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Whatever else may be meant by "equality" in specific contexts, its ordinary usage requires a comparison of the political, social, and economic conditions of different members of society. Equality theories are normative theories that explain which differences in condition are justifiable, and which are unacceptable. In short, equality is about the distribution of social benefits and burdens; equality rights are rights to distributive justice.

Unfortunately, legal reality is not always co-extensive with human reality. Words acquire a legal meaning which is at variance with ordinary usage of the language. The American experience with constitutional equality rights, an experience documented in Part 2 of this paper, is typical in this regard. The American doctrine is confused and confusing, and fails to accurately reflect popularly accepted concepts of equality. Two sources of the confusion can be identified. First, society no longer accepts the liberal paradigm of equality as formal equality, and yet the courts have failed to adapt the doctrine accordingly. To some extent, this is because there is genuine vacillation on the part of the courts, and indeed on the part of society, between the two competing models of equality. But the indecision on the substantive normative issue is over-shadowed and influenced by a secondary, processual issue. The courts are concerned with adhering to a principle

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of judicial restraint. They do not wish to usurp authority that they feel is better exercised by another branch of the government. The courts' choice between the liberal and post-liberal equality theories is strongly influenced by the fact that the liberal model can be given effect without creating "problems" of judicial activism.

This essay is an attempt to deal with the two problems just mentioned. In Part 1, I advocate the adoption of the post-liberal concept of equality as equality of condition. Although the choice between normative theories is plainly a value choice, it is a choice which is largely dictated by our belief or disbelief in the power of the individual free will. It is argued that both as a matter of public intuition and social scientific positivism our society has come to recognize the enormity of the constraints upon individual "choice". It is time for legal recognition of these constraints, and this entails the adoption of equality of condition as the primary constitutional theory of equality. Nevertheless, for reasons of principle and reasons of strategy, it is suggested that liberal anti-discrimination theory ought to be retained as a secondary and subordinate equality principle.

Part 3 deals with the problem of judicial restraint, and attempts to find a reasonable solution to the problems of implementing a theory of substantive equality in a legal régime which finds judicial activism intolerable. A novel compromise is suggested: substantive equality rights should be treated as dynamic rights so that we retain the purity of our vision of equality, while at the same time recognizing the limited capacity of the judiciary to impose sweeping affirmative remedies to achieve equality "now". By "dynamic rights" I mean that the disadvantaged ought to have a right to insist that new government initiatives at least not move society away from the substantive equality ideal. It is submitted that this approach would recognize and give effect to the most important practical and political constraints on judicial decision-making.

I am sympathetic to those who warn against the displacement of primary social values with processual values, a common tendency which Professor Samek referred to as the "meta phenomenon":

> The meta phenomenon is the human propensity to displace "primary" with "secondary" concerns, that is, concerns about ends with concerns about means. The latter come to be perceived as primary, and distort the former in their own image. The new primary concerns are in turn displaced by the new secondary concerns about the means to be adopted to achieve the new ends, leading to another shift in the focus of consciousness. The new secondary concerns come to be perceived as primary, and so on. The progression is not linear but global. If we think of the total

> number of primary concerns of a man, a society, an ideology, as a sort of gravitational field, it will be distorted continuously by the pull of a growing mass of secondary concerns. The result is an increasing loss of balance, a relentless slide to the peripheral.[1]

The ultimate manifestation of the meta phenomenon is in theories of constitutional interpretation, such as those of Professor Ely,[2] which assert a single processual value as the exclusive content of the constitution.[3] It is not difficult to show that these theories yield indeterminate outcomes—at best they suggest when the judiciary should intervene but often fail to dictate the nature and extent of the intervention.[4] But I am inclined, in any event, to agree with those who declare them to be wrong in principle (as well as in fact) for subordinating ends to means, or "truth" to "hierarchy". Under the processualists' approach,

> [t]he simple fact that a majority has declared some value or faith worthy of legal sanctification determines the goodness of that faith.[5]

This does not mean that processual values are irrelevant. Only, that they should be subordinated to substantive values. Not many of us after all would be pleased to be entirely ruled by an oligarchy of nine lawyers. "Truth" will be more gratifying if we all participate in its attainment. I suggest that some sacrifice in the speed with which we move towards equality of condition is not a bad price to pay for democratic government. The main thing is to move in the right direction, to keep the faith.

In any event, even those who do not care at all for processual values would have to admit, as a matter of legal reality, that judges

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1 R.A. Samek, "Untrenching Fundamental Rights" (1982), 27 McGill L.J. 755 at 763.

2 J. Ely, "Constitutional Interpretivism: Its Allure and Impossibility" (1978), 53 Ind. L.J. 399; "The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values" (1978), 92 Harvard L.J. 5; "Toward a Representation—Reinforcing Mode of Judicial Review" (1978), 37 Md. L.R. 451; *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

3 Professor Ely's suggestion is that constitutional rights exist to reinforce public participation in goverment decision-making.

4 For a critique of the theories see: L.H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980), 89 Yale L.J. 1063; P. Brest, "The Fundamental Rights Controversy; The Essential Contradictions of Normative Constitutional Scholarship" (1981), 90 Yale L.J. 1063; P. Brest, "The Substance of Process" (1981), 42 Ohio State L.J. 131.

5 D. Fraser, "Truth and Hierarchy: Will the Circle be Unbroken?" (1985), 33 Buffalo L.R. 729 at 743. Fraser adds that "brevity requires such a generalization:" *id.*

do care about democracy. If egalitarians are to persuade the judiciary to favour the substantive approach to equality, they are going to have to offer some means of doing so without shattering accepted principles of judicial restraint. For those of us who believe in substantive equality and who believe that it can be effected through the adjudication of constitutional rights, the answer lies in the dynamic approach. Otherwise we will remain a lonely group of dissidents, engaging in "abnormal discourse"[6] at the social periphery, while we wait for a revolution that never comes.

1. DISTRIBUTIONAL THEORIES AND THE MEANING OF EQUALITY

The purpose of a normative theory is to offer a vision of what should be. In the context of equality analysis, it is to answer the question: what do we mean when we say that social benefits and burdens should be distributed equally? There are really two parts to the inquiry: first, we have to define the "thing" that is being equalized; second, we have to define "equal".

In a society in which many benefits are traded for money it seems reasonable to use "income" as a rough measure of net social benefits. But "income" in this sense must include a notional or imputed income to account for the several benefits and burdens which are not normally the objects of exchange for money. There are two major reasons for selecting a single monetary measure of net social benefits as the usual basis for the type of comparison that equality analysis demands.

First, there has to be some measure which permits interpersonal comparisons to be made. Goods and services are so heterogeneous that it would be grossly unfair to treat, say, all two bedroom apartments as yielding an equivalent flow of benefits to the tenants. There is a similar heterogeneity in respect of the "bundles" of benefits and burdens experienced by different individuals. How, for example, can the condition of X and Y be compared without resort to a "unit of account" when X consumes imported avocados and mangos while Y consumes locally grown blueberries and apples? "Income" provides the necessary language of comparison. We ought to be conscious, however, of the limited vocabulary of our language, and must be on guard against overlooking benefits and burdens simply because they are not customarily assigned a dollar value.

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6 *Ibid.*, pp. 773–775.

Second, by selecting a single measure of comparison we avoid the problems associated with requiring an equal distribution of each particular benefit.[7] Equality does not have to mean sameness. Different people have different needs and tastes and it is hard to see why exact uniformity and conformity of consumption should be required, providing that the overall distribution of benefits and burdens is equal according to some reasonable standard.

An important *caveat* should be entered, however. The desirability of some uniform measure of social benefits should not blind us to the possibility that there may be particular types of benefits and burdens which should be separated out from the general "income" measure of benefits. There may be compelling arguments for requiring interest-specific equality for certain important benefits—a possibility that will be discussed below in reviewing the American doctrine. Conversely, some other benefits and burdens should perhaps be excluded entirely from the general application of equality principles.[8] For the time being, however, I will assume that equality is to be measured across the general run of benefits and burdens, and not with respect to particular interests.

The choice of "income" as the measure of an individual's share of the social product gives rise to a second serious doubt. Is it really appropriate to be using an objective valuation of the benefits experienced by the individual? Perhaps instead, society should seek to equalize the psychic benefit (happiness?) that each person gets from his or her share. The most obvious problem with attempting to use a subjective measure of benefits is that we simply do not know enough about people to make interpersonal comparisons about psychic states of well-being.[9] Probably there is a rough correlation between income and happiness—this at least would seem to be intuitively obvious from trying to imagine the relative states of mind of, on the one hand,

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7 It will be argued in Part 2 that the interest-specific approach to equality creates a real limitation on the possible growth of the American "Fundamental Interest" doctrine.

8 For example, it will be argued that some interests whose social value is derived from processual concerns ought not to be subjected to the same equality principles as other interests.

9 Economists have long felt comfortable asserting that each person is "better off" when more rather than less benefits are conferred upon him or her. They have, however, always declined to make interpersonal comparisons of psychic states of well-being. Happiness ("utility") is seen as an ordinal rather than a cardinal concept.

a person eking out a subsistence income and, on the other, someone receiving an income that permits significant leisure time. In any event, I submit that it is fairer to use an objective rather than a subjective standard of comparison. Although we know very little about the relationship between consumption of material benefits and psychic states of mind, it is probably a safe guess that status-based expectations about material benefits play a significant role in determining the satisfaction that people derive from their share of the social product. To equalize these feelings of satisfaction would therefore involve society in giving more material benefits to people with high expectations based on their existing status. Such a scheme would defeat most of our intuitive concepts of equality.

The final issue that is raised by selecting "income" as the subject matter of equality analysis is one that is more familiar to constitutional lawyers. It is the issue raised by section 32(1) of the *Charter* and by the phrase "equal protection and equal benefit *of the law*" in section 15(1). What is the proper scope of constitutional equality rights? Surely, some will argue, it is only those benefits and burdens which descend from the government that must be equalized.

Of all the constitutional rights, equality is the one right which demands at a minimum that the rights be applied with full awareness for governmental willingness to enforce so-called private rights. I am not concerned here with the question of whether the *Charter* permits an individual to bring another individual to Court for violating *Charter* equality rights. If any content is to be given to section 32 it probably means that private individuals are immune from a *Charter* action, *per se*. But section 32 does not purport to define the nature of the *prima facie* right. It is merely a section defining the *application* of the *Charter*. The section 32 limitation is properly viewed as a purely remedial limitation.

Neither does section 15(1) suggest that the "things" being equalized are restricted to some narrow conception of government benefits. The meaning given to the phrase "equal protection and benefit of the law" should be a sensible one, that recognizes the enormous inequalities of "protection" and "benefit" that are conferred by state enforcement of proprietary and contractual rights. There are many people with few private rights that are worth enforcing, who would gladly forego the "protection" that is offered them in return for permission to invade exclusive proprietary rights of the wealthy. Surely the Constitution ought to recognize that the realization of income from all sources is not only a social phenomenon based on human interaction, but a legal one, the outcome of which would be very dif-

ferent in the absence of a legal régime or in the presence of a different régime.

Unfortunately, a twisted version of equality as a *prima facie* right to the universality of narrowly-defined government benefits is the standard legal approach towards equality analysis. It is an unfortunate product of the mistaken belief that equality is about "distinctions" or "classifications", which in turn flows from the liberal theory of distributive justice. It is apparent that the subject-matter of equality analysis turns on the meaning of equality itself: if equality means formal equality, then section 15(1) is blind to the unequal impact of property and contract, and only direct government benefits are the subject of equalization; if, however, equality means substantive equality, then the differential impacts of all branches of the law must be considered, and income from any source is properly viewed as a benefit that springs from the law. Before leaving this issue for the time being, it is impossible not to remark that the adoption of the universality-of-narrowly-defined-benefit approach by the Americans has forced them into enunciating a "minimal scrutiny" standard of review to avoid producing absurd results. To actually suggest—as that doctrine does—that the redistribution of income from wealthy people to poor people is a permissible *violation* of equality is to stand "equality" on its head and give it a meaning that is truly an embarrassment to the ordinary usage of the language.

Since equality means distributing the social product equally, the real debate within equality theory ought to be a debate about the principles of distributive justice.[10] The important question that has to be faced by the equality theorist is whether there are sufficient morally-relevant differences between people to justify differently sized shares in the social product. It is obvious that there are *de facto* differences

10 There ought also to be—and there already is—a strong debate about when the equality objective should be subordinated to other social objectives. But it is important that these separate issues be dealt with separately so that permissible government action (*i.e.* "reasonable limits" on equality) can be distinguished from mandatory government action (*i.e.* equality rights themselves). Most limits on equality rights can be described as advancing efficiency objectives. If "reasonable limits" are mixed in with the definition of the right itself there is a tendency to lose perspective on what the right is about. The American doctrine has become greatly confused by the fusion of the distributive right and the efficiency limitation on the right, with the awkward result that the right itself has disappeared and equality has come to be synonymous with efficiency! The American experience is discussed in Part 2. There is some discussion of "reasonable limits" in the Canadian context in Part 3.

between people—ranging from physical characteristics such as skin-colour, gender, eye-colour, through mental or psychological characteristics such as intelligence, creativity, industriousness, to socio-economic characteristics such as education, work experience, and accumulated wealth. But which of these attributes, if any, are morally relevant?

One possible theory of distributive justice is suggested by conservative ideology, which postulates the existence of a natural social hierarchy. God has created inequality and those who are "better" than others should be entitled to a larger share of the social product—indeed it is the ruling class that ought to be distributing the social product. Classical conservatism can be seen as "divine right" tempered by "noblesse oblige", but whatever obligations are owed by the powerful in respect of compassion towards the weak, they are owed to God and not to the weak themselves. In other words, redistribution is a matter of grace, not a matter of right. Basically, then, conservatism presents a theocentric vision of the universe in which there is no reason for interfering with a natural hierarchy: since the hierarchy is ordained by God, it is not only natural, but it is right.[11]

It follows that equality is alien to conservatism. The inclusion of equality rights in the Constitution must be taken as a rejection of general conservative doctrine. The meaning of equality therefore falls to be determined either by liberal or post-liberal ("socialist") principles. At best, conservatism can only tell us that if we must have equality rights at all, those rights ought not to apply to situations of natural hierarchy.

But while it is correct to conclude that conservatism cannot contribute to a meaningful definition of equality, it would be dangerous to ignore the enormous impact that the ideology has had on the application of equality rights. Although in general the American courts have adopted a liberal theory of equality, conservative perceptions of natural hierarchy have excluded large classes of people from its appli-

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11 There is an agnostic version of conservatism which yields the same conclusion, namely, social Darwinism. Again social hierarchy is perceived as natural and desirable and, again, "equality" is an alien concept. Social Darwinism however is not pure conservatism, but a mixture of liberalism and conservatism. While the idea of natural hierarchy is a fundamentally conservative vision, the idea that an individual's position in the hierarchy is best determined by competition is an essentially liberal concept. It will be shown, below, that liberalism and conservatism have largely become blended ideologies in order to maintain "meritocratic" distribution in the face of the socialist challenge.

cation. For example, the declaration that "all men are created equal" is the quintessential expression of liberalism, but most of the signatories clearly did not intend to suggest that blacks or women were included in the class of "men". While the post-Civil War amendments rectified the exclusion of blacks, concepts of natural hierarchy with respect to women have been persistent.[12]

It is quite possible, therefore, for a person or a society which in general advocates a liberal or even a socialist[13] definition of equality to be a conservative with respect to particular issues. It is submitted that for at least three reasons the Canadian equality theorist must soundly reject the conservative vision of acceptable natural hierarchy both in its general and in its particular forms. First, it is a theory that in its general form absolutely conflicts with the constitutional equality objective. Neither is there any textual support in the *Charter* for issue-specific conservatism, that is, the idea that equality rights ought not to extend to some (*i.e.* natural) hierarchies. If this were so, one might have expected that equality rights would be specifically aimed only at artificial hierarchies, those produced by socialization and stereotype. On the contrary, equality rights are granted *generally* in section 15, and even the incomplete enumeration of non-discrimination rights includes the disabled and the young or old—groups whose condition is often naturally produced.

Second, the characterization of particular hierarchies as "natural" has been an arbitrary conclusary exercise in the past. The fact of observable inequality of condition has been taken as proof of the naturalness of the hierarchy. It is now conceded by all but the most extreme racists and sexists that blacks and women are not naturally inferior beings, and yet the perception for long periods of history was precisely the opposite. Conservatism has erred too often in the past to be trusted in the future.

Finally, the theological assumption of the divine creation of natural hierarchies cannot be accepted in a heterogeneous society which gives explicit constitutional endorsement to freedom of religious belief

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12 For an articulation of the classical conservative outlook, see *Bradwell* v. *Illinois* (1872), 83 U.S. 130 (U.S. Ill., 1872).

13 For example, George Orwell, one of the leading but independent English socialists of the 20th century (see, *e.g.*, *Homage to Catalonia*, *The Road to Wigan Pier*, *The Lion and the Unicorn*), maintained very traditional conservative values in respect of the place of women. Although many of his more orthodox socialist contemporaries were somewhat more enlightened, Orwell's views were by no means unusual.

in sections 2 and 15. Once this assumption is dropped it is no longer possible to conclude that even demonstrably "natural" inequality is morally justifiable. The supposition, for example, that the unequal position of the disabled is natural does not necessarily yield a conclusion that the inequality is right. To be sure the nature of the disability may impose limitations on society's *ability* to equalize benefits, but it is submitted that subject to competing (non-equality) objectives, it does not detract from the *desirability* of a social obligation to attempt to equalize the overall distribution of the social product.[14]

The equality debate must therefore be a debate between liberals and "socialists".

Liberalism is an ideology of individual responsibility which is rooted in the homocentric perception of the Renaissance humanists. Virtually anything was thought to be within the grasp of the individual will. The Florentine Platonist, Pico della Mirandola, imagined God addressing Adam as follows:[15]

> Neither a fixed abode, nor a form that is thine alone, nor any function peculiar to thyself have we given thee, Adam, to the end that according to thy judgement thou mayest have and possess what abode, what form, and what functions thou thyself shalt desire. Constrained by no limits, in accordance with thine own free will, in whose hand we have placed thee, thou shalt ordain for thyself the limits of thy nature.

Indeed, it is this soaring vision of ourselves as creatures uniquely in control of our individual destinies that has made liberalism such an exciting and persistent ideology even though scientists and social scientists have been compiling the evidence of a more mundane, less appealing human condition.

There are two major conclusions that flow from the premise of free will: first, each individual is responsible for his or her own condition in life; second, government ought not to interfere with the individual exercise of free will beyond providing an infrastructure of basic rules to ensure that individuals do not interfere with each other. Be-

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14 It is one of the incidental advantages of taking "income" as the subject-matter of equality (instead of adopting an interest-specific approach) that the court is asked to look beyond the reasonableness of, say, refusing a driver's licence to a visually impaired person. In assessing the equality of that person's condition the court ought to consider whether alternative transportation methods have been provided, and if so, whether they are adequate.

15 Pico della Mirandola, *Oration on the Dignity of Man*, cited in P.O. Kristeller, *Eight Philosophers of the Italian Renaissance* (London: Chatto and Windus, 1965), p. 67.

cause of the prominence of concepts such as the social contract and libertarianism in liberal writing, it is often forgotten that these are not independent ideas with a life of their own, but conclusions which depend on the premise of free will. It will be argued here that the decay of liberalism has been characterized by a loss of faith in the freedom of the individual will, unaccompanied by an adequate recognition that the liberal conclusions must collapse with the premise.

The liberal theory of distributive justice, then, recognizes the moral relevance of characteristics that are subject to the individual exercise of free will. And by presumption, just about all characteristics *are* subject to the individual will. But even the most ardent proponent of free will could hardly deny that characteristics such as race, alienage, illegitimacy and gender[16] are beyond personal control. Since these characteristics are morally irrelevant, society should neutralize their effects so that differences in condition accurately reflect the exercise of the individual free will.[17] The best means in which society can achieve this is to be blind to attributes which are personally immutable. The liberal equality right is a right to determine one's own condition through the exercise of free will; it is not a right to an equal condition. Hence, we have the phrase "equality of opportunity."

Socialist theories of distributive justice have in common, with their liberal counterparts, a normative presumption that variables beyond individual control ought not to dictate a person's share of the social product. The socialist, however, shares the skepticism of the conservative about the ability of the individual to determine his or her condition. But while the conservative theory is satisfied to attribute the forces of extra-personal determinism to divine will, or at least to a morally justifiable natural order, socialist theory suggests that it is social forces, especially economic forces, that determine individual conduct and condition. If liberalism is a homocentric doctrine of individual responsibility, socialism is a sociocentric doctrine of collective responsibility. Since the individual's fate is not subject to personal con-

16 These characteristics comprise the list of "suspect classifications" under the American doctrine. Presumably other immutable characteristics, such as eye-colour, are not included as suspect because there is no apparent problem of "eye-colour consciousness".

17 The determination of guilt or innocence under the criminal law illustrates well these two central propositions of liberalism. On the one hand, voluntariness is a vital element to criminal liability and no conviction will be entered in its absence. On the other hand, the law is prepared to recognize very few instances of involuntariness. Socio-economic determinism is not much of a defence.

trol, there is no reason to treat the rewards received in the marketplace as "belonging" to him or her. The market rewards might just as well have been determined by a lottery, insofar as individual meritorious conduct is concerned. Since "earned" rewards do not reflect individual "merit", there is no reason why some should get a greater share of the social product than others.

It is important to recognize that the "socialist" vision of equality as equality of outcome is valid, irrespective of what particular force or forces are regarded as determining forces,[18] as long as

1. there is no substantial scope for the operation of free will, and
2. there is no validity to the conservative perspective that the determined outcome has moral validity *per se*.

It does not matter whether outcomes are dictated by economics, psychology, genetics, or even by purely random events, such as climatic events. To the extent that the forces are not subject to personal control, the social product ought to be distributed in equal shares. It is somewhat inaccurate therefore to refer to equality of condition or outcome as an exclusively socialist vision—since this conveys the inaccurate impression that determining or external forces must be social ones.[19] The phrase, "post-liberal equality", is perhaps a better expression of the more general view.

Properly viewed, then, the equality debate is a continuation of the old—and probably eternal—debate about the freedom of the will.

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18 It should also be pointed out that one does not have to be a historical determinist—in the sense of asserting that our collective history is pre-determined—in order to subscribe to "socialist" equality theory. The classic work on historical determinism which rejects purely deterministic theories (and also rejects purely "heroic" theories) of history, places great emphasis on the historical influence of random forces, such as the accidents of genetics: S. Hook, *The Hero in History: A Study in Limitation and Possibility* (London: Secker and Warburg, 1945). To the extent that random forces are external to individual control, a mixed heroic/deterministic theory of history is perfectly consistent with a position that there is no individual free will—which is all that is required for the "socialists" theory to hold.

19 It can be argued that society has a more compelling duty to redistribute income where it is a social force (*ie.* not a random force) that caused the initial inequality. In practice, however, it is impossible to discover the extent to which a person's condition is the result of, *e.g.*, heredity or environment. In any event, the more compelling duty in the case of social determinism does not detract from the general principle that "no person is an island" in respect of forces beyond personal control.

There is a tendency on the part of equality theorists, especially those who are lawyers, to brush over the issue quickly by assuming that while a few traits are personally immutable, notably race and gender, most other traits are subject to personal control. But can the equality theorist afford to ignore the accumulation of evidence against the hypothesis of free will? Geneticists have shown that to a large extent we are what we are born with. Psychologists and doctors have shown the strong influence on our conduct of a wide variety of variables ranging from the food consumed by our mothers during pregnancy to the way our parents, teachers, and peers treated us during childhood. Sociologists have shown that our values and attitudes are largely determined by the people around us. Economic analysis reveals the enormous dependence of our lifetime earnings on the quantum of pecuniary and non-pecuniary[20] capital that we are fortunate enough to start out with.

The proponent of free will is left with the unexplained portion of human conduct—the statistical deviants—as evidence of free will.[21] The fact that some conduct remains unexplained is taken by the liberal as proof that there is scope for genuine personal choice, and that the relationships described by the academics only illustrate tendencies about the types of variables that influence choice. The pure determinist, on the other hand, would argue that the unexplained portion of human behaviour reflects the imperfect state of our knowledge in the face of a complex decision-making process. If we only knew enough about "human mechanics", we could predict without inaccuracy the responses of the human "machine" to given stimuli.

Whether one is willing to ascribe any significant role at all to the individual free will is probably a matter of personal faith. It is fair to say, however, that the classical liberal notion of the primacy of that free will is increasingly perceived as a romantic ideal rather than as an actual description of the human condition.[22] It is this phenomenon of

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20 Non-pecuniary capital includes, for example, education, job-experience, and social "skills", most of which are in turn closely correlated to parental income.

21 Even if all conduct was explained it could be argued that there still is choice. Just because the exercise of choice is perfectly predictable (the argument runs) does not deny the fact of choice itself. This argument is right in theory but meaningless in practice: if everyone reacts predictably to external stimuli, how can we say that there is any scope of an independent *individual* choice? The individual is simply doing the same thing that other beings would do if presented with the same set of independent variables.

22 A recent article published in the Halifax newspaper reflects a characteristic unwillingness to give up the assumptions of liberalism in the face of evidence which

widespread disbelief in the freedom of the will that justifies the perception of many commentators that our society has entered a "post-liberal era".[23] Curiously, though, public acceptance of the liberal theory of distribution according to "merit" seems to be more durable than the acceptance of the theory's underlying premise. Perhaps the repudiation of the socio-political consequences of the free will premise is too openly a rejection of our romanticism, of our sense of personal dignity. Perhaps the conclusions of the liberal theory have been better socialized by experience than have its premise. Perhaps, also, the quiet merger of liberal and conservative thought to defend existing distributive outcomes has had some effect in delaying the social movement towards equality of condition. Under the merged "liber-vative" way of thinking, meritocratic distribution is defended as a *per se* objective so that the difficult and divisive question of the origins of observable differences in "merit" can be avoided. But this doctrinal merger can have no more validity than the assumptions which have become concealed. To the extent that merit is ascribed to nature, corresponding distributive differences are justifiable only if the natural hierarchy is morally right—an assumption that has already been rejected, above. To the extent that merit is ascribed to individual choices, an heroic or romantic theory of human behaviour is treated as if it were a reality.

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is difficult to deny. The article begins with a note that a recent neurobiological examination of Albert Einstein's brain has revealed that Einstein had 73% more "support cells" for every neuron than are found in the average brain. The author continues:

"We are learning a lot—perhaps an alarming lot—about what we are . . . But that knowledge seems to threaten us—that inner something that makes us individuals. It seems to portray us as merely physical, as more comprehensible and quantifiable than we want to be.

It was bad enough when Copernicus evicted us from where we think we belong: the center of the cosmos. Since then, many systems of thought have seemed to imbed us stickily in the world in ways that compromise our sense of identity."

The author then refers to the work of Darwin, Marx and Freud, and yet, in spite of an apparently genuine recognition of the enormity of the constraints upon the free will, he cannot bring himself to part with his dignity, his faith that there is "something grander" about the human being. (George F. Will, "We're learning a lot about what we are," *Halifax Mail-Star*, February 28, 1985, p. 7.)

23 Professor Gold is but one of many to acknowledge that we have entered a post-liberal era: M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L.R. 131.

But the long term trend is relatively clear. Even in the legal sphere, which has always been one of the last to change, there is for example a shift in tort law away from the (free will) emphasis on fault to the (substantive equality) question of compensation. And there is no question in the eyes of the public that a progressive income tax is a step *towards* equality and not merely a permissible step *away* from it. It is submitted that the law must recognize the social trend because it would be unfair to continue to impose a romantic theory of justice on those who suffer from maldistribution of the social product. We simply cannot ignore the power of socio-economic forces comprising the poverty cycle. Even those who insist upon the existence of some degree of freedom of the will would have to agree that most important human choices are very heavily constrained—that it takes a greater achievement of individual will to deviate from usual human tendencies than it does to follow them. For these reasons equality theory must accept substantive equality as the general rule of distributive justice, relegate equality of opportunity to a secondary role, and resort to the naturalness of a hierarchy as a justification for inequality only when that hierarchy advances a social objective which over-rides the equality objective in importance.

To illustrate some of the abstract concepts that I have discussed so far, let us consider the plight of the American black. The first thing to be said is that no reasonable person can ascribe the disadvantaged situation of blacks to natural hierarchy. It is obviously attributable to slavery, to intentional maldistribution of the social product away from blacks as a group, and to the cumulative effect of discrimination against individual blacks. It is therefore a clear situation in which conservative ideology is inapplicable. Any other conclusion would be a bald assertion of white superiority.

The liberal approach to racial inequality is to prohibit discriminatory conduct which artificially shackles the exercise of the individual free will. Discrimination, being the differential treatment of individuals because of their membership in a group, is obnoxious to a doctrine of individual responsibility which calls for assessment of each person on his or her own "merits". The liberal cure for perceived inequality is therefore to prohibit racial classifications. But that is as far as liberalism will go. Any meddling with distributive outcomes would interfere with the ability of individuals to fulfill their personal aspirations by means of hard work, personal sacrifice, and other means purportedly within individual control.

After 120 years of liberal equality it is doubtful whether the relative condition of American blacks has significantly improved, a fact

that is of some considerable embarrassment to the ideology. It is true that this result can in part be explained by the imperfect application of liberal ideology: only since 1954[24] has American constitutional law recognized that the "separate but equal" doctrine of *Plessy* v. *Ferguson*[25] was discriminatory; it is only since the passage of the Civil Rights Acts that the anti-discrimination principle has extended beyond the government sphere; and, of course, there will always be cases of discrimination that escape, undetected by the legal system. Nonetheless, it does not seem plausible that the present inequality of condition can be explained solely in these terms, particularly since it has persisted in the face of social programs and modest redistributive schemes[26] that go beyond the minimum required for liberal equality.

The determinist would argue that even if discrimination could be completely stopped the inequality of outcome would persist indefinitely in the absence of major (*i.e.* substantive equality) redistributive schemes. Even the simplest of economic analyses suggests that as between two groups, one with capital already accumulated, and the other (on account of slavery) without significant accumulated wealth, the former will be infinitely better off because its capital earns a return. This aspect of the inequality cycle is further exacerbated by the fact that the wealthy have a much greater propensity to save, and hence to invest, than do the very poor, who not surprisingly are faced with the more immediate concern of improving their standard of living.

The economic factor—the compounding of interest—is enough in itself to demand a drastic redistribution. But there is, as well, a cycle of inequality that applies in respect of human factors.[27] It will be the already wealthy whose children can afford to forego wage income to acquire higher education. It will be those who are in an accepted social group who learn other skills needed for success: well-placed acquaintances; subtle moral codes or mannerisms deemed necessary in order to "belong"; the right tastes and political opinions. Indeed, there is not just a shattering of confidence, but the very moti-

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24 *Brown* v. *Bd. of Educ. of Topeka, Shawnee County, Kan.* (1954), 347 U.S. 483 (U.S. Del., 1954).

25 *Plessy* v. *Ferguson* (1896), 163 U.S. 537 (U.S. La., 1896).

26 I am refering to race-neutral programs which disproportionately "favour" blacks since blacks are disproportinately represented in the groups of poor whom the programs were aimed at.

27 Conceptually we can think of human attributes as non-pecuniary "capital". Although these factors are less capable of quantification it seems likely that they are subject to a similar geometric compounding of "interest".

vation of those whose family and race have been locked into the poverty/ghetto cycle is bound to be eroded by the evidence all around them that in order to escape it takes random good luck (a lottery win, a gift of athletic or musical prowess), rather than any personal exercise of the will. In short, the individualism that is so close to the liberal's heart is crushed as thoroughly by the repeated defeats inflicted by socio-economic forces as it is by ongoing discrimination. The determinist demands equality of outcome not only because it is a desirable end in itself, but also to prevent existing inequalities from being perpetuated into the indefinite future by socio-economic forces which can loosely be described as "the poverty cycle".

What is so clear from the example of the American blacks is that liberal deference to well-situated individuals (who would like to think that their condition reflects their own meritorious exercise of free will) has resulted in a staggering inequality in condition. While it is possible for the liberal to explain any particular *individual's* condition as reflecting merit, it is impossible to do so with the *group's* condition. The essential contradiction of liberal distributive justice is that even when differences can only be traced to factors beyond personal control, the liberal refuses to intervene for fear of disturbing outcomes which, by hypothesis, are within personal control.

If, as I submit, equality must in general be defined as equality of outcome (or equality of condition or substantive equality), does it follow that the liberal perspective ought to be entirely dismissed? My suggestion is that equality of opportunity (or the anti-discrimination principle) be retained as a secondary doctrine, which is subordinate to equality of condition, but which might give rise to a constitutional violation when the primary substantive doctrine is inapplicable. There are good reasons, strategically and as a matter of principle, for retaining anti-discrimination doctrine.

As a matter of principle, it seems to be that there is at least some validity to the liberal antipathy towards unnecessarily treating individuals as members of a class, even when substantive equality is not greatly affected by so doing. Consider, for example, the abolition of the "separate but equal" doctrine in *Brown* v. *Board of Education*.[28] It is difficult to see how that doctrine is offensive to both formal and substantive equality in relation to the segregated schools that were in issue in that case. Even if the tangible educational facilities are identi-

28 *Supra*, note 24.

cal, segregated schooling is substantively unequal because of intangibles such as peer interaction and cross-fertilization of ideas, interests, and ambitions, all of which will be available unequally to blacks due to the ghettoized, disadvantaged situation of their classmates. This type of argument is harder to make, however, in relation to golf courses,[29] buses,[30] airport restaurants,[31] and courtroom seating,[32] to name a few of the other government facilities which the United States Supreme Court has ordered desegregated. The substantive argument is also difficult to make with respect to prohibitions on racial intermarriage[33] or cohabitation.[34] It is true that a substantive equality argument can be framed in terms of the stigmatization (which motivated these discriminatory laws) eventually working its way into inequalities of condition. But the liberal emphasis on invidious "classification" seems to better capture the nature of the inequality than the post-liberal emphasis on effects. At least in the case of classifications which have historically been used to oppress minority groups, I suggest that there is indeed some validity to the idea that stigmatization and stereotyping are offensive, *per se*, even if it cannot be proven that there are adverse effects.

A second type of situation that justifies retaining the anti-discrimination principle arises in respect of certain types of benefits and burdens which should not be included in the general run of benefits and burdens that form the subject matter of distributive justice.[35] Some benefits and burdens derive much of their social value not from their effects on the people to whom they are distributed, but from the intrinsic value of the process that allocates them. The allocation of seats in a legislature by election and the determination of guilt or non-guilt in a criminal proceeding are notable examples of processual values.[36] To allow equality of outcome to dictate the results of elec-

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29 *Holmes* v. *City of Atlanta* (1955), 350 U.S. 879 (U.S. La., 1955).

30 *Gayle* v. *Browder* (1956), 352 U.S. 903 (U.S. Ala., 1956).

31 *Turner* v. *City of Memphis* (1962), 369 U.S. 350 (U.S. Tenn., 1962).

32 *Johnson* v. *Virginia* (1963), 373 U.S. 61 (U.S. Va., 1963).

33 *Loving* v. *Com. of Virginia* (1967), 388 U.S. 1 (U.S. Va., 1967).

34 *McLaughlin* v. *Florida* (1964), 379 U.S. 184 (U.S. Fla., 1964).

35 See *supra*, note 8, and accompanying text.

36 This is a *narrow* exception to the general inclusion of benefits and burdens in the overall measure of substantive equality. I do not mean to suggest, for example, that criminal laws should not be subject to scrutiny for disproportionate impact—but once a criminal law has been found to be constitutional we obviously do not want judges to fill racial or gender quotas!

tions or criminal trials would obviously be abhorrent to extremely strong processual values. It makes better sense to apply an essentially processual theory of equality to distributive processes that are valued as processes.

The strategic reasons for retaining equality of opportunity as an inferior but independent right flowing from section 15 are compelling. There are bound to be many instances in which the courts impose "reasonable limits" on substantive equality rights. It will be comforting to the egalitarian litigant to know that she or he has another arrow in the quiver in case the Court deflects the first. In fact it will be suggested in Part 3, below, that the principle of judicial restraint will create a broad limitation on substantive equality rights. It will also be shown in Part 3 that the text of section 15 strongly supports a "dual set of rights" flowing from the *Charter*. First, however, let us consider the American experience with constitutional equality rights.

2. THE AMERICAN EXPERIENCE WITH EQUAL PROTECTION

For 120 years the American *Bill of Rights* has contained a clause providing for the "equal protection of the laws." The jurisprudence has evolved into three distinct branches and no coherent vision of equality has emerged. We will see that the "suspect classification" branch presents a liberal version of equality; the "fundamental interest" branch, a substantive version of equality; and the branch of general application, the "minimal scrutiny" branch, has attempted to disengage itself entirely from equality theory. In spite of this doctrinal disarray, the American jurisprudence is likely to be extensively cited in Canada, particularly during the early stages of development of Charter equality rights. American equality analysis is the standard against which other theories, including the theory advanced in this paper, will be measured and compared. It is important therefore to understand its weaknesses and strengths. In particular, it is important to recognize the sources of the difficulties that the Americans have encountered so that we can avoid duplicating their errors.

(a) Minimal Scrutiny: The Rationality Requirement

"Minimal scrutiny" or the "general minimum equal protection doctrine" is the only branch of the Equal Protection doctrine which applies to all laws. The other branches can only apply when there is,

respectively, a "suspect" or "invidious" governmental classification or an unequal distribution of "fundamental" interests.

Minimum scrutiny requires only that governmental classifications or distinctions be rational. One statement of the doctrine is that legislation

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[37]

But the classification does not have to be "made with mathematical nicety"[38]: it can be overly inclusive or overly exclusive in relation to the purpose of the legislation.[39]

It is well known that the burden on the party challenging a statute is an extremely difficult one to meet. The onus is on the challenger to show that the classification is "purely arbitrary" and when the challenge is made

> if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.[40]

Since one can always speculate as to some state of facts that might explain a classification, there is an almost irrebuttable presumption of constitutionality.[41]

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37 F.S. *Royster Guano Co.* v. *Com. of Virginia* (1920), 253 U.S. 412 (U.S. Va., 1920).

38 *Lindsley* v. *Natural Carbonic Gas Co.* (1911), 220 U.S. 61 (U.S. N.Y., 1911); *Dandridge* v. *Williams* (1970), 397 U.S. 471 (U.S. Md., 1970).

39 In *Railway Express Agency* v. *New York* (1949), 336 U.S. 106 (U.S. N.Y., 1949), at p. 110, Mr. Justice Douglas suggested that "theoretical inconsistencies" were not of interest to the courts since legislatures properly made their classifications "by practical considerations based on experience". He also said that it "is no requirement of equal protection that all evils of the same genus be eradicated or none at all." In another leading case, *Williamson* v. *Lee Optical Co.* (1955), 348 U.S. 483 at 489, the Court said, to the same effect, that legislative reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." In Part 3, below, I will argue that there is merit to this view of the proper role of legislatures: that while the courts ought to define what equality is, normally the legislatures should be permitted to move towards the equality objective at their own pace.

40 *Lindsley* v. *Natural Carbonic Gas Co., supra*, note 38.

41 A good illustration is provided by *Kotch* v. *Board of River Port Pilot Com'rs* (1947), 330 U.S. 552 (U.S. La., 1947), in which the Court upheld a Louisiana law which had the effect of reserving all apprentice port pilot positions to friends and rela-

The gist of this doctrine is that a legislative or administrative classification must be rationally connected to the object or purpose of the legislation. I will come back to the question of rationality below. What is most astonishing about this doctrine is that there is no attempt within it to explain which legislative *objects* are acceptable, and which, if any, are not. One is left to guess at the aims of "minimal scrutiny" in order to infer a basis for distinguishing prohibited from acceptable legislative objects.

The first possibility—that the doctrine prohibits classification for differential distribution alone—derives from the classical liberal theory of distributive justice. I will refer to this possibility as the "ultra liberal theory" of minimal scrutiny, since it embodies the purest (or most extreme) application of liberal principles. It will be recalled that under liberal doctrine an individual's condition is determined by the meritorious exercise of free will. It follows that it is not just *unnecessary* for the government to redistribute income, but it is downright *wrong* since doing so involves taking away from the morally worthy and giving to the unworthy. Nevertheless, the government must legislate (and therefore classify) in order to provide an infrastructure to ensure that condition really does reflect merit. For this reason legislation which classifies and punishes those who steal, for example, is necessary. The rule that emerges is that legislation which classifies for distributive purposes is unacceptable, but legislation which classifies for non-distributive purposes (which I will call "efficiency"[42] purposes) is not.[43] It is all right to refuse driving licenses to a class of people who would cause more accidents, but it is unconstitutional to refuse licenses to a class for no other reason than to reduce its share of the social product.

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tives of existing pilots. The Court said, at p. 563:

"We can only assume that the Louisiana Legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve."

42 Although the two main purposes of government action are those of distribution and efficiency, there is some legislation which is designed to promote other social values. Lord's Day legislation, for example, was probably motivated largely by a desire to advance religious values. For the purpose of the analysis here, however, it does no harm to refer to all non-distributive objectives as "efficiency" objectives.

43 Of course most legislation has both distributive and efficiency objectives. The very low standard of review ("rational connection") means that it is only legislation which is motivated *exclusively* by distributive objectives which will be impugned. The reasons for this will be discussed below.

There is at least some support for the ultra-liberal theory in the jurisprudence. Indeed a few of the cases are hard to explain on any other basis. In 1935, in *Smith* v. *Cahoon*[44] the United States Supreme Court struck down a Florida statute which required commercial carriers to post liability bonds but exempted carriers of fish and farm products. The Court said that the exemption was not rationally connected to the highway safety objectives of the statute. But this was in the depression and farmers and fishermen were especially hard hit. The Court must have been aware of this undoubted fact in that the exemption was motivated by distributive and not efficiency concerns. Although the Court has never clearly articulated the ultra-liberal theory, its concern with classifications motivated by objectives of differential distribution is apparent from Mr. Justice Jackson's opinion in the *Railway Express* case:

> [N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape political retribution that might be visited upon them if larger numbers are affected.[45]

But while the ultra-liberal theory of minimal scrutiny offers a good historical and conceptual explanation for the doctrine, it is too offensive to accepted modern notions of the proper role of government to be retained. Even a judiciary with a strong liberal bias would now find unacceptable the notion that the government had not just a right, but a *duty* to ignore the plight of farmers and fishermen during the Depression. Similarly, it would be absurd to prohibit redistribution through a progressively-scaled income tax. Judicial recognition of the permissibility of government concern with distributive objectives has had two effects. First, it resulted in the development of an extremely low standard of scrutiny so that redistributive measures—and, incidentally, just about everything else—would meet the standard. Second, and more importantly, it has led to an alienation of the rationality doctrine from its distributive roots. However misguided and obnoxious the ultra-liberal theory of minimal scrutiny may be, at least it is conceived in some theory of distributive justice.

The second, and probably the dominant modern view of the doctrine is that government classification is permissible, even for solely

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44 *Smith* v. *Cahoon* (1931), 283 U.S. 553 (U.S. Fla., 1931).

45 *Railway Express Agency, supra,* note 39.

distributive purposes, as long as "rationality" is satisfied. In other words, it is not the objects of the legislation that are impugned, but only the means. Distributive justice, which is at the very center of any meaningful concept of equality has been totally displaced in favour of "rationality".

The awkward thing about this view of the doctrine is that rationality simply cannot operate in a vacuum. If there is no prohibition on the ends of legislation, how is it possible to distinguish "means" from "ends"? Consider the fact situation of *Smith* v. *Cahoon*, this time from a rationality perspective. What the Court in effect characterized as means to an ultimate end of "highway safety", that is, the farm and fish exemptions, could just as easily—and with greater verisimilitude—be characterized as independent ends: the object of the exemptions was clearly to exempt farm and fish products from the added burden that the bonding scheme would otherwise impose on farmers and fishermen. The abstraction of legislative objects to a higher level of generality ("highway safety") is totally unnecessary and misleading unless the lower level of generality ("exemption of farmers and fishermen from new burdens") is in itself impermissible.

Apparently the courts have failed to perceive that unnecessary abstraction is jurisprudential smoke and mirrors. The concept of rationality, which has a legitimate but secondary role to play in a doctrine with substantive content,[46] has acquired an artificial life of its own. Some commentators have compounded the problem by suggesting that rationality is useful in correcting legislative arbitrariness.[47] Others have suggested that demanding efficient means-ends "tailoring" will move legislative decision-making closer to some processual ideal.[48] Suggestions for reform have centered on replacing the "any conceivable objective" standard with the more exacting standard of "actual legislative objectives", for the purpose of removing *ex post* jud-

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46 In the context of the suspect classification doctrine, for example, the role of rationality is to insist that when the government seeks to justify a suspect classification by resorting to a very abstract or general "compelling state objective", it must be prepared to show that the classification actually does advance that purpose, and does in a properly "tailored" fashion so that it is not overly inclusive or exclusive.

47 M. Gold, "Equality Before the Law in the Supreme Court of Canada: A Case Study" (1980), 18 Osgoode Hall L.J. 336.

48 S. Bice, "Rationality Analysis in Constitutional Law" (1980), 65 Minn. L.R. 1. Professor Bice suggests that the legislature should have to pick the most efficiently-tailored scheme towards its ends. All actual ends of legislation should be permitted in his model. He argues that legislation is to some extent the prod-

icial speculation as to the objectives of the legislation.[49] These commentators have missed the essential point, however, which is that rationality can tell us nothing about equality.

A third possible view of minimal scrutiny is that it is a "reasonableness" doctrine, allowing the courts to strike down classifications which do not serve a sufficiently important end, or which are poorly tailored to an end that might otherwise justify a classification.[50] This may well be the initial Canadian approach. In *Mackay* v. *R.*,[51] Mr. Justice McIntyre suggested that classifications had to advance "some necessary and desirable social objective". At least this approach recognizes that rationality can only function when there are at least some impermissible legislative objectives. However, unless the criteria of reasonableness or desirability are spelled out, the doctrine will remain unconnected to distributive justice and therefore to equality. It is difficult to see why an equality right should give rise to a reasonableness doctrine.

There is a fourth possible approach to minimal scrutiny that would restore the doctrine to its equality roots. It can be regarded as a refinement of the reasonableness approach. It would involve prohibiting legislative classifications which are aimed exclusively at an

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uct of political horse-trading of a sort that results in "inefficient" legislation, and that a high standard of "efficiency" would require legislators to conform to a more statesman-like model of politics. In my view, this suggestion is the ultimate subordination of distribution to efficiency. Indirect subsidies (such as the exemption of fish and farm products in *Smith* v. *Cahoon*) are demonstrably a less "efficient" means of achieving stated objectives than direct lump sum transfer payments. But direct transfer payments are often unacceptable politically. By striking down indirect subsidies and exemptions, the courts are not likely to force the legislatures to enact the "best" scheme, since the "best" is often simply not a political possibility. Instead the legislatures will enact something worse—either the legislature's concern with minimizing adverse distributive effects will prevail, in which case the entire scheme (*e.g.* the liability bond for carriers in *Smith* v. *Cahoon*) will be shelved; or else the efficiency concerns will prevail and the scheme will be enacted without any compensation for those affected adversely by its distributive effects.

49 For example: G. Gunther, "In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection" (1972), 86 Harvard L.R. 1; S. Bice, *supra*, note 48; M. Gold, *supra*, note 23.

50 Professor Paul Bender refers to minimal scrutiny as a "reasonableness" requirement: "The *Canadian Charter of Rights and Freedoms* and the United States Bill of Rights: A Comparison" (1983), 28 McGill L.J. 811.

51 *MacKay* v. *R.*, [1980] 2 S.C.R. 370 [1980] 5 W.W.R. 385, 114 D.L.R. (3d) 393, 33 N.R. 1, 54 C.C.C. (2d) 129 (S.C.C.). This case was the last word from the Supreme Court on equality rights under the *Canadian Bill of Rights*.

objective of differential distribution when, and only when, the differential distribution retards or impinges on the substantive equality objective. The exemption for farm and fish products in *Smith* v. *Cahoon* should have been permitted in recognition of the particularly unfortunate situation of workers in those industries during the Depression. Similarly, the different tax brackets in an income tax system clearly advance substantive equality. On the other hand, a (hypothetical) scheme singling out people with brown eyes for differential distribution should be impermissible. But it should be impermissible not because it is "irrational", but because it unnecessarily creates inequalities of condition. More controversially, perhaps, a regressively scaled income tax (*i.e.* one with decreasing marginal tax rates) should also be impermissible as unnecessarily exacerbating existing inequalities. Although this would be a principled approach to the minimal scrutiny doctrine, it does not appear that this solution to the present doctrinal wasteland has been grasped by the courts or by the commentators.

In any event, even this fourth approach would not be satisfactory. For one thing the doctrine erroneously focuses on the act of classification as the triggering event for the analysis. We have seen that this is historically explainable in terms of the liberal demand for universality. But it is common for universal distribution schemes to have impacts which are substantively unequal. Consider, for example, a sales tax, which is applicable to all ultimate sales. It is highly unequal in its effects since the poor consume (and pay sales tax) on a greater proportion of their income. The fact that the sales tax contains no wealth-based "classifications" ought not to immunize it from review. The generally applicable equality doctrine ought to assess the substantive equality effects of the *law*, not merely effects of classifications.

Second, the American doctrine provides for no balancing of objectives. As the doctrine presently stands, the slightest "efficiency" objective justifies the most egregious inequality. Suppose, for example, that a welfare scheme which makes it difficult for teen mothers to collect full benefits could be shown to have some marginal but detectable effect on deterring teen pregnancies. Surely the mere advancement of a non-distributive societal objective should not conclude the issue. The real question is whether the nature and quantum of damage to equality of condition is a worthwhile price to pay for the marginal reduction in teen pregnancy. At least Mr. Justice McIntyre's formulation in *MacKay* v. *R.* allows for a balancing of objectives.

In conclusion, the American minimal scrutiny doctrine is not a useful starting point for Canadian doctrinal development. It contains at least four major defects:

1. it fails to distinguish explicitly between desirable differential distribution and undesirable differential distribution;
2. it subordinates all distributive concerns to any efficiency concern;
3. it focuses attention on classifications instead of on effects;
4. to the extent that substantive equality concerns are recognized at all, they are relegated to the status of permissible violations ("reasonable limits") to a general principle of universality, instead of being accorded the status of positive constitutional rights.

In the context of American ideological and constitutional history it is not surprising that the only general branch of Equal Protection jurisprudence is indifferent in principle, and hostile in effect, to substantive equality values. Mr. Justice Harlan has commented that "a philosophy of leveling" is "foreign to many of our basic concepts of the proper relations between government and society".[52] The result is a huge vacuum in American equality law,[53] which has caused problems not just in respect of the general equality theory, but also in respect of class-specific and interest-specific inequality.

(b) The Suspect Classification Doctrine: The Anti-Discrimination Principle

The American suspect classification doctrine requires that governmental classification by certain invidious or suspect criteria is unconstitutional unless the classification meets the applicable standard of justification. Classification based on race or national origin attracts strict scrutiny and can only be justified where the classification is "necessary" to advance a "compelling state interest".[54] Classifications

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52 *Douglas* v. *California* (1963), 372 U.S. 353 (U.S. Cal., 1963) at 362. Although Harlan J.'s statement is an accurate summary of the historical approach to equality in the United States, it is worth noting that this statement appears in a dissenting opinion in which the majority *did* engage in this "foreign" activity of "leveling". In Canada, moreover, the philosophy of leveling is clearly discernible in s. 15(2) and s. 6(4) of the *Charter*.

53 In practical terms, minimal scrutiny claims have very rarely succeeded, and the few exceptions are explainable as "suspect classification" or "fundamental interest" cases in another guise: see Bender, *supra*, note 50, at p. 850, note 156 thereat.

54 *Korematsu* v. *U.S.* (1944), 323 U.S. 214 (U.S. Cal., 1944) was the first case in which a criterion (race) ws held to be suspect. Separate governmental treatment of American Indians is an exception to the general doctrine regarding racial classifications: *Morton* v. *Mancari* (1974), 417 U.S. 535 (U.S. N.M., 1974); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (U.S. Orl., 1977).

based on alienage,[55] sex,[56] or illegitimacy,[57] attract a lesser degree of scrutiny, usually referred to as "intermediate scrutiny", and can be justified where the classification is "substantially related" to an "important" state interest. Although the different standards have an enormous impact on the results, the general principles of intermediate and strict scrutiny are the same, and it is with these principles that I am primarily concerned.

The central feature of the suspect classification doctrine has already been noted, above, in Part 1—it is a liberal anti-discrimination doctrine prohibiting classifications; it is not a doctrine prohibiting inequality of condition. The very drawing of suspect classifications in legislation is not (*prima facie*) permitted. Nor is it permitted to create *de facto* classification in administering the law.[58] Nor is it permissible to set up a classification that is formally neutral but unequal in impact, *if and only if* the motivation behind the classification is to covertly discriminate against individuals on the basis of their membership in a group defined by the suspect criteria. In *Mo Ah Kow* v. *Nunan*,[59] for example, a prison ordinance requiring haircuts of no longer than one inch was found to be motivated by an attempt to inflict extra punishment on Chinese Americans, whose religious and social customs at the time (1879) dictated the wearing of a long braid. Consequently, the ordinance was struck down.

These constitutional prohibitions flow from the paramountcy of the individual in the liberal *weltanschaung* and not from solicitude for the condition of the group or groups affected. Mr. Justice Powell expressed it this way in the *Bakke* case:[60]

> It is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions

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55 The language of strict scrutiny is generally used for classifications based on alienage: *Graham* v. *Richardson* (1971), 403 U.S. 365 (U.S. Pa., 1971); *In Re Griffiths* (1973), 413 U.S. 717 (U.S. Conn., 1973). However the courts have been more easily satisfied with the justification of alienage classifications than is the case with racial classifications: *Mathews* v. *Diaz* (1976), 426 U.S. 67 (U.S. Fla., 1976).

56 The Court seems finally to have settled on an intermediate standard for sex-based distinctions: *Craig* v. *Boren* (1976), 429 U.S. 190 (U.S. Orl., 1976).

57 The Court has referred to "stricter scrutiny" for illegitimacy-based distinctions: *Weber* v. *Aetna Casualty and Surety Co.* (1972), 406 U.S. 762.

58 *Casteneda* v. *Partida* (1977), 430 U.S. 482 (U.S. Tex., 1977); *Yick Wo* v. *Hopkins* (1886), 118 U.S. 356 (U.S. Cal, 1886).

59 (1879), 12 F. Cas. 252 (C.D.D. Cal.).

60 *Regents of University of California* v. *Bakke* (1978), 438 U.S. 265 (U.S. Cal., 1978), at 299.

> impinge upon personal rights, rather than the individual only because of his membership in a particular group.

To the same effect, Mr. Justice Stevens considered the meaning of "discrimination" in Title VII of the *Civil Rights Act*:

> Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.[61]

In its extreme form the individual approach to suspect classifications results in a prohibition against "class"-conscious[62] government action of any kind. Since the prohibition on discrimination is to protect the sanctity of the individual it follows that minority group members should not be treated differently, even when it is for their own benefit. Early case law therefore suggested that affirmative action was unconstitutional.[63] The parallel with the ultra-liberal theory of minimal scrutiny is unmistakeable.

On a moment's reflection, however, class conscious remedial action which impinges on individual members of *majority* groups surely cannot be dealt with on the same footing as discrimination against *minority* members. What differentiates suspect classifications from minimal scrutiny classifications is surely that the former are associated with historical patterns of oppression and persecution, that is, they are associated with systematic maldistribution of the social product in favour of majoritarian groups.[64] Logically, therefore, discrimination

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61 *City of Los Angeles* v. *Manhart* (1978), 435 U.S. 702 (U.S. Cal., 1978), at 709.

62 By "class"-conscious I mean, *e.g.* race-conscious, gender-conscious, *etc.*

63 See Mr. Justice Douglas' opinion in *DeFunis* v. *Odegaard*)1974), 416 U.S. 312 (U.S. Wash., 1974).

64 There appears to be some confusion about why suspect classifications are suspect. There is apparently some judicial authority for the view that rationality explains it all—*i.e.* that race, gender, *etc.* are suspect because they are not often relevant to any government objective. This is an unfortunate manifestation of the type of "rationality" imperialism into other doctrines that one can only expect when the general branch of the equality doctrine is seen as demanding rationality. But (ir)rationality neither explains the phenomena of racism or sexism, nor does it explain the jurisprudence. Racism and sexism are perfectly rational means of distributing the social product in a manner that favours a more powerful group. It is true that irrational stereotypes can become self-fulfilling by the process of socialization and further add to the pattern of maldistribution. Insofar as the jurisprudence is concerned, there are many cases in which a racial or gender classifi-

(*i.e.* "class"-consciousness) that operates to the detriment of majority group members ought to be treated no differently than any other minimal scrutiny classification: "whiteness" or "maleness" are simply not associated with oppression or disadvantage. The failure of the Americans to understand their own minimal scrutiny doctrine has resulted in a failure to appreciate that affirmative action in a racial or gender context is not significantly different in principle from a progressively scaled income tax. Both are differential distribution schemes which promote substantive equality. It appears nonetheless that the courts are beginning to move in the same direction, (and in the same incoherent manner), as they moved long ago in respect of progressive income taxation.[65] Affirmative action plans will likely be viewed as permissible violations of liberal equality.

If affirmative action was a *right*, instead of a permissible violation of a right, the second major weakness of the anti-discrimination approach to group-specific inequality would be obviated: because of the insistence on a "colour blind" way of thinking, the court is required to shut its eyes to the differential impact of government action on groups defined by suspect criteria. Disproportionate impact does not give rise to a constitutional violation unless it can be proved that the legislature was motivated by the prohibited "colour-conscious" way of thinking.[66] The focus of the anti-discrimination principle is primarily on motivation or intent, instead of on effects, and the doctrine thereby becomes a "fault" doctrine instead of a "strict liability" doctrine.

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cation has been found to be factually relevant (*ie.* rational) but unconstitutional nevertheless. For example, in spite of their obvious relevance the use of sex-specific actuarial tables has been prohibited in computing government pension plan contributions or pay-outs: *City of Los Angeles* v. *Manhart, supra*, note 61; *Arizona Governing Committee for Tax Deferred Annuity and Compensation Plans* v. *Norris* (1983), 103 S. Ct. 3492 (U.S. Ariz., 1983).

65 The trend in Supreme Court opinion from *DeFunis* v. *Odegaard, supra*, note 63 to *Regents of California* v. *Bakke, supra*, note 60, to *Fullilove* v. *Klutznick* (1980), 448 U.S. 488 (U.S. N.Y., 1980), is fairly clear. Even in *Fullilove*, however, the Court is insisting that a legislature weigh the evidence of past unlawful discrimination before an affirmative action program will pass constitutional muster. It is difficult to see why there is a requirement for past discrimination instead of disadvantageous condition. Obviously past discrimination was not a requirement for permitting a progressive income tax scheme. A mistaken leaning towards "fault" concepts of anti-discrimination rights is characteristic of the individualistic approach to these rights.

66 *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.* (1977), 429 U.S. 252 (U.S. Ill., 1977). See, also, the text accompanying note 59, *supra*.

This approach often yields astonishing results. Ever since *Brown* v. *Board of Education*,[67] for example, the American courts have been very involved in school desegregation issues. But because of the doctrinal emphasis on motives the Supreme Court is left in the embarrassing position of desegregating only those school systems where *de jure* discrimination can be proven to be the cause of racial imbalance.[68] Those school systems in which there is "only" *de facto* segregation caused by residential housing "choices" have escaped judicial desegregation, to the bewilderment of the northern blacks (who, after all, experience the same condition irrespective of its historical causes) and to the annoyance of southern whites who sense the bias in the law in favour of northern whites.[69]

Why is it that the American courts have been reluctant to move towards a substantive equality approach to group-specific inequality? It would be naive not to recognize that at least to some extent the reluctance stems from a genuine belief in the normative superiority of the anti-discrimination principles to the egalitarian alternative. Most judges are drawn from the upper stratum of majoritarian society. It is difficult for them to recognize that their own personal "successes" were not entirely the results of their own "merit". But even as isolated a group as the judiciary is, it is not completely immune from changing social values. There are some fairly clear indications that the judiciary is not satisfied with the limitations of the liberal doctrine. It is particularly apparent in the school desegregation cases that the American courts have been embarrassed by the twin "fault" principles, namely that

1. the Fourteenth amendment strikes only at *de jure* segregation, and
2. that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[70]

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67 *Supra*, note 24.

68 *Keyes* v. *School Dist. No. 1, Denver, Colo.* (1973), 413 U.S. 189 (U.S. Colo. 1973).

69 "As a result in 1970 in the South only 39.4% of black students attended predominantly minority schools, while in Northern and Western states the figure was 57.6%": J. Nowak, R. Rotunda, and J. Young, *Constitutional Law* (St. Paul: West Publishing Co., 1977), p. 568. Another consequence of this approach is that it is open to majority group members to undo the effect of a desegregation order by moving to a new residential area to convert the segregation phenomenon into a *de facto* one: *Pasadena City Bd. of Ed.* v. *Spangler* (1975), 423 U.S. 1335 (U.S. Cal., 1975).

70 *Milliken* v. *Bradley* (1974), 418 U.S. 717 (U.S. Mich., 1974).

In practice, the Supreme Court has recently not applied these principles in a punctilious manner, and has moved the application of the doctrine towards a substantive equality approach in spite of the apparent narrowness of the principles which the Court is purporting to apply.[71] Indeed, there is even some explicit recognition of the desirability of change. Mr. Justice Powell has called for the abolition of the *de jure/de facto* distinction at least in respect of school segregation.[72] Mr. Justice Stevens has suggested that unconstitutional intent may best be measured by effects.[73]

The judicial reluctance to recognize explicitly group-specific substantive equality rights is therefore attributable to other factors in addition to judicial preference for liberal equality values. The most important of these is undoubtedly a widespread judicial nervousness at exceeding their technological and political limits by the type of sweeping remedies that substantive equality entails. The school desegregation/busing cases virtually required the courts to "legislate" and administer a desegregation program for entire school districts.[74] Part 3, below, suggests a means of recognizing substantive equality rights without impinging unduly on the factors which are at the root of judicial restraint.

The absence of a meaningful general doctrine of equality is a third important cause of judicial hesitancy in respect of group-specific equality of condition. Although it may not be immediately apparent I submit that the courts are aware that it would be fundamentally inconsistent to adopt a substantive approach in respect of the conditions of minority groups in society while not recognizing a principle of substantive equality as the universally-applicable general principle of equality. This is more than a theoretical problem. And it is one that arises not because of the well-situated "innocent beneficiary" of discrimination, but because it is inconsistent, unprincipled, and unfair to ignore the plight of the poorly-situated member of the majority group. For while it is true to say that there is no societal problem of discrimination against whites or males, it is not true to say that there is no problem of white male poverty.

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71 See especially *Keyes, supra*, note 68; *Swann* v. *Charlotte-Mecklenburg Board of Education* (1971), 402 U.S. 1 (U.S. N.C., 1971); *Dayton Bd. of Ed.* v. Brinkman (II) (1979), 443 U.S. 526 (U.S. Ohio, 1979); and *Columbus Bd. of Ed.* v. *Penick* (1979), 443 U.S.449 (U.S. Ohio, 1979).

72 *Keyes, supra*, note 68.

73 *Dayton Board of Education* v. *Brinkman* (1977), 433 U.S. 406 (U.S. Ohio, 1977).

74 See *e.g. United States* v. *Montgomery County Board of Education* (1969), 395 U.S. 225 (U.S. Ala., 1969).

At first blush it may seem eminently reasonable to confer substantive equality rights on groups whose disadvantaged condition is entirely the product of discrimination by the majority group, while refusing to confer rights on disadvantaged people who are members of a group which has not been discriminated against. Substantive equality, it might be argued, is collective compensation for the "fault" of discrimination—a "fault" which is obviously not present outside the confines of the suspect classification branch.

The initial appeal of the "fault" argument wears thin, however, when we recall why it is that substantive equality rights (and not just anti-discrimination rights) are needed to cure inequalities of condition. The analysis in Part 1 showed that the whole usefulness of the substantive approach stemmed from the existence of poverty-cycle factors that perpetuate inequalities of condition into the future. Were it not for these forces of socio-economic determinism, a stringent prohibition on new discrimination would be adequate to remedy inequality of condition. The distinct feature of the substantive approach to group-specific equality is that even someone who has personally not been discriminated against is recognized nevertheless to suffer from past discrimination against his or her ancestors. To put the problem bluntly: can we say to the poor black that she is entitled to be compensated (*inter alia*) for the handicap of a disadvantageous "starting position," and then turn around to the poor white and say that he is deemed to be the author of his own misfortunes? It does not seem to me to be much of an answer to say that the poor black's disadvantageous start is cognizable because it was caused by discrimination against her ancestors; whereas the poor white's disadvantageous start is not cognizable because it was caused by the "laziness" or "stupidity" of his. The "fault" approach to group-specific substantive equality inevitably leads to this sort of unsupportable distinction.

It is only if we are prepared to turn to "no fault" equality concepts that we can satisfactorily justify substantive equality rights of any sort. The unequal condition of the poor is the product of a vast web of oppressive social forces, only one of which would be restrained by a prohibition against discriminatory conduct. Without any doubt the web is spun much more finely for minority group members than it is for "unsuccessful" elements of the majority group. This justifies a stronger attack on inter-group inequalities than on inequality at large. But it is not possible simultaneously to attack the one web and deny the existence of the other without falling into serious inconsistency and unfairness. It is, moreover, the general appreciation for the power of deterministic social forces which provides the answer to the prob-

lem of "penalizing the innocent beneficiary" of discrimination. Once it is acknowledged that the condition is determined by external forces more than by personal "merit", then it does not seem so outrageous to deprive the well-situated "innocent" of some of his income.

The important lessons to be learned from the suspect classification doctrine are that substantive equality is unlikely to become a viable approach to group-specific equality unless (1) it can be reconciled somehow with the principle of judicial restraint, and (2) a general doctrine of substantive equality is developed and substituted for the existing vacuum.

(c) The Fundamental Interest Doctrine: Substantive Equality for Processual Interests

The fundamental interest branch of equal protection requires the application of the strict scrutiny standard of review to the differential distribution of "fundamental interests". The courts apply a substantive and not merely a formal definition of equality in determining what constitutes a differential (or unequal) distribution of the interests. Thus in a series of decisions concerning procedural rights of defendants in criminal prosecutions,[75] duration-of-residency requirements as a pre-condition to government benefits,[76] and a host of voting and

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75 *Douglas* v. *California* (1963), 372 U.S. 353 (U.S. Cal., 1963); *Griffin* v. *Illinois* (1956) 351 U.S. 12 (U.S. Ill., 1956). These cases respectively imposed a duty on the state to provide counsel for a defendant's first appeal, and prohibited the government from charging transcript fees for a defendant appealing his or her first conviction. It is important to distinguish these equality cases from cases based on substantive constitutional guarantees, such as *Gideon* v. *Wainwright*, (1964), 372 U.S. 335 (U.S. Fla., 1964). In *Gideon* the Court held that the Sixth Amendment's "right to counsel" itself required the provision of counsel for indigents at trial. But in *Griffin* and *Douglas*, there was no constitutional right to an appeal. The use of the equal protection clause means that the state can provide for an appeal if it wishes to do so—but if it does, then it has to be a right which is genuinely available to all, irrespective of financial resources. The problems with the fundamental interest doctrine are highlighted by the somewhat arbitrary holding that only the defendant's first appeal is a fundamental interest; no lawyer need be provided for higher appeals: *Ross* v. *Moffitt*, (1974), 417 U.S. 600 (U.S. N.C. 1974).

76 *Shapiro* v. *Thomspon*, (1968), 394 U.S.618 (U.S. Conn., 1968), is the leading case. In *Shapiro*, statutes were struck down which denied welfare benefits to persons who had not resided within the jurisdiction for at least one year. Although the fundamental interest at stake in these cases is what we in Canada would call "mobility rights", the majority of the Court (*per* Brennan J.) was probably of the view that it is the interface between mobility rights and basic subsistence benefits

political participation rights,[77] the Supreme Court has insisted that the unequal impact of restrictions on certain government benefits can give rise to a constitutional violation.

There are, however, severe problems with the doctrine. In particular, the courts have been at a loss to provide a useful explanation of which interests are "fundamental" and which are not. Clearly it is not the importance of what is at stake for the individual which determines its "fundamentality". The American Supreme Court has refused to perceive welfare rights,[78] housing,[79] or education[80] as fundamental. The most recent attempt to define the concept is Mr. Justice Powell's opinion in the *San Antonio School*[81] case, an opinion which effectively eliminates the fundamental interest doctrine as a broad source of egalitarian rights:

> [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.
>
> . . .
>
> Education, of course, is not among the rights afforded explicit protection under our Federal constitution. Nor do we find any basis for saying it is implicitly so protected.[82]

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that gives rise to fundamental interest. Thus in *Memorial Hospital* v. *Maricopa County* (1974), 415 U.S. 250 (U.S. Ariz., 1974) a residency requirement for hospitalization or medical care for the indigent was also struck down. But as the government benefit becomes less basic for subsistence we see the Court being more circumspect in its application of the doctrine: in *Sosna* v. *Iowa* (1975), 419 U.S. 393 (U.S. Iowa, 1975), the Court upheld a one year residency requirement for filing a divorce in the state courts; and in *Starns* v. *Malkerson* (1971), 401 U.S. 985 (U.S. Minn., 1971), a one year residency for subsidized university tuition was upheld.

77 These political participation cases are too numerous to cite in detail. A rough idea can be conveyed by the following partial list: voting taxes were prohibited in *Harper* v. *Virginia State Board of Elections* (1966), 383 U.S. 663 (U.S. Va., 1966); filing fees and property ownership requirements for potential candidates were subjected to strict scrutiny in *Bullock* v. *Carter* (1972), 405 U.S.134 (U.S. Tex., 1972) and *Turner* v. *Fouche* (1970), 396 U.S. 346 (U.S. Ga., 1976) respectively; and in *Reynolds* v. *Sims* (1964), 377 U.S. 533 (U.S. Ala., 1964), the Court insisted on equal apportionment of electoral districts so that each person's vote would carry the same weight.

78 *Dandridge* v. *Williams* (1970), 397 U.S. 471 (U.S. Md., 1970).

79 *Lindsey* v. *Normet*)1972), 405 U.S.56 (U.S. Or., 1972).

80 *San Antonio Independent School Dist.* v. *Rodriquez* (1973), 411 U.S. 1 (U.S. Tex., 1973).

81 *Ibid.*

82 *Ibid.*, pp. 33–35.

According to this view, then, a fundamental interest is a constitutional right, and what is prohibited under the equal protection clause is a differential burdening of a constitutional right. The trouble with this proposition, however, is that some cases have effectively denied fundamental interest status to some constitutional rights,[83] while other cases have granted that status to non-constitutional rights.[84]

As a matter of legal positivism it is possible to discern two characteristics shared by most of the fundamental interests. First, they are almost all capable of treatment as discrete and absolute interests in the sense that they involve rights which one either has or does not have. They do not involve the judiciary in picking an outcome from a continuum of possibilities, so much as in choosing between one of two alternatives. In *Douglas* v. *California*,[85] which involved the right to counsel on an appeal from conviction, the majority treated the issue as a choice between providing any lawyer or no lawyer, and justifiably avoided the difficult questions of whether the provision of legal aid constituted the provision of equal legal services.[86] Even in the residency requirement cases[87] the question was a clear choice between eligibility or non-eligibility for a given level of benefits. The plaintiffs in the *San Antonio* case,[88] on the other hand, would have involved the Court in restructuring education financing to ensure that an equal education was provided to all Texans. It is not surprising that the Court was reluctant to do so. Once again, I submit, the technological limits of the judicial process are having a significant effect on the doctrine.

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83 A woman's right to choose to have an abortion seems to be a fundamental right for some purposes but not for others. In a series of cases the Supreme Court has refused to require subsidized abortions: *Maher* v. *Roe* (1977), 432 U.S. 464 (U.S. Conn., 1977); *Harris* v. *McRae* (1980), 448 U.S.297 (U.S. N.Y., 1980); *Poelker* v. *Doe* (1977), 432 U.S. 519 (U.S. Mo., 1977), and *Beal* v. *Doe* (1977), 432 U.S. 438 (U.S. Pa., 1977). The Court has not applied strict scrutiny to these abortion funding cases. In effect, then, the Court is applying formal equality, so that legislative restrictions on the right to choice are subjected to strict scrutiny, but restrictions emerging from differences in condition are not.

84 See *supra*, note 75.

85 *Ibid.*

86 The point was, however, raised in Harlan J.'s dissent.

87 *Supra*, note 96.

88 *Supra*, note 80.

The courts are naturally suited to "binary" choices, which are far easier to equalize.[89]

A second notable feature about fundamental interests is that most of them do not bear directly on outcomes so much as on processes. The rights are substantive rights in the sense that they display consciousness of differential impact on people whose condition is different. But all that is being equalized—even if genuinely equalized—is, with a few notable exceptions,[90] a processual prerequisite: a right to a lawyer, a right to vote, a right to stand for election. Whenever the Court has been confronted with a major substantive interest, it has shied away from recognizing the interest as fundamental.

Undoubtedly the Court's preference for processual interests is largely attributable to the value preference of the judiciary and also to the principle of judicial restraint. There are, however, difficult problems with implementing equality through the narrow lens of interest-specific equality. These have already been alluded to in Part 1. Essentially it is wrong to equalize some components of "income" or condition while allowing others to escape scrutiny. Moreover, it is unappealing to insist on identical consumption patterns. Equality should measure overall condition. For these reasons I am inclined to think that the Americans are right (if probably for the wrong reasons) in excluding non-constitutional substantive interests from the range of interests which require interest-specific equality.[91]

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89 The electoral apportionment cases (*e.g. Reynolds* v. *Sims, supra,* note 77) are the only exceptions to the general rule that fundamental interests involve binary choices. These cases do not impose a real strain on judicial technology, however, since they involve readily available statistics and a quantitative formula that is very simple to apply. Even so, the Court has had some difficulty specifying the limits of tolerable deviation from "one person, one vote": contrast *White* v. *Regester* (1973), 312 U.S. 755 (U.S. Tex., 1973), with *White* v. *Weiser* (1873), 412 U.S. 783 (U.S. Tex., 1973).

90 Apart from the *Shapiro* and *Memorial Hospital* cases, *supra,* note 76, the most notable exception is *Skinner* v. *Oklahoma* (1942), 316 U.S. 535 (U.S. Okl., 1942), in which the Court applied strict scrutiny to a statute that provided for the forced sterilization of "habitual criminals". Probably, *Skinner* could have been treated as a cruel and unusual punishment case, and the other two cases as excessive burdens on constitutional mobility ("interstate travel") rights.

91 The absence of a general doctrine of equality has forced egalitarians to make their arguments through the interest-specific route. The real cure for the problem, it seems to me, is not to expand the fundamental interest doctrine but to correct the deficiencies of the general doctrine. But one can hardly blame egalitarians for trying to make use of the only substantive equality doctrine that is available to them.

The fundamental interest doctrine should not be entirely shunned, however. I have already pointed out that certain processual interests ought to be carved out of "income" for special equality treatment: in particular, I am thinking of the operation of the criminal justice and electoral systems, and perhaps also various processual interests that operate in the realm of administrative law. In the case of the criminal justice system it is suggested that the decision-maker should apply a liberal equality theory—in effect the judge should be blind to who the defendant is—when deciding guilt or innocence. But in order for these process-oriented systems to function fairly it is necessary that the components of the process (*e.g.* right to counsel, right to an appeal, *etc.*) be distributed according to substantive equality. The fundamental interest doctrine therefore ought to be preserved in respect of these interests. A good argument can also be made that it is desirable to retain the doctrine for all constitutional rights, including substantive rights, on the basis that constitutional rights are sufficiently distinct or separable from the general run of social benefits and burdens that they merit a special standard of scrutiny when they are differentially burdened.

3. EQUALITY RIGHTS AS CONSTITUTIONAL RIGHTS

American scholars have advanced a number of competing models of constitutional interpretation ranging from strict "original understanding" textual interpretation[92] to interpretation designed to reinforce processual values of participation in government[93] to interpretation guided by fundamental[94] or consensual[95] values, to a purely realist view that a constitution means whatever judges say it means.[96] With the exception of legal realism—which explains everything and therefore nothing—each of these theories or models of constitutional adjudication contains serious conceptual flaws or else fails adequately to explain the American jurisprudence without a strained, implausible application.[97]

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92 R. Berger, *Government by Judiciary* (Cambridge: Harvard Universityy Press, 1977).

93 Ely, *supra*, note 2.

95 Perry, "The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government" (1978), 66 Geo. L.J. 1191.

96 *E.g.*, O. Holmes, *Collected Legal Papers* (New York: Harcourt, Brace, 1921).

97 For a critique of some of these models, see Fraser, *supra*, note 5.

Perhaps the best that can be done here is to adopt a positivist approach and recognize that judges are simply not going to be prepared to arrogate "too much" power to themselves at the expense of the legislatures.

> Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed.[98]

What are the "tacit constraints" which the egalitarian must beware of? The first is the text of the *Charter* itself. It is unlikely that the Courts will be prepared to place extravagant interpretations on so new a document as the *Charter.* Fortunately, the theory of equality articulated in Part 1 fits neatly into the wording of section 15:

> *Equality Rights*
>
> Equality before and under law and equal protection and benefit of law
>
> 15.(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> Affirmative action programs
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It has already been shown that the phrase "equal protection and equal benefit of the law" is entirely consistent with a right to an equal distribution of the social product. The choice of the singular form ("the law") is interesting. It suggests that the law ought to be viewed as a cohesive unitary structure: at a minimum it demands recognition that rules are related to other rules, not discrete entities, severable from

98 S. Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982), 60 Texas L.R. 551.

the legal régime as a whole. In addition to supporting the view that, say, a progressively scaled income tax cannot be dealt with in disregard for proprietary and contractual laws, it supports the proposition that the subject matter of equality is overall net social benefits and not merely particular benefits in isolation.[99]

The concluding portion of section 15(1) (beginning with the words, "without discrimination") is clear support for the retention of the liberal concept of equality of opportunity with respect to enumerated and "class"-specific inequality. The fact that the anti-discrimination principle is retained should not be taken as ousting substantive equality rights. If this were the intent, the word "equal" would be mere surplusage: that result could have been obtained by the simple expedient of providing for "benefit and protection of the law without discrimination". Moreover, the very words "benefit" and "protection" strongly imply an analysis of the *impact* of the law; and the choice of the American phrase "equal protection" may be a conscious attempt to import into the *Charter* no less egalitarian rights than the Americans have—and we have seen that there are at least some substantive equality rights in the United States.

Finally, section 15(2), and its companion in section 6(4), offers further support for the proposition that two sets of rights, equality rights and non-discrimination rights, flow from subsection (1).[100] It provides a hierarchy of rights for situations when the two sets of rights come into conflict. The reference to "disadvantaged" groups or individuals in section 15(1) drives home the point that equality rights are concerned with the relative overall condition of different members of society.

This textual analysis of section 15 only confirms what is intuitively evident from an ordinary reading of the plain language in the

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99 These propositions present some difficulty in respect of distribution of powers between the federal and provincial governments. But the *Charter* binds both levels of governments and the difficulties should not be overstated: all that is required is that each level of government be conscious of the distributional consequences that flow from the exercise of authority at the other level.

100 An "equality-rights only" perspective would render s. 15(2) surplusage, inserted out of abundance of caution. The "non-discrimination rights only" perspective would regard s. 15(2) as stating that substantive equality is merely a reasonable limit on non-discrimination rights. But this is an embarrassing perspective since it involves saying that substantive equality is more important than liberal equality but somehow is not important enough to be recognized as a constitutional right. Why should the more important vision of equality be relegated to the status of a permissible violation of the less important vision?

section—that broad, pervasive rights are conferred. On the basis of the text alone, it is those who seek a narrow interpretation of the section who have the more difficult task. The situation may well be reversed, however, if an "orginal understanding" theory is urged on the interpretators. Plausible explanations for the seemingly sweeping language of section 15 have been, and will continue to be advanced in the narrower terms of curing some of the defects in the interpretation of the equality provision (section 1(*b*)) of the *Canadian Bill of Rights*.[101] The argument will be, in essence, that the *Charter* is an attempt at a more perfect and more inclusive liberal theory of equality. The initial appeal of the argument is off-set by the fact (already mentioned) that the drafters of the *Charter* could have corrected the deficiencies of the *Bill of Rights* jurisprudence in an unambiguous fashion that would have restricted the meaning of equality to the liberal definition. Moreover, once an examination of the legislative history is undertaken, it will be found that section 15 rights were originally entitled "non-discrimination rights", but were later re-named "equality rights"—a change which illustrates once again the dual nature of the rights and the hierarchical supremacy of egalitarianism in the final result.[102] In any event, the futility of "original understanding" theories is inherent in an attempt to discover a single (or even predominant) intent for language enacted by many different people. Professor Brest has pointed out that the interpretor is only on safe ground in assuming that drafters of ambiguous or open-ended provisions intended their meaning to be determined by the courts.[103] The fact that the language is vague reflects an inability to achieve consensus on clearer language. The fact that the tone of the language favours a broad post-liberal interpretation of the rights should be taken as indicating that there was, if anything, more consensus for post-liberal equality than for liberal equality.

Two much more serious constraints on judicial interpretation of *Charter* equality rights remain to be considered. One consists in the generally limited perception of the proper institutional role of the courts in determining or applying social and economic policy. The

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101 See, *e.g.*, Gold, *supra*, note 23.

102 According to the Hon. Jean Chrétien, the change was made "to stress the positive nature of this important part of the Charter": Min. of Justice and Attorney General of Canada, *Government Response to Representations for Change to the Proposed Resolution* (Jan. 12, 1984), p. 4.

103 P. Brest, "The Misconceived Quest for Original Understanding" (1980), 60 B.U.L.R. 204.

other is the potentially over-riding importance of societal objectives other than equality. These two constraints overlap, and when properly viewed, the first can be seen as a particular instance of the second. In other words, judicial restraint may be treated as a "reasonable limit" on equality rights that is "demonstrably justifiable in a free and democratic society."

It is submitted that the courts have not always been frank about acknowledging the decisive influence on the substantive doctrine of self-recognized institutional limitations. The effect of this semi-covert influence in American constitutional law[104] has often been to distort and confuse the meaning of words like "equality" so that the desired self-restraint could be achieved by indirect means. The reason that equality means "substantive equality" for the purposes of the fundamental interest doctrine but only means "non-discrimination" for the purposes of "class"-specific equality analysis ought to be plainly stated as follows: equality *means* substantive equality for all purposes *but* we, the judiciary, are only prepared to give effect to (genuine) equality within the narrow confines of the fundamental interest doctrine where we can do so without exceeding our institutional competence. Once institutional competence "comes out of the closet" it becomes possible to re-evaluate the *status quo* to determine whether the most appropriate boundary line has been drawn between equality and judicial restraint. Section 1 of the *Charter* invites judicial honesty in this respect. Indeed, the reference to a "free and democratic society" begs for a consideration of the appropriate political limits of judicial activism. The result would be to promote a more coherent vision not only of equality, but also of the proper role of the judiciary in the Canadian polity.

What, then, is within the institutional competence of the judiciary? To answer "whatever the judges want" is to ignore a judicial sensitivity to both political and technological constraints upon their offices. Consider first the political constraints.[105] In a democracy it is widely accepted that democratically-elected legislators ought to decide the general run of policy questions and prioritizations. But the judiciary is not relegated to mere application of legislative decisions to particular fact situations. The very existence of the *Charter* dispels

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104 It is perhaps unfair to criticize the American judiciary on this point since the Americans have been far more open than others about their perceptions of the proper role of the judiciary. See, for example, the famous 4th footnote in *U.S. v. Carolene Products Co.* (1938), 304 U.S. 144 (U.S. Ill., 1938).

105 I include in this category the ultimate legal constraint on judicial authority under the *Charter*: s. 33, the *non-obstante* provision.

any such narrow perception of the judicial role.[106] Nevertheless, enactment of the *Charter* was obviously not intended to hand over the government to nine aging lawyers.

One way of striking the appropriate balance has been suggested by the political theorists. It is suggested, for example, that judicial review is appropriate

1. to correct the remedial imperfections of majority rule, that is, to reinforce the democratic nature of the democratic process itself, and
2. to supply the defects of majority rule, that is, to counterbalance the effects of chronic and ineradicable deficiencies of the democratic system.

There are only a few equality rights which can be given effect by the judiciary in its capacity of democracy-reinforcer.[107] Although some attempts have been made to fit more important equality rights under this heading, these attempts have been more notable for their heroism than for their persuasiveness.[108]

More important equality rights have been found to be within the purview of the judiciary in its capacity as a counter-vailing force to combat chronic defects of democratic government. As long ago as 1938, there was judicial recognition of its special role as a protector of "discrete and insular minorities" who stood to be oppressed by the tyranny of the majority.[109] Virtually the entire suspect classification doctrine, portions of the fundamental interest doctrine,[110] and possibly even the minimal scrutiny doctrine are explicable on this basis.

What is often overlooked, however, is that tyranny of the majority is not the only chronic and ineradicable weakness of the democratic

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106 See, *e.g.*, P. H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982), 25 Pub. Admin. 1.

107 I refer to the political process fundamental interests: *supra*, note 77.

108 The most famous such attempt is by F. Michaelman, "Welfare Rights in a Constitutional Democracy" (1979) Wash. U.L.Q. 659. It is suggested that absolute (non-relative) welfare rights such as the rights to some minimum level of food, health-care, housing, *etc.*, flow from the courts' role as a reinforcer of democratic values. With only slight exaggeration the theory asserts that since those who cannot eat cannot vote, there must exist a right to eat—an astonishing basis upon which to ground subsistence rights and perhaps the ultimate victory of logic over common sense.

109 *U.S.* v. *Carolene Products Co.*, *supra*, note 104.

110 Persons accused of crimes can be seen as a minority which is especially in need of judicial protection on account of extreme majoritarian hostility to this group.

form of government. Another defect of democratic government is the notoriously short time-horizons of elected officials. Elected policy-makers are all too often willing to forego progress on long-term social objectives in favour of programs or concerns with a more immediate electoral pay-off. This suggests another special role for the courts: to ensure that long-term objectives are not unduly sacrificed for short-term political advantage.

From the perspective of the purely processual theorist I should go no further than to say that long-term societal objectives, *whatever they might be*, should be protected by the judiciary against encroachment by short-term societal objectives, *whatever they might be*. This would have the substantive value-neutrality that is so important to Professor Ely and the processualists. But, as already indicated in the Introduction, I am not prepared to concur in the view that the Constitution is merely a manual of procedure for the fair conduct of government. To be sure, process is important, but it is not the only value promulgated by the Constitution. From the normative point of view, it would be unfortunate if judges were expected to give their *imprimateur* to decisions which they perceived to be substantively wrong notwithstanding a provision in the Constitution which appears to call for judicial intervention. The Court's legitimacy is damaged just as much by non-intervention when intervention is called for,[111] as it is by wrongful intervention when the court itself makes a substantive error.[112]

From the positivist point of view I submit that no judges are capable of the substantive value-neutrality that is expected of them by the pure processualists,[113] and neither would most claim to be. Even Mr. Justice Stone, whose footnote in *U.S.* v. *Carolene Products*[114] is the origin of the processual theories, only purported to suggest a higher *standard* of scrutiny where a defect in the democratic process existed. He did not suggest that there ought to be no review in other instances. Moreover, the American doctrine itself, although often taking refuge

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111 *E.g.* by endorsing the "separate but equal" philosophy of *Plessy* v. *Ferguson*, *supra*, note 16, prior to *Brown* v. *Board of Education of Topeka, Shawnee County, Kan.* (1954), 347 U.S. 483 (U.S. Del., 1954).

112 *E.g.* by embracing social Darwinism in *Lochner* v. *New York* (1905), 198 U.S. 45 (U.S. N.Y., 1095).

113 Moreover, because every process dictates an outcome it is dubious if it is even theoretically possible to be value-neutral: P. Brest, "The Substance of Process", *supra*, note 4.

114 *Supra*, note 104.

in processual concepts, goes farther than those concepts would suggest. In respect of racial classifications, for example, the classification will not pass scrutiny if it is perfectly tailored to a *legitimate* state objective; it must be tailored towards the advancement of a *compelling* state objective. This weighing of objectives is clearly more than is required under the processual theory, which ought to be satisfied by a well-tailored statute that advances any permissible legislative objective. As soon as government objectives are to be weighed, the Court has entered the substantive domain. But how many would suggest that they are wrong in doing so?

Finally, and perhaps most importantly, we must recognize that the language of various parts of the *Charter* is hostile to the purely processual interpretation theories. Section 7 refers to the "right of life, liberty and security of the person", and section 15 to the "equal protection and equal benefit of the law". Although the precise content of these values is subject to debate, they certainly do not have the sound of mere processual values. Neither, however, does section 15 have the sound of a declaration of existing rights or even of rights which one might realistically expect to achieve in the near future—not, at least, if I am right in arguing that "equal protection and equal benefit" means equality of condition. The most reasonable interpretation is that equality of condition (and perhaps as well the right to life, liberty and security of the person) are statements about the direction in which our society should be moving, constitutional statements of our society's long-term objectives.

As Professor Brest has pointed out,[115] there is no satisfactory absolutist answer to the fundamental rights controversy, or as it is sometimes called the counter-majoritarian problem. The extent to which courts ought to intervene in matters of substance is a question of degree. Once it is recognized that one of the chronic defects of the democratic process is a tendency to renege on long-term ideals, and once it is conceded that the *Charter* does contain at least some of our societal ideals, only a processual absolutist can object to the dynamic approach to rights (which will be proposed below) as derogating from our democratic tradition.

There is another form of political constraint on the judiciary that deserves mention. Simply put, the judiciary cannot effect radical change. It operates within a sphere of conventionality. Change must

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115 P. Brest, "The Fundamental Rights Controversy," *supra*, note 4.

be "interstitial", or the legitimacy of the judiciary will be called into question. One cannot lose sight of the fact that judges are appointed, and an angry public combined with an angry government can convert a Supreme Court, by careful appointment, into a judicial version of the Governor General or the Senate with all sorts of legal powers but few conventional ones. The even more dangerous threat of section 33 cannot be forgotten either. The goal of the judiciary will be to have the section 33 power fall into the same desuetude as the federal power of disallowance over provincial legislation. It is inconceivable to me that judges will want any part of a "dialogue" with the legislatures through section 33, as some have suggested.[116] Nor *should* they want such a dialogue. Under section 33 it is the legislatures who have the last word, and each time the power has been used it becomes politically less costly to use again. Although the dynamic approach to fundamental rights adjudication is a radical concept of rights it is not an approach that leads to radical results. Since the approach involves no more than a restoration of the *status quo ante* where there is a violation the results of its use are well within an acceptable sphere of conventionality.

As a matter of day to day practice, it is probably the technological contraint on judges which is the most important element of judicial restraint. The judiciary is highly aware of its limited resources and of the inadequacy of the case method as an instrument to effect social policy. To a large extent judges are at the mercy of the professional competence of the litigants' counsel to supply adequate information on which to reach a decision. The case method, moreover, has a tendency to distort reality by presenting the courts with freak situations rather than average ones. Above all, it presents one situation at a time instead of the full array of factors and circumstances that may be relevant to policy-making. Such constraints suggest that judges ought not to be required to legislate social and economic schemes *de novo*.

The implication of these constraints on the exercise of judicial authority for the equality theory articulated in Part 1 are massive. It is obvious that an equality theory which demands equality of condition for all members of society without regard for "merit" is a theory which would call for the most sweeping affirmative rights imaginable. Equality of condition, even when applied just in the "class"-specific context, let alone when applied at large, calls for such a wholesale

116 See D. Fraser, *supra*, note 5.

restructuring of society that the immediate tendency is to reject it out of hand as an unrealistic objective. The temptation of judges presented with a claim for affirmative equality rights will be to throw up their hands and seek shelter in the familiar doctrinal and remedial certainties of liberalism. They will follow the lead of those such as Professor Gold who are prepared to recognize that we have moved into a post-liberal era, but who, when confronted with the constraints on judicial power, are satisfied to adopt the restraint of an essentially liberal theory of equality whose only significant post-liberal modification is an allowance "for a variety of not unjust legislative actions to be taken consistent with [the *Charter*]".[117] Equality of condition, according to that analysis, will continue to be treated as a permissible violation of liberal equality. If purely permissive "rights" are the extent of our willingness to implement our post-liberal values then we have really not advanced beyond the minor modifications to liberalism that were accepted long ago with the first redistributive schemes.

What the egalitarian must do is more than persuading the courts to share our disillusionment with the liberal assumption of personal control over one's condition. The courts must be shown that substantive equality rights can be given effect without unduly compromising judicial restraint. The courts will need assistance in "drawing the line" between judicial enforcement of equality rights and unacceptable judicial activism.

With some reluctance,[118] I propose the formula to which I have already alluded. The courts should insist on a legal dynamic towards equality of condition; that is, any changes in our legal régime should move us towards, or at least not away from, equality. The dynamic approach to equality rights can be given effect by striking down changes in governmental behaviour that increase social inequality, but welcoming changes which promote equality. In other words the court can accept as given the legal régime immediately before the change at issue and choose the more equal of the two alternatives.[119]

Before dismissing legal dynamism as completely outside the legal tradition, I would ask the reader to consider the merits. As a matter

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117 *Supra*, note 23 at p. 158.

118 I admit to being dissatisfied with a boundary line that relies on a distinction between affirmative and negative rights: to those affected by the result the distinction is specious in that the importance of what is at stake is in no way related to its positive or negative character.

119 This would mean that the legal régime of April 1985 probably would not be challengable as substantively unequal under the dynamic approach.

of legal history, the dynamic rule is not a bad "predictor" of the past. Unwittingly, the legal system has long been using a rough version of the dynamic rule. As society, through its government, has come to recognize certain values as important or fundamental, the courts, or sometimes the legislatures themselves, have sanctified those values by finding them to be legal rights. The premise of the *Canadian Bill of Rights*, for example, was that it declared existing rights:[120]

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist . . . the following human rights and fundamental freedoms . . . .

But while many of the rights in the *Bill of Rights* may have existed in 1960 as conventions of appropriate behaviour, it is trite to point out that they did not always exist. Certainly, the non-discrimination rights were a relatively new phenomenon. So what the *Bill of Rights* was doing was to insist of the federal government that it could not regress from the 1960 *status quo*. In a rapidly changing society, the *Bill of Rights* would be obsolescent in a few decades since new *de facto* "rights" would be conferred, but would not be protected from regressive measures. The dynamic approach recognizes the changing world, recognizes the appropriateness of protecting progressive changes, but does so without requiring a new constitutional instrument every few years.

The dynamic rule also has the merit of conforming to natural psychological expectations. It is one thing for the government not to embark on a redistributive scheme. But it is worse still to stop an existing one. Once people have been encouraged to believe that their equality demands have been recognized (or partly recognized) by society, it is a devastating blow for them to be disinherited. In a microcosmic form, these expectations have received judicial recognition in administrative law cases: judges appear to be much more hostile to administrative decisions terminating an existing interest (a job, a liquor license, a taxi license) than to administrative decisions refusing to grant a new one.

Perhaps the greatest conceptual attribute of the dynamic rule is its honesty and humility. Equality of condition is a social goal. It is not a social fact. The best that we can hope to do is to move towards

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120 *The Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1.

the ideal. The dynamic approach recognizes and accepts the limits on our collective capacity for immediate perfectibility.

The traditional static approach, however, distorts our vision of the ideal by forcing us to pretend that we have achieved it. It says, in effect, "we can't have genuine equality now; therefore we don't want it, now or ever." Under the static approach, this apparent *non sequitur* flows inevitably from the fact that future rights are the same as present rights. In this way, present possibility is allowed to limit and twist our values. Fortunately, though, the static approach is often honoured in the breach. The courts constantly redefine purportedly static rights. But there are some chasms that require too great a leap to be cured by the subtle distinctions and misapplication of past cases that is the usual judicial technique of change. The leap from non-discrimination rights to substantive equality rights is too great a leap to achieve by intellectual dishonesty. If substantive equality is to be recognized in the future, we must recognize it now.

The other attractive feature of the dynamic rule is that it satisfies the constraints on judicial activism that have already been discussed. The dynamic rule allows the legislative branch to dictate the pace of change and the prioritization of the areas in which change should occur. The role of the judiciary is to make sure that the *direction* of change is consistent with long-term constitutional objectives or ideals. This is consistent with the concerns of the processualists, since judicial intervention is justified to correct the chronic democratic tendency to displace long-term objectives in favour of short-term electoral pay-offs—a tendency which is particularly acute in respect of egalitarian objectives, as I will point out in my conclusions, below.

The dynamic rule also satisfies the technological limitations on judges. They can strike down new legislation or new administrative practices without having to construct an alternative scheme or mechanism, and without leaving "gaps" in the structure of government.[121] Although the effect of the dynamic rule is to recognize in future years the rights which would now be affirmative claims, the mechanics of the dynamic approach do not require the courts to give effect to voracious affirmative rights. At the time of adjudication, the

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121 In the case of an offensive statutory amendment, for example, the court can restore the *status quo ante* by striking out the entire amendment, including the sections which repeal the pre-existing legislation. This seems like an unusual thing to do, perhaps, but it is entirely analogous to, for example, the doctrine of conditional revocation in the law of wills.

claim is merely a negative one, asking the Court to strike down a change in the law.

I do not mean to suggest, however, that the dynamic approach ought to be universally applied. The dynamic rule is essentially just a different way of drawing a line or striking a balance between constitutional rights and reasonable limits on those rights. There will be cases where it will seem fairly clear that the judiciary ought to go further and impose a requirement for positive change on the legislature or the executive. Clearly, for example, the traditional static approach to non-discrimination rights ought to be maintained since such an approach accords with ordinary expectations of the proper function of the judiciary and does not usually pose difficult technological problems in granting a remedy. Also, it seems reasonable to insist on actual (*i.e.* full) compliance with substantive equality in respect of those "fundamental interests" for which interest-specific equality is desirable and achievable. These situations do not present problems, however, since they are cases where judicial restraint is fairly clearly not a "reasonable limit" on the Constitutional right.

There will be other situations, however, in which the dynamic rule seems to offer an excessively stingy approach to substantive equality rights. Conversely, there may be situations in which a movement away from substantive equality is necessary to meet a genuine short-term non-distributive problem.

It is here that resort must be had to the burden and standard of proof. My suggestion is that the party seeking a departure from the dynamic rule ought to bear the burden of showing why such a departure should be permitted—except, of course, that fundamental interest and non-discrimination cases ought to be dealt with by the conventional method of requiring the government to justify a departure from full compliance with the static right. What I am suggesting, in effect, is that the courts ought to take judicial notice of the justifiability of limiting substantive equality rights in the dynamic fashion which is proposed. In other words, the courts ought to start from the presumption that the combined effect of sections 15 and 1 yields the dynamic rule.[122] It would be silly for the courts to require the government to

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122 Professor Gold has suggestd a different approach to the same sort of difficulty. His suggestion is, first, that the rights in s. 15 be circumscribed so that they include internal limitations specifying the burden and standard of proof in respect of the subject matter in issue. Second, s. 1 is used "to alter the doctrine respecting who has the burden of justification": Gold, *supra*, note 23, p. 152. For reasons already discussed I am not sympathetic to the view that the meaning

prove, in case after case, that the principle of judicial restraint is a reasonable limit on substantive equality that demonstrably justifies the dynamic approach.[123]

I do not wish to enter into a lengthy discussion about standards of proof. A few general propositions will suffice. If the dynamic rule is to be given much effect the standard of proof ought to be a significant hurdle. In particular, since the dynamic rule already incorporates great deference to the legislature, it would seem appropriate for an especially tough standard to be applied to regressive governmental changes. It is worth emphasizing the point that the dynamic rule (and the principle of judicial restraint which is served by the dynamic rule) fully reflects those limits on substantive equality which already exist. It is conscious and subservient to those limits even if, but for the principle of judicial restraint, those limits are unreasonable. Only something on the order of a national emergency can justify regressive changes to the distribution of the social product.

In the case of a plaintiff seeking to set aside the dynamic rule in order to claim affirmative relief, the standard need not be so high, particularly if it can be shown that a remedy can be granted without unduly impinging on the principle of judicial restraint. One can probably conclude from the enumerated criteria, and from section 28, respectively, that the Constitution is especially concerned with remedying "class"-specific inequality, and, most of all, gender inequality. Therefore a lower standard ought to be required with respect to these forms of inequality.

A few other points should be made about the proposed dynamic rule. The rule gives rise to a right, enforceable by an individual, to a

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of equality should be distorted by non-equality concerns; I therefore do not agree with the ideal of internal limitations which can only confuse us as to what equality means. Moreover, there is a serious technical problem with his approach. In some cases his approach would require the *challenger* of a law to invoke s. 1 to alter an unfavourable standard of proof which is internalized within s. 15 itself. But to suggest that a challenger can invoke s. 1 is to suggest that s. 15 confers *rights* on the government. These are doubtful propositions.

123 The technical point may be raised that the dynamic approach is not "prescribed by law". Only on the narrowest reading of the phrase, however, can it be said that the principle of judicial restraint is not "prescribed by law". For while it is true that there is no statutory or constitutional provision that draws the line between judicial and legislative authority (and hence the need to come up with a solution such as the dynamic rule), there is explicit constitutional recognition for the existence and functioning of the legislature. The law therefore implies a limit on judicial authority.

pre-existing level of *social* equality. It is not an individual right to a pre-existing *personal* share of the social product. A decline in an individual's share of income does not give rise to a cause of action unless it is attributable to some change in the legal régime (*i.e.* in the content, administration, or adjudication of the laws) whch has a regressive impact on the distribution of the social product—either because it increases "class"-specific inequality or inequality at large.

One of the most difficult questions raised by the dynamic rule is the question of severability. Should the courts adhere to the practice, so familiar from non-discrimination and "rationality" analysis, of isolating particular sections and treating them as if they were discrete legal entities? The purpose of the dynamic rule is to allow the political process to determine the pace, the mechanics, and the prioritization of progressive change. If the package as a whole advances equality of condition at large and as between "classes" enumerated by section 15, then it would be inappropriate for the judiciary to isolate particular sections as regressive. To do so would be to give the judiciary a power to legislate the pace of progress. Particular sections could of course still be isolated and struck down where the anti-discrimination principle or fundamental interest doctrine is involved.

More difficult questions of severability arise when there is an equality conflict,[124] or even when the overall effect of the legislation is regressive. In these situations, the courts will have to make an educated guess at whether or not the legislature would have been willing to enact the legislation with a few offending portions removed. If the court is uncomfortable about severing off parts of a new statutory scheme, it would probably be wise to strike down the entire package and encourage the legislature to try again with a more progressive scheme.

4. CONCLUSIONS

There are really only two types of ultimate social objectives: distributive objectives and production (or efficiency) objectives. I began this paper by asserting that equality is about the distribution of social benefits and burdens. It is natural, therefore, that in a paper on equality I have so far left efficiency objectives to one side. Such an approach

124 That is, a conflict between the impacts on two disadvantaged "classes" or between the disadvantaged as a whole and one or more protected "classes".

is rare; so rare, in fact, that I have had to ignore the work of leading legal philosophers who have defined the ideal distribution in terms of non-distributive concepts.[125] The dominant cultural ethic of the modern Western world has been its emphasis on production values. Since efficiency and equality are often in direct conflict, this has meant the subordination of equality values to efficiency values. Indeed, the striking characteristic of classical liberalism is that it defined equality entirely in terms of efficiency: the ideal distribution of income is the distribution which best promotes efficiency, *i.e.* a distribution according to "merit". It was shown in Part 1, that distribution by "merit" hinges on the freedom of the will, and that our society has largely rejected the idea that each of us has personal control over our individual destinies.

Many proponents of the *status quo* would argue that even if we do not actually have free will (or have only a minimum freedom), the orderly operation of society requires that we "deem" ourselves to have it. If jailing convicted criminals reduces crime, for example, then we should continue to distribute penal burdens as if defendants had the power to control their own actions. While this conclusion may generally be correct as an appropriate weighing of efficiency and distributive objectives in the area of criminal law, it is important to remember that it is not distributive justice *per se* which is advanced—not, that is, if criminals do not really have personal control over their actions.[126]

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125 *E.g.* John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971). Professor Rawls' theory, to be fair, does not purport to be an equality theory alone. Implicit in his argument, however, is the proposition that inequality of distribution is "just" if someone can be made better off without making the most disadvantaged person worse off. Once again, distributive justice is defined at least partly in terms of efficiency. In my view, the rock on which Professor Rawls' theory must flounder in his vital assumption that each person only cares about his or her absolute condition and is indifferent to relative condition. As I will agree below, the assumption may seem fairly realistic as a static "snapshot" of human wants but a dynamic "movie" shows that "absolute" wants are dictated by relative concepts.

126 That a deterrent effect may be empirically provable is no more proof of the existence of free will than the fact that people respond to pecuniary incentives. The error is often made that because people respond to external stimuli they must have the power of choice. But determinism is precisely a recognition that people do respond to stimuli in a predictable fashion. The determinist argues that all people of identical genetic composition and lifetime experience would respond similarly. It is the fact that different people are subjected to different independent variables—and not any mystical uniqueness of consciousness or moral worth—that makes people different.

Similarly, it is possibly true that we need an unequal distribution of the social product in order to encourage people to produce "enough". This conclusion does not mean that income differences are "just" from a distributional perspective, but only that they may be "necessary" for efficiency reasons. What I am emphasizing is that we cannot call something "equal" just because it is efficient. Whether efficiency or equality should prevail in these situations is a matter of weighing the two objectives.

The dynamic approach to equality does not ignore production values. The government is free to pursue new efficiency initiatives as long as there is no augmentation of the maldistribution. Also, the government is permitted to maintain existing practices (which heavily favour production values). What the dynamic approach does do, however, is to recognize that the growth of the social product is not as compelling an objective as egalitarianism at this stage in our social evolution. Precisely because our orientation in the past has been entirely on production there is a real need to re-orient ourselves towards distributive justice, to tilt the scales in the opposite direction.[127] Our capacity to produce has reached a stage where the social benefits from increasing the size of the production "pie" are at best minimal and at worst positively destructive. Second only to nuclear holocaust, the ecological effects of over-production may be the greatest threat that the human species has ever known. But quite apart from environmental concerns, we surely have to question the social benefits of increasing production at a time when the average Canadian has an income roughly ten to twenty times as great as the average citizen of the Third World.

If I am right in suggesting that our society has favoured efficiency values over equality values to a point of absurdity, then there is either something terribly wrong about our social values or else there is something wrong with the way that social values are expressed or translated into government policy.

This leads me into the third important governmental objective, the objective of fair process. Process has both macro (*e.g.* political) and micro (*e.g.* natural justice) applications. It is not an ultimate objective, but only an intermediate one, in the sense that fair process is

127 The economist's theory of "diminishing marginal utility" can be used by way of analogy to illustrate the general proposition that the greater is a society's production the less emphasis shuld be placed on production values relative to equality values, other things being equal: Rawls, *supra*, note 125 at pp. 36–37.

only important because we suspect that in its absence our ultimate objectives—especially our distributive objectives—will be ill-served. Without fair criminal trials we fear that the burden of imprisonment will be imposed on the wrong people. Without fair elections we fear that we will be unable to prevent government authorities from maldistributing the social product in their own favour. These are legitimate concerns, and it is partly out of deference to them that our judiciary leaves most policy decisions in the hands of those who are responsible to the electorate. But even the most ardent processualists are in agreement that the democratic system is imperfect and that the judiciary ought to intervene to cure the deficiencies.

How is it, then, that the democratic system chronically errs in choosing between equality and production values?[128] I submit that the problem arises in part, at least, because the short time horizon of elected governments encourages the political process to translate what are essentially relative demands into absolute demands, that is, to convert equality needs into production needs. The victim of maldistribution expresses a need or a want for a better condition. The politician attempts to gratify that need with the least costly political method—by improving the general standard of living. In this way the politician does not have to face the hostility from better-off voters whose condition would have to deteriorate if the redistribution method were adopted.

There would be no objection to the production approach if people only cared about their absolute condition. Most of us would rather not think of ourselves as the proverbial "dog in the manger". The poor, in particular, have been strongly socialized to look towards improving their own condition, and to accept the fact that they will experience an inferior standard of living. Undoubtedly, therefore, there is a tendency to perceive one's condition as an absolute problem, rather than a relative one. Indeed, this is what makes the production "solution" so successful politically.

The fact is that people *do* care about their relative position. In our materialistic society, our relative condition is a measure of our social worth. Those who have the most expensive consumer desirables and houses are looked up to. As the advertisement frankly expressed it,

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128 It is possible, of course, that the voters are simply wrong. I do not think that the problem is so simple as that, however. The disadvantaged are "wrong" for failing to perceive or articulate their needs as relative needs. But the needs are not felt or experienced as relative needs but simply as needs.

"if only your friends could see you now." So, while the disadvantaged perceive and express their wants in absolute terms, the *reason* for the need arises from their relative condition. The democratic system creates the illusion of dealing with the poverty problem by improving the condition of the poor, along with the condition of the rich. All the while, though, the system is sowing the seeds for the next round of "absolute" demands. Just when refrigerators and flush toilets have become nearly universal a whole set of other social expectations has emerged. The production solution has postponed or temporarily neutralized demands which are rooted in equality.[129] Democratic governments will constantly put off any achievement on equality objectives until they are forced to address them either by a collapse of production (as was the situation in the first burst of egalitarian policy-making during the Depression) or by judicial fiat.

Once it is agreed that the judiciary ought to adopt a substantive approach to equality rights, the difficult question is how it should limit itself. Unless some guidance or starting point is offered, the courts will be left to apply a vague test involving the weighing of efficiency objectives against equality objectives. They will probably recoil from such an impossible arbitrary task. Although the dynamic rule is itself a somewhat arbitrary way of drawing the lines between equality and efficiency and between equality and judicial restraint, it has much to commend it, both in principle, and because it is relatively easy to apply. I am, of course, highly skeptical about the likelihood that the courts will be prepared to adopt such an approach. But I am even more skeptical about the chances that the courts will adopt substantive equality rights without such an approach.

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129 I do not deny the genuine existence of absolute demands, particularly on the part of the acutely disadvantaged. I would point out though that the "insatiability of human wants" which is urged by economists is largely an artificial condition produced by expectations of growth arising out of our history of growth and by such phenomena as commercial advertising which drives home the message that our present standard of consumption is inadequate or defective. The point I am making in the text is that however true may be existence of absolute demands, there is also a relative demand which the political process redefines instead of satisfies.