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Liberty vs. Equality: Congressional Enforcement Power Under the Fourteenth Amendment

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LIBERTY VS. EQUALITY: CONGRESSIONAL ENFORCEMENT POWER UNDER THE FOURTEENTH AMENDMENT

KINGSLEY R. BROWNE

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INTRODUCTION

Although to some extent section 1 of the fourteenth amendment is self-executing in its command that “[n]o State shall . . . deny to any person . . . the equal protection of the laws,” the framers of the amendment, in section 5, vested power in Congress to enforce the provisions of the amendment.¹ The contours of congressional power are far from clear, however. The two major areas of controversy concern congressional power to reach private conduct and congressional power to define the substance of section 1 guarantees.

1. U.S. CONST. amend. XIV states:

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

It is the purpose of this article to examine briefly the status of the law in these two areas of fourteenth amendment interpretation, to consider the legislative history of the amendment, and to try to determine the extent to which current interpretation is in harmony with the goals of the Congress that passed the amendment. In addition, it is the thesis of this article that the concept of "equality of result," which is gaining currency at the expense of the traditional "equality of opportunity," is quite different from the concept of equality embodied in the Declaration of Independence and the fourteenth amendment. Moreover, the "New Equality," espoused by certain elements of modern society and reflected in some recent Supreme Court opinions, is ultimately harmful to society because it makes equality the premier social goal, and other traditional values, such as liberty, fall by the wayside. Indeed, as will be demonstrated, the New Equality is incompatible with liberty. Finally, this article will attempt to show a number of social costs—in addition to the sacrifice of liberty—that must be paid in order to continue the crusade for the New Equality.

I. CONGRESSIONAL POWER TO REACH PRIVATE ACTION UNDER SECTION 5

A. *The Guest Case*

The leading case dealing with congressional power to reach private conduct under the fourteenth amendment is *United States v. Guest*,² a criminal action in which six defendants were indicted for criminal conspiracy in violation of 18 U.S.C. § 241.³ The indictment comprised five numbered paragraphs, two of which are of particular interest to this inquiry. The second paragraph alleged that the defendants interfered with the free exercise and enjoyment of Negro citizens in "[t]he right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia"⁴ The fourth paragraph alleged that the defendants had conspired to interfere with Negro citizens in the exercise and enjoyment of "[t]he right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia."⁵

Writing for the Court, Justice Stewart stated that a valid cause of action was stated in paragraph 2 because the indictment alleged that one of the means by which the objects of the conspiracy were achieved was "[b]y caus-

2. 383 U.S. 745 (1966).

3. 18 U.S.C. § 241 (1976) states:

Conspiracy against rights of citizens. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

4. 383 U.S. at 753.

5. *Id.* at 757.

ing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."⁶ The Court held that this allegation was sufficiently broad to cover a charge of active connivance by officials of the state and, therefore, was not defective for failure to allege state action.

With respect to the fourth paragraph, Justice Stewart stated that the right to travel is a fundamental right completely independent of the fourteenth amendment. Thus, the right is protected against private, as well as state, interference. If the right infringed were guaranteed only by the fourteenth amendment, then only state interference could be reached.

Justice Clark's concurring opinion,⁷ in which Justices Black and Fortas joined, took exception to Justice Stewart's assumption that paragraph 2 of the indictment could stand only if some state action were found. Justice Clark made the sweeping statement that "there now can be no doubt that the specific language of section 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with fourteenth amendment rights."⁸

Justice Brennan's opinion,⁹ concurring in part and dissenting in part, in which he was joined by Chief Justice Warren and Justice Douglas, also took exception to Justice Stewart's conclusion that section 241's protection of "right[s] . . . secured . . . by the Constitution" reaches only conspiracies in which discriminatory conduct by state officers is involved. Justice Brennan argued that section 241 reaches private conspiracies not because the fourteenth amendment of its own force prohibits such conspiracies, but because section 241 is a valid exercise of congressional power which, under section 5, can reach all conspiracies. Moreover, he argued, the right to equal utilization of state facilities is a right secured by the Constitution within the meaning of section 241. He stated that a right can be "secured by the Constitution" within the meaning of section 241, even though only governmental interferences with the right are covered by the Constitution itself.

Justice Harlan dissented from that part of the Court's opinion that held that the right to travel is protected against private interference.¹⁰ He stated that it is "dubious that the Constitution was intended to create certain rights of private individuals as against other private individuals. The Constitutional Convention was called to establish a nation, not to reform the common law"¹¹ He did, however, state that there are a few rights protected against individual interference that have been read into the Constitution, such as rights against interferences with voting in federal elections, with federal law enforcement, and with communication with the federal government.

An interesting feature of the *Guest* decision is that six members of the Court specifically stated that Congress has power under section 5 to reach

6. *Id.* at 756.

7. *Id.* at 761.

8. *Id.* at 762.

9. *Id.* at 774.

10. *Id.* at 762.

11. *Id.* at 771.

conduct by private persons that is not covered by section 1 itself, although that is not the holding of the Court. Neither Justice Brennan's nor Justice Clark's opinion goes so far as to say, however, that fourteenth amendment rights are rights against other individuals. They both take the position that fourteenth amendment rights are rights against the state, but that individual interferences with this relationship between the states and individuals may be reached by Congress under section 5.

The law has not changed since *Guest*. The Supreme Court has never held that section 5 gives Congress the general power to reach private conduct; it has not needed to. The Court's recent expansion of its interpretation of congressional power under the thirteenth amendment¹² has eliminated the need for expansion of the fourteenth amendment, at least with respect to racial issues.

The leading modern case concerning congressional power to reach private action under the thirteenth amendment is *Jones v. Alfred H. Mayer Co.*,¹³ in which the Court held for the first time that 42 U.S.C. § 1982¹⁴ bars all racial discrimination, public and private, in the sale or rental of property, and that so construed the statute is a valid exercise of congressional power to enforce the thirteenth amendment. In *Griffin v. Breckenridge*,¹⁵ the Court held that 42 U.S.C. § 1985(c)¹⁶ was a valid exercise of congressional power to reach private conduct under section 2 of the thirteenth amendment, and, in *Runyon v. McCrary*,¹⁷ the Court held that 42 U.S.C. § 1981¹⁸ prohibits private schools from discriminating on the basis of race, using the questionable rationale that the power to make and enforce contracts under the statute imposes a duty on individuals not to refuse to contract for racial reasons.

The principal drawback (for those who favor a broad congressional power in this area) of using the thirteenth amendment to reach private conduct is the inability of Congress to reach the conduct of individuals who are discriminating on the basis of something other than race.¹⁹

12. Section 2 of the thirteenth amendment is substantially similar to section 5 of the fourteenth amendment. The thirteenth amendment, section 2, provides that: "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

13. 392 U.S. 409 (1968). For criticism of this decision, see Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485 (1969).

14. 42 U.S.C. § 1982 (1976): "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

15. 403 U.S. 88 (1971).

16. 42 U.S.C. § 1985(c) (1976) (renumbered as § 1985(3) in Supp. III 1979). This statute provides a civil cause of action for victims of conspiracies which have as their purpose "depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"

17. 427 U.S. 160 (1976).

18. 42 U.S.C. § 1981 (1976) states: "All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens"

19. The issue whether 42 U.S.C. § 1985 covers private sex discrimination was presented to the Court in *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979). The question was not resolved, because the Court held that the plaintiff could not avoid following the procedures of Title VII by going under § 1985; the Court therefore vacated and remanded to the court of appeals, which had held that § 1985 covered sex discrimination.

Very little is certain in the area of fourteenth amendment interpretation, but it is virtually certain that the issue of congressional power to reach private conduct under section 5 will once again be before the Court. Thus, it may be useful at this point to examine the legislative history of the fourteenth amendment for clues concerning the intent of the framers of the amendment.

B. *The Legislative History of the Fourteenth Amendment*

Vast amounts of research and analysis have been undertaken to ascertain the "intent of the framers" of the fourteenth amendment.²⁰ It is not the purpose of this article to perform another exhaustive study of the subject or even to recapitulate that which has already been done. Rather, this article will rely on the work of others and attempt to glean from other writers some kind of insight into the problem of legislative intent.²¹

The obvious starting point for determining the meaning of a provision is its language. The fourteenth amendment states "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the amendment gives Congress "power to enforce, by appropriate legislation, the provisions of this article." The language seems clear: *States* may not deny any person equal protection of the laws, and Congress has the power to ensure that they do not. Moreover, the text says "equal protection of the *laws*"; it does not say "equal treatment." Because of the focus on laws, it seems unlikely that regulation of private conduct was contemplated. Given the plain meaning of the amendment, the burden should be on those claiming the framers had a different intent.

There were several versions of the fourteenth amendment introduced prior to the introduction of the version that made its way into the Constitution. Although there were many differences between the various versions, there were essentially two basic forms—the "positive" form and the "negative" form. The positive form is represented in the versions of the amendment submitted by John Bingham, which in one form or another gave

20. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) [hereinafter cited as *GOVERNMENT BY JUDICIARY*]; C. FAIRMAN, *Reconstruction and Reunion 1864-1888*, in *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* pt. 1 (1971) [hereinafter cited as *RECONSTRUCTION AND REUNION*]; H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956); J. TEN BROEK, *EQUAL UNDER LAW* (1965); Berger, *The Fourteenth Amendment: The Framers' Design*, 30 S.C.L. REV. 495 (1979); Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311 (1979); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950); Gaffney, *History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court*, 25 CATH. U.L. REV. 207 (1976); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956); Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

21. Not everyone agrees that legislative intent is of particular importance. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). For the view that opinions in Congress ranged so widely that the specific intent is impossible to glean, see Frank & Munro, *supra* note 20.

Congress power to pass laws to secure to all persons the right to equal protection of the laws.²² The negative form is represented in the versions submitted by Thaddeus Stevens, which stated that all laws shall operate impartially, or that no state shall discriminate.²³ The final product is something of a hybrid of the two versions—section 1 embodying the negative version, and section 5 acting as a grant of power to Congress.

The question here is simply whether the grant of power to Congress is merely to ensure that “no state shall deny” the equal protection of the laws, or whether it is an affirmative grant to Congress of a general legislative power with respect to life, liberty, and property. In other words, does Congress have the power under section 5 only to protect the *rights* guaranteed by the fourteenth amendment, or does Congress have the power to protect *interests* similar to those safeguarded by fourteenth amendment rights? If Congress has the power only to protect rights guaranteed by the amendment, then Congress cannot reach private conduct.

Much of the confusion surrounding the interpretation of the fourteenth amendment arises out of a careless use of the term “right,” and a failure to understand that for every right there is a duty.²⁴ Indeed, the term “right” in the absence of a correlative duty is meaningless. Section 1 of the amendment gives persons within the jurisdiction of the state the right to be free from discriminatory treatment by the state. Who, then, has the duty to provide non-discriminatory treatment? The obvious—and only—answer is that the duty falls upon the state.

Even the members of the *Guest* Court who argued that section 5 gave Congress the power to reach individual conduct appear to accept this conclusion. Those members of the Court, however, seem to argue that section 5 gives Congress power not only to protect fourteenth amendment rights, but also to protect the interests safeguarded by the fourteenth amendment. They recognize that the fourteenth amendment does not of its own force impose a duty upon private citizens to act in any particular manner toward other citizens. It does, however, encompass certain interests, such as equal treatment with respect to life, liberty, and property. Six of the nine members of the *Guest* Court would allow Congress, then, to ban activities which violate the spirit of section 1, but not the letter, much the way the Federal Trade Commission Act²⁵ allows the FTC to reach violations of the spirit of the antitrust laws.²⁶ What is questionable in the economic sphere is to be abhorred in the constitutional sphere—if section 1 imposes no duty on indi-

22. For example, on February 3, 1866, Bingham introduced the following amendment: “Congress shall have power . . . to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th Amend.)” *Reconstruction and Reunion*, *supra* note 20, at 1274.

23. For example, on January 12, 1866, Stevens introduced the following amendment: “All laws, state or national, shall operate impartially and equally on all persons without regard to race or color.” *Id.* at 1271.

24. See generally Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 *YALE L.J.* 16, 28-59 (1913).

25. 15 U.S.C. §§ 41-58 (1976).

26. See, e.g., *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392 (1953).

viduals, then how can section 5, which is merely power to enforce section 1, impose that duty?

One of the leading proponents of the view that Congress has the power to reach private conduct under section 5 is Jacobus ten Broek. Ten Broek argues that the fourteenth amendment is an abolitionist document and that pre-Civil War abolitionist doctrine should be examined for elucidation of the content of the amendment.²⁷ Ten Broek further contends that the negative form of the amendment was adopted because the positive form made protection of the amendment only as certain as Republican control of Congress—if protection were to come only from Congress, a hostile Congress could withdraw the protection. Therefore, argues ten Broek, it was necessary to make the amendment self-executing. This argument skillfully avoids the main question: Upon whom is the duty to rest? If Congress actually intended to impose a duty upon individuals as well as states and wanted the amendment to be self-executing, why did the drafters not write “no state nor any individual shall deny . . .”? Certainly the framers were not so inept as to impose the duty on the wrong party in their zeal to make the amendment self-executing. Ten Broek argues further that the phrase “no state shall” in conjunction with section 5 must grant Congress the power to supply protection and that, therefore, the negative form has the same meaning as the positive form.

Ten Broek seizes upon statements in the debates on the amendment by Robert Hale, a conservative Republican who, in expressing his reservations about the positive form of the amendment, stated that if one reads the language precisely, it is “a grant of the fullest and most ample power to Congress to make all laws ‘necessary and proper to secure to all persons in the several states protection in the right of life, liberty, and property,’ with the simple proviso that such protection shall be equal.”²⁸ There are obvious problems in relying on statements expressing opposition to a given piece of legislation because of a tendency on the part of those who oppose legislation to predict horrendous results if the legislation should pass. Moreover, ten Broek essentially ignores the significance of Thaddeus Stevens’ reply to Hale:

Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a state was equal, impartial to all? Or is it not simply to provide that, where any state makes a distinction in the same law between different classes of individuals, Congress shall have the power to correct such discrimination and inequality?²⁹

As a matter of statutory construction, statements by proponents of legislation would seem somewhat more reliable than statements by opponents. For example, how many people would wish to rely on Phyllis Schlafly’s interpretation of the Equal Rights Amendment?³⁰

Ten Broek also ignores a number of statements by John Bingham, notably one made in support of the final draft of the amendment. Bingham

27. Ten Broek, *supra* note 20. See also Kaczorowski, *Searching for the Intent of the Framers of Fourteenth Amendment*, 5 CONN. L. REV. 368 (1972-73).

28. Ten Broek, *supra* note 20, at 212.

29. *Id.* at n.6.

30. See generally P. SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* (1977).

remarked that section 1 would fill a great need: "[T]hat is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction *whenever the same shall be abridged or denied by the unconstitutional acts of any State.*"³¹

Ten Broek also points to the large number of references in the debates to accounts of individual atrocities—lynchings, beatings, and the like—and argues that victims of these crimes were intended to be protected by the amendment and, unless that amendment reaches private conduct, the amendment is a futile gesture.³² Congress undoubtedly was concerned with such occurrences, but ten Broek misapprehends the intended remedy. It was not to punish the perpetrators of the crimes, but to punish state officials when they failed to protect the victims.³³ The words of John Bingham best show the remedy desired:

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, *to punish officials of States* for violation of the oaths enjoined upon them by their Constitution? That is the question and the whole question . . . [If state legislators] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and the rights of their fellow men.³⁴

Given the unambiguous wording of the amendment, and absent any convincing evidence that the Thirty-ninth Congress intended the amendment to encompass private conduct, the amendment should not be extended to cover such conduct.

II. CONGRESSIONAL POWER TO DEFINE THE SUBSTANTIVE CONTENT OF FOURTEENTH AMENDMENT GUARANTEES

Beyond the issue of whether Congress has the power to reach private conduct under section 5 is the question whether Congress can define the substantive content of the amendment. This question has never been answered definitively.

The leading modern case dealing with this issue is *Katzenbach v. Morgan*.³⁵ *Morgan* involved a challenge to section 4(e) of the Voting Rights Act of 1965,³⁶ which provided that no person who had successfully completed the sixth grade at an accredited Puerto Rican school where the language of instruction was other than English could be denied the right to vote in any election because of an inability to read and write English. Plaintiffs were

31. CONG. GLOBE, 39th Cong., 1st Sess. 2547 (1866), cited in RECONSTRUCTION AND REUNION, *supra* note 20, at 1287 (emphasis added).

32. Ten Broek, *supra* note 20, at 203-04.

33. Avins, *Federal Power to Punish Individual Crimes under the Fourteenth Amendment: The Original Understanding*, 43 NOTRE DAME L. 317 (1967-68).

34. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (emphasis added).

35. 384 U.S. 641 (1966).

36. 42 U.S.C. §1973b(e) (1976).

registered voters of New York challenging the constitutionality of section 4(e).

The New York Attorney General argued that Congress can exercise its section 5 power only if the judicial branch determines that the state law is prohibited by the amendment Congress seeks to enforce. Because *Lassiter v. Northampton County Board of Elections*³⁷ approved literacy tests not used for invidious discrimination, the state argued that Congress had no power to prohibit their use.

The question thus presented to the Supreme Court was whether Congress could forbid the use of literacy tests even if the Court might not have found such use to be a violation of section 1. The Court answered in the affirmative, but the decision rested on alternative holdings. The Court held that congressional power under section 5 is the same kind of broad power expressed in the necessary and proper clause,³⁸ and that there were two possible ways Congress might have exercised this power in passing section 4(e).

First, Congress could have decided that the enhanced political power obtained through exercise of the franchise would be helpful in gaining non-discriminatory public services for the Puerto Rican community. This is a standard necessary and proper clause argument: The Puerto Ricans have a right to non-discriminatory treatment, Congress has the power to guarantee it, and Congress has chosen to guarantee it in this manner. The analysis is in accord with Chief Justice John Marshall's classic formulation of the necessary and proper power in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."³⁹ There is nothing out of the ordinary about this first alternative holding in *Morgan*, and it is a statement of the law with which few would disagree. The second alternative holding is, however, if not revolutionary, at least dramatic.

Justice Brennan, writing for the majority, also held that Congress could have decided that literacy tests are a denial of equal protection, notwithstanding the fact that the Court reached a contrary conclusion. Justice Brennan's opinion displayed a great deal of deference to Congress' "specially informed legislative competence"⁴⁰ and stated that it was "Congress' prerogative to weigh these competing considerations,"⁴¹ and that it "is enough that we perceive a basis upon which Congress might predicate [its] judgment."⁴² One might read this opinion narrowly and argue that Congress had merely determined (or could have determined) that in this particular instance the use of literacy tests was a denial of equal protection because the tests were used discriminatorily. There is, however, some rather broad language in the opinion that suggests that Justice Brennan had more than that in mind. He

37. 360 U.S. 45 (1959).

38. U.S. CONST. art. I, § 8, cl. 18.

39. 17 U.S. (4 Wheat.) 316, 421 (1819).

40. 384 U.S. at 656.

41. *Id.*

42. *Id.*

stated that "Congress might also have questioned whether denial of a right so precious and fundamental in our society was a necessary or appropriate means . . . of furthering the goal of an intelligent exercise of the franchise."⁴³ Here, Justice Brennan is essentially allowing Congress to make the decision that literacy tests might violate the equal protection clause, even when not used for invidious discrimination, despite the Court's contrary resolution of that question in *Lassiter*.

Justice Harlan, joined by Justice Stewart, dissented, arguing that the literacy test was reasonably designed to serve a legitimate state interest. Moreover, he argued that under *Marbury v. Madison*⁴⁴ it is a judicial question whether a practice is a violation of the Constitution. Justice Harlan also distinguished between the question of whether a statute is appropriate remedial legislation to cure an established violation and the question of whether there has in fact been an infringement of a constitutional command. The fact that there had been no findings of any discrimination in voting to support section 4(e) as appropriate remedial legislation led Justice Harlan to dissent. He also argued that Justice Brennan's deference to Congress' special legislative competence and to its ability to weigh competing considerations would allow Congress to dilute equal protection and due process decisions of the Court as well as to expand them.⁴⁵

Justice Brennan responded to that argument in a footnote in which he stated that

[Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.⁴⁶

This reassurance, however, is off-target. It begs the question to state that Congress' power is limited to enforcing the guarantees of the amendment; that is a statement acceptable to all. The question, left unanswered by the footnote, is who decides what the amendment is to guarantee?

The conclusion to be reached from Justice Brennan's opinion is that Congress' view of the content of the guarantee controls when it is more expansive than that of the Court, while the Court's interpretation applies when the Court's interpretation is more expansive. This is superficially analogous to the doctrine that a state court may interpret a provision of its constitution that is identical to a provision of the United States Constitution in such a way that the state constitution grants more protection, but it may not apply its state constitution in such a way that does not provide the minimum protection required under the United States Constitution.⁴⁷ The analogy

43. *Id.* at 654.

44. 5 U.S. (1 Cranch) 137 (1803).

45. 384 U.S. at 668 (Harlan, J., dissenting).

46. *Id.* at 651 n.10.

47. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

breaks down, however, in two respects. First, the state's interpretation and the United States Supreme Court's interpretation are interpretations of different documents. Second, the supreme court of a state may not interpret the United States Constitution in a manner different from the interpretation provided by the United States Supreme Court, even if the state court interprets constitutional guarantees more liberally.⁴⁸

Beyond the naked assertion that Congress may only enlarge, not dilute, there is no explanation of why this should be. If Congress has superior competence, it should be deferred to; if it does not have superior competence, it should not be deferred to. There is no principled way to distinguish enlargement from dilution.⁴⁹

The theory that Congress may expand, but not restrict, the scope of constitutional guarantees has been called the "ratchet theory."⁵⁰ In addition to the problem of determining why the ratchet can turn only one way, is the problem in some instances of determining in which direction the ratchet is turning.⁵¹ For example, suppose Congress decided to pass a statute creating a newsman's privilege in state courts or enlarging the power of state courts to issue gag orders. Such statutes would involve conflicts between the first amendment rights of the press and the fifth and sixth amendment rights of defendants. If Congress has a specially informed legislative competence, it should be allowed to weigh the competing considerations and have its conclusion accorded the same deference as in *Morgan*.

The next case to deal with congressional power to define the substance of fourteenth amendment guarantees was *Oregon v. Mitchell*,⁵² in which the constitutionality of provisions of the 1970 amendments to the Voting Rights Act was challenged. The challenged provisions provided for a nationwide extension of the literacy test ban and an extension of the right to vote to eighteen-year-olds in state and federal elections. The literacy test ban was upheld unanimously. Justice Harlan, who dissented in *Morgan*, accepted as a basis for congressional action actual findings by Congress that literacy tests were tools of discrimination. Because of his firm conviction that the fourteenth amendment has no application to voting cases, he concurred on the ground that the ban was a legitimate exercise of Congress' enforcement power under section 2 of the fifteenth amendment.⁵³

48. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291 (1980).

49. See Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Gordon, *The Nature and Uses of Congressional Power under Section 5 of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977).

50. Cohen, *supra* note 49, at 606.

51. *Id.* at 607.

52. 400 U.S. 112 (1970).

53. Justice Harlan argued consistently throughout his career that voting was not covered by the fourteenth amendment. He pointed to the fact that constitutional amendments were necessary to bring about abolition of state restrictions on voting with respect to race, sex, and failure to pay a poll tax (amendments XV, XIX, and XXIV, respectively). Furthermore, Justice Harlan convincingly argued that the legislative history of the fourteenth amendment demonstrates that voting was intended to be excluded from the protection of the amendment, as does the very text of section 2 of the amendment, which calls for a decrease in representation in

The more interesting aspect of *Oregon v. Mitchell* lies in the treatment of the eighteen-year-old voting provision. Four members of the Court argued that Congress has the power to regulate voter qualifications in both federal and state elections,⁵⁴ and four members of the Court argued that Congress could regulate in neither.⁵⁵ Only one justice, Justice Black, believed that Congress could regulate federal, but not state, elections. Because of the shifting majorities, Justice Black wrote the decision of the Court.

To support his decision that Congress may regulate federal elections, Justice Black relied on article I, section 4 of the Constitution,⁵⁶ an argument of no relevance to the topic of this article. Justice Black also held that congressional regulation of state elections was an invalid exercise of congressional power under section 5 of the fourteenth amendment, because the power to determine voter qualifications is vital to the "separate and independent existence of the States."⁵⁷ He relied on the fact that there had been no finding that the twenty-one-year-old vote requirements were used by states to disenfranchise on the basis of race. The applicability of Justice Black's reasoning to cases not involving voting is doubtful, for his opinion states that "where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race."⁵⁸

Justice Black identified three limitations on congressional power: 1) Congress may not by legislation repeal other provisions of the Constitution;⁵⁹ 2) section 5 was not intended, and may not be used, to strip states of the power of self-government or to "convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation";⁶⁰ and 3) Congress may not undercut other fourteenth amendment guarantees.⁶¹

Justice Douglas would have upheld the application of the eighteen-year-old vote requirement to state elections.⁶² He stated that "Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection,"⁶³ deferring to Congress' judg-

Congress of those states that denied blacks the vote. *Reynolds v. Sims*, 377 U.S. 533 (1964) (Harlan, J., dissenting). In fact, at the time of passage of the amendment, only six states had extended the franchise to Negroes. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 70.

54. Douglas, Brennan, White, and Marshall, JJ.

55. Burger, C.J., Stewart, Blackmun, and Harlan, JJ.

56. Article I, § 4 states, in pertinent part: "The Times, Places and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 3.

57. 400 U.S. at 125.

58. *Id.* at 130.

59. *Id.* at 128. The fourteenth amendment of its own force, however, gives Congress the power to limit a state's eleventh amendment immunity. *See, e.g., Quern v. Jordan*, 440 U.S. 332 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

60. 400 U.S. at 128.

61. *Id.* This harks back to Justice Brennan's footnote in *Morgan*. *See* text accompanying notes 45-49 *supra*.

62. 400 U.S. at 135 (Douglas, J., concurring in part and dissenting in part).

63. *Id.* at 141.

ment concerning the substance of the equal protection clause.

Justice Brennan, joined by Justices White and Marshall, would have upheld the eighteen-year-old requirement on either of two alternative grounds. First, he argued that it is questionable whether denying the vote to those between the ages of eighteen and twenty-one could withstand the scrutiny of the Court under the equal protection clause.⁶⁴ Second, he argued that even if the state laws were proper under section 1 of the amendment, "proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases."⁶⁵

Justice Brennan also stated that the twenty-one-year-old vote requirement would be subjected to strict scrutiny and a state would have to show a compelling interest in the requirement.⁶⁶ Justice Brennan went on to state that as long as Congress' decision that the equal protection clause requires the extension of the franchise to eighteen-year-olds is rational, no more must be shown to support its decision.

Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, would deny Congress the power to set qualifications in either state or federal elections, and stated that section 302 is valid

only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling."⁶⁷

Because Congress does not have the power to define the substance of the amendment, Justice Stewart argued that section 302 was invalid.

Justice Harlan also argued that Congress could not lower the voting age in either federal or state elections.⁶⁸ He stated that the extent of congressional power is to prevent or remedy discrimination that is within the purview of the amendment. He characterized the suggestion that members of the age group between eighteen and twenty-one were threatened with unconstitutional discrimination as "little short of fanciful."⁶⁹ He went on to say that "all the evidence indicates that Congress—led on by recent decisions of this Court—thought simply that eighteen-year-olds were fairly entitled to the vote and that Congress could give it to them by legislation."⁷⁰ This comment points out a serious problem with deference to Congress in this area. Realistically, Congress does not come to the conclusion that a given

64. *Id.* at 240 (Brennan, J., concurring in part and dissenting in part).

65. *Id.*

66. As Justice Stewart pointed out in his opinion, this is an impossible standard to set. *Id.* at 294-95 (Stewart, J., concurring in part and dissenting in part). He argued that no state could possibly demonstrate a compelling interest in drawing the line at one age or another. The only realistic approach is to determine whether a state has a compelling interest in setting an age qualification and then to determine whether the age selected is a reasonable one.

67. *Id.* at 296.

68. *Id.* at 154 (Harlan, J., concurring in part and dissenting in part).

69. *Id.* at 212.

70. *Id.* at 213.

situation (for example, a twenty-one-year-old voting requirement) is a violation of the equal protection clause and then undertake to correct it. Instead, Congress reaches the conclusion that a different situation is politically—not constitutionally—desirable and then seeks to find some constitutional authority for its action. Although the same criticism is often made of decisions by the Court, Congress is, in principle as well as in fact, a political body; the Court may at times respond to political pressure, but it is not overtly a political institution.

It appears that in *Oregon v. Mitchell* there are five justices (Black, Douglas, Brennan, White and Marshall) who believe that, at least when Congress is not impinging upon concerns left explicitly to the states, Congress may expand the substance of fourteenth amendment guarantees.

More recently, in *City of Rome v. United States*,⁷¹ the Court was faced with the question of the constitutionality of section 5 of the Voting Rights Act, which requires "preclearance" by the United States Attorney General of changes in voting practices in "covered" jurisdictions. Section 5 permits such change only if the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The case centered around changes in the electoral system of Rome, Georgia, primarily a change whereby city commissioners would be elected at-large within wards. On the same day in a separate case, the Supreme Court upheld the constitutionality of at-large elections in Mobile, Alabama, where there was a racially disparate effect.⁷²

Justice Marshall, writing for the majority in *City of Rome*, upheld the challenged section of the Voting Rights Act as valid legislation under section 2 of the fifteenth amendment, despite the City's argument that, since section 1 of the amendment prohibits only purposeful discrimination, Congress is without power under the enforcement clause to reach conduct having only a discriminatory effect. Justice Marshall held that the preclearance provisions requiring both a lack of discriminatory purpose and a lack of discriminatory effect were appropriate remedial legislation.

Although *City of Rome* was decided on the basis of the fifteenth amendment, it is relevant to fourteenth amendment analysis because of the similarity between the enforcement clauses of the two amendments, and because of Justice Rehnquist's dissent,⁷³ in which he discussed the history of the Court's treatment of the "remedial versus substantive" debate. Justice Rehnquist argued that there are three theories of congressional enforcement power relevant to the case. The first is that if the proposed changes violated section 1 of the amendment then, without question, Congress could prohibit their implementation. Second, Congress could act to enforce the judicially established substantive provisions of the amendments. The third theory is that Congress has the power to determine that electoral changes with a disparate

71. 446 U.S. 156 (1980).

72. *Mobile v. Bolden*, 446 U.S. 55 (1980). *Mobile's* plan was not covered by the Voting Rights Act because *Mobile* was not seeking to change its system; it had been in effect since 1911. *Id.* at 59.

73. 446 U.S. at 206 (Rehnquist, J., dissenting).

impact on race violate the Constitution.⁷⁴

Justice Rehnquist argued that neither of the first two theories could support the application of the Voting Rights Act to Rome. He argued that under *Mobile v. Bolden* Rome's changes were not unconstitutional, and that because of a lower court finding that the city had engaged in no purposeful discrimination for almost two decades, application of the Act was not an appropriate remedial measure.⁷⁵ Therefore, argued Justice Rehnquist, application of the preclearance provision to Rome was constitutional only if Congress had the power to determine that electoral changes with "a disparate impact on a minority group's ability to elect a candidate of their race violates the Fourteenth or Fifteenth Amendments."⁷⁶ He went on to argue that a majority of the Court has never ratified congressional power to define the substantive content of the Civil War amendments.⁷⁷ It should be remembered, however, that Justice Black's opinion in *Oregon* can be read to say that Congress does have some power to define the substance of the amendments' guarantees.⁷⁸ Based on his reasoning in *Oregon*, however, Justice Black would probably not have upheld this particular exercise of congressional power.

III. COUNTERVAILING FORCES LIMITING CONGRESSIONAL POWER

There are two separate considerations that counsel restraint in interpreting congressional power under the enforcement clauses of the Civil War amendments: federalism and individual freedom.⁷⁹ Interpretations that would allow Congress to reach private conduct under the fourteenth amendment primarily implicate concerns of individual liberty—if Congress grants individuals rights as against other individuals, it necessarily imposes a duty on the latter, thereby restricting individual liberty.⁸⁰ Interpretations that would allow Congress to define the substance of the amendments' guarantees implicate primarily federalism concerns, at least so long as private conduct cannot be reached. The extent of the impingement would, of course, depend upon the expansiveness of the Court's view of the grant of federal power. Therefore, speculation about possible effects of the view that Congress is empowered to reach private conduct and define the scope of the amendments must be rather general, and only a few possible conflicts between congressional power and either federalism or individual liberty will be addressed.

Without question, the fourteenth amendment was intended to be a

74. 446 U.S. at 210.

75. The Court held that the only way that Rome could "bail out" from under the preclearance provisions was if the entire State of Georgia could bail out. In order for the entire state to bail out, Georgia would have to show that every political subdivision had freed itself from discrimination, thereby making every political subdivision in the state hostage to the transgressions of a single subdivision. *Id.* at 203-04 (Powell, J., dissenting).

76. *Id.* at 219-20 (Rehnquist, J., dissenting).

77. *Id.* at 220-21.

78. See text accompanying note 59 *supra*.

79. See Cohen, *supra* note 49. Cohen argues that the federalism issue is the major constitutional concern. The federalism concern may, however, be viewed as an aspect of the individual freedom concern, because decreased state autonomy leads to a centralization of power.

80. See text accompanying notes 2-19 *supra*.

limit on state power.⁸¹ The language of the amendment itself makes that much clear. Moreover, the Thirty-ninth Congress intended that Congress, not the courts, would be the primary enforcers of the amendment,⁸² although Justice Brennan dismisses that issue as "of academic interest only."⁸³ It is also rather clear from the legislative history, however, that the intent of the framers was not to effect too drastic a change in the federal system.⁸⁴ An expansive reading of section 5, in conjunction with current notions concerning broad congressional powers under the commerce power⁸⁵ and the spending power,⁸⁶ would render the states hollow shells.

In addition to the regulation of voting, which was, without a doubt, beyond the intent of the framers,⁸⁷ the most obvious exercise of congressional power would be in the area of state justice systems. Despite the fact that the Supreme Court has stated that the fourteenth amendment does not require twelve-man juries⁸⁸ or indictment by grand jury⁸⁹ in state criminal proceedings, nor does the amendment prohibit capital punishment *per se*,⁹⁰ Congress could presumably regulate in these areas.

Congress also might mandate bilingual education, even in the absence of federal funding. It might find that in order for all children to enjoy the equal protection of the laws, they must all be taught in their native tongues.

If Congress is permitted to weigh competing constitutional values, it might also establish a newsman's privilege in state and federal courts.⁹¹ In *Welsh v. United States*,⁹² three justices⁹³ were willing to defer to Congress' balancing of values of religious freedom and Congress' power to raise armies, in Congress' establishment of criteria for conscientious objection to the draft. An even broader reading might allow Congress to make its own determination of what constitutes a taking of private property, thereby allowing Congress to regulate local zoning practices.

This is not to suggest that these particular acts will come to pass, only that they are the kinds of actions Congress might take in exercise of an expansive power. Recent growth in power of the federal government has decreased in force the authority of Herbert Wechsler's classic statement on

81. See note 59 *supra*.

82. GOVERNMENT BY JUDICIARY, *supra* note 20, at 221-29.

83. *Oregon v. Mitchell*, 400 U.S. 112, 263-64 n.37 (1970).

84. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). Fairman states:

The freedom that the states traditionally have exercised to develop their own systems of administering justice, repels any thought that the federal provisions on grand jury, criminal jury, and civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified.

Id. at 137.

85. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941).

86. See, e.g., *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947).

87. See note 53 *supra*.

88. *Williams v. Florida*, 399 U.S. 78 (1970).

89. *Hurtado v. California*, 110 U.S. 516 (1884).

90. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

91. See text accompanying note 51 *supra*.

92. 398 U.S. 333 (1970).

93. Burger, C.J., White & Stewart, JJ.

federalism that “[f]ar from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration.”⁹⁴ In theory, Wechsler is right; in practice, however, there seems to be a tendency for the perspectives of a congressman to change once in Washington, from concern for state interest to national concerns. Perhaps this is as it should be, but it does not make Congress a very effective restraint on the exercise of congressional (its own) power.

With respect to concerns of individual freedom, congressional power to reach private conduct is of great concern. Regardless of whether one favors congressional intervention in particular private matters, it must be borne in mind that such intervention does limit individual liberty. One may counter that the liberty to be a bigot and act in a discriminatory manner is not worth having. Perhaps it is and perhaps it is not. The fact remains that freedom of action is restrained. The topic of individual freedom will be dealt with more extensively below;⁹⁵ for the moment it will suffice to identify areas of possible congressional intervention.

Congress might, for example, attempt to regulate all forms of private discrimination, including such practices as private club membership, although in such a case constitutional concerns of associational freedom would probably serve as a limit.⁹⁶ Congress might also impose upon private employers obligations of due process toward their employees with regard to such matters as promotion and termination. Also, the *Runyon v. McCrary*⁹⁷ rationale might be applied through the fourteenth amendment to reach sex discrimination in private schools receiving no federal aid.⁹⁸ Although unlikely, Congress might go so far as to determine that corporal punishment of children violates the children’s civil rights and outlaw spanking, as Sweden did. Again, of course, constitutional concerns of family autonomy and privacy would be raised.⁹⁹

Another result of an expansive view of congressional power to define the substance of fourteenth amendment guarantees is the bill now pending before Congress stating that “human life shall be deemed to exist from conception” and that the term “person” in the fourteenth amendment “shall include all human life as defined herein.”¹⁰⁰ The bill, expressly based upon section 5, contains a finding that “present day scientific evidence indicates a significant likelihood that actual human life exists from conception.”¹⁰¹ The purpose of the bill is, of course, to get around the holding in *Roe v. Wade*¹⁰²

94. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

95. See text accompanying notes 194-232 *infra*.

96. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

97. See text accompanying notes 13-18 *supra*.

98. See Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 243.

99. See generally *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

100. S. 158, 96th Cong., 1st Sess., Cong. Rec. S. 287-88 (Jan. 19, 1981).

101. *Id.*

102. 410 U.S. 113 (1973).

forbidding states from banning abortions in most circumstances. Such a measure would not only permit states to restrict access to abortions, it would also, presumably, prohibit any state funding of abortions and perhaps *require* states to ban abortions, or at least give Congress the power to prohibit abortions nationwide.

Proponents of the Human Life Bill argue that the determination of when life begins is a matter for which Congress is more suited than are the courts.¹⁰³ In *Wade*, the Court declined to decide when human life begins, but stated that the word "person" in the fourteenth amendment does not include the unborn. The bill reflects one of the major difficulties with the "ratchet theory."¹⁰⁴ It is far from clear in the case of this bill which way the ratchet is turning. It is true that the "privacy right" of a woman to abort a fetus she is carrying would be restricted. At the same time, however, Congress would be extending fourteenth amendment protections to a whole new class of "persons." If, as Justice Brennan stated in *Morgan*, it is Congress' prerogative to weigh competing considerations and that all that is necessary to sustain congressional action under section 5 is "a basis upon which Congress might predicate its judgment,"¹⁰⁵ there is no principled reason to deny Congress power in this area. If the bill passes, the Court will have to face squarely the question of whether Congress has wide latitude in determining the scope of fourteenth amendment rights when it seeks to advance liberal causes, but a much narrower latitude in advancing conservative causes.

IV. EQUALITY AND LIBERTY

The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of the United States Handicapper General.¹⁰⁶

A. *Equality and Liberty Defined*

Most of the attempts to expand congressional enforcement power under the Civil War amendments have been attempts to assure greater "equality." It is the thesis of the remainder of this article that the quest for greater equality has become a national obsession, at least among policy makers, and an expansive reading of congressional power under the fourteenth amendment poses very real dangers. Moreover, current conceptions of equality are far removed from the notion of equality around which this country was formed. The modern concept of equality, rather than being a necessary complement to liberty, has become its antithesis. Finally, the quest for greater equality

103. Galebach, *A Human Life Statute*, HUMAN LIFE REV. (Winter 1980), reprinted in Cong. Rec. S. 288 (Jan. 19, 1981).

104. See text accompanying notes 50-51 *supra*.

105. See text accompanying notes 40-42 *supra*.

106. K. VONNEGUT, WELCOME TO THE MONKEY HOUSE 8 (1968).

carries with it tremendous costs to society, costs which should be considered in the decision-making process.

In his classic reflections on American society, Alexis de Tocqueville observed:

Democratic nations are at all times fond of equality, but there are certain epochs at which the passion they entertain for it swells to the height of fury. This occurs at the moment when the old social system, long menaced, is overthrown after a severe intestine struggle, and the barriers of rank are at length thrown down. At such times, men pounce upon equality as their booty, and they cling to it as to some precious treasure which they fear to lose. The passion for equality penetrates on every side into men's hearts, expands there, and fills them entirely. Tell them not that, by this blind surrender of themselves to an exclusive passion, they risk their dearest interests: they are deaf. Show them not freedom escaping from their grasp whilst they are looking another way: they are blind, or, rather, they can discern but one object to be desired in the universe.

. . . .

I think that democratic communities have a natural taste for freedom: left to themselves, they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible: they call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery. They will endure poverty, servitude, barbarism; but they will not endure aristocracy.¹⁰⁷

We are in such an epoch today. Tremendous attention and resources are marshalled to achieve the goal of equality; every decision is examined to ensure that it will have no disparate impact upon any group, at least any "protected" group.

Equality and liberty are the two cornerstones of this country. The Declaration of Independence states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."¹⁰⁸ Depending upon one's definition of the terms "Liberty" and "Equality," these two values may come into conflict. If they do, which is to prevail?

There are two major formulations of the concept of liberty or freedom. One is the "negative" form, or "freedom from"; the other is the "positive" form, or "freedom to."¹⁰⁹ Under the negative formulation, a person is free to the extent that no person or group of persons interferes with his activity. Helvetius described a free man as one "who is not in irons, nor imprisoned in a gaol, nor terrorized like a slave by the fear of punishment . . . it is not lack of freedom not to fly like an eagle or swim like a whale."¹¹⁰ The essence of

107. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 191-92 (1842).

108. *DECLARATION OF INDEPENDENCE*, July 4, 1776.

109. Berlin, *Two Concepts of Liberty*, reprinted in I. BERLIN, *FOUR ESSAYS ON LIBERTY* 122 (1969). See also Muller, *The Meanings of Freedom*, in H. MULLER, *ISSUES OF FREEDOM* 3 (1960).

110. Quoted in I. BERLIN, *supra* note 109, at 122 n.2.

the negative form of liberty is that all coercion is inherently bad, although coercion may have to be applied to restrain other, greater evils; and, while non-interference is inherently good, it is not the only good.¹¹¹

Under the "positive" form, or "freedom to," a person is free to the extent that he is his own master.¹¹² Bertrand Russell defined freedom as "the absence of obstacles to the realization of desires."¹¹³ This absence of obstacles includes obstacles other than merely restraints by other people. The essence of the distinction between the negative and the positive forms is that the latter entails the *power* to achieve the objective that one chooses. Those who maintain that the positive form is the only true freedom argue that whether one is restrained from achieving goals by external restraints imposed by other people, or for any other reason, such as lack of economic power, the result is the same; therefore, the only realistic view of freedom is that it is the possibility of meaningful choice.

The distinction between the two forms of freedom reflect the distinction between the concept of "right" and the concept of "power." In response to the question of whether a pauper has the freedom to buy a new car, one who believes in the negative form of freedom will respond in the affirmative, because the pauper has the *right* to buy the car on the same terms as anyone else; it is irrelevant that he does not have the economic power. One who subscribes to the positive definition will respond to the question in the negative, because the pauper does not have the *power* to buy the car; his theoretical right to buy it is irrelevant.

Opposing views in *Harris v. McRae*¹¹⁴ also demonstrate the difference between the two forms of freedom. *McRae* involved the question of the constitutionality of the Hyde Amendment, which severely restricted federal funding of abortions. Justice Stewart, writing for the Court, stated that the statute was constitutional because it "places no governmental obstacles in the path of a woman who chooses to terminate her pregnancy. . . ."¹¹⁵ In a statement clearly expressing the negative form of freedom, Justice Stewart stated that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its creation."¹¹⁶

Justice Brennan, dissenting, stated that "the Hyde Amendment not only was designed to inhibit, but does in fact inhibit, the woman's freedom to choose abortion over childbirth."¹¹⁷ This statement represents the positive view of freedom. Strictly speaking, of course, the Hyde Amendment does not restrict a woman's freedom to choose an abortion, it merely restricts her power to pay for it.

It appears that Justice Brennan's primary objection to the amendment is that because Medicaid pays for childbirth but not for abortion, the state is

111. *Id.* at 161.

112. *Id.* at 131.

113. *Quoted in H. MULLER supra* note 109, at 9.

114. 448 U.S. 297 (1980).

115. *Id.* at 315.

116. *Id.* at 316.

117. *Id.* at 332.

“wielding its enormous power and influence in a manner that might burden the pregnant woman’s freedom to choose whether to have an abortion.”¹¹⁸ It is true that to an indigent woman the Hyde Amendment serves to make the childbirth alternative more attractive economically than the abortion alternative. It is also true, however, that the maintenance of a public school system makes the public schooling alternative more attractive economically than the private schooling alternative, despite the fact that parents have a constitutional right to send their children to private schools.¹¹⁹ That does not mean that the state has a constitutional duty to pay for private schooling.

It is not difficult to understand the difference between the two definitions of liberty, or to realize that each has some validity. The difficulty lies in deciding which form of liberty it is that our government is to guarantee. I would argue that it is the negative form. The Declaration of Independence best characterizes the freedom: “Life, Liberty and the pursuit of Happiness”—not “Life, Liberty and Happiness”; or “Life, Liberty and the achievement of Happiness.” The philosophers of the Western liberal tradition, out of which this country grew, viewed the institution of government as a creature of a “social compact,”¹²⁰ and believed that governments “deriv[e] their just powers from the consent of the governed.”¹²¹ For the Founders, freedom was considered to be the natural state, with the voluntary surrender by the people of a certain amount of freedom in favor of security. Government might be the protector of liberty, but it certainly was not the grantor of liberty. Those who view freedom in its positive form view it as something to be granted by the government, a view quite different from the idea of liberty embodied in the Declaration of Independence.

Whether one accepts the positive or negative form of freedom, one conclusion is inescapable: the two forms of freedom are incompatible. Either form, of course, in its purest sense is theoretically impossible. There cannot be a complete absence of restraint on everyone; people being what they are, one group will try to take advantage of another group by restraining them in some way. If that is permitted to happen, the latter group is less free; if it is not permitted, the former group is less free. Similarly, under the positive definition of freedom, everyone cannot be given the power to achieve all of his goals—people want too much. By giving one person the power to achieve his desired ends, it is generally necessary to restrain someone else. Merely because pure absolute freedom under either definition is not an achievable goal, however, does not mean that freedom is not desirable or that one form is not superior to the other.

Just as there are diametrically opposed definitions of “liberty,” there are equally conflicting definitions of the term “equality,” the two forms being “equality of opportunity” and “equality of result.”¹²² The concept of equal-

118. *Id.* at 330.

119. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

120. J. LOCKE, *TWO TREATISES OF GOVERNMENT* (1690).

121. DECLARATION OF INDEPENDENCE, July 4, 1776.

122. *See* M. & R. FRIEDMAN, *FREE TO CHOOSE* 128-149 (1980).

ity of opportunity embraces the proposition that no one should be prevented for arbitrary reasons from using his capacities to pursue his own objectives. Everyone can enter the race, but some are more likely to win. Equality of opportunity does not mean an equal probability of success; it means an equal amount of external restraints.

The "New Equality," equality of result, means something entirely different. To return to the metaphor of the race, it means that everyone has an equal probability of winning, or more commonly, that every "protected" group—whether it be defined by gender, race or national origin—is proportionately represented in the class of "winners." Those who favor this definition of equality argue that it is unrealistic to have "shackled" someone—or someone of his group, as there is little concern that the particular individual who receives the edge was ever the victim of discrimination himself¹²³—and then to let him out of the shackles and expect him to compete equally.¹²⁴ The goal of equality of result, however, extends beyond the remedy of past discrimination, and is considered a principle that should be reflected in all aspects of society. James Fenimore Cooper reflected on the two forms of equality almost a century-and-a-half ago:

Equality, in a social sense, may be divided into that of condition, and that of rights. Equality of condition is incompatible with civilization, and is found only to exist in those communities that are but slightly removed from the savage state. In practice, it can only mean a common misery.¹²⁵

An example of the difference in the two philosophies may be helpful. One who subscribes to the "equality of opportunity" definition would argue that a black child from a poor family where education is not valued has the same opportunity to go to Harvard as does a white child from a well-to-do family where education is stressed. That is, Harvard is not going to refuse the poor applicant admission anymore merely because he is black, or because he does not come from the "right kind of family," or any other arbitrary reason. It may, however, refuse him because of his inadequate academic achievement, but that does not reflect a lack of equality. The response to that assertion by the advocates of the New Equality is that regardless of whether Harvard's decision is based upon arbitrary or rational criteria, the fact remains that the poor child does not have the same probability of success. That is true, but that conclusion does not necessarily mean that government should intervene in order to "equalize."

The case of *City of Rome v. United States*, discussed above,¹²⁶ reflects an acquiescence by the Court in a congressional policy embodying the concept of equality of result. In *City of Rome*, it will be remembered, Congress was deemed to have the power to block a change in voting practices that might

123. *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stevens, J., dissenting).

124. Some critics of the New Equality argue that for the proponents of the New Equality, it is the race itself that is evil. See Jaffa, *Equality as a Conservative Principle*, Review of W. KENDALL & G. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION*, 8 LOY. L.A.L. REV. 471 (1975).

125. J. COOPER, *THE AMERICAN DEMOCRAT* 36 (1838).

126. 446 U.S. 156 (1980). See text accompanying notes 71-78 *supra*.

result in fewer blacks being elected in Rome, Georgia. If equality of opportunity were being guaranteed, the Court would determine only whether blacks were unfairly being denied access to the ballot or the ballot box. Instead, the Court guaranteed equality of result by allowing Congress to ensure that minority groups could be represented in public office in proportion to their numbers in the population. Implicit in this decision is the assumption that race is a legitimate criterion by which to evaluate candidates.

There remains the question of whether equality of result is the kind of equality that was intended to be guaranteed by those whose ideas are represented in the Civil War amendments. Probably there is no better way to answer this question than by looking to the words of Abraham Lincoln, who, in his Gettysburg Address, stated that our nation was "conceived in Liberty, and dedicated to the proposition that all men are created equal."¹²⁷ In 1857, he stated:

I think the authors of that notable instrument [the Declaration of Independence] intended to include *all* men, but they did not intend to declare all men equal *in all respects*. They did not mean to say all were equal in color, size, intellect, moral development, or social capacity. They defined with tolerable distinctness in what respects they did consider all men created equal—equal with "certain unalienable rights, among which are life, liberty, and the pursuit of happiness." This they said, and this they meant.¹²⁸

These are not the words of a man seeking equality of result or reward. Lincoln was not arguing for a change in the social order to ensure an equal position for the Negro, but a change in the legal order to ensure that the same law would apply to the black man as applied to the white man. The equality that Lincoln sought was equality of opportunity.

B. *Can Liberty and Equality Coexist?*

Now that the terms "liberty" and "equality" have been defined, it is instructive to consider a classic question in political philosophy: Are equality and liberty compatible, or are they necessarily antithetical? The answer to this question depends upon the definitions of the terms chosen.

The negative form of freedom ("freedom from") and equality of result are not compatible because, in order to ensure equality of result, the government must necessarily impose external restraints on some people, and to that extent their freedom of action is impaired. The government cannot ensure a given outcome without in some way arbitrarily restraining someone else—whether it is by redistributing wealth or by conferring other advantages. The freedom of action of the person whose money is taken, or the person who would have occupied the spot which has been assured to the other person by the government, has been restrained. Equality of result is therefore impossible because it cannot accompany equal freedom.

For the same reason, the positive form of freedom and equality of result

127. Address by President Lincoln, *Gettysburg Address* (Gettysburg, Pa. November 19, 1863).

128. A. Lincoln, *Address Delivered at Springfield, Illinois, June 26, 1857*, in *THE IDEA OF EQUALITY: AN ANTHOLOGY* 185 (G. Abernethy ed. 1959).

are also incompatible, or at least compatible only to a limited extent. They are compatible only insofar as the desire for a given outcome coincides with the outcome that the government deigns to bestow. A necessary feature of a system that guarantees equality of outcome is the presence of a "master planner" who decides what outcomes are to be protected. Equality of result does not mean that any particular results are guaranteed; it means only that the results are to be granted or denied equally. One might desire success, but "success" generally connotes a level of achievement beyond that achieved by others. Under a system where equality of result is guaranteed, the freedom to be successful is denied.

One might, at first blush, expect that "freedom to" and equality of opportunity would be compatible. "Freedom to," however, presupposes that those who lack the means to achieve their goals will gain some form of aid to achieve them. Generally, this cannot be achieved without some form of restraint on others, and this restraint is unequal. Since equality of opportunity involves equality of external restraint, "freedom to" and equality of opportunity cannot coexist. Moreover, to the extent that one person's "freedom to" is granted, another's may be impaired.

"Freedom from" and equality of opportunity are compatible; in fact, they are two sides of the same coin. When these two values coexist, everyone enjoys the same absence of external restraint. These are the forms of liberty and equality embodied in such documents as the Declaration of Independence and the Gettysburg Address. No one is assured of attaining a particular status in society, but everyone has the opportunity to try. One group of society is not subject to different laws than is another group. One is not guaranteed a position in society because of an ascribed status such as noble birth, gender, or race; nor is anyone excluded from a position on these grounds. When the government goes beyond the guarantee of "freedom from" and equality of opportunity, every step it takes makes us less free. As Thomas Jefferson observed: "The natural progress of things is for liberty to yield and government to gain ground."¹²⁹ The question then becomes: to what extent and with what fervor do we oppose this natural trend? Are we willing to make equality the supreme end in itself and sacrifice liberty to achieve it?

C. *The National Obsession with Equality*

The "reverse discrimination" cases are the clearest reflection of the trend in this country toward the deification of equality. Equality has become the new religion among policymakers.¹³⁰ If this were equality of opportunity there should be little cause for concern. Unfortunately, it is equality of result, the goal of which is to achieve proportional representation

129. Letter from Thomas Jefferson to E. Carrington (May 27, 1788), reprinted in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* (A. Koch & W. Pedersen eds.).

130. It should be pointed out that studies show that a majority of both blacks and whites oppose affirmative action. Bolce & Gray, *Blacks, Whites and "Race Politics"*, 54 *PUB. INTEREST* 61 (1979). Of course, the phrasing of the question would probably have a significant impact on the distribution of responses.

of selected groups in all things; not equality among individuals, but among classes, reflecting a shift "from equality of prospective opportunity toward statistical parity of retrospective results."¹³¹ The desire of contemporary populists for wholesale egalitarianism is "not *for fairness*, but against *elitism*; its impulse is not justice, but *ressentiment*."¹³² To the extent that equality is seen as an element of justice, it is seen as the only element of justice;¹³³ the term "meritocracy" is derided as "elitism."

It is not the purpose of this article to delve deeply into the "reverse discrimination" cases; a brief synopsis of them is enough to show the ascendancy of the concept of the New Equality in the Supreme Court. In *Regents of the University of California v. Bakke*,¹³⁴ the Court ratified preferential admissions programs in universities, so long as the programs do not involve quotas. That is, even without a showing of past discrimination by the institution, the institution may weigh the applicant's race in its admission decision. The holding of the Court means that as long as the goal of the program is equality of result, traditional constitutional principles forbidding state-sponsored racial discrimination are to be ignored.

In *United Steelworkers v. Weber*,¹³⁵ the Court held that an affirmative action program that reserved fifty percent of the openings in a company training program did not violate Title VII, *solely* because the effect of the plan was to achieve equality of result in the plant workforce. In order to reach that result, the Court was willing to ignore the plain meaning of the statute, as well as relatively unambiguous legislative history.¹³⁶

More recently, in *Fullilove v. Klutznick*,¹³⁷ the Court upheld a provision of the Public Works Employment Act of 1977¹³⁸ that required at least ten percent of federal funds granted for public works projects to be used to procure services or supplies from minority business enterprises. Despite the fact that Congress had made no findings that there had been any prior discrimination in federal contracting, the Court was "satisfied that Congress had abundant historical basis from which it *could* conclude that traditional procurement practices, when applied to minority businesses, *could* perpetuate the effects of prior discrimination."¹³⁹ Again, the common thread running through all these decisions is that the extent of protection that one has against racial discrimination depends upon one's race, for in the name of equality the Court is willing to extend constitutional protections unequally.

The above-described cases reflect a trend toward a return to pre-eminence of the ascribed status that the architects of the Declaration of Independence and the Civil War amendments intended to eliminate. Indeed, it was not Lewis Carroll but a United States Supreme Court Justice who de-

131. Sowell, *Weber and Bakke, and the Presuppositions of "Affirmative Action"*, 26 WAYNE L. REV. 1309, 1312 (1980).

132. Bell, *On Meritocracy and Equality*, 29 PUB. INTEREST 29, 65 (1972).

133. See Votaw, *The New Equality: Bureaucracy's Trojan Horse*, 20 CAL. MAN. REV. 5 (1978).

134. 438 U.S. 265 (1978).

135. 443 U.S. 193 (1979).

136. See text accompanying notes 181-189 *infra*.

137. 448 U.S. 448 (1980).

138. 42 U.S.C. § 6701 (Supp. III 1979).

139. *Id.* at 2775 (emphasis added).

clared that "in order to treat some persons equally, we must treat them differently."¹⁴⁰

The reverse discrimination cases demonstrate graphically the incompatibility of equality of result and liberty; the means by which equality is obtained is by restricting the liberty of others. In order to achieve statistical parity, external restraints are placed upon some competitors solely upon the basis of an ascribed status.

The national obsession with equality is vividly illustrated by a report entitled *Sex Bias in the U.S. Code*,¹⁴¹ a report prepared under contract for the United States Commission on Civil Rights. The purpose of the 230-page report was to identify and analyze sex-based references in the Code.¹⁴² The report makes a number of recommendations. For example, the words "mankind," "manpower," "paternity," "manmade," "midshipman," and "he" should be eliminated from the Code and, presumably (if we have any social conscience), from our vocabularies as well. These words are to be replaced by "humankind," "human resources," "parentage," "artificial," "midship-person," and "he/she,"¹⁴³ respectively. It was also recommended that a female counterpart to "Johnny Horizon," the anti-litter symbol, be created.¹⁴⁴ While reading the report, one conjures up a mental image of the authors of the report channeling all their energies toward the exclusive goal of becoming offended. It seems that such a concentration on trivialities demeans legitimate claims of sexual inequality and does little more than invite ridicule of the women's movement in general.

V. COSTS OF THE NATIONAL OBSESSION WITH EQUALITY

The achievement of the New Equality is not without social costs, but those who favor such equality may be willing to pay them (and make those who do not favor it pay them as well). It is far from clear, however, whether those who value this equality so highly have considered how much must be given up to achieve it. These costs are associated not only with congressional actions under the enforcement clauses of the Civil War amendments, but also with actions of the judicial and executive branches. The costs of the policy may be categorized as economic costs, social costs, institutional costs, and political costs, with, of course, much overlap in the categories.

A. *Economic Costs*

Perhaps least important, but nonetheless substantial, are the economic costs of the all-pervasive national obsession with equality. Surely, if equality

140. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

141. U.S. COMM'N ON CIVIL RIGHTS, *SEX BIAS IN THE U.S. CODE* (1977).

142. *Id.* at 2.

143. *Id.* at 15-16. Efforts to purge the language of allegedly "sexist" terms have not been limited to the public sector. Roget's Thesaurus has banned "male chauvinist" terms from its new edition, replacing such words as "mankind" and "countryman" with "humankind" and "country dweller," respectively. *Rocky Mountain News*, April 11, 1982, at 2. There has been no announcement about whether such terms as "nigger," "jungle bunny," and "jigaboo," which appear in the 1977 edition, have been found equally inappropriate.

144. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 141, at 102.

is the transcendent value some feel it is, it is difficult to complain that it costs too much money. When it comes to liberty, for example, few would argue that it is not worth the price. Certainly the massive defense budget suggests that, for many, liberty is worth whatever price must be paid for it.¹⁴⁵ But what about equality? People may reach different conclusions about its value, but everyone should realize that it is costing us dearly. It is impossible to determine precisely how much is spent in the quest for equality; we do not yet have a Department of Equality, whose budget may be scrutinized carefully by cost accountants. The costs of equality are diffused throughout society; in this respect the situation differs from defense spending, which is done primarily by the federal government.

The government spends a great deal of money on many kinds of equality-oriented programs. The Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs, the Civil Rights Division of the Justice Department, as well as divisions in each cabinet department, all spend millions of dollars promulgating and monitoring such programs. There are also hidden costs, such as the payment of higher contracting fees to minority contractors because they are, to an extent, exempt from competitive bidding requirements.¹⁴⁶

In addition to direct spending by the government are sums spent in the private sector to comply with the edicts of the government. For example, it is estimated that in the years 1974-78 business paid more than one billion dollars in back pay awards, promotion, and training directly related to achieving equality, and that does not include the money spent on legal fees, changes in personnel systems, and the like.¹⁴⁷ It also does not include the massive sums spent by business to comply with government reporting requirements.

Schools and universities are in much the same situation as business. It has been estimated that the cost to colleges and universities of complying with federal hiring and admission requirements has been over two billion dollars.¹⁴⁸ It is estimated that compliance with federal regulations at Harvard alone consumed 60,000 hours of faculty time in academic year 1974-75,¹⁴⁹ and the University of Michigan spent \$350,000 just to compile statistics in connection with affirmative action programs.¹⁵⁰ It is also estimated that between 1976 and 1980 schools and school districts spent almost 800,000 man-hours completing Office for Civil Rights questionnaires.¹⁵¹

145. Even most of those who do not favor massive defense spending oppose such spending because they feel that it is not necessary for the preservation of our liberties.

146. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

147. Tamarkin, *Is Equal Opportunity Turning into a Witchhunt?*, FORBES, May 29, 1978, at 29. The Fortune 500 companies spend close to \$1,000,000,000 per year on routine compliance activities alone. Seligman, *Affirmative Action is Here to Stay*, 105 FORTUNE 143, 156 (April 19, 1982).

148. Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656 (1977) (hereinafter cited as *Sex Discrimination Regulations*).

149. *Id.*

150. Sowell, *Affirmative Action Reconsidered*, 42 PUB. INTEREST 47, 57 (1976).

151. *Oversight Hearing on Paperwork Control Amendments: Hearing Before the House Subcomm. on Elementary Secondary and Vocational Education of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 46 (1979).

These requirements involve tremendous sums of money.

The irony of these massive expenditures to achieve proportional representation is that in addition to being inefficient they may be counterproductive as well. One is reminded of José Ortega y Gasset's observation that "[t]he mob goes in search of bread, and the means it employs is generally to wreck the bakeries."¹⁵² Where equal representation, rather than efficiency, becomes the goal of the national economy, large sums of money are channeled into non-productive activities, which may have a stagnating effect on the economy.¹⁵³ Since, in the past, a growing economy was available to allow immigrants to become assimilated, the very practices used in an attempt to achieve equality may make its achievement impossible. This is a classic example of the fable of the goose that laid the golden egg—a system may, at its own pace, be capable of producing the desired result, but attempts to speed up the system are doomed to failure.¹⁵⁴

B. *Social Costs*

1. *Mediocrity*

Tremendous social costs are also associated with the drive for equality, not least of which is the demonstration of the truth of John Stuart Mill's observation that "the general tendency of things throughout the world is to render mediocrity the ascendant power among mankind."¹⁵⁵ Mediocrity is inevitable in a system that values proportional representation over excellence.

Perhaps the trend toward mediocrity is nowhere more observable than in the field of education. Even some who favor the *Bakke* decision acknowledge that there will be some decline in average educational standards, "perhaps an appreciable reduction."¹⁵⁶ When equality of opportunity was the accepted standard, the expectation was that excellence was the ultimate objective and that superior achievement would be rewarded.¹⁵⁷ Yet, when standards for admission are lowered, there is pressure also to lower expectations, for otherwise there is the very real possibility that those for whom the standards were lowered will fail at proportionately higher rates. An example of the decline in expectations that accompanies a decrease in admission standards is shown by changes in grading policies at George Washington University in Washington, D.C. Prior to the early 1970's, George Washington required as a condition of graduation a cumulative 2.0 overall grade point average (GPA) and a 2.5 GPA in the major field—hardly a stringent re-

152. J. ORTEGA Y GASSET, *REVOLT OF THE MASSES* 60 (1932).

153. Walker, *The Exorbitant Cost of Redistributing Injustice*, 21 B.C. L. REV. 1 (1979).

154. George Gilder has observed that "[u]pward mobility is at least partly dependent on upward admiration: on an accurate perception of the nature of the contest and a respect for the previous winners of it." G. GILDER, *WEALTH AND POVERTY* 99 (1981). As long as people are encouraged to believe that the contest is inherently unfair, there is little incentive to participate in it. The result is that the only upward mobility comes from an increase in government largesse, and the contest is transformed into a race for a favored position at the federal trough.

155. J. MILL, *ON LIBERTY* 62 (1859).

156. Griswold, *The Bakke Problem—Allocation of Scarce Resources in Education and Other Areas*, 1979 WASH. U.L. Q. 55, 69.

157. *Id.* at 68.

quirement in a day when the average grade was a "B." In the early 1970's, however, the administration decided that since the school was admitting "C" students it was "unfair" to require anything more than "C" work from them. Consequently, the major GPA requirement was lowered to 2.0.¹⁵⁸

Those who favor affirmative action argue that it does not require that unqualified applicants be accepted, only that a minority in the "qualified" pool be given precedence over a qualified non-minority. This argument is misleading, however, because applicants do not fall into one of two discrete, internally homogeneous groups—either "qualified" or "not qualified." Within the group of applicants labelled "qualified," there are those who are more qualified and those who are less qualified. A characteristic complaint about the Department of Education is that "they do not make allowances for quality judgments, appearing to regard the Ph.D. simply as being in the same category as a machinist's union card."¹⁵⁹ To illustrate that simply labelling applicants as either "qualified" or "not qualified" is inadequate, one need only consider the case of Allan Bakke, rejected from the medical school at the University of California at Davis in favor of sixteen "qualified" minority students. Bakke had a GPA of 3.46 and Medical College Admissions Test (MCAT) scores in the ninetieth percentile, while the average GPA of the accepted minorities was a 2.75 and their average MCAT score was in the thirty-second percentile.¹⁶⁰ Surely just to call them all "qualified" is not to tell the whole story.

Another example of a willingness to accept mediocrity in order to attain proportional representation is the change in the pass rate of the Pennsylvania bar examination. From 1955 to 1970, only 83 of 306 (27%) blacks who took the state bar exam passed, compared with 7300 of 10,790 (68%) whites.¹⁶¹ In order to pass more blacks, the overall pass rate was increased to 85-98% in the years 1971 to 1975, thereby raising the pass rate for blacks to about 60%.¹⁶²

An unanswered question is at what point do we stop accepting subcompetence? We can admit students into college who would not otherwise be considered qualified and take extraordinary measures to keep them in; we can admit students into professional schools who would not otherwise be considered qualified and take more extraordinary measures to keep them in; and we can admit students into professions who would not otherwise be considered qualified. Do we then take extraordinary measures to keep them in their professions? Is it "fair" to apply the same standards of professional competence, or do we adopt separate malpractice standards for people who were admitted under affirmative action programs? At what point do we stop considering abstract notions of fairness and recognize that society has a

158. The author attended George Washington University from 1972 to 1975.

159. Letter from Carleton Whitehead, Affirmative Action Compliance Officer at Reed College, Portland, Ore., cited in *Sex Discrimination Regulations*, *supra* note 148.

160. 438 U.S. at 277-78 n.7. The figures quoted are composites of the two years that Bakke applied.

161. Symposium, *The Minority Candidate and the Bar Examination*, 5 BLACK L.J. 119 (1976).

162. *Id.* New Mexico has also recently raised its pass rate in order to raise the pass rate of minorities. Winter, *N.M. Lowers Bar Exam Pass Score; Sparks Protest*, 67 A.B.A.J. 1438 (1981).

strong interest in having the standards of competence set as high as possible? In the words of John Sparrow, "excellence may not be a matter for pride, but it is never a matter for regret."¹⁶³

Perhaps the supreme irony is the selectivity with which people decide when to accept mediocrity. A decision to require proportional representation of whites on a professional basketball team would be satirized throughout the land. Why? Well, obviously, one should be selected for a sports team on the ability to play the sport, that is, on the basis of merit. Yet requirements that certain groups be represented in certain proportions in higher education receive more support. Does competence matter less in a doctor than in a professional basketball player? Those who favor affirmative action argue that it is acceptable to admit to professional schools those who are objectively less qualified, because the objective criteria (for example, GPA, Law School Admissions Test [LSAT], or MCAT) used to select students do not predict how good a doctor or a lawyer one will be, even though they may accurately predict academic success. That argument proves too much. If the objective criteria are irrational they should not be applied to anyone; in fact, if they are irrational, their use by state schools is unconstitutional.

Mediocrity also brings with it economic costs, for when irrelevant criteria such as sex or race are preferred to efficiency in a job, it takes more people to do the same amount of work, either because a less competent person works more slowly, or because he makes more mistakes that need correction. Consequently, productivity declines.

2. Loss of Individualism

Another great social cost associated with what Daniel Boorstin has called "Intergenerational Bookkeeping"¹⁶⁴ is the change in the traditional liberal view of individualism and a return to consideration of people as members of a group. The concept of equality of opportunity derives from two basic tenets of classic liberalism—that the individual, and not the family, community, or state, is the basic unit of society, and that the purpose of society is to allow the individual the freedom to seek his own goals.¹⁶⁵ Equality of opportunity and the classic liberalism deny the precedence of birth or any other criterion that determines position, other than competition, the outcome of which is determined by talent, ambition, and luck.¹⁶⁶

Individualism is losing its importance in our society. No longer are we considered individual actors in our dealings with the state (and each other); we are considered merely as representatives of our race, ethnic group, or gender. Perhaps, to paraphrase Justice Blackmun in *Bakke*,¹⁶⁷ to treat peo-

163. J. SPARROW, *TOO MUCH OF A GOOD THING* (1977).

164. D. BOORSTIN, *THE SOCIOLOGY OF THE ABSURD* (1970).

165. Bell, *supra* note 132. See also J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* at x (1978).

166. See Bell, *supra* note 132.

167. 438 U.S. at 407. See text accompanying note 140 *supra*.

ple as individuals we must ignore their individual qualities and treat them according to which group they represent.

Loss of individualism is another area where current conceptions differ drastically from the principles around which this country was formed. Although the founders were not egalitarians in the sense of being levelers (as were the architects of the French Revolution), they were egalitarians in the sense that they believed that people were to be treated the same under the law without regard to birth or social station.¹⁶⁸ The trend in modern society is to go back to a state where legal relations depend upon membership in a group.

3. Devaluation of Minority Accomplishment

In a sense, the saddest aspect of affirmative action is the devaluation of true accomplishment by minorities, because the victims are the intended beneficiaries of the programs. Even though many members of minority groups would have succeeded without affirmative action, a common presumption today is that a minority person who succeeds does so because he had help not available to others.

Thomas Sowell points out that black income as a percentage of white income reached its peak in 1970—the year before the implementation of “goals and timetables,” though the percentage has since decreased.¹⁶⁹ He argues that sociological “explanations” offered by white liberals and black “spokesmen” to explain why blacks cannot pull themselves up the way other oppressed minorities have in the past miss the mark, because the fact is that blacks have pulled themselves up—from further down and against stronger opposition—and they show every indication of continuing to advance. This advancement, he argues, would have continued even without affirmative action; all affirmative action has done is to destroy the legitimacy of what has already been achieved.

Another way in which minorities are harmed by affirmative action is by the shunting of minorities into certain kinds of jobs. For example, in faculty hiring in colleges and universities, employers are faced with opposing sets of incentives. By hiring from the government-designated groups, an employer's short-run liabilities are lowered, but his long-run liabilities are increased because employees from designated groups can subject the employer to additional costs whenever their pay, promotion, or discharge patterns deviate from those favored by government agencies. In faculty hiring programs, these considerations can be significant because of “up or out” policies of trying out new faculty and either renewing their contracts and perhaps eventually granting them tenure, or letting them go. The effect has been to reduce demand for untested members of minority groups, raise demand for better qualified members of such groups, and shift members of minority groups out

168. Thomas Jefferson wrote: “The foundation upon which all our constitutions are built is the natural equality of man, the denial of every preeminence but that annexed to legal office, and particularly the denial of a preeminence by birth.” Letter from Thomas Jefferson to George Washington (1784).

169. Sowell, *supra* note 150.

of faculty and into administration where "up or out" policies do not apply. These predictions are borne out by empirical evidence that: 1) blacks without doctorates and having few publications earn less than similarly situated whites; 2) blacks with Ph.D.'s from top schools and having several publications earned more than comparable whites; and 3) there is a higher proportion of blacks in administrative positions than would be expected.¹⁷⁰

Adverse impacts on minority students are also observable. For example, at Cornell University in the early 1970's, half of all black students were on academic probation. It is not that they were incapable of good academic performance; their scores were in the upper twenty-five percent of all students admitted to college, but the Cornell student body as a whole was in the upper one percent.¹⁷¹

The obverse of the devaluation of minority accomplishment is the built-in excuse that affirmative action provides for those non-minorities who do not succeed: they are encouraged to believe that their failure was due to government-mandated affirmative action, rather than to some deficiency on their part.¹⁷² In addition to sowing the seeds of race hatred, the end result is that it becomes too difficult for minorities to take credit for their genuine accomplishment and too easy for non-minorities to escape responsibility for their genuine failure.¹⁷³

C. *Institutional Costs*

Perhaps the greatest institutional cost is the conversion of what was once thought to be a government of laws, not men, into a government of men. When the integrity of the judicial and political processes is made subordinate to a given social goal, good or bad, we cannot reasonably expect respect for our governmental institutions to survive.

The greatest perversions of constitutional principle have probably come from the judiciary, with the administrative bureaucracy not far behind. Congress has been far from blameless, but more restrained due to the nature of the institution. Chief Justice Burger has warned:

What Cardozo tells us is beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others also aiming at "good ends."¹⁷⁴

Complaints that the Court is rewriting the Constitution or sitting as a continuing constitutional convention are usually met with the somewhat condescending reminder that "it is *a constitution* we are expounding."¹⁷⁵

170. *Id.*

171. Scalia, *The Disease as Cure*, 1979 WASH. U.L. Q. 147.

172. Walker, *supra* note 153.

173. Sowell, *supra* note 150.

174. *United Steelworkers v. Weber*, 443 U.S. 193, 219 (1979) (Burger, C.J., dissenting).

175. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in the original).

That rather facile reminder is intended to calm any fears one might have that the Court is acting in an improper manner when it construes the Constitution in a way that runs counter to the intent of the framers (to the extent that intent can be determined). Surely, it *is* a constitution that is being expounded, and surely it should not have the prolixity of a legal code, and surely situations arise which were not within the contemplation of the framers. When such unforeseen occurrences arise, however, the Court should not then consider the constitutional provision a *tabula rasa* on which it may scribble according to its sense of what is wise social policy. Moreover, the "amendment" of the Constitution by the judiciary is wholly out of keeping with the spirit of article V of the Constitution, which makes constitutional amendments rather difficult to pass. The argument that it is because of the difficulty of the amending process that five of nine justices on the Supreme Court have the right or obligation to change the meaning of the Constitution from the meaning it was originally intended to have is incompatible with the amending process as originally conceived. The reason for requiring ratification by three-fourths of the states was precisely to "guard . . . against that extreme facility, which would render the Constitution too mutable."¹⁷⁶

A look at two landmark cases in fourteenth amendment construction—*Brown v. Board of Education*¹⁷⁷ and *Reynolds v. Sims*,¹⁷⁸ both of which brought new meaning to the fourteenth amendment—may be instructive. Arguably, *Brown* is supportable using a historic approach. Although the framers of the amendment did not intend the fourteenth amendment to outlaw segregated schools,¹⁷⁹ the greatly increased importance of public schools in our society may justify a change in the law. On the other hand, *Reynolds v. Sims* is impossible to reconcile with the intent of the framers. As discussed above,¹⁸⁰ one of the very few clear principles that can be derived from the legislative history of the amendment is that it was not intended to apply to voting; not only did the framers not intend the amendment to apply to voting, they intended it *not* to apply. Moreover, it cannot be argued that the importance of voting had changed so much between the 1860's and the 1960's as to justify the Court's departure from historical principles. Regardless of whether one feels that the "one man, one vote" policy required by *Reynolds* is wise social policy, it cannot be gainsaid that the route by which this policy was achieved was harmful to institutional respect, at least among those who feel that the means, not only the ends, are important.

In the area of statutory construction, a leading case exemplifying the intellectual chicanery in which the Court is willing to engage is *United Steelworkers v. Weber*.¹⁸¹ In *Weber*, the Court was faced with an affirmative action plan that reserved half the positions in a training program for black employees. The Court was also faced with the following language from Title VII: "It shall be an unlawful employment practice for any employer, labor organ-

176. J. MADISON, FEDERALIST No. 43.

177. 347 U.S. 483 (1954).

178. 377 U.S. 533 (1964).

179. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

180. See note 53 *supra*.

181. 443 U.S. 193 (1979).

ization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race. . . ."¹⁸² Justice Brennan, however, was not deterred. First, he stated that Weber's "reliance upon a literal construction [of the statute] . . . is misplaced."¹⁸³ He continued, stating that the prohibition against racial discrimination "must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose."¹⁸⁴ The "legislative history" that the Court relied on was a collection of general statements about the plight of the Negro in American society. The Court totally ignored, as Justice Rehnquist pointed out in his dissenting opinion, much more specific language in the debates, such as Senator Humphrey's statement that "[i]t is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions."¹⁸⁵ Justice Brennan also ignored an interpretative memorandum by Senators Clark and Case, floor managers of the bill, which stated that "any deliberate attempt to maintain a racial balance, whatever such balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race."¹⁸⁶ Their memorandum continued: "[employers] would not be obliged—or indeed permitted—. . . to prefer Negroes for future vacancies, or . . . to give them special seniority rights . . ."¹⁸⁷ Despite this clear legislative history, Justice Brennan announced that "an interpretation of the sections that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."¹⁸⁸

Such a method of statutory construction certainly makes Congress' job easier. Instead of beginning a statute with a statement of legislative purpose and following with the substantive provisions of the law, now Congress need only draft the purpose clause and the Court will provide the rest.

It is not the purpose of this paper to argue that *Weber* is wrong, though it is; the more important criticism relevant here is that it is intellectually dishonest, a consequence producing far higher institutional cost than mere error. This decision can only be understood as arising out of a conviction that equality of result is "the greater good," and therefore the attainment of the end justifies the means employed. In addition to fostering a well-deserved lack of respect for judicial processes, such intellectual dishonesty on the part of the judiciary creates grave risks to the freedom of the nation,¹⁸⁹ for when laws are given a meaning different from that intended by those who drafted them, we become the subjects of judicial despotism.

The extension of the ratification period for the Equal Rights Amend-

182. *Id.* at 200 n.3.

183. *Id.*

184. *Id.* at 200-01.

185. *Id.* at 238 (Rehnquist, J., dissenting).

186. *Id.* at 239.

187. *Id.* at 240.

188. *Id.* at 202.

189. See text accompanying notes 194-232 *infra*.

ment (ERA) is an example of the same "ends justify the means" reasoning on the part of Congress that the Court has used.¹⁹⁰ Even if one favors the ERA, one must feel a trifle uneasy about the extension. The states that have ratified the amendment approved the proviso that the amendment would be void if not ratified by the necessary thirty-eight states by 1979. Congress unilaterally extended the deadline (by a simple majority, not by the two-thirds needed to propose a constitutional amendment), and the General Services Administration now refuses to accept rescissions by states of their ratifications. The entire purpose of having deadlines for ratification is to ensure that approval by the necessary three-fourths majority of all states is roughly contemporaneous. Those who favor the extension, however, do not care. For them, the goal of equality justifies using improper means. If they succeed, however, they may live to regret it. Principles established in this controversy may also be applied to amendments now pending concerning abortion, balanced budgets, and school busing—amendments of which those who favor the ERA extension may not approve.

Probably no better statement could be found to illustrate the idea that different legal principles are applicable depending upon the outcome desired than the statement by Arthur Goldberg that "when the Supreme Court seeks to overrule in order to cut back the individual's fundamental constitutional protections against government interference, the commands of stare decisis are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes markedly less restrictive caution."¹⁹¹

Governmental pronouncements that race is not to be a criterion for decision-making are stripped of a great deal of their educative force by the willingness to approve the use of race to favor minority groups. After a generation of being told by the Supreme Court that racial discrimination is "immoral, unconstitutional, inherently wrong, and destructive of democratic society," we are now told that it is "not a matter of fundamental principle but only a matter of whose ox is gored."¹⁹²

A democratic society cannot long endure a lack of respect for its governmental institutions. Unless a society is to become totalitarian, where "might makes right," government institutions must be perceived as being motivated by guiding principles. The people need not feel that every government decision that affects their lives must be right—indeed, such could never be the case. Yet, government must be perceived as legitimate and must be guided by some principle other than "it is right or wrong depending upon whose ox is gored."

D. *Political Costs*

The foremost, or indeed the sole condition, which is required in

190. See *Idaho v. Freeman*, 50 U.S.L.W. 2392 (D. Idaho 1981) in which the court declared that the extension was invalid and the rescission by the states was valid. See also Miller, *The ERA Ratification Game: Changing the Rules at Halftime*, 8 STUDENT LAW. 9 (Jan. 1980).

191. A. GOLDBERG, *EQUAL JUSTICE* 74-75 (1971).

192. A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975). For an example of the "gored ox" theory at work, compare the treatment of racial gerrymandering in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) with that in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

order to succeed in centralizing the supreme power in a democratic community, is to love equality, or to get men to believe you love it. Thus, the science of despotism, which was once so complex, is simplified, and reduced, as it were, to a single principle.¹⁹³

As discussed above,¹⁹⁴ the New Equality is incompatible with freedom—the government must act as an ever-vigilant puppeteer, always ready to pull the strings in order to equalize. The problem is that the strings are attached to the people. Increasingly more decisions that used to be made by the private sector are now made by government; increasingly more decisions that used to be made by state governments are now made by the federal government. True, there are not yet tanks rolling down the streets, and our television sets do not yet look back at us; the diminution of our freedom has been much more subtle. It might be wise, however, to pay heed to the words of James Madison who stated: “Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people by silent and gradual encroachments by those in power than by violent and sudden usurpations.”¹⁹⁵ A memorable quote from Justice Brandeis points out the danger we face from the well-intentioned:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹⁹⁶

Those who favor the subordination of freedom to equality probably do not intend that our society be enslaved, but rather that only a small amount of liberty be sacrificed for a greater amount of equality. Yet, any free society, of which there are precious few, that puts any value above liberty, whether it be equality, safety, or efficiency, cannot long be free. It is not true that one's liberty should never be restrained; it must be restrained on occasion to protect the liberty of others, but when liberty is sacrificed for a different value, the result is a net decrease in the amount of liberty.¹⁹⁷

The erosion of our liberty is manifested in many ways. One of the principal ways is by the subversion of the judicial process, whereby courts are willing to sacrifice principle in order to obtain the “good result,”¹⁹⁸ thus rendering the will of the people or their elected representatives nugatory when that will conflicts with courts' conceptions of the New Equality.

It has not been primarily Congress—and certainly not the framers of the Constitution—that has sponsored the New Equality. Rather, the New Equality has been mandated by the courts and by the bureaucracy, the least

193. A. DE TOCQUEVILLE, *supra* note 107, at 300-301.

194. *See* text accompanying notes 107-30 *supra*.

195. Speech by James Madison, Virginia Convention (June 16, 1788).

196. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

197. *See generally* J. RAWLS, A THEORY OF JUSTICE (1971); Daniels, *Equal Liberty and Unequal Worth of Liberty*, in N. DANIELS, *READING RAWLS* 253 (1975); Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534 (1973), *reprinted in* N. DANIELS, *READING RAWLS* 230 (1975).

198. *See* text accompanying notes 174-93 *supra*.

politically responsible branches of government.¹⁹⁹ Robert Nisbet warns that the growth of bureaucracy results in an invisible accretion of power and that the liaison of what he calls the "New Despotism" with humanitarianism makes for a peculiarly effective movement, this effectiveness most easily measured by the government's growing capacity for entering into the smallest details of our lives.²⁰⁰ Wouldn't the framers of the Constitution and the fourteenth amendment be surprised to learn that pinching a derriere in the workplace is a federal offense?²⁰¹

Two areas where freedom is most greatly restricted are in private employment and in higher education admissions and employment. In employment, an obsession with disproportionate effects has greatly reduced the extent to which relevant factors may be used in hiring and promotion decisions. For example, although tests may be used by employers to screen potential employees, if the tests have a disproportionate effect the employer must demonstrate that the test is job-related.²⁰² Although this sounds like a reasonable goal, the burden upon employers is great since they must prove that the test is job-related. This "validation" of tests may cost \$40,000 to \$50,000²⁰³—a substantial deterrent to an employer considering the use of a non-standardized test.²⁰⁴

Similarly, an employer has a legitimate interest in whether a prospective employee is pregnant and will be taking pregnancy leave within a few months of her hiring. Yet, to refuse to hire on that basis is sex discrimination.²⁰⁵

Even more ridiculous, it is also, in many cases, against the law to terminate or refuse to hire someone because of a felony conviction. For example, the EEOC stated that an employer's policy of automatic termination for any "serious crime" was a violation of Title VII because a "substantially disproportionate percentage of persons convicted of 'serious crimes' are minority

199. See Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U. L. REV. 1, 18.

200. Nisbet, *The New Despotism*, 59 COMMENTARY 31, 32 (June 1975).

201. See generally Berns, *Terms of Endearment*, 261 HARPERS 14 (October 1980); Polansky, *Sexual Harassment at the Workplace*, 8 HUMAN RIGHTS 14 (Winter 1980).

202. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

203. This figure comes from Robert Guion, past president of the Industrial and Organizational Psychology Division of the American Psychological Association, quoted in N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* at 57 (1975).

204. George Gilder argues that federal surveillance of employment practices has also been counterproductive. G. GILDER, *WEALTH AND POVERTY* 137 (1981). Because one of the results of such surveillance is to encourage companies to protect themselves with paperwork, employers tend to favor documented qualifications of women over drive and aggressiveness of men, despite the fact that such diligence and motivation are, he argues, the most important contributors to productivity. Moreover, historically the method used by the lower socioeconomic classes to achieve upward mobility has not been to become educated, but to work harder than those in the higher income classes. The current equal rights campaign fostered by administrative agencies has caused discrimination "in favor of the credentials that the rich and middle classes can buy over the competitiveness, hard work, and drive to get ahead that are the chief assets of the classes below." *Id.* Because an employer can estimate aggressiveness and drive only subjectively, he runs a real risk if he attempts to use these qualities in his employment decision. Perhaps gone forever are the days when an employer could say "I like your spunk, kid; you're hired," despite the fact that the "kid's" objective qualifications were not overly impressive.

205. 42 U.S.C. § 2000e(k) (Supp. III 1979).

group persons"²⁰⁶ Therefore, an employee who had been charged with resisting an officer, assault with intent to kill, and carrying a concealed weapon, and who pleaded guilty to resisting an officer, could not be discharged because his crime had no bearing on his ability as a machine operator. This result was reached despite a showing by the employer that the automatic termination policy was applied even-handedly with respect to race. The EEOC stated that "[t]he sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer."²⁰⁷ Aside from the rather startling implication that questions of expense are not involved in the determination of efficiency of job performance, the suggestion that it is none of an employer's business whether one of his employees is prone to violent acts is somewhat dismaying. Certainly, this concern is rational, and if the employer chooses to terminate such employees he should be permitted to do so.²⁰⁸ It is a rather queer state of affairs when an employer can fire his employees for no reason at all (as long as there is no disproportionate impact on protected groups), but he cannot fire an employee for being convicted of a serious crime.

In response to the argument that the concerns of the employer are largely economic and therefore not worthy of protection, one should heed the following statement by Justice Stewart:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.²⁰⁹

Thus, those who would advocate freedom in all areas of life, except with regard to "capitalist acts between consenting adults,"²¹⁰ are misguided; economic freedom, like all freedoms, is worth protecting.

In the area of higher education, there is also warrant for concern.²¹¹ Indeed, Derek Bok, president of Harvard University, has identified "Harvard's independence and freedom from governmental restraint" as the

206. 4 FEP Cases 849, 850 (1972). See also *Green v. Missouri Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1977).

207. 4 FEP Cases at 850 (emphasis added).

208. We may take only a little solace in the fact that even in Massachusetts "[n]arrow questions into whether a person can do, or is available for, the particular job for which (s)he applied, may be appropriate." Schreiber, *Employment Applications—What Massachusetts Employers Can and Cannot Ask*, 65 MASS. L. REV. 69 (1980) (emphasis added).

209. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

210. *Votaw*, *supra* note 133, at 12.

211. On the question whether the freedom threatened is "academic freedom" or merely the same general freedom as threatened by the burden of federal regulation of business, see McCormack, *Regulatory Problems in the Modern University Setting*, 1980 UTAH L. REV. 461.

"critical issue for the next generation."²¹² Kingman Brewster, president of Yale University, has also warned of the "growing tendency for the central government to use the spending power to prescribe educational policies."²¹³

A clear example of the bureaucratic obsession with the New Equality is the case of *Grove City College v. Harris*.²¹⁴ *Grove City* involves the attempted application of Title IX regulations to a small liberal arts college in Pennsylvania. Title IX provides that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving federal financial assistance. . . ."²¹⁵ *Grove City* College has scrupulously avoided accepting federal financial assistance because of its desire to remain autonomous.

The Department of Health, Education and Welfare (HEW), however, promulgated regulations defining "recipient" not only as an institution *receiving* federal funds, but also as an institution *benefiting* from federal funds.²¹⁶ Consequently, HEW claimed that *Grove City* fell within the ambit of Title IX because some of its students received federal assistance in the form of Basic Educational Opportunity Grants (BEOG) and Guaranteed Student Loans (GSL).²¹⁷ The college refused to execute an assurance of compliance, contending that it was not subject to Title IX, whereupon HEW ordered that BEOG's and GSL's of all *Grove City* College students be terminated. This termination was ordered despite the fact that there was not "the slightest hint" of any failure to comply with Title IX, other than the college's refusal to submit the assurance of compliance. The district court held that the college was, indeed, subject to the provisions of Title IX, but that student assistance could not be terminated.²¹⁸

The burdens on a college or university that falls within the purview of Title IX are rather onerous. They include such obligations as requiring a university to ensure that corporations that recruit on its campus do not discriminate on the basis of sex,²¹⁹ and that student-teacher programs in which the college participates also do not practice sex discrimination.²²⁰ In addition, schools face substantial record-keeping and compliance report require-

212. Harvard University Gazette, June 13, 1975 at 1, col. 2, *quoted in* O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525, 525 (1975).

213. Yale Alumni Magazine, April, 1975 at 34-35, *quoted in* O'Neil, *supra* note 212, at 525.

214. 500 F. Supp. 253 (W.D. Pa. 1980). A similar case is that of Hillsdale College, a small college in Michigan. A resolution by the college states:

Whereas, by the [Title IX] regulations, the Federal government now seeks to impose its control over [our] freedom and independence through the subterfuge that a few of the students at Hillsdale College receive federal aid through the medium of such programs as Veterans Benefits and the National Direct Student Loan Fund; . . .

. . . RESOLVED, that Hillsdale College will, to the extent of its meager resources and with the help of God, resist by all legal means this and all other encroachments on its freedom and independence.

Sex Discrimination Regulations, *supra* note 148, at 683.

215. 20 U.S.C. § 1681(a) (1976).

216. 45 C.F.R. § 86.2(h) (1980).

217. 500 F. Supp. at 255.

218. *Id.* at 273.

219. 45 C.F.R. § 86.51(a) (1980).

220. *Id.* § 86.31(b)(7).

ments.²²¹ These requirements mandate the expenditure of a great deal of money, reducing to a large extent the schools' ability to set their own priorities. Judge Friendly has pointed out another danger of heavy regulation of private schools; that is, as regulation increases, the difference between private and public schools decreases. Since private donors contribute to private institutions to preserve a diversity they deem important, a greater homogenization jeopardizes an important source of support.²²²

With regard to the threat of federal control over curricula, Nathan Glazer tells of a regional HEW representative demanding an explanation for the absence of women and minority students in the Graduate Department of Religious Studies at an Ivy League university.²²³ Upon being told that a reading knowledge of Hebrew and Greek was required, drastically limiting applications to the program, the HEW representative advised orally: "Then end those old-fashioned programs that require irrelevant languages. And start up programs on relevant things which minority group students can study without learning languages."²²⁴ Obviously, HEW has neither the statutory authority nor the constitutional power to require that the curriculum be changed, yet it certainly has the power to influence significantly (by "raised eyebrow") such decisions because of its control over funding.²²⁵

Another example of bureaucracy's attempt to extend its power to enforce the New Equality is the decision by the Internal Revenue Service (IRS) to withdraw the tax-exempt status of Bob Jones University because of its racially discriminatory policies.²²⁶ Because of a belief rooted in the Bible, the sincerity of which is not questioned by the IRS, that sexual relations between the races are wrong, the University has a policy of prohibiting interracial dating and marriage among its students.²²⁷ The IRS argued that, even though the policies are rooted in religious belief, it has the power to withdraw the tax exemption—a rather frightening assertion. When a government agency has the power to pass on the acceptability of an organization's religious beliefs and practices to determine whether they are in accord with prevailing notions of social justice, religious freedom is far from secure.²²⁸

221. *Id.* §§ 86.3(c), (d), 86.4, 8, 9. See generally *Hearings on Sex Discrimination Regulations Before the House Subcomm. on Postsecondary Education*, 94th Cong., 1st Sess. 99 (1975).

222. H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 29-30 (1970). See generally O'Neil, *Private Universities and Public Law*, 19 *BUFFALO L. REV.* 155 (1970).

223. N. GLAZER, *supra* note 203, at 161.

224. *Id.*

225. Another example of government interference with the operation of the University is shown by the incarceration of a professor of education for refusing to disclose how he voted in the decision of a faculty committee that had declined to recommend tenure for a junior colleague. Daniel Moynihan observed that "the curious thing is that the dog did not bark." Moynihan, *State v. Academe*, 261 *HARPERS* 31 (December 1980). Of one thing we can be certain: if the objective of the incarceration had been anything other than the New Equality, the nation would have heard a resounding chorus of barks.

226. *Bob Jones Univ. v. United States*, 639 F.2d 147 (4th Cir. 1980), *cert. granted*, 102 S. Ct. 386 (1981).

227. *Id.* at 149. See Note, *Tax Exemption and Race Discrimination*, 57 *U. DET. J. URB. L.* 415 (1980).

228. Congress has expressed its displeasure with such practices by the IRS. See Supplement-

In upholding the position of the IRS, the United States Court of Appeals for the Fourth Circuit stated that "certain governmental interests are so compelling that conflicting religious practices must yield in their favor."²²⁹ So much for the first amendment protection of religious freedom that was once called "the transcendent value."²³⁰ (One wonders whether the court would have eliminated as cavalierly first amendment protection of racially derogatory speech.) This is not to suggest that there can never be governmental restrictions on religious practices. Certainly, where such practices pose an imminent threat to the health, safety, or morals of the community, some restriction is possible,²³¹ even necessary, but absent compelling circumstances—and abstract notions of fairness and equality are hardly compelling—government should not embark upon such a dangerous course.

What, after all, is different in principle from the IRS' action in *Bob Jones* and a decision by the IRS to take away the tax-exempt status of the Catholic Church because of its refusal to admit women to the priesthood? The decision of the court in *Bob Jones* is as wrong as the hypothetical decision in the Catholic Church case, for "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."²³²

CONCLUSION

It has not been the purpose of this paper to settle definitively the questions raised; that is beyond the scope of this article and probably an impossible task as well. The purpose has been merely to identify some issues that should be of current concern.

tal Appropriations and Rescission Act of 1980, Pub. L. No. 96-304, 94 Stat. 857, 903 (1980) (funds appropriated by the Act could not be used in such a way that would cause the loss of tax-exempt status to private schools).

It could be argued that the *Bob Jones* situation is analogous to that presented in *Harris v. McCrae*, 448 U.S. 297 (1980), in that the government is merely making the choice of one of two constitutionally protected alternatives more desirable economically. See text accompanying notes 114-19 *supra*. In *McCrae*, the Court stated that it was permissible for the government to subsidize abortion and other medical services unequally, because although childbirth and abortion are both constitutionally protected, the government may by unequal funding encourage alternative activity deemed in the public interest. 448 U.S. at 315. The Court stated that the constitutional freedom recognized in *Roe v. Wade*, 410 U.S. 113 (1973), did not prevent a state from making "a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds." 448 U.S. at 314 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

The situation with respect to religion is quite different, however. If the religion clauses of the first amendment mean anything, they mean that the government may not make a value judgment favoring one religion over another. As the Supreme Court has stated, "[g]overnment . . . must be neutral in matters of religious theory, doctrine, and practice." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). Freedom of religion means that not only must the government refrain from planting obstacles in the path of religious exercise, but that it must take a neutral position in the removal of obstacles already there.

229. 639 F.2d at 154.

230. *Norwood v. Harrison*, 413 U.S. 455, 469 (1973).

231. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878). But see *United States v. Ballard*, 322 U.S. 78 (1944).

232. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

There is a vast repository of power residing in Congress,²³³ granted by section 5 of the fourteenth amendment. An expansive view of congressional power carries with it many dangers, chief among which is the threat to individual freedom. The shift in emphasis from the Old Equality (equality of opportunity) to the New Equality (equality of result) has brought with it the subordination of the value of liberty to current conceptions of equality. The definitions of liberty and equality used to justify this change are incompatible with the ideals of liberty and equality upon which this country was built, and the new definitions should be abandoned.

We are becoming a society that refuses to recognize the propriety of differences. Consider, for example, the movement to subject women to the draft and the extreme view that women should have the same combat responsibilities as men do. Proponents of such measures refuse to accept that biological differences between men and women (primarily reflected in temperament, rather than body strength) justify disparate treatment. The purpose of the equal protection clause is to command a recognition of equality when people are equal, not to command a declaration of equality when they are not.

Regardless of whether one favors the New Equality, it is important to recognize the tremendous price that is being paid for it. To the proponents of the New Equality, all other social values, such as fairness, justice, efficiency, and liberty are secondary. Whether the goals of the New Equality are even possible is questionable, and we should bear in mind Edmund Burke's observation that "those who attempt to level, never equalize."²³⁴

233. See Orloski, *The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power*, 49 ST. JOHNS L. REV. 493 (1975).

234. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 61 (1790).