SEARCHING SCRUTINY: THURGOOD MARSHALL'S CONSTITUTIONAL JURISPRUDENCE AND ITS INFLUENCE ON *LAWRENCE V. TEXAS* AND *OBERGEFELL V. HODGES*

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ABSTRACT

Justice Thurgood Marshall's analytical approach to Equal Protection transcended the judicial norm regarding jurisprudential sensitivity to the plight of oppressed groups. In a series of opinions from the 1970s and 1980s, Marshall rejected the typical three-category approach to Equal Protection in favor of his own approach. According to Marshall, the degree of judicial scrutiny should vary from case to case, based on the constitutional and societal importance of the interest adversely affected, the recognized invidiousness of the basis upon which the particular classification is drawn, 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. This article argues that in two recent gay rights cases, the United States Supreme Court used Marshall's approach for determining the appropriate level of judicial scrutiny instead of the categorical approach, even though the Court did not expressly credit Marshall for its methodology.

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INTRODUCTION

Are equality and liberty connected? The U.S. Supreme Court addressed this question in its landmark gay marriage decision, *Obergefell v. Hodges.*[1] In *Obergefell*, the Court held that prohibitions on same-sex marriage violated the 14th Amendment of U.S. Constitution.[2] The Court rested its conclusion on the grounds of both the Due Process Clause and the Equal Protection Clause and stated that the two are "connected in a profound way."[3] This recognition of a "dynamic" between liberty and equality led the Court to conclude the challenged same-sex marriage bans were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[4]

Writing for the majority in *Obergefell*, Justice Anthony Kennedy recognized a connection between the right to equal protection of the law and the due process right to liberty. This recognition diverged from the analytical approach the Supreme Court took in analogous cases.[5] In those prior cases, Court tended to

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[1] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[2] *Id.* at 2604-05.
[3] *Id.* at 2603-03.
[4] *Id.* at 2603-05.
[5] *See, e.g.,* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (choosing to analyze the pending case under an Equal Protection framework rather than under Due Process even though the case "reflect[ed] both equal protection and due process concerns"); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (separating Equal Protection and Due Process analyses of the challenged anti-miscegenation statutes).

separate its Equal Protection and Due Process analyses rather than consider the "interrelation of the two principles."[6]

The approach that the Court took in *Obergefell*—considering both Equal Protection and Due Process principles in a single analysis—echoes the jurisprudential approach that Thurgood Marshall propounded, which instructed courts to consider 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,"[7] as well as "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn,"[8] for both Due Process and Equal Protection analysis.[9] These factors, according to Marshall, should determine the "degree of care with which the court will scrutinize particular classifications."[10] Marshall's theory was that certain constitutional rights intersect; state actions that implicate the intersections of

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[6] Obergefell, 135 S. Ct. at 2603.
[7] Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).
[8] San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting).
[9] *See* Richardson v. Belcher, 404 U.S. 78 (1971) (Marshall, J., dissenting) (applying the factors Marshall articulated in his dissent in Dandridge v. Williams to the Due Process claim in the pending case); *see also* Zablocki v. Redhail, 434 U.S. 374 (1978) ("[U]nder the Equal Protection Clause, we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected."). quoting Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).
[10] Rodriguez, 93 S. Ct. at 1330.

constitutional rights should heighten the level of scrutiny that apply.[11] Marshall's case-by-case method of determining the appropriate degree of judicial scrutiny diverged from the three-category approach that the Supreme Court traditionally has taken, and indeed provided Justice Kennedy with a way to circumvent the application of rational basis review to state laws targeting homosexuals.

The resemblance of Kennedy's analytical approach in *Obergefell* to Justice Marshall's approach is unsurprising because the *Obergefell* Court relied on a majority opinion Marshall wrote in which he applied his factors to a marriage case: *Zablocki v. Redhail*.[12] The *Obergefell* Court cited Marshall's *Zablocki* opinion for the proposition that "[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other,"[13] which buttressed Kennedy's dual analysis of the same-sex marriage bans under the Equal Protection Clause and Due Process Clause. Although the *Obergefell* Court did not expressly credit Marshall for its approach, it effectively adopted Marshall's approach and is indebted to Marshall's jurisprudence because the other cases it cited

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[11] *See* United States v. Salerno, 481 U.S. 739, 762 (1987) (Marshall, J., dissenting) (arguing that there are "substantive limits contained in both the Eighth Amendment and the Due Process Clause which render [the challenged] system of preventative detention unconstitutional.").
[12] *See* Obergefell, 135 S. Ct. at 2603 ("The synergy between the two protections is illustrated further in *Zablocki*.").
[13] *Id.*

for authority did not actually consider both Equal Protection and Due Process principles in a single analysis.[14]

This article reviews the development of Marshall's jurisprudence on the connection between constitutional rights—particularly on equality and liberty—to demonstrate that the Supreme Court's analytical approach in *Obergefell* and *Lawrence v. Texas* matched the approach that Marshall long espoused.

I. CONSIDERING THE INTERESTS AT STAKE IN EQUAL PROTECTION ANALYSIS

Much of Justice Marshall's jurisprudence on equality and liberty evolved through dissent. In a series of dissenting opinions in the 1970s, Marshall eschewed the three-category approach to Equal Protection analysis that the Supreme Court tended to embrace. As one law professor noted, "[i]n the usual case, the Court makes a threshold determination of the appropriate standard of review it will apply to the challenged classification. The choice is made from among three such standards: rational basis scrutiny, intermediate scrutiny, and strict scrutiny."[15]

Marshall, however, propounded a different approach to constitutional analysis that he did not limit to three categories. Moreover, Marshall's method for determining the appropriate

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[14] *Id.* at 2603-04 (discussing Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma ex rel. Williams, 316 U.S. 535 (1942); and Lawrence v. Texas, 539 U.S. 558 (2003)).

[15] Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 Ky. L.J. 591, 596 (2000).

standard of review departed from the traditional categorical approach. Marshall's recognition of the relationship between equality and Due Process rights manifested in his dissenting opinions, which also provide contextual insight into the rationale for Marshall's more nuanced approach. These cases demonstrate how Marshall's analytical approach to Equal Protection Clause cases took due process interests into consideration.

a. *Dandridge v. Williams*

The first case that illustrates Marshall's approach, and its differences from three-category Equal Protection analysis, is *Dandridge v. Williams.*[16] In *Dandridge,* Plaintiffs challenged a Maryland regulatory scheme that limited welfare benefits under the Federal Aid to Families with Dependent Children Act ("AFDC").[17] Plaintiffs challenged the regulatory limitation that "any single family may receive an upper limit of $250 per month in certain counties and Baltimore City, and of $240 per month elsewhere in the State."[18] These caps on AFDC benefits, Plaintiffs argued, discriminated against them "because of the size of their families, in violation of the Equal Protection Clause of the Fourteenth Amendment."[19] In other words, the statute discriminated against larger families because the amount of money per child gradually

[16] *See* Dandridge v. Williams, 397 U.S. 471 (1970).
[17] *Id.* at 473-74.
[18] *Id.* at 475.
[19] *Id.*

decreased as the number of children in a family increased.[20] The District Court agreed, finding that the AFDC's limitation on benefits for large families cut "too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply."[21]

The U.S. Supreme Court reversed the District Court's judgment. A majority of the Supreme Court held that the "concept of 'overreaching' has no place in this case" because the case involved here "state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families."[22] The Court appears to have lowered the level of its scrutiny because social and economic regulations do not affect freedoms protected by the Bill of Rights.[23] The Court suggested that courts should give great deference to states when plaintiffs challenge social and economic regulations pursuant to the Equal Protection Clause:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely

[20] *Id*.
[21] *Id.* at 483.
[22] *Id.* at 484.
[23] This proposition conflicts with the Court's later position that "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." Washington v. Davis, 426 U.S. 229, 238 (1976) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

> because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'…'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'[24]

This reasoning implies that "reasonable basis" analysis is appropriate for any statute or regulation governing "economics and social welfare." The Court did not address the matter of whether a higher degree of scrutiny would be appropriate in *Dandridge* because "there is no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect."[25] The reasonable basis standard adopted by the majority would permit a court to uphold classifications challenged pursuant to the Equal Protection Clause if *any* hypothetical state of facts "reasonably may be conceived" that would justify the alleged discrimination.

Applying this low standard of analytical review, the Court found that Maryland's limitation on AFDC benefits did not violate the Equal Protection Clause. "It is enough," the Court held, "that a solid foundation for the regulation can be found in the State's

[24] *Id.* at 485 (internal citations omitted).
[25] *Id.* at 485 n.17.

legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor."[26] Capping welfare benefits for large families, according to the majority of the Court, was justified by the government's "legitimate interest" in encouraging people to get jobs and avoiding distinctions between welfare families and poor families.

In his dissent, Justice Marshall rejected the majority's application of the lowest level of scrutiny simply because the challenged law pertained to social welfare. Marshall abjured the majority's "emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration."[27] "The Court holds today," Marshall argued, "that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects."[28] In Marshall's view, the Court rationalized the challenged AFDC classification even "though the classification's underinclusiveness or overinclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State" and "the relationship between the classification and the state interests which it purports to serve is so tenuous that it could not

[26] *Id.* at 486.
[27] *Id.* at 508.
[28] *Id.*

seriously be maintained that the classification tends to accomplish the ascribed goals."[29]

In Marshall's opinion, the Maryland cap on welfare benefits yielded the consequence of fewer benefits for members of larger families. "In practice, of course, the excess children share in the benefits that are paid with respect to the other members of the family," the result being "that support for the entire family is reduced below minimum subsistence levels."[30] Thus, the "maximum grant regulation produces a basic denial of equal treatment" because persons who "are concededly similarly situated (dependent children and their families), are not afforded equal, or even approximately equal, treatment under the maximum grant regulation."[31] The class that the statute discriminated against were members of poor families that received less AFDC benefits because of the greater size of their families. According to Marshall, the underinclusiveness of Maryland's allocation of AFDC benefits constituted "'a prima facie violation of the equal protection requirement of reasonable classification,' compelling the State to come forward with a persuasive justification for the classification."[32]

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[29] *Id.*
[30] *Id.* at 518 n.11.
[31] *Id.* at 518.
[32] *Id.* at 519 (internal citations omitted).

Marshall proceeded to admonish the majority for its failure to demand a persuasive justification from the Maryland government in this case. "The Court never undertakes to inquire for such a justification," but rather "avoids the task by focusing upon the abstract dichotomy between two different approaches to equal protection problems that have been utilized by this Court."[33] The "abstract dichotomy" to which Marshall referred was between rational basis (the "traditional test") and his alternative test: "if the classification affects a 'fundamental right,' then the state interest in perpetuating the classification must be 'compelling' in order to be sustained."[34]

Marshall distinguished the facts of this case from earlier cases in which the Court applied rational basis. "The cases relied on by the Court, in which a 'mere rationality' test was actually used…are most accurately described as involving the application of equal protection reasoning to the regulation of business interests."[35] To Marshall, however, the distinctive importance of welfare benefits for poor families with children rendered the majority's application of rational basis inappropriate in this case. Unlike cases in which regulatory regimes governing business interests were challenged, "[t]his case, involving the literally vital interests of a powerless

[33] *Id.*
[34] *Id.* at 520 (citing Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Board of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964)).
[35] *Id.* (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955)).

minority—poor families without breadwinners—is far removed from the area of business regulation, as the Court concedes. Why then is the standard used in those cases imposed here?"[36] The majority had not adequately justified using the business-regulation standard (rational basis) to a case involving poor families in need.

The failure of the majority in *Dandridge* to consider the importance of AFDC benefits led Marshall to expound a different jurisprudence on Equal Protection. The majority did not evaluate the importance of AFDC benefits to this plaintiffs in this case, or utilize it as a criterion for the determination of the appropriate level of judicial scrutiny. Instead, the majority unquestioningly assumed that the "economics and social welfare"[37] standard of analysis applied to the Federal Aid to Families with Dependent Children Act. The Court did not explore whether large families living at certain levels of abject poverty require AFDC benefits as a matter of sustenance, or whether the AFDC's cap on benefits should not be treated as a mere matter of fiscal control. Marshall, however, believed that since certain populations need AFDC benefits to survive, the rational basis test was inappropriate in this case. Instead, a court's focus

> 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*

[36] *Id.*
[37] *Id.* at 484-85.

> *interests in support of the classification.* As we said only recently, "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[38]

Here, Marshall propounded a multifaceted approach for determining the appropriate level of judicial scrutiny that would develop into his nuanced jurisprudence on equality and liberty. This test is a variant of the tests used by the Court led by former U.S. Supreme Court Chief Justice Earl Warren.[39]

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[38] *Id.* at 521 (emphasis added) (quoting Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969)). In *Kramer*, the Court analyzed a New York statute that imposed eligibility requirements on voting in school board elections. The statute limited voting in these elections to people who either "(1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools." *Id.* at 622. Plaintiff was a bachelor who lived with his parents. He argued the statute violated the Equal Protection clause because "[a]ll members of the community have an interest in the quality and structure of public education" and that "'the decisions taken by local boards may have grave consequences to the entire population." The Court agreed and gave strong consideration of the importance of the right to vote, which "is preservative of other basic civil and political rights." *Id.* at 626. Accordingly, the Court gave the "the statute a close and exacting examination," requiring it to accomplish its stated purposes with an "exacting standard of precision." *Id.* at 632. The Court in *Kramer* rejected using the rational basis test because of the importance of the interest at stake, thereby providing solid authority from which Marshall could develop and apply his own Equal Protection jurisprudence on the intersection of equality and liberty.

[39] *See, e.g.,* Williams v. Rhodes, 393 U.S. 23, 30, (1968), in which the Warren Court invalidated an Ohio voting ballot statute that effectively made "it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." Plaintiffs were members of the Ohio American Independent Party and the Socialist party, and argued that the petition-size prerequisite for a party to be on the ballot denied voters wishing to vote for them of equal protection of the laws. *Id.* at 26. In determining the appropriate level of scrutiny with which to analyze the statute, the Court considered the importance of the right to vote, finding that the statute "place[d] burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for

This approach led Marshall to consider principles that are more characteristic of Due Process Clause analysis than traditional Equal Protection Clause analysis. Other Courts have only considered the class adversely affected by the challenged law[40] or the area that the challenged law governed (*e.g.* economics and social welfare) in determining the level of scrutiny. Alternatively, Marshall's test also considers the importance of the interest denied to the plaintiffs' class: "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."[41] Therefore, Marshall argued, the rational basis standard does not comport with the harm that plaintiffs suffer due to the Maryland law that capped benefits for large families. The allegedly discriminatory classification here, the "distinction between large and small families," was not "one that readily commends itself as a

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the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Id.* at 30. Since the ballot requirement abridged multiple important rights, the Court applied strict judicial analysis and required the government to show a "compelling state interest" to justify the statute. *Id*.

[40] *See, e.g.,* Williamson, 348 U.S. 483 (1955) (upholding a statutory distinction between optometrists and ophthalmologists because the statute was "reasonably related" to the "health and welfare of the people"); *see also* City of Cleburne v. Cleburne Living Ctr.*,* 473 U.S. 432, 442-43 (1985) (applying rational basis review to government action adversely affecting "the mentally retarded" because mental retardation is not a "quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation…Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.").

[41] Dandridge*,* 397 U.S. at 522.

basis for determining which children are to have support approximating subsistence and which are not."[42] Rather than conditioning the level of scrutiny solely on whether the class affected is an "inherently suspect" class—which the majority did[43]—Marshall would inquire into the interests at stake, too. The importation of the factor of the interests at stake into Equal Protection analysis demonstrates Marshall's understanding that unequal distributions of benefits should face heightened scrutiny if the putative discrimination deprives the disadvantaged class of vital interests.

Marshall's conclusion in *Dandridge* further elucidates his recognition that equality should be understood in terms of the interests at stake. Marshall ultimately determined that the state's proffered legitimate state interest did not justify the deprivation of "the interests of those who are disadvantaged by the classification" in this case:

> The State's position is thus that the State may deprive certain needy children of assistance to which they would otherwise be entitled in order to provide an arguable work incentive for their parents. But the State may not wield its economic whip in this fashion when the effect is to cause a deprivation to needy dependent children in order to correct an arguable fault of their parents.[44]

[42] *Id.* at 523.
[43] *Id.* at 485 n.17.
[44] *Id.* at 525 (internal citations omitted).

Here, Marshall argued that incentivizing employment did not justify depriving needy children of their basic needs. The matter of poor children living or dying should not be analyzed as a matter of business-economics. The interests at stake that the state distributed unequally among children of differently sized families led Marshall to conclude

> the 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.[45]

The level of scrutiny Marshall applies surpasses the rational basis review applied by the majority, which merely required the cap on AFDC benefits to be supported by any conceivable legitimate state interest.[46] Marshall's level of scrutiny required a closer link between the state's "asserted rationale" and the unequal treatment of children in large versus small families. Marshall demanded a stronger justification for the unequal treatment than job-search incentives. It was primarily the interests at stake—a "subsistence existence" for children of large, poor families—that led Marshall to determine that

[45] *Id.* at 529-30.
[46] *Id.* at 486.

a level of scrutiny more exacting than rational basis was appropriate in this case.

Marshall's consideration of the interests at stake for the adversely affected class was a methodological departure from traditional Equal Protection analysis, which tends to only look to whether the adversely affected class is a suspect class.[47] Marshall's subsequent opinions illustrate that Marshall's variable approach for determining the appropriate level of scrutiny rested on his belief that the constitutional right to equality is related to certain Due Process interests.

b. *San Antonio Independent School District v. Rodriguez*

The intricacies of Marshall's approach to Equal Protection analysis manifested in *San Antonio Independent School District v. Rodriguez*.[48] In *Rodriguez*, Plaintiffs challenged Texas' method of financing public education. The state allocated funds to a given school district based on the property value in the district per student.[49] The tax rate of property assessed in each district determined the amount of money the state allocated for the education of each student in the district's public schools.[50] Plaintiffs were Mexican-American parents of students attending public

[47] *See* Cleburne Living Ctr., 473 U.S. at 446 (declining to apply heightened judicial scrutiny based on the Court's "refusal to recognize the retarded as a quasi-suspect class.").
[48] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1282 (1973).
[49] *Id.* at 1285.
[50] *Id.*

schools in a district where the state-local total of funds allocated per student was $248.[51] However, the state-local total per student in the wealthiest school district in the same city was $558.[52]

Based on these funding disparities, Plaintiffs brought a class action challenging this system of funding as a violation of the Equal Protection Clause because it discriminated on the basis of wealth in the way the state provided education.[53] The District Court found that "wealth is a 'suspect' classification and that education is a 'fundamental' interest," which therefore required Texas to show that the system was "premised upon some compelling state interest."[54]

The Supreme Court reversed. The Court premised its reversal on two grounds: first, that there was "no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts,"[55] so the disadvantaged class could not be properly framed as poor or indigent people. Second, "lack of personal resources has not occasioned an absolute deprivation of the desired benefit" of education.[56] Therefore, "the disadvantaged class is not susceptible of identification in traditional terms."[57] Since the disadvantaged class could not be framed to the Court's satisfaction,

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[51] *Id.*
[52] *Id.* at 1286.
[53] *Id.* at 1287.
[54] *Id.*
[55] *Id.* at 1291.
[56] *Id.*
[57] *Id.*

it concluded that "the Texas system does not operate to the peculiar disadvantage of any suspect class."[58]

Following from its conclusion that the Texas system did not adversely affect a suspect class, the Court refused to apply strict scrutiny to the challenge system. The Court rejected the proposition that the importance of education should trigger a higher-level scrutiny in this case: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[59] Thus, the Court declined to consider the importance of students' interest in education in its analysis: "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."[60] In an argument resembling the majority opinion in *Dandridge v. Williams*, the Court analyzed the challenged law as economic legislation rather than legislation affecting vital interests of the plaintiff class. This led the Court to apply the rational basis standard instead of strict scrutiny:

> this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights… A century of Supreme Court

[58] *Id.* at 1294.
[59] *Id.* at 1297.
[60] *Id.* at 1297-98.

> adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.[61]

Yet again, the Court's perception of the challenged law as an economic regulation rendered the Court reluctant to require a compelling and precise justification from the state government. The Court merely required the Texas government to show that the "challenged state action rationally furthers a legitimate state purpose or interest."[62] Given the Court's minimal requirements on the Texas government, it is unsurprising that the Court held "that the Texas plan abundantly satisfies this standard."[63] In both *Dandridge* and *Rodriguez*, the Court showed reluctance to question state government's decisions regarding the unequal distribution of welfare benefits, even if the benefits were vital to a group of people's basic needs.

Marshall again dissented in this case, admonishing the majority's "retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance

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[61] *Id.* at 1300.
[62] *Id.* at 1308.
[63] *Id.*

to reach their full potential as citizens."[64] In Marshall's opinion, "the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record."[65] Marshall also objected to the majority's evasion of the point that discrimination in the *quality* of education might exist even though students are not absolutely deprived of education: "it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws."[66]

Regarding the level of scrutiny that the majority applied, Marshall characterized the majority's decision to apply rational basis as an "emasculation of the Equal Protection Clause."[67] Marshall also criticized the majority's analysis of Equal Protection as a "rigidified approach to equal protection analysis."[68] The central flaw of the Court's approach, according to Marshall, was that it presupposed that only two standards of Equal Protection review were available:

> The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—

[64] *Id.* at 1316.
[65] *Id.*
[66] *Id.* at 1326.
[67] *Id.* at 1330.
[68] *Id.*

> strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly 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*.[69]

In this passage, Marshall attacks the majority's assumption that strict scrutiny or rational basis are the only tests for Equal Protection analysis. The Court's Equal Protection jurisprudence actually evinces a "spectrum of standards" varying in the degree of "care," or scrutiny, with which the Court analyzes challenged laws. Marshall also announced two further criteria for determining what degree of scrutiny is appropriate: the "societal importance of the interest adversely affected" and the "invidiousness of the basis" for the classification. Marshall's persistent attention to the importance of the interests being denied to the adversely affected class underlies the difference between his Equal Protection jurisprudence and the traditional jurisprudence of the Court. His conception of different

[69] *Id.* (emphasis added).

levels of scrutiny as variations in degree rather than in category hinged on the consideration of the importance of the affected interest.

Essential to Marshall's own jurisprudence was the consideration of the *societal importance* of the interests adversely affected, not just whether the interest is a fundamental right. "I therefore cannot accept," Marshall wrote,

> the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights.[70]

For examples, Marshall listed the right to procreate, the right to vote in state elections, and the right to an appeal from a criminal conviction as interests that do not find explicit protection in the Constitution, yet "the Court has displayed a strong concern with the existence of discriminatory state treatment" regarding these interests "due to the importance of the interests at stake."[71] Government action affecting these interests has triggered higher degrees of

[70] *Id.*
[71] *Id.* at 1331 (citing Skinner, 316 U.S. 535, 541 (1942); Reynolds, 377 U.S. 533 (1964); and Griffin v. Illinois, 351 U.S. 12 (1956)).

scrutiny from the Court because these interests are "interrelated with constitutional guarantees."[72] Marshall thusly supported his jurisprudential approach—varying the degree of judicial scrutiny according to the importance of the interests at stake *and* the invidiousness of the classification—with support from the Court's prior cases, which "amply illustrated" the "effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests."[73] Thus, Marshall rooted his variable approach in *stare decisis* and argued that the majority's "rigidified" categorical approach betrayed a close reading of precedent.

In conclusion, Marshall chastised the Court's insistence on conformity to two standards of judicial review—one that generally results in upholding the challenged law and the other than generally results in invalidating the challenged law. Despite precedent, the majority in this case attempted "to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests."[74] Although the majority suggested that Marshall's "variable standard of review would give this Court the appearance of a

[72] San Antonio Indep. Sch. Dist., 93 S. Ct. 1278, 1332.
[73] *Id.* at 1333 (citing Eisenstadt, 405 U.S. 438 (1972)).
[74] *Id.* at 1336.

'superlegislature,'" Marshall championed the flexibility of his standard because it would permit a court to vary its level of scrutiny on a case-by-case basis: "an approach [that] seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document."[75]

Marshall's dissents in *Dandridge* and *Rodriguez* together provide the criteria for Marshall's variable approach for determining the appropriate level of judicial scrutiny. Marshall identified five criteria: 1) the character of the classification in question, 2) the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, 3) the asserted state interests in support of the classification[76], 4) the constitutional and societal importance of the interest adversely affected, 5) and the recognized invidiousness of the basis upon which the particular classification is drawn.[77] Although at least one scholar has characterized these criteria as elements,[78] Marshall's criteria are more accurately characterized as factors. These criteria are not "constituent part[s] of a claim that must be proved for the claim to

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[75] *Id.*
[76] *See* Dandridge, 397 U.S. at 521 (discussing criteria 1-3).
[77] *See* Rodriguez, 93 S. Ct. at 1330 (discussing criteria 4-5).
[78] *See* Gary Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. STATE L.J. 429, 436-37 (1994) ("[b]y characterizing the poor and their basic subsistence needs as akin to businesses and business regulation, the majority was cutting itself off from the responsibility of examining the nexus of the three elements.").

succeed,"[79] but rather are criteria on which the "variations in the degree of care with which the Court will scrutinize particular classifications" depend.[80] Marshall's variable approach comprises these factors.

Although Marshall emphasized the basis of his variable approach in the Supreme Court's precedents, it should be noted that his theory significantly elaborated on the Court's jurisprudential harbingers. The cases Marshall cited and discussed in support of his variable approach did not stress that the degree of the Court's scrutiny should vary according to 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."[81] Those cases did not posit a "spectrum of standards" available to the Court that transcend the dichotomy of strict scrutiny and rational basis.

The majority opinions in *Dandridge* and *Rodriguez* would come to prevail in the Equal Protection cases that immediately followed.[82] The Supreme Court applied "a relatively relaxed

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[79] *Element*, BLACK'S LAW DICTIONARY (10th ed. 2010).
[80] *Rodriguez*, 93 S. Ct. at 1330.
[81] Dandridge, 397 U.S. at 521.
[82] *See, e.g.,* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-15 (1976) (holding that "[m]andatory retirement at age 50 under the Massachusetts statute" did not violate the Equal Protection Clause because "*San Antonio School District v. Rodriguez*...reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to

standard" of rational basis analysis in later cases involving unequal distributions of interests, such as the availability of employment opportunities, that it did not deem to be fundamental.[83] Marshall, however, would continue to resist the Court's categorical approach, "object[ing] to its perpetuation" on the ground that "[t]he model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken or should undertake in equal protection cases." [84] Although the Court would continue its adherence to the categorical approach to judicial scrutiny, Marshall continued to push the Court to focus "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 state interests asserted in support of the classification"[85] in a variety of constitutional contexts.

II. MARSHALL'S APPROACH IN DUE PROCESS AND EIGHTH AMENDMENT CONTEXTS

Marshall's variable approach was not limited to Equal Protection cases. Marshall's recognition of the connection between equality and due process interests compelled him to espouse an

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the peculiar disadvantage of a suspect class." The Court also cited *Dandridge v. Williams* for the proposition that "[p]erfection in making the necessary classifications is neither possible nor necessary.").

[83] Massachusetts Bd. of Retirement, 427 U.S. 307, 313 (citing Dandridge, 397 U.S. at 485).

[84] *Id*. at 317 (Marshall, J., dissenting).

[85] *Id*. at 318.

analytical formula that considered the importance of the constitutional interests at state, in addition to the traditional Equal Protection Clause criterion of the classification in question. Indeed, Marshall did not restrict the application of his variable approach for determining the appropriate degree of scrutiny for alleged constitutional violations to Equal Protection claims. Rather, Marshall's vision of the intersections between the right to equal protection of the law, and the due process rights to life and liberty, manifested in his analyses of Due Process and Eighth Amendment issues.

a. *Richardson v. Belcher*

Richardson is a Due Process case that parallels *Dandridge v. Williams* in three ways: the cases' facts, the Court's analyses, and Marshall's separate analyses.[86] In *Richardson*, the federal government reduced Plaintiff's monthly Social Security Disability Insurance (SSDI) payments by $104.40 upon finding that Plaintiff also received worker's compensation payments from the state government of West Virginia.[87] The U.S. government reduced Plaintiff's SSDI payments pursuant to the "offset provision" of the Social Security Act, which required such a reduction if an SSDI recipient also received worker's compensation.[88] Plaintiff argued

[86] *Compare* Richardson v. Belcher, 404 U.S. 78 (1971), *with* Dandridge v. Williams, 397 U.S. 471 (1970).
[87] Richardson, 404 U.S. at 79.
[88] *Id.*

that "the classification embodied in [the challenged offset provision] is arbitrary because it discriminates between those disabled employees who receive workmen's compensation and those who receive compensation from private insurance or from tort claim awards."[89]

Although Plaintiff's claim was a Due Process challenge, the Court looked to its Equal Protection analysis in *Dandridge v. Williams* to establish its analytical framework for evaluating Plaintiff's claim. "A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is 'rationally based and free from invidious discrimination.'"[90] The Court argued that the rational basis standard it used to analyze the Equal Protection claim in *Dandridge* was applicable to the Due Process claim in *Richardson*: "[w]hile the present case, involving as it does a federal statute, does not directly implicate the Fourteenth Amendment's Equal Protection Clause, a classification that meets the test articulated in *Dandridge* is perforce consistent with the due process requirement of the Fifth Amendment."[91] The majority offered no further justification for applying its permissive Equal Protection standard from *Dandridge*.

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[89] *Id.* at 81.
[90] *Id.* (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).
[91] *Id.* (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

The Court proceeded to examine the legislative history of the Social Security Act and posited a rational basis for the offset provision. "To find a rational basis for the classification created by [the offset provision]," the Court remarked, "we need go no further than the reasoning of Congress as reflected in the legislative history."[92] A House Report revealed data that, prior to the enactment of the offset provision, "a typical worker injured in the course of his employment and eligible for both state and federal benefits received compensation for his disability in excess of his take-home pay prior to the disability."[93] "It was strongly urged that this situation reduced the incentive of the worker to return to the job, and impeded the rehabilitative efforts of the state programs."[94] On the basis of this finding, the Court concluded that the offset provision was rationally related to a legitimate goal:

> The original purpose of state workmen's compensation laws was to satisfy a need inadequately met by private insurance or tort claim awards. Congress could rationally conclude that this need should continue to be met primarily by the States, and that a federal program that began to duplicate the efforts of the States might lead to the gradual weakening or atrophy of the state programs. We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress

[92] *Id.* at 82.
[93] *Id.* at 82-83.
[94] *Id.* at 83.

> might have been better served by applying the same offset to recipients of private insurance, or to judge for ourselves whether the apprehensions of Congress were justified by the facts.[95]

According to the majority's analysis, the legislative history of the offset provision indicated that Congress enacted it to incentivize "the worker to return to the job" and prevent the obstruction of "the rehabilitative efforts of the state programs." The Court did not evaluate the factual bases for these goals, or the relation of the offset provision to the furtherance of these goals, because the analytical standard at play was the one from *Dandridge*: if rationally based and free from invidious discrimination, the Court must affirm the challenged law. "If the goals sought are legitimate," the Court concluded, "and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment."[96] Accordingly, the majority upheld the offset provision.

In his dissent, Marshall asserted the contrary position: the offset provision "creates an unlawful discrimination under the Due Process Clause of the Fifth Amendment."[97] "Thus, the Court today," Marshall wrote, "holds that Congress can take social security

[95] *Id.* at 83-84.
[96] *Id.* at 84.
[97] *Id.* at 88 (Marshall, J., dissenting).

benefits from a disabled worker as long as it does not behave in an 'arbitrary' way; classifications in the federal social security law are consistent with the Fifth Amendment if they are 'rationally based and free from invidious discrimination.'"[98] Marshall rejected the majority's analysis because "the 'rational basis' test used by this Court in reviewing business regulation has no place when the Court reviews legislation providing fundamental services or distributing government funds to provide for basic human needs."[99]

To Marshall, the majority's holding that the offset provision satisfied the *Dandridge* rational basis standard was incorrect. To Marshall, the offset provision was under-inclusive:

> Under the challenged offset provision, federal social security disability benefits are reduced only for those persons whose disability entitles them to workmen's compensation. Other persons who receive other kinds of disability compensation—for example, private insurance benefits or tort damages—are allowed the full amount of federal social security benefits.[100]

This unequal treatment of SSDI recipients that qualify for worker's compensation and SSDI recipients compensated by private insurance lacked an adequate justification because "[t]here simply is no reasonable basis for singling out recipients of workmen's

[98] *Id.* at 89-90.
[99] *Id.* at 90.
[100] *Id.* at 89.

compensation for a reduction of federal benefits, while those who receive other kinds of disability compensation are not similarly treated."[101] Recipients of SSDI that did not receive state worker's compensation benefits could receive equal, if not greater, net payments due to contributions from private sources, so a "concern about excessive combined benefits and 'rehabilitation' does not explain that distinction."[102]

However, the incorrect outcome of this case under the rational basis test was only part of the story, according to Marshall, because rational basis was not the correct level of scrutiny to apply. The challenged classification in question should not be determinative:

> [i]n deciding whether a given classification is consistent with the requirements of the Fifth or Fourteenth Amendment, we should look to '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 (or federal) interests in support of the classification.'[103]

Marshall would have applied the analytical standard he articulated in *Dandridge* to *Richardson*, just as the majority imported its own

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[101] *Id.* at 91.
[102] *Id.* at 92.
[103] *Id.* at 90 (quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting)).

analytical standard from *Dandridge.* The majority, however, considered only the fact that the offset provision was "in the area of social welfare" in its determination that rational basis review should govern its analysis.[104] However, the nature of the claim in *Richardson*—brought pursuant to the Due Process Clause of the Fifth Amendment—begs the question why the majority did not consider the rights and interests at stake in this case, which is characteristic of Due Process analysis.[105]

The nature of the claim *Richardson*, as a Due Process claim, supported the application Marshall's variable approach, which considered the nature of the interests that the offset provision denied to Plaintiff. Under Marshall's approach, "it is necessary to consider more than the character of the classification and the governmental interests in support of the classification. Judges should not ignore

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[104] *Id.* at 81 (majority opinion).

[105] *See, e.g.,* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) (holding that Due Process requires that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that a governmental order for an NAACP chapter to disclose its members deprived them of Due Process because "a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have"); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) ("we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society"); Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) ("unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case"); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitute, disabled, or elderly individuals."[106] Marshall evaluated the importance of these payments to the class affected in his determination that the appropriate level of judicial scrutiny should surpass mere rationality:

> Thus, in assessing the lawfulness of the special disadvantages suffered here by workmen's compensation beneficiaries, the Court should consider the individual interests at stake. Federal disability payments, even when supplemented by other forms of disability compensation, provide families of disabled persons with the basic means for getting by. I would require far more than a mere 'rational basis' to justify a discrimination that deprives disabled persons of such support in their time of need.[107]

This passage further illumines Marshall's basis for raising the level of scrutiny beyond the majority's standard from *Dandrige*, which would affirm any law that governs social welfare as long as "any state of facts reasonably may be conceived to justify" the law.[108] Marshall, conversely, stressed the necessity of all forms of disability compensation to workers' and their families' "getting by." The necessity of these benefits to the survival of the class adversely

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[106] Richardson, 404 U.S. at 90 (Marshall, J., dissenting).
[107] *Id.* at 90-91.
[108] Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

affected by the offset provision renders spurious the majority's characterization of the challenged law as one governing social welfare. "The plain fact is that Congress passed this offset provision because it thought disabled persons should not receive excessive combined disability payments," Marshall proclaimed.[109] "The burden of reduced federal benefits—so devastating to the families of the once-working poor—cannot be imposed arbitrarily under the Fifth Amendment. In my view, that has happened here."[110]

Marshall's dissent in *Richardson* echoes his dissent in *Dandridge* in multiple ways. In both dissents, Marshall emphasized the jurisprudential need to consider the importance of the interests affected in addition to the statutory classification in determining the appropriate level of judicial scrutiny. Marshall urged courts to look beyond the fact of termination of governmental benefits; courts should also evaluate the importance of those benefits to the individuals in the case before analyzing the termination under a rational basis standard. Both *Dandridge* and *Richardson* involved state laws that diminished the amount of benefits that low-income families would receive, which compelled Marshall to object to the majority's categorization of these laws as social welfare laws requiring mere rationality for justification.

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[109] Richardson, 404 U.S. at 95 (Marshall, J., dissenting).
[110] *Id.* at 96.

One important point of distinction between these cases, however, is that *Dandridge* was an Equal Protection case and *Richardson* a Due Process case. The majority applied what originated as an Equal Protection analytical test from *Dandridge* and applied it to *Richardson*, resulting in its failure to consider the importance of the welfare benefits to the class discriminated against: SSDI recipients qualifying for worker's compensation. Marshall's approach, however, would consider the importance of the interests affected and the "class discriminated against" in both Due Process and Equal Protection cases. In *Richardson*, Marshall considered how the SSDI benefits were denied to a *class* of people, which suggests that Equal Protection principles entered his analysis.

The variable approach Marshall espoused inquiries into the importance of the interests at stake in Equal Protection cases and the invidiousness of unequal treatment in Due Process cases, which presupposes a connection between equality (in considering the invidiousness of the classification) and life (in considering the vital importance of the interests at stake, which here were SSDI payments). Marshall's conception of the applicability of each respective inquiry to each constitutional context stemmed from his vision of the intersection of life and equality. If a class of persons is denied vital interests, courts should not analyze the state action as social welfare regulation. When state action infringed on interests

protected by areas of constitutional intersection, Marshall believed that courts should accordingly heighten the level of judicial scrutiny, which is demonstrable from his dissent in a later criminal case.

b. *United States v. Salerno*

Another case that does not implicate the Equal Protection Clause, but still illustrates Thurgood Marshall's conception of the intersection of constitutional rights, is *Salerno*.[111] This case involved the "Excessive Bail" Clause of the Eighth Amendment and substantive due process.[112]

The defendants were charged with various Racketeer Influenced and Corrupt Organizations Act (RICO) violations.[113] At the defendants' arraignment, the District Court ordered the detainment of both defendants pursuant to the Bail Reform Act[114] because the defendants' criminal activity would not cease "on even the most stringent of bail conditions."[115] On appeal, the defendants brought a facial challenge to the statute and the Second Circuit found the statute unconstitutionally permitted "authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process."[116]

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[111] United States v. Salerno, 481 U.S. 739 (1987).
[112] *Id*. at 741.
[113] *Id.* at 743.
[114] *See* 18 U.S.C. § 3142 (1982), *invalidated by* United States v. Karper, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).
[115] *Salerno*, 481 U.S. at 744 (quoting United States v. Salerno, 631 F. Supp. 1364, 1375 (S.D.N.Y. 1986), *vacated*, 794 F.2d 64 (2d Cir. 1986), *rev'd*, 481 U.S. 739 (1987), *aff'd*, 829 F.2d 345 (2d Cir. 1987).
[116] *Id*.

As respondents before the Supreme Court, the defendants argued that the Bail Reform Act violated both the Due Process Clause of the Fifth Amendment and the Eighth Amendment's prohibition of excessive bail.[117] The majority "treat[ed] these contentions in turn," analyzing each constitutional claim separately.[118]

On the Due Process claim, the Court framed its analysis in terms of a distinction between punitive and regulatory legislation. "Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on 'whether an alternative purpose to which [the restriction] *may rationally be connected* is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'"[119] "We have repeatedly held," the majority continued, "that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[120] "The government's interest in preventing crime by arrestees is both legitimate and compelling," the majority concluded, for "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest."[121]

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[117] *Id*. at 746.
[118] *Id*.
[119] *Id.* at 747 (emphasis added) (quoting Schall v. Martin, 467 U.S. 253, 269 (1987)).
[120] *Id.* at 748.
[121] *Id.* at 749-50.

Accordingly, the majority rejected defendants' substantive Due Process claim because "[t]here is no doubt that preventing danger to the community is a legitimate regulatory goal,"[122] and "that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[123] The majority did not mention the right to the presumption of innocence at any point in its Due Process analysis, and although it ultimately found the government's justification for the Bail Reform Act compelling, the majority's holding that the Constitution required only that the governmental justification be merely legitimate indicates that the majority's standard of review resembled the "rational basis" test from *Dandridge* and *Richardson*.[124]

On the Excessive Bail claim, the Court ruled against the defendants because this "Clause, of course, says nothing about whether bail shall be available at all."[125] The Court rejected "the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[126] "We believe that when Congress has mandated detention on the basis of a compelling

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[122] *Id*. at 747.
[123] *Id*. at 748.
[124] *Cf.* Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 484 (1970).
[125] Salerno, 481 U.S. at 752.
[126] *Id*. at 753.

interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail."[127] The majority accordingly upheld the legality of the Bail Reform Act's "future dangerousness" criterion under both the Due Process Clause and the Excessive Bail Clause.[128]

In another vigorous dissent, Marshall eschewed the majority's division of the substantive guarantees implicit in the Due Process Clause and the protections afforded by the Excessive Bail Clause as a "false dichotomy."[129] The majority premised its separate analyses of the Bail Reform Act, according to Marshall, upon a "sterile formalism, which divides a unitary argument into two independent parts and then professes to demonstrate that the parts are individually inadequate."[130]

As in *Dandridge* and *Richardson,* Marshall dissented in *Salerno* largely because the majority failed to recognize that the challenged law adversely affected an interest to which multiple separate constitutional provisions bestow protection: the presumption of innocence. "[T]he very pith and purpose of this statute," Marshall argued, "is an abhorrent limitation of the presumption of innocence. The majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the

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[127] *Id*. at 754-755.
[128] *Id*.
[129] *Id*. at 759 (Marshall, J., dissenting).
[130] *Id.* at 758-759.

role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence."[131] In *Dandridge* and *Richardson*, both the Due Process Clause and Equal Protection Clause were at play because state governments reduced benefits to specific classes; in *Salerno*, the Bail Reform Act adversely affected a right that both the Due Process Clause and Bail Clause protected:

> Concluding that pretrial detention is not an excessive solution to the problem of preventing danger to the community, the majority thus finds that no substantive element of the guarantee of due process invalidates the statute…The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction….[Because] the Due Process Clause protects other substantive rights which are infringed by this legislation, the majority's argument is merely an exercise in obfuscation.[132]

Both the Due Process Clause and the Excessive Bail Clause, Marshall argued, protect "the invaluable guarantee afforded by the presumption of innocence."[133] Thus, the majority's separate analyses under each respective constitutional claim amounted to a facetious pedantry that concealed the constitutional right at stake in *Salerno:* the presumption of innocence. "The majority does not

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[131] *Id.* at 762-63.
[132] *Id*. at 759-60.
[133] *Id.* at 763.

ask," Marshall noted, "as a result of its disingenuous division of the analysis, if there are any substantive limits contained in both the Eighth Amendment and the Due Process Clause which render this system of preventative detention unconstitutional."[134] In other words, the majority's refusal to identify substantive protections contained in both constitutional provisions enabled the majority to divide the case into two separate rights, impose a minimal standard of scrutiny, and require a showing of merely "a legitimate regulatory goal"[135] from the government.

The laxity of this standard allowed the majority to accept a proffered governmental goal to which the "future dangerousness" criterion for bail-denial lacked any relation. To Marshall, the majority accepted a rationale for the Bail Reform Act that did not adequately explain the criteria for pretrial detention that the statute prescribed:

> This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience

[134] *Id.* at 762.
[135] *Id.* at 759.

> teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution… The detention purportedly authorized by this statute bears no relation to the Government's power to try charges supported by a finding of probable cause, and thus the interests it serves are outside the scope of interests which may be considered in weighing the excessiveness of bail under the Eighth Amendment.[136]

In other words, the majority applied a standard of scrutiny so permissive that it permitted a justification for the statute that lacked a logical relation to the "legitimate regulatory goal" it purported to further.[137] The majority's identification a compelling interest behind the Bail Reform Act might suggest a level scrutiny higher than rational basis, but the majority failed to inquire into the *strength of the relation* between the "detention purportedly authorized by this statute" for future crimes, and "the Government's power to try charges" enumerated in the indictment. Even considered as a mere "regulatory" restriction on liberty, the Bail Reform Act authorized the detention of defendants not yet convicted and thus implicated the presumption of innocence. The majority's refusal to acknowledge this right, protected by both the Bail Clause and the Due Process Clause, enabled it to proceed under a rational basis analysis.

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[136] *Id.* at 755-765.
[137] *Id.* at 747.

Marshall's dissent in *Salerno* exemplifies the crux of Marshall's conception of the intersection of certain constitutional rights: the protections of the Due Process Clause intersect with protections afforded by other parts of the Constitution, including the Bail Clause. Since the presumption of innocence is a fundamental right that both the Due Process Clause and Bail Clause embody, the Court should not have separated defendants' claim into a formalistic "false dichotomy," but rather should have evaluated the Bail Reform Act's authorization of pretrial detention—based on unproven guilt of offenses irrelevant to the indictment—under a higher degree of judicial scrutiny.

Although Marshall did not expressly articulate in *Salerno* his variable approach from *Dandridge*, his argument in *Salerno* follows the same structure and pattern: when government action adversely affects multiple constitutional interests and rights, the Court should correspondingly heighten its level of scrutiny instead of separating the constitutional challenge into different challenges analyzed under rational basis. Marshall's espousal of his variable approach in both Due Process and Equal Protection contexts suggest that the criteria of his approach are rooted in an intersectional theory of constitutional rights:[138] when state action denies a constitutionally

[138] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972). In *Mosley*, in which Marshall wrote for the majority, Plaintiff challenged an ordinance that prohibited picketing 150 feet from school buildings, but exempted labor dispute pickets from its general prohibition. *Id*. at 92-93. Because the ordinance treated

protected interest to a specific class, the action implicates both Due Process Clause and Equal Protection Clause. Analogously, when state action denies someone the right to be presumed innocent until proven guilty beyond a reasonable doubt, the action implicates both the Due Process Clause and Bail Clause. Accordingly, the exactitude of the level of judicial scrutiny should correlate with the importance of the interest affected and the invidiousness of the classification. That is the soul of Marshall's variable approach.

A pattern underlying Marshall's opinions in these cases is a recognition that the challenged laws adversely affected the interests of vulnerable groups. In *Dandridge* and *Richardson*, the challenged laws reduced welfare benefits for poor families and children.[139] In *Rodriguez*, Texas' system for public school funding resulted in lower per-student funding for Mexican-American students.[140] In

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some picketing differently from others, Marshall analyzed the ordinance "in terms of the Equal Protection Clause." *Id*. at 94-95. However, Marshall asserted that "the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing." *Id*. at 95. Marshall cited multiple secondary sources discussing "the First Amendment-Equal Protection intersection." *Id*. at n.3. Marshall held that the ordinance violated the Equal Protection Clause because "[f]ar from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression." *Id*. at 102. Marshall considered First Amendment principles in his Equal Protection Clause analysis because of the intersection between the two separate constitutional provisions: "[f]reedom of expression, and *its intersection with the guarantee of equal protection*, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis." *Id*. at 101 (emphasis added).

[139] *See* Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 96 (1971) (Marshall, J., dissenting).

[140] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 12-13 (1973).

Salerno, the Bail Reform Act authorized the incarceration of criminal defendants for future crimes, yet the majority found that an accused person's "strong interest in liberty" may "be subordinated to the greater needs of society."[141] Marshall, however, appreciated that "at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves."[142] Marshall's variable approach emanated from an empathic compassion for disadvantaged and vulnerable classes when governments threatened their life, liberty, and equal protection of the law. Marshall's opinions in *Dandridge*, *Rodriguez*, *Richardson*, and *Salerno* illustrate his position that rational basis review is not necessarily the appropriate level of scrutiny simply because the class affected is not "suspect" and the interests at stake are not "fundamental rights." Marshall's grasp of the vulnerability of the class in question and the importance of the interests at stake pervaded throughout his constitutional jurisprudence, which culminated in two Equal Protection Clause opinions that yielded a tremendous influence on cases involving gay rights.

[141] *Salerno*, 481 U.S. 750-51.
[142] *Id.* at 767 (Marshall, J., dissenting).

III. "SECOND ORDER" RATIONAL BASIS REVIEW AND MARSHALL'S ROLE IN ITS DEVELOPMENT

Marshall's instruction to look to the intersection of the rights adversely affected in various constitutional contexts led him to believe the Supreme Court did not apply the correct level of judicial scrutiny in a number of cases. Furthermore, Marshall criticized the Court's facetious separation of constitutional analyses when multiple provisions were implicated; the intersection of some constitutional protections (e.g. Equal Protection and Due Process; Due Process and the Bail Clause) may warrant a single analysis with heightened scrutiny. Although the Court would continue its trend of analyzing state actions under rational basis review even when important interests were at stake, Marshall's opinion in *Zablocki v. Redhail* applied his variable approach that exemplified its differences from the prevalent categorical approach to Equal Protection. Moreover, when the majority of the Court applied a higher standard of scrutiny under the guise of rational basis analysis, in *Cleburne v. Cleburne Living Center*, Marshall called out the majority's disingenuous statement of its standard of review. Marshall's opinions in these cases would provide subsequent jurists with the concept of "second order" rational basis, which allowed the Court to consider the other constitutional interests at stake in applying heightened scrutiny behind the façade of rational basis review.

a. *Zablocki v. Redhail*

In the discussed cases, Marshall diverged from the Court's application of "rational basis" analysis when the challenged laws impinged on important interests. Marshall's opinions in those cases were dissents. In *Zablocki v. Redhail*, however, Marshall wrote for the majority as he applied his variable approach for determining the appropriate degree of judicial scrutiny.[143] By doing so, Marshall created precedent for the implementation of his approach in later gay rights cases.[144]

At issue in *Zablocki* was a Wisconsin statute that denied the right to marry to any Wisconsin resident that had outstanding child support payments.[145] Redhail, the named plaintiff in this case, was denied a marriage license pursuant to this statute, and brought a § 1983 class action challenging the statute's constitutionality under both the Equal Protection Clause and Due Process Clause.[146] The state government denied Redhail a marriage license because "he had not satisfied his support obligations to his illegitimate child."[147] In the court below, "the three-judge panel analyzed the challenged statute under the Equal Protection Clause and concluded that 'strict

[143] *See* Zablocki v. Redhail, 434 U.S. 374 (1978).
[144] *See, e.g.,* Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[145] *See* Zablocki, 434 U.S. at 375.
[146] *Id.* at 376.
[147] *Id.* at 378.

scrutiny' was required because the classification created by the statute infringed upon a fundamental right, the right to marry."[148]

In his analysis for the majority, Marshall also considered the importance of the right to marry in his determination of the appropriate level of scrutiny under the Equal Protection Clause. Marshall reiterated his variable approach for determining the appropriate level of scrutiny: "under the Equal Protection Clause, 'we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.'"[149] Instead of first looking to whether the classification at issue targeted a "suspect class," Marshall focused on the interests affected: "our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical

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[148] *Id.* at 381.

[149] *Id.* at 383 (quoting Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 253 (1974)). In *Maricopa Cty.,* Marshall wrote for the majority in reviewing an Arizona statute that required at least one year of residence in the county "as a condition to receiving nonemergency hospitalization or medical care at the county's expense." *Id.* at 251. Plaintiff challenged this statute as violative of the Equal Protection Clause. *Id.* For the majority, Marshall wrote that "determining whether the challenged durational residence provision violates the Equal Protection Clause, we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." *Id.* at 253. Marshall found that the challenged durational requirement infringed on the "right of interstate travel [which] has repeatedly been recognized as a basic constitutional freedom." *Id.* at 254. Accordingly, Marshall applied strict scrutiny to the statute although no suspect class was affected, and concluded that "Arizona's durational residence requirement for free medical care must be justified by a compelling state interest and that, such interests being lacking, the requirement is unconstitutional." *Id.*

examination' of the state interests advanced in support of the classification is required."[150] The nature of this "critical examination," by its very phrasing, suggests that it surpassed the level of analytical exactitude required by "rational basis" review.

Marshall proceeded with a discussion of the "leading decision" on the right to marry, *Loving v. Virginia.*[151] In *Loving,* an interracial couple "had been convicted of violating Virginia's miscegenation laws," and challenged those laws "on both equal protection and due process grounds."[152] The U.S. Supreme Court's "opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause."[153] However, "the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry."[154] Marshall thus cited *Loving* as a precedential basis for considering both Equal Protection and Due Process precepts in his Equal Protection analysis.

Turning to the Wisconsin statute at issue, Marshall proclaimed that the "statutory classification at issue here…clearly does interfere directly and substantially with the right to marry."[155]

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[150] Zablocki, 434 U.S. at 383.
[151] *Id.* (discussing Loving v. Virginia, 388 U.S. 1 (1967)).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 387.

Marshall imposed a unique level of scrutiny on the statute: "*it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests*."[156] This requirement—close tailoring to effectuate sufficiently important state interests—diverges from traditional rational basis analysis.[157] Since Marshall's declaration of this unique standard of scrutiny directly followed Marshall's discussion of the importance of the right to marry, it is reasonable to infer that the basis for the formulation of this standard is the importance of the "individual interests affected," which Marshall identified as a criterion at the outset of his opinion.[158] However, this standard does not rise to the demanding level of strict scrutiny, which customarily required that the challenged classification is "shown to be *necessary* to the accomplishment of some permissible state objective."[159]

Applying this standard to the Wisconsin statute, Marshall began with the two interests proffered by the State in support of the statute: "the permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody

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[156] *Id*. at 388 (emphasis added).
[157] *Cf.* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (upholding a statutory distinction between optometrists and opthamologists because the statute was "reasonably related" to the "health and welfare of the people.").
[158] *Zablocki*, 434 U.S. at 383 (quoting Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 253 (1974)).
[159] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (emphasis added) (internal citations omitted).

children is protected."[160] Marshall found insufficient evidence to justify either of these proffered interests:

> The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court, and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage…With regard to safeguarding the welfare of the out-of-custody children, [the State's argument] does not make clear the connection between the State's interest and the statute's requirements… This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.[161]

Marshall rested his opinion largely on the importance of the right to marry. He measured the strength of both proffered State interests against "the withholding of court permission to marry" and the "broad infringement on the right to marry" rather than the nature of the classification: otherwise eligible persons with outstanding child support payments. Therefore, the fundamentality of the right to marry shaped the exacting nature of Marshall's analysis in *Zablocki*, although the constitutional provision under which he decided it was the Equal Protection Clause, not the Due Process Clause.

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[160] *Zablocki,* 434 U.S. at 388.
[161] *Id.* at 388-389.

Additionally, Marshall evaluated the overinclusiveness and underinclusiveness of the challenged Wisconsin statute. Marshall rejected the State's argument that the statute furthered "the ability of marriage applicants to meet support obligations to prior children by preventing the applicants from incurring new support obligations."[162] The statute, according to Marshall, failed to "closely effectuate" the prevention of expanding child support obligations. The statute was

> grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage. The statutory classification is substantially overinclusive as well: Given the possibility that the new spouse will actually better the applicant's financial situation, by contributing income from a job or otherwise, the statute in many cases may prevent affected individuals from improving their ability to satisfy their prior support obligations.[163]

This underinclusive-overinclusive analysis indicates that Marshall's level of scrutiny far surpasses the rational basis standard, according to which "the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."[164] Indeed, the standard of scrutiny

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[162] *Id.* at 390.
[163] *Id.*
[164] Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

Marshall applied in *Zablocki* more closely resembles intermediate scrutiny: the standard typically applied to gender-based classifications.[165] Thus, Marshall's opinion in *Zablocki* reflects the variability of his approach: even when the classification in question does not affect a suspect class, the importance of the "individual interests affected" may justify heightening the level of scrutiny beyond "mere rationality" review.

Zablocki v. Redhail demonstrates Marshall's application of his variable approach to a marriage restriction that did not target a suspect class. Other jurists, such as Justice Rehnquist, would have applied rational basis review to the Wisconsin marriage restriction and upheld the statute.[166] However, Marshall's consideration of the fundamentality of the right to marry elevated his level of scrutiny to a unique gradation that defies the traditional categories. Marshall's consideration of the importance of the interest in marriage, in an Equal Protection case, would ultimately form the most unshakeable precedent for the Court in overruling prohibitions on same-sex

[165] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); and United States v. Virginia, 518 U.S. 515, 533 (1996) ("[t]he State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives…And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.").

[166] *See* Zablocki, 434 U.S. at 407 (Rehnquist, J., dissenting) ("I would view this legislative judgment in the light of the traditional presumption of validity. I think that under the Equal Protection Clause the statute need pass only the 'rational basis test.'").

marriage.[167] Moreover, Marshall would use his variable approach to unmask "second order" rational basis review, which masquerades as rational basis review, but actually demands more than mere rationality. "Second order" rational basis analysis, too, would yield precedential influence on the Court's subsequent delegitimization of infringements on gay rights.

b. *City of Cleburne v. Cleburne Living Center*

Cleburne is a case in which the majority seems to have covertly applied Marshall's variable approach.[168] In *Cleburne*, a municipal zoning agency denied a special use permit to a proposed group home for people with mental disabilities.[169] After holding a public hearing, the City Council of Cleburne voted to deny a special use permit to Cleburne Living Center ("CLC") for the construction of a home for the mentally disabled.[170] The Council's decision was based on an ordinance providing that a permit "was required for the construction of "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions."[171] CLC challenged this decision, alleging "that the zoning ordinance was invalid on its face and as applied because it

[167] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).
[168] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
[169] *Id.* at 435.
[170] *Id.* at 436.
[171] *Id.*

discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents."[172]

The district court affirmed the constitutionality of both the ordinance and its application to CLC, "[c]oncluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims."[173] The Fifth Circuit reversed, however, "determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance under intermediate-level scrutiny."[174]

Writing for the majority, Justice White began his analysis with a familiar axiom: "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude…and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[175] The Court treated the ordinance in this case as one of "social or economic legislation," which—as the Court established in *Dandridge v. Williams* and *Richardson v. Belcher*[176]—requires only

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[172] *Id.*
[173] *Id.* at 437.
[174] *Id.* at 437-38.
[175] *Id.*
[176] *See* Dandridge v. Williams, 397 U.S. 471, 484 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect"); Richardson v. Belcher, 404 U.S. 78, 81 (1971) ("A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the

rational basis review upon appeal. According to this approach, a state law's qualification as "social or economic legislation" is a sufficient condition to require mere rationality as a justification for the law.

In *Cleburne,* however, the Court identified two possible conditions that justify raising the level of scrutiny: 1) ""when a statute classifies by race, alienage, or national origin" and "when state laws impinge on personal rights protected by the Constitution."[177] The Court then identified one additional condition that permits heightening the level of scrutiny beyond mere rationality: "classifications based on gender also call for a heightened standard of review" because gender "generally provides no sensible ground for differential treatment."[178] "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability...is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[179]

The Supreme Court held that "the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation."[180] "Heightened scrutiny

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Fourteenth Amendment if it is rationally based and free from invidious discrimination.").
[177] City of Cleburne, 473 U.S. at 440.
[178] *Id.*
[179] *Id.* at 440-41 (quoting Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).
[180] *Id.* at 442.

inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation."[181] The central premise behind the Court's conclusion was that although certain classifications of the "mentally retarded" might be invidious, the appropriate standard of Equal Protection scrutiny should not vary according to the facts of the specific case, but rather should generally apply to *all* classifications of mental retardation:

> Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid *as a general matter, not merely to the specifics of the case before us*.[182]

The Court was reluctant to apply a level of scrutiny higher than rational basis because some statutory classifications of mental disability—for example, § 504 of the Rehabilitation Act of 1973[183]—were actually enacted to benefit persons with

[181] *Id.* at 443.
[182] *Id.* at 446 (emphasis added).
[183] *See, e.g.,* 29 U.S.C. § 701.

disabilities.[184] "That a civilized and decent society," Justice White asserted, "expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable."[185] The Court's insistence on applying the same standard of scrutiny for *all* classifications of a certain group rather than adopting a case-specific, variable approach led the Court to conclude that rational basis was the appropriate level of scrutiny for classifications of those with mental disabilities: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."[186]

Applying this standard to this case, however, the Court did not find that the city council's denial of a special permit to CLC was "rationally related to a legitimate governmental purpose," but rather was based on "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, [which] are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[187] One basis for the city's denial of the permit to CLC was the "negative attitude of the majority of property owners located within

[184] City of Cleburne, 473 U.S. at 443.
[185] *Id.* at 444.
[186] *Id.* at 446.
[187] *Id.* at 448.

200 feet of the" proposed facility towards the mentally disabled.[188] However, the Court noted that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[189] Private biases of the council's constituency, in other words, do not constitute a legitimate governmental purpose.

Additionally, the Court found explanatory gaps in the city's justification of the permit-denial to CLC. The city argued "that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets."[190] This attempted explanation "fail[ed] to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit."[191] Accordingly, the Court concluded that the city of Cleburne's "requiring the permit in this case…rest[ed] on an irrational prejudice against the mentally retarded" rather than a legitimate governmental purpose, and thereby violated the Equal Protection Clause.[192]

The majority's analysis purported to scrutinize Cleburne's special-use ordinance under the rational basis test, but it tends to resemble Marshall's analysis in *Zablocki v. Redhail* more than typical rational basis analysis, which does "not require that a State

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[188] *Id.*
[189] *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).
[190] *Id.* at 450.
[191] *Id.*
[192] *Id.*

must choose between attacking every aspect of a problem or not attacking the problem at all."[193] Rational basis review, exemplified by *Williamson v. Lee Optical*,[194] tends "to embody the notion that most legislation is entitled to a strong presumption of constitutionality and that, all things considered, the judicial invalidation of social and economic legislation should be an exceptional event."[195] In *Cleburne*, however, the majority's analysis of the city's argument that the ordinance was aimed at "avoiding concentration of population and at lessening congestion of the streets" recalls Marshall's underinclusive-overinclusive analysis from *Zablocki*, which evaluated whether the challenged law was "closely tailored to effectuate only" the interests proffered by the government.[196] The incisive nature of the majority's analysis in *Cleburne* begs the question whether the standard of judicial scrutiny it applied was actually rational basis analysis, which does not set aside a statutory discrimination "aside if any state of facts reasonably may be conceived to justify it."[197]

Justice Marshall, concurring in the judgment in part and dissenting in part, questioned the authenticity of the majority's statement that it analyzed the ordinance under rational basis

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[193] Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).
[194] Williamson v. Lee Optical, 348 U. S. 483 (1955).
[195] Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 Ky. L.J. 591, 603 (2000).
[196] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).
[197] Dandridge, 397 U.S. at 484.

analysis.[198] "The Court holds the ordinance invalid," Marshall wrote, "on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place."[199] Despite the majority's pretenses, however, "Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."[200] Although the majority conducted its analysis as if it implemented a generalized, fact-independent inquiry, "it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation."[201]

In other words, according to Marshall, the majority said it applied rational basis to Cleburne's zoning ordinance, but the exactitude of the majority's analysis suggests that it applied heightened judicial scrutiny. "[T]he Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing

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[198] *Id.* at 455 (Marshall, J., concurring). *See also* Justice Stevens' concurrence, which echoes some of Marshall's arguments: "our cases have not delineated three-or even one or two-such well-defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process." *Id.* at 451 (Stevens, J., concurring) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting)).
[199] Dandridge, 397 U.S. at 456.
[200] *Id.*
[201] *Id.* at 456.

inquiry associated with heightened scrutiny."[202] The dissonance between what the majority said it was doing with the ordinance, and what the majority actually did with it, manifested in the majority's dissatisfaction with Cleburne's proffered justifications:

> To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*…The Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out [the mentally disabled] to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the rational-basis test, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[203]

Marshall identified the asymmetry between traditional rational basis analysis, which typically permits statutory classifications if any "state of facts reasonably may be conceived to justify"[204] them, and the majority's analysis in *Cleburne*, which consists of the "sort of

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[202] *Id.* at 458.
[203] *Id.* (quoting Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)).
[204] Dandridge, 397 U.S. at 484.

probing inquiry associated with heightened scrutiny."[205] Consequently, Marshall labelled the Court's analysis "second order rational-basis" analysis because it clearly surpasses the permissive standards utilized in *Dandridge v. Williams* and *Williamson v. Lee Optical*.

Marshall argued that the majority's categorization of the standard it employed was disingenuous and would create confusion in the lower federal courts. The majority's "suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review-a small and regrettable step back toward the days of *Lochner v. New York*."[206] The majority's insincerity amounted to a refusal to express the true standard of judicial scrutiny it had applied to Cleburne's zoning ordinance: "by failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked."[207] The majority's failure to identify its level of scrutiny forthwith would render lower courts "left in the dark on this important question, and this Court remains unaccountable for its decisions

[205] *Id.* at 458.
[206] *Id.* at 459-60 (citing Lochner v. New York, 198 U.S. 45 (1905)).
[207] *Id.* at 460.

employing, or refusing to employ, particularly searching scrutiny."[208]

In his own analysis of Cleburne's zoning ordinance, Marshall restated his variable approach to classifications challenged pursuant to the Equal Protection Clause: "I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"[209] In this case, the zoning ordinance "works to exclude the retarded from all residential districts in a community," so Marshall's "two considerations require[d] that the ordinance be *convincingly justified as substantially furthering legitimate and important purposes*."[210]

This standard of review deviates from rational basis and strict scrutiny formulas, and indeed resembles the standard Marshall applied in *Zablocki*, which required Wisconsin's marriage restriction to be supported "by sufficiently important state interests" and be "closely tailored to effectuate only those interests."[211] In *Cleburne*, Marshall clearly stated the basis for his unique standard

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[208] *Id.*
[209] *Id.* at 460 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting).
[210] *Id.* (emphasis added).
[211] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

of scrutiny: "the interest of the retarded in establishing group homes is substantial."[212] Like to the right to marry, the "right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."[213] Even though the classification in this case—the "mentally retarded"—does not target a suspect class, the interest that Cleburne's ordinance denied to the class was housing, which Marshall regarded as a fundamental liberty. The "constitutional and societal importance of the interest adversely affected," therefore, justified a more demanding level of scrutiny than rational basis analysis, and Marshall—unlike the majority—admitted as much.

> In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation. The searching scrutiny I would give to restrictions on the ability of the retarded to establish community group homes leads me to conclude that Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible

[212] *Id.* at 461.
[213] *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

> assumptions or outmoded and perhaps invidious stereotypes.[214]

Here, Marshall considered both the invidiousness of the classification—the Equal Protection component of his variable approach—and the importance of the interests at stake: the right to establish a home.

Marshall elaborated on the grounds for his variable approach in an illuminating discussion regarding the evolving nature of discrimination. "Once society begins to recognize certain practices as discriminatory," Marshall observed, "in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court would refrain from approaching such practices with the added skepticism of heightened scrutiny."[215] Since traditional analysis looks generally to the class adversely affected, but not to the interests affected or case-specific facts, the standard of scrutiny that traditional analysis would apply would decrease if activism spawned protective legislation to benefit the affected class. But courts

> do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human

[214] *Id.* at 464-65.
[215] *Id.* at 466.

> potential and freedom…Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.[216]

This discussion reveals the societal and historical foundations of Marshall's variable approach. With the progression of time, different interests come to be seen as more or less important than they were in previous eras. Moreover, different classes become the targets of beneficial or invidious legislation in ways that differ from previous eras. The "principles of equality" evolve with time, Marshall argued, and the categorical approach to constitutional analysis that the majority traditionally has implemented fails to "look to the fact of such change as a source of guidance." The growing legal representation and protection of persons with disabilities should not have led the Court to establish rational basis as the standard of review for classifications of disability; courts are not precluded from considering "evolving standards of equality."

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[216] *Id.* (comparing Plessy v. Ferguson, 163 U.S. 537 (1896) with Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

Marshall's opinion in *Cleburne* influenced subsequent civil rights cases in at least two major ways. First, it explained the majority's actual level of scrutiny, which invalidated the zoning ordinance behind the façade of "rational basis" when in reality, its probing nature indeed rose to the level of a "heightened" level of scrutiny. This "second order" rational basis analysis, as Marshall called it, would reemerge in *Lawrence v. Texas*[217] and would enabled the Supreme Court to delve into exacting analyses of sexuality classifications despite the dictate of traditional jurisprudence to only require mere rationality for non-suspect classes. Had Marshall not written separately in *Cleburne* to call out the majority's deviation from *Lee Optical* rational basis review, it is possible that subsequent generations of the Supreme Court would have viewed *Cleburne* as an anomaly that resulted in constitutional invalidation only because of the Court's finding of animus. Marshall's concurrence in *Cleburne* provides an alternative understanding of the majority's conclusion that explains why a classification triggering "mere rationality" review resulted in an analysis that refused to conceive of justifications for the government. This alternative understanding afforded later courts an opportunity to broaden their analytical considerations in cases where

[217] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

Lee Optical rational basis review would have compelled courts to uphold the challenged statues.

Second, Marshall's *Cleburne* opinion revealed the roots of Marshall's variable approach: as history progresses and culture changes, society can alter its perception of classifications once seen as legitimate and interests once seen as unimportant. Therefore, courts should consider shifting "cultural, political, and social patterns"[218] to identify the precise degree of scrutiny that is appropriate.

It is true that "Justice Marshall's concern was that the Court's infusion of real bite into the rational basis standard might have the effect of destabilizing equal protection doctrine."[219] It is also true that "the 'sliding scale' equal protection methodology that Marshall himself proposed, in *Cleburne* and elsewhere, had its own destabilizing potential."[220] But courts that used Marshall's approach, however, were not compelled to apply rational basis in Equal Protection cases simply because the classification is not "suspect," or in Due Process cases because the affected interests fall under the jurisprudential umbrella of "the social and economic field."[221] Although Marshall's variable approach "destabilizes" the

[218] City of Cleburne*,* 473 U.S. at 466 (Marshall, J., dissenting).
[219] Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 Ky. L.J. 591, 615 (2000) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting)).
[220] *Id*. at n.112.
[221] Dandridge v. Williams, 397 U.S. 471, 484 (1970).

traditional three-category approach, the former permits courts to make holistic evaluations of the challenged governmental actions and consider the various intersecting constitutional interests at stake. The latter, however, confines a court's analysis to jurisprudential demarcations that amount to vestiges of "past practices."[222] As society evolves, different classes might be targeted and different interests might be restricted, so a categorical and context-independent approach to determining the right level of scrutiny blinds courts to the intersection of constitutional rights and the broader issues present in civil rights cases. However, Marshall's methodological consideration of gradation, history, culture, and nuance—unfortunately lost on the courts on which Marshall served—would rematerialize when state restrictions on gay rights confronted the Supreme Court.

IV. MARSHALL'S APPROACH APPLIED IN *LAWRENCE V. TEXAS*, AND *OBERGEFELL V. HODGES*

Marshall's variable, multifactor approach to determining the proper degree of judicial scrutiny yielded a significant precedential impact on the majority opinion in *Obergefell*, although the *Obergefell* Court did not expressly credit Marshall for its approach. The *Obergefell* decision was surprising for many reasons, not least of which was that the Court had previously declared that

[222] City of Cleburne, 473 U.S. at 466 (Marshall, J., dissenting).

classifications of homosexuality receive rational basis review, not heightened scrutiny.[223] However, Marshall's jurisprudence influenced another gay rights cases authored by Justice Kennedy that preceded *Obergefell*: *Lawrence v. Texas*. In *Lawrence* and *Obergefell*, Justice Kennedy's reasoning posited an intersection between the Equal Protection Clause and Due Process Clause and was shaped by Marshall's jurisprudential influence.

a. *Lawrence v. Texas*

Justice Kennedy wrote for the majority in *Lawrence*, which involved a Texas statute that criminalized same-sex "intimate sexual conduct."[224] Kennedy chose to analyze the facial constitutional challenge to the statute under the Due Process Clause, but considered equal protection principles in his analysis.[225] The Court's purported application of the rational basis standard here, as in *Cleburne*, resulted in its invalidation of the statute.[226] Kennedy's consideration of equal protection principles and the evolving nature of discrimination and oppression—again under the guise of rational basis review—suggest that Marshall's Equal Protection jurisprudence influenced Justice Kennedy's reasoning in *Lawrence*.

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[224] Lawrence v. Texas, 539 U.S. 558 (2003).
[225] *Id*. at 575.
[226] *Id*. at 579.

The defendants in *Lawrence* were convicted of "deviate sexual intercourse with another individual of the same sex."[227] They challenged the constitutionality of the statute pursuant to the Equal Protection Clause.[228] Nonetheless, the Court "conclude[d] the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause."[229] This analytical pivot by Kennedy suggests a conceptual intersection between the right to equal protection of the law and the due process right to liberty. Kennedy, however, insisted that the existence of an on-point prior case, *Bowers v. Hardwick*,[230] supported the choice to analyze the case under a Due Process framework so that the Court could reconsider the holding in *Bowers*.[231]

Bowers involved a gay defendant that challenged a Georgia statute making it a criminal offense to engage in sodomy.[232] "The laws involved in *Bowers* and here," Kennedy wrote, "are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[233]

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[227] *Id*. at 563.
[228] *Id*.
[229] *Id*. at 564.
[230] Bowers v. Hardwick, 478 U.S. 186 (1986).
[231] *Id*.
[232] Lawrence, 539 U.S. at 566-67.
[233] *Id*. at 567.

Rejecting the *Bowers* Court's characterization of the right at stake as "a fundamental right upon homosexuals to engage in sodomy,"[234] Kennedy framed the right more broadly: "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[235]

The *Lawrence* Court then engaged in a lengthy refutation of the *Bowers* Court's proposition that American laws targeting same-sex couples had "ancient roots."[236] After discussing the history of laws targeting same-sex couples, the Court held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, *just as heterosexual persons do*. The decision in *Bowers* would deny them this right."[237] The phrasing of this holding suggests that the unequal treatment of homosexual "autonomy" entered into the Court's reasoning. Kennedy's explanation of why the Court decided the case under the Due Process Clause confirms the Court's consideration of equal protection principles:

> [T]he instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would

[234] *Id*. at 566 (quoting Bowers, 478 U.S. at 190).
[235] *Id*. at 567.
[236] *Id*. at 570 (quoting Bowers, 478 U.S. at 192).
[237] *Id*. at 574 (emphasis added).

> be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants…*Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests*. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.[238]

This passage provides four main reasons why the Court elected to transform the petitioners' Equal Protection Clause challenge into a Due Process Clause challenge. First, the Court felt inclined to reconsider and overrule *Bowers*. Second, the Court was concerned that invalidating the statute under the Equal Protection Clause would result in the state's broadening of the statute to proscribe both homosexual and heterosexual sodomy, in the same way the Georgia statute in *Bowers* did. Third, Justice Kennedy recognized a connection between the right to equal protection and the due process right to liberty. Kennedy's assertion that deciding the case on Due Process grounds also advances the interests of "[e]quality of

[238] *Id*. at 574-75 (emphasis added).

treatment" presupposes that equality and liberty intersect. Fourth, Kennedy premises his identification of this intersection on the proposition that "stigma might remain" on homosexual conduct if a statute restricts liberty in sexual behavior in the home.

Was the *Lawrence* Court applying second-order rational basis to the Texas statute? In a concluding passage that again echoed Marshall's *Cleburne* concurrence, Kennedy gave further analytical consideration to the evolving nature of freedom and discrimination.

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[239]

Kennedy suggested, in the above passage, that conceptions of liberty can evolve with time, such that later generations can invoke certain "components of liberty" lost on previous generations. This discussion parallels Marshall's discussion of the "evolving principles of equality" in *Cleburne*.[240] "[H]istory makes clear," Marshall argued, "that constitutional principles of equality, like

[239] Lawrence, 539 U.S. at 578-79.
[240] City of Cleburne, 473 U.S. at 466.

constitutional principles of liberty, property, and due process, evolve over time."[241] "Shifting cultural, political, and social patterns," Marshall explained, "at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause."[242] In other words, shifting patterns in society—such as shifting attitudes towards homosexual persons and conduct—can provide "greater freedom" for gay rights activists to invoke as history progresses and "[a]s the Constitution endures."[243]

Kennedy did not cite Marshall's concurrence in *Cleburne*, or the majority opinion in *Cleburne*. However, the similarities between Kennedy's analysis and Marshall's analysis demonstrate that the standard of judicial scrutiny employed in *Lawrence v. Texas* surpassed the permissive rational basis standard from *Lee Optical*.[244] Unlike the *Lee Optical* Court, Kennedy did not speculate as to what the Texas "legislature might have concluded"[245] by concocting hypothetical justifications for the Texas government. Rather, Kennedy considered both the right to "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty."[246] Kennedy

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[241] *Id*.
[242] *Id*.
[243] Lawrence, 539 U.S. at 579.
[244] *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955).
[245] *Id*. at 487.
[246] Lawrence, 539 U.S. at 575.

considered the "stigma"[247] the Texas statute imposed on homosexual conduct. He considered the fact that "times can blind us to certain truths and later generations can see."[248] In sum, it appears that Kennedy considered both "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[249]

Kennedy's approach mirrors Marshall's variable approach because it considered not only the liberty rights at stake, but also the "societal importance" of those liberty rights (stigma on homosexual persons) and the "recognized invidiousness of the basis upon which the particular classification is drawn" (the proscription of specifically same-sex intimate conduct). Kennedy's failure to articulate the standard of review employed in *Lawrence* renders the question open as to which approach the majority adopted in that case. The factors and principles that Kennedy explicitly considered, however, support the conclusion that Marshall's variable approach guided the Court's conclusion in *Lawrence* more than the traditional three-category approach to determining the applicable level of judicial scrutiny.

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[247] *Id* at 560.
[248] *Id*. at 579.
[249] City of Cleburne, 473 U.S. at 460 (quoting San Antonio Independent Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting).

Justice O'Connor's concurrence in *Lawrence* lends further support for this conclusion. O'Connor was in the majority in *Bowers*, and did not join in overruling it.[250] However, "[r]ather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court [did], [she] base[d] [her] conclusion on the Fourteenth Amendment's Equal Protection Clause."[251] In this opinion, O'Connor asserted that the Texas statute was invalid under Equal Protection Clause analysis, which required rational basis analysis. However, O'Connor's analysis reveals that she subjected the statute to a higher level of scrutiny than rational basis analysis because she considered due process principles. Thus, her opinion uses an approach more akin to Marshall's multifactor, variable approach than the traditional three-category approach.

O'Connor purported to apply rational basis to the Texas statute. To support the applicability of rational basis review, O'Connor cited (among other cases) *City of Cleburne v. Cleburne Living Center*. In *Cleburne*, the Supreme Court purported to apply rational basis, but in fact applied heightened scrutiny. O'Connor's citation of these cases suggests that she too applied "second order" rational basis review.

O'Connor argued that a more "searching scrutiny" applied to the Texas statute at issue. "We have consistently held…that some

[250] Lawrence, 539 U.S. at 558 (O'Connor, concurring).
[251] *Id*. at 579.

objectives, such as 'a bare ... desire to harm a politically unpopular group,' are not legitimate state interests."[252] O'Connor's use of the "legitimate state interest" standard suggests that she applied rational basis. However, O'Connor then stated that a higher level of scrutiny applied: "[w]hen a law exhibits such a desire to harm a politically unpopular group, we have applied a *more searching form of rational basis review* to strike down such laws under the Equal Protection Clause."[253] This assertion implies that there are different *forms* of rational basis review, which vary in degree of exactitude. O'Connor used the term "searching scrutiny" here to signify a standard that does not permit certain governmental interests that would "normally pass constitutional muster"[254] under rational basis review.

Justice O'Connor seems to have taken a due process precept into consideration in her analysis in *Lawrence*: "[w]e have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."[255] O'Connor cited *Cleburne* to support this proposition. Liberty in personal relationships, however, is more characteristic of due process analytical concepts. Justice O'Connor's reasoning suggests that she took due process principles into consideration in her

[252] *Id*. at 580.
[253] *Id*. (emphasis added).
[254] *Id*. at 579.
[255] *Id.* at 580.

determination that a more searching form of rational basis applied to the Texas statute. O'Connor's concurrence evinces an analytical approach that took both equal protection and due process concerns into account in the determination that heightened rational basis, rather than *Lee Optical* rational basis, was appropriate. Her analysis resembles Marshall's approach because she considered both the invidiousness of the classification of homosexuals and the personal relationship interests at stake.

Both Kennedy's opinion for the majority and O'Connor's concurrence share commonalities with Marshall's variable approach. Marshall's approach espoused consideration of Equal Protection principles in Due Process Clause cases, and vise versa, by instructing courts to consider "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"[256] and "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."[257] In *Lawrence*, Justice Kennedy acknowledged that the case could have been decided on Equal Protection Clause grounds, stating that

[256] Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).
[257] San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting).

"[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[258] Kennedy considered the relative importance to homosexuals of the governmental benefits that they did not receive (the liberty to engage in intimate consensual conduct in private), the asserted state interests, the constitutional and societal importance of the interest adversely affected, and the recognized invidiousness of the basis upon which the particular classification was drawn (sexual orientation).

O'Connor's utilization of a simultaneous Equal Protection-Due Process analysis under the façade of rational basis analysis was a Marshall-esque approach that resembled Kennedy's analysis more than it differed from it. Both Kennedy's analysis and O'Connor's analysis featured more searching scrutiny than the *Lee Optical* paradigm, in which "instead of attempting to discern the actual goals that led the legislature to enact the law, the Court engage[s] in unsupported speculation about what those goals might have been."[259] Rather, both Kennedy's opinion and O'Connor's concurrence borrowed aspects of Marshall's variable approach; they both considered the invidiousness of the classification *and* the

[258] Lawrence, 539 U.S. at 575.
[259] Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 Ky. L.J. 591, 605 (2000).

interests at stake for homosexuals in applying a less permissive form of rational basis review than the traditional approach. Moreover, both the majority opinion and O'Connor's concurrence in *Lawrence* presaged the majority opinion in *Obergefell v. Hodges*, in which Justice Kennedy again wrote for the majority and again considered both Equal Protection and Due Process principles to circumvent the jurisprudential obstacles of the categorical approach to judicial scrutiny and rational basis review.

b. *Obergefell v. Hodges*

Thurgood Marshall's message for judges to look to "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification" crystalized again in Justice Kennedy's opinion in *Obergefell*. In ruling same-sex marriage prohibitions unconstitutional under the Due Process Clause, Kennedy reasoned that equal protection principles must enter the analysis and compelled that very conclusion. Kennedy's reliance on Marshall's majority opinion in *Zablocki v. Redhail* solidified Marshall's role in the outcome of *Obergefell*.

In *Obergefell*, the plaintiffs challenged Michigan, Kentucky, Ohio, and Tennessee statutes that defined marriage as a union between one man and one woman.[260] Kennedy engaged in an

[260] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (emphasis added).

extensive discussion of the history of marriage. "From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage," Kennedy argued.[261] "Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations."[262] Kennedy noted that although marriage is central to civilization, but also noted its evolution over time and that "[t]he history of marriage is one of both continuity and change."[263] As an example of such institutional change, Kennedy cited "the centuries-old doctrine of coverture, [under which] a married man and woman were treated by the State as a single, male-dominated legal entity."[264] However, "[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned."[265] Kennedy's Marshall-esque evaluation of the facts and circumstances behind marriage laws led him to conclude that "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[266]

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[261] Obergefell, 135 S. Ct. at 2593-94.
[262] *Id*. at 2594.
[263] *Id*. at 2595.
[264] *Id*.
[265] *Id*.
[266] *Id*. at 2596.

Kennedy here used a conception of freedom and discrimination that matches Marshall's discussion thereof in *Cleburne*. There, Marshall criticized the traditional, categorical approach that the Court used in *Cleburne* to determine that rational basis applied; he argued that that Court's refusal to acknowledge the history of discrimination against persons with mental disabilities was tantamount to "sit[ting] or act[ing] in a social vacuum."[267] In *Obergefell*, Justice Kennedy practiced Marshall's principle of considering the "evolving standards of equality" and liberty.[268] Kennedy's discussion of the "changed understandings of marriage" and "new dimensions of freedom" mirrors Marshall's proposition that "constitutional principles of liberty, property, and due process, evolve over time."[269] Kennedy's proposition that the "institution [of marriage]—even as confined to opposite-sex relations—has evolved over time"[270] demonstrates that "look[ed] to the fact of such change as a source of guidance on evolving principles of equality."[271]

Kennedy then started his constitutional analysis of the same-sex marriage bans under a Due Process Clause framework. "Under the Due Process Clause of the Fourteenth Amendment," Kennedy

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[267] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring).
[268] *Id*.
[269] *Id*.
[270] Obergefell, 135 S. Ct. at 2595.
[271] City of Cleburne., 473 U.S. at 466.

began, "no State shall 'deprive any person of life, liberty, or property, without due process of law.'"[272] Kennedy accordingly utilized the vocabulary characteristic of due process analysis rather than the "classification" vocabulary of equal protection analysis at the outset of his analysis. "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."[273] Kennedy noted, however, that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries...That method respects our history and learns from it without allowing the past alone to rule the present."[274]

Justice Kennedy's attempt to balance traditions of the past with changes in the present resulted in a passage in which he again channeled Thurgood Marshall's holistic, history-sensitive approach.

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[275]

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[272] Obergefell, 153 S. Ct. at 2597.
[273] *Id*. at 2598.
[274] *Id*. (citing Lawrence v. Texas, 539 U.S. 558, 572 (2003)).
[275] *Id*.

Kennedy asserted that the extent of liberty protections— "the extent of freedom in all of its dimensions"—can vary across different eras. Justice Kennedy propounded that what was seen as "'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."[276]

Kennedy's utilization of Marshall's concept that constitutional principles like liberty and equality evolve over time led Kennedy to survey a number of marriage cases that the Supreme Court decided, especially *Zablocki v. Redhail*.[277] Kennedy relied on Marshall's opinion *Zablocki* for several premises in his argument, including the general proposition that "the right to marry is protected by the Constitution."[278] According to Kennedy, *Zablocki* reaffirmed the holding of *Loving v. Virginia*, in which the Court held that "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[279]

Kennedy used *Zablocki* to "demonstrate that the reasons marriage is fundamental under the Constitution apply *with equal force* to same-sex couples."[280] Kennedy cited *Zablocki* for the proposition that "it would be contradictory 'to recognize a right of privacy with respect to other matters of family life and not with

[276] City of Cleburne., 473 U.S. at 466.
[277] Obergefell, 135 S. Ct. at 2598-99.
[278] *Id.* at 2598.
[279] *Id*. (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967)).
[280] *Id*. at 2599 (emphasis added).

respect to the decision to enter the relationship that is the foundation of the family in our society.'"[281] *Zablocki*, argued Kennedy, required the Court to consider the "varied rights" of family privacy "as a unified whole: 'the right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause.'"[282] In sum, the Court's rulings in *Zablocki*—along with *Loving v. Virginia* and *Turner v. Safley*, a case concerning the marriage rights of prisoners—required the Court to analyze "the right to marry in its comprehensive sense, asking if there was a sufficient justification for *excluding the relevant class* from the right."[283]

Kennedy's reliance on *Zablocki* for that proposition was apt. Kennedy's recognition of an intersection between the Equal Protection Clause and Due Process Clause, his understanding of the evolving nature of equality and liberty, and his eschewal of a traditional standard of review under the three-category approach all resemble Marshall's opinions in *Zablocki* and elsewhere. In determining the appropriate level of judicial scrutiny in *Zablocki*, Marshall's Equal Protection Clause analysis focused almost exclusively on Due Process Clause cases.[284] In *Obergefell*, Kennedy did not state that he analyzed the case under strict scrutiny,

[281] *Id*. (quoting Zablocki v. Redhail, 434 U.S. 374, 386 (1978)).
[282] *Id*. (quoting Zablocki, 434 U.S. at 384).
[283] *Id*. at 2602 (discussing Turner v. Safley, 482 U.S. 78 (1987)).
[284] Zablocki, 434 U.S. at 383-87.

intermediate scrutiny, or rational basis review at any point in his analysis in *Obergefell*. Kennedy did state, however, that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[285] This assertion again echoed Marshall.

Kennedy explicitly confirmed the entrance of equal protection principles in his analysis. "The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[286] This is unsurprising, given Kennedy's reliance on *Zablocki*, an opinion in which Marshall rested the decision on Equal Protection Clause grounds,[287] but took into consideration both "the nature of the classification *and the individual interests affected*"[288] in determining that "[t]he statutory classification at issue…clearly does interfere directly and substantially with the right to marry."[289] Kennedy echoed Marshall's description of the "intersection with the guarantee of

[285] *Id*.
[286] *Id*.
[287] Zablocki, 434 U.S. at 382 ("[w]e agree with the District Court that the statute violates the Equal Protection Clause.").
[288] *Id*.
[289] *Id*. at 387.

equal protection"[290] and other constitutional rights by arguing that equal protection and the due process right to liberty intersect:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[291]

Here, Kennedy posited a connection between equality and liberty that emanated from Kennedy's narrative of the evolving principles of discrimination. In stating that the Due Process Clause and Equal Protection Clause "are connected in a profound way" and "may be instructive as to the meaning and reach of the other," Kennedy supported his conclusion that the same-sex marriage bans in the present case were unconstitutional under the Fourteenth Amendment because they "excluded the relevant class" from a liberty interest—marriage—from which heterosexual couples were not excluded. The proposition that the right to equal protection and the due process right to liberty converge aided Kennedy in the

[290] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 101 (1972)
[291] Obergefell v. Hodges, 135 S. Ct. 2584, 2602-03 (2015).

"identification and definition of the right" at stake in each respective case. When a class is excluded from a liberty interest from which the government does not exclude others, then both the Equal Protection Clause and the Due Process Clause are implicated, regardless of whether the class is doctrinally "suspect." Kennedy hinted at the evolving nature of equality and liberty as the basis for his dual Equal Protection-Due Process analysis: "[t]his interrelation of the two principles furthers our understanding of what freedom is *and must become*."[292]

Kennedy's identification of an *intersection* between the Equal Protection Clause and the Due Process Clause, for which he cited *Zablocki v. Redhail* for authority, led Kennedy to invalidate the same-sex marriage restrictions: "the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry."[293] Kennedy's analytical debt to Marshall materialized in Kennedy's discussion of "this relation between liberty and equality"[294] in *Obergefell*. The dual Equal Protection-Due Process analysis parallels Marshall's analysis in *Zablocki* and channeled Marshall's discussion of history and discrimination in *Cleburne Living Center*. Kennedy also drew upon his own opinion in *Lawrence v. Texas*, a "second order" rational

[292] *Id*. at 2603 (emphasis added).
[293] *Id*. at 2604 (citing *Zablocki*, 434 U.S. at 383-88).
[294] Obergefell, 135 S. Ct. at 2604.

basis opinion that was also indebted to Marshall's jurisprudence: "*Lawrence*…drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State 'cannot demean their existence or control their destiny by making their private sexual conduct a crime.'"[295] Although Kennedy did not explicitly credit Marshall or explicitly apply Marshall's variable approach, both his analysis and presentation of history indicate Marshall's influence.

Thurgood Marshall was the theoretical architect of *Obergefell v. Hodges*. Justice Marshall's approach to determining the appropriate degree of judicial scrutiny varied according to "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,…the asserted state interests in support of the classification,"[296] "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[297] Marshall implemented this approach in *Zablocki v. Redhail*, in which he stated that "under the Equal Protection Clause, 'we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of

[295] *Id*. (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).
[296] Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).
[297] San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1330 (1973) (Marshall, J., dissenting).

the classification and the individual interests affected.'"[298] In *Obergefell*, Justice Kennedy seemed to have applied this method of determining the level of the "burden of justification" on the governments. In reaching his conclusion, Kennedy relied on Marshall's opinion in *Zablocki*. Furthermore, Kennedy's narrative about the power of "new insights and societal understandings" to "reveal unjustified inequality within our most fundamental institutions"[299] echoed Marshall's argument in *Cleburne Living Center*, in which he discussed the "evolving principles of equality"[300] to which courts should look for guidance in Equal Protection Clause cases. Justice Kennedy's reliance on Marshall's vocabulary and concepts regarding "second order" rational basis review, the intersection of equality and liberty, and the historically evolving nature of equality and liberty, shows the stamp of Marshall's doctrinal influence on Kennedy's decisions in *Lawrence v. Texas* and *Obergefell v. Hodges*.

CONCLUSION

> Through his story, Justice Marshall reminded us, once again, that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to

[298] Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (quoting Mem'l Hosp. v. Maricopa Cty., 415 U.S. 250, 253 (1974)).
[299] Obergefell, 135 S. Ct. at 2603.
[300] City of Cleburne., 473 U.S. at 466.

> narrow the gap between the ideal of equal justice and the reality of social inequality.[301]

In a touching written tribute to Thurgood Marshall, Justice Sandra Day O'Connor described the life and legacy of Marshall and the impact he had on her, not just "as a lawyer and jurist," but "also, as colleague and friend."[302] Marshall brought a "special perspective" to the Court, according to O'Connor, which "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 established safeguards for their protection."[303]

Marshall's ability to empathize with socially vulnerable populations manifested in his legal thought. The brief to which Marshall contributed in the case of *Brown v. Board of Education*[304] described the Equal Protection issue in terms of the importance of the interest of education: "equality of educational opportunities necessitates an evaluation of all factors affecting the educational process. Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause."[305] This

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[301] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218 (1992).
[302] *Id*. at 1217.
[303] *Id*.
[304] 347 U.S. 483 (1954).
[305] Brief for Petitioner, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1952 WL 82041, at *10.

framing demonstrates an early expression of Marshall's variable approach because of the manifest consideration of not only the classification in question (African-American students), but also the importance of the interest at stake: educational opportunities. In the majority opinion in *Brown*, Justice Warren (whose constitutional jurisprudence would greatly influence Marshall's variable approach[306]) ostensibly adopted Marshall's imploration to consider the importance of education, holding that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[307]

The arguments Marshall made in *Brown*, as a lawyer, presaged the arguments Marshall made as a jurist on the Supreme Court. Marshall's dissents, beginning with *Dandridge v. Williams*,[308] "reflect a judge's ability to impart to his or her colleagues an understanding of the disparate realities of litigants before the Court, thereby fostering decisions more sensitive to the realities of the litigants and, at times, resulting in outcomes altered by the dissenting view."[309] In *Dandridge*, *San Antonio Independent*

[306] Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969)).
[307] Brown, 347 U.S. at 493.
[308] *See* Dandridge, 397 U.S. at 521.
[309] The Hon. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confrontation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1 (2009).

School District v. Rodriguez, *Richardson v. Belcher*, and *United States v. Salerno*, Marshall's dissents attempted to generate empathy with the oppressed classes whose rights and interests were at stake. For example, in *Dandridge*, Marshall criticized the majority of the Court's inability to appreciate the plight of "the literally vital interests of a powerless minority—poor families without breadwinners."[310] In *Rodriguez,* Marshall evaluated the case from the perspective of the Mexican-American "child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds."[311] In *Richardson v. Belcher*, the government was unequally denying important benefits to "families of disabled persons with the basic means for getting by,"[312] thus distributing important benefits in an unequal fashion. And in *Salerno*, Marshall, unlike the majority, empathized with "person[s] innocent of any crime" whom the challenged statute allowed to "be jailed indefinitely."[313] In each of these cases, Marshall analyzed the case from the perspectives of people denied important interests because the governments failed to provide equal access to those interests. A profound commitment to distributive

[310] Dandridge, 397 U.S. at 520.
[311] San Antonio Indep. Sch. Dist. v. Rodriguez, 93 S. Ct. 1278, 1322 (1973) (Marshall, J., dissenting).
[312] Richardson v. Belcher, 404 U.S. 78, 91 (1971) (Marshall, J., dissenting).
[313] United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting).

fairness characterized Marshall's approach to state action: a commitment to the principle that "although the Constitution may not require government to provide a particular benefit to its citizens, when government chooses to do so it may not discriminate against some in providing that benefit on the basis of impermissible or irrelevant characteristics."[314]

Marshall's life experience and perspective bled into his jurisprudential divergence from the categorical approach to judicial scrutiny. Marshall eschewed the categorical approach because it failed to protect populations whom the Supreme Court refused to categorize as suspect, resulting in the least demanding standard of scrutiny:

> If a statute is subject to strict scrutiny, the statute always, or nearly always, *see Korematsu v. United States*, 1 323 U.S. 214, (1944), is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.[315]

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[314] Gary Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. STATE L.J. 429, 439 (1994) (quoting Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 460 (1988)).
[315] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

The Court's commitment to the categorical approach allowed it to restrict its application of strict scrutiny to a narrow set of cases—and consequently, to restrict its invalidation of challenged state actions. Marshall's variable approach, however, would allow judges such as Justice Anthony Kennedy to analyze statutes with heightened scrutiny even though they did not target a "suspect class" or infringe on a "fundamental right."

Justice Sandra Day O'Connor expressly acknowledged the influence that Thurgood Marshall had on her.[316] Justice Anthony Kennedy did not expressly credit Marshall's influence directly in *Lawrence v. Texas* or *Obergefell v. Hodges*. Kennedy, did, however, analyze the state restrictions on gay rights under the premises that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects,"[317] and that "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way,"[318] thus positing an intersection between the two rights in a Marshall-esque analysis.[319]

Moreover, Kennedy's historiography in *Obergefell* regarding liberty and equality stated that "changed understandings

[316] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, *supra* note 325.
[317] Lawrence v. Texas, 539 U.S. 558, 575 (2003).
[318] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602-03 (2015).
[319] *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[320] There, Kennedy conveyed a proposition nearly identical to Marshall's argument in *Cleburne* "that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time."[321] Kennedy's analyses in *Lawrence* and *Obergefell* applied searching scrutiny on the grounds that the challenged laws restricted liberty in a discriminatory fashion by targeting homosexuals, thereby implicating both the Due Process Clause and Equal Protection Clause. Kennedy did not apply *Lee Optical* rational basis to these cases (evident from their dispositions) partially because Kennedy considered both the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. Although Kennedy did not expressly credit Marshall for the non-categorical, variable approach of adjusting the Court's level of scrutiny, the similarities in vocabulary, concepts, and assumptions about history between Kennedy's and Marshall's

[320] Obergefell, 135 S. Ct. at 2596.
[321] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., dissenting).

jurisprudence demonstrate Marshall's indelible mark on the outcomes of the gay rights cases discussed in this article.

Marshall's approach to constitutional analysis was variable and flexible in that it took various factors into consideration to determine the level of scrutiny that the challenged law required. Marshall did not vary, however, in the empathy with which he analyzed the predicaments of the classes adversely affected in those cases. Marshall recognized that when issues of distributive fairness arose, courts should not restrict their analysis to rigid doctrinal categories, but should also consider other dimensions of the plight of the persons involved. Similarly, Justice Kennedy took cognizance of the unequal distributions of liberty interests that took place in the discussed gay rights cases.[322] Kennedy's approach resembled Marshall's approach not only in its analytical variability, but also in its holistic and empathic nature.

Both Marshall and Kennedy played vital roles in the evolution of constitutional jurisprudence that resulted in an expansion of gay rights under the Equal Protection Clause and Due Process Clause. "Judges such as…Anthony Kennedy played important and heroic roles respectively in combating discrimination, unlawful governance, and violations of due process. Attorneys such

[322] *See, e.g.,* Obergefell, 135 S. Ct. at 2590 ("[t]he marriage laws at issue are in essence unequal: Same-sex couples are denied benefits afforded opposite-sex couples and are barred from exercising a fundamental right.").

as Thurgood Marshall…did the same."[323] It was Marshall's work as a judge, however, that laid the groundwork for Kennedy in the vindication of equality, liberty, and the intersection between them.

[323] William E. Walters, *A Time for Principles: Heroes at the Bar*, 37 AUG. COLO. LAW. 5 (2008).