FOREWORD

EQUALITY, THE ELUSIVE VALUE

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Of all the visitors to our shores, the gifted Frenchman, de Tocqueville, would best understand the theme of Washington University's "Quest for Equality" series. In his *Democracy in America*, penned almost 150 years ago,[1] he proclaimed that democratic communities have "a natural taste for freedom . . . they will seek it, cherish it, and view any privation of it with regret. But for equality, their passion is ardent, insatiable, incessant, invincible."[2] And de Tocqueville would understand the term "quest." He may not have comprehended that it is easier to develop a psychological sense of what he observed as the "equality of condition,"[3] yielding a species of camaraderie across class lines, than to "accomplish" equality or even define its relation to effort, gain, reward, and obligation. But he did see a century before Myrdal[4] the qualifying dilemma of race; and if he understandably failed to foresee all of its unfolding complexity, he did note its intensity—even hypothesizing the possibility of race war in the South.[5]

In more timeless perspective, of the three great recurring themes in Western legal and political philosophy—liberty, justice, and equality—the equality concept, as I have noted elsewhere,[6] always has been the most complex. People are obviously unequal in talent and character; conditions and opportunities are infinitely varied; and all societies seem naturally to develop into a structure of position and preferment. People look upward seeking equality, downward claiming privilege.

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1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (P. Bradley ed. 1945).
2. 2 *id.* at 97.
3. 1 *id.* at 3.
4. A. MYRDAL, TOWARDS EQUALITY (1971).
5. 1 A. DE TOCQUEVILLE, *supra* note 1, at 391-92.
6. Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination*, 62 CORNELL L. REV. 494, 494 (1977) (book manuscript in preparation).

Equality is our most elusive value, with a varied background in natural law, Christian theology, and democratic theory. A certain modicum of equality is a precondition of a free society, yet in most philosophic thought since Aristotle it has not been an absolute. Aristotle wrapped equality into his concept of distributive justice, transmuting equality into a concern for treating persons alike only insofar as they share like qualities, rather than imposing equality of result on all.[7]

In America there has been a special tension, indeed a tragic tension not resolved, between the ideals of equality of opportunity and individualism and the reality of black slavery and its aftermath. The "Quest for Equality" in our constitutional order, although not exclusively concerned with racial matters, is heavily influenced by issues of discrimination and corrective action. In pursuit of the traditional ideal of equality of opportunity, and of the newer claims for an equality of results, detailed court orders often dominate such fields as school desegregation, employment, welfare administration, and even the political process itself.[8]

In school desegregation, for example, the important events follow the initial substantive ruling of unconstitutionality, and in these events courts stay deeply involved. As courts cast about for equitable solutions, the complex remedy may overshadow the seemingly simple substantive right that provided the basis for judicial *entre.*

Despite some ambiguous phrases in *Brown v. Board of Education*,[9] the orthodox desegregation theory holds that the Constitution forbids official acts of racial segregation but does not confer a substantive right to racial balance in all schools. Yet courts temporarily order integrative busing as a means of dismantling an officially segregated system. The distinction between these two concepts becomes blurred as the initially required proof of school board wrongdoing becomes more subtle,

7. ARISTOTLE, *Ethica Nicomachea*, in 9 THE WORKS OF ARISTOTLE 1131-32 (W. Ross ed. 1925).

8. All of these, except legislative representation, have been included in the symposium. For a preview of one developing issue, the interaction of constitutional considerations with the Voting Rights Act, 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1976), see Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 HARV. L. REV. 1847 (1978). *See also* R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 7-22, 456-99, 503-27 (1968); Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1.

9. *Compare* "[s]eparate educational facilities are inherently unequal," 347 U.S. 483, 495 (1954), *with* "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms," *id.* at 493.

i.e., as culpability becomes based not upon overt segregation laws, but upon board policies concerning the location of new schools and the arrangement of attendance lines. To correct these more subtle forms of segregation, remedial busing orders remain in force indefinitely.

By 1978 it appeared that some lower courts viewed racial imbalance per se as a substantive wrong, or at least as nearly conclusive proof of a constitutional violation on the part of school officials.[10] On this issue sharp conflict emerged between the lower federal courts and the Supreme Court.[11] If the Supreme Court some day should view racial imbalance in schools, however caused, as a constitutional violation, then to what extent would America have embraced a kind of "ethnic proportionality" principle without explicit debate, and how broadly in our society would the principle apply?

The newest conflict in constitutional equality values, illustrated by the *Bakke*[12] and *Weber*[13] cases, is individual rights versus group rights. In *Bakke*, by means of a cryptic judgment unsupported by any majority opinion, the Court seemed to frown on achieving group preference in professional school admissions through use of an overt double standard for blacks and some other selected minorities. But it left quite murky the extent to which some ethnic considerations might validly be used in allocating scarce resources where such considerations are relevant to the purpose or function of an institution.

It is understandable that major interindividual and intergroup tensions should be associated with litigation under the "equal protection of the laws" concept because "equality" is the most amorphous of our constitutional principles, and some facets of its meaning are in internal conflict. How broad should be the presumption that all men are cre-

10. *E.g.*, Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976), *vacated per curiam*, 433 U.S. 677, *remanded*, 566 F.2d 1175 (7th Cir. 1977); United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir. 1976); United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Brinkman v. Gilligan, 503 F.2d 684 (6th Cir. 1974).

11. *Compare* the Supreme Court's insistence on proof of intentional segregative acts of school authorities and consequent segregative effects, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Austin Independent School Dist. v. United States, 429 U.S. 990 (1976), *with* the Sixth Circuit's response to *Dayton* in Brinkman v. Gilligan, 583 F.2d 243 (6th Cir. 1978), which continued to infer systemwide school board discrimination from racial imbalance and policies affecting only certain grades and schools. The Supreme Court again granted review. Dayton Bd. of Educ. v. Brinkman, *cert. granted*, 47 U.S.L.W. 3451 (U.S. Jan. 9, 1979) (No. 78-627).

12. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

13. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435)

ated "equal"? Is the principle satisfied by abolishing privileges of status based on class? Should the approach be even more individualized by adding restrictions on inherited wealth to equalize starting points? Under the latter approach, would it follow that extra benefits should be provided for the slow starter? What then of subsequent inequalities due to extra effort and ability? When should a person (or group) be viewed as "on his (or its) own"? What is the impact on incentives of a system of equalization? Some of these quite different meanings of equality are implied in such phrases as "equality of opportunity" or "equality of results," but never very clearly.

In our legal and constitutional order, particularly as we have devised remedies for racial discrimination (or racial "nonproportionality" effected by a multiplicity of causes), the "equal protection of the laws" concept frequently operates as an "allocational right." It arouses animosity in those disfavored by the allocations. With limited resources, any change in favor of one person or group harms the beneficiaries of the preceding allocation. The harm to the individual is the same whether the status quo ante was "natural" or governmentally supported.

Put in terms of modern social science, "equality" is a zero-sum game whenever resources are finite and insufficient to meet demands. One person's gain is another person's loss. This factor does not operate with full force in elementary and secondary public school desegregation because no one is totally deprived of an education. The impact of pupil reassignment is instead on location and quality of education. The zero-sum factor does operate unavoidably in affirmative action programs that feature race preference in college admissions, employment, and some housing programs. The *Bakke* decision, even if limited, and the pending *Weber* decision may have a major impact on the federal civil rights legislation and executive orders that form the foundation for most of our affirmative action programs.

Evolving concepts of equality, in addition to posing difficult choices in allocation and in completion of desegregation, have stimulated a prolonged drive for a new substantive constitutional amendment, the sex-focused "equal rights" amendment (ERA). Because the status of women appears to be in the process of being substantially equalized in federal programs under the aegis of the equal protection principle, the additional substantive impact of ERA is quite uncertain. One noteworthy feature, perhaps an accidental result of outdated drafting, is that

unlike our past constitutional guarantees the Equal Rights Amendment is not phrased explicitly in terms of "personal rights."

The fifth and fourteenth amendments both specifically protect "any person"[14] against denial of due process or equal protection at the hands of the federal or state governments. The ERA, in contrast, states that "equality of rights," whatever that term may come to mean, shall not be abridged by the federal or state governments on account of sex. Even under the specific "any person" language of the fifth and fourteenth amendments, arguments have been made to subordinate personal rights to group rights, *i.e.*, to devise goals or quotas in various activities to bring about more nearly proportionate representation of various groups. Cases like *Bakke*[15] and *Weber*,[16] in which plaintiffs argue that their personal rights have been overridden to help members of certain groups,sharply raise the issue in constitutional terms under the fifth and fourteenth amendments and in statutory terms under Titles VI,[17] VII,[18] and IX[19] of the Civil Rights Act of 1964 as amended. Hence, a question perhaps more important than many of those raised in the highly emotional disputes over ERA may be ERA's relationship to, and impact on, the emerging personal rights-group rights conflict in American constitutional law. Specifically, would it be easier or harder to justify an overt sexual preference hiring quota under the ERA (perhaps based on a theory of compensating women for past restrictions of opportunity) than under the equal protection principles in the fifth and fourteenth amendments?

Also on the equality frontier are novel theories for creating some constitutional constraints on governmental choices, or governmental nonaction, in the fields of welfare and basic services. The conceptual problem centers on the feasibility of creating some intermediate affirmative obligations for government without sliding into the explosive concept of rights that must be supported.

Under the impact of modern developments in the quest for equality, two aged topics take on fresh meaning. One is the question of the continuing importance of the traditional public-private spheres dichotomy

14. U.S. CONST. amends. V & XIV, § 1.

15. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

16. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 99 S. Ct. 720 (1978) (No. 78-435).

17. 42 U.S.C. §§ 2000d to 2000d-4 (1976).

18. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

19. 42 U.S.C. § 2000h-2 (1976)

when equality values collide with individuality and privacy. In constitutional parlance the question is whether there still must be a showing of "state action" before the Constitution can be invoked against the challenged practice. The other topic concerns the proper role of the courts, participating primarily through constitutional review, in sharing the travail of society and the quest for a better order.

Traditionally, judicial review has taken the form of negating statutes and executive acts that transcend the authorized power of government or that impinge on personal guarantees. Examples include the invalidation of New Deal legislation in the 1930's and the expanding scope of first amendment limitations on governmental power. Under modern judicial review, largely founded on the "equal protection of the laws" principle, however, a court judgment does not so much *terminate* a program adopted by the political branches as *begin* a period of substitute "administration by judges." Courts restructure the offending institution's program and sometimes restructure government itself. Well known examples include school desegregation, management of state prisons and hospitals, and legislative redistricting.

This development raises troublesome jurisprudential questions concerning the adequacy of the courts' information base, the clarity of guidance from the constitutional text, the tension between judicial power and popular control of government, and the ability of judges to take on the tasks of program administration and governmental reorganization. Truly, the "equal protection of the laws" principle, which Justice Holmes characterized fifty years ago as the "last resort of constitutional argument,"[20] has emerged as the most dynamic—and perhaps the most unruly—constitutional principle.

20. Buck v. Bell, 274 U.S. 200, 208 (1927).