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Taylor: Comment on Rowan

William L. Taylor

COMMENT

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I. INTRODUCTION

In the sphere of equality what makes the United States Constitution a living, vital document is the work of the Supreme Court over the last three decades. I wish to describe that work and suggest to you that we are all better off as a result of it. Indeed, we would have very little to celebrate in this bicentennial year without it. In addition, I will defend the Court's work against attacks on its legitimacy and wisdom. Finally, I will discuss briefly the rather extraordinary referendum that the Nation will have on the Supreme Court's work in the critical areas of equality, individual rights, and liberties when the Senate votes on whether to approve Robert Bork's nomination as a Justice of the United States Supreme Court.

II. THE CONCEPT OF EQUALITY IN THE MODERN ERA

The constitutional concept of equality in the modern era is rooted in the Supreme Court's 1954 decision, *Brown v. Board of Education*.[1] It is continued to this day in the Court's interpretations of the equal protection clause and civil rights laws.

The concept of equality adopted by the Court in *Brown* was not supported by the legislative branch of the federal government until ten years after the decision, when Congress passed the Civil Rights Act of 1964.[2] Congressional support, however, has continued since that time. In fact, Congress has expanded the concept of equality in some respects. For example, it has imposed obligations on private employers not to discriminate in the job market,[3] and on proprietors of restaurants, hotels, and other places of public accommodation to serve black people.[4] In a few cases Congress has unsuccessfully sought to narrow the concept of equality. Primarily, though, Congress has provided the means for enforcing constitu-

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1. 347 U.S. 483 (1954).

2. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of 28 and 42 U.S.C. (1982)).

3. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e to 2000e-16 (1982).

4. Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a to 2000a-6 (1982).

tional rights declared by the Court.[5]

The executive branch gave support to the *Brown* decision and its principles of equality in 1961, three years earlier than did Congress, but that support lasted only until 1981. Since then the equality embodied by *Brown* has been under severe and sustained attack from the Reagan administration. This attack has focused on the basic remedies for discrimination adopted by the judiciary and Congress in public[6] and private schools,[7] employment,[8] and voting.[9]

I will discuss briefly the Court's work on equality and ask you to imagine what our country would be like without it.

In the area of race, the Court called for the dismantling of the caste system that had kept black people as a subject class for the better part of two centuries. The caste system was formal in the South and informal in much of the rest of the Nation.[10]

After an era of massive resistance, the Court ultimately addressed the question of remedy and adopted an affirmative, common-sense approach. The Justices recognized the great danger in tendering formal equality without real content, as occurred after Reconstruction. Therefore, the Supreme Court was careful to respect the rights and interests of all people. The Court tried to assure genuine opportunity for black people who had been denied it. This led not only to equality of results, but to real opportunities for education, jobs, and access to important services.[11]

The pioneering work of the Court in *Brown* has borne fruit in other areas as well, including sex discrimination. Despite the states' failure to ratify the Equal Rights Amendment and despite the

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5. *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at scattered sections of 28 and 42 U.S.C. (1982)).

6. *See, e.g.*, *Authorization Request of Civil Rights Division of Justice Dep't: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 328 (1985) (testimony of William L. Taylor) [hereinafter *Hearings*].

7. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (non-profit private schools with admission standards that discriminate on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code, nor are contributions to such schools deductible as charitable contributions).

8. *See, e.g.*, *Hearings*, *supra* note 6, at 113 (testimony of Barry L. Goldstein, NAACP Legal Defense Fund; and William Robinson, Lawyer's Comm. for Civil Rights).

9. *See generally* Miller, *Ronald Reagan and the Technology of Deception*, ATLANTIC MONTHLY, Feb. 1984, at 65.

10. For an excellent history of how the caste system operated in four communities that were included in the *Brown* case, see R. KLUGER, SIMPLE JUSTICE (1976).

11. *See* Taylor, *Brown, Equal Protection and the Isolation of the Poor*, 95 YALE L.J. 1700, 1717-25 (1986).

Court's application of a lower standard of scrutiny to gender classification under the fourteenth amendment, the Court, with the support of Congress, has attacked the stereotypes that underlie public policy limiting the ability of women to achieve their potential.[12] Similarly, the Supreme Court and Congress have begun to strip away the barriers in public policy and private industry that have prevented disabled persons from participating in and making a contribution to society.[13] The concept of equality has extended to other corners of our society as well. For instance, the application of principles of equality prevented the state of Texas from excluding from public schools children whose parents are in the country illegally.[14] It has also prohibited the state of Louisiana from depriving children whose parents are not legally married the right to sue for the wrongful death of one of the parents.[15]

Finally, some of the most important work by the Court in equality has been in extending the right to vote and the right to participate in the political process through civil rights and one person, one vote decisions.[16] Far from being exercises of judicial authority at

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12. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442 (1987) (upholding affirmative action program designed to improve representation of women in agency workforce); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking down single-sex admissions policy of state nursing school); Craig v. Boren, 429 U.S. 190 (1976) (invalidating state statute prohibiting sale of 3.2% beer to males under the age of 21 and females under the age of 18); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that statute which, solely for administrative purposes, provided that spouses of male members of the uniformed services are dependents for purposes of obtaining certain benefits, but that spouses of female members are not dependents unless they are dependents for over one-half of their support, violated due process clause of fifth amendment); Reed v. Reed, 404 U.S. 71 (1971) (holding that statute which required that, between persons equally qualified to administer estates, males must be preferred to females violated the fourteenth amendment).

Congressional enactments designed to improve the status of women include the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982); the Women's Educational Equity Act of 1978, 20 U.S.C. §§ 3341-3348 (1982 & Supp. III 1985); and the Federal Child Support Enforcement Act of 1975, 42 U.S.C. §§ 651-665 (1982 & Supp. III 1985).

13. *See, e.g.*, School Bd. of Nassau County v. Arline, 107 S. Ct 1123 (1987) (holding that a teacher susceptible to tuberculosis was a "handicapped" individual within the meaning of the Rehabilitation Act and was therefore covered by the Act); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (holding that the Rehabilitation Act's bar on employment discrimination extends to programs not receiving federal aid); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982) (prohibiting discrimination against qualified handicapped individuals in any program or activity receiving funds from the federal government, in any activity conducted by any executive agency or by the United States Postal Service).

14. *See* Plyler v. Doe, 457 U.S. 202 (1982).

15. *See* Levy v. Louisiana, 391 U.S. 68 (1968).

16. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

the expense of the other branches, these decisions enabled state legislatures to be more responsive to the needs of their constituents, facilitating constitutional policy.

Without these various decisions and the vision of equality they represent, the United States of America would be a nation more seriously riddled by racial and ethnic strife, real and perceived inequality of opportunity, and corrupt local political systems than it is today. These Supreme Court decisions were not "special interest" decisions to benefit business or other minority groups. They were decisions to benefit all of us. As Ralph Ellison wrote in the 1940s, out of the black struggle for equality would come the creation of "a more human America."[17]

III. OBJECTIONS TO THE COURT'S WORK ON EQUALITY

In spite of its contribution to equality in the United States today, the Court's work continues to suffer attack. One objection is that it was the province of the popularly elected branches of government, rather than that of the courts, to deal with denial of equality and that, if only the courts had been patient, the changes eventually would have been made. Whatever the legal merits of the first claim, which I will address below, the notion that the other branches would have acted anyway is dubious.

To understand the weakness of such a proposition, we only need to recall the era of massive resistance, when the only organized word from Congress was the Southern Manifesto and when the President told us that "law cannot change the hearts and minds of men."[18] It took the peaceful protest movement led by Dr. Martin Luther King and the violent repression of that movement to arouse the Nation's conscience and to impel action by the political branches of government.

This introduces a key point in understanding the role of the Court and its work on equality. In *Brown* and its progeny the Court did not confer rights on people as if by divine dispensation. The *Brown* decision empowered people to organize themselves and thus improve their situations. The Court simply served as a catalyst, creating opportunities for people and impelling the other branches to perform their responsibilities. If the political branches and the ma-

17. *See* R. ELLISON, AMERICAN DILEMMA: A REVIEW, IN SHADOW AND ACT 302 (1964).

18. In 1958 President Eisenhower said that "[l]aws themselves will never solve problems that have their roots in the human heart and in human emotions." R. SARRATT, THE ORDEAL OF SEGREGATION 51 (1966).

jority of the American people had viewed the Court's work as illegitimate, its decisions never would have been implemented.

Much of the criticism of the Court's decisions in the area of equality comes from people who have never accepted the concept of judicial review and the principle delineated in *Marbury v. Madison*[19] that the Supreme Court is the final arbiter in interpreting the Constitution. That group of critics includes Attorney General Edwin Meese who earlier this year suggested that while the Supreme Court has a role in interpreting the Constitution, other government officials do not necessarily have to adopt the Court's view. Interestingly, Mr. Meese chose the Court's decision in *Board of Education v. Clark*[20] as his prime target. That case was the supreme test of the rule of law in our era, and if Meese's view was followed, we might have failed that test.

Others claim that the Court's actions in the area of equality are illegitimate based on principles of original intent. I will not enter that debate except to make some brief observations.

First, as Carl Rowan has suggested, if we are not to trivialize the Constitution, we must look beyond what was in the immediate ken of that remarkable group in Philadelphia and look instead to their larger purpose. What we find is powerful rhetoric not only about equality, but also about other related values such as opportunity and enterprise. Thomas Jefferson had the foresight to discuss a public school system before one even existed:

> The object is to bring into action that mass of talents which lies buried in poverty in every country for want of means of development; and thus give activity to a mass of mind, which in proportion to our population shall be the double or treble of what it is in most countries.[21]

It would be hard to find a better prescription for affirmative action and indeed for affirmative government.

The debates over the fourteenth amendment and over the various laws establishing the Freedmen's Bureau[22] included the same objections to race-specific action that we hear today—that there was

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19. 5 U.S. (1 Cranch) 137 (1803).

20. 400 U.S. 816 (1970).

21. Letter from Thomas Jefferson to Abbé José Correa de Serra (Nov. 25, 1817), *reprinted in* 7 THE WRITINGS OF THOMAS JEFFERSON 94-95 (H.A. Washington ed. 1864).

22. *See, e.g.*, Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866). For a general discussion of the establishment and development of the Freedmen's Bureau, see Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

no reason to treat blacks better than whites. The argument in favor of race-specific action was also the same then as it is today—give at least opportunity to people to whom we have done nothing but wrong.

IV. THE CURRENT CHALLENGE TO EQUALITY

Let me return now to my opening remarks about the upcoming national referendum on the Constitution. The Reagan administration has failed over the past six years to reverse the course that I have described. It has been rebuffed in the Congress, in the courts, by business, labor, religions, community leaders, and the American people. It has been defeated with respect to *Bob Jones University v. United States*,[23] the Voting Rights Act of 1968,[24] the school desegregation cases,[25] and its assault on affirmative action.[26]

Now, the administration is making a final attempt, through the nomination of Judge Robert Bork to the United States Supreme Court, to accomplish its agenda. In Judge Bork the administration has found the embodiment of these failed positions, the perfect King Canute to roll back the tide of liberty and opportunity. Bork has written a great deal and has made a number of things perfectly clear. He agrees with the principle established by *Brown*, but he disagrees with most of the remedies that have made *Brown* a living reality.[27] Among his targets have been *Shelley v. Kraemer*,[28] which barred the enforcement of racially restrictive covenants, the Public Accommodations Act of 1964,[29] the Voting Rights Act of 1965,[30] and the Supreme Court's decision outlawing poll taxes.[31] If these

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23. 461 U.S. 574 (1983).

24. 42 U.S.C. § 1871 (1982).

25. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958).

26. *See generally* Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984) (discussing the Reagan administration's record on civil rights).

27. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971) ("[T]he Court, because it is neutral, cannot pick and choose between competing gratifications, and likewise, cannot write the detailed code the framers omitted, requiring equality in this case but not in another.").

28. 334 U.S. 1 (1948). *See* Bork, *supra* note 27, at 15 ("[T]he rule of Shelley would require the Court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs simply because the contrary result would be state enforcement of discrimination.").

29. Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a to 2000a-6 (1982).

30. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

31. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The twenty-fourth

positions lead you to think that Bork's commitment to racial equality is weak, consider that he believes the fourteenth amendment has even less of an application to other groups that suffer discrimination, *e.g.*, women, disabled people, aliens, illegitimate children. About *Skinner v. Oklahoma*,[32] a 1942 Supreme Court decision striking down an Oklahoma law calling for the sterilization of some convicts, Bork remarked that the decision was one in a line of cases that was "improper and intellectually empty."[33] Bork also opposes vehemently the use of the fourteenth amendment to guarantee the one person, one vote principle, as well as a host of other decisions dealing with other rights and liberties like the right to privacy.[34]

With his record of opposition to the current scope of equality jurisprudence, how can Judge Bork be confirmed? Three shibboleths, if accepted, will lead to his confirmation.

1. Bork's views on these cases reflect not his personal values but a principled belief in "judicial restraint."

Even assuming this would be a valid defense, in Bork's case it is not true. He is only a selective advocate of judicial restraint. In reference to *Morgan v. Katzenbach*,[35] where Congress enacted a statute expanding the right to vote, Bork was willing to abandon judicial restraint and strike down the statute. It is only when laws narrowing personal rights and liberties are challenged that he becomes an apostle of judicial restraint.

2. Once the nominee gets on the Court he will moderate his views.

Such a moderation has occurred in the past. Former nominees such as Justice Powell have moderated their views once on the

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amendment, prohibiting states from imposing a poll tax for voting in Presidential and congressional elections, does not apply to state or local elections. U.S. CONST. amend. XXIV. In *Harper* the Supreme Court declared such taxes in state and local elections unconstitutional under the equal protection clause of the fourteenth amendment. 383 U.S. at 668.

32. 316 U.S. 535 (1942).

33. *See* Bork, *supra* note 27, at 11-12.

34. *See id.* For example, Bork, then a professor at Yale Law School, ridiculed the decision in Griswold v. Connecticut, 381 U.S. 479 (1965), where the Supreme Court struck down a state law that made the use of contraceptives by married couples a criminal offense. He characterized the decision as "unprincipled . . . both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define that right." *Id.* at 9.

Judge Bork went on to say that substantive due process is an "improper doctrine," stating that "[s]ubstantive due process requires the Court to say, without guidance from the Constitution, which liberties or qualifications may be infringed by majorities and which may not." *Id.* at 11.

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

Court, and such a moderation may occur again with a candidate who merely thinks that some Supreme Court decisions are wrong. Bork, however, does not merely think certain decisions are wrong, he thinks they are disastrous. In his words, some of these decisions were "unconstitutional" or "judicial usurpation," and that Justice Warren in *Baker v. Carr*[36] could not "muster a single respectable supporting argument."[37] Given his views, Bork would betray his rigid principles if he did not seek to reverse these decisions. In many areas where the Court is closely divided Bork could prove to be the decisive vote.

3. Absent incompetence or dishonesty of the nominee, the President's judicial nomination should be approved.

This view is not supported by "original intent" or by history. Judicial nominees should not be rejected lightly. But Senators are elected just as the President is, and they take the same oath of office as do the President and judges—an oath to support and defend the Constitution. A Senator would be remiss in his obligation if he voted to confirm a nominee whose views of the Constitution would alter rights and immunities that the Senator believes are fundamental to our legal system. If Senators apply the standard I have suggested, the nomination of Judge Robert Bork will be rejected—not by forty-one Senators engaging in a filibuster, but by a majority voting against the nomination.

36. 369 U.S. 186 (1962).

37. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 166.