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EQUALITY AS A CONSTITUTIONAL CONCEPT

INTRODUCTION BY WHITMAN H. RIDGWAY*

The notion of equality permeated the Revolutionary period, yet the unamended Constitution was mute on the subject. The Declaration of Independence confidently asserted, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[1] Yet America in the 1780s was a slaveholding nation, and people expected that their individual rights would be protected by state constitutions. Only after the Anti-Federalists complained of the potential threat to individual liberty posed by the new federal government was a Bill of Rights adopted by amendment in 1791.

The promise of the Declaration of Independence would be realized only after the destruction of slavery and the ratification of the thirteenth and fourteenth amendments. These important amendments gave the federal government the responsibility to protect the rights of individual citizens against state action. In the words of the fourteenth amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.[2]

Henceforth, the privileges and immunities, due process, and equal protection clauses would be the means through which equality as a constitutional concept would be secured.

The problems of racial equality were not solved during the Reconstruction era. The relegation of black Americans to a second-class citizenship was recognized when the Supreme Court accepted the notion of "separate but equal" in *Plessy v. Ferguson*.[3] The "separate but equal" fiction was rejected in 1954 when the Court decided

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1. The Declaration of Independence para. 2 (U.S. 1776).

2. U.S. CONST. amend. XIV, § 1.

3. 163 U.S. 537, 550-51 (1896) (statute requiring separate but equal railway accommodations for whites and blacks does not violate the equal protection clause of the fourteenth amendment).

to end segregated schools in *Brown v. Board of Education*.[4] During the Truman, Kennedy, and Johnson administrations the federal government called for the end of segregation. Laws were passed that attempted to ensure full legal, civil, and voting rights for blacks and other minority groups.[5] Serious problems, however, remain.

The question of gender equality has been an important topic since the end of World War II. Unmentioned in the Constitution, and seen as a dependent class during most of the nineteenth century, women have asserted their right to equality before the law with greater success in the twentieth century. Ratification of the nineteenth amendment gave women the vote in 1920, but absolute equality has been more elusive. Statutes and court decisions have struck down gender distinctions with some success.[6]

One controversial strategy to compensate for past racial and gender discrimination has been the adoption of affirmative action programs. These programs place women and members of racial minority groups into jobs and training programs previously unavailable to them ahead of other workers. During the spring of 1987 the Supreme Court decided in *Johnson v. Transportation Agency, Santa Clara County*,[7] that an affirmative action program designed to promote women and minorities was constitutional.

There is a contemporary debate between those who feel the Nation has gone too far by the adoption of affirmative action programs and those who argue that it has not gone far enough. The debate

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4. 347 U.S. 972 (1954) (separate but equal doctrine as applied to school segregation violates the equal protection clause). *See also* Schiro v. Bynum, 375 U.S. 395 (1964) (invalidating segregation in municipal auditoriums); Turner v. City of Memphis, 369 U.S. 350 (1962) (airport restaurants); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (parks).

5. *See, e.g.*, Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at scattered sections of 18, 25, and 42 U.S.C. (1982)); Civil Rights Act of 1964, Pub. L. No. 88-352, 74 Stat. 90 (codified at scattered sections of 28 and 42 U.S.C. (1982)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified at scattered sections of 18, 20, and 42 U.S.C. (1982)); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 5 U.S.C. § 5315 and scattered sections of 28 and 48 U.S.C. (1982)).

6. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (presumption that widows, but not widowers, were dependent on their spouses and qualified for death benefits violates equal protection clause); Craig v. Boren, 429 U.S. 190 (1976) (law prohibiting the sale of 3.2% beer to men under 18 and women under 21); Frontiero v. Richardson, 411 U.S. 677 (1973) (federal law permitting male members of the armed forces to claim their spouses as dependents, but not allowing female members to claim their spouses absent proof of dependency); Reed v. Reed, 404 U.S. 71 (1971) (state law giving men preference over women as administrators of estates).

7. 107 S. Ct. 1442 (1987).

hinges on what the proponents believe the Constitution allows. Those who assert that we have gone too far argue that under a neutral Constitution previous race and gender discrimination cannot be used to justify plans which benefit one group to the disadvantage of another on the basis of race or gender. As typified by the case of *Regents of the University of California v. Bakke*,[8] this school of thought maintains that members of the majority have equal rights that ought to be protected. Those who believe we have not gone far enough focus on implied rights derived from a broad reading of the Constitution and assert the need for society to correct past wrongs through remedial legislation.

The nomination of Judge Robert Bork to the United States Supreme Court underscored the immediacy of this debate at the time of Mr. Rowan's lecture. Judge Bork's reputation as a strict constructionist made him a favorite of those who believe we have gone too far, because they hoped that he would join a new majority that would reverse the Court's modern trend. Those who feel we have not gone far enough maintained that Judge Bork's published views as a scholar constituted a threat to recent Court decisions recognizing racial and gender equality. Indeed, they believed that Judge Bork's strict constructionist judicial philosophy would serve to reverse such decisions were he confirmed by the Senate.

Perhaps, the source of the controversy lies in the underlying concept of equality, which continues to elude definition. It is unclear whether equality protects individuals or groups. It is even unclear how far this protection should extend.

8. 438 U.S. 265, 320 (1977) (medical school's admissions program, which set aside 16 out of 100 positions for members of minority groups, violates the equal protection clause because whites with higher scores were denied admission).