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EQUALITY IN AMERICA: THE EXPANSION OF A CONCEPT*

JOHN P. ROCHE†

If we are going to understand the development of the concept of equality in the United States, we must first of all establish certain historical propositions, propositions which will provide the framework for the discussion to come later. At the risk of sounding unAmerican, I must insist that the most important fact in any analysis is the right theory—though theory alone can hardly carry the day. To paraphrase Justice Oliver Wendell Holmes, the status of equality in America cannot be solved by abstractions, nor without them.

Thus we must begin with what I have called "American exceptionalism," the remarkable fact that the conquest of liberty and equality in this country has been accomplished under unique historical circumstances. In every other free nation, the struggle for human liberation has been one of circumscribing the power of an irresponsible elite—a church, a monarch, an oligarchy, an aristocracy. In other words, freedom for the mass of the population has been attained by destroying the arbitrary jurisdiction of a small, self-anointed ruling class. In contrast, the problem in the United States has always been one of obtaining civil rights from the majority.

To put the matter differently, the society which emerged on this side of the Atlantic in the seventeenth and eighteenth centuries outran the authority mechanisms of Tudor-Stuart England. Despite certain rituals, the British provinces in North America were essentially "do-it-yourself" exercises in community building. And by the time the British—after the end of the Second Hundred Years War with France in 1763—got around to asserting their theoretical rights of sovereignty, these communities were deeply entrenched behind the barricades of local, responsible self-government.

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It was John Adams—that brilliant, perverse, and underrated social theorist—who noted all this and went on to point out that in terms of elite theory, *i.e.*, who shall rule in America?, the American Revolution was over before the fighting began.[1] And it proved impossible for the British to cope with the colonists because the Redcoats were confronted not by a few malcontents, but by a thoroughly integrated society resting on a foundation of responsible self-government. To win the Revolution a few battlefield victories would not suffice: His Majesty's forces had to crack and destroy a whole social system.

The Americans fought the British for the right to define their own rights, the right they claimed from habit and prescription to run their own communities in their own fashions. And the truth-finding mechanism was majority rule. The sovereignty of the community—operating through the majority—was plenary. Everyone, of course, believed in "natural" and "inalienable" rights, but the crucial consideration was that the community had the authority to define the content of these abstractions. The "Peace of the Commonwealth" was substituted for the "King's Peace," and the result was that tyranny of the majority so brilliantly limned by Alexis de Tocqueville fifty years later:

> When an individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority and serves as a passive tool in its hands. The public force consists of the majority under arms; the jury is the majority invested with the right of hearing judicial cases; and in certain states even the judges are elected by the majority. However iniquitous or absurd the measure of which you complain, you must submit to it as well as you can.[2]

The rights of man were thus accorded to the American as defined by his neighbors—a definitional process that could on occasion be a bit disconcerting. In 1794, for example, at the time of the discontent over the whiskey tax in Western Pennsylvania, Albert Gallatin told some of his inflamed neighbors to stop acting like a "mob." They ominously referred him to a recent resolution which

[1] 10 THE WORKS OF JOHN ADAMS 282-83 (Adams ed. 1856).
[2] 1 TOCQUEVILLE, DEMOCRACY IN AMERICA 271 (Vintage ed. 1954).

proclaimed "that if any one called the people a mob, he should be tarred and feathered."[3]

Or take the instance of Abner Kneeland, arrested and tried in Massachusetts in the 1830's for blasphemy on the basis of a tract denying the doctrine of the Virgin Birth. Kneeland asserted that the Massachusetts Bill of Rights guaranteed his religious freedom, but the Supreme Judicial Court held, in the words of Chief Justice Lemuel Shaw, that religious freedom was reserved for "honest" and "sincere" men—not for blasphemers who were, by definition, insincere and dishonest disrupters of the peace.[4]

With this in mind, let us turn to the specific context of equality, specifically to Jefferson's majestic statement in The Declaration of Independence that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."

A masterpiece of political warfare, The Declaration contained no qualifications, no reservations. Yet, if we are to consider it as more than pious propaganda for the American cause, we must immediately supply a number of unarticulated qualifications. Negroes, Catholics, and atheists (to say nothing of the female half of the population) could hardly view this as an act of emancipation. They were not accorded the status of equals in American society, and the men who voted for The Declaration did not rush home to remove their disabilities. A large proportion of the signees were, of course, slaveholders and apparently (and here Jefferson was an exception; at least he wrestled with his conscience on the slavery issue—but he won) saw nothing contradictory in affirming the equality of man one day and buying a slave the next. (This paradox was not unnoticed; the starkly logical Abigail Adams had written her husband on September 22, 1774: "It allways appeared a most iniquitious Scheme to me—fight ourselfs for what we are daily robbing and plundering from those who have as good a right to freedom as we have.")[5]

If one were to have the temerity to translate this portion of The

[3] BRACKENRIDGE, INCIDENTS OF THE INSURRECTION 136-37 (1795).

[4] Commonwealth v. Kneeland, 37 Mass. 206 (1838). See LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 43-58 (1957).

[5] 1 THE ADAMS PAPERS, ADAMS FAMILY CORRESPONDENCE, 1761-1776, at 162 (Butterfield ed. 1963).

Declaration into operational political theory, a different proposition would emerge—the proposition which, I submit, is basic to an understanding of the development of equality in America over the past three centuries. It would run roughly as follows—*all those who have been admitted to membership by the political community are equal.* In other words, men achieve equality as a function of membership in the body politic—and this membership is not an inherent right, but a privilege which the majority accords on its own terms.

The myth of the libertarian past dies hard, but if we are going to grasp historical reality, we must once and for all lay to rest the notion that our forefathers built a pluralistic society around the principles of liberty and equality.[6] What throws many analysts off is the fact that restrictions on liberty, and inequalities, were unquestionably the consequence of "democratic procedures"—*e.g.,* an overwhelmingly Protestant society unthinkingly limited the freedom of Catholics and atheists. Papists and atheists were not (in the spirit of the later Smith Act) spokesmen for "opinion," but were subversives, threats to public order. Which is not to say that the fathers did not believe in liberty and equality. They believed completely in these great ideals *properly defined.*

Indeed, this proposition was at the heart of 18th and 19th century Liberalism. Full membership in the political community, *i.e.,* liberty and equality, was reserved to those who had—in the eyes of the Establishment—earned the right to exercise it. And in the United States the Establishment was majoritarian. It was John Stuart Mill who gave this collectivist notion of tutelage its classic statement. In an oddly neglected section of his essay *On Liberty,* Mill —after asserting the individual's absolute sovereignty over "his own body and mind"—hastened to add:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. . . . For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great, that there is seldom any choice of

[6] For an elaboration of this proposition, see ROCHE, SHADOW AND SUBSTANCE (1964).

> means for overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end, perhaps otherwise unattainable. *Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement* and the means justified by actually effecting *that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.* Until then, there is nothing for them but implicit obedience. . . ."[7]

Mill was talking about India, which he ran with one hand while he wrote essays on "Liberty" with the other, but the basic theory applies equally well to the relationship within a society between those who "belong" and outsiders. Equality, like liberty, was a condition conferred by the community at its discretion, usually to "good" people who had earned their prerogatives.

The problem for discussion here is equality, but for obvious reasons I shall arbitrarily limit the analysis to the specific problem of the Negro. The question we are directing ourselves towards may be put as follows: What have been the historical stages that the Negro has passed through on his seemingly interminable journey towards full membership in the American community—*i.e.,* towards acceptance by the majority in the category of "equals"?

This approach, I submit, throws new light on the dilemmas of the anti-slavery movement in the pre-Civil War period. Any individual or group which urged emancipation had perforce to come to terms with the free Negro, that is, include in his theory an answer to the question: What becomes of the Negroes after they have been released from slavery? The radical answer was full integration, social and political equality. But this ran head-on into the deep-rooted racial prejudices of the American majority—North and South.

Here again is de Tocqueville with his characteristic instinct for the jugular:

> As soon as it is admitted that the whites and the emancipated blacks are placed upon the same territory in the situation of two foreign communities, it will readily be understood that there are but two chances for the future: the Negroes and the whites must either wholly part or wholly mingle. I have already expressed my conviction as to the latter event. I do not believe that the

[7] MILL, ON LIBERTY 13-14 (Library of Liberal Arts ed. 1956). (Emphasis added.)

> white and black races will ever live in any country upon an equal footing. But I believe the difficulty to be still greater in the United States than elsewhere. An isolated individual may surmount the prejudices of religion, of his country, or of his race; and if this individual is a king, he may effect surprising changes in society; but a whole people cannot rise, as it were, above itself. A despot who should subject the Americans and their former slaves to the same yoke might perhaps succeed in commingling their races; but as long as the American democracy remains at the head of affairs, no one will undertake so difficult a task; *and it may be foreseen that the freer the white population of the United States becomes, the more isolated will it remain.*[8]

To hazard a historical generalization, I believe that outside of the South there was a clear majority of the white population opposed in principle to slavery—but equally convinced of the "natural inferiority" of the Negro. (The statute books in Northern states were littered with discriminatory provisions aimed at controlling the emigration of free Negroes and at preventing social, political, and legal equality: the first adjudication of "separate but equal" was, after all, in Boston in 1850, and segregation was sustained.)[9]

Northerners, and Westerners, in other words, were not distressed by Negro inequality, per se, but were increasingly outraged by the savage social consequences of applied inequality: the slave system. Sincere and decent people (such as Abraham Lincoln) drew the moral line this side of chattel slavery, but on the other side of equality. Characteristically they attempted to formulate a solution which would simultaneously end slavery *and* terminate the Negro problem—and the one arrived at was "colonization," the establishment in Africa (on the model of Liberia and Sierra Leone), or the West Indies, or the American West (Texas was strongly favored for the location of the "Black Republic" at one time) of Negro communities. Thus slavery *and* the Negro would be banished from the white community in a fashion that should warm the heart of a contemporary Black Muslin. Except for a few dedicated Abolitionists who argued for full equality, it seems clear that as far as the overwhelming preponderance of American opinion was concerned, there was no alternative to slavery as an institutional pattern of dealing with the Negro *within* the white community.

To say this is not to downgrade slavery as a cause of the Civil

[8] TOCQUEVILLE, *op. cit. supra* note 2, at 388-89. (Emphasis added.)
[9] See Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849).

War; indeed, slavery was crucial. Not because Northerners and Westerners were committed to equality for the Negro, but because they were unwilling to allow the South to impose inequality on whites throughout the Union.[10] The necessary and logical consequences of the slave system were the suppression of civil rights, the Southern veto on all legislation which was seen as undermining the economic and political autonomy of the region, a pro-slavery foreign policy, civil wars in the territories—indeed, the "militant South" demanded that the whole thrust of national public policy be adjusted to the imperatives of the slave system. When the Southern states abandoned the Union in 1860-1861 because they had lost the presidential election, the evidence seemed conclusive: slavery required a rule or ruin approach to American national interest, and it was obvious that the nation would live in dire jeopardy until this cancer was removed.

Ironically the majority in the states which sustained the Union was thus dedicated to freeing the Negroes, but not to making them equals. And this dichotomy was ominous because it signified that a Union victory in the Rebellion would only end human slavery; the future status of the Negro was wrapped in ambiguity and ambivalence. Lincoln's soldiers died in fearful numbers to "make men free," but the survivors did not have the foggiest notion of what to do with the freedmen once their chains had been removed.

If we examine (admittedly with 20-20 hindsight) the options that existed in 1865, it is immediately clear that two alternatives existed. (Colonization was patently out of the question: there were over four million slaves in 1860 and the establishment of even small colonies had proved inordinately expensive.) On the one hand, the slaves could simply be freed and left to fend for themselves; on the other, the national government could undertake a massive program of compensatory assistance for the freedmen, take them under its protection, and bring them under its tutelage to full membership in the American community. The problem was, however, that while the Radical Republicans realized that the first alternative was disastrous, they lacked the conviction and the political base necessary to implement the second. Let us examine the situation as it developed in the Reconstruction period.

[10] For an extraordinarily perceptive analysis of the general role of slavery in American political thought, see ELKINS, SLAVERY (1959). I differ with Elkins on a number of points, but his synthesis is invaluable.

The Lincoln-Johnson program of Reconstruction contemplated freeing the slaves, establishing loyal state governments in the temporarily misled South, and then calling it a day. Anyone who appreciates Abraham Lincoln's sense of political reality may—admittedly on the basis of spectral evidence—question whether he would have followed this line to its logical conclusion. For one thing, the natural leaders of the Southern white community—though barred from politics for participation in the Rebellion—were hardly going to be eliminated from *influence*; and the marginal political credentials of Southern Unionists made them bad long-run political risks.[11] In short, the power structure of the Southern white community could never be cracked by marginal political figures, particularly those who had fought against the "Boys in Grey." (It is perhaps pure speculation, but I have always suspected that both Lincoln and Johnson—Southern poor whites in origin—held the illusion that if the planter magnates were excluded from the political process, the non-slaveholding whites would implement the principles of true democracy, *i.e.*, they assumed the existence of a "class division" and refused to believe that the magnates *were* in fact the natural elite.)

It rapidly became apparent to the Republican leaders in Congress that the Lincoln-Johnson program of Reconstruction was a total failure; nothing was really reconstructed. The Negro, now free, was still at the mercy of the police power and was put into what amounted to serfdom by the Black Codes and labor contract legislation. And the worst of it was that freeing the slaves *increased* Southern representation in the House of Representatives and the Electoral College. (In 1860, the slave states had seventeen members of Congress "representing" the three-fifths Compromise in the Constitution; with the freed Negroes counted per capita for representation purposes, they would pick up another dozen.)[12] Political self-interest, to say nothing of principle—or of the merger of the two that most of us silently manage—required guarantees for the future.

Thus began Congressional Reconstruction which, from the viewpoint of social theory, had as its objective the demolition of the white power structure in the South. I can hardly take the time

[11] There is no finer study of the political dynamics of Reconstruction than McKitrick, Andrew Johnson and Reconstruction (1960).

[12] *Id.* at 332.

here to discuss Reconstruction in detail, but the key point for our purposes is that while the Radicals knew precisely *what* they hoped to accomplish, they refused to accept the only theory which could provide consistency and justification to their actions, that of the full potential equality of the Negro. Some few did, but the great bulk of Republican Congressmen and Senators—and more important, their constituents—did not. The War had been fought to free the Negro, not to make an equal of him, and now that the fighting was over and slavery destroyed, the average Unionist wanted to go home and bask in the sunshine of peace. He was capable of getting quite angry at Southern efforts to reverse the verdict of Appomattox (see the congressional elections of 1866), but he was not willing to underwrite that sustained effort which alone could bring equality to the Negro.

Cracking a social system is not an exercise in rhetoric—it is a campaign which must be mounted with strong administrative instruments and backed by a full political commitment to change. Indeed, what has struck me as remarkable is the relative success of the much maligned Freedmen's Bureau. Sent out into hostile country with no conventional weapons for dealing with militant local majorities (only troops, the ultimate weapon in administration), and virtually no infrastructure to maintain day to day operations, the Bureau's many devoted agents were the unsung heroes of the one effort that could conceivably have broken the social pattern of the South.[13] One who today reads the statute[14] establishing the Bureau must marvel at the institutional genius of its authors: it was an extremely sound attempt at the most difficult accomplishment known to politics—elite building. And it failed not because of its conceptual weakness, but because it never obtained that massive commitment to its goals which made, for example, MacArthur's reconstruction of Japanese society possible.

To summarize, in the brief years of Radical Reconstruction there was an effort in such measures as the Civil Rights Act of 1866,[15] the Freedmen's Bureau Acts,[16] the fourteenth and fifteenth

[13] There is no broad study of the Freedmen's Bureau which approaches it from the viewpoint I am suggesting. BENTLY, HISTORY OF THE FREEDMEN'S BUREAU (1955) is thorough—and thoroughly unsympathetic to the basic objectives of the Bureau.

[14] Freedmen's Bureau Act, ch. 90, 13 Stat. 507 (1865).

[15] Ch. 31, 14 Stat. 27.

[16] Ch. 90, 13 Stat. 507, as amended, ch. 200, 14 Stat. 173 (1866).

amendments, to establish a national definition of equality, one which looked to the incorporation of the freed Negro into the political community. But these measures were supported by different men for different reasons and, I am convinced, reflected in the bulk of their supporters a limited conviction that racial equality should be enforced *in the South* for political reasons. To say this is not for one moment to slur the memory of that noble band of true egalitarians who spearheaded both the struggle against slavery and against the reassertion of Southern racism under other forms in the post-Civil War period; it is simply to suggest that their idealism did not reflect the views of the majority in the North and West, whose immediate interest in eliminating Southern power was otherwise motivated. (It should be recalled that the Southern bloc in Congress had long barred the passage of a Homestead Act, a true protective tariff, railroad land-grants, and a number of other measures near and dear to the hearts of the North and West.)

Every nation, it seems, had some national obsession; for the United States racism has been the plague which has undermined our strength and national purpose since the eighteenth century. We cannot tarry here to recount the collapse of the Republican effort to nationalize liberty and equality—the political side of this has been told with sensitivity and perception by C. Vann Woodward in his *Reunion and Reaction.*[17] We should, however, examine the process by which the fourteenth amendment and its companion civil rights act were converted into battle monuments. This evisceration began in the *Civil Rights Cases*[18] in which the Supreme Court delivered the *coup de grâce* to national efforts to protect the Negro from the "customary" disabilities imposed by "private" action. By giving an extremely narrow interpretation to the fourteenth amendment Justice Joseph P. Bradley (with the former slaveholder Justice John Marshall Harlan alone dissenting) ruled that only formal state action of a discriminatory character fell within the amendment's interdict. Consequently, "private" racial discrimination by railroads, theatres, hotels, and the like was held to be a matter within the sole jurisdiction of the states. Bradley suggested

[17] WOODWARD, REUNION AND REACTION (1951). Part of the remainder of this essay is adapted from Roche, *Civil Liberty in the Age of Enterprise,* 31 U. CHI. L. REV. 103 (1963). A number of points alluded to here are there developed in detail.

[18] 109 U.S. 3 (1883).

that to rule otherwise would make the Negroes favorites of the national government and would discriminate against white men, who presumably were in need of equal treatment.[19]

The Bradley opinion has to be understood as a period-piece. It was grossly unhistorical: The framers of the fourteenth amendment were attempting to provide constitutional certainty for the Civil Rights Act of 1866 which penalized racial discrimination by "custom" as well as by "law."[20] In an ironic sense, Bradley's opinion echoed President Johnson's veto of the Civil Rights Act, which was promptly overridden by two-thirds of both houses of Congress.[21] Fundamentally, Justice Bradley declared the fourteenth amendment, as originally conceived, to be unconstitutional.

Significantly, Bradley noted in private correspondence that he was very disturbed by the alleged "power of Congress to pass laws for enforcing social equality between the races."[22] In realistic terms "social equality" was hardly a real issue in the 1870's or 80's; the fact of the matter was that by 1883, the Negro had been left to his fate by Congress, the President, and the American (white) people. All Justice Bradley did was incorporate the realities of the day into the fourteenth amendment. Bradley shared the common view that the white man had been discriminated against by the civil rights laws with unfortunate results. He demanded fair play for the white population.

"Private acts" (though in fact they were enforced by the police power of the state) were thus eliminated from national jurisdiction. Even the action of a railroad, which Bradley had agreed was "affected with a public interest," being in effect a quasi-public corporation, was a "private" decision so far as racial discrimination was concerned. Thus a railroad became a schizophrenic entity: Some of its decisions were public (rates and schedules, for example) and some private (racial segregation). By these same paradoxical rules, a state law banning racial segregation on interstate carriers was unconstitutional as a burden on interstate commerce,[23] while a similar

[19] *Ibid.*

[20] Ch. 31, § 2, 14 Stat. 27.

[21] See Johnson's veto message of March 27, 1866, in 6 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 405 (1897).

[22] For an examination of Bradley's role in the undermining of the civil rights acts, see Roche, *supra* note 17, at 108-11.

[23] Hall v. De Cuir, 95 U.S. 485 (1877).

law requiring segregation was upheld as a legitimate police regulation.[24]

As it survived the *Civil Rights Cases,* the fourteenth amendment limited only state action depriving individuals of due process or equal protection of the laws. Occasionally the Court did find some state action, for example, a law barring Negroes from juries, to be unconstitutional;[25] but the characteristic pattern of racial discrimination was left undisturbed by the development of two subsidiary propositions. First, "state action" was generally defined in a very narrow legalistic fashion as action taken in pursuance of state law: The fact that no Negro had ever been called to jury duty was, for example, no proof as far as the Court was concerned that Negroes were being discriminated against, providing no law forbade their serving on juries.[26] Moreover, if an official act of discrimination was technically in violation of a state constitution or statute, it was not considered "state action" on the ground that a state cannot be held responsible for the illegal actions of its agents.[27]

The Court began in 1883 the process of redefining "equal protection" that culminated in constitutional sanction for "Jim Crow" laws in the 1896 decision of *Plessy v. Ferguson.*[28] Although seldom emphasized by commentators, the decision in *Pace v. Alabama*[29] was *in loco parentis* to the "separate but equal" rule of *Plessy.* At issue were two Alabama laws: the first punishing fornication or adultery between persons of the same race as a misdemeanor (100 dollar fine or six months in jail); the second making it a felony for persons of different races to intermarry or live in adultery or fornication with each other (two to seven years in jail). A Negro man and a white woman, who had been sentenced to two years in prison, appealed their sentences on the ground that the differential treatment prescribed by statute for interracial sexual relations was state action denying them equal protection of the laws. Note that the law penalized intermarriage on the same basis as illicit relations.

[24] Chiles v. Chesapeake & O. Ry., 218 U.S. 71 (1910).

[25] See Strauder v. West Virginia, 100 U.S. 303 (1880).

[26] Virginia v. Rives, 100 U.S. 313 (1880). But discrimination by a state judge, even in the absence of a statute, was held to be state action in *Ex parte* Virginia, 100 U.S. 339 (1880).

[27] See Justice Frankfurter's examination of this proposition in his dissent in Monroe v. Pape, 365 U.S. 167, 202 (1961).

[28] 163 U.S. 537 (1896).

[29] 106 U.S. 583 (1883).

Justice Stephen J. Field, for a unanimous Court, found no difficulty in sustaining the Alabama code. A man may have had a natural right to follow his calling, in Field's view, but he had no equivalent right to choose his wife free from state control. The laws under attack did not discriminate against Negroes, observed Field, any more than they did against whites:

> The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes a punishment for an offense which can only be committed when the two sexes are of different races. There is in neither section any discrimination against either race.[30]

After all, Field concluded, both the Negro and the white woman received the same punishment.

While Field's opinion was brief, its import for the future was enormous. In less than three pages, the Justice, his eight brethren concurring, effectively torpedoed the equal protection clause. Even Harlan could not dissent in this instance; miscegenation probably hit him at his weakest point: his fundamentally Southern social and religious convictions about the distinctiveness of the "races."[31] What *Pace v. Alabama* did was reestablish the *legal* category "Negro" —it now became legitimate for the states to differentiate formally between Negroes and whites as they did between men and women, or aliens and citizens. While the purpose of the equal protection clause had been to eliminate from American law the category "Negro"—its authors were infuriated by the "Black Codes"—the Court now told the states that "race" was a valid basis for differentiation among its citizens.

But in the case of the category "Negro" few limitations were discovered. Recall that in *Pace v. Alabama* the Court implicitly held that the state could, in the effort to maintain public morality, treat marriage between a white and a Negro as if it were adultery or fornication. In short, the "race" of one partner could convert a lawful relationship into a felony. Moreover, in defiance of the history of race relations in the South, "Negro" was treated as a homogeneous category: white supremacists apparently saw nothing illogical in defining as a Negro anyone with one Negro grandparent,

[30] *Id.* at 585.

[31] Westin, *John Marshall Harlan and the Constitutional Rights of Negroes*, 66 YALE L.J. 673 (1957).

or great-grandparent in some states, though when the odds got up to seven to one, some questions arise as to which is the "master race." Even when, as in Alabama, one Negro grandparent was decisive, the category was a bit eccentric; it was rather as if a state legislature had defined a basket of apples as a basket containing at least twenty-five per cent apples. This problem, however, never troubled either Southern politicians or the courts.

In terms of the social system, the Negro, even at the zenith of "Radical Reconstruction," never achieved equality. From the viewpoint of the Southern white community, the Civil Rights Acts were a marginal harassment; Union troops were a problem, but the last blue contingent went North in 1877. With the outlawing of "Black Codes," informal measures of social control, which were no less effective because informal, were utilized to the same end. Then, in the late '80's and early '90's, began the flood of "Jim Crow" legislation, laws based on the principle enunciated in *Pace v. Alabama* that Negroes were different from whites and that this distinction justified differential treatment. Curiously, as Professor C. Vann Woodward has noted (and Tocqueville predicted), "the barriers of racial discrimination mounted in direct ratio with the tide of political democracy among whites. In fact, an increase of Jim Crow laws upon the statute books of a state is almost an accurate index of the decline of the reactionary regimes of the Redeemers and triumph of white democratic movements."[32] The Redeemers had used the Negroes as pawns in their maintenance of political power; now the Negroes were to be punished for their cardinal sin —helplessness.

The classic "Jim Crow" law was an enactment requiring racial segregation in railroad and tram cars. In order to understand the importance of the Supreme Court's decision in *Plessy v. Ferguson,* which provided the constitutional foundation for racial discrimination until 1954,[33] let us review the principle involved. When a state required that railroads provide facilities for whites and Negroes on a separate basis, it was establishing a classification on the basis of "race." For this classification to be sustained in the face of the equal protection clause, it had to be demonstrated that separation based on "race" was a reasonable method of attaining a

[32] WOODWARD, ORIGINS OF THE NEW SOUTH 211 (1951).
[33] See Brown v. Board of Educ., 347 U.S. 483 (1954).

legitimate legislative goal: the maintenance of public health, morals, and welfare. Assuming for purposes of argument that some special "scientific" rationale could be introduced to justify laws against intermarriage, there would be no necessary carryover to transportation. One can require, for example, that men and women use different dressing rooms at the beach without insisting that they swim at different places. In short, the emotionally charged problem of sexual relations present in *Pace v. Alabama* was absent in *Plessy v. Ferguson.* If the Court sustained the statute, it would be hard to conceive of any social, economic, or political relationship in which segregation could not be legally required.

In 1890, Louisiana passed a "Jim Crow" transportation law. One Homer Adolph Plessy was arrested for attempting to enter the coach reserved for whites and refusing to leave when ordered to do so. There is an air of unreality about the whole episode: Plessy was one-eighth Negro and insisted that he was "white." Like his French contemporary Captain Dreyfus, who was something of an anti-Semite, Plessy was hardly a fighter for the rights of man. The Louisiana courts declared him a Negro and he challenged the constitutionality of the statute. Dividing seven to one, the Supreme Court upheld the Louisiana enactment.

Justice Henry B. Brown wrote the opinion of the Court. Early in his statement, he put the holding in a nutshell: "A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races . . . ."[34] After examining precedents and noting that the state legislatures must be permitted a large area of reasonable discretion in their police power enactments—a latitude, it might be recalled, the Court was reluctant to grant in the economic sphere—Brown came to the heart of his opinion. The whole difficulty, he averred, arose from Negro hypersensitivity:

> We consider the underlying fallacy of [Plessy's] argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[35]

As the clincher to this argument, Brown observed that if the Negroes controlled state legislatures and passed "precisely similar"

[34] 163 U.S. at 543.
[35] *Id.* at 551.

enactments, white men would not feel they had been assigned an inferior position.[36]

This brings us to Brown's sociology which needs to be set out at some length in his own words:

> The argument [against the segregation statute] also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of mutual affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.... *Legislation is powerless to eradicate racial instincts* or to abolish distinctions based upon physical difference.... If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.[37]

It was precisely in this period that racial theories reached their apogee in the United States; among biologists, sociologists, and social anthropologists as well as journalists and political commentators, the assumptions of Baron Gobineau and Houston Chamberlain—that races were discrete entities and that the white or "Caucasian" race was superior to the others—were taken for granted. The southern politician, of course, needed no lofty theoretical justification for white supremacy—he knew what he wanted and really did not care how the scientists, journalists, or Supreme Court Justices rationalized his attainment of racial segregation. But the better elements in the community needed a respectable intellectual base to justify discrimination, and the "social science" of the time supplied the requisite foundation.

Negroes, then, were biologically different from whites, essentially members of a different species, set apart by their "racial instincts." Thus, in the same fashion that an intelligent zoo keeper separates the lions and the elephants in different compounds, the Supreme Court endorsed the proposition that biologically distinct Negroes and whites need not be given identical treatment. What was good for Negroes was not necessarily good for whites, any

[36] *Ibid.*

[37] *Id.* at 551-52. (Emphasis added.). Brown thus held the statute to be a not unreasonable technique of foreclosing social conflict and maintaining the peace.

more than a lion would necessarily thrive on an elephant's diet. Fundamental to this view, though not explicit in Brown's opinion, was the further corollary that the whites were more advanced, more "civilized," than the Negroes, that they were several stages higher in the evolutionary scale.

Once the proposition that Negroes were in essence a distinct biological category had been established (by ipse dixit), the principle of proportional equality could come into play. Equality, according to Aristotle and a steady stream of theorists since, is treatment according to merits or deserts. (For Aristotle, however, a man's merits were a function of his potentialities, not of the color of his skin or the color of one great-grandparent's skin.) Now merit became a function of membership in a racial category, and the "Negro Race" had no claim to treatment in the laws of the United States identical with that accorded members of the "Caucasian Race." While the analogy is perhaps banal, recall that the zoo keeper does not "discriminate" against the elephant when he feeds him hay instead of the red meat beloved by lions. On this basis, Justice Brown could blandly and quite sincerely state that segregated treatment for Negroes was only a consequence of their distinctiveness and was in no way a "badge of inferiority." Only a psychotic elephant would complain because he got no steak.

Justice Harlan wrote what many consider his finest dissent in *Plessy v. Ferguson.* It is an interesting opinion because Harlan subscribed completely to the "Negro Race" theory, but refused to admit the relevance of this "social science" to American constitutional law. "The white race," said Harlan, "deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."[38] The Constitution, Harlan thundered, "is color-blind",[39] the former colonel of Kentucky volunteers in Lincoln's army effectively charged the Court with overruling the verdict of Appomattox. He asserted bluntly that "the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case.*"[40] "Every true man has pride of race,"

[38] *Id.* at 559.
[39] *Ibid.*
[40] *Ibid.*

observed the Justice, "but I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved."[41]

Equal protection of the laws was in this fashion glossed by the Supreme Court to eliminate juridical equality of Negroes; essentially a state fulfilled the requirements of the fourteenth amendment if it treated all whites equally, all Negroes equally, and granted "substantial equality" to Negroes vis-à-vis whites. The Court's holding unloosed a flood of "Jim Crow" lawmaking in all the Southern, and even some of the Northern, states, a flood which ended by submerging every aspect of day to day life under the protocol of segregation. As Woodward has shown, some ingenious legislator in one state would devise a new law, providing segregation coverage for some area theretofore overlooked, and it would rapidly spread from state to state in a wave of mimicry.[42] It seems to have become a species of nasty game—and one totally lacking a logical rationale. The same Negro woman who prepared a white family's meals and all but raised its children would be compelled to use the "Colored" drinking fountain, the "Colored" wash rooms and sit in the back of the trolley to keep the white population uncontaminated.

Indeed, a case can be made from the viewpoint of the Negro, the picture got worse rather than better as the United States moved into the twentieth century. For one thing, perhaps under the impact of the racial dogmas which were so popular, the number of white men who were concerned about the cause of Negro rights went into decline after the Civil War. As the old radicals—Charles Sumner, Wendell Phillips, George W. Julian, William Lloyd Garrison—died, there were few replacements. The *reductio ad absurdum* probably came in 1903 when the program of the Louisiana Socialist Party came out for "separation of the black and white races into separate communities, each race to have charge of its own affairs."[43]

A second cause of Negro discouragement was the spread of Southern white racial mores into the North and West, a phenomenon which accelerated with World War I and the concomitant exodus of Negroes from Southern farms to Northern factories, or to serv-

[41] *Id.* at 554.

[42] WOODWARD, THE STRANGE CAREER OF JIM CROW (rev. ed. 1957).

[43] Cited in KIPNIS, THE AMERICAN SOCIALIST MOVEMENT, 1897-1912, at 131 (1952).

ice jobs in factory towns. The early years of the new century were racked by a series of savage race riots; significantly they took place in cities on both sides of the Mason-Dixon Line, the two worst being in Atlanta (1906) and Springfield, Illinois (1908). According to John Hope Franklin, more than a hundred Negroes were lynched in the first year of the century, and "before the outbreak of World War I the number . . . had soared to more than 1100."[44]

These decisions offer a good insight into the operation of the American constitutional process. Two Supreme Court holdings—*Pace v. Alabama* and *Plessy v. Ferguson*—dealt squarely with the merits of state segregation laws. Yet the Court's rulings in these cases, particularly in the *Plessy* case, were by extrapolation used to validate the whole structure of "Jim Crow." The fundamental question—whether state-enforced segregation violates the equal protection clause—was not (with one area of exception) reexamined by the Supreme Court until the 1940's and 1950's. Thus, while lawyers are technically within their guild prerogative when they assert that a Supreme Court decision is only a determination of the case at bar, the Justices in one "limited" holding (enforced segregation in *transportation* does not violate the equal protection of the laws, *Plessy v. Ferguson*) in social and institutional terms gave their imprimatur to the whole structure of white supremacy. In other words, the *Plessy* opinion was a monumental piece of judicial legislation—the Supreme Court effectively amended the Constitution of the United States by rewriting the fourteenth amendment in terms of majority opinion.

I shall not attempt here to trace the story into the twentieth century (I have covered the matter in detail in my recent book, *The Quest for the Dream*).[45] Suffice it to say that it is quite clear to me that right up through World War II the Negro was excluded from the political community.

Indeed, we have lingered too long with the past—compulsive behavior in a historian, I suppose—and the time has come to show some respect for the constitutional injunction against cruel and unusual punishment. What I hope has emerged is the role of "American Exceptionalism" in the struggle for equality, that is, the fact that inequality for the Negro (and the Jew, the Irishman, the Asian,

[44] FRANKLIN, FROM SLAVERY TO FREEDOM 432 (1947).
[45] ROCHE, THE QUEST FOR THE DREAM (1963).

the Mexican) has been a consequence of the refusal on the part of the majority to accord equal status—which in turn has arisen from majority refusal to consider the Negro as a "man" among "men" at the same time that it affirmed vehemently that "all men are created equal."

The transformation of American attitudes towards equality has thus been an outgrowth of the tremendous war that has been waged in the United States over the past half century against our ancient curse of racism, a campaign that began in private hands but has now been turned over to public authority. This has not been a passive affair, one based solely on education (that wonderful slogan for avoiding activism) because as we all know stateways *can* change folkways (to use Sumner's old categories) and the power of the state, notably of the national government, has been decisive in bringing real equality to the United States. Morality can be legislated—segregationists are currently fighting to *preserve* their huge body of morals legislation on the racial question—but it can only be legislated successfully when it is backed by strong national commitment. Legislation, however, cannot make the Negro equal—he has lived too long under the burdens of discrimination. It can and should provide him with the instruments by which to achieve his proper participating place in the American community and in particular it should be premised on the theory that only by giving this generation of Negroes special compensatory treatment can the next generation stand on its own.

Let us make one historical proposition perfectly clear: as a community we have, since the days when veterans of the American Revolution were given preference in western lands, applied the principles of compensatory treatment to many categories in the population. As a veteran of World War II, I have been compensated in many fashions: the G.I. Bill subsidized my Ph.D., a civil service point bonus awaits my use, and my home is mortgaged under highly favorable conditions. However, as an author I find myself without the benefits of a cotton farmer: regrettably the government does not purchase and hold overstock of my books, nor pay me not to write more than one a year. The cotton farmer is given special preference because of the eccentricities of nature; the vagaries of book purchasers have yet to receive adequate historical standing.

Thus it is absurd to oppose special historical treatment for the

Negro on principled grounds unless one is simultaneously urging the abolition of, *inter alia,* the Veterans Administration, the agricultural subsidy program, the "impacted areas" educational subventions, and the tariff. We can hardly argue that the Negro should be the first group in American history which must "stand on its own two feet."

The American people, led by their President, the courts, their churches, and other private groups, have finally faced up to the fact that equality for the Negro is, in President Johnson's phrase, "a moral right." We have passed the Civil Rights Act of 1964,[46] the first meaningful civil rights act in our modern history, and this is only a beginning. As a political community we now have the obligation, the moral duty, to provide an existential as well as a formal content to equality: to display our remorse and our creativity by devising massive programs in the areas of housing, education, employment, and the like which will indicate to the Negro that we are not merely paying lip-service to a slogan. (I support this for all deprived Americans, but the Negroes are clearly a priority case.)

Let me conclude by noting the significance of what I have been discussing. Without realizing it, most of us have lived through a truly remarkable episode in the development of a democratic society. By and large, we Americans are a historyless people—history begins the day we start a job—and we need on occasion to look backwards and meditate on what we observe. What has happened in the course of the last quarter of a century in the area of equality is nothing less than spectacular: anti-Catholicism, anti-Semitism (once the common currency of our culture) have been driven to the paranoid littoral. And the Negro has been accepted as a *Man.*

No one living in the racial turmoil of 1964 can imagine for a minute that the war is over. Yet, as I look at American history, and the structure of politics in 1964, it appears that we have, on the crucial theoretical level, broken the back of racism. A lot of nasty mopping up remains to be done: the Negro has yet to receive his minimal rights in such citadels of racism as Alabama and Mississippi, and economic realities elsewhere, North and South, often make a mockery of his formal prerogatives. But, as the vote on the Civil Rights Act, the presidential election, and polls indicate, the *consensus is there,* and the muscle will be provided.

[46] Pub. L. 88-352, 78 Stat. 241.

In essence, we have had a "white Revolution" rather than a "Negro Revolution" (which would have been doomed in a society ninety per cent white), a radical transformation in the attitudes of the majority. And as a majority "Revolution" this trend has the inexorable crushing power of a glacier.

The American majority, in other words, has finally—in that violent, amorphous fashion which has always characterized our culture—determined to give full coverage to The Declaration of Independence. And while we must feel shame at the intolerable delay, we can also find some pride in knowing that those of us who have fought for racial equality all our lives did not misjudge the vitality of the democratic process nor the latent decency of the American people.