Maryland Law Review

Volume 47 | Issue 1 Article 8

Belz: Comment on Rowan

Herman Belz

COMMENT

HERMAN BELZ*

Freedom and equality have been the fundamental principles of the American political tradition since the founding of the Republic. Political liberty in the United States is based on the rights of individuals to protection in the exercise of civil rights and to participation in republican self-government under the principles of consent and majority rule as expressed in the Declaration of Independence. Equality as a constitutional concept likewise has been interpreted with a bias toward individual freedom. American equality has meant equal protection of the laws and equality of opportunity. It has been premised on the removal of artificial and irrelevant restraints on individuals, restraints such as legally defined class status or the requirement of racial, religious, or ethnic qualifications for participation in public life.

Reflection on equality as a constitutional concept raises the problem of defining the Constitution and ascertaining its meaning. History and political philosophy provide two relevant approaches to this problem. Accordingly, I will begin my consideration of constitutional equality by examining the subject from an historical point of view. This examination requires us to reflect on the nature and intent of the Civil War Amendments to the Constitution. It also leads us back further, to the founders' Constitution of the eighteenth century.

Justice Thurgood Marshall recently asserted that, although "the Union survived the [C]ivil [W]ar, the Constitution did not."[1] Justice Marshall's position is that the thirteenth, fourteenth, and fifteenth amendments, embodying in his view "a new, more promising basis for justice and equality," formed a new constitution.[2] This assertion, however, is historically inaccurate. The Constitution was not abandoned or discarded during the Civil War, and the framers of the Civil War Amendments did not make a new constitution. Rather they confirmed, clarified, and extended the principles of liberty,

---

* Professor of History, University of Maryland College Park. A.B., Princeton, 1954; M.A., University of Washington, 1963; Ph.D., 1966.

1. T. Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii 7 (May 6, 1987) (available at the *Maryland Law Review*).

2. *Id.*

equality, and consent embodied in the original Constitution. These principles were imperfectly realized in American politics and government in the antebellum period, primarily because of the institution of slavery. The Civil War framers completed the Constitution by abolishing slavery and extending the principle of the natural rights of individuals to the entire Nation.

The concept of equal rights for individuals without racial distinction guided the authors of the Civil War Amendments. It was expressed specifically in constitutional and statutory provisions for legal and political equality.[3] American slavery had been racial slavery; American freedom had therefore been racially qualified—as actually implemented, if not in principle. The purpose and intent of the Civil War Amendments was to remove the racial stigma from republican civil and political liberty. It was to make the freed slaves American citizens and confer upon them the civil rights accorded all citizens and not, as some have argued, a special right of Negro freedom and equality.[4]

The concept of equality that was written into the Constitution by the founding fathers and the Civil War Amendments' framers is, in the language of philosophy, "individual-regarding equality."[5] It means that in the organization of society there is only one class of persons and that class shares the same civil liberties. A second type of equality is described as "segmental equality,"[6] referring to the relationship of individuals within a subclass, such as the military. Segmental equality is individual-regarding within the class. A third type of equality, "bloc-regarding" or "group-regarding," insists on equality between subclasses.[7]

Is constitutional equality merely a formal textual term, a concept lacking fixed content that can be given any one or a combination of these three philosophical meanings? Is the "equal protection of the laws" provided for in the fourteenth amendment

---

3. *See, e.g.*, U.S. CONST. amend. XIV (equal protection clause).

4. Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

5. D. RAE, EQUALITIES 20-21 (1981). Individual-regarding equality is manifested in the one person, one vote principle, which defines a class of equal citizens, granting each the same formal right to vote as any other. Equal rights such as civil liberties of thought and expression, rights against arbitrary arrest, and rights to property also fall under the concept of individual-regarding equality.

6. *Id.* at 28-29. A segmental subject structure is defined by two features: (1) subjects of equality are divided into two or more mutually exclusive subclasses and (2) equality is required within, but not between, these subclasses.

7. *Id.* at 32. Bloc-equal structures are formally defined by two features: (1) the subjects of equality are divided into two or more subclasses and (2) equality is required between subclasses (blocs) and not within them.

subject to redefinition according to the preferences of judges and administrative agency rulemakers, the two types of government officials who have been most active in settling disputes about equality and formulating civil rights policy in recent years? Under the theory and practice of our constitutionalism, the answer is a firm and unequivocal "no." Yet on what basis can we say that the Constitution embodies individual-rights equality? I believe the answer can be found in history and political philosophy.

The history to which I refer concerns the founding of representative institutions in the seventeenth and eighteenth centuries and the making of republican constitutions in the Revolutionary era. In the course of this historical experience Americans established equal opportunity for individuals as a replacement for the feudal and aristocratic idea that inherited or ascriptive status should determine the nature and scope of a person's activity in politics and society. The principle of equal opportunity was subsequently extended against distinctions and prejudices based on race, sex, ethnicity, and family connections. The history of these events, including the abolition of slavery and conferral of civil rights on the freed people by the fourteenth amendment, reveals that the substance of the idea of equality was the natural rights philosophy derived from Hobbes, Locke, and other sources of modern liberalism, and expressed in the Declaration of Independence.

Although the emancipation of slaves was the single most significant civil rights advance in modern history, the attempt to secure liberty and equal rights through the constitutional amendments[8] and Civil Rights Acts of the Reconstruction[9] was only partially successful. Racial discrimination, much of it unlawful and unconstitutional, persisted. The denial of black citizens' civil rights was widespread and systematic, especially in Southern government and politics. The Supreme Court decision in *Plessy v. Ferguson*[10] confirmed and encouraged this behavior by legalizing state-sponsored segregation under the philosophy of "separate but equal." At the time of the decision people knew that separate facilities were not equal, but in the opinion of both blacks and whites separate facilities were better than no facilities at all. In other words, the separate but equal rule seemed reasonable, and in the view of the Supreme Court and American society this made it constitutional.

---

8. U.S. CONST. amends. XIII-XV.

9. Civil Rights Acts of 1866, 1870, 1871, & 1875 (codified as amended at 42 U.S.C. §§ 1971-1972, 1981-1992 (1982)).

10. 163 U.S. 537 (1896).

Plessy embodied a racial-group concept of equality. If it was a valid interpretation of the fourteenth amendment, it superseded the individual-rights idea as the substance of constitutional equality. Notwithstanding the reasonableness it seemed to express in the context of the late nineteenth century, was *Plessy* sound constitutional law? For decades supporters of equal rights argued that it was not. They sought to weaken and overthrow the separate but equal rule and reverse the landmark segregation holding. The modern civil rights movement made this its principal objective, and success finally came in the 1954 decision of *Brown v. Board of Education*.[11]

If the NAACP lawyers who argued *Brown* had prevailed in their legal reasoning, the Supreme Court would have declared *Plessy* wrongly decided, and held segregated schools unconstitutional on the ground that the framers of the fourteenth amendment did not intend for race to be regarded as a reasonable means of classification in state legislation. The Court, however, did not decide *Brown* on this basis. Instead, the Court concluded that in view of the importance of education in modern American society, separate schools were inherently unequal. The once reasonable separate but equal rule had become unreasonable.

The *Brown* opinion did not explicitly subscribe to either the individual-rights or the group-regarding concept of equality. Nevertheless, most legal and political observers saw the decision as a vindication of the principle of individual equal rights without racial distinction. It gave a strong impetus to the civil rights movement, which with the adoption of the Civil Rights Act of 1964[12] and the Voting Rights Act of 1965[13] appeared to have gained full acceptance for individual-rights equality in public policy. These statutes were taken as clear expressions of individual equality as a constitutional concept.

Few exercises of congressional legislative power seem as clear as the provision in Title VII of the Civil Rights Act of 1964 stating that it shall be an unlawful employment practice to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual in the terms or conditions of employment because of the individual's race, color, religion, sex, or national ori-

---

11. 347 U.S. 483 (1954).

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

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

gin.[14] Within a few years, however, a group-defined theory of equality was asserted by federal judges and Equal Employment Opportunity Commission administrators as the standard of equality contained both in the Civil Rights Act and in the Executive Order prohibiting discrimination in federal contract work.[15] The theory and practice of affirmative action expressed the concept of bloc or group equality.

Affirmative action started out in the early 1960s as an individual-rights method of promoting equal employment opportunity. One means by which equal employment opportunity was effected was by requiring government contractors to take positive steps to change recruiting patterns and the environment in which employment decisions were made. Amidst the social upheaval of the mid-1960s affirmative action quickly went beyond providing a remedy for intentional acts of unlawful discrimination against individuals because of race to become a jobs program for blacks. Proponents of affirmative action sought to establish it as a policy that would permit or require preferential hiring treatment for blacks as a group. The purpose was to make blacks equal to whites by removing the effects of past discrimination. Affirmative action judicial decisions and administrative regulations shifted the focus of unlawful discrimination from intentional injury or denial of rights based on race, to practices in social institutions, such as businesses and schools, that had an adverse or statistically disproportionate impact on blacks and other minority groups.[16]

In redefining discrimination, affirmative action decisionmakers redefined the equality that is the subject of Title VII of the Civil Rights Act of 1964, and by implication the equality embodied in the fourteenth amendment. Equality of opportunity, traditionally envisioned as the removal of discriminatory barriers in order to give blacks and other minorities access to jobs, training, and education, gave way to equality of condition or result. It was argued that to insist merely on individual-rights equality of opportunity was to preserve inequality. In order to reach this conclusion proponents of affirmative action denied that nondiscriminatory individual-rights equality had been or could be effective in changing the socioeconomic condition of blacks as a group. They argued that something more was needed: compensatory discrimination that would address

---

14. *See* 42 U.S.C. § 2000e-2(a)(1) (1982).

15. Exec. Order No. 11,246, 3 C.F.R. 168 (1964).

16. H. BELZ, AFFIRMATIVE ACTION FROM KENNEDY TO REAGAN: REDEFINING AMERICAN EQUALITY 9-17 (1984).

the question of equality between racial groups, and would treat blacks and whites as fungible social resources without regard to the experience and attributes of individuals. The consequence has been the establishment of race-conscious affirmative action, as seen in court-ordered and government-induced "voluntary" public and private quota policies in employment, education, and business.[17]

There were compelling political and social reasons for adopting racially preferential policies in the mid-1960s. Chief among them appear to have been the desire to give blacks jobs and a stake in their communities in order to prevent further ghetto rioting and to achieve a measure of social stability and justice. A broader ideological justification for affirmative action, at least in the view of its leading theorists, was historical: to secure atonement from white society for the sins of slavery and racial discrimination.[18] The institutionalization of affirmative action in the past twenty years has created political and economic interests that demand perpetuation of race-conscious preferment in the name of "civil rights."

The question is whether the justifications for affirmative action transcend political expediency and assume the status of a constitutional principle. Is affirmative action merely a temporary means of achieving individual rights, as is implied in the frequent assertion that in order to go beyond race it is necessary to take race into account? If so, does using race to go beyond race actually work as intended? If it does not, are we to conclude that affirmative action asserts a new principle of constitutional equality defined in racial-group terms? Is this new principle perhaps the old principle of segregation justified in the language of a new reasonableness?

It is pertinent to note that while there is much anecdotal evidence regarding the actual effects of affirmative action, there has been very little systematic social research on the subject. Scholars have yet to survey the effects of affirmative action in a number of important areas: confidence among its alleged beneficiaries; demoralization of those whom it has not protected; the economic costs of enacting and implementing affirmative action regulations; and the effects of preferential treatment policies in other societies.[19]

The constitutional aspects of affirmative action are equally unsettled. After several years of studious avoidance of the issue, the Supreme Court recently handed down a series of decisions that up-

17. *Id.*
18. *Id.*
19. Beer, *Resolute Ignorance: Social Science and Affirmative Action*, 4 SOCIETY May-June 1987, at 63-69.

held affirmative action plans and remedies.[20] The Court's actions may be said to have confirmed the legality of affirmative action in a positivistic sense, but it is not so clear that these decisions have established the constitutional legitimacy of race-preference policies or fixed racial-group equality as the controlling meaning of the equal protection clause of the Constitution.

The Supreme Court has in fact said very little about the Constitution in its affirmative action decisions. In *United States v. Paradise*,[21] for example, Justice Brennan declared: "It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." Justice Brennan offered no constitutional opinion, however—no reasoning from text, original intent, history, or even moral philosophy—to explain how the equal protection clause of the fourteenth amendment permits race-conscious relief. He merely cited another affirmative action decision, *Local 28 of Sheet Metal Workers v. EEOC*,[22] to support his opinion. But *Sheet Metal Workers* contains nothing about the fourteenth amendment. To some extent the Court has recognized that the task of constitutional analysis of affirmative action has barely begun. In both *Sheet Metal Workers* and *Paradise* Justice Brennan admitted that although the Court has held that governmental racial classifications for remedial purposes require a level of judicial scrutiny more demanding than the rational basis test, there is no consensus on the appropriate constitutional analysis to be employed.[23]

Prompted by Justice Scalia's dissenting opinion in *Johnson v. Transportation Agency, Santa Clara County*[24] the Court alluded to the Constitution in relation to affirmative action. Justice Scalia stated that Title VII of the Civil Rights Act of 1964 was not intended to place a lesser restraint on discrimination by public officials than the

---

20. *See* Local 28 of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986); United States v. Paradise, 107 S. Ct. 1053 (1987); Johnson v. Transportation Agency, Santa Clara County, 107 S. Ct. 1442 (1987).

21. 107 S. Ct. 1053, 1064 (1987).

22. 106 S. Ct. 3019 (1986).

23. *See Paradise*, 107 S. Ct. at 1064 ("But although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach a consensus on the appropriate constitutional analysis."). In determining whether race-conscious remedies are appropriate, the Court looked to "the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." 107 S. Ct. at 1067.

24. 107 S. Ct. at 1064.

Constitution allows.[25] In other words, according to Justice Scalia, the protection of individuals against racial discrimination in Title VII expresses or implements the principle of individual equal rights embodied in the fourteenth amendment.[26] In the majority opinion Justice Brennan denied this proposition. Observing that Title VII is based on the commerce power, he reasoned that the equal opportunity provisions of the Civil Rights Act were not intended to incorporate the commands of the fourteenth amendment.[27] Furthermore, Justice Brennan added, the requirement that a public employer must also satisfy the Constitution does not mean that the Title VII statutory prohibition was not intended to extend as far as the Constitution.[28] Justice Brennan seemed to say that under the commerce power government officials carrying out affirmative action policy can treat individuals in ways that might be prohibited by the fourteenth amendment. In any event, the relationship between Title VII and the Constitution requires clarification.

Although the Supreme Court has asserted the constitutionality of remedial racial classifications, it has also struck down racial quota policies on constitutional grounds. In *Wygant v. Jackson Board of Education*[29] the Court held that layoffs of white employees in accordance with an affirmative action plan violated the equal protection clause. In *Regents of the University of California v. Bakke*[30] the Court struck down a medical school racial quota for admission as contrary to the fourteenth amendment. And in *Washington v. Davis*[31] the Court decided that the unlawful discrimination prohibited by the fourteenth amendment was intentional discrimination, rather than statistically derived institutional discrimination. The anti-quota decisions of the Supreme Court, however, are no more satisfactory or illuminating than the decisions favoring quotas in providing analysis of affirmative action in relation to the constitutional concept of equality.

The Supreme Court's failure to come to grips with affirmative action as a question of constitutional equality reflects the lack of le-

---

25. *See id.* at 1472 (Scalia, J., dissenting) ("[I]t would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids.").

26. *See id.* at 1469.

27. *See id.* at 1472.

28. *See id.* at 1450.

29. 106 S. Ct. 1842 (1986).

30. 438 U.S. 265 (1978).

31. 426 U.S. 229 (1976). The Court held that while it is true that the due process clause of the fifth amendment prohibits the United States from invidiously discriminating between individuals or groups, it does not follow that a law or official act is unconstitutional solely because it has a racially disproportionate impact. *Id.* at 239.

gitimacy of racial preference in American society. Despite years of government efforts aimed at gaining acceptance for compensatory discrimination, affirmative action lacks legitimacy because it rejects the concept of individual equality that most people believe is basic to the American political tradition. In addition, racially preferential policies fail to secure the approval of public opinion because they have been created almost exclusively by judges and bureaucrats circumventing the procedures of democratic policymaking. The illegitimacy of racial preference is not surprising when one considers the statements of its leading theoreticians, who have increasingly distanced themselves from the mainstream values of ordinary Americans. For example, Professor Derrick Bell writes: "Our task is no longer the comparatively straightforward one of securing for all regardless of race, color, and creed, those rights protected by the Constitution."[32] Rather, the task of the civil rights movement, declares Professor Bell, is to end class-based "economic exploitation."[33] In the view of another proponent of affirmative action, the goal of civil rights reformers is to eradicate racism by overcoming the predilection of Americans for incremental change through popular control, imposing substantial social and economic change by authoritative elites.[34] These and other arguments from the proponents of affirmative action come close to repudiating the substantive and procedural values of constitutional democracy.

For many years supporters of affirmative action defended it as a temporary expedient needed to eliminate unlawful racial discrimination and achieve individual equal rights. Increasingly, however, affirmative action is seen as embodying a new principle of social and political organization: racial-group proportionalism. Under this principle it is the under-representation of designated racial and ethnic groups that becomes unlawful discrimination. Equality becomes proportional racial representation, on the theory that in the absence of discrimination all racial groups will be represented in all aspects of society in proportion to their percentage of the population. Although this idea has gained recognition in affirmative action judicial opinions and administrative regulations, studies of perceptions of discrimination show that the experience of most citizens confutes it.[35]

---

32. Bell, *The Dilemma of the Responsible Law Reform Lawyer in the Post-Free-Enterprise Era*, 4 LAW AND INEQUALITY 231, 235 (1986).

33. *Id.* at 243.

34. *See* J. HOCHSCHILD, THE NEW AMERICAN DILEMMA (1984).

35. *See* Beer, *The Wages of Discrimination*, PUB. OPINION, July-Aug. 1987, at 17-19.

Equal opportunity for individuals without distinction of race, religion, gender, or national origin is one of the bedrock principles of our polity. It is, as Douglas Rae wrote in his study *Equalities*, "the most distinctive and compelling element in our national ideology."[36] Furthermore, because of its importance to the definition of American nationality, equality of opportunity is written into our fundamental law. It is what we mean when we refer to equality as a constitutional concept.

36. D. RAE, *supra* note 6, at 61.