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Variations on a Theme by Thomas Jefferson

The Pursuit of Equality in American History. By Jack R. Pole. Berkeley, Los Angeles, and London: University of California Press, 1978. Pp. xv, 380. \$14.95.

Reviewed by Philip B. Kurland†

Thomas Jefferson, in whose memory the lectures collected in this book¹ were delivered, played little or no role in the framing of the American Constitution. The notion of James Madison as Jefferson's messenger at the Convention of 1789² is no longer creditable, if it ever was. Jefferson was, however, as we all know, the principal author of the Declaration of Independence. And today a case could well be made that a single sentence of that Declaration has become *de facto* "the supreme law of the land": "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."³ The Supreme Court may soon discover that this sentence is to be found in the Ninth Amendment and/or in the privileges and immunities clause of the Fourteenth Amendment, after which the rest of the Constitution can be regarded as auxiliary if not redundant.

Perhaps this suggestion is no more than hyperbolic shorthand for the proposition that courts are in the process of rejecting the positive law engrossed in the words of the Constitution in favor of the natural law implicit in the Declaration, just as some of our most prominent jurists would have it.⁴ Certainly it must be conceded that the Supreme Court has given priority to whatever values it thinks are represented by

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1. J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* (1978) [hereinafter cited by page number only].

2. See E. MORGAN, *THE BIRTH OF THE REPUBLIC 1763-89*, at 131 (1956) ("Jefferson's views were ably represented by James Madison"); A. KOCH, *JEFFERSON AND MADISON* 3-96 (1950) (describing "great collaboration" between these two men at time of Convention).

3. What the sentence was intended to mean is still an unresolved question. For the most recent and interesting parsing of the sentence, see G. WILLS, *INVENTING AMERICA* 167-255 (1978).

4. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); C. FRIED, *AN ANATOMY OF VALUES* (1970).

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the concept of equality,⁵ although the word itself is not to be found in the Constitution except in the phrase of the Fourteenth Amendment commending equal protection of the laws for all persons.⁶

Professor Pole's book is concerned with tracing equality as a recurrent theme in American history. It is not a constitutional history, except in the recognition that the Constitution may absorb dominant moral themes in American society. Thus, the notion of equality appears in different guises at different times in our history, beginning with a meaning that calls for the abolition of state-sponsored or state-protected privileges, continuing through "equality of opportunity," and arriving today at the notion of what Pole calls "equalization of results."⁷

Throughout this volume Pole is concerned with the problem of reconciling the concept of equality with the concept of individuality, a reconciliation that he believes to be constitutionally commanded. He notes at the very outset of the book:

I see egalitarian principles in the light of a Western tradition in which they are legitimized by a profound, not a merely perfunctory, respect for individuality, and which emphasizes the distinctions 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 Fourteenth Amendment.⁸

Not surprisingly, then, he ends where he began:

This burden [to justify disparities of "equality of results"], however, contains several imperfectly reconciled ingredients of which the most important is that the Constitution extends its protection equally to all—to every individual on American soil—in his or her capacity as an independent and irreducible individual. No constitutionally acceptable outcome can conflict with that obligation. It is the individual whose rights are the object of the special solicitude of the Constitution and for whose protection the Republic had originally justified its claim to independent existence.⁹

5. See P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 98-169 (1970).

6. It is apparently heresy to suggest that the contemporary interpretation of the equal protection clause is not based, as it should be, on the intentions of those who framed the Fourteenth Amendment. Thus, Raoul Berger's recent book, see R. BERGER, *GOVERNMENT BY JUDICIARY* (1977), has been roundly trounced by the academic priests of the dominant egalitarian dogma, not because its scholarship is invalid—it has not been shown to be in error on this score—but because it is a sin to suggest that we should be controlled by the "original meaning." See, e.g., Brest, *Berger v. Brown et al.*, N.Y. Times (Book Rev.), Dec. 11, 1977, at 10, col. 1; Miller, *Do the Founding Fathers Know Best?* Wash. Post, Nov. 13, 1977, at E5, col. 1. For Berger's response, see Berger, *Government by Judiciary: Some Countercriticism*, 56 TEX. L. REV. 1125 (1978).

7. P. 358.

8. P. x.

9. P. 358.

This is not merely an academic problem; it was the underlying issue dividing the Supreme Court in the recent notorious case of *Regents of the University of California v. Bakke*,¹⁰ even if the jurists did not directly confront the dilemma. Indeed, some of the Justices—those who would have denied Bakke's admission—assumed that the concept of "equality of results" is implicit in the Constitution,¹¹ though Mr. Justice Powell¹² and presumably the Justices who joined in Mr. Justice Stevens's opinion¹³ asserted the traditional position that the Constitution was concerned with the protection of individuals rather than classes.

Pole is no more successful in unraveling this Gordian knot than was the Court. He chooses to cut it by use of the "co-ordinate principle of interchangeability."¹⁴ He writes:

The advance of equality as a principle of constitutional law has been based in the United States as in other Western countries 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 and when linked with the idea of equality in the most affirmative sense—a sense widely accepted throughout a large part of American history—it assumes the co-ordinate principle of interchangeability.¹⁵

The "co-ordinate principle of interchangeability," however, is either a rejection of the notion of the uniqueness of each individual so that persons are fungible, or it means no more than the proposition that family, religion, class, or race are invalid bases for governmentally created privileges or sanctions. The first meaning is, of course, totally destructive of "individuality . . . which emphasises the distinctions among people as well as their similarities."¹⁶ The second meaning—the classic view that government cannot classify on the basis of factors irrelevant to its legitimate legislative ends—would call for a definite

10. 98 S. Ct. 2733 (1978).

11. See *id.* at 2766 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting).

12. See *id.* at 2738 (opinion of Powell, J.).

13. See *id.* at 2809 (Stevens, J., concurring and dissenting). The opinion was joined by Chief Justice Burger, and Justices Stewart and Rehnquist.

14. P. 293.

15. *Id.*

16. P. x.

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withdrawal from some of the rules of "equality of results" recently written into our national laws both by Congress and by the courts.¹⁷

But this fatal flaw in Pole's thesis does not destroy the very great worth of this history of the idea of equality, an idea of no mean importance in the development of American society. That history is well told. Certainly, it will be enlightening, if not consoling, even to those who think that they already know all they need to know about the subject. The defect does not lie in the author's capabilities, but, as he acknowledges, is intrinsic in the intractable nature of the subject:

The pursuit of equality was the pursuit of an illusion, because equality was a complex concept and not a simple or single goal. The mere fact of occupying new and higher ground in the pursuit changed the perspective of the viewer. The concept of equality, once unfolded, was a source of intense gratification, challenge, and excitement, but it was found also to be full of variations, or proliferating rewards and deceptions.¹⁸

The conclusion of at least this reader, though, is that we shall soon have greater and greater governmentally imposed "equality of results," just as the academic bible commands.¹⁹ And so, hail to equality; farewell to individuality, farewell to excellence, farewell to civility. Government, like religion and war, is indeed a great leveller.

17. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16, at 991-1136 (1978).

18. P. 292.

19. See J. RAWLS, *A THEORY OF JUSTICE* (1971).