in its provision constitutionally suspect).
6. This principle underlies the positions Justice Marshall has taken in a variety of contexts: his hostility to the efforts of state or federal governments to limit access to welfare benefits, *see, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); his attempts to provide beneficiaries adequate and expeditious procedures to challenge denials of benefits, *see, e.g.*, *Heckler v. Day*, 467 U.S. 104, 131-36 (1984) (Marshall, J., dissenting); and his efforts to define the poor as a “suspect” or “quasi-suspect” class for the purposes of equal protection analysis, *see, e.g.*, *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); *James v. Valtierra*, 402 U.S. 137, 143-45 (1971) (Marshall, J., dissenting).
For a vision that largely parallels Justice Marshall’s on this and the immediately preceding dimension, *see* F.D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), reprinted in Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 423 (1987).
7. *See* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Marshall, J., joining Blackmun, J., dissenting).
8. *See* *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).
9. Justice Marshall was a member of the majority of the Court that, in *Roe v. Wade*, 410 U.S. 113 (1973), established (and delimited) a woman’s constitutional right to decide whether to carry a child to term. Since that decision, he has consistently voted to preserve and protect the woman’s right. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting) (contending that denying federal funds for abortions unconstitutionally impairs poor women’s access to abortions).
10. *See* *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (Marshall, J., dissenting) (arguing for a constitutional right to live with household companions of one’s choice); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (Marshall, J., joining plurality opinion) (contending that governmental intrusions in family living arrangements must withstand strict scrutiny).
11. *See* *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (overturning a conviction for possession of obscene material on the ground that it violated the defendant’s “right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home”).
12. *See id.*
13. Justice Marshall is best known for his insistence that criminal defendants be provided effective legal representation. *See, e.g.*, *Mempa v. Ray*, 389 U.S. 128 (1967); *Strickland v. Washington*, 466 U.S. 668, 706-19 (1984) (Marshall, J., dissenting); Bazelon, *Humanizing the Criminal Process: Some Decisions of Mr. Justice Marshall*, 6 BLACK L.J. 3, 4-7 (1978). But he has been equally vigorous in his efforts to secure representation for “the politically and economically underprivileged” in their efforts to improve their lot. *See, e.g.*, Marshall, *Group Action in the Pursuit of Justice*, 44 N.Y.U. L. REV. 661, 662-63, 668-70 (1969) [hereinafter *Group Action*]; Marshall, *Financing the Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A.J. 1487 (1975) [hereinafter *Financing the Public Interest Law Practice*].
14. *See, e.g.*, *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978) (Marshall, J., dissenting) (arguing

protect these entitlements.¹⁵

Two things are noteworthy about the foregoing vision. First, to use the contemporary lexicon, it is a liberal, not a republican, outlook.¹⁶ Like John Stuart Mill, Justice Marshall believes that individuals should enjoy extensive protections against governmental or private interferences with their personal liberties.¹⁷ By contrast, he is comparatively unconcerned with cultivating "civic virtue" or enabling or encouraging people to assume larger roles in the deliberative processes that affect their lives.¹⁸ So, while he is a vigorous defender of persons' rights to vote¹⁹ and subsequently to bring their views and needs to the attention of their elected representatives,²⁰ he has shown little interest in opening the processes of governmental decisionmaking to popular participation²¹ or enlarging the set of

that persons cannot be forced to choose between their rights to privacy and public employment); *Arnett v. Kennedy*, 416 U.S. 134, 211 (1974) (Marshall, J., dissenting) (arguing that a state cannot condition public employment upon sacrifice of procedural protections against wrongful discharge); *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 185-89 (1971) (Marshall, J., dissenting) (arguing that a person cannot be required to pledge to support the state and federal constitutions as a condition of entry into the legal profession); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (holding that a public employee cannot be discharged for exercise of freedom of speech unrelated to job performance).

15. *See, e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 239-81 (1970) (Brennan, J., White, J., and Marshall, J., dissenting in part) (arguing that Congress has the power to set minimum ages for voting in state elections in order to effectuate the equal protection of the laws).
16. Scholars of many stripes are interested these days in the difference between and relative merits of liberal and republican political theories. For discussions by historians, see, for example, Appleby, *Republicanism and Ideology*, 37 *AM. Q.* 461 (1985); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 *WILLIAM & MARY L. REV.* 57 (1987). For a discussion by a political theorist, see Sandel, *The Political Theory of the Procedural Republic*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 85 (A. Hutchinson & P. Monahan eds. 1987). For discussions by legal scholars, see, for example, Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1111 (1988). For a helpful review of the literature, see Fallon, *What is Republicanism, and Why Is It Worth Reviving?*, 102 *HARV. L. REV.* — (forthcoming 1989).
17. *See* J. MILL, *ON LIBERTY*, reprinted in *THE PHILOSOPHY OF JOHN STUART MILL* 185-319 (M. Cohen ed. 1961). *See supra* notes 7-12.
18. For varying discussions of how courts might foster these traits and habits and of the proper relationship between such efforts and the protection of personal freedoms, see Fisher, *The Significance of Public Perceptions of the Takings Doctrine*, 88 *COLUM. L. REV.* 601, 609-12, 616-17 (1988); Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057, 1067-73 (1980); Michelman, *Tutelary Jurisprudence* (unpublished draft); Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1341-46 (1987).
19. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 126 (1980) (Marshall, J., dissenting) (contending that fifteenth amendment extends to vote dilution as well as outright denial of the franchise); *Evans v. Corman*, 398 U.S. 419 (1970) (protecting the rights of the residents of a federal enclave to vote in state elections).
20. *See, e.g.*, *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 301 (1984) (Marshall, J., dissenting) (arguing for the right of homeless persons to dramatize their plight by sleeping in federal parks); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (protecting the right of a public school teacher to criticize a school board). *Cf.* *Buckley v. Valeo*, 424 U.S. 1, 287 (1976) (Marshall, J., concurring in part and dissenting in part) (arguing that ceilings on candidate expenditures from personal resources promote the "reality and appearance of equal access" to the political system); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (right to engage in peaceful labor picketing in a shopping mall). He is wont to point out that the Constitution itself provides for "the right to petition the Government for a redress of grievances." *See, e.g.*, Interview with Carl Rowan, *Searching for Justice: Three American Stories* (WUSA, Channel 9, Washington, D.C., television broadcast, Sept. 13, 1987) (quoting U.S. Const. amend. I).
21. *See Financing the Public Interest Law Practice, supra* note 13, at 1488 (insisting that the "underrepresented" should have an opportunity to make their views known to governmental decisionmakers but declining to argue that they should be able to participate in the decisionmaking process itself); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 292 (1984) (Marshall, J., concurring in the judgment) (taking a narrower view than Justices Stevens or Brennan of the circumstances in which the faculties of public universities must have access to the decisionmaking processes of their institutions).

issues over which local political bodies have control.²²

Second, in avowedly pursuing this vision, Justice Marshall has implicitly or explicitly distanced himself from all of the currently popular theories of constitutional or statutory interpretation. He has taken the position that, when the pertinent texts are ambiguous, a judge should look for guidance neither to "neutral principles,"²³ nor to a utilitarian calculus of the relative costs and benefits of alternative decisions,²⁴ nor to the "original intent" of the draftsmen of the texts,²⁵ nor to society's "widely shared values,"²⁶ nor to a prediction of how those values will evolve in the future.²⁷ Instead, the judge should navigate by a conception, derived from his own "experience and conscience,"²⁸ of what is wrong with our society and how it should be improved.²⁹

The candor and success with which Justice Marshall has pursued this approach has considerable contemporary significance. At least since the Revolutionary era, self-consciously political theories of constitutional or statutory interpretation have generally been held in low repute in this country; the prevailing view has been that a judge's "personal values" are not supposed to affect his or her decisionmaking.³⁰ Arguably, however, the nature and intensity of the recent Senate

22. While Justice Marshall has never expressed hostility to the strengthening of local communities, in cases involving clashes between community power and personal liberties, he has consistently favored the latter. See, e.g., *supra* note 10.
23. This phrase is the talisman for a tradition of reflection on constitutional law initiated by Herbert Wechsler's article, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The tradition is examined and criticized in White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, reprinted in PATTERNS OF AMERICAN LEGAL THOUGHT 136-63 (1978).
24. See *United States v. Topco Assoc.*, 405 U.S. 596, 609-10 (1972) (when deciding whether to use a "per se rule" or "rule of reason" in a particular antitrust context, courts ought not try to determine which would make better "economic sense"); *New York v. Quarles*, 467 U.S. 649, 686 (1984) (Marshall, J., dissenting) (expressly rejecting utilitarian analysis in determining the limits of the *Miranda* doctrine). On the merits of Marshall's stance on this issue, compare Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) (implicitly criticizing it) with Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 604-06 (1985) (explicitly defending it).
25. In the context of constitutional law, this approach has been popularized by the Reagan administration and its judicial appointees. See, e.g., Address by Edwin Meese, III to the Washington, D.C. Federalist Society, Lawyers' Division (Nov. 15, 1985), reprinted in *Addresses: Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 26-29 (1985); Rehnquist, *Observation: The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694-95, 704-06 (1976).
26. For variants of this approach, see *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246-99 (1973); *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1177-87 (1980). For a criticism of it, see Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994-99 (1967).
27. For variants of this approach, see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976); White, *supra* note 23, at 156-58. For a criticism of it, see J. ELY, *DEMOCRACY AND DISTRUST* 69-70 (1980). Some of Justice Marshall's comments on the constitutionality of the death penalty or segregated public schools might seem to adopt this theory. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 362-63 (1972) (Marshall, J., concurring). But those remarks are better interpreted as predictions of how the American public will come to feel about the practices in question than as acknowledgments that the trajectory of public sentiment provides the definition of "cruel and unusual punishment" or "equal protection."
28. See Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 393 (1981).
29. See, e.g., Marshall, *The Continuing Challenge of the Fourteenth Amendment*, 3 GA. L. REV. 1, 9 (1968) (after recounting the history of the "separate but equal" doctrine, advising law school graduates: "It is your job as future lawyers, future judges, future legislators, and as legal educators to see that the nation's concern for justice through law does not again go the way of the fourteenth amendment.") (emphasis added); Kramer, *The Road to City of Berkeley: The Antitrust Positions of Justice Thurgood Marshall*, 32 ANTI-TRUST BULL. 335, 341-44 (1987) (arguing that when construing the antitrust laws, Justice Marshall consistently favors workers over employers).
30. See, e.g., Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* (1768), reprinted

examination of Judge Bork reveals a growing acceptance by legal scholars, Congresspersons, and the general public that a justice's political convictions inevitably will and perhaps should influence the way he or she votes.³¹ In this connection, Justice Marshall's distinguished judicial record suggests two things: that we need not fear recognition of the political character of the judicial office; and that it is crucial that the right people be appointed to the posts.

II

In two senses, Justice Marshall may accurately be described as a "realist." First, he fits the colloquial meaning of the term; he is pragmatic, shrewd, concerned more with results than with appearances, contemptuous of puffery and cant. These traits are perhaps most evident in his analysis of individual cases. As a former colleague recalls:

He possessed an instinct for the critical fact, the gut issue, born of an exquisite sense of the practical. This gift was often cloaked in a witty aside: "There's a very practical way to find out whether a confession has been coerced: ask, how big was the cop?"³²

Similar attitudes inform in less obvious ways other aspects of Justice Marshall's judging. So, for example, he is suspicious of abstract, *a priori* theories regarding the sorts of groups that deserve special protection under the equal protection clause; to determine whether a classification is "suspect," he prefers to ask whether the group allegedly disadvantaged by it has historically suffered from discrimination.³³ In ascertaining whether the challenged statute does indeed disadvantage the group in question, he attends more to the provision's demonstrated impact than to its ostensible objectives.³⁴ For similar reasons, he has been skeptical of states' efforts to insulate discriminatory practices from judicial review by delegating programs or decisions to private parties.³⁵

Finally, the same traits underlie his notorious resistance to the sanctification of

in TRACTS OF THE AMERICAN REVOLUTION 152-53 (M. Jensen ed. 1967) (lamenting the fact that the confusion of colonial laws enabled judges to exercise discretion); F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS 182 (1839); J. ELY, *supra* note 27, at 44-48; Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 199-200, *passim* (1986).

31. Judge Bork's integrity and intelligence were never seriously challenged in the proceedings. Instead the questioning and debate focused on the views he had expressed in his scholarship (and, to a lesser extent, in his prior opinions) and how they were likely to affect his voting as a justice. Most of the members of the public who took an interest in the proceedings seem to have approved of this way of framing the issue. See, e.g., Russakoff, *Bork's Hill Testimony Failed to Charm South*, Wash. Post, Oct. 4, 1987, at A12, col. 1; Taylor, *Politics in the Bork Battle; Opinion Polls and Campaign-Style Pressure May Change Supreme Court Confirmations*, N.Y. Times, Sept. 28, 1987, at A1, col. 5. For a much less sympathetic description of this trend, see Gunther, *Lewis F. Powell, Jr.*, 101 Harv. L. Rev. 409 (1987).
32. Kaufman, *Thurgood Marshall: A Tribute*, 6 BLACK L.J. 23, 25 (1978); see also Ripple, *Thurgood Marshall and the Forgotten Legacy of Brown v. Board of Education*, 55 NOTRE DAME LAWYER 471, 482-83 (1980) (citing examples of Justice Marshall's ability "to make the record come alive" and "inform the Court of the real impact of its decision[s]").
33. See, e.g., *Cleburne v. Cleburne Living Center*, 437 U.S. 432, 461-65 (1985) (Marshall, J., concurring in part, dissenting in part) (contending that heightened scrutiny of a statute disadvantaging the mentally retarded is required by the long history of segregation and discrimination suffered by the group); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 324-25 (1976) (Marshall, J., dissenting).
34. See, e.g., *Beal v. Doe*, 432 U.S. 438, 459 (1977) (Marshall, J., dissenting) (emphasizing the disproportionate impact on minority women of a statute racially neutral on its face withholding Medicaid funds for abortions); *Fiallo v. Bell*, 430 U.S. 787, 800 (1977) (Marshall, J., dissenting) (contending that the challenged statute in practice discriminated among parents on the basis of gender and among children on the basis of legitimacy); Note, *Justice Marshall and Equal Protection Review: A Spectrum of Standards?*, 64 WASH. U.L.Q. 1251, 1263 (1986) [hereinafter *Spectrum of Standards*].
35. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 272-73 (1971) (Marshall, J., dissenting) (criticizing the

the Constitution itself. His impatience with romanticism and chauvinism made him the most prominent and influential critic of the recent self-congratulatory Bicentennial Celebration of the Constitution³⁶ and the hagiographic style of Supreme Court history it unfortunately reinforced.³⁷

The second sense in which Justice Marshall's jurisprudence is "realistic" is that his approach to adjudication corresponds in more ways than perhaps he would acknowledge to the analytical style commended by the group of scholars who, in the 1920s and 30s, marched under the banner of Legal Realism.³⁸ The connection should not be exaggerated; the Realists were a diverse crew, and Justice Marshall would vigorously contest some of the more extreme statements associated with the group. Nevertheless, Justice Marshall comes closer than perhaps any other Supreme Court justice in our history to the Realist credo.

Of the points of resemblance, the following are most prominent. Like the Legal Realists, Justice Marshall believes that law must be viewed, "not as a set of abstract and socially unrelated commands of the sovereign, but as an effective instrument of social policy."³⁹ Partly as a result, he shares the Realists' disdain for "paper rules" and their conviction that it makes no sense to say that a person has a "right" to something if there do not exist effective remedies to enforce the right.⁴⁰ They are also similar in their preferences regarding doctrinal form. Both Justice Marshall and the Realists are suspicious of general rules, especially those framed in terms of binary categories; they prefer either "sliding scales" or narrow rules tailored to particular contexts and problems.⁴¹ Finally, like the Realists, Jus-

majority for permitting the City Council of Jackson, Mississippi to close or transfer to private control several public swimming pools rather than comply with a desegregation order).

36. See Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987). For indications of the influence of Justice Marshall's comments, see Editorial, *Complacency and the Constitution*, N.Y. Times, Sept. 14, 1987, at A18, col. 1; Editorial, *Justice Marshall's Critique*, Wash. Post, May 9, 1987, at A22, col. 1.
37. See *Group Action*, *supra* note 13, at 664-66 (harshly criticizing the Supreme Court's handling of civil rights during Reconstruction). For a general discussion of the hagiographic tradition, see Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).
38. For recent studies of the Realist movement, see L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465 (1988).
39. Marshall, *1966 Law Day Speech quoted in Kaufman*, *supra* note 32, at 25. For similar statements by Legal Realists, see, for example, Llewellyn, *On the Good, the True, the Beautiful in Law*, 9 U. CHI. L. REV. 224, 264 (1942); Oliphant, *Stare Decisis*, 14 A.B.A.J. 159, 160 (1928). In this respect, the Realists were building on the work of Oliver Wendell Holmes. See, e.g., *Privilege, Malice and Intent*, reprinted in COLLECTED LEGAL PAPERS 117, 120 (1920).
40. See Marshall, *Remarks to the Judicial Conference of the Second Circuit*, 106 F.R.D. 103, 121 (1984) ("In the real world, the existence of rights has no meaning unless their violation can be effectively remedied."); *Group Action*, *supra* note 13, at 662 ("[T]he crucial task is not so much to define our rights and liberties, but to establish institutions which can make the principles embodied in our Constitution meaningful in the lives of ordinary citizens."). For the classic Legal Realist argument to the same effect, see, Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 448 (1930).
41. For examples of Marshall's devotion to "particularism" in this sense, see, for example, *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 292 (1984) (Marshall, J., concurring in the judgment) (criticizing both the majority and the dissent for adopting overly general rules and contending instead that "the constitutional authority of a government decisionmaker to choose the persons to whom he will and will not listen prior to making a decision varies with the nature of the decision at issue and the institutional environment in which it must be made."). For examples of similar stances by Legal Realists, see, for example, F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 817 (1935); Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931); Sturges & Clark, *Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691, 701 (1928). A minority of Realists went even further, arguing that every case must be decided on its own facts. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 157-58 (1930). Justice Marshall has never subscribed to rule-skepticism of that radical sort.

tice Marshall is enraged by judicial decisionmaking that proceeds in ignorance of the social circumstances out of which disputes grow; detailed knowledge of the persons and problems that will be affected directly or indirectly by a ruling is, they agree, a prerequisite to wise adjudication.⁴²

The doctrinal area in which Justice Marshall's commitment to the foregoing propositions has been most in evidence is equal protection. For many years, he has campaigned against the Court's organization of that field in terms of three levels of "scrutiny" — "strict," "intermediate," and "rational basis" — the choice of which most often determines whether statutes are upheld or struck down.⁴³ He has repeatedly advocated instead a system in which the validity of each statute is determined in light of "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interest in support of the classification."⁴⁴ Such an approach, he claims, not only would be more likely than the current system to detect invidious discrimination, but would also foster more sensitive analysis of particular legislative problems. The accuracy of that prediction is debatable.⁴⁵ More important for present purposes, however, is the way Justice Marshall's long-standing disagreement with all of his colleagues on this score reveals his fidelity to the central tenet of Legal Realism: that intelligent and just adjudication requires close attention, unmediated by artificial doctrinal categories, to all of the interests and values at stake in narrowly defined social contexts.⁴⁶

III

Perhaps the most constant theme in Justice Marshall's career is his commitment to the use of legal processes to resolve disputes and remedy social ills. In the civil-rights movement, he was famous for his skepticism regarding the efficacy of extra-legal tactics and his preference for recourse to the courts or legislatures.⁴⁷ Af-

42. See, e.g., *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting) ("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."); Wright, *Thurgood Marshall: A Tribute*, 40 MD. L. REV. 398, 400 (1981) ("[Justice Marshall] is a steadfast opponent of legal abstractions that fail to recognize the facts of life. . ."). This attitude makes Marshall impatient with lawyers who fail to develop records that effectively illuminate the underlying social facts. See, e.g., *Powell v. Texas*, 392 U.S. 514, 521-22 (1968).

43. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16, at 1430-1672 (2d ed. 1988).

44. *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting). Other cases in which Justice Marshall has (unsuccessfully) urged adoption of this approach include: *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 455-56 (1985) (Marshall, J., concurring in part and dissenting in part); *Harris v. McRae*, 448 U.S. 297 (1980) (Marshall, J., dissenting); and *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

45. For a skeptical view, see *Spectrum of Standards*, *supra* note 34, at 1259-68.

46. Cf. M. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 15-21 (1927) (advocating abandonment of the prevailing system for determining whether statutes unconstitutionally abridge property rights in favor of close examination of all of the social interests affected by shielding particular entitlements from legislative interference); F. Cohen, *supra* note 41, at 842 ("[The realistic judge] will frankly assess the conflicting human values that are opposed in every controversy, appraise the social importance of the precedents to which each claim appeals, open the courtroom to all evidence that will bring light to this delicate practical task of social adjustment, and consign to Von Jhering's heaven of legal concepts all attorneys whose only skill is that of the conceptual acrobat.").

47. See J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 34-39 (1959); Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. Negro Educ. 316 (1952). Constance Baker Motley suggests that Justice Marshall's faith in legal processes was tested during the late 1950s and early 1960s by the Southern resistance to the implementation of *Brown*. See Motley, *I Remember the Tumultuous Years and Thurgood Marshall*, 13 HARV. C.R.-C.L. L. REV. 237, 238 (1978). For an indication that his faith was still more-or-less intact in 1967, see Marshall, *Law and the Quest for Equality*, 1967 WASH. U.L.Q. 1, 4, 7-8.

ter his appointment to the bench, he continued in a variety of contexts to take similar positions. For example, during the urban riots in the spring of 1969, he delivered a speech urging young Blacks dissatisfied with social and economic conditions not to resort to force and violence, concluding: "I say [this] because I am a man of the law, and in my book, anarchy is anarchy."⁴⁸ In the famous *Emporium Capwell* case, Justice Marshall (speaking for the Court) ruled against a group of black employees who, dissatisfied with the pace at which their union was seeking redress for their grievances, picketed their employer; by refusing to work within the system established and regulated by the National Labor Relations Act, he held, the workers had forfeited their protection against firing.⁴⁹ His commitment to providing effective remedies for legal rights⁵⁰ proceeds in part from the same desire to have problems resolved through legal channels: "Where no remedies are offered, or where the only ones offered can accomplish little, those who need protection will have reason to turn away from the legal system. They will be convinced that their rights are being trivialized more than they are being protected."⁵¹

Less well-known but equally important to his judicial record has been Justice Marshall's commitment to the "rule of law" in a more technical sense — his fidelity to the contemporary Anglo-American political ideal that goes by the same name. Originating in the writings of Aristotle, Locke, Montesquieu, and Dicey, that ideal consists of a set of related limitations on the exercise of governmental power.⁵² The principal features of the rule of law in this sense may be summarized as follows: the state should impose its will upon persons only through the promulgation (by lawmakers who do not know the identities of those affected) and enforcement (by judges who are free from bias and immune to pressure) of general, clear, well-publicized rules that are capable of being obeyed.⁵³ Important (though much debated) subsidiary propositions include: similar cases must be treated similarly;⁵⁴ no person is above the law;⁵⁵ legal rules (especially criminal rules) should not be retroactive;⁵⁶ and any person adversely affected by or accused of violating a law has a right to have her claims heard by an impartial court.⁵⁷ Adherence to these principles, it is said, helps secure at least three important ends:

48. *A Supreme Court Justice's Warning to Fellow Negroes*, U.S. News and World Rep., May 19, 1969, at 92-93.

49. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69-70 (1975). For a criticism of the ruling, see Carter, *supra* note 2, at 17-18.

50. See text accompanying note 40, *supra*.

51. Marshall, *Remarks to the Judicial Conference*, *supra* note 40, at 118.

52. See Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW*, *supra* note 16, at 1-16 (describing the different versions of the Rule of Law that derive from Aristotle and Montesquieu and criticizing contemporary incarnations of the ideal); D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 128-29 (1984) (discussing the Lockean version of the ideal).

53. There exists no single canonical statement of the ideal, but a good sense of its contours may be obtained by collating the following discussions: L. FULLER, *THE MORALITY OF LAW* 33-91 (1964); F. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW* lecture III (1955); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351-52, 358-59 (1973); J. RAWLS, *A THEORY OF JUSTICE* 235-43 (1971); J. RAZ, *THE AUTHORITY OF LAW* 210-29 (1979).

54. See, e.g., F. HAYEK, *THE CONSTITUTION OF LIBERTY* 153-54 (1960); J. RAWLS, *supra* note 53, at 237-38. *But cf.* L. FULLER, *supra* note 53, at 41-44 (excluding equality of treatment from his definition of the "inner morality of the law"); J. RAZ, *supra* note 53, at 226-27 (arguing that this principle is tautological or unattainable).

55. *Cf.* *United States v. Nixon*, 418 U.S. 683, 715 (1974) (denying that, "in any sense . . . a President is above the law").

56. This proposition is derivative of the principal statement insofar as laws that apply to actions committed prior to their enactment cannot be "obeyed." See L. FULLER, *supra* note 53, at 51-62; J. RAWLS, *supra* note 53, at 238. *But cf.* J. RAZ, *supra* note 53, at 214 (a retroactive statute does not conflict with the rule of law if its enactment can be foreseen).

57. See J. RAWLS, *supra* note 53, at 238-39; J. RAZ, *supra* note 53, at 217. This proposition is described as "subsidiary," because, in the opinion of the theorists who have developed the theory, these proce-

(i) it makes possible implementation of the central principle of democratic theory — that persons ought not be subject to any constraints to which they have not consented either directly or through their chosen representatives;⁵⁸ (ii) by enabling private actors to plan their activities with knowledge of how other persons or the state will respond to their behavior, it fosters productive activity and promotes liberty;⁵⁹ and (iii) it reduces arbitrariness and inequality in the imposition of collective force on individuals.⁶⁰

Justice Marshall has never formally pledged allegiance to this composite ideal, but his opinions and extrajudicial comments reveal a devotion to it stronger than that of most of his colleagues. In a variety of contexts, for example, he has insisted that laws be clear and predictable. His hostility to statutory “vagueness”⁶¹ and strict interpretation of the constitutional ban on “ex post facto”⁶² laws are readily explainable on this ground. And an effort to provide both landowners and government officials guidance as to their rights seems the best explanation for his much-maligned advocacy of the “physical invasion” test for determining whether a statute “takes” private property.⁶³ A commitment to consistency in judicial decisionmaking underlies his stances in several other areas — for example, his hostility to summary rulings (which enable judges to evade their responsibility to decide cases on general principles)⁶⁴ and his advocacy of a “sliding scale” of equal protection scrutiny⁶⁵ (which, he believes, would increase similarity in the treatment of similar cases).⁶⁶ The principle that no person should be denied her “day in court” underlies his opposition to all barriers to access to the judicial system⁶⁷ and his consistent support for expansive rights of “procedural due process.”⁶⁸ Much of his concern to provide capital defendants adequate representation and

dural protections are instrumental to the achievement of the substantive ideal of general rules fairly and equally applied and have no independent non-instrumental value.

58. See, e.g., J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* in *TWO TREATISES OF GOVERNMENT* 373-78 (P. Laslett ed. 1970). *But cf.* Kennedy, *supra* note 53, at 377-91 (criticizing the argument from democratic theory).
59. See, e.g., F. HAYEK, *LAW, LEGISLATION AND LIBERTY* vol. 1 (1973); vol. 2, 133-52 (1974); J. RAWLS, *supra* note 53, at 235-36. *But cf.* Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 78-80 (1984) (criticizing this argument); A. KRONMAN, *MAX WEBER* 120-30 (1983) (discussing the ambivalence of Weber, the theorist most often associated with this argument).
60. See, e.g., MONTESQUIEU, *THE SPIRIT OF LAWS*, Bk. VI, chs. 1-6 (1748); J. RAWLS, *supra* note 53, at 240.
61. See, e.g., *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683-85 (1968).
62. See, e.g., *Weaver v. Graham*, 450 U.S. 24 (1981); *Dobbert v. Florida*, 432 U.S. 282, 304 (1977) (Marshall, J., joining Stevens, J., dissenting).
63. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For a criticism of the physical-invasion test reaffirmed by Justice Marshall in *Loretto*, see, for example, L. TRIBE, *supra* note 43, at 602-04. For a tentative defense of it, see Michelman, *Takings, 1987*, 88 *COLUM. L. REV.* 1600, 1628 (1988).
64. See, e.g., *Pennsylvania v. Bruder*, 109 S. Ct. 205, 207 (1988) (Marshall, J., dissenting) (“[I]t is unfair to litigants and damaging to the integrity and accuracy of this Court’s decisions to reverse a decision summarily without the benefit of full briefing on the merits of the question decided.”); *Dorszynski v. United States*, 418 U.S. 424, 451-52 (1974) (Marshall, J., dissenting) (contending that a trial judge should be required to state his reasons for concluding that a juvenile would not benefit from treatment under the Youth Corrections Act); *Address by Thurgood Marshall to the Conference on World Peace Through Law*, Abidjan, Ivory Coast, 1973, quoted in Bazelon, *supra* note 13, at 8-9; Olsen, *Marshall Raps Fellow Justices for Use of Summary Rulings*, *N.J.L.J.*, Oct. 21, 1982, at 6.
65. See text accompanying notes 43-46, *supra*.
66. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting); *Spectrum of Standards*, *supra* note 34, at 1258.
67. See, e.g., *United States v. Kras*, 409 U.S. 434, 461-62 (1973) (Marshall, J., dissenting) (arguing that access to the courts should be deemed a fundamental right); Marshall, *Law and the Quest for Equality*, *supra* note 47, at 9 (urging pursuit of “equality in access to justice”); *Financing the Public Interest Law Practice*, *supra* note 13, at 1488 (same).
68. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 206 (1974) (Marshall, J., dissenting); *Jenkins v. McKeithen*, 395 U.S. 411 (1969) (plurality opinion).

opportunities for collateral review of their convictions stems from the same source.⁶⁹ These attitudes do not always lead to procedural generosity, however; Justice Marshall's hostility to according litigants special privileges plus his penchant for clear rules make him notoriously unsympathetic to parties who have not jumped through all the hoops.⁷⁰

In recent years, a growing number of legal scholars and political theorists have expressed skepticism regarding the virtues of the "rule of law," contending that even rough approximation of the ideal is unattainable and that, in any event, its achievement would be undesirable.⁷¹ Justice Marshall seems to have been altogether unaffected by those arguments. If anything, his fidelity to the ideal has intensified in the course of his judicial career.

CONCLUSION

Those, then, are the principal components of Justice Marshall's jurisprudence: a commitment to the pursuit, when feasible, of a substantive vision of a just society; "realism" in both the colloquial and the technical senses; and faith in the rule of law. It is an unusual combination, and its oddity occasionally makes for dissonance. For example, his pursuit of a substantive agenda and his loyalty, derived from the ideal of the rule of law, to consistency and constraint in judicial decisionmaking do not cohere comfortably; it is not surprising, in view of these conflicting impulses, that Justice Marshall has never taken a public position on the sense or degree to which judges are "bound" by the laws they are called upon to interpret.⁷² On a somewhat more specific level, Justice Marshall sometimes seems torn between, on one hand, his realist penchant for narrow rules or flexible standards and, on the other, his respect for clarity and consistency.

On the whole, however, one is struck by how well the components of the program fit together. For example, the strongly liberal cast of Justice Marshall's substantive vision⁷³ comports well with the protection of individuals from arbitrary governmental power that provides the principal justification and appeal of the rule of law.⁷⁴ And Justice Marshall's articulation and open pursuit of a normative vision has enabled him to fill the most serious gap in the Realists' legal theory — the absence of a developed view of the purposes the law should be advancing.⁷⁵

In sum, by his example, Justice Marshall has developed a novel and remarkably successful approach to appellate decisionmaking — one whose merits should be borne in mind when the next generation of justices is selected.

69. See Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 8 (1986) (insisting that capital defendants should "receive a fair chance to present all available defenses" — at a minimum, opportunities equal to those accorded other sorts of litigants). Justice Marshall's stance on this issue is surely influenced by his conviction that the death penalty is unconstitutional under all circumstances, but is not wholly derivative of that view.

70. See Kramer, *supra* note 29, at 340-41; Kennedy & Minow, *Thurgood Marshall and Procedural Law: Lawyer's Lawyer, Judge's Judge*, 6 HARVARD BLACKLETTER J. 95, 99-100 (1989).

71. See, e.g., Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 YALE L.J. 561, 566 (1977); Sandel, *supra* note 16, at 85-96; Hutchinson & Monahan, *Democracy and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, *supra* note 16, at 97-123; cf. Lowi, *The Welfare State, the New Regulation and the Rule of Law*, in *id.* at 17-58 (correlating the deterioration of the ideal with the rise of the administrative state); Shklar, *supra* note 52 (suggesting that the vulnerability of the ideal to criticism derives in part from our loss of the two psychological and political theories that originally gave it meaning and value).

72. Cf. Carter, *supra* note 2, at 13-14 (describing the trauma of a Black judge committed to racial justice when called upon to enforce rules he considers "threatening, if not to the survival, then at least to the full absorption of Blacks into the mainstream of American life").

73. See text accompanying notes 2-12, 16-22, *supra*.

74. See Shklar, *supra* note 52, at 16.

75. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 159-78 (1973).

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The portrait of Justice Thurgood Marshall is a *fine art* linoleum print created in 1989 by Edward McCluney, a resident of Cambridge, Massachusetts.

A *fine art* print is a multiple-original work of art on paper which comes in direct contact with a master plate. The print of Justice Marshall was produced from a master linoleum block measuring 24" × 18". There are 100 original number prints on paper and 10 prints numbered "Artist Proofs." These complete the entire edition.

The first 50 prints of Justice Marshall's portrait have been set aside for persons who have worked with Justice Marshall during his tenure on the Court. Prints numbered 51 through 100 are being made available to law schools and jurists.

McCluney has held one-man shows at Wendell Street Gallery, Cambridge, Massachusetts, and at the National Center for Afro-American Artists, Boston, Massachusetts. He has also been featured in Boston's Museum of Fine Arts' group show, *Massachusetts Masters: Afro-American Artists*. His portraits have been installed in the Harvard Law School and the National Center for Afro-American Artists Permanent Collections. McCluney is presently the director of the Student Art Association of the Massachusetts Institute of Technology and an assistant professor in the design division at the Massachusetts College of Art.

