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Equality: Elusive Ideal, or Beguiling Delusion?

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THE PUBLIC DISCOURSE which fixes upon the conditions of just government in our time shows a marked concern to enlist the generation that created this political system in support of any proposition that is likely to excite opposition. I am convinced that the founding fathers are shown to have endorsed a great deal more of social experimentation than any of them ever thought about. For at least a half century the Americans felt a pressing need to describe for the world a new departure in government and to justify a determination to assure justice for all citizens which no other country had yet displayed. Of necessity myth becomes a prominent feature of such an account. Complicated relationships are simplified; compromises are obscured; practical solutions are transmuted into realized ideals. It was inevitable, perhaps, that the enlightenment of other peoples would be matched by a deception of ourselves.

Benign deceit infuses both the instrumentalities of government and the ideological foundations of the political system. Lately we are assaulted by a refrain that the electoral-representative apparatus relied upon for two hundred years to assure popular control of government is a farce and a fraud from start to finish; that Congress and President are indifferent to the expectations and preferences of the people (or that they exhibit concern for nothing else); that the impact of government on the citizen is contrived by bureaucracies that answer to no one. Grant that the apparatus and the performance of American government fall a far distance short of the model described in high school civics books, I will insist that a much wider gap separates advertisement from commitment in the ideological fabric that surrounds and supports government in the United States today. And I am convinced that the deception which infests the ideological domain is far more threatening to the security and improvement of republican government in America than any misperceptions that infiltrate the institutional realm.

The elevation of liberty and equality to

primacy among political goals seems to me to be an example of distortion in what I call the ideological domain, the realm of purpose, belief, convictions, and aspiration. Liberty within certain ill-defined limits was a primary goal for the founders; common status and equalness in claims to certain advantages no doubt also were in the first ranks of aspiration. But generally, there ought to be no doubt, liberty (or freedom) and equality were viewed during the era of winning independence and establishing republican government as secondary to a third conception which I shall call virtue.

The primary, first rank, condition necessary to republican government lies in the fitness of the people for self-rule. It is a matter of prevailing beliefs and convictions; of balance among open-mindedness and stubborn prejudices, inhibitions and tolerances, self-interest and the common good; of self-discipline, impulse to productivity, and readiness to accord honor to individuals who provide leadership and exhibit creativity.

This is a big order in a specification of merit. If the requirements for effective citizenship in a self-governing republic had been full-fashioned in the minds of the founders we may suppose they would have agreed upon a phrase to encapsulate them, as they came up with the formulation that the prime purpose of government is to assure "the safety and happiness of the people." "Virtue" had come, long before 1776, to identify a wide range of qualities and habituated behaviors thought to be essential to the realization of the Christian ideal, and "virtue" was made do when attention turned to the requisites for a citizenry that could be trusted with instituting and carrying on its own government.

It is a fact little publicized today that, while the first round of state constitution writing made no attempt to define or explicate a concept of liberty or of equality, five of the constitutions adopted prior to 1787 did identify principal components of the prevailing conception of virtue. ". . . a frequent recurrence to fundamental principles," said the Pennsylvania constitution, "and firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty and keep a government free . . ." Vermont accepted the paragraph as stated by Pennsylvania; John Adams, drafting the Massachusetts constitution, added piety to the list of qualities and put it first; New Hampshire, copying Massachusetts generally, struck piety out. Virginia, first of all states to come in with a constitution, omitted industry but cited virtue along with other qualities listed by Pennsylvania, indicating unreadiness to make virtue a covering label for all the components of the citizen fully equipped for a role in self-government.

The inclusion of such a declaration in several of the fundamental testaments plus repeated evocation of visions of national greatness hooked up with appeals for certain standards of conduct in the sermons, lectures, and polemical pamphlets of the time induce a conviction that here, in something commonly called virtue, was a perception of order thought to be antecedent to, a prerequisite for, the preservation of national freedom, personal liberties, and any desired measure of equality. The perception, as I analyze it, appears to have envisaged an autonomous individual who is sensitive to the requirements of a cooperating society, devoted to the common well-being, and motivated to a career of productivity and such creativity as he might be capable of. Claims to liberty and equality were vital to the national pursuit of safety and happiness. But anterior to both was the assurance that the individual should be made free to maximize his contributions to the common well-being.

It is with this setting in mind that I address myself to the American quest for a conception of equality susceptible of attainment.[1]

II

THE PROBE into the maze encompassed by the word "equality" may begin with the Declaration of Independence. The time has come, asserts the opening sentence, to declare the causes which impel the Americans to disconnect themselves from Britain and assume among the powers of the earth "the separate and equal station to which the laws of nature and of nature's God entitle them." "Equal and independant station" Thomas Jefferson wrote in the first draft; "separate and equal station" is the language finally approved. It would seem that no difference in meaning was implied by the change; the world was to know that the status of the new American nation—its place in a family of independent nations—was to be the same as that of any other member.

Did Jefferson appeal to a second familiar proposition—an idea of equality among individuals—in the next following sentence? "We hold these truths to be self-evident," reads the text as finally adopted, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty, and the pursuit of happiness." Is this a second guiding principle? Not only does arrival at national autonomy activate every claim to treatment and to honor which any other "one people" may rightfully assert; beyond that, within a nation all individuals are in equal measure clothed with certain inalienable rights, life, liberty, and the pursuit of happiness being among them. Is this what Jefferson meant to say?

Equalness in right to assert claims against government was indeed familiar doctrine in 1776, but I persist in a conviction that this resounding sentence was designed not to affirm a principle of individual rights but rather to launch the justification of the drastic act of separation and entry into the society of nations as one of many members. What *is* self-evident is this sequence of principles: That all collectivities of individuals who can support a claim to be viewed as one people are endowed by their Creator with certain inalienable rights and in this respect all such peoples are equal; that governments are instituted to secure these rights and when a government becomes destructive of these ends it is the right of that people to replace it with a new one, doing so (if they are prudent) only when driven to such a desperate act by a long train of abuses and usurpations tending to reduce them to absolute despotism or absolute tyranny. Thereafter follows a long list of repeated injuries and usurpations which the American people had suffered as colonists, not a one of which cites differences in treatment of individuals—not a one of which alleges that the King had subjected his American children to offensive variations in social status or imposed his rule unevenly upon them. Reference to a principle that under just governments laws apply equally to all of a nation's citizens would have been a diversion from the central purpose of the Declaration and an irrelevant intrusion into a severely succinct argument. Thomas Jefferson was too skilled a dramatist to place over the door a rifle which he had no intention of firing before the play was over.

My conviction that this was the intended progression of thought is not disturbed by Jefferson's initial choice of words: "We hold these truths to be sacred & undeniable; that all men are created equal & independent, and from that equal creation they derive rights inherent and inalienable . . ." Nor is this conviction shaken by Lincoln's affirmation at Gettysburg of "the proposition that all men are created equal." Viewed as a people the American Negro, through a long train of abuses and usurpations," had been subjected to absolute tyranny. Recognizing their state, it was appropriate for Negroes (indeed it was their duty) to throw off such government and provide new guards for their future secur-

ity. If Negroes had just cause for repudiating a government or removing themselves from under it, surely they had just cause and surely a sympathetic white population had just cause to alter the existing government in such manner as seemed likely to effect the safety and happiness of those who had previously endured despotism.

I have no doubt that Abraham Lincoln conceived the full fledged American citizen to be cloaked by a battery of rights conferred upon him by the nature of things, rights to be enjoyed equally by all citizens of the United States. I have no doubt that Thomas Jefferson held to the same view. My point, made at risk of excessive repetition, is that the language of the Declaration of Independence and the Gettysburg Address are not shown by the internal evidence to have been addressed to that proposition.

I labor the point because I wish to withdraw these two revered documents from their present misuse as supports for a regime of equality which I doubt can be achieved and which, if achievable, seems to me certain to exact costs far exceeding any gains that can possibly accrue.

III

I ADDRESS myself from now on to a few points that alert one to the maze that a push for a closer approach to equality must traverse and forewarn us that the goal being sought, if achievable, may not be worth what it costs:

Observation 1: The Founding Fathers were considerably less devoted to equality than now is commonly thought to have been the case. Unquestionably they were adamant against a raft of privileges which were sanctioned by customs and law throughout Europe and were committed to the furtherance of levelling long in process in the American colonies. Status and advantages that went with titles of nobility they certainly were going to have none of. But beyond this, as to what matters and in what manifestations they wanted proofs of equalness is not so clear. The common law and statutory enactments were spotted with assurances of like status and like treatment in civil and criminal causes. These guarantees were maintained after independence was won. Abolition of primogeniture and imprisonment for debt were at the threshhold of attention, but generally the quarter century of replacing colonial rule with independence and republican government was not marked by busy revision of the law with a view to enlarging the scope of common rule for the rich and the poor, the wellborn and the lowly in birth. State constitutions cited situations in which all individuals should stand alike vis-à-vis government but they were fewer than you may have supposed in the first round of constitution-making and they may have added nothing to the requirement of equalness that was already embodied in the law of England and the colonies. Bills of rights mentioned sectors of affairs into which government should not intrude and courses of action which government should not pursue. These restrictions removed rich and poor alike from the reach of governmental authority but there is no reason to suppose that such inhibitions on government stemmed from a desire to even up advantage among individuals or among classes of citizens. Forbidding the legislators to pass bills of attainder and ex post facto laws gave protection to the little man but it may well have been the high and the mighty who screamed loudest for these safeguards.

It also may be worth noticing that a very large proportion of the constitutional pronouncements traditionally cited as personal guarantees do not give the citizen immunity from governmental power but only assure him that governmental power will not be exercised arbitrarily. ". . . no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practised in this State, or may hereafter

be directed by the Legislature." ". . . no freeman ought to be taken or imprisoned, . . . or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." (Maryland, 1776). Such assurances that government would impose its demands by rules announced in advance supported a transcending inference that all citizens were to stand equally before lawmakers and the administrative and judicial officials who apply the law in particular instances. I do not find a promise of equalness in respect to anything in the sweeping statement that "life, liberty, and the pursuit of happiness" are included among the inalienable rights." Like the fat man's clothing which marked the spot where the body can be found, these words specify objectives that can only be sought with varying outcomes.

Observation 2: The history of public policy formation in the United States discloses the recurring enactment of legislation of uneven application. I have not looked into the evidence but undoubtedly it is the case that from the first year of independence state legislators thought the redress of injuries and the removal of barriers to the pursuit of safety and happiness to be a prime obligation of just governments. Remedial legislation was devised to fit the particular injustice that was recognized and often it was fashioned to relieve a segment of the population that was most effective in pressing a demand. Bars to the pursuit of safety and happiness were levelled without troubling to find out whether the persistence of other barriers generated equal or greater frustration for other victims.

This is not to say that no thought was given to appeals for strict adherence to tests of equal needs and equal benefits. One interested in this pack of dilemmas could hardly invest an hour's time better than in a reading of the debate in the U. S. House of Representatives on a bill to relieve the inhabitants of Savannah following a fire in 1796 that all but removed that city from the landscape. (*Annals of Congress,* 4th Congress 2d Session, pp. 1712-27) Summarizing the argument: There had never before occurred so calamitous an event of the kind in the United States. New York and Charleston had suffered grievous disasters of the same origin and it might be offered as a principle that if Savannah is to be afforded relief today, New York and Charleston should have been given assistance yesterday. Not so. New York is rich enough to afford itself relief; Savannah wants means to alleviate its own distress. (This from William Smith, sponsor of the relief bill.) What was the use of society (asked Harper) if it were not to lessen the evils of such calamities as the present by spreading the losses over the whole community instead of letting them fall upon the heads of a few? Moore was not persuaded. Individuals, if they pleased, could show their humanity by subscribing to the relief of other citizens but it was not within the power granted by the Constitution for Congress to vote relief from the Treasury. If, however, the principle was adopted it should be general; every sufferer had an equal claim. Lexington (Virginia) contained only a hundred houses and all but two had been destroyed by fire. He should therefore move to include Lexington in the proposed relief, though it was his intention to vote against appropriations for either city. Smith, rising again, thought there was a valid distinction between the two situations. The destruction of Savannah was a great loss in a national view, cutting into the national revenue, and probably any contribution from the Treasury would be amply compensated by the return of the city to its former importance in the commercial scale. To this, said Murray, could be added the setback to population, arts, and wealth accruing from the destruction of an important frontier town in the South. It was necessary to the Union to have a town where Savannah was sit-

uated. This appeal, pushed by several who spoke, was wasted on as many others.

The bill to provide relief to the residents of Savannah failed to pass by a vote of 55 to 24. Georgia and Rhode Island voted solidly for the bill; Connecticut solidly against it. All other state delegations having two or more members on the floor split in their support and opposition. Twenty Congressmen took part in the discussion. The reporting, though abbreviated, supports a conclusion that there was widespread and probably universal conviction that a government designed to establish justice is obligated to give its laws a common application to all of its citizens caught up in similar circumstances. Held in equal favor I should think, though not so sharply enunciated on this occasion, was a companion rule that circumstances alter needs, giving rise to conditions that justify differential treatment. The more he heard the more he found himself in favor of the resolution, said Claiborne of Virginia. He had compared the advantages and disadvantages with respect to the relief of Savannah and concluded it would be highly consistent with policy to grant relief. Georgia was a slaughter pen during the war besides being harassed by hostile Indians. Can it be possible to suppose that we have not power to assist in erecting that place again? For what purpose was it that money was spent to erect trading-houses in the back countries? For the general welfare, he answered; for the support of trade and the increase of the revenue. Such will be the consequence of a small sum given toward the relief of this suffering town.

Tradition honored many departures from the principle of equal protection of the law despite avowals that justice is blind, the law is no respecter of persons, and so on. Some deviances from the general rule stemmed from curtailments of the principle. Incompetencies necessitated special status and specialized treatment, *e.g.*, response to the disabilities of infancy, childhood, and youth, and to mental deficiencies and disorders. Pariahs were charged for their alienation in measures differing from state to state (freed Negroes, Indians residing among whites in the villages, and in South Carolina (up to 1790 at least) persons who did not acknowledge that there is one eternal God and a future state of awards and punishments. Also falling into the pariah class, I should think, were those in prison or suffering loss of privileges for criminal behavior.

The inhibitions imposed on women are accounted for in part by supposed incompetencies (denied the right to vote because of the natural delicacy and tenderness of their minds) but accounted for mainly no doubt by a supposition that the family ought to speak with a single voice in representing the interests of the children, in the maintenance and disposition of property, and in other matters. To the extent that a disability peculiar to women was attributable to this cause it could be defended as no breach of the equal protection of the laws. By the same reasoning it was no departure from equal treatment to restrict the suffrage to individuals exhibiting certain claims to property or financial income, it being thought sound policy to restrict the right to vote to persons having an evident common interest with and attachment to the community and sufficiently independent of others to be autonomous in casting a vote.

Some of the early tests for curtailment of the equality rule have long since been rejected. As many others, I hazard a guess, survive unquestioned with little or no modification.

Another type of departure from equality under the law is better seen as a failure to realize an ideal than as a crowding of the boundaries within which the principle is contained. This is the quandary of ascertaining the scope of an injury to be redressed or a problem to be solved and of fashioning remedies and solutions suffi-

ciently tailored to the objectionable conditions. This is the quandary that stayed some of the Congressmen from voting for the relief of Savannah. What they wanted was a persuasive drawing of lines that would have separated capacity for self-help from destitution, and differentiated appeals for aid resting on sentiments of humanity or charity from proposals to restore a national resource or halt a spreading deterioration. If Congressmen had been convinced that the case of Savannah fell into an appropriate category, William Smith's bill might have claimed a place as the keystone of a national policy of disaster relief.

Observation 3: Equality is an indeterminable condition. It is unlikely that the most affectionate family relationship attains an evenness in the treatment of the children which precludes complaint that one is favored above the other. Government at best can only approximate equalness, which may be to say that justice is nearsighted in its search for wrongs and astigmatic in fitting remedies to the wrongs it recognizes. Public policy is necessarily rough hewn in conferring benefits on the needy or the worthy, in distributing burdens throughout the society, and in eradicating evils arising out of nature, human wickedness, or error and poor judgment. Highways benefit everybody but particular highways benefit some persons more than others; when should the costs be charged to users in toll rates and when extracted from a public treasury fed by taxes collected from everybody?

Drawing lines and erecting classifications makes steady work for legislatures and judging the fitness of the legislature's product makes steady work for the judicial branch. "Legislation almost of necessity proceeds subject by subject, with classification a principal part of the process. In adjusting their laws to the needs of the people the States have a wide range of discretion about classification; the equal protection clause does not require that all state laws shall be perfect and complete, nor that the entire field of proper legislation shall be covered by a single act; and it is not a valid objection that a law made applicable to one subject might properly have been extended to others." (Justice Pitney [1921] 257 U.S. 312) "What satisfies this equality [the equal protection of the laws required by the fourteenth amendment] has not been and probably never can be precisely defined. . . . It does not prohibit legislation which is limited, either in the objects to which it is directed or the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions . . . But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts in the cases in which they were employed. . . . the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned." (Justice McKenna [1898] 170 U.S. 283)

How wide a latitude? Wide enough, thought Justice Holmes if I read him right, to permit the legislature to lance a boil which is in plain sight without looking to see whether there may not be a carbuncle coming to a head at another spot on the body politic. Inmates of a state mental institution who, by an elaborate procedure fortified against error, were found to be afflicted with hereditary insanity, imbecility, or other specified mental disability might be subjected to sterilization under a law which made no provision for sterilization of persons known to be equally afflicted but not confined to a state institution. The failure of the law to bring in the equally disabled and deficient who had not previously

been identified and incarcerated was not a defect sufficient to condemn the law for want of equal application. "It is the usual last resort of constitutional arguments to point out shortcomings like this," said Holmes with the approval of all members of the Supreme Court but one. "But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." ([1927] 274 U.S. 200)

This is the way it was in the beginning when the American citizen had nothing better than a due process guarantee to appeal to in the face of discriminatory treatment by the national government. So it was for the eighty some years between the incorporation of the equal protection requirement into the Constitution in 1868 and the announcement of the desegregation decisions in 1954. And so it may be still for disaster relief programs, it probably being too audacious an act of justice for the Supreme Court to veto public aid to those cleaned out by a hurricane on the ground that victims of isolated windstorms, floods, fires, and cave-ins are left to shift for themselves.

Twenty-five years ago *Brown v. Board of Education* and *Bolling v. Sharpe* set off a domino effect that brought crashing down a profusion of laws and local ordinances resembling the school legislation in that they involved discrimination on racial grounds but easily differentiable by old rules of classification because they did not involve educational activity and were not confined to children whose hearts and minds stand to be affected in a way unlikely ever to be undone. Thus it came about that an era of Search Out and Rescue was inaugurated. No longer can legislators or administrators be confident that judges will approve an act that identifies a palpable evil and removes from its effect individuals or classes of persons who are shown to be principal victims of that evil. No longer can a classification be confidently defended with the rationale: The injustice we recognize is alleviated by the remedy we prescribe and those who protest that we have not done enough cite a different cause for grievance. We will leave Jonah in the whale's belly until we have got Daniel out of the lion's den.

IV

WE HAVE ENTERED upon a new regime of rectifying wrongs. If it has not yet been so ordered we only await a decree that public authorities must search out and rescue victims of wrongs in any degree aggravated by law, sustained by public resources, or attributable to persons construed even faintly to be agents of the state. Negroes, in the first instance, were made the beneficiaries of missions launched under judicial supervision. For good cause! It was their grievance that moved the white man to repentance and the decree sought by the suppliants in court could be directed to the victimization of a nation. Separation of children in the public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal "deprive the children of the minority group" of the equal protection of the laws guaranteed by the Fourteenth Amendment."

The black children pleading for justice before the Supreme Court were a minority by head count in the schools of Topeka, Kansas, and other jurisdictions involved in the litigation. For the nation and for remembrance in history the entire black population of America is a minority not just because blacks are outnumbered but because they have been subjected by the whites to a long train of abuses and usurpations pursuing invariably a design to reduce the race under absolute despotism. Human events had now run a course which made it the duty of the Supreme Court to decree for black people an equal station and so vaporize any possible thought of dissolving the political bonds which theretofore had joined them

with the whites in a union less than perfect.

Presume for a moment that this rationalization justifies the replacement of lax tests of equalness with aggressive campaigns to erase differences in status and treatment. What other sectors of the population qualify for the monitoring of living conditions, occupation and employment, and a vast complex of social relationships that scream for ameliorative policies and affirmative action programs? Indians certainly. But Chicanos and other ethnic groups? Mennonites and Mormons? Women collectively (race and other differentiating characteristics aside) seem harder to qualify on a train of abuses-equal station test. Females may outstrip males in a recital of abuses and usurpations put up with, but however hotly they be pursued by a menacing despotism, this gentler sex can hardly array proof that the laws of nature and of nature's God entitle them to a *separate* as well as an equal station.

I have stretched out far enough this moment for presuming that the new regime of Search Out and Rescue finds its vindication in the first paragraph of the Declaration of Independence. It is a safe bet worthy of overwhelming odds that when the occasion for an authoritative ruling arrives, the justification of Search Out and Rescue campaigns and their attendant affirmative action programs, if they are approved and activated, will be anchored to the constitutional provisions of equal protection of the laws and its surrogate provision, due process of law. If it turns out that the female component of this binary population may lawfully demand affirmative action to assure a female combatant in every heavyweight prize fight, this giant step toward justice will need not a shade, whiff, or whisper of connection with separate and equal station.

It is not my purpose to downgrade affirmative action; much less my purpose to berate the women because they got there before the men with a schedule of wrongs to be rectified. It does fall within my province and duty to contend that if claims to an aggressive equal protection of the laws justify affirmative action programs for adult women they just as imperatively justify Search Out and Rescue programs for children physically abused by vicious parents, browbeaten by siblings, run over by playmates, humiliated by teachers, and told by practically everybody to be seen and not heard.

Blacks, women, and children are inclusive segments of the population. Their numbers may justify first attention in an effort to remedy wrongs that too long have been suffered and ignored. Children, long viewed as wards of the state, may be blessed with status and special treatment without regard for parity with adults. But I know of no constitutional theory, compatible with an overriding commitment to search out and rescue, which authorizes the disposition of government's helping hand by random choice among tail runners in the pursuit of safety and happiness or by measuring pressures laid on by differentiable groups who claim they are running last because some others have been given a boost. Of necessity the initiation of rescue programs may be scheduled, since the universe of human relations can no more be reconstructed during one presidential administration than Rome can be built in a day. Nonetheless, if government maintains janissaries who dog reluctant employers into finding more places for women, government cannot for long refuse to send out scouts who stir up jobs for the deaf, the blind, the crippled, the cross-eyed, the tongue-tied and every other identifiable class of unwanted usables who need the help of a bureaucracy to connect them with payrolls. If national or state government launches a new program to wipe out malaria it cannot long put off spending as much money to eradicate the ragweed and golden rod which condemn other people to asthma. Does it not follow that if

Peoria levies a tax for support of its orchestra it must add an equal amount for its museum because some people in Peoria would rather look at pictures than listen to a symphony?

These are eventualities to be accorded a high predictability if strict adherence to logic guides further development of public policies. Barring some bold rationalization which relieves the judiciary from the logical consequences of holdings and doctrine already on the books it seems an unavoidable conclusion that we are now only at the beginning of a Search Out and Rescue era. Deliverance from this grim prospect might come by injecting the Declaration of Independence into the U. S. Constitution by fiat given precedent by the transposition of the Bill of Rights into fifty state constitutions. This would allow unique constitutional status for the claims of Negroes, Indians, and such other sectors of the population as the judiciary may think to fall within the compass of one people threatened with despotism by the sufferance of a long train of abuses and usurpations.

V

ASSUMING the long continuation of an aggressive regime of equalization extending to all groups in the population who can make a showing of disadvantage at the hands of government or with its connivance, we are warned to prepare ourselves for a huge crop of unwanted consequences. This is made inevitable by the pervasiveness of governmental authority in American life and the rule that activities must meet all requirements of equal protection if they are sanctioned by law or supported by national, state, or local government. On anybody's map of the current social scene transactions that stand apart from the regime of compulsory equalness have to be hunted up like islands in the Pacific Ocean. In those precincts where equality in status, opportunity, and treatment are decreed, initiation of further ameliorative policies will be discouraged, experimentation and the setting of models will be curtailed, and dispersion of governmental power may well give way to a degree of centralization we have not as yet experienced.

These consequences I foresee because the judiciary has committed itself to a goal of equalness which not only puts an end to the rude classifications and variant policies taken for granted for more than 150 years, but invites every individual who can make a showing of disadvantages sanctioned by political authority to call upon a court to lift him up to where the others are or pull the others down to where they are even with him. No longer allowed a measure of arbitrariness in setting bounds to extensions of ongoing policy and innovations heading off in new directions, policy making authorities will recognize compelling reasons for sitting tight. Each enlargement of the area invaded by public policy spreads wider the interface where individuals and interests embraced by public policy rub up against individuals and interests not yet touched by the soothing hand of government. Aware that the improvement of one man's lot generates claims for equal benefits in a dozen other quarters the sensible reaction is for the responsible legislator to stand pat whenever urged to plunge forward in pursuit of the general welfare.

Assuming that the courts do not pull back from the aggressive role which the logic of the past twenty-five years commits them to, experiments in promoting the general welfare may hit a low point for this century. Surely there is a lesson for us in the coercive mixing of the races in the public schools. I presume the objectives of the nation, broadly viewed, are agreed upon: To improve the quality of education for blacks; to, at least, maintain levels of quality previously attained for whites; to quicken the processes of integration and to better relations between the two races at all age levels and in all sectors of life.

If there is some doubt of a substantial consensus on these goals, there can hardly be any doubt at all that right here must be the greatest gap between a fixed national goal and sure knowledge of how to achieve that goal. In a rating of public confidence in the quality of expertise or know-how, maximization of military strength, minimization of pollution of air and water, conservation of energy and security of energy supply would surely rank far above the three objectives involved in desegregation of schools. Yet it is a strange fact that with hundreds of jurisdictions having sizable black and white populations, one policy—perhaps I should say one formula—for mixing the races persists. It may be true to say that considerable variance can be found in the mixing patterns from place to place. I think it cannot be shown that there is a conscious designing of arrangements—ratios and selection procedures—fashioned to maximize promising experiments and monitored to assure that this society learns something about how to deal with towering racial problems as a consequence of purposeful variation of experience.

It may well be the case that we pursue a single rule in school integration because we do not trust ourselves to choose between several different rules. It may be discovered sooner or later that the judges will allow some experiments in policy areas right where evenness in application of the law is most highly treasured. At best, however, we must expect lenience to be miserly, because every evidence that the law does not apply evenly is the nesting place for a charge that someone is denied the equal protection of the laws.

The drive for uniformity which deters experimentation puts a choker on model setting. And without model demonstrations which rub our faces with evidences of what we could do if we had more imagination, more determination, or more money I am afraid there is not much learning—not much of one community getting an idea from another, that is—not much of one community bursting out of its lethargy just because it will be damned if it will be made to look like a dead town by a rival community. This is a lavishly rich country and a country enormously admired for its productive capacity. Money lying loose in so many pockets is a main guarantor of the ceaseless innovation which enables a vanguard to set models that stimulate the laggards to catch up and in their turn to take the lead. Luxuriant resources do not alone account for this truly seething productivity, however. We have not been and are not now squeezed into molds, each one a way of doing things prescribed for all parts of the nation. The dispersion of governmental authority among one national, fifty state, and a few thousand city and county governments has allowed the American people to permit a tryout for just about everything an inventive population could think up.

In recent decades a practice of raking surplus wealth into Washington and returning it reallocated to the lesser governments and with strings attached has significantly restricted the range of choices open to the shapers and managers of the country's agricultural, industrial, financial, labor-supplying empire. If giant enterprise is not held down here and shunted aside there, middle-sized business and small fry operators certainly are. Now add to the pressure generated by a centralized spreading about of money—add to that the constraints inherent in the command to construct a world in which the mountains and valleys of the social terrain are reduced to a peneplain. Add this compulsion to fashion a world where pleasant hills and valleys have replaced peaks, promontories, plateaus, and sink holes and you may find you have indeed stumbled a good distance into that humdrum stupefying regime of conformity which was constantly being inveighed against with religious fervor only a few years ago.*

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[1]This placement of equality in an array of conditions attributed to the American conception of republican government, or democracy, appears to be wholly compatible with the view of Tocqueville. Alexis de Tocqueville came to America in 1831 determined to demonstrate to aristocratic Europe that the minimization or total absence of social classes in America provided a fertile soil for a kind of government that was destined to sweep Europe. Impressed that the absence of social classes in the manifestations exhibited throughout Europe accounted for the main differences between the old world and the new—in political institutions, public policies, economic productivity, social relations, attitudes of the people—Tocqueville made democracy and equality equivalents. For Tocqueville, equality was the condition which absence of social classes induced; it carried no implication of evenness in posts of power and possession of fortunes which individuals might arrive at by their capabilities and efforts. This he made clear near the beginning of the second volume of his *Democracy in America:* "When men living in a democratic state of society are enlightened, they readily discover that they are not confined and fixed by any limits which force them to accept their present fortune. They all, therefore, conceive the idea of increasing it. If they are free, they all attempt it, but all do not succeed in the same manner. The legislature, it is true, no longer grants privileges, but nature grants them. . . . Natural inequality will soon make way for itself, and wealth will spontaneously pass into the hands of the most capable." *Democracy in America,* Vol. 2, Phillips Bradley, ed., (New York: Vintage Books, 1945), p. 39.

The New Natural Law and the Problem of Equality

STEPHEN J. TONSOR

An appeal to the condition of man in the state of nature has always been among the most powerful arguments pro or con concerning equality. "Doing what comes naturally" is the conclusive argument in support of all human behavior. For theists the argument from nature has usually borne the stamp of divine approval for such behavior has its origin "in nature and nature's God." To prove that an action is natural is to demonstrate that it is licit. All of the great theoretical formulations of the idea of human equality or inequality from the Greeks to Freud have appealed to the condition of man in the state of nature as their ultimate justification.

It is important to note too that all the classic formulations of the "state of nature" with the exception of Freud's stem from the pre-Darwinian era. They are often formulated in terms of the myth of the age of gold when, as Virgil predicts in the Golden Eclogue, "the goats, unshepherded, will make for home with udders full of milk, and the ox will not be frightened of the lion, for all his might." Alternatively, they are imperfect inductions based on faulty or incomplete ethnological evidence. Even after the discovery of the New World the image of man in the state of nature continues to be heavily idealized and romanticized.[1] When, in the seventeenth and eighteenth centuries, primitive man was closely observed, the sources of his behavior were ill understood and faulty interpretation of the evidence often produced a picture as inaccurate as that produced by idealization and romanticism.

Most of these theoretical reconstructions of the condition of man in the state of nature posited a benevolent and nonaggressive human nature living in a state of equality, virtue and abundance. Even when the equality was a negative equality, that is mankind was equally degraded, depraved or sinful, these inherent weaknesses of condition in primitive man gave no man a real advantage over another.

Darwinism, from the date of the publication of *On the Origin of Species* on November 24, 1859 to the present, has transformed both our conception of man in the state of nature and our knowledge of what "human nature" is and how it came to be. The easy simplicities of earlier views were contested and abandoned and although "Darwinism" in its many formulations was from the outset filled with scientific controversy a new conception of human nature and of "natural law" gradually emerged.

Although the theory of evolution through natural selection is over a century old the earlier ideas of a harmonious and non-aggressive human nature not only remained intact but continued to dominate the social sciences. As late as the 1960's, Donald Symons remarks,[2] "the chimpanzee (the customary model for early man) was a peace-loving, promiscuous, Rousseauian ape, and students of human evolution emphasized tool-use, cooperation, hunting, language and 'innate' needs for long-lasting, intimate relationships. Today, however, the chimpanzee is a murderous, cannibalistic, territorial, sexually jealous, Hobbesian ape;