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Ruminations on the Quality of Equality†

Philip B. Kurland*

I

Equality is the subject of many learned works—ancient and modern—no two of which are in complete accord as to its meaning or form.1 The concept of equality, except in mathematics, would appear to have no more definition than the shape of an amoeba. And that definition must differ depending on the time at which it is viewed, the perspective from which it is viewed, the purpose for which it is viewed, and—perhaps most importantly—the idiosyncracies of the viewer. For, after all, equality is a concept that appeals to instinct rather than intellect.

Some may observe, and with certain validity, that I address the problem from a nineteenth-century focus. I am reminded of Professor Paul Freund’s comment on Mr. Justice Brandeis:

A critic as unperceptive as he was unfriendly once remarked that Charles Evans Hughes possessed one of the finest minds of the eighteenth century. A more plausible observer might maintain that Louis D. Brandeis had one of the finest minds of the nineteenth century. It is certain that most of the central features of the twentieth century were antipathetic to his view of man and man’s potentialities.

The twentieth century is an era of mass movements; of the separation of ownership from control; of impersonal and anonymous corporate acts obscuring responsibility and shielding individuals from the consequences of their failings. . . . The problem of recognizing human fault and frailty, virtue and talent, in the context of giant enterprise is to be found in twentieth-century industry, in governmental undertakings, and in national structures themselves. This problem was, I believe, central in Brandeis’ thinking. To him the rise of giantism and the

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† © 1979 by Philip B. Kurland. Based on an address presented at the Brigham Young University Forum Assembly, March 27, 1979.
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moral dilemmas it has posed—the curse of bigness, as he was not ashamed to describe it—was lamentable, corrupting man’s character, and by no means so inevitable or irredressible as is commonly assumed.²

Indeed, it is the curse of bigness that is central to my concerns, for it involves the necessary subversion of the individual, the subordination of individual rights and responsibilities to the group, the class, the caste, and the mass. Mass society, as our sociologists label it, with its gross commercial, industrial, labor, social, educational, and political institutions, all subjected to control by governments of massive bureaucracies, is the problem.

A sterile, destructive, all-encompassing equality—or what is called equality—is, to me, not the solution to the evils of the mass society but only its consequence. Such a mass society, with egalitarianism as its creed and dogma, places little worth on the individual, on liberty, on civility, on privacy, on culture, or on excellence—all the things that make life in society tolerable. The mass society represents a reversal of what Henry Maine once styled the movement toward individual freedom,³ for we now seem to be going backward, from contract to status.

There is, of course, no quarrel to be had with the worth of what Sir Isaiah Berlin spoke of as “the irreducible minimum of the ideal of equality”: “‘Every man to count for one and no one to count for more than one.’”⁴ But that speaks of the individual “one”; it doesn’t address the argument that every group or class is to count for “one” or “more than one.” And, as Berlin pointed out, “Like many familiar phrases of political philosophy,” the proposal to count every person as one, neither more nor less, “is vague, ambiguous, and has changed in connotation from one thinker and society to another.”⁵

II

The bicentennial of the first American Revolution was celebrated in 1976. It is not clear why, since so few of its goals are still cherished. As with Washington’s Farewell Address,⁶ the prin-

². Freund, Mr. Justice Brandeis, in Mr. Justice 177 (rev. ed. A. Dunham & P. Kurland 1964) (footnote omitted).
⁵. Id.
ciples of the Revolution are honored but their teachings are ig-
nored. The first American Revolution was a political revolution
asserting the right of American citizens to be their own sovereign.
It had an element of equality in its rhetoric. For, despite the then
well-entrenched and still unmitigated institution of slavery, Jef-
ferson's Declaration of Independence announced—with the usual
ambiguity of such sonorous phrases—that “all men are created
equal.”

The second American revolution—the industrialization and
consequent urbanization of the nation—clearly incompatible
with Jefferson’s reliance on an agrarian society as the essential
element of both liberty and equality, may never be celebrated. It
has no fixed date of origin, nor can it be said when it ended. But
it has ended. This was an economic revolution—materialistic
rather than idealistic—that made Americans among the best fed,
best clothed, best housed, and best educated people of the world.
(I speak here in quantitative terms, not about haute cuisine, or
high style, or architecture, or culture.) Surely that preeminence
is fast fading, if it is not already gone.

There was an element of equality in this revolution, too,
although it might sound strange to contemporary ears. It, too,
demanded that equals were to be treated as equals, but also that
unequals were to be treated differently. Thus, each person was
entitled to take from society in goods and services the equivalent
of that which he put in: right was measured by contribution. And
the measure of contribution was to be found in the prices fixed
for goods and services by the market place. Those who did not
contribute were certainly not entitled to equal shares. Indeed,
they were not entitled to any share at all, except by way of gift,
patronage, or charity. Whether delineated as Protestant ethic or
social Darwinism, the second revolution rested on the notion that
property and its appurtenances were the measure of equality. Mr.
Justice Holmes to the contrary notwithstanding,8 Herbert Spen-
cer’s Social Statics was indeed incorporated in the fourteenth
amendment.

This notion of fair shares was, of course, contradictory to the
idealized seventeenth-century notion of commonwealth and even
more to the twentieth-century welfare state, in which an ever
increasing number of goods and services are dispensed not by

7. See J. Sparrow, Too Much of a Good Thing 1-23 (1977); G. Wills, Inventing
America (1978).
those who produced them but by the government which asserts control over them. This is the third American revolution—the egalitarian revolution—essentially social but encompassing the political and economic as well. The emphasis of the egalitarian revolution is on societal equality among groups or classes rather than among individuals. And it is equality of condition rather than equality of opportunity that is its goal. All classes are to be made equal to all other classes. But, as in Animal Farm, if “all animals are equal,” still, “some animals are more equal than others,” and perhaps those animals that once were less equal than others are now to be more equal than others. It has been said on higher authority that “the last shall be first”—but not until the millennium.

III

Let me emphasize that my perspective on this question of equality is a narrow one. I am not a philosopher who might explain the egalitarian revolution in a magnum opus in the name of “Justice.” Nor am I a political theorist who would justify it in the name of “Truth.” I do not pretend to know the real meaning of Justice and Truth, for these, too, are essentially instinctive or inspired, rather than rational, concepts. Still less am I an economist who knows that the market rather than the government, or vice versa, should have primary claim to control the mechanism for determining distribution of all goods and services. And least of all am I a sociologist or political scientist, who knows how a society should properly be constructed. I am a narrow-gauge lawyer who has witnessed the current revolution “through a glass, darkly,” i.e., through the prisms afforded by the courts, legislatures, and bureaucracies—by the courts in judgments directed to particular cases or controversies, by the legislatures in statutes addressed to particular problems, and by the bureaucracies in the execution of their own wills in the guise of executing the wills of others.

I am not proclaiming my modesty in denying my access to the insights of my fellow academicians. For I do claim realism in the place of the philosopher’s idealism. And I claim humanism rather than the economist’s bloodless and soulless “dismal sci-

11. 1 Corinthians 13:12.
I can afford only judgment in the place of the sociologist's statistics, with a recognition that my judgment may be no better than his statistics. And my observations are, in the current academic jargon, microcosmic where the political theorist's wisdom is macrocosmic. But you must not take my observations of the "brave, new world"¹³ that is dawning to suggest that all lawyers are equally limited. Many, if not most, lawyers, certainly those in academia, in government, and on the federal benches, make claims to greater insights about the social condition than even the greatest of philosophers, economists, sociologists, and political theorists. Lawyers are, indeed, in the forefront of what was once called social engineering: the manipulation of individuals for their own benefit—individuals who are presumptively incapable of judging what is best for themselves—but more importantly, the manipulation of individuals for the benefit of a society that might otherwise fall afoul of the democratic principle of majority rule. In fact, of course, lawyers are, despite themselves, among the manipulated rather than among the manipulators in this "passing strange" and "wondrous pitifull" exercise.

I would note, however, that many academic theories supporting the imposition of equality of condition on the members of present-day American society hypothesize the equality of individuals in man's natural state, and that any existing change from the assumed equality of primitive man must be justified as benefiting the least among us. I shall not here contend with that form of argument, except to note that there are at least two major difficulties with its premise. First, we are not in a primitive state and to analogize to it ignores that we have become more or less civilized over the millennia since men first formed a society. As contemporary events readily demonstrate, civilization may be a very thin veneer. But to break through it to barbarism as an excuse for remodeling the contemporary human condition invites the dangers already too familiar to us. Moreover, as Thomas Hobbes, whose concepts of natural law underlie at least some contemporary concepts of egalitarianism, said:

[T]he Lawes of Nature (as Justice, Equity, Modesty, Mercy, and (in summe) doing to others, as wee would be done to,) of themselves, without the terour of some Power, to cause them

to be observed, are contrary to our naturall Passions, that carry
us to Partiality, Pride, Revenge, and the like.\footnote{15}

Second, there is no reason to believe that in any primitive society
all men were equal. As T.H. Huxley once remarked: "[T]he
doctrine that all men are, in any sense, or have been, at any time,
free and equal, is an utterly baseless fiction."\footnote{16} The future, of
course, may be different. Recent scientific discoveries about the
manipulation of human chromosomes, test-tube babies, and
cloning, for example, may make possible the equality-in-fact,
nay, the identity-in-fact, of all persons, which neither law nor
philosophy can produce.\footnote{17}

The other major premise on which some egalitarians base
their arguments is the idea that their theories are justified by a
higher law, that their instincts assure them of the justice of egali-
tarianism. As for this higher law, I would respond only in the
words of still another egalitarian, Jeremy Bentham,\footnote{18} who wrote:

The various systems that have been formed concerning the
standard of right and wrong, may all be reduced to the principle
of sympathy and antipathy. One account may serve for all of
them. They consist all of them in so many contrivances for
avoiding the obligation of appealing to any external standard,
and for prevailing upon the reader to accept of the author's

\footnote{16}{T.H. Huxley, \textit{On The Natural Inequality of Man}, in \textit{Method and Results} 313 (1911).}
\footnote{17}{Another Huxley, Aldous, envisioned a society in which biological identity-in-fact
was achieved:

In Aldous's counter Utopia, then, human beings are deliberately bred inferior
as well as superior; Gammas and Identical Epsilon Semi-Morons as well as
Alpha-Pluses. The principle of mass production, as one of the World Managers
explains, is at last applied to biology. The theme, the well-known theme of
\textit{Brave New World}, is the effect of science applied to human beings by their rulers
at some approaching future point. (The theme was not the progress of science
as such; Aldous's intention was not scientific prophecy, no foretelling of any
probable specific technological development, such as if and when we might split
the atom—bottled babies were just a serviceable extravagance—it was psychol-
ogical prophecy.) The theme was that you could dominate people by social,
educational and pharmaceutical arrangements:

iron them into a kind of uniformity, if you were able to manipulate
their genetic background . . . if you had a government sufficiently
unscrupulous you could do these things without any doubt . . . .

And this, Aldous said in the London interview in 1961, "This was the whole idea
of \textit{Brave New World}.

\footnote{18}{See H. Maine, \textit{Lectures on the Early History of Institutions} 398-400 (7th ed.
1914).}
sentiment or opinion as a reason for itself. The phrases [are] different, but the principle the same."

Predictions—even about less pervasive egalitarianism—are likely to be faulty and so I pretend to none. But two decades ago, one of our deepest thinkers intimated that the culmination of the second American revolution would distort what she saw as the egalitarianism of labor. Problems of equality of access disappear when there is no shortage of the good desired to be had by all. It is only when scarcity compels priorities of access that equality of condition becomes a problem. In 1958 Hannah Arendt postulated that "the advent of automation . . . in a few decades probably will empty the [fields and] factories and liberate mankind from its oldest and most natural burden, the burden of laboring and the bondage to necessity." Fortunately, or unfortunately, the intervening years have not in fact eliminated the need for human labor as a condition for the production of human goods. And so the question remains whether access to scarce goods should be allocated, at least in some measure, to the creators of those goods. But as Arendt pointed out, even the millennium, when all shall reap although none need sow, would provide an egalitarianism of no small problems. She wrote:

The modern age has carried with it a theoretical glorification of labor and has resulted in a factual transformation of the whole of society into a laboring society. The fulfilment of the wish, therefore, like the fulfilment of wishes in fairy tales, comes at a moment when it can only be self-defeating. It is a society of laborers which is about to be liberated from the fetters of labor, and this society does no longer know of those other higher and more meaningful activities for the sake of which this freedom would deserve to be won. Within this society, which is egalitarian because this is labor's way of making men live together, there is no class left, no aristocracy of either a political or spiritual nature from which a restoration of the other capacities of man could start anew. Even presidents, kings, and prime ministers think of their offices in terms of a job necessary for the life of society, and among the intellectuals, only solitary individuals are left who consider what they are doing in terms of work and not in terms of making a living. What we are confronted with is the prospect of a society of laborers without labor, that is, with-

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out the only activity left to them. Surely, nothing could be worse. 21

Cassandra was a false prophetess not only as to the facts but as to their consequences. Had Arendt’s laborless society come into existence, she wished that it would be the life of the mind that would replace the life of labor. But she was an intellectual, unprepared to acknowledge that a society might wish mindlessly to invest itself totally in that which it already invests its spare time: viewing and participating in games and entertainment. All that I would say here is that a pervasive egalitarianism, when achieved, will probably have some strange and unwanted consequences, and not the least for the intellectuals who would sponsor it. For the egalitarian movement—along with the presently prevalent political populism—is a continuance of that anti-intellectualism which has very deep roots in American society. 22

IV

Finally, let me turn to the subject about which I pretend to have some knowledge, or with which at least I have had some experience. For we are repeatedly told by the courts that the current egalitarianism which they are helping to impose derives from the American Constitution. That, I think, is arrant nonsense. It is not being taken from the Constitution, it is being put into it. I do not mean that equality is not an important strand in the constitutional fabric. I would deny, however, that it is, as our Supreme Court and its apologists would have it, the sole or even the primary constitutional value. It is only one value among many in our basic document, and never before has it emerged as the dominant one.

The notion of equality can be seen in many places in the constitutional text, although the word “equal” is used in the document only as an adjective in the fourteenth amendment’s equal protection clause. Certainly it must be acknowledged that the Constitution which emerged from the Convention of 1787 was given in part to a reduction of privileges and disabilities that had attached to various classes under the English constitution. Thus, for example, the Constitution forbade the creation of titles of nobility. 23 Citizens were, even beyond the borders of their own

21. Id. at 4-5.
23. U.S. Const. art. I, § 9, cl. 8: “No Title of Nobility shall be granted by the United
state, entitled equally to privileges and immunities of the law.\textsuperscript{24} Religious qualifications for national office were forbidden.\textsuperscript{25} But equality was not considered a governmentally imposed condition. As Charles Pinckney said at the great Convention:

The people of the US are perhaps the most singular of any we are acquainted with.— among them there are fewer distinctions of fortune & less of rank; than among the inhabitants of any other nation.— every freeman has a right to the same protection & security and a very moderate share of property entitles them to the possession of all the honors & privileges the public can bestow.— hence arises a greater equality, than is to be found among the people of any other country, and an equality which is more likely to continue. . . . Every member of the society almost, will enjoy an equal power of arriving at the supreme offices & consequently of directing the strength & sentiments of the community.— none will be excluded by birth, & few by fortune from a power of voting for proper persons to fill the offices of government—the whole community will enjoy in the fullest sense that kind of political Liberty which consists in the power which the members of the state reserve to themselves of arriving at the public offices, or at least of the having votes in the nomination of those who fill them — ——\textsuperscript{26}

Pinckney was obviously referring to equality of opportunity, not equality of condition, to be achieved through the guarantees of liberty. But the functions of government in that day were considerably different from what they have become since the arrival of the welfare state in the 1930's. The role of government then was largely to provide for the common defense against the rest of the world and for domestic tranquility within. Of course, that domestic tranquility, like Jefferson's "pursuit of happiness," was seen against the Lockean background of the sacredness of private property. "Life, liberty, and property"—or even the pursuit of happiness—denoted a different constitutional conception than did "liberty, equality, and fraternity," which was the banner of a revolution very different from the American. The French Revolution was an uprising by the deprived against the affluent. The

\begin{footnotes}
\footnote{States . . . .} Cf. U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility.").

\footnote{24. U.S. Const. art. IV, § 2, cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."}

\footnote{25. U.S. Const. art. VI, cl. 3: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."}

\footnote{26. 4 J. Farrand, Records of the Federal Convention 1787, at 31-32 (rev. ed. 1937).}
\end{footnotes}
disparity between the rich and the poor there was unmediated by a middle class; there was no social mobility except through the sword. Equality in the French Revolution, as in the Russian Revolution, was to require the subordination, if not the elimination, of the upper class and the consequent raising of the lower class. The American Revolution, on the other hand, was a political one. There were not many poor in the colonies; there were equally few inordinately wealthy. Essentially, as Pinckney described it, we were already a one-class society.

V

It will be remembered, however, that Pinckney spoke only of “Freemen” having the right to “protection & security.” Slaves were not included and slavery was acknowledged by the Constitution as an institution protected by the law.27 Slaves were property and their owners were protected in their property rights by the national government no less than the states. In this regard England was ahead of us. It was in 1772 that Lord Mansfield, in Somerset’s Case,28 ruled that every man who came into England was entitled to the protection of the English law, whatever oppression he may previously have suffered, and whatever the color of his skin. It was this conception of equal protection of the law—the same protection afforded to everyone—that found its way into the fourteenth amendment after the thirteenth amendment destroyed the institution of slavery.

The fourteenth amendment by itself was no command for a universal equality, not even equality of rights, no less equality of condition. Equality before the law—the fourteenth amendment’s proposition—had, for example, to be supplemented by additional constitutional provisions even before equality of suffrage could be effected.29 The consequent suffrage amendments spoke in terms of barring discrimination based on factors irrelevant to the exercise of the franchise. The fifteenth amendment banned disqualification “on account of race, color, or previous condition of servitude.” The nineteenth amendment forbade disqualification “on account of sex.” Neither race nor gender was a rational basis for distinguishing among those “citizens,” not persons, who could exercise the electoral franchise.

The fourteenth amendment also came to be read to invali-

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27. U.S. Const. art. IV, § 2, cl. 3 (fugitive slave provision).
date governmental action based on grounds irrelevant to the legitimate governmental goals to be accomplished. Reason became the test for legitimacy of government action both under the equal protection and due process clauses of the fourteenth amendment. Race, religion, and gender were usually and necessarily irrelevant grounds for most governmental classifications. Nothing in the color of a person's skin could rationally justify separate treatment; few things about a person's religion could justify discriminatory treatment for better or worse by the government; and the biological differences between the genders can only rarely be rationally relevant to separate treatment by the government. The recognition was slow in coming that the fourteenth amendment allowed government to distinguish among persons only on the basis of factors relevant to the objective to be achieved. What was early recognized was that the rights against discrimination that were conferred by the Constitution were rights of individuals, and not of the groups or classes to which they belonged or were assigned.

The principal "American Dilemma," as Gunnar Myrdal appropriately labeled it, was the problem of discrimination against blacks because they were black; the new egalitarianism developed out of attempts to solve the dilemma. Much earlier in our history, two esteemed savants, Jefferson and Tocqueville, told us that the race problem was insoluble. And between the Reconstruction era and the middle of the twentieth century, little had been done by any branch of government to try to solve it. Segregation of the races—separate but unequal treatment—was the rule, rarely by choice of both races, sometimes by choice of one, and sometimes, even, through the force of law.

The evil to be abated might itself, however, be subsumed under a notion of equality: that all blacks equalled all other blacks and all whites equalled all other whites but no black equalled a white and no white equalled a black. It was a conception subversive of reason that the only significant factor in the measurement of a person could be the color of his skin. The result was a disqualification of those with black skins, regardless of their individual capacities, from access to education, to employment, to decent housing, to all those things necessary to upward mobil-

ity in an open society. (It would be nice to say that this primitivism has disappeared. But it may well be, as I shall suggest later, that it has simply been revised under the banner of the new egalitarianism.)

From the beginning the Supreme Court had done little to mitigate this classification by race or color. Unlike their English counterparts, the American Court failed to produce an early Somerset decision. Indeed, it was the Supreme Court in Dred Scott v. Sanford, in an opinion by Chief Justice Taney, that stamped the mark of Ishmael on the black race and helped to bring on the Civil War. Blacks could not, said the Court, be citizens or members of the American society whose rights were guaranteed by the Constitution because they were of an inferior race. The fourteenth amendment sought to right the wrong of the Dred Scott decision. “All persons,” it said (clearly including blacks because “person” was the word used in the “fugitive slave clause”), “born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” Moreover, all persons, citizens or not, are protected by their entitlement to due process of law and the equal protection of the laws. And, as citizens, they are entitled to the privileges and immunities that attach to citizenship, although it has never been made clear what those privileges and immunities might be.

There was, or should have been, little question that race was disqualified as a factor on which government could rely when imposing burdens or allotting benefits among its people. Due process of law and equal protection of the laws were both meant to preclude such discrimination against blacks based on their race. But the second American revolution, through the Supreme Court, captured the fourteenth amendment soon after its inception. The origins of the amendment, to protect the emancipated slaves, were ignored by the Supreme Court in favor of creating a charter for laissez faire business competition. “Substantive due process,” today a label of opprobrium, then was the approved standard, beginning with The Slaughter-House Cases and ending only with the reformation of the Court of the “nine old men.”

33. 60 U.S. (19 How.) 393 (1857).
34. U.S. CONST. art. IV, § 2, cl. 3.
36. 83 U.S. (16 Wall.) 36 (1873).
QUALITY OF EQUALITY

(We have since the Warren Court had a similar doctrine of judicial hegemony under the rubric of “substantive equal protection.”37 But that is a different aspect of my story and will not be elaborated here.)

Meanwhile, the Court returned to the notion that, because of their color, blacks were different from whites, and so long as the class designated black was allegedly treated equally with the class designated white, there was no violation of the equal protection clause. The “separate but equal” notion of Plessy v. Ferguson38 remained dominant—never mind the fact that separate was never equal—until Brown v. Board of Education39 in 1954.

VI

In Brown the Court took its first step by way of judicial contribution to the new egalitarian revolution of the second half of the twentieth century. It did not there, however, directly confront the question whether governmental racial classification could ever be sanctioned as rational. Instead, in Brown, the Court simply held that education was a peculiarly important governmental function, so important that government could not pretermit the joinder of races in the schoolroom. In education, it said, separate could not be equal—for reasons that were not very clear. In a companion case, involving the schools of the District of Columbia, subject to the fifth amendment’s interdictions on national government rather than the fourteenth amendment’s limitations on state governments, the Court did point out the irrelevancy and, therefore, unconstitutionality of the racial classification.40 Subsequently, in a series of unexplained summary orders, the Court made it clear that if “separate but equal” was invalid for purposes of education, it was equally invalid for transportation and other public facilities.41

Had the Court stopped here to enforce its ruling, or if the states had proved obedient to judicial mandate, a simple and rational principle of equality would have evolved: No individual

38. 163 U.S. 537 (1896).
should be treated by a state differently from any other individual because of the difference in skin color, since skin color carries with it no other attribute on which a rational difference in treatment could be justified. But the Court equivocated. It did not order its constitutional reading to be immediately controlling whenever a black student asserted his right to be treated without regard to his color, but only that desegregation take place "with all deliberate speed." The result was that the states found recalcitrance profitable to their prejudices and they indulged them.

By the time the states decided to reject school assignment on the basis of race, it proved too late for equality to satisfy the Supreme Court. That august tribunal came to insist not on a standard that ignored race, but on a standard based on race calling for an appropriate racial mix, i.e., an approximation in each school of the racial proportions in the entire school system. Thus, race, which was thought to have been abolished as a legitimate ground for governmental classification by Brown, was reintroduced as a compulsory factor by the later school cases. Freedom for blacks to choose their own schools was paternalistically rejected on the expectation that blacks really had no free will in this matter.

VII

From that point forward we have been transposing the meaning of illegal discrimination. No longer is irrationality the determinant of illegal discrimination. Almost any differential treatment, however justified in fact, is invalid, unless it concerns purely economic regulation, in which case any discrimination, rational or not, is valid. We entered the egalitarian revolution with a commitment to elimination of governmental bigotry and prejudice, based on the ground that the color of a man's skin, or hair, or eyes necessarily had no bearing on securing or denying the individual rights that the Constitution afforded him. We are emerging from the egalitarian revolution with a commitment to a quota society, in which a person's gender, or the color of his skin, or his national origin, or even the sound of his name be-

44. The New York Times for March 17, 1979, carried a story under the headline Job Hunter's Ploy: 'Bob,' No; 'Roberto,' Si from which the following is excerpted:
   ROCKVILLE, Md., March 16—Roberto Eduardo Leon . . . [has a] new role as a member of an ethnic minority.
comes determinative of his rights. We entered the egalitarian revolution with the principle that individuals were to be treated equally with other individuals, with differences in treatment required to be justified on relevant distinctions that did not include race, gender, national origin, or religion. We are emerging from it with a demand for equality among classes, not individuals, classes defined by race, gender, national origin, or religion. The egalitarian revolution has moved from equality to status.

As the late Professor Alexander M. Bickel wrote:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation.

For until 24 days ago Roberto Eduardo Leon had for 56 years been Robert Edward Lee . . .

But Mr. Leon . . . has pecked out a niche of his own, of sorts, . . . by apparently becoming the first American to take a Hispanic name by legal means and thus seek to qualify for preferential treatment under Federal law.

"My job with the county environmental protection agency is spotting loopholes and I spotted one," Mr. Leon said candidly.

What he had done was discern that members of minority groups are given preferential treatment in promotion in the Montgomery County bureaucracy. So with the stroke of a local judge's pen [Mr.] Lee became Senor Leon.

Mr. Leon said he believes that his formal reclassification by the county as being a member of a minority group now gives him a leg up on promotion into three vacant county jobs at the supervisory level . . . . Mr. Leon contends that if he and the other white, male Anglo-Saxon engineers who also are applying for the positions are all considered by review boards to be equal in competence, under county law he would have to receive the position because of his new ethnic identification.

A spokesman for the Equal Employment Opportunity Commission . . . said the Federal group was seeking to have state and county organizations concerned with minority rights use a person's origin rather than his surname as an indication of his status.

New York Times, Mar. 17, 1979, at 8, col. 4 (city ed.).

The fact of the matter is, of course, that the Spanish surname is neither more nor less a qualification for the position in question than Mexican or Puerto Rican origins.
not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.\(^4\)

The new rule is not a rule of equality. It is a rule that minorities may not be treated less favorably, but they can—and must under some of our laws—be treated more favorably than those not labeled as minorities. And a minority is not to be determined by the size of the group, but rather by the states of mind of those labeled as minorities and nonminorities. Thus, our sociologist friends, from whom the law has borrowed its definition, told us:

Contemporary sociologists generally define a minority as a group of people—differentiated from others in the same society by race, nationality, religion, or language—who both think of themselves as a differentiated group and are thought of by the others as a differentiated group with negative connotations. Further, they are relatively lacking in power and hence are subjected to certain exclusions, discriminations, and other differential treatment. The important elements in this definition are a set of attitudes—those of group identification from within the group and those of prejudices from without—and a set of behaviors—those of self-segregation from within the group and those of discrimination and exclusion from without.\(^5\)

While this standard has been applied by the courts to females, although they are neither a numerical minority nor politically powerless, it has not been equally applied to religious minorities or ethnic groups who are both numerically small and consequently politically powerless. In short, so far, there are only a small number of minorities thus classified that have been afforded preferential treatment under the rubric of nondiscrimination.

The word "discriminate" once meant to distinguish among individuals or things on the basis of real, however subtle, differences among them. A person of discrimination was highly regarded because of his ability to distinguish the meritorious from the meretricious. Discrimination is no longer a word used to suggest taste and refinement; it is rather a word associated almost exclusively with real or imagined bigotry and boorishness. He who is charged with discrimination is accused of indulging prejudices that make him, in the vernacular, a "racist" or a "sexist."

Whatever those words may mean, they are pejorative. A person making distinctions based on race or gender in order to benefit a protected minority, however, is not a racist or a sexist but only a true believer that the differences between males and females, and among blacks, whites, browns, and yellows, are real, never mind how irrelevant the racial or gender factor may be to the end to be achieved. Thus, the notion of the President of the United States that the qualifications of a nominee for appointment to a United States court are to be found in the color of his skin or her gender is neither racist nor sexist. On the other hand, a standard of substantive qualifications to fill such important roles would be both, if it did not afford the proper quota of minorities and women. The unfortunate consequence is that many individuals within the protected classes who well merit the appointments will be demeaningly labeled and treated as “quota” judges.

In 1970 Daniel J. Boorstin, now the Librarian of Congress, wrote a satire about a hypothetical professorial thesis for the structuring of society according to the doctrine of “Ethnic Proportionalism,” the principal tool or measure of which was to be the “Ethnic Quotient.” The book was entitled *The Sociology of the Absurd*, with the word “absurd” turned on its head. Today, the book does not read as satire but as descriptive of present conditions. The preposterous has become the legal standard of behavior. Account must now be taken by courts, by legislatures, by executive agencies, by schools and universities, by employers, indeed, by almost anyone who receives money from, or pays money to, the national government, of what Boorstin called the “New Social Science to promote [the] New Democracy.”

As Harold Rosenberg once told us:

Bureaucracy is the social realization of the arithmetical point of view, that is, the point of view of the mass that is ruled. The sage of bureaucracy is the statistician. But counting depends on the existence of the single unit. Hence bureaucracy must have one Person as its measure. Should there be more than one, each would insist on his absolute difference and statistics would become impossible.

47. D. Boorstin, *The Sociology of the Absurd* 23 (1970). In fact, Boorstin’s is a tame version of the new egalitarianism because it is no longer to be applied to all minorities, but only to those singled out as worthy by the courts and the bureaucracies. And this is largely a distinction between classes labeled “had’s” and “had not’s.” See also G. Orwell, 1984 (1949).

The individual has come to be ignored as the measure of equal treatment in favor of the class to which the individual is statistically assigned. Neither the Constitution nor the Congress has sponsored the new egalitarianism that demands proportionate equality among such arbitrarily defined classes. This quota system or caste system or status system is purely a creature of the courts and the bureaucracy. It is not a social policy established through democratic expression, pursuant to which each person counts for one and none counts for more than one, but rather through those guardians of government that must be described as "politically irresponsible," i.e., without responsibility to any electoral constituency for the rules and decisions that they promulgate. This quota system was the standard invoked to assure that all protected minorities would be treated as well as all whites, not that individual members of those minorities would be treated as well as individual whites.

The Constitution, essentially through the fourteenth amendment, calls on the majority to treat minorities as the majorities would treat themselves. This requirement has been perverted, not to require equality under law for select minorities, but to afford them preferences. And the justification for the inequality of the new egalitarianism is that it allegedly compensates for past inequalities. Thus, past iniquitous irrationalities become justifications for present iniquitous irrationalities, regardless of whether any particular claimant for preference has himself ever suffered from the earlier disabilities imposed on his race or her gender.

It is one thing to say that if A has been excluded from a job or a place in school because he is black, and B because she is female, and C because he is a Seventh-Day Adventist, each of them should be and is now entitled by law to the place that should have been his were it not for his race, gender, or creed, and to monetary compensation for the period of deprivation. That is a rationally based conclusion that race, gender, and religion are irrelevant to qualifications for the places involved. It is another thing, however, to say that one becomes entitled to a place not because he has been discriminated against, but simply because he is black, she is female, or one professes a given religion. The

49. Cf. Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("principles of law which officials would impose upon a minority must be imposed generally").
bureaucratic allocation of places in the proportion that the numbers of the race, gender, or religion bear to the population as a whole is irrational. For there is nothing in the ratio, any more than there is in the skin color or gender, that establishes an individual's qualifications for the place, unless quotas are self-justifications as the new egalitarianism seems to imply. Under the new egalitarianism, it is not the individual, the "person," who is afforded equal protection of the laws, it is rather the class, a self-defined minority within which each individual is the same as every other, that receives the constitutional protection. It is, I submit, one thing for Gertrude Stein to tell us: "A rose is a rose is a rose is a rose." It is another for the courts and bureaucracies to tell us that a black is a black is a black.

A consequence of this new jurisprudence is the affirmation of a prediction made by Mr. Justice Harlan Fiske Stone many years ago:

The experience of the past one hundred and fifty years has revealed the danger that, through judicial interpretation, the constitutional device for the protection of minorities from oppressive majority action, may be made the means by which the majority is subjected to the tyranny of minority. It was the lasting contribution of Justice Holmes that he saw clearly that the danger arose, not from the want of appropriate guiding formulas for the exercise of the judicial function, but from the judicial distrust of the democratic process, and from the innate tendency of the human mind to apply subjective rather than objective tests of the reasonableness of legislative action.  

We are heading toward an equality measured by superficial characteristics. We start with a patently reasoned position that government may not assume disparity of capacities because of a person’s race, creed, color, national origin, or sex. But we have quickly moved toward a concept of status measured by exactly those conditions that were once condemned by constitution and law. We reject the notion of individuality in favor of the presumption of uniformity of all those within the once-condemned classifications. We treat groups, not persons. All blacks, all whites, all Spanish-speaking, all males and females become fungible and their characteristics are assumed to be uniform. A black is treated as culturally deprived not because he is culturally deprived but because he is black. A white is treated as acculturated not be-

cause he is acculturated but because he is white. A black offspring of the middle class is to be treated the same as a black offspring of the impoverished, not because their upbringing or condition is the same but because their color is the same. Having joined all blacks, and all whites, and all women, we then command equality of condition without reference to the merits of any of the individuals within the group. We have thus abolished discrimination, not only in the sense of racial, religious, or other irrational prejudices, but in the sense of recognition of real individual differences.

IX

Finally, I would come full circle and make again the point that the quota society will be brought about only by the subordination of once much-cherished values in the effort to impose equality upon us. The goal of the new equality was described by an English author in a book entitled The Danger of Equality: “The more nearly the citizens of a country resemble one another in the amount of money they spend, the goods they own, the education they acquire and the social deference they receive, the more nearly perfect will that country be.”52 The means to that goal is the quota. It matters not for this goal that the equality may be achieved by reducing the highest to the lowest, by tearing down rather than building up.

Essentially, my problem is not the accomplishment of this state of Nirvana. It is the price to be paid for it. In part, the price is democracy itself, for as Geoffrey Gorer wrote about the monolithic nature of the new egalitarianism: “Democracy depends on a multiplicity of values; if only a single value is emphasized democracy cannot survive.”53

My principal personal complaint about the new egalitarianism is that its goal seems to be the homogenization of the human race, nay, that it already assumes homogeneity as the fact. My creed is different. With Judge Learned Hand, I have a “faith in the indefectible significance of each one of us.”54 I think that the question posed by the egalitarianism of today is “whether the ultimate value shall be this wistful, cloudy, errant You or I, or that Great Beast, Leviathan.”55 And for me the choice is easy.

53. Id. at 71.
55. Id. at 82.
My colleague, Dean Karl Weintraub, put this creed better than I could in the introduction to his recent sterling book entitled *The Value of the Individual*:

We desire to be rational men. We are made to submit and ultimately learn to submit voluntarily to the common tasks of citizenship. We wish to deal responsibly with the commonly shared national and worldwide problems of man. . . . We work in commonly binding disciplines, and in our professional life we aim at fulfillment of professional ideals. And yet, while we have commitments to universal human objectives . . . [we] have come to place a very high value on our specific uniqueness as individuals. We are captivated by the spectacle of all the subtle differences between the I and the thou. We see genuine value in the belief that each person has a very special human form and something very much his own to give to the world. We feel a deep need to be true to the self. . . . We may recognize the dangers in this fascination with individuality, since it can be so easily bastardized into egocentric addiction to arbitrary whim, into a mindless glorification of doing “one’s own thing,” into the “idiocy” (in the sense by which the Greeks spoke of *idiotes*) of seeing in surrounding social patterns the enemy rather than the support of each self-search. Yet we are captivated by an uncanny sense that each one of us constitutes one irreplaceable human form, and we perceive a noble life task in the cultivation of our individuality, our ineffable self.54

Such an attitude does not reject the recognition that there are a myriad of shared attributes which properly call for invocation of equality. But individualism can share with equality what equality, or at least the new equality, cannot or is unwilling to share with individualism. Individualism can tolerate, in fact depends upon, the continued existence of multiple values that the new egalitarianism would eliminate or substantially reduce: liberty, privacy, excellence, civility, culture. For the new egalitarianism is monolithic while individualism remains pluralistic.

By way of summary, then, invidious quotas that limit access to goods and positions on grounds of race, religion, gender, or national origin are replaced by benign quotas that assure access to goods and positions on grounds of race, religion, gender, or national origin. These so-called benign quotas are to be limited to benefit only chosen minorities and not, at least not yet, minority religions or minorities measured by some national origins. We

have moved not from status to contract, but from status marking
disabilities to status marking privileges. We became concerned
not merely to reduce the privileges of those who had been afforded
them, but to substitute new privileged classes for old ones. The
all-but-imaginary majority class of white Anglo-Saxon Protes-
tants are to be afforded no governmental assurance of proportion-
ate representation.

Certainly, equality is one of the high values in any society
that purports to be democratic. But it ought not be the sole politi-
cal or social value. And where it conflicts with others that are also
necessary to a nontotalitarian state, a balance must be struck if
freedom is not to be subverted, if the worth of the individual, of
excellence, of civility, of privacy, of majority rule, of self-
government are to continue to have a place.

The old equality, as opposed to the new egalitarianism, was
based on the recognition of the individual as the focus of constitu-
tional protection. Thus, the most recent scholarly history of
equality in the United States, written by the English historian
Pole, constantly reiterates the theme of individuality. He begins
his book by saying:

I see egalitarian principles in the light of a Western tradition in
which they are legitimised by a profound, not a merely perfunc-
tory, respect for individuality, and which emphasises the distin-
tinctions among people as well as their similarities; and I regard
this emphasis as logically consistent with the requirements of
the United States Constitution, more especially since the Four-
teenth Amendment.  

He ends his book by saying:

The Constitution extends its protection equally to all—to every
individual on American soil—in his or her capacity as an inde-
pendent and irreducible individual. No constitutionally accept-
able outcome can conflict with that obligation. It is the individ-
ual whose rights are the object of the special solicitude of the
Constitution and for whose protection the Republic had origi-
nally justified its claim to independent existence.

In between he tells us:

The advance of equality as a principle of constitutional law
has been based in the United States as in other Western coun-

58. Id. at 358.
tries on the precept of legal and moral individualism. The individual, being of full age and sound mind, is held to be accountable and responsible for his, or her own conduct, and it is each individual who is entitled to claim the full and unalienable rights of man. The individualist principle dissociates people from the context of family, religion, class, or race."

It is not too late to turn back from the new egalitarianism to the old equality. It is not too late to turn back from Leviathan. But it soon may be.

59. Id. at 293.