

# THE QUEST FOR EQUALITY\*

OSCAR HANDLIN\*\*

The concept of equality entered only tangentially into the Constitution as ratified in 1789. This was not a subject that greatly concerned either the framers of that document or the people who ratified it. The members of the Convention, after all, had met primarily to put together a federal frame of government; and they composed a charter that they hoped would draw together the disparate elements of the nation. In doing so, they had to take much for granted, including the existing patterns of state action. Attention went primarily to the disposition of powers among the agencies that were to exercise them. Only much later did the constitutional provisions apply directly to persons.

In the thinking and usage of the eighteenth-century founders, the word "equality" applied to a condition in which the state treated individuals alike, without the interjection of the European distinctions of status with which the framers were familiar, directly or indirectly. That is, they had in mind equality under the law.

The Constitution's silence on the matter makes it necessary to go back to previous statements about the issue in order to understand the precise connotation of the concept of equality. Those most frequently cited came early in the Revolution in the Declaration of Independence. The preamble to that document asserted categorically that all men were created equal.<sup>1</sup> That broad statement evoked little controversy at that time, for it was in accord with the general philosophy that prevailed in the late eighteenth century when the colonists gained their independence. The understanding that could be taken for granted then, however, has by no means survived intact through two intervening centuries.

We can approach the meaning of the term "equal" in the Declaration by noting its use in the first paragraph of the preamble in a clause

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\*\* Carl H. Pforzheimer University Professor, Department of History, Harvard University. A.B., 1934, Brooklyn College; A.M., 1935, Ph.D., 1940, Harvard University.

1. "We hold these truths to be self-evident, that all men are created equal . . ." 2 THE WORKS OF THOMAS JEFFERSON 200 (P. Ford ed. 1904).

that described the process by which a people assumed "the separate and equal station" to which the laws of Nature entitled it. The meaning there was identical to that in the statement of the equality of men—equality in those unalienable rights with which their Creator had endowed them. The Virginia constitution put it simply and more clearly when it stated that men were by nature—not equal—but equally free and independent.<sup>2</sup>

This view of equality was narrow. By equal, the author of the Declaration and his contemporaries did not mean identical. They recognized that individual differences existed and were important. Therein they agreed with the dominant opinion of their times. Even Rousseau, the best known theorist on the subject, believed that men differed in natural endowments and that civilization made those inequalities significant so that absolute equality in any society was unthinkable.<sup>3</sup>

People were not alike in their capacities at birth and, with growth and maturity, the disparities in intellect and in moral sense would widen. Jefferson, therefore, early proposed a three-tier system of education that would continually select the ablest while affording all the chance to advance.<sup>4</sup> Late in life, he and John Adams discussed the attributes of a natural aristocracy.<sup>5</sup> They assumed that individuals differed in ability as well as in interest and also that those differences were neither inherited nor conditioned upon civil status or position, but rather were the products of natural endowment and of character. A natural aristocracy, they concluded, was one based on merit and achievement. That was why the Society of the Cincinnati, which made heredity a requirement for membership, aroused such widespread hostility.<sup>6</sup>

Equal meant equal in the eyes of the law. That connotation was consistent with the few passages in the Constitution that had any bearing on the matter. Article I referred to inhabitants and persons as the basis for representation;<sup>7</sup> article II distinguished natural born citizens eligible for the Presidency;<sup>8</sup> and article IV dealt with the comity of the citizens

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2. Declaration of Rights, ch. 1, 9 Va. Stat. 109 (Hening 1776).

3. J. ROUSSEAU, *The Second Discourse*, in *THE FIRST AND SECOND DISCOURSES* 101 (R. Masters ed. 1964).

4. 4 *THE WORKS OF THOMAS JEFFERSON* 62-65 (P. Ford ed. 1904).

5. 10 *THE WORKS OF JOHN ADAMS* 52, 58, 64 (Little, Brown & Co. 1856); 4 *THE WRITINGS OF THOMAS JEFFERSON* 226-31 (T. Randolph ed. 1830).

6. See D. BOORSTIN, *THE AMERICANS* 371 (1958).

7. U.S. CONST. art. I, § 2, cl. 3.

8. *Id.* at art. II, § 1, cl. 5.

of the states.<sup>9</sup> Each allusion was to legal rights.

In the decades after ratification Americans adhered to the same concept of equality. All individuals enjoyed the latitude of making what they could of themselves free of those distinctions, restraints, and supports by which they believed European society sustained status. Government and the law treated all alike. Writing in 1790, John Jay defined civil liberty as the equal right of "all the citizens to have, enjoy and to do, in peace, security, and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good."<sup>10</sup>

The implications were clearest when it came to religion, for concern about toleration since the seventeenth century and concern about equality since the Great Awakening focused the attack after the Revolution on the inherited vestiges of establishment. It would take a century to remove the last of them, and problems of separation of church and state persisted even longer. But the commitment to equality in this sphere was clear at Independence.

The people of the Revolutionary generation, however, qualified the term "equality" by certain large omissions. Although they were unclear and sometimes ambiguous on the subject, they did not mean to abolish distinctions based on sex. Few men or women at the moment considered the issue vital, for they then stood at a point of transition between a society that revolved in every aspect about the integrated household and one increasingly disposed to treat individuals in detachment. The provisional frontier settlements of the colonial period had given broader scope to the activity of women than had been characteristic of Europe. With stability and development after 1783 that scope tended to narrow. But neither earlier nor later did women enjoy a status of full equality with men.

Furthermore, every signer of the Declaration and every American for years thereafter understood that significant portions of the nation were far from equal, even in the eyes of the law. The Constitution referred to four categories of residents: free persons; those bound to service for a number of years; all other persons (represented at three-fifths of their total); and Indians not taxed.<sup>11</sup> The human beings assigned to those classes were certainly not equal—in any sense.

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9. *Id.* at art. IV, § 2, cl. 1.

10. 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 395 (H. Johnston ed. 1891).

11. U.S. CONST. art. I, § 2, cl. 3.

The listing was eloquent in what it did not say as well as in what it did. Nowhere did the word "slave" appear, not even in article I, section nine, which denied Congress the right to forbid the importation of certain persons before 1808;<sup>12</sup> nor in article IV, section two, which dealt with the return as fugitives of persons held to service or labor.<sup>13</sup> Nor did the Constitution anywhere refer to color. This reticence sprang from the hope, expectation, and belief that slavery would not be a permanent feature of life in the Republic, but somehow would ultimately disappear. Yet for the moment, the uncomfortable fact was that Negro slaves lacked any rights whatever and even free blacks were far from being the equals of whites.

Indians not taxed referred to those who remained members of their tribes.<sup>14</sup> The phrase was significant, for it distinguished between people who entered the society about them and those who did not. The intention was to draw not a racial but a political line. Those who abandoned their inherited culture were Americans like others, but those who chose to stay apart, although not unfree, nevertheless were not equal in status to citizens.

Finally, Jefferson's contemporaries recognized that some people, by acts of their own, put themselves in positions that diminished the equality to which nature would have entitled them. Thus, seamen subject to the authority of their captains were not altogether free; nor were soldiers during the period of their service; nor convicts during the terms of their incarceration; nor apprentices or children during their minority. These were relationships of command and obedience and, therefore, of their nature involved inequalities. Yet they evoked no challenge or criticism.

The concept of equality in the first half-century of the Republic was thus limited and circumscribed. It bore no connotation of identical social and economic condition or status, but was essentially political. It meant simply that those persons included in the polity were equal in their relations to it.

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12. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ." U.S. CONST. art. I, § 9, cl. 1.

13. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

*Id.* art IV, § 2, cl. 3.

14. See note 11 *supra*.

The polity, however, was open. The unwillingness to accept the permanence of slavery, the expectation that Indians would move out of their tribes, and the welcome accorded immigrants reflected the underlying belief that anyone by an act of will could become an American and, therefore, an equal. These attitudes also reflected the basic assumption that people were the products of their environment and capable of making of themselves what they wished. Since individual talents and dispositions differed, there was no reason to believe that the results of their efforts would bring them to identical places or yield identical results. But all remained equal in the eyes of the law.

In the second quarter of the nineteenth century, the concept of equality received significant elaboration, although within the same framework of fundamental assumptions. Equality continued to mean equality under the law; and it continued to bear the corollary that its application might produce strikingly different outcomes. But it now seemed necessary to clear away needless encumbrances upon equality.

The imperative received most explicit expression in the body of thought sometimes blanketed under the general rubric of Jacksonian democracy. Its central thrust was directed toward the abolition of privileges that seemed to survive from an earlier past or that had taken root unnoticed in the Republic.

Increasingly in the 1830's and 1840's, equality came to mean equality of opportunity. All participants in the society were to strive to attain their own objectives without state or other intervention that might assist some or pose obstacles in the way of others. The movement for universal suffrage was but the political expression of the impulse toward equality of opportunity—putting the ballot in their hands would enable all to protect themselves against the pretensions of status and privilege. The principle of political equality, that is the sovereignty of every man, explained an influential minister, was to the conception of a republic.<sup>15</sup>

As to what constituted privilege, Jacksonian rhetoric was less precise, for the term did not have the visible references that it had borne in the eighteenth century and that it continued to bear in aristocratic societies, titled nobility, exclusive guilds, and favored ecclesiastics. In a vague way, privilege in the United States applied to any unfair advantage, whether by birth, by wealth, or by grant of the state as in charters of incorporation or licenses to banks to emit paper money. Americans

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15. *See generally* E. CHAPIN, *THE RESPONSIBILITIES OF A REPUBLICAN GOVERNMENT* (1841).

were neither levelers, seeking a redistribution of property, nor advocates of governmental passivity. They did insist that neither riches nor the law in any way diminish competitive equality in the race of life.

It was not at all inconsistent, therefore, for the Jacksonians to press for state action that would widen individual opportunity. Thus, they enlisted in a continuing campaign to assure access to the landed resources of the country for all those who wished to work the soil. They also vigorously supported efforts to expand public education so that all young people could prepare for the effort at advancement. The movements for common schools, for the development of secondary and collegiate education, and for the conversion of all curricula to useful subjects sprang from the same sources as the drive for preemption and homestead—the insistence upon the state's role as an equalizer of competitive opportunity.

Yet, while the emphasis changed, the underlying view of humanity remained what it had been in the revolutionary era—people were inherently alike, except for ability and for variations induced by the environment. Impressed by the diversity of people encountered in the city, an observer of 1854 nevertheless insisted upon “the essential *unity* of humanity. For, we find that the differences between men are *formal* rather than *real*.”<sup>16</sup> It was in this sense that Lincoln still used the word when he spoke at Gettysburg of a nation “dedicated to the proposition that all men are created equal.”<sup>17</sup>

The Jacksonians were well aware, as the Jeffersonians had been, that some residents of the United States suffered from considerable handicaps; and the nascent humanitarian reform movements of the same decades sought to broaden the opportunities of all so as to approach equality. This objective united such disparate groups as the abolitionists, who found slavery an offensive denial of the equality to which all men were entitled, and the early campaigners for women's rights, for ameliorating the conditions of prisoners, for aiding the poor and other underprivileged social elements, and for normalizing the situation of the Indians. These movements gained strength in the 1840's and 1850's, although the problem abolition addressed proved incapable of resolution without the trauma of civil war.

The causes of that conflict and the motives for which Northerners

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16. E. CHAPIN, *THE AMERICAN IDEAS AND WHAT GROWS OUT OF IT* 16 (1954) (emphasis added).

17. 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 23 (R. Basler ed. 1953).

fought it were mixed. But certainly among them was the determination to abolish slavery and, in a small group at least, the determination to bring the freed Negro to a full level of equality with whites.

In the debates of 1858 Lincoln had stated the position of many of his countrymen. While disavowing any desire for personal mingling of the races, he maintained that the Negro was "entitled to all the natural rights enumerated in the Declaration of Independence." In "the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas and the equal of every living man.*"<sup>18</sup>

This objective of equality by no means commanded the support of all Northerners or even of all northern abolitionists, but it had a persistent nucleus of supporters both in Congress and in the whole country. Its monuments were the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution<sup>19</sup> and the civil rights acts culminating in that of 1875.<sup>20</sup> These measures, bitterly debated and enacted with difficulty, put every American on an identical footing in the eyes of the law and in the face of opportunity. The amendments excluded any abridgment of the privileges and immunities of citizens by the states;<sup>21</sup> or the denial to any person of the equal protection of the laws;<sup>22</sup> or any restraints on the right to vote on account of race, color, or previous condition of servitude.<sup>23</sup> The laws forbade discrimination and assured to all equal status in transportation and public accommodations.<sup>24</sup> The approach of amendments and legislation was well within the existing concept of equality and the thrust was negative. Certain state actions were forbidden; none were enjoined. Nor did Reconstruction measures aim to go beyond the existing concept of equality before the law. Above all, their guarantees protected individuals, not groups.

The nation, however, never tested the effectiveness of these efforts. Ironically, precisely at the point at which the law approached recognition of the right of all Americans, including blacks, to complete equal-

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18. THE LINCOLN-DOUGLAS DEBATES OF 1858, at 102 (E. Sparks ed. 1908) (emphasis added).

19. U.S. CONST. amends. XIII, XIV, XV.

20. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

21. U.S. CONST. amend. XIV, § 1.

22. *Id.*

23. U.S. CONST. amend. XV, § 1.

24. Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 335.

ity, scientific and popular thought accepted ideas that justified racial inequality.

The racist interlude began in the 1850's; Josiah Nott, George Fitzhugh and other defenders of slavery then argued that Negroes were a distinct, inferior species whose characteristic traits justified their bondage.<sup>25</sup> But faith in the literal accuracy of the Bible and in the common descent of all mankind from a single pair of ancestors prevented orthodox Christians from accepting that argument until well after 1859 when the penetration of Darwinian ideas led to acceptance of the belief in innate biological differences among races arising from separate lines of evolution.<sup>26</sup> The new ideas found a strategic place after 1865 in the armaments by which unreconstructed southerners sought to maintain the inferiority of the free Negroes, preserve conditions analogous to those of slavery, and in time circumvent the civil rights acts and the fourteenth amendment. Racism gathered additional support in the 1870's and 1880's when Americans along the Pacific and in the northern states discovered its utility as they confronted the questions of Oriental and East European immigration.

Operating within this intellectual context, the courts and state legislatures proceeded to narrow the meanings of the Reconstruction measures. The judges and legislators were, of course, also sincerely concerned with other matters such as the effects of increased national and diminished state authority on American federalism and the proper scope of the police power. But no thinking person could shake off the implications for race relations, even in cases that in the first instance dealt with other subjects.

Judicial decisions after the *Slaughter-House Cases*<sup>27</sup> freed the states to act in racial matters without excessive concern for the restraints of the fourteenth amendment. In *Hall v. DuCuir*<sup>28</sup> the Supreme Court, dealing with transportation, took up Lemuel Shaw's observation in the *Roberts Case*,<sup>29</sup> dealing with education, that equality did not necessarily involve identity, and thus established a basis for Jim Crow practices. Meanwhile, the southern economy doomed blacks to tenantry and local manipulation deprived them of the vote and all political influence.

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25. G. FITZHUGH, *CANNIBALS ALL!* (C. Van Woodward ed. 1960); J. NOTT & G. GLIDDON, *TYPES OF MANKIND* 260 (1854).

26. C. DARWIN, *THE DESCENT OF MAN* (1871); C. DARWIN, *THE ORIGIN OF SPECIES* (1859).

27. 83 U.S. (16 Wall.) 36 (1873).

28. 95 U.S. 485 (1878).

29. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850).

For the period between 1890 and 1930, the record was dismal. A line of increasing rigidity segregated blacks from the rest of society and condemned them to inferiority. The doctrine of "separate but equal," fully enunciated in *Plessy v. Ferguson*,<sup>30</sup> validated evolving Jim Crow patterns and in practice shielded inequality. The distinction between social and legal equality hardened in that case,<sup>31</sup> and thereafter became the instrument for establishing racial inferiority in education, residence, and employment.

The damage was by no means to blacks alone. Racism also entered into the anti-Catholic and anti-Semitic movements that punctuated these years, and it adversely affected as well such groups as Italian-Americans and Greek-Americans. The disadvantaged minorities suffered to varying degrees; but all labored under some burden of inequality.

Yet in retrospect, it was also significant that restraints both in the law and in society stood as barriers to racism. The Constitution, as the judges now interpreted it, was neutral, incapable of intervening to halt discrimination by state or private action. But no majority, however large or powerful, could explicitly legislate against a group, not even in the deepest South where the desire for apartheid was explicit. Even *Plessy v. Ferguson* contained the saving qualification "but equal"; and though for the moment it seemed of little consequence, that qualification ultimately would bring the whole doctrine tumbling down.

The judges were not more enlightened or less prejudiced than other men and women. They operated under one inflexible constraint. Nowhere did the Constitution recognize groups; it treated only individuals. It was not merely color blind, as Justice Harlan's dissent put it;<sup>32</sup> both the original charter and the fourteenth amendment recognized only persons, and neither legislation nor judicial decisions could get around that awkwardness.

Furthermore, a broad social consensus still affirmed the faith in equality of opportunity for all. That faith explained the somewhat incongruous American mingling of respect for achievement and insistence upon the fundamental equality of all men, noted by Lord Bryce in the 1880's. Success in whatever field earned popular esteem—in business, politics, the church, battle, or philosophy. A Vanderbilt,

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30 163 U.S. 537 (1896).

31. *Id.* at 552.

32. *Id.* (Harlan, J., dissenting)

Webster, Beecher, Grant, or Emerson was "an object of interest, perhaps of admiration." But each was "deemed to be still of the same flesh and blood as other men."<sup>33</sup> Not only defenders of the status quo, but also every variety of progressive and socialist critic looked toward the identical remedy for present faults—increase in opportunity. "Not human equality, but equality of opportunity to prevent the creation of artificial inequalities by privilege is the essence of socialism," John Spargo exclaimed in terms that Jefferson, Jackson, and Wilson would have accepted.<sup>34</sup>

Hence, it was possible to keep the creed intact, although social realities often departed from it. In accepting the Presidential nomination in 1904, Theodore Roosevelt said, "[t]his government is based upon the fundamental idea that each man, no matter what his occupation, his race, or his religious belief, is entitled to be treated on his worth as a man, and neither favored nor discriminated against because of any accident in his position."<sup>35</sup> He knew very well that black people labored under crushing disabilities, and that other Americans suffered seriously from discrimination. Yet he was not a hypocrite in his rhetoric. Rather, he expressed a statement of purpose that dedicated the Republic to the goal of equality before the law, a goal inherited from the Revolution and as yet unattained.

Perception of that possibility guided the one successful move toward equality in the whole of this unhappy period, the move that culminated in 1920 with ratification of the nineteenth amendment, which forbade any abridgment of the right to vote on account of sex.<sup>36</sup> Reformers who sought to ameliorate the condition of women had long dissipated their energy in pursuit of unrealistic objectives unattractive to the majority, male or female. The judicial ruling in 1875 that the guarantees of the fourteenth amendment applied to race only and thus not to sex<sup>37</sup> had defined a remediable grievance; and after 1890 the crusaders for women's rights, focusing on the issue of suffrage, had waged successful local campaigns and finally gained constitutional sanction for equality at the ballot box, nationwide. That issue was comprehensible and thus

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33. J. BRYCE, 2 *THE AMERICAN COMMONWEALTH* 606 (1888).

34. J. SPARGO, *SOCIALISM* 236 (1906).

35. 15 *THE WORKS OF THEODORE ROOSEVELT* 65 (P.F. Collier & Son, Executive ed. 1897-1906).

36. U.S. CONST. amend. XIX.

37. See generally Lewis, *The Meaning of State Action*, 60 *COLUM. L. REV.* 1083 (1960); Van Alstyne & Karst, *State Action*, 14 *STAN. L. REV.* 3 (1961); Williams, *The Twilight of State Action*, 41 *TEX. L. REV.* 347 (1963).

capable of winning wide support that broad-ranging attacks on accepted institutions and habits could not. In addition, it did not encounter the brutal complications of race.

The tide turned after the First World War, although the consequences did not become fully apparent for another thirty years. A few social scientists, like Lester Ward and Franz Boas, already had rejected the concept of innate racial differences and thus had weakened the intellectual props of racism.<sup>38</sup> Slowly in the 1920's, more swiftly after 1930, and still more so after 1945, Americans turned their backs upon the divisive doctrines. Meanwhile, the second and third generation descendants of immigrants moved toward positions of influence in government and society, while northward migration gave blacks a political base. These groups formed an alliance of minorities with support from the revived labor movement of the 1930's; and the cement that held those potent forces together was a recognition that discrimination was the source of inequality. A common strategy followed from that perception—the eradication of all barriers based on race, creed, or national origin. The tactics employed called for devising a mechanism by which the law could intercede to lower such barriers. The reinterpretation of the fourteenth amendment so that it applied not only to the states, but also to their agencies and, in time, to private bodies provided a basis for expanding the scope of the guarantees of equal protection of the law.<sup>39</sup>

The social forces leading to the struggles against discrimination gained strength after 1940, partly as a result of the Depression, partly as a result of the Second World War, and partly as a result of the steadily increasing political influence of the coalition of minorities. In the two decades after 1940, these groups struggled successfully to eliminate the restraints upon equality and opportunity in employment,<sup>40</sup> in housing,<sup>41</sup> and in education.<sup>42</sup> The basic thrust was, as it had been since the Civil War, negative—that is, to forbid discrimination based on group characteristics. Fierce resistance in the Congress and in some one-party Southern states, which disenfranchised a large part of the electo-

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38. F. BOAS, *Race and Progress*, in RACE, LANGUAGE AND CULTURE 3 (1940); L. WARD, APPLIED SOCIOLOGY 107-10 (1906).

39. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1873).

40. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e-1 to 17 (1976) (Title VII).

41. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1976) (Title VIII).

42. Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, 2000c-1 to 9 (1976) (Title IV).

rate, slowed progress toward that objective. But in many cases it was clear by 1960 that this struggle was won or shortly would be.

In the fight for equality, the line of argument—political and judicial—had been consistent and bounded by commitments both to individual cases and to pluralism. The battle against the residues of racism was directed at injustices done individuals, not groups; and it disavowed any intention of imposing a flat uniformity or homogeneity on American society. Indeed, the civil rights campaign avoided a frontal attack upon the reasoning of *Plessy v. Ferguson*,<sup>43</sup> focusing instead upon factual demonstrations that separate was not equal. As the Court held in *Sweatt v. Painter*,<sup>44</sup> the evidence revealed that the law school provided to blacks was not equivalent in any sense to that available to whites in the University of Texas. Separateness was not at issue; demonstrable inequality was. Even *Brown I*<sup>45</sup> did not go beyond the finding of actual structural inequality in the schools of the city. Nor did the briefs of plaintiffs in that decisive case go further.

The process of implementing the *Brown* decision and of extending its meaning to areas other than education was painfully slow. The Court had called for all deliberate speed.<sup>46</sup> But the problems of transforming social institutions calcified through decades of acceptance would have been difficult even had they been addressed with the greatest good will. They were not. In the South die hard resistance by violence, judicial appeal, and community action generated delay after delay. And even apart from these impediments of residual racism and entrenched conservatism, more important but less noticed complexities prevented any easy solution. A profound displacement had shifted black population from rural to urban areas and from the South to the North and West. The remedies conceived in 1954 were applicable to the inequalities caused by segregation and by the Jim Crow patterns of the past, overtly and formally created by governmental or communal agencies. The same remedies did not apply to places where segregation was incidental to recently evolved residential patterns, with origins totally dissimilar to those of the rural South. Yet no one embroiled in the old war gave serious thought to the differences of approach the new one required.

As a result, the painfully won victories of the eleven years after *Brown* brought not contentment and peace, but resentment and re-

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43. 163 U.S. 537 (1896).

44. 339 U.S. 629 (1950).

45. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

46. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

newed conflict. The most significant victories were those pried out of a reluctant Congress by President Lyndon B. Johnson in 1964 and 1965—the one a potent civil rights law,<sup>47</sup> the other a statute on suffrage<sup>48</sup> that opened the way to black participation and soon transformed the politics of the South and the northern cities.

The quest for equality thus entered a totally new stage after 1965, one largely based at first upon the unsatisfied needs of black Americans now possessed of power, especially in the northern cities. In this stage equality ceased to refer to opportunity and increasingly came to refer to results. Government was not merely to eliminate prejudice and discrimination by negative action, but also to assure to such underprivileged groups as the blacks a distribution proportionate to their numbers of the desirable places in American society by affirmative action.

The leading figures in this struggle were totally unaware of the nature of the issues and of the consequences of the course advocated. In a volatile society in which swiftly changing currents concealed all traditional moorings, events blew in unpredictable directions and people who lacked any inner sense of direction drifted to unanticipated destinations.

Significantly, the battleground of the struggle for expanded civil rights shifted after 1965 from the floor of Congress to the courtroom and to the bureaucratic office; the radical changes after that date came by judicial and administrative rulings rather than by way of legislation. Enactment of statutes required the support of popular majorities that could no longer be mobilized either in the area of civil rights or elsewhere; and increasingly, the courts and the executive ventured to act instead. Thus, the dilatory tactics of states in dealing with apportionment had enticed the Supreme Court in *Baker v. Carr*<sup>49</sup> to enunciate a wide-reaching and novel conception of one-person-one-vote. Thus too, the dilatory tactics of building trade employers and unions had induced the Secretary of Labor to move to a fair hiring pattern by executive order.<sup>50</sup>

There was a vital difference between judicial and legislative remedies, even in cases in which the malady was correctly diagnosed and the

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47. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1971a to 1975d, 2000a to 2000h-6 (1976)).

48. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973b-4 (1976)).

49. 369 U.S. 186 (1962).

50. Exec. Order 11246, 3 C.F.R. 339 (Supp. 1965).

prescribed treatment was appropriate. The necessity of pulling together a majority forced legislators to consider the effects of the remedy upon the whole body. Judges did not have to do so; they could, if they wished, write their opinions out of the case books and out of their own understanding of justice. Therein lay the essential difference between political and judicial action.

Administrative acts also lacked the sanction of a popular majority and in their nature were resistant to popular pressures. Bureaucratic measures differed from legislative and judicial ones, for while bounded by statutes and decisions, they were the products of the intentions of those who framed them and, consciously or unconsciously, reflected the particular assumptions and presuppositions of the officeholders. For more than a decade those conceptions turned about a definition of equality determinable by results, so that any variance from uniformity was a *prima facie* sign of discrimination; *de facto* and *de jure* segregation merged into one. That these views had the support of no test at the ballot box, except insofar as the election of 1972 was a negative one, did not lighten their impact.

In the absence of legislative resolution of the problems inherent in the new concept of equality, judicial gropings toward consistent case law and free-wheeling administrative rulings left Americans curiously in the dark about vital aspects of their lives as the 1970's drew to a close. It will be enough to enumerate some of the problems created by abandonment of the historic conception of equality.

*Brown* held that race was not a proper ground for school assignment. By tortuous logic various courts have held that race was a necessary ground for assignment in order to attain the objectives of *Brown*: not everywhere—not in Detroit, for instance—but in Los Angeles and Boston, depending somehow on readings of past intent. Race also became a criterion for assessing the fairness of employment practices, the validity of ability tests, and the legality of some—though not all—residential patterns.

The Constitution and the statutes had taken cognizance only of persons. The rulings after 1965 treated groups, which therefore had to be defined. Before very long, numerous claimants to underprivileged status joined the blacks. The Indians, Asians, and Hispanics found manifest advantages to identification as minorities, as did Italo-Americans and Polish-Americans. Women's voices swiftly rose in charges that sex was as often a source of deprivation as ethnicity. Elaborately calculated goals designed to meet competing claims—the euphemistic term

for quotas—produced a situation in which inequality of access became a necessary condition of equal results.

Since the law knew no way of defining group membership other than by self-identification, it treated each category as fixed, homogeneous, and solidary. The offspring of three generations of well-to-do middle class college graduates were still black, as deprived on the application form as youths from the slums, while the children of migrants from Appalachia were white, as advantaged as any other Wasps.

To make results the measure of equality required the assumption that occupational abilities and preferences were randomly distributed in society—that within any subsidiary population pool the same percentage of individuals could and wished to be physicians or football players, chess players or businessmen—so that deviations from the norm were evidence of discrimination and called for governmental action. No evidence whatever supported that assumption. The relation of ethnicity to ability had been irrelevant so long as the law treated only individuals, who sorted themselves out without regard to group lines. The issue became relevant only when governmental rulings proceeded from the expectation that every population cross section would contain the same admixture of elements. At that point the issue became so laden with emotion, prejudice, interest, and politics as to move beyond the point of rational, scientific consideration.

Incontestable, however, was the evidence—historical, anthropological, and sociological—of an undissolvable bond between culture and calling, between life style, values, and attitudes toward the world on the one hand and, on the other, the ability and inclination to heal scientifically, to compete in contact sports, to play chess, and to make money. Yet at the very time that results became the measure of equality, blacks, Indians, chicanos, and other groups began to stress their cultural particularity, emphasizing especially the unique traits bound to lead to heterogeneity in outcome without evermore frequent governmental intervention.

In 1978 the social effects are incalculable. They include at least the possibility of a vast deterioration of competence in tasks vital to all.

The alternative method of achieving equality of results was long familiar to social theorists; uniformity of incomes would dissolve all incentive for any work for which the individual was unfit. The benevolent rulers of Edward Bellamy's *Looking Backward*<sup>51</sup> evened

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51. E. BELLAMY, *LOOKING BACKWARD* (1888).

out differences and imposed centralized standards on a uniform and homogeneous populace. Equality there was that of the prison camp and the army batallion. Indeed, Bellamy called his labor force the Industrial Army. But it was equality of results.

More than two centuries ago, Rousseau understood the concomitants of that kind of equality—enrichment of the state, impoverishment of the people by the removal of surpluses through taxation, and destruction of the arts, sciences, and civilization that he regarded as the cause of inequality.<sup>52</sup> In theory, at least, he was willing to pay the price.

Americans were not, and their historic concept of equality of opportunity did not require it; hence the uncertain consequences of the vital changes now demanded on them.

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52. See note 3 *supra*.