

## MORE IS NOT LESS: A REJOINDER TO PROFESSOR MARSHALL

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I am grateful to Professor Marshall for writing such a thoughtful response to my Article. Before addressing his criticisms, it is important to note what he does not contest. He does not deny that the values which are safeguarded from government actions—equality, freedom of expression, and privacy—deserve protection from private conduct. Professor Marshall does not challenge my basic point that private power centers, especially large corporations, infringe upon these values in ways that are indistinguishable from infringements by governmental actors. Nor does Professor Marshall dispute my conclusion that there is nothing in the definition of these values that explains why they should be protected only from governmental and not from private actions.

Ultimately, Professor Marshall's entire argument is institutional. Although we both agree that crucial values should be protected from private infringement, he believes that the protection should come exclusively from legislatures, whereas I believe that protection should come from both legislatures and courts. Professor Marshall offers four reasons why the courts should not protect constitutional values from private infringements. Consideration of his arguments reveals that each is based upon unsupported assumptions and none justifies his position of total judicial abdication.

First, Professor Marshall argues that eliminating the state action requirement would "dilute existing liberties. . . ."<sup>1</sup> Initially, Professor Marshall attempts to prove this point by quoting several constitutional scholars (Professors Cox, Kauper, and Brest), who state that the fourteenth amendment applies only to state action. These quotations simply describe the traditional view of the state action doctrine. None of the quotations explains why protecting constitutional values from private infringement would decrease freedom.

Professor Marshall then argues that if everything were considered state action, individual autonomy would be lost. He states that if there were no state action doctrine, "the state [would be] omnipresent" and "[e]ach individual [would be] a conduit of government action."<sup>2</sup> The ar-

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<sup>1</sup> Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action,"* 80 Nw. U.L. REV. 558, 559 (1985).

<sup>2</sup> *Id.* at 561.

gument is that the state action doctrine preserves a zone of autonomy, allowing individuals a range of decisions which the state cannot review.

There are a number of problems with this argument. First, by admitting that legislatures have the authority to eliminate all private violations of constitutional values, Professor Marshall agrees that all private violations occur because of legislative inaction. In other words, the government is "omnipresent" with or without the state action doctrine; either the government is preventing violations or it is allowing them to occur.

Second, the conduct that is protected by the state action doctrine is the freedom and autonomy of those who are accused of violating the rights of others. The state action doctrine protects the ability of corporations and individuals to discriminate, to punish people for speaking freely, and the like. As such, it protects one group by sacrificing another. At the very least, eliminating the state action doctrine would have no net effect on freedom; there would be only a tradeoff—one set of freedoms would be protected and another set would be lost. More likely, eliminating the state action doctrine would have a positive effect on freedom because currently the choice of whose freedom to favor is made entirely on the basis of whether government action is present. Without government action, the defendant's freedom always is upheld and the plaintiff's always denied. If there were no state action doctrine, a conscious choice would be made as to whose freedom deserves greater protection. I believe that a deliberate choice between competing liberties is preferable to decisions based on arbitrary favoritism of all nongovernmental defendants.

Finally, as my Article argues, autonomy can be directly protected by laws and legal principles without the state action doctrine. If the state action doctrine protects freedoms worth safeguarding, then those freedoms can be upheld by legislatures and courts. In fact, explicit recognition and protection of such rights will enhance, not harm, the liberties.<sup>3</sup>

Professor Marshall's second major criticism is that judicial balancing of competing freedoms is undesirable. Professor Marshall advances several distinct arguments, each meriting separate consideration. One argument is that it is undesirable for a court to choose among competing rights, thus making it seem that one right is more important than another. Professor Marshall argues that it is difficult to balance competing values. This, of course, is true, but the fact that there are not easy solutions or determinate answers does not explain why the inquiry is undesirable.

Unlike Professor Marshall, I believe that courts constantly choose between competing values in situations where no easy or determinate an-

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<sup>3</sup> A lengthy discussion of why the elimination of the state action doctrine would enhance autonomy can be found at Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 519-35 (1985).

swers exist. In criminal procedure cases, the courts, in defining the scope of the fourth and fifth amendments, weigh the government's need for investigative techniques against the infringement of individual liberties. In deciding cases involving freedom of religion, the courts must resolve the inherent tension between the establishment and free exercise clauses.<sup>4</sup> Because the Court has not treated freedom of speech as an absolute right, in each first amendment case it is necessary to decide if the government's justification for restriction is sufficient to permit the challenged restriction. Upholding equality inevitably sacrifices liberty; ending discrimination eliminates someone's liberty to discriminate. The examples are endless; it is difficult to even think of many important constitutional cases in which a difficult value conflict does not exist.

Moreover, a choice between competing values is made whether or not there is a state action doctrine. Professor Marshall explicitly admits that there are competing freedoms.<sup>5</sup> This being the case, one person's liberty will be vindicated and the other person's violated. The question is not whether a balance should be struck; rather, the only issue is how to strike it. The state action doctrine arbitrarily favors nongovernmental defendants over all plaintiffs. My Article argues for balancing through reflection and choice.<sup>6</sup>

Professor Marshall makes another, separate argument in his second section, contending that eliminating the state action doctrine would inhibit legislative action.<sup>7</sup> This argument rests on a number of unsupported assumptions. Professor Marshall assumes that under the state action doctrine legislatures act to protect rights from private violations, but that such protection would be lost if the doctrine were eliminated. He further assumes that judicial protection of rights would not offset, or exceed, this loss. In other words, Professor Marshall not only assumes that legislatures are better at protecting rights than are the courts; he also

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<sup>4</sup> For example, in the 1985 term, in considering a state law that required employers to allow employees not to work on their Sabbath, the Court had to balance the harm of state support of religion against the benefits of protecting workers' exercise of their religion. *Estate of Thornton v. Caldor*, 105 S. Ct. 2914 (1985) (invalidating state law requiring that workers be allowed not to work on their Sabbath). For an excellent discussion of this tension and a possible solution, see Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

<sup>5</sup> Marshall, *supra* note 1, at 56-62.

<sup>6</sup> Professor Marshall argues that it would be undesirable for the Court to admit that it was upholding some values, such as freedom to discriminate in some contexts. *Id.* at 564. I strongly disagree. If one value is deemed more important than another, the Court should explain why. If the explanation is insufficient, one would hope that the Court would realize this and rule differently. If the choice is correct, and the explanation clear, then I believe that people can understand the result and distinguish it from other, different situations. For example, I believe that society could accept a decision upholding the right of people to discriminate in inviting dinner guests to their homes and that such a decision would enhance our concept of liberty, not jeopardize equality. Such a decision would not enshrine a "right of bigotry." *See id.* If it were bigotry, the Court would rule the other way.

<sup>7</sup> Marshall, *supra* note 1, at 566-67.

assumes that there would be less legislative protection without the state action doctrine. No justification for these assumptions is offered.

I believe that eliminating the state action doctrine would encourage, not discourage, legislative action. Liberty and equality are not denied if the legislature adequately protects them from private infringement. If, however, the legislature does not act, then the courts can order protection. Legislatures would be encouraged to act to prevent judicial decrees. Furthermore, judicial decisions frequently have inspired legislative actions. For example, the Civil Rights Act enacted during the 1960s followed a decade of Supreme Court decisions upholding the rights of blacks under the equal protection clause.<sup>8</sup>

A final point that Professor Marshall makes in his second section is that eliminating the state action doctrine would create substantial litigation and compliance costs. Specifically, Professor Marshall argues that without the state action doctrine, some defendants would forgo rights that merit protection rather than pay the costs of litigation to vindicate them.<sup>9</sup> Under the current system, plaintiffs have no protection from private infringements of fundamental values. Professor Marshall's argument is simply that without the state action doctrine plaintiffs would have too much protection. The question then is whether it is worse for plaintiffs to have no protection or too much protection; is it worse for defendants to have too little protection instead of absolute protection? Professor Marshall makes no attempt to answer these questions.

Also, it should be noted that a group's inability to protect itself through litigation never has been deemed a sufficient reason to prevent such a group from being sued. Landlords can sue to evict tenants and creditors can sue to collect from debtors, even though those sued might be forced to settle or concede simply because they lack resources for court battles. If there were no state action doctrine, the most frequent defendants would be major private power centers such as corporations. It would be ironic if society chose to prevent corporations from being sued to save them litigation costs when it never has accepted such a rationale when the defendants were the poor or the powerless.

The third major section of Professor Marshall's response contends that the effect of my argument would be to overrule *Monroe v. Pape*.<sup>10</sup> I

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<sup>8</sup> Professor Marshall argues that if the courts chose to favor landlords over tenants, legislatures could not reverse this balance. *Id.* at 566. Certainly, it is true that when courts protect a right, the legislature cannot reverse the judiciary's decision. This constitutes an objection only if it is argued that legislative decisions concerning rights are preferable to judicial ones. Professor Marshall does not explain why legislative decisions are better. It is beyond the scope of this short essay to explain why courts are the appropriate institution to protect rights in American society. Suffice it to say that the insulation of courts from majority pressure long has made the judiciary the preferred forum for vindicating rights. I hope to address at some length in a future essay now in progress the question of why courts are preferable.

<sup>9</sup> Marshall, *supra* note 1, at 567 n.52.

<sup>10</sup> 365 U.S. 167 (1961).

argue that a state denies liberty or equality if it fails to provide an adequate remedy. Therefore, there is no basis for the judiciary to create a remedy for private violations if a sufficient remedy exists. Professor Marshall contends that this argument would overrule *Monroe v. Pape*, which holds that federal courts may hear claims under section 1983 even if states provide an adequate remedy.

In *Monroe v. Pape*, the Court interpreted the legislative history of section 1983 to mean that Congress intended to create a supplemental remedy against state governments and their officers. Eliminating the state action doctrine obviously would not invalidate section 1983; federal courts could continue to hear suits against state governments and officers even when adequate state remedies exist.<sup>11</sup> My argument is only that courts would have no basis for action under the Constitution to protect rights from private infringement if the state provided a sufficient remedy. In fact, Congress could enact a statute, like section 1983, to create a supplemental federal remedy even in cases where the state provided an adequate remedy.

Thus, Professor Marshall is wrong when he claims that my argument has implications for the continued viability of *Monroe v. Pape*. He confuses the power of the courts to create a remedy in the absence of a congressional statute with the completely separate issue of the Court's compliance with a congressional statute that creates a supplemental remedy.

Professor Marshall makes a more general point in connection with his discussion of *Monroe v. Pape*. He contends that "[the] more broadly rights are drawn, the more difficult it becomes to enforce those rights stringently."<sup>12</sup> As an example, he points to the problems with broadly defining speech as all forms of expressive activity.

Professor Marshall, however, confuses breadth in the *content* of the right with breadth in its *application*. Certainly, if speech is defined broadly to include most human activities—almost anything humans do has expressive content—there is a need to be more specific. If a word is defined to include everything, the definition isn't very useful. But once the content of a right is defined, Professor Marshall offers no reason why applying the right to private parties inevitably will narrow the underlying right. In fact, I repeatedly recognize throughout the Article that rights do not necessarily apply to private parties as they apply to the government. Hence, there is no reason why narrower application of rights to private power centers will affect protection of rights from government interference. If anything, the process of evaluating the rights in applying

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<sup>11</sup> There is question whether *Monroe* survived *Parratt v. Taylor*, 451 U.S. 527 (1981), which held that federal courts may not hear claims under § 1983 when the plaintiff claims only a right to a postdeprivation remedy for a denial of due process and the state provides an adequate remedy.

<sup>12</sup> Marshall, *supra* note 1, at 567.

them to private actions will increase awareness of the underlying values and enhance their protection.

Finally, section four of Professor Marshall's reply contends that eliminating the state action doctrine would change the role of the Constitution in society, lessening the legitimacy of the Constitution and the Court. Again, Professor Marshall's argument rests on many assumptions. He assumes that people understand that constitutional rights are protected only from governmental and not from private infringement; that people would dislike the expansion of liberties which would result from the elimination of the state action doctrine; and that this dislike would decrease the Constitution's force and legitimacy. None of these assumptions is defended by Professor Marshall.

I believe that most people now view, or in any event would accept a view of, the Constitution as a document that enshrines and protects basic values from all sources of infringement. Furthermore, I believe that people would welcome expanded protection from private power centers, such as employers, landlords, and utility companies. Judicial activism has long been opposed on the grounds that it threatens the Court's institutional credibility and effectiveness. Yet, after almost a century of judicial activism, there is no indication that the Court's legitimacy has been undermined or that the Court's decisions are not followed.<sup>13</sup>

#### CONCLUSION

Professor Marshall emphasizes the inevitability of conflict between competing claims of rights. I agree. Our disagreement is over whether the conflict should be resolved by a blanket rule, such as the state action doctrine, which always prefers one group's rights over another's. I believe that society should consciously decide whose freedom to protect. Inexcusable violations of fundamental values should not be tolerated just because the violator is a major corporation rather than the government. Freedom and equality deserve protection from private, as well as public, actions.

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<sup>13</sup> See J. ELY, *DEMOCRACY AND DISTRUST* 47-48 (1980):

"The possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience." The warnings probably reached their peak during the Warren years; they were not notably heeded, yet nothing resembling destruction materialized. In fact, the Court's power continued to grow and probably has never been greater than it has been over the past two decades.

See also Gibbons, *Keynote Address*, 56 N.Y.U. L. REV. 260, 270-71 (1981) ("The historical record suggests that far from being the fragile political institution that scholars like Professor Choper and . . . Professor Alexander Bickel have perceived it to be, judicial review is in fact quite robust.").