JUSTICE MARSHALL AND THE FIRST AMENDMENT

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It should have surprised no one that Justice Thurgood Marshall became one of the Supreme Court's most consistent champions of First Amendment freedoms. His long experience as chief advocate for an institution aspiring to rapid social change had given him repeated occasions to see what the First Amendment meant to the disadvantaged. Fortunately for all of us, he has brought that experience to bear on his work as a member of the Court. This issue of the *Journal* is a natural occasion for looking back and looking ahead. In this article, we shall look first at the ways in which Justice Marshall's years with the NAACP seem to have shaped his thinking about the First Amendment, and then examine Justice Marshall's distinctive contributions to First Amendment doctrine.

I. RETROSPECT: THE NAACP EXPERIENCE AS DOCTRINAL TEACHER

When Solicitor General Marshall became Justice Marshall in 1967, he brought to the Court not only his two years of experience as the Nation's chief lawyer, but some twenty-three years of experience as counsel for the NAACP. During that quarter of a century, he had briefed or argued 62 cases in the Supreme Court.[1] In this century, only Justices Brandeis, Reed, Frankfurter and Jackson came to the Court with comparable preparation as an advocate before the Supreme Court itself. The NAACP, of course, was dedicated primarily to ending racial discrimination. But in that cause, the First Amendment loomed large, as the NAACP came to be the first line of legal defense for what Gunnar Myrdal called, in a phrase that now seems quaint, "the Negro protest."[2]

Thurgood Marshall left the NAACP for the federal bench in 1961, just at the beginning of a decade in which the protest of blacks against discrimination came to dominate First Amendment decisions and First Amendment discussion.[3] But he had been in the thick of the battle during the years immediately following *Brown v. Board of Education*,[4] when the NAACP itself had come under attack, and the freedom of association had crystallized as a First Amendment right.[5] Surely those years of struggle importantly influenced Justice Marshall's later decision-making about the First Amendment. His votes and his opinions demonstrate a willingness

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1. *See* R. Bland, *Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall*, 183-84, 189 (1973).

2. G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy*, Ch. 35 (1944).

3. *See generally*, H. Kalven, Jr., *The Negro and the First Amendment* (1965).

4. 347 U.S. 483 (1954).

5. Bland, note 1 *supra*, at 105-09.

to define First Amendment freedoms in the most generous way, and a concern that "the public forum"[6] be kept open to those who cannot command the press and the broadcast media.

A. *The Scope of the First Amendment*

Just as the Jehovah's Witnesses broke the doctrinal ground for the public forum idea in the 1940's, it was the activity of the NAACP that gave us the modern version of the First Amendment's freedom of association. The standard citation for the proposition that such a freedom exists is *NAACP v. Alabama*.[7] In that case, Thurgood Marshall was on the brief for the NAACP. The brief argued that the state, in demanding the disclosure of the Association's membership list, infringed on the right of the members of the NAACP to associate freely to discuss problems and advocate solutions. The Supreme Court agreed, and in so doing broke important new ground for the First Amendment. Not only was the freedom of association recognized as a First Amendment freedom, but state invasions of this freedom were to be tested against a rigorous "compelling state interest" standard of review.[8]

At around the same time, a different assault on the NAACP threatened the Association's freedom to pursue its goals through the litigation process itself—which had been the NAACP's chief activity from the time Thurgood Marshall joined its legal staff. Virginia, as part of its "massive resistance" to school desegregation, sought to prevent the Association from recruiting clients, financing lawsuits, or serving as intermediary between NAACP lawyers and their clients—all in the name of maintaining the purity of the legal profession. Marshall participated in the first battles in this war, culminating in *Harris v. NAACP*[9] which he argued. Litigation, said the NAACP's brief, was a part of the program for promoting the NAACP's associational goals. After some years of delay,[10] the Supreme Court agreed with this position, holding in *NAACP v. Button*[11] that the First Amendment freedoms of association and expression included, "[i]n the context of NAACP objectives, litigation as . . . a form of political expression."[12] This holding came after Thurgood Marshall had moved from the NAACP to the federal bench, but it built on his argument in the *Harrison* case.[13]

When Justice Marshall approaches a case implicating the freedom of association, then he must surely feel the way a composer feels on hearing his music performed; he must be as sensitive as anyone to the intrusion of an occasional dissonance. So it must have been in 1974, when the Supreme Court played its sour note in *Village of Belle Terre v. Boraas*.[14] The village had adopted a zoning ordinance limiting one area to single-family residences, but limiting its definition of a "family" to (a) any number of persons related by blood, adoption or

6. *See* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

7. 357 U.S. 449 (1958).

8. For other similar cases involving the freedom of association, in the context of NAACP membership, *see* Bates v. Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960).

9. 360 U.S. 167 (1959).

10. The *Harrison* case had been decided in favor of abstention by the federal court pending determination of state-law issues by the Virginia courts.

11. 371 U.S. 415 (1963).

12. 371 U.S. at 429.

13. See Justice Marshall's comments in his article, *Group Action in the Pursuit of Justice*, 44 N.Y.U.L. REV. 661 (1969).

14. 416 U.S. 1 (1974).

marriage, plus any domestic servants, or (b) up to two (but no more than two) persons not so related. With only two dissents, the Court upheld this ordinance, in an opinion by Justice Douglas that treated the case as if it involved no more than a simple regulation of land use. Justice Brennan dissented on jurisdictional grounds, and Justice Marshall dissented on the constitutional merits.

The Marshall dissent begins with a bow to the general principle upholding the validity of land-use zoning. Of course the ordinary zoning case presents no serious constitutional problem. But this ordinance was far from ordinary, as Justice Marshall showed. Citing *Button*,[15] he argued that the village's definition of a "family" effectively proscribed a form of personal association, and thus violated the First Amendment:

> The instant ordinance discriminates on the basis of . . . a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation or mere economics who can occupy a single home . . . . The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.[16]

The majority's response to this contention was an assertion that the right of association was not involved in the case. That is no answer at all, and indeed there is no persuasive answer to Justice Marshall's argument.

Two points are of special interest here. The first is Justice Marshall's willingness to see in the Amendment a broadly defined guarantee of the freedom of association.[17] Secondly, and at least as importantly, he sees the victories won by the NAACP in the 1950's and 1960's as victories for all of us. In *Belle Terre*, he characteristically extends First Amendment principles forged in the civil rights struggle to new areas and new claimants.

Justice Marshall's efforts to enlarge the First Amendment's protections of the freedom of association find a close parallel in his efforts to persuade the Supreme Court to adopt a generous definition of the "expression" protected by the Amendment. Again the story begins in Marshall's experience with the NAACP. The Association became involved early with the defense of persons who engaged in such "direct action" techniques as sit-in demonstrations at lunch counters. In one of those cases, *Garner v. Louisiana*,[18] Marshall headed the team that wrote the brief for Garner and fifteen other sit-in demonstrators. The brief argued not only that the state had supported private racial discrimination by enforcing its trespass laws, but also that the sit-in itself was a form of expression, protected by the First Amendment. While the Supreme Court's majority opinion held for the demonstrators on a narrower ground,[19] Justice Harlan added a concurring opinion largely adopting the First Amendment ground that had been

15. Note 11, *supra*.

16. 416 U.S. at 16-17.

17. What is most puzzling about this case is Justice Douglas' inability to see the same point, after having relied on the First Amendment as partial support for his opinion in Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Douglas seemingly became trapped in a view of the case that made the ordinance look like the equivalent of an "open space" environmental control.

18. 368 U.S. 157 (1961). The *Garner* case was the last one in which Marshall participated before the Supreme Court as counsel for the NAACP.

19. The ground, which the NAACP brief had also argued, was that the evidence did not support a finding that the sitters-in had disturbed the peace.

argued by the NAACP. Since the demonstrators were sitting in at the lunch counters to convey their anti-discrimination message, Justice Harlan concluded, the state could not constitutionally use a general breach-of-peace statute to protect any countervailing interests of the property owner.[20]

The Harlan opinion, which Harry Kalven called "a venture rich in imaginative daring,"[21] was written narrowly.[22] Yet it provided new life for a concept that had been recognized in the very infancy of First Amendment theory: the use of symbol, or a gesture, to convey a message can be "as much a part of the 'free trade in ideas' . . . as is verbal expression. . . ."[23] The display of a red flag,[24] or the salute to the American flag,[25] are protected expression; if such symbols and gestures are to be regulated by the state, the regulation must be justified by compelling necessity. A similar idea informs much of the Supreme Court's recent treatment of the "public forum" principle. If access to the streets for a parade is protected by the First Amendment, the reason is that the marchers are conveying a message.

Since coming to the Supreme Court, Justice Marshall has joined several opinions vindicating First Amendment claims on behalf of symbolic expression.[26] And recently, in dissent, he has had occasion to suggest a possible First Amendment dimension to the regulation of a police officer's hair length: "An individual's personal appearance . . . may well be used as a means of expressing his attitude and lifestyle."[27] In this opinion Justice Marshall echoes his *Belle Terre* dissent, not only by expressing his concern for protecting those who choose to remain outside the cultural mainstream, but also by giving an ample reading to the First Amendment, finding there sufficient scope to encompass protections for a wide variety of forms of association and expression. And, as in *Belle Terre*, he seeks to extend to new areas and new claimants a principle won in the course of his advocacy for "the Negro protest"[28] of an earlier era.

B. *The Public Forum*

It was the late Harry Kalven who gave us the expression, "the public forum." His famous article of that name[29] was published in 1965. Earlier, however, in a series of lectures at Ohio State University, he had used the expression in analyzing the ways in which the black protest movement had made its impact on free-speech theory.[30] As Kalven showed on both those occasions, when the black protest movement turned, around 1960,[31] to sit-ins and freedom

20. 368 U.S. at 185, 196-204.

21. Kalven, note 3 *supra*, at 132.

22. Justice Harlan said that he would apply his First Amendment reasoning only to the case in which the owner of the property had not shown his unwillingness to allow the sit-in—a case unlikely to recur.

23. 368 U.S. at 201.

24. Stromberg v. California, 283 U.S. 359 (1931).

25. West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943).

26. *E.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Spence v. Washington, 418 U.S. 405 (1974). Justice Marshall did not participate in the decision of United States v. O'Brien, 391 U.S. 367 (1968).

27. Kelley v. Johnson, 425 U.S. 238, 250-51 (1976) (dissenting opinion). The First Amendment claim in this case was not argued to the Court.

28. *See* note 2, *supra*.

29. Note 6, *supra*.

30. Note 3, *supra*.

31. 1960 marked the Greensboro sit-ins, which began an era of "direct action" in the civil rights movement. Previously, in 1955-56, the Montgomery bus boycott, under the leadership of Dr. Martin

rides and marches, the new tactics put a strain on existing First Amendment doctrine. During Thurgood Marshall's last year with the NAACP, he not only briefed the *Garner* sit-in case,[32] but also argued *Boynton v. Virginia*,[33] which arose out of the freedom rides.[34] When he was Solicitor General, some years later, Marshall spoke approvingly of peaceful civil disobedience as a means of communication, and referred explicitly to Kalven's theory of the public forum.[35] Surely the NAACP experience must have been in his mind, then and later.

In the years since Justice Marshall came to the Supreme Court, the problem of regulating speech in public places has presented itself to the Court over and over again. It is fair to say that during this period only Justice Brennan has matched Justice Marshall for consistent devotion to the principle of the public forum, through good times[36] and bad.[37] First, Justice Marshall has sought to expand the scope of the public forum to new areas, both public and private, that might be called "non-traditional" fora. Secondly, he has been astute to limit regulations within the public forum to the minimum necessary to protect governmental interests of compelling importance.

By now it is well established that the concept of the public forum extends to such places as streets and parks. Although the concept is of recent origin,[38] it is fair to call such places "traditional" fora.[39] All the Justices have agreed that when a street is commandeered to convey a message, the First Amendment problem confronting the Court is to work out an accommodation of that claim and the street's primary function of conveying traffic. When the use of other, less traditional, places is claimed for purposes of First Amendment expression, however, a majority of the Supreme Court in recent years has approached the problem not as one of accommodation, but as one of definition: Is a jailhouse ground,[40] or a city-owned bus,[41] or an Army base[42] a public forum or not? If it is not—and in all three of the cases just noted the Court held that it was not—then the current majority holds that the regulation of expression is valid so long as it is a rational means for carrying out a legitimate governmental purpose.

From this ungenerous view of the public forum Justice Marshall has regularly dissented, often in lonely tandem with Justice Brennan. He has joined Justice Brennan in arguing that the First Amendment follows government wherever it goes, demanding *justification* for restrictions of speech even in such places as a military reservation. Of course the interest in free expression must be accommodated to the primary functions of any governmental institution; few would argue that there is a First Amendment right to distribute literature on a rifle range

Luther King, Jr., had succeeded in conveying a message that was both political and economic; it did not, however, raise First Amendment issues in any direct way.

32. Note 18, *supra*.

33. 364 U.S. 454 (1960).

34. *See* Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CALIF. L. REV. 15 (1961).

35. Marshall, *Law and the Quest for Equality*, 1967 WASH. U. L. Q. 1 (1967).

36. *E.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

37. *E.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (surely the worst of times); Greer v. Spock, 424 U.S. 828 (1976).

38. It had been foreshadowed as early as Hague v. CIO, 307 U.S. 496 (1939), but its modern incarnation dates from Kalven's article in 1965, note 6, *supra*.

39. *See generally* Stone, *Fora Americana: Speech in Public Places*, 1974 Sup. Ct. Rev. 233.

40. Adderly v. Florida, 385 U.S. 39 (1966).

41. Lehman v. City of Shaker Heights, note 37, *supra*.

42. Greer v. Spock, note 37, *supra*.

at an Army base. But what the majority in *Greer v. Spock*[43] does with such obvious cases of justification is to turn them into an occasion for demanding no justification at all. If an Army base has the primary function of training soldiers, the majority is prepared to tolerate the most thoroughgoing restrictions on expression throughout the base, at all times and places, making no significant accommodation of that function to the demands of the First Amendment.

The Brennan dissent in *Greer v. Spock*,[44] which Justice Marshall joined, carefully examined the problem of free speech on an Army base as an exercise in the weighing of competing claims.[45] The majority, by defining most Army bases to fall outside the concept of the public forum, avoided any such weighing of claims. In evident exasperation, Justice Marshall added his own two-paragraph dissent, complaining of the Court's "unblinking deference" to the military.[46] In this statement, he sounds a theme that appears repeatedly in his opinions:

> The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society. That commitment surely calls for a far more reasoned articulation of the governmental interests assertedly served by the challenged regulations than is reflected in the Court's opinion.[47]

The First Amendment is no absolute for Justice Marshall; he is prepared to acknowledge the validity of restrictions on speech, even in government-owned places, when the restrictions are necessary for the protection of a compelling governmental interest.[48] But what is inadmissible is precisely "unblinking deference" to governmental determinations to restrict speech.

Justice Marshall has also played a leading role, albeit an unsuccessful one, in the recent abortive attempt to bring the concept of the public forum to privately owned places that are open to the public. Throughout this unhappy chapter of First Amendment history, Justice Marshall's opinions carry the ring of conviction that comes only from experience. The civil rights sit-ins, of course, mostly took place at privately owned lunch counters. When Justice Marshall addresses the problem of the freedom of speech in a shopping center, he cannot help hearing echoes from his own brief in *Garner v. Louisiana*.[49]

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43. Note 37, *supra*.

44. *Id.* at 849.

45. Justice Powell, concurring in *Spock*, also weighed the interests involved in the case, but struck a different balance, 424 U.S. at 842.

46. 424 U.S. at 873. Compare Justice Marshall's dissent in Middendorf v. Henry, 425 U.S. 25 (1976), decided the same day as *Spock*, and holding the Sixth Amendment's guarantee of the right to counsel inapplicable to summary courts-martial. See also his opinion in the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971).

47. 424 U.S. at 873. Justice Marshall sounded a similar theme in his dissent in Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977). In that case the state's department of corrections had prohibited prison inmates from joining a union, barred union meetings in the prisons, and refused to deliver bulk mailings of union literature to prisoners. The Court upheld all these regulations against a First Amendment attack, on the ground that they were rationally related to prison operations. The majority concluded that since prisons were not part of any public forum, prison officials had the discretion to regulate prisoners' activities within the limits of rationality. Justice Marshall's dissent refused to accept this definitional approach to the problem, arguing that "traditional First Amendment principles are applicable in prisoners rights cases," 433 U.S. at 143, and that the prison officials' restrictions thus must meet a burden of justification heavier than than of mere rationality. Compare his concurring opinion in Procunier v. Martinez, 416 U.S. 396, (1974).

48. See the discussion of Grayned v. City of Rockford, 408 U.S. 104 (1972), in the text at note 59, *infra*.

49. Note 18, *supra*.

The story begins with the *Logan Valley* case,[50] decided near the close of Justice Marshall's first term on the Supreme Court. Union pickets stationed themselves near a supermarket in a large suburban shopping center, in peaceful protest against the store's employment of non-union workers. On application by the store and the owner of the shopping center, the state courts granted an injunction against the picketing, on the sole ground that the pickets were committing a trespass on the owner's property. In a 6-3 decision, the United States Supreme Court reversed, holding that the shopping center was, for First Amendment purposes, the functional equivalent of the streets of a company town.[51] Justice Marshall wrote for the Court.

The *Logan Valley* opinion is, fundamentally, a triumph of common sense. Justice Marshall did not say, for example, that the private owner's property rights must be subjected to all the limitations that would apply to city-owned streets. Instead, he pointed to the full access that had been granted to the public to the shopping mall, and he showed that shopping centers such as the one before the Court had recently accounted for some 37 percent of all the retail sales in the United States and Canada. It was, finally, this practical impact of speech-restrictive policies by shopping-center owners that was critical to Justice Marshall's conclusion: "These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have."[52]

Four years after *Logan Valley*, a similar case brought the shopping center problem back to the Court. In *Lloyd Corp. v. Tanner*,[53] a 5-4 majority concluded that *Logan Valley* did not extend to the First Amendment claims of antiwar protesters who sought to distribute leaflets on the property of a privately owned shopping center. The leafleting, said the majority, "had no relation" to the shopping center's purposes (and thus was to be distinguished from the picketing in *Logan Valley*, which was directly related to the activities of one of the center's stores). Furthermore, the Court said, the case differed from *Logan Valley* because here the handbills could be distributed conveniently to persons crossing the public streets to get into the center. As any observer of these two decisions could see, the most important thing that had happened between *Logan Valley* and *Lloyd Corp.* was a change in the composition of the Court. In those four years, President Nixon had made all of his four appointments, and their votes were sufficient, along with that of Justice White, a *Logan Valley* dissenter, to swing the decision. Justice Marshall, dissenting in *Lloyd Corp.*, even took the unusual step of remarking on the fact. As he pointed out, it was hard to read *Lloyd Corp.* as anything but "an attack . . . on the rationale of *Logan Valley*."[54]

Justice Marshall's *Lloyd Corp.* dissent breaks no new doctrinal ground; rather it urges fidelity to First Amendment principles that nearly all of us has thought to be established. But the dissent does include one passage that typifies Justice Marshall's approach to public forum cases: "We must remember that it is a balance that we are striking—a balance between the freedom to speak, a

50. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).
51. *See* Marsh v. Alabama, 326 U.S. 501 (1946).
52. 391 U.S. at 324.
53. 407 U.S. 551 (1972).
54. 407 U.S. at 571.

freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property."[55] Justice Marshall struck the balance in favor of speech; the majority, on the other hand, struck no balance at all, but defined the case out of the First Amendment's coverage. Indeed, the language of the majority opinion in *Lloyd Corp.* even suggests that a state law striking the balance in favor of speech in this context might violate the owner's property rights as guaranteed by the Fourteenth Amendment's due process clause.[56]

The chapter ends—for now, anyway—some four years after *Lloyd Corp.* with *Hudgens v. NLRB*.[57] Again the case arose out of union picketing of a business in a shopping center. When the owner of the center threatened to have the pickets arrested for criminal trespass, they left the center; the union then filed an unfair labor practice charge with the National Labor Relations Board, based on this threat. The Board, thinking itself bound by *Logan Valley*, concluded that the threat did amount to an unfair labor practice, and issued a cease and desist order against the center owner. After some skirmishing, the Fifth Circuit enforced the Board's order, and the case came on to the Supreme Court. By a 6-2 vote, and in an opinion by Justice Stewart (who had joined in *Logan Valley* and dissented in *Lloyd Corp.*), the Court reversed, expressly stating that *Lloyd Corp.* had overruled *Logan Valley*.

In his dissent in *Hudgens*, Justice Marshall is seen in an unfamiliar role, picking his way through the wreckage of *Logan Valley* to find some parts that will still do service. Where his usual style is to view a First Amendment case in large perspective, here he becomes the parser of sentences, the master of narrow distinction. Reading this opinion, one thinks of Marshall's NAACP years, especially the early days, when he regularly had to make the best of things in uncongenial terrain, both geographical and doctrinal. At the close of his *Hudgens* dissent, however, Justice Marshall returns to the larger theme that sustained him—if not the First Amendment—through *Logan Valley* and *Lloyd Corp.* alike, the functional equivalency of a shopping center to the traditional public forum:

> In the final analysis, the Court's rejection of any role for the First Amendment in the privately owned shopping center stems, I believe, from an overly formalistic view of the relationship between the institution of private ownership of property and the First Amendment's guarantee of freedom of speech. . . . [P]roperty that is privately owned is not always held for private use, and when a property owner opens his property to public use the force of [the values of privacy and autonomy] diminishes. . . . [T]here is nothing new about the notion that that autonomy interest must be accommodated with the interests of the public.[58]

On private as well as public land, the First Amendment problem for Justice Marshall is an accommodation of competing values, not to be avoided by defining the problem away. There is so much good sense in this view that it is hard to see how future Courts can ignore it. *Logan Valley* may not live in the way that Justice

55. 407 U.S. at 580.

56. However, in Hudgens v. NLRB, 424 U.S. 507, 521-23 (1976), the Court indicated that it would sustain an NLRB determination, on the basis of statutory criteria, that a shopping center's exclusion of union pickets constituted an unfair labor practice.

57. Note 56, *supra*.

58. 424 U.S. at 542.

Marshall argued in *Hudgens*, but it was right when it was decided, and it is not a bad bet for resurrection.

For Justice Marshall, the conclusion that a privately owned shopping center, or some parts of an Army base, should be included in our definition of the public forum does not lead to the further conclusion that First Amendment activity in those places is entirely beyond the reach of government regulation. It is one thing to define the scope of the public forum, and another to decide whether a given regulation of speech in the public forum is justified. Justice Marshall's opinions in the cases just discussed make this distinction, and they are reinforced by another opinion—this time for the Court—in a case that arose in the most traditional of public fora, a public sidewalk.

The case was *Grayned v. City of Rockford*.[59] In protest against a high school principal's failure to act on a series of complaints by a group of black students, some 200 persons marched and demonstrated on a sidewalk about 100 feet from the school building. Some witnesses testified that the demonstrators' cheers and chanting were audible in the school.[60] Grayned, one of the demonstrators, was convicted of violating an ordinance forbidding any person, while on grounds adjacent to a school building in which a class is in session, wilfully to make noise "which disturbs or tends to disturb the peace or good order of such school session or class . . . ." On appeal, Justice Marshall wrote for the Supreme Court in upholding the conviction against attack on the ordinance's facial validity.[61]

The ordinance in *Grayned* was challenged on grounds of vagueness and overbreadth. In discussing both issues, Justice Marshall displayed the attitudes and approaches to First Amendment problems we have already seen to be characteristic of him: a careful effort to identify with some precision the weights that are placed in the constitutional balance, a concern for the practical effects of a particular government regulation on the freedom of speech, and a special sensitivity to the need for coherent constitutional doctrine. The opinion is heavily footnoted, with many approving citations to decisions *upholding* First Amendment claims. The holding is closely tailored, to avoid giving encouragement to other restrictions that might sweep more widely over constitutionally protected expression. In short, the opinion is a fine example of the lawyer's craft, and ultimately—although it sustains a conviction—a contribution to the expansion of First Amendment liberties.

Describing the vagueness question as "close," Justice Marshall remarks that the phrase "tends to disturb" is troubling. That language, however, is saved by various state-court constructions of analogous statutes and ordinances, pointing toward a standard of actual or imminent disruption of normal school activity. Similarly, in discussing the overbreadth challenge, Justice Marshall makes clear that the only tolerable restriction on noise in this context is one that is limited to protecting against material disruption of the school session. By the time Justice Marshall finishes his analysis of the constitutionality of the ordinance, he has nailed down a rule that is broadly protective of speech—even while upholding Grayned's conviction. Those of us who set a great store by First Amendment

59. Note 48, *supra*.

60. This testimony was disputed.

61. The appeal was based solely on an attack on the validity of the ordinance on its face, and not on its application to the evidence.

values have reason to be thankful that this opinion was written by Justice Marshall.

Beyond making this contribution to First Amendment doctrine, however, the *Grayned* opinion shows that for Justice Marshall, the public forum is not some sort of constitutional sanctuary for any and all forms of expression, however they may impinge on other interests. Regulation of First Amendment activity is tolerable, even in the public forum, when government can demonstrate that regulation is necessary to achieve an interest that is *compelling*. Justice Marshall's main contribution to our thinking about the First Amendment is his insistence on a close look at both of those aspects of justification. During his years with the NAACP, Marshall was repeatedly required to make just this sort of careful examination of individual cases, in order to brief and argue a wide variety of First Amendment issues. It is no accident that today he is impatient, as he sits in judgment, of efforts to define problems away rather than resolve them through weighing interests.

II. PROSPECT: JUSTICE MARSHALL AND TOMORROW'S FIRST AMENDMENT

Justice Marshall's biographer quotes an evaluation by a lawyer who served under Marshall when he was Solicitor General: "He doesn't purport to be a legal scholar, but he is an effective lawyer because he has common sense and a good instinct for facts."[62] Despite this faint praise, Justice Marshall has made his distinctive mark on constitutional doctrine, not merely by his votes but by his opinions. He was the author, for example, of what I consider to be *the* best equal protection opinion of the modern era, his dissent in *San Antonio Independent School Dist. v. Rodriguez*.[63] In the First Amendment area as well, Justice Marshall has made significant contributions to the growth of doctrine; he cares about doctrine, and he knows that doctrine matters. I shall discuss three examples of his influence on First Amendment doctrine; all of them concern government regulation of the content of speech.

A. *The Equality Principle*

After twenty-three years as a principal advocate for the NAACP, Thurgood Marshall needed no instruction from anyone as to the importance of the First Amendment in opening the channels of political communication to minority views and unpopular speakers. Perhaps his most significant judicial contribution to First Amendment doctrine has been made in just this context, in his opinion for the Court in *Police Dep't of Chicago v. Mosley*.[64]

The *Mosley* decision held invalid a Chicago ordinance that prohibited picketing within 150 feet of a school during school hours, but excepted labor picketing. Justice Marshall's opinion rested decision on the equal protection clause of the Fourteenth Amendment, but spoke primarily to First Amendment

62. Bland, note 1, *supra*, at 8.

63. 411 U.S. 1, 70 (1973). Similarly, Justice Marshall has given us the best modern articulation of a coherent approach to cases involving the right to travel, in his opinion in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974). This approach was promptly ignored by the court in Sosna v. Iowa, 419 U.S. 393 (1975), which offered no coherent approach at all. In the First Amendment context, in addition to the opinions discussed in the text, see Justice Marshall's careful, lawyer-like dissent in Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971).

64. 408 U.S. 92 (1972).

concerns. The Chicago ordinance was unconstitutional because it discriminated against speech in the public forum on the basis of the speech's content: "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[65] Any such regulation, to be valid, must thus withstand strict judicial scrutiny, aimed at assuring that the regulation is necessary to further a substantial governmental interest.

This principle of equality is readily inferred from the First Amendment, and it had found casual expression in a few earlier opinions. But the *Mosely* opinion crystallized the principle for the future, and *Mosely* is now the standard citation for the principle. If Justice Marshall had done nothing else to promote First Amendment values, this opinion alone would earn him our admiration.[66] I have discussed *Mosley* and the implications of the equality principle elsewhere,[67] and will not repeat that discussion. Two points, however, deserve mention here.

First, Justice Marshall's *Mosley* opinion illustrates his continuing concern for the need for government to *justify* restrictions on speech. Contrary to the inference drawn by Chief Justice Burger, concurring in *Mosley*,[68] the case need not be read to stand for an absolutist rule prohibiting any regulation of speech content. What Justice Marshall does reject is the easy assumption that whole categories of speech can be defined out of the First Amendment. Instead, *Mosley* means that any restriction on speech content is presumptively invalid, demanding justification that passes the strict scrutiny of the compelling-state interest standard of judicial review.[69]

The second noteworthy feature of *Mosley* is the way the decision has come to dominate a significant area of First Amendment debate. Even opinions that resist applying Mosley, such as the opinion of Justice Stevens that failed to command a majority in *Young v. American Mini Theaters, Inc.*,[70] show the necessity of taking *Mosley* into account. The equality principle in the First Amendment is here to stay, and Justice Marshall deserves the credit for crystallizing the principle.[71]

B. *The Problem of Obscenity*

In the latter days of the Warren Era, the Supreme Court began to extricate itself from the untenable notion that the problem of obscenity could be solved by

65. 408 U.S. at 95.

66. See also Justice Marshall's partial dissent in Buckley v. Valeo, 424 U.S. 1, 286 (1976).

67. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

68. 408 U.S. at 103.

69. See Karst, note 67, *supra*, at 28-35.

70. 427 U.S. 50 (1976).

71. See also Justice Marshall's devastating dissent in California v. LaRue, 409 U.S. 109, 123 (1972), a decision that came perilously close to holding that the Twenty-first Amendment *pro tanto* repealed the First Amendment.

The *Mosley* principle, insisting on compelling justification for regulations aimed at message content, was the core of Justice Marshall's opinion for the Court in Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977). The township had forbidden the posting of "For Sale" signs on residential property, in an effort to protect against the stampeding of sales by white landowners in a newly integrated neighborhood. It was not enough, said Justice Marshall, that the township feared that the signs would cause some owners to act irrationally. Quoting Justice Brandeis, he argued that the remedy for speech that may lead to fallacy is more speech, not suppression. To deny access to information that was not false or misleading was constitutionally unacceptable, given the alternative of educating them further.

waving a definitional wand. The "two-level" theory—that some speech was protected by the First Amendment and other speech was not—had been applied in *Roth v. United States*[72] and in *Roth's* motley progeny,[73] over a decade of decisionmaking unaccompanied by any serious effort to identify *why* obscene speech should be unprotected. Then, in 1967, the Court made its first tentative effort to explain the factors that justified suppression of obscenity. In *Redrup v. New York*,[74] in a per curiam opinion that did no more than sketch those factors, the Court hinted that a work could not be held obscene unless (a) it was suppressed under a statute that focused on "a specific and limited state concern for juveniles," or (b) it was published in such a way as to constitute "an assault upon individual privacy" by exposure to a captive audience, or (c) it was distributed in a manner that constituted "pandering."[75]

Two years later, Justice Marshall wrote for the Court in *Stanley v. Georgia*,[76] and the whole tenor of debate about First Amendment protections in the area of obscenity changed in a fundamental way—for a few years, that is, until the new majority called a halt to the change and returned to the definitional glibness spawned by *Roth*.[77] Today, *Stanley's* promise remains unfulfilled, but the decision is worth our attention, even so, because of its likely influence on the future of First Amendment doctrine.

In Stanley, a man had been prosecuted for possessing obscene films in his home. The *Roth* approach suggested that the decision should turn on the question whether the films were obscene and thus beyond the First Amendment's protection. Justice Marshall's opinion for the *Stanley* Court made no such inquiry; instead, he wrote that "the First and Fourteenth Amendments prohibit making the private possession of obscene material a crime."[78] *Roth*, he said, must be read in context; its statement that obscenity lies beyond the scope of the First Amendment had no application to the private possession of obscenity. Both the right to receive ideas, "regardless of their social worth,"[79] and the privacy of the home were involved in *Stanley*. Thus: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[80] Now, if obscenity is outside the First Amendment's protection, the state need not justify its regulation, beyond making some showing of minimum rationality. What *Stanley* implied was nothing less than a re-thinking of the whole subject of obscenity as an object of the First Amendment's protection.

For the first time, the Court in *Stanley* confronted the argument that obscene material might lead to anti-social behavior. Noting that the argument rested on a shaky empirical base, Justice Marshall went on to quote Justice Brandeis' famous comment that "[a]mong free men, the deterrents ordinarily to be applied to

72. 354 U.S. 476 (1957).

73. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962); Jacobellis v. Ohio, 378 U.S. 184 (1964); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); Mishkin v. New York, 383 U.S. 502 (1966). Just listing these decisions is depressing.

74. 386 U.S. 767 (1967).

75. 386 U.S. at 769.

76. 394 U.S. 557 (1969).

77. The return to *Roth* was signaled in United States v. Reidel, 402 U.S. 351 (1971), and made explicit in Miller v. California, 413 U.S. 15 (1973), and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

78. 394 U.S. at 568.

79. *Id.* at 564.

80. *Id.* at 565.

prevent crime are education and punishment for violations of the law . . . ."[81] Justice Marshall concluded: "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits."[82] This language stands in dramatic contrast with *Roth*, where Justice Brennan had said that the Court need not even consider whether obscenity created a danger of antisocial conduct, since obscenity was not protected speech.

Justice Marshall did recognize that some state interests might justify prohibiting the public distribution of obscene material. In particular, he mentioned two of the concerns that had been noted in *Redrup*: the protection of children[83] and the protection of the sensibilities of "captive" viewers. These concerns may not exhaust all the possible justifications for state regulation of erotica;[84] Justice Marshall mentioned them merely as examples of such interests. The important thing about *Stanley* was that it shifted the focus of analysis from value-concealing definitions to the candid weighing of interests.

Roth's "two-level" theory was, in Harry Kalven's graceful phrase, "a strained effort to trap a problem."[85] It won't work, as Kalven demonstrated and as even Justice Brennan tardily came to recognize.[86] Devised as a means of avoiding open confrontation of the costs and benefits of the regulation of certain kinds of speech,[87] the theory seems likely to give way in the face of pressures for the Court to be honest about what it is doing—just as the theory has largely given way in the areas of "fighting words," libel and commercial speech.[88] *Stanley* was sharply limited, in the Court's 1973 encounter with obscenity, but the result of that encounter—the reaffirmation of *Roth* and the "two-level" theory—is an unstable resolution. When the Court returns, as it almost surely will, to the problem of justifying governmental regulation of obscenity, *Stanley* will be there, ready for rehabilitation and for use as the leading precedent for the new approach.

C. *Defamation: Public Debate and Private Rights*

Thurgood Marshall had not yet come to the Supreme Court when the Court decided *New York Times Co. v. Sullivan*,[89] the leading modern decision concerning First Amendment protections of defamatory speech. But in his first term at the Court, he had a chance to affirm his devotion to the *New York Times* principle. In *Pickering v. Board of Education*,[90] a public school teacher had been fired for

81. Whitney v. California, 274 U.S. 357, 378 (1927) (concurring opinion), quoted at 394 U.S. at 567.

82. 394 U.S. at 567.

83. But compare Justice Marshall's opinion for the Court in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), holding a movie censorship ordinance invalid for vagueness, in the context of an effort to regulate the showing of movies to children.

84. For an articulation of some arguable justifications, see J. Paul and M. Schwartz, Federal Censorship: Obscenity in the Mail, 191-202 (1961).

85. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 11.

86. Paris Adult Theatre I v. Slaton, note 77, *supra*, 413 U.S. at 73 (dissenting opinion).

87. *Cf.* Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

88. See, *e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (fighting words); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech).

89. Note 86, *supra*.

90. 391 U.S. 563 (1968).

writing a letter to a newspaper, criticizing the school board and the superintendent of schools. Some statements in the letter were false, but the statements were not shown to have impeded the teacher's job performance or to have harmed the operation of the schools. In these circumstances, and on the basis of *New York Times*, the Court held that the teacher could not constitutionally be dismissed for criticizing the work of public officials, absent a showing that his false statements were made knowingly or recklessly. Justice Marshall wrote for the Court, in an opinion that was brief and straightforward, emphasizing the "public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment . . . ."[91]

In *Pickering*, as in *Stanley*, Justice Marshall recognized that those First Amendment values might, in some circumstances, be outweighed by other values. And just a few years later he dissented from a decision that, he thought, uncritically extended the *New York Times* standard of knowing or reckless falsity to the defamation of "an individual who held no public office, who had not taken part in any public controversy, and who lived an obscure private life."[92] The case was *Rosenbloom v. Metromedia, Inc.*[93] Rosenbloom, a magazine distributor, was arrested on obscenity charges. A local radio station referred to him more or less directly in a number of news broadcasts as "a main distributor of obscene material," part of "the smut literature racket," and one of a number of "girlie-book peddlers." After his acquittal on the obscenity charges, Rosenbloom sued the broadcaster in a federal district court for damages for defamation; he succeeded in recovering $25,000 in general damages and $250,000 in punitive damages. The court of appeals reversed, on the basis of *New York Times*, and the Supreme Court affirmed.

The plurality opinion in *Rosenbloom*, written by Justice Brennan, held that the *New York Times* standard of liability governed any defamation, regardless of whether its victim was a public official or "public figure," whenever it concerned "a matter of public or general interest."[94] Justice Marshall dissented, arguing that the plurality Justices had chosen the wrong means for protecting First Amendment interests in cases such as this one. So long as the state did not impose absolute liability on the publisher, Justice Marshall was content to let liability be imposed without regard to the rigorous standard of knowing or reckless falsity. Thus, in his view, a showing of negligence should be enough to justify an award of damages to a person like Rosenbloom, who "was just one of the millions of Americans who live their lives in obscurity."[95] But Justice Marshall recognized that huge verdicts such as Rosenbloom's could have serious inhibiting affects on the press and on broadcasters. To protect against media self-censorship, he proposed an entirely different sort of First Amendment protection, to serve in place of the *New York Times* standard in such cases. He would insist on limiting

91. 391 U.S. at 573.

92. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (dissenting opinion).

93. 403 U.S. at 78.

94. 403 U.S. at 44. Only two other Justices joined in Justice Brennan's opinion. Justice White concurred on the ground that the broadcasts were commenting on the acts of public officials, and that any incidental defamation of other persons ought therefore to be subjected to the *New York Times* standard. Justice Black concurred on the ground that the First Amendment is an absolute bar to libel judgments against the press.

95. 403 U.S. at 78.

recovery, in any case involving defamation of a private individual involved in a matter of public concern, to actual damages proved by the plaintiff.[96]

Three years later, the Supreme Court adopted Justice Marshall's approach almost in its entirety. In *Gertz v. Robert Welch, Inc.*,[97] the Court faced what it characterized as a case similar to *Rosenbloom*, involving a magazine's defamation of a man who was "neither a public official nor a public figure."[98] Justice Marshall's *Rosenbloom* standard of liability became the *Gertz* majority's standard: the states were left to determine their own liability rules, so long as they did not impose liability on fault, when defamatory falsehood by a publisher or broadcaster injured a private individual. However, damages were to be limited to actual losses proved; the First Amendment would not tolerate the common law's presumptions of damage. The one apparent departure of the *Gertz* majority from Justice Marshall's earlier proposal was that the Court seemingly left open the possibility of awards of punitive damages in these cases, provided that the *New York Times* standard was met.[99]

Anyone who is surprised that Justice Marshall's leadership in this area of First Amendment doctrine was directed away from an unlimited freedom of speech should go back and read his *Mosley* and *Stanley* opinions again. Justice Marshall is no First Amendment absolutist; he has consistently recognized that the values on freedom of expression may sometimes have to give way to other important values, whether the context be shopping-center leafleting or mass-media publishing. In his *Rosenbloom* dissent, one can see his sympathy for the little people left by the Court to the mercies of sensationalist broadcasting. What his *Rosenbloom* opinion shows us is that Justice Marshall really does balance the interests in free expression against other competing interests. His constant insistence on *justification* for the regulation of speech is not a pretense designed to mask a view that justification never can be found. In *Rosenbloom* he concluded that the public-debate value in the First Amendment was less strongly present than it would be in a case involving a public official or a public figure; the balance was thus tipped in favor of allowing the state to insist on compensation for harm caused to the private individual. But when the state went beyond that protection, giving presumed or punitive damages for defamation, the balance shifted for Justice Marshall; the state's interest in punishing false and defamatory speech did not outweigh the interest in free speech.

More recently, Justice Marshall showed that he adheres to the *New York Times* standard in cases in which public officials and public figures are involved—and, more significantly, that he is prepared to give the concept of "public figures" a definition generous enough to include all cases in which the public-debate values of the First Amendment are significantly implicated. A long

96. Justice Harlan, dissenting, agreed with Justice Marshall on the issue of the standard of review, but would have permitted punitive damages.

97. 418 U.S. 323 (1974).

98. It was arguable that the plaintiff was a public figure. He was an attorney in a civil action against a police officer who had shot a suspect and had been convicted of murder. None of the Justices, however, was persuaded that he fit the "public figure" category.

99. The Court treated the question of punitive damages by stating a negative: that such damages could not be awarded in the absence of a showing that satisfied *New York Times*. Some language in the opinion is highly critical of the award of punitive damages; it is certainly left open for a defendant to argue that such an award violates the First Amendment even if *New York Times* is satisfied. Justice Marshall concurred in the *Gertz* opinion, and did not think it necessary to add a special concurrence to negate the inference that punitive damages might, under some circumstances, be awarded.

and gaudy divorce proceeding in Florida provided the setting. Time magazine erroneously reported that the Florida court had awarded a divorce to the husband, Russell Firestone, on the ground of his wife's adultery. While the judge's statement at the time of awarding the decree contained innuendo suggesting his view that both spouses had led free-spirited lives, the decree was not in fact based on a formal finding of adultery. When Mrs. Firestone sued Time for damages for defamation, she succeeded to the tune of $100,000. On review by the U.S. Supreme Court, the state courts' determination that Mrs. Firestone was not a public figure was affirmed.[100] However, the Court remanded the case for determination (or, as some of the Justices saw it' redetermination) of the issue of fault under the *Gertz* standard. Justice Marshall dissented, mainly on the ground that Mrs. Firestone was a public figure.[101]

On this issue, Justice Marshall has all the better of the argument. Mrs. Firestone was well-known in Palm Beach's version of capital-S Society. The divorce proceeding lasted for 17 months, and generated 43 articles in the Miami Herald and 45 in two Palm Beach newspapers. Mrs. Firestone held a number of press conferences during the proceedings, the better to bring her story to the public. And, as Justice Marshall dryly noted, her "subscription to a pressclipping service suggests that she was not altogether uninterested in the publicity she received."[102] She had put herself in the public spotlight, Justice Marshall argued; that was enough to satisfy *Gertz's* definition of a public figure. In the *Firestone* case, however, the Court seems to say that somehow the public had no business being interested in the sort of gossip generated by a divorce such as this one. That reading of *Gertz* was too much for Justice Marshall. As he argued in his *Rosenbloom* dissent, it should not be for the courts to determine what is and what is not legitimately within the public's interest. Rather the focus should be on the individual's actions and on the publicity that had already developed before the news report in question. There are echoes of *Mosley* in this opinion; Justice Marshall is suspicious of any doctrine that puts government officials, including judges, in the position of selecting which messages should be heard by the public.

In *Firestone* Justice Marshall again saw his own doctrinal handiwork mistreated by the Court. But here, as in the shopping-center cases and the obscenity cases, the long-term prospect for Justice Marshall's position is hopeful. There is, after all, something compelling about good sense.

III. Trusting the People

Justice Marshall's *Firestone* dissent sounds a theme that runs throughout his First Amendment opinions: trust the people to make their own choices of what they will read or hear. In this perspective he can be seen as the heir to the tradition of Justice Black. Justice Marshall's insistence on the equality principle as part of the core of the First Amendment surely derives from this trust. So also does his insistence that speech be free unless government can demonstrate compelling justifications for regulating it.

To this sense that people can be trusted to be their own masters, Justice

100. Time, Inc. v. Firestone, 424 U.S. 448 (1976).

101. He also argued that there had been a finding of negligence by the courts below, and that this finding was constitutionally unsupportable. It seems most unlikely, given the various opinions in this case, that a new determination of negligence will pass constitutional muster in the Supreme Court.

102. 424 U.S. at 486-87.

Marshall adds a healthy realism about the political process. His argument to the Supreme Court as Solicitor General, presenting the Government's views in *Reitman v. Mulkey*,[103] showed a keen awareness of the way politics worked. The NAACP years were spent immersed in that branch of politics that goes by the name of constitutional litigation.[104] His experience as a political advocate touches his work as a Justice in ways I have not begun to mention.[105] His remarks from the bench during oral argument sometimes produce laughter, as he makes his points with a wry humor that is soundly based in realism about politics and about life.[106]

Most striking of all, when one reviews Justice Marshall's First Amendment opinions, is his consistent willingness to carry principles won in the course of the Black protest movement into other contexts, for the benefit of other clienteles. He has no narrow view of the First Amendment as a guarantee to be demanded "for our side" and forgotten when someone else is the claimant. Indeed, no such view is consistent with the First Amendment itself. Justice Marshall, as much as any Justice of our time or any time, has understood that "[f]reedom of speech is indivisible; unless we protect it for all, we will have it for none."[107]

103. 387 U.S. 369 (1967). Solicitor General Marshall pointed out that placing an anti-fair-housing measure in the state's constitution required racial and ethnic minorities to win a statewide yes/no vote in order to remove the provision, while enacting such a measure as ordinary legislation allowed the usual horse-trading in the legislature that could make a minority's views more influential.

104. For a general discussion of NAACP litigation as a form of political action, see C. Vose, Caucasians Only (1959), discussing the restrictive covenant cases that culminated in Shelley v. Kraemer, 334 U.S. 1 (1948).

105. See, for example, the discussion in his opinion for the Court in the local government reapportionment case of Abate v. Mundt, 403 U.S. 182 (1971), decided the same day as *Rosenbloom*.

106. Three examples will suffice. In the oral argument of United States v. Nixon, 418 U.S. 683 (1974), the President's counsel was arguing for an absolute executive privilege for presidential conversations. Justice Marshall pressed counsel about a hypothetical case in which the President was discussing making an appointment of a judge in exchange for money. The counsel said, "If the President did appoint such an individual, the remedy is clear; the remedy is, he should be impeached." Justice Marshall interrupted: "How are you going to impeach him if you don't know about it?" When counsel floundered, Justice Marshall went on: "If you know the President is doing something wrong, you can impeach him; but the only way you can find out is this way [allowing access to the White House tapes]; you can't impeach him so you don't impeach him. You lose me some place along there."

In Cohen v. California, 403 U.S. 15 (1971), a young man had been convicted for disturbance of the peace by the "offensive conduct" of wearing a jacket with a vulgar, but common, four-letter word on it, while he was in a courthouse corridor. During oral argument, Justice Marshall asked counsel for the city whether anyone walking along the streets using the word in public might be arrested. When counsel replied in the affirmative, Justice Marshall asked, "Are the jails big enough?"

During the oral argument of Spence v. Washington, 418 U.S. 405 (1974), counsel for Spence argued that the Washington flag abuse statute was overly broad. Pointing to a flag in the courtroom, counsel noted that the gold fringe on the flag would violate the statute. Justice Marshall looked around at the flag, looked back at counsel, and said, "They'll never get us." (I have this story from my colleague Jonathan Varat, who was there.)

107. Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967).