Securing Justice: A Response to William Bradford Reynolds

Michael A. Middleton
SECURING JUSTICE: A RESPONSE TO WILLIAM BRADFORD REYNOLDS

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I doubt that William Bradford Reynolds would disagree that the self-evident truths the Framers of the Declaration of Independence spoke about are as applicable today in the 1980's as they were over 200 years ago. I also doubt that Mr. Reynolds would disagree that despite the fact that black people were not considered human beings when the Constitution was framed, the fourteenth amendment to that great document was intended to bring them within the ambit of its protections. On these two basic propositions, I suspect, Mr. Reynolds and I would agree. Beyond that however, Mr. Reynolds advances a fundamentally flawed analysis of the fourteenth amendment that, if adopted, would limit its interpretation in such a manner that its meaning would be frozen in a time that cannot and should not be considered comparable to the America of 1987 (or, indeed, 2087). Mr. Reynolds' analysis would also deny to government the power effectively to remedy what, in my view, is our nation's most egregious social wrong. With this approach, I cannot agree.

I.

Mr. Reynolds has identified "a disturbing jurisprudential emphasis that is aimed at wrenching the Constitution free from its great historical and philosophical moorings." This "emerging" jurisprudence, he suggests, poses "the major threat to individual liberty under our Constitution." This challenge to the cause of individual liberty comes from two individuals who are

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1. "[A]t the time of the Declaration of Independence, and when the Constitution of the United States was formed and adopted . . . [blacks] had no rights which the white man was bound to respect." Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).


4. Id. at 585.
involved in the preaching of an "unbridled brand of radical egalitarianism." These two leaders of the challenge to individual rights and liberties are Justice William Brennan and Professor Ronald Dworkin.

Defending our individual liberty from these radical egalitarians are Attorney General Edwin Meese and Assistant Attorney General William Bradford Reynolds. They call for a return to a jurisprudence of original intention—a jurisprudence focusing not on the problems of contemporary society and the application of constitutional principles to their solutions, but on the text of the Constitution and the "intentions of those who wrote, proposed and ratified that text." Mr. Reynolds criticizes Justice Brennan's belief in the power of the judiciary to interpret the Constitution in such a manner as to apply its principles to the problems of contemporary society. This criticism sounds much like the longstanding argument that the doctrine of judicial review constitutes a usurpation of power by the judiciary. The notion that the Justices of the Supreme Court have taken liberties in interpreting the Constitution is not new. As long ago as Justice Marshall's decision in Marbury v. Madison, dissidents challenged the Court's authority as the final arbiter of the meaning of the Constitution. To date, that challenge has consistently come in the form of a dissenting view. That Mr. Reynolds can comfortably characterize Justice Brennan's belief in the "power of the judiciary" as "radical" in light of the history of the development of judicial review is shocking. That his true disagreement with Brennan does not concern the power of the Court but the manner in which the Court has exercised that power is apparent. Mr. Reynolds, unable seriously to deny that the courts are empowered by our constitutional system to apply its protections, shifts his criticism to the manner in which Justice Brennan has exercised that power.

II.

Mr. Reynolds charges that Justice Brennan's constitutional jurisprudence has "turned its back" on the Constitution and created law that is "the

5. Id. at 586.
6. Id.
7. Id. at 589-90.
8. 5 U.S. 137 (1804); see also Cooper v. Aaron, 358 U.S. 1 (1958).
9. On the power of courts in America to found their decisions on their reading of the Constitution, Alexis de Tocqueville wrote in the early 19th century, "It is recognized by all the authorities; and not a party, not so much as an individual, is found to contest it." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 104 (1945); see also Simon, The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation, 58 S. CAL. L. REV. 603, 613 (1985).
10. The one clear outcome of the debate over judicial review is the general consensus that "the court is to interpret . . . law." E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 43-44 (1963). The dispute arises in those instances where the court's interpretation arguably goes beyond what the particular critic views as the law's intended parameters. Such is the case in this instance.
result only of judicial opinion informed by evolving standards of morality."  

Specifically, Mr. Reynolds expresses disagreement with Brennan’s “egalitarian jurisprudence” because it is too concerned with the future, too appreciative of evolving moral standards, and unduly focused on the power of the judiciary.

A system of jurisprudence cannot ignore the past, present or future. It cannot ignore the Constitution’s structural arrangements nor evolving moral standards. It must respect both the concepts of limited government and judicial authority. Mr. Reynolds, however, suggests that there is some clear measure of the appropriate weight to be given to these various legitimate concerns, and that Justice Brennan has clearly exceeded those bounds.

It seems that Mr. Reynolds would prefer that Justice Brennan show less concern for today’s circumstances than for those 200 years ago. It is clear, however, that Justice Brennan’s system of jurisprudence does show concern for history in that it looks “to the history of the time of framing and to the intervening history of interpretation” as aids to understanding the meaning of the words of the text. That concern for history focuses on the application to present circumstances of those historic and fundamental principles that provided the framework for the formation of this democratic republic.

Mr. Reynolds charges that Justice Brennan’s “radical egalitarianism” is less concerned with constitutional structure than it is with his appreciation of evolving moral standards, and less concerned with limited government than with unlimited judicial power. Constitutional structure, however, which includes as an essential component the doctrine of judicial review, requires the judiciary to apply the Constitution to current problems. Mr. Reynolds’ problem is that he does not agree with Justice Brennan’s application. Similarly, a concern for limited government to secure individual liberty does not require that courts shy away from their obligation to act in the face of a history of constitutional violations to ensure that constitutional goals are achieved. The judiciary was not intended by the Framers to be so limited.

12. Id. at 588.
13. Id. at 591-92.
   We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.
15. W. Reynolds, supra note 3, at 591.
16. See supra note 10 and accompanying text.
that it cannot act to guarantee the enjoyment of constitutional rights.\textsuperscript{17}

Mr. Reynolds asserts that Justice Brennan shows excessive appreciation for evolving moral standards and charges that he is guided by his personalized egalitarian vision of society when he determines that the liberty of the majority to oppress the rights of the minority may be limited by the judiciary. The moral standards for which Justice Brennan shows appreciation however, are the same moral standards that were so appreciated by the Framers. And Justice Brennan's vision of society, while possibly personalized, is a vision shared by the Framers. As James Madison put it, "Justice is the end of government. It is the end of civil society."\textsuperscript{18}

Brennan has said that "the very purpose of the Constitution . . . [is] to declare certain values transcendent, beyond the reach of temporary political majorities."\textsuperscript{19} This expresses one of the fundamental concerns of the Framers; that certain rights of the people were to be secure. Madison made it clear in The Federalist, No. 51, that there was a need not only for security from the excesses of government, but also from the oppression of one segment of society by another.\textsuperscript{20}

The Framers were concerned over what Madison called the dangers of a factious majority\textsuperscript{21} and what Alexis de Tocqueville called the "tyranny of the majority."\textsuperscript{22} An arguably effective means for protecting against this evil, was, as described by Madison, the "comprehending in the society [of] so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."\textsuperscript{23} But

\begin{thebibliography}{9}
\bibitem{17} \textit{The Federalist} No. 78, at 466-67 (A. Hamilton) (Mentor ed. 1961). All references are to this edition.
\bibitem{18} \textit{The Federalist} No. 51, at 324 (J. Madison).
\bibitem{19} Address by Justice William J. Brennan, Georgetown University Text and Teaching Symposium (Oct. 12, 1985).
\bibitem{20} Madison stated:
It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . Justice is the end of government. It is the end of civil society. It has ever been, and ever will be, pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger: and as, in the latter state, even the stronger individuals are prompted by the uncertainty of their condition to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions . . . be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.
\bibitem{21} \textit{The Federalist} No. 51, at 323-25 (J. Madison).
\bibitem{22} A. de Tocqueville, \textit{supra} note 9, at 231.
\bibitem{23} \textit{The Federalist} No. 51, at 324 (J. Madison).
\end{thebibliography}
this, contrary to the suggestion of Mr. Reynolds,24 was not the only protection against majority oppression in the minds of the Framers. Madison's argument for the effectiveness of this approach only went so far as to suggest that unjust combinations would be "improbable," "less likely," or "more difficult."25 The institutional innovations catalogued by Hamilton in Federalist No. 9 were also considered, even by Mr. Reynolds, to be essential.26 Those institutional innovations include a strong and independent judiciary empowered to act when majority tyranny survived the effort to divide and weaken.27

At the time of the framing of the Constitution, the question whether the constitutional structure and the expansion of the sphere together were sufficient to avoid the evil of majority tyranny was the subject of significant concern to contemporary writers such as Alexis de Tocqueville. In discussing the threatened tyranny of the majority, de Tocqueville noted that "Some have not feared to assert that a people can never outstep the boundaries of justice and reason in those affairs which are peculiarly its own; and that consequently full power may be given to the majority by which it is represented. But that is the language of a slave."28 He went on, "If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach?"29 And finally, in expressing his fears for the future of the American experiment, de Tocqueville noted, "I am not so much alarmed at the excessive liberty which reigns in that country as at the inadequate securities which one finds there against tyranny."30 "If ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse to physical force."31

The Framers and their contemporary commentators understood the purposes of our written Constitution as placing certain fundamental values beyond the reach of the majority, and establishing a governmental structure that would ensure that absolute power is not concentrated in any branch of government, particularly that branch which most directly represents the people. As Thomas Jefferson said, "The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come."32

25. Id. at 602.
26. Id. at 599.
27. The Federalist No. 9, at 72 (A. Hamilton).
28. A. de Tocqueville, supra note 9, at 269.
29. Id.
30. Id. at 271.
31. Id. at 279.
32. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789).
To suggest then, that Justice Brennan has turned his back on the Constitution is disingenuous. There are not many who question the authoritativeness of the Constitution,33 perhaps least of all, Justice Brennan.34

One must turn a blind eye to history to suggest, as Mr. Reynolds does, that a jurisprudence that advocates adapting the overarching principles of the Constitution to contemporary social problems is somehow “radical.”35 The only position that can at this point in history be reasonably considered radical is one, such as Mr. Reynolds’, that advocates turning back the clock to an age when the express words of the Constitution only arguably had some contemporary significance.36 The absurdity of such a position is that it precludes the judiciary from even considering the dramatic changes that have occurred over the past 200 years that could justify deviation from what can only be assumed to be the original intent of the Framers. Because the Constitution was “intended to endure for ages to come,”37 it is patently unreasonable to limit the interpretation and application of its abstract language by referring only to one’s own view of original intent.38

This is not to say that there is no place in our constitutional system for a consideration of the intent of the Framers or the expression of that intent in the text of the document. There can be little doubt that the Framers intended that the judiciary interpret and apply the Constitution to questions

34. Justice Earl Warren said of Brennan: “He administers the Constitution as a sacred trust and interprets the Bill of Rights as the heart and life blood of that great charter of freedom.” S. Friedman, WILLIAM J. BRENNAN, JR.: AN AFFAIR WITH FREEDOM 347 (1967). In referring to Justice Brennan:

[Perhaps his] predominant characteristic, throughout his service on the Court, has been his patent devotion to the fundamental principles of the Constitution and his judicial courage in carrying them out. Indeed it can be said of Justice Brennan that he has done his best to emulate Chief Justice Marshall in “never [seeking] to enlarge the judicial power beyond its proper bounds, [yet] not [fearing] to carry it to the fullest extent that duty requires.”

35. W. Reynolds, supra note 3, at 591.
36. As Justice Brennan points out, “[S]ources of potential enlightenment (on the original intent of the Framers) . . . provide sparse or ambiguous evidence of the original intention.” Further, Brennan appropriately questions “whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states.” Brennan, supra note 14, at 4; see also Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204 (1980); Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
appropriately before it. Indeed, at the time of the framing of the Constitution, the well understood common law rule was that the judiciary, on a case-by-case basis, was to elaborate on general concepts and abstract principals embodied in written law.39

The questions for the judiciary arise in determining what the original intent was, and in deciding how bound by that intent it must be in resolving questions not contemplated or not specifically addressed by the Framers. On the question of race-consciousness in governmental decisionmaking, Mr. Reynolds asserts that he has found the original intent of the Framers and that the judiciary should be strictly bound by it. The remainder of this Article will argue that he is wrong on both counts.

III.

Mr. Reynolds' specific example of Justice Brennan's abuse of his interpretive authority is his approach to the question of race consciousness in governmental activity. Mr. Reynolds suggests that the fourteenth amendment guarantee of equal protection, far from sanctioning race consciousness, absolutely prohibits it. There is no dispute that the fourteenth amendment guarantees equal protection of the law. The problem is that there is no clear definition of the concept of equality provided in the document or its history.40

The concept of equality advanced by Reynolds, which can be summarized as neither requiring nor permitting anything more than absolute "colorblindness," is simplistically drawn from Justice Harlan's dissent in Plessy v. Ferguson41 and supported by Mr. Reynolds' reading of original intent.42 Such a view of equality might be appropriate in an ideal world with no history of racial oppression and discrimination, but in this world such a view is morally and historically insupportable.

Justice Brennan's view, on the other hand, while similar to Mr. Reynolds', includes a necessary recognition of the fact that this is not an ideal world. In Regents of the University of California v. Bakke,43 Justice Brennan noted that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."44 He went on, in

39. "A Constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body." The Federalist No. 78, at 467 (A. Hamilton).
41. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
42. W. Reynolds, supra note 3, at 603-04.
44. Id. at 327.
addressing the constitutionality of considerations of race to state that "[t]he assertion of human equality is closely associated with the proposition that differences in color . . . are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be 'constitutionally an irrelevance,' summed up by the shorthand phrase 'our Constitution is color-blind,' has never been adopted by this Court as the proper meaning of the Equal Protection Clause." Justice Brennan recognizes that the ultimate issue is the fulfillment of the promise of the fourteenth amendment. He recognizes that in light of our nation's history of racial discrimination and oppression, sameness of treatment irrespective of race simply perpetuates the initial oppression. His concept of equality then, is infused with the concept of justice. The fundamental concept is that justice requires that there be constitutional remedies for constitutional wrongs. This concept of equality is shared by the majority of Justice Brennan's brethren on the Court. 

Mr. Reynolds, however, suggests that Justice Brennan's definition of the fourteenth amendment's promise "derive[s] primarily from a liberal social agenda" which has "little or no connection with the Constitution, the Bill of Rights, or any subsequent amendment." He apparently ignores the fact that all sitting members of the Court share the view that race-consciousness is, in appropriate circumstances, constitutionally permissible, and he relies on the dissent in Plessy and his own personal view of original intent to suggest that Justice Brennan's view is inappropriate. The obvious question is: if the Framers had a specific definition of equality in mind, why has Mr. Reynolds not set it forth? The obvious answer is that the Framers, instead of defining their terms with specificity, used such amorphous language as "equal protection of the law" so as to preclude any single rigid interpretation of that language.

45. Id. at 355.
46. In North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971), the Supreme Court, in a unanimous decision, held that a statute mandating colorblind school assignment plans could not stand "against a background of segregation," since such a limit would "render illusory the promise of Brown [v. Board of Education]." Justice Stevens most recently noted in his concurrence in United States v. Paradise, 107 S. Ct. 1053 (1987), "The District Court . . . may, and in some instances must, resort to race-conscious remedies to vindicate federal constitutional guarantees," Id. at 1079. Justice Blackmun stated the proposition most clearly in his Bakke concurrence when he said, "In order to get beyond racism, we must first take account of race. There is no other way," Bakke, 438 U.S. at 407; see also infra note 48.
47. W. Reynolds, supra note 3, at 592.
48. See Justice O'Connor's concurrence in Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986), noting that "all members" of the Court "apparently" agree that racial classifications that can withstand "strict scrutiny" may pass constitutional muster. Id. at 1852 (O'Connor, J., concurring).
A single rigid interpretation of the fourteenth amendment however, is exactly what Mr. Reynolds advances. The flaw in his interpretation is that while he professes allegiance to originalist theory, his principle of "color-blindness" is no more supported by a fair reading of original intent than the "personalized visions" he criticizes. A persuasive case has been made that the Framers of the fourteenth amendment did not specifically intend to render segregation of the races unconstitutional so long as the very specific prohibitions against racial discrimination embodied in the Civil Rights Act of 1866\(^50\) were enforced.\(^51\) It is widely accepted among Constitutional scholars that this is an accurate view of the history of the fourteenth amendment.\(^52\) It is inconsistent with a strict originalist approach to argue that the Framers of the fourteenth amendment constitutionalized a concept of color-blindness when the history of the amendment so clearly evidences an intent at that time to maintain the race-based distinctions that allowed for state-enforced segregation. In short, the temper of those times is probably more accurately captured by \textit{Plessy}\(^53\) than by \textit{Brown}.\(^54\)

To be sure, Justice Harlan’s dissenting attempt in \textit{Plessy} to interpret the fourteenth amendment to require "color-blindness" is better understood as an expression of his "personalized vision" of the evil consequences of a policy of state-imposed social segregation.\(^55\) Now, almost a century later, Mr. Reynolds presses the judiciary to adopt that vision as if it were the original intent, so as to deny to government the power effectively to remedy the enormous damage done by the Court’s failure to embrace it in 1896.

The conclusion, drawn from the text and historical context of the fourteenth amendment, that the Framers intended only to constitutionalize the specific rights enumerated in the 1866 Act, does not compel the conclusion that such a limitation must bind future generations in their interpretation of the amendment. A plausible argument can be made, even from an originalist perspective, that by using, in addition to specific prohibitory language, the general "equal protection" language in fact used by the Framers, they contemplated that future generations would not be precluded from expanding on the concept in light of evolving moral standards.\(^56\)

\(^{50}\) Section 1 of The Civil Rights Act of 1866 protected the rights of newly freed blacks "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and . . . like punishment. . . ." The Civil Rights Act, ch. 31 § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981, 1982 (1982)).


\(^{55}\) \textit{Plessy}, 163 U.S. at 552 (Harlan, J., dissenting).

\(^{56}\) While Perry concludes that "there is no evidence that the framers of
The unfortunate fact is that race has always been a consideration in American life. To claim at this stage of history that it is constitutionally irrelevant is sophistical.

Moreover, general arguments that advocate limiting constitutional interpretation to the literal intent of the Framers at the time of its framing must also fail. Not only can the specific intent of the Framers not be established, but if it could, it would be foolhardy to attempt literally to apply the words used to express that intent to the complex situations extant today.\textsuperscript{57} It is the tenor of the Constitution that must guide the Court in applying its protections to current disputes.\textsuperscript{58}

As Justice Brennan has said, "A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against a claim of constitutional right."\textsuperscript{59} This approach to original intent "expresses antipathy to claims of the minority to rights against the majority."\textsuperscript{60} Indeed, others have expressed the notion that those who advocate a return to original intent on the issue of race have less an intellectual interest in neutral principles important power-limiting provisions [the fourteenth amendment] intended them to serve as open-ended norms," M. Perry, supra note 52, at 72, there is also no evidence that they intended to preclude interpretation by future generations of the amorphous language used. See supra note 39.

\textsuperscript{57} See Frankfurter, The Supreme Court in the Mirror of Justice, 105 U. Pa. L. Rev. 781 (1957).

\textsuperscript{58} Hamilton stated quite clearly that limitations on legislative authority "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, at 466 (A. Hamilton). As Mr. Justice Strong noted in Strader v. West Virginia, 100 U.S. 303 (1880), "The true spirit and meaning of the [fourteenth] amendment . . . cannot be understood without keeping in view the history of the times when [it] was adopted, and the general objects [it] plainly sought to accomplish. . . . [T]he amendment . . . is to be construed liberally, to carry out the purposes of its framers." Id. at 306-07. Similarly, Mr. Justice Miller, in the Slaughter-House Cases, 83 U.S. 36 (1873), noted that "the one pervading purpose . . . lying at the foundation [of the fourteenth amendment] . . . and without which [it] would [not] have been even suggested [was] . . . the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." Id. at 71. In describing the appropriate approach to judicial interpretation of the fourteenth amendment, Justice Miller stated that "in any fair and just construction of any section or phrase of the[se] amendment[s], it is necessary to look to the purpose which we have said was the pervading spirit of [it], the evil which [it was] designed to remedy. . . ." Id. at 77; see also supra notes 36, 56.


\textsuperscript{60} Id. at 5.
than in general opposition to the Court's effort to recognize the legitimate claims of powerless people.\textsuperscript{61}

IV.

Motivation and internal consistency aside, Mr. Reynolds' position is also flawed as a criticism of what he terms the "liberal social agenda."\textsuperscript{62} He attempts to provide an example of how current jurisprudence misapplies the fourteenth amendment on the issue of race through its recognition of the constitutionality of the use of race in governmental decisionmaking. His attack shifts from Justice Brennan to Professor Ronald Dworkin, the alleged guru of "radical egalitarianism." His attack on Professor Dworkin's philosophy of equality is as flawed as his attack on Justice Brennan's judicial approach.

Mr. Reynolds first distorts Professor Dworkin's "idea of equality," which, he suggests, has had a great influence on Justice Brennan, and attempts to demonstrate how that distortion conflicts with the "constitutional theory of individual rights."\textsuperscript{63}

The core of Professor Dworkin's constitutional theory of equality is not, as Mr. Reynolds suggests,\textsuperscript{64} the notion of "public insult." The idea that "public insult" can justify a racial classification was advanced by the Supreme Court of the State of Washington in DeFunis v. Odegaard,\textsuperscript{65} where that court recognized a constitutional difference between benign and invidious racial classifications. It held that benign classifications were permissible because they did not stigmatize an insular racial minority and involved no public insult.\textsuperscript{66} The Supreme Court,\textsuperscript{67} finding moot the question raised, did not address the lower court's logic. Four years later however, in Bakke,\textsuperscript{68} the Supreme Court specifically rejected the notion that the insult felt by the group disadvantaged by a racial classification was an appropriate basis for finding the classification unconstitutional. Rather, a classification's constitutional legitimacy was to be determined not by measuring the degree to which the classification "stigmatized" or insulted those excluded, but by balancing the legitimate governmental concerns advanced against the harm

\textsuperscript{61} Wright, Professor Bickel, The Scholarly Tradition and the Supreme Court, 84 Harv. L. Rev. 769 (1971); see also Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327 (1986).
\textsuperscript{62} W. Reynolds, supra note 3, at 592.
\textsuperscript{63} Id. at 594-95.
\textsuperscript{64} Id. at 595.
\textsuperscript{65} 82 Wash. 2d 11, 507 P.2d 1169 (1973).
\textsuperscript{66} Id. at 27-31, 507 P.2d at 1178-81.
\textsuperscript{67} DeFunis v. Odegaard, 416 U.S. 312 (1974).
done by the classification under traditional constitutional standards.69

In Taking Rights Seriously,70 Dworkin expresses his idea of equality in similar terms. He suggests clearly that the notion of insult does not control the determination of the legitimacy of a racial classification under the fourteenth amendment. "[I]t is not true, as a general matter, that any social policy is unjust if those whom it puts at a disadvantage feel insulted."71 As an example, Dworkin suggests that the insult felt by individuals excluded from law school because of their relative lack of intelligence, for example, will not render their exclusion violative of equal protection. Moreover, classifications that exclude on the basis of race are arguably equally "insulting" to those so excluded regardless of race. Since there will always be some insult involved in the exclusion of any group for any reason, insult is inappropriate as a basis for determining the constitutional acceptability of the classification.

Professor Dworkin's theory of equality turns instead on the justification for the particular racial classification in question. Where the classification is based on utilitarian concerns corrupted by racial prejudice, then the classification offends the right of those excluded to be treated as equals. Such classifications are constitutionally prohibited. When the classification however, is grounded in non-corrupted utilitarian, or "ideal" concerns, i.e., that a more intelligent bar will better serve the community, or that a more equal society is a better society, it does not deny the right of anyone to be treated as an equal. In short, the classification "is justified if it serves a proper policy that respects the right of all members of the community to be treated as equals."72 It is not then the "public insult" that renders a racial classification impermissible, it is the purpose of the classification that renders it permissible. This is the approach that has been developed and applied by the Supreme Court in its decisions on the constitutionality of race-conscious affirmative action.73

69. While there remains substantial disagreement among the Justices as to what the appropriate standard is (see Justice O'Connor's separate opinion in Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1852 (1986)), it is clear that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Bakke, 438 U.S. at 291.


71. Id. at 231.

72. Id. at 239.

73. This too, is the approach taken by Justice Brennan where in his opinion in Bakke he stated, "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice. ..." Bakke, 438 U.S. at 325. It is interesting to note that Justice Powell misperceived Justice Brennan's reference to insult in the same manner that Reynolds has misperceived Dworkin's logic. Powell ascribes to Brennan the position that "stigma" is the crucial element in analyzing racial classifications. Bakke, 438 U.S. at 294. Instead, Brennan only suggested that where government takes race into account to demean or insult a racial group, the classification is impermissible.
This balancing approach does not, as Mr. Reynolds asserts, establish the proposition that those not "shrouded with the stigma of inferiority," but excluded by preferential treatment have no cognizable claim against such treatment.\textsuperscript{74} Rather, this approach requires that in evaluating that claim, the Court should look to the governmental interest served by the classification. If that interest is grounded in sound public policy not colored by racial prejudice, then the racial classification utilized to effectuate that interest respects the right of all citizens similarly situated to be treated as equals. That class of citizens that has been denied fundamental constitutional rights by the tyranny of a factious majority is entitled to a constitutional remedy. Justice, the "end of government . . . the end of civil society,"\textsuperscript{75} demands no less. The remedy is not rendered unconstitutional simply because it identifies its beneficiaries on the basis of the characteristic which was used to identify them for victimization. The public policy furthered by the racial classification must be considered. The majority may have its liberty, but not the liberty to deny a minority its fundamental rights or to withhold a remedy for the unconstitutional denial of those rights. The majority does have the right to be treated as an equal citizenry. This right is not infringed upon by the inconvenience that all citizens must endure in remedying constitutional wrongs.\textsuperscript{76}

In sum, Mr. Reynolds' basic misconception of Professor Dworkin's logic is that he assumes that the racial equality debate is a battle between competing and similarly situated racial groups rather than a balancing of society's sense of justice against its history of racial oppression. When the conflict is viewed in the latter sense, it can easily be understood that racial classifications designed to remedy prior race-based wrongs further society's legitimate interest in securing justice. While such classifications may impose burdens on some individuals, they do not offend any individual's right to be treated as an equal. When Professor Dworkin's thesis is misperceived, as it is by Mr. Reynolds, to suggest competition for scarce benefits between similarly situated segments of society, it can be viewed simplistically as a matter of "robbing Peter to pay Paul."

While it is undeniable that in balancing the harm done against the purpose served by a racial classification, a purpose to insult or demean should appropriately be found wanting, it is not necessary to conclude that a racial classification serving a legitimate purpose is impermissible because it results in an insult.

\textsuperscript{74} W. Reynolds, \textit{supra} note 3, at 595.
\textsuperscript{75} \textit{See The Federalist} No. 51, at 324 (J. Madison).
\textsuperscript{76} Justice Powell, joined by Justices Burger and Rehnquist, writing for the majority in \textit{Wygant} stated, "We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." \textit{Wygant} v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1850 (1986).
The position that Professor Dworkin's logic leads to a requirement of proportional representation also flows from Mr. Reynolds' misconception. Proportional representation could only be justified under Professor Dworkin's thesis if it were determined that a proportional society is better than a society that distributes opportunities on the basis of legitimate criteria. Clearly however, the Constitution would not allow such a determination. Proportionality as an ultimate goal would operate permanently to limit opportunities for certain individuals based solely on a judgment regarding the worth in society of the group to which the individual belongs. This must be viewed as an inappropriate justification for a racial classification because it denies each individual the right to be treated as an equal. Proportionality as an interim measure designed to achieve a compelling and legitimate societal goal, however, may be constitutionally justified since it treats similarly situated individuals as equals. The "separate but proportional" rule that Mr. Reynolds so fears, then, is not a logical outgrowth of Professor Dworkin's theory of equality.

Likewise, Professor Dworkin's approach cannot be said to support the separate but equal result of Plessy v. Ferguson, nor undermine the Court's decision in Brown v. Board of Education as is suggested by Mr. Reynolds. In Plessy, the "public good" that arguably justified the challenged racial classification was grounded in racial prejudice and was therefore inconsistent with the recognition that all citizens are to be treated as equals. The argument constructed by Professor Van Alstyne, and hypothetically advanced in Brown, that equal but separate schools for Blacks were in the public interest because they were designed to assure "a historically disadvantaged racial minority an equal opportunity to develop educational curricula and programs more responsive to their needs, free from domination in schools where their children might otherwise be overwhelmed by a racial majority," might well be found compelling by a Dworkin influenced Court. Indeed, the Court that heard the case may well have found the scheme constitutional but for its specific finding that "separate educational facilities [were] inherently unequal." The scheme itself, regardless of its purpose, would operate to deny equal protection of the law. Presumably, a Dworkin influenced Court

77. W. Reynolds, supra note 3, at 596.
78. See, e.g., Johnson v. Chicago Bd. of Educ., 604 F.2d 504 (7th Cir. 1979).
79. 163 U.S. 537 (1896).
81. W. Reynolds, supra note 3, at 597.
82. In Plessy v. Ferguson, the public good offered as justifying the racial classification was the avoidance of civil disorder that would result from race mixing. Plessy, 163 U.S. at 550.
83. W. Reynolds, supra note 3, at 597.
84. Brown, 347 U.S. at 495.
85. Id.
would also have found segregated educational experiences inherently unequal.

Mr. Reynolds also suggests that Professor Dworkin's logic rejects the concept of the human good. Mr. Reynolds reads Professor Dworkin to mean that any claim of inherent worth of a person by virtue of any of his or her traits or characteristics would be false.86 Nowhere, however, does Professor Dworkin suggest so absolute a conclusion. What Professor Dworkin does suggest is that in balancing the competing personal preferences of individuals excluded against those who prefer the exclusion, judgments about the worth of individuals excluded that are unrelated to the personal utilitarian preferences of those making the judgments unfairly tip the balance against those excluded. For example, a preference for virtuous men in admissions to law school may be related to the altruistic preference of society favoring virtue. The success of the personal preference of the non-virtuous applicant would be made to depend on the esteem and approval of others, rather than on their competing personal preferences. Individuals then, would not be treated as equals; their treatment would be based on the judgment of them by others.

If intelligence was not determined by law school admissions committees to be a legitimate criterion for determining who best will serve the personal interests of the community in effective lawyering, but rather was used in admissions decisions only because the community deemed the intelligent to be inherently more worthy of admission, then the right of the unintelligent to be treated as equals would be unfairly made to depend on the esteem and approval of others. Because law school admissions committees have determined intelligence to be directly related to one's ability to practice successfully, the use of intelligence as an admission criterion does not unfairly exclude.87

This analysis does not minimize the worth of individuals based on their personal traits, it simply suggests that the right of individuals to be treated as equals should not be sacrificed to the opinions of those individuals held by others in the community where those opinions are based on personal traits that bear no relationship to satisfying the legitimate concerns of the community. The right of blacks to be treated as equals should not be sacrificed to the preferences of the community to see blacks denied opportunity, to see opportunities provided exclusively to whites, or to avoid the inconvenience of affording a remedy for constitutional wrongs. The right of whites to be treated as equals is not sacrificed in the implementation of race-conscious affirmative action. The community has a constitutional obligation to remedy its constitutional wrongs.88 This is a legitimate and compelling concern.89

86. W. Reynolds, supra note 3, at 597.
87. R. DWORKIN, supra note 70, at 238.
88. See supra note 18.
Far from suggesting that the Constitution is "merit blind,"90 Professor Dworkin suggests only that the measure of merit should directly serve some real and legitimate end and not be the result of generalized judgments about the worth of individuals based on their possession of irrelevant traits. It is not that there are no traits that make mankind "admirable or estimable,"91 it is that individuals who do not possess those traits are denied their right to be treated as equals when those traits do not serve a legitimate end and are used to justify the denial of opportunity to those individuals.

V.

That there are two compelling and often competing values expressed in the Constitution cannot be denied. The tension between the constitutional ideals of liberty and equality, which is the focus of Mr. Reynolds' paper, is real. Mr. Reynolds has suggested that the fourteenth amendment precludes government from considering race in striking the balance between those competing ideals. Race-consciousness in governmental decisionmaking is, he suggests, "the major threat to individual liberty under our Constitution."92 The appropriate balance is, indeed, not easy to strike, but Mr. Reynolds' appeal to the goal of protecting liberty through a narrow and faulty reading of the text of the Constitution and its assumed meaning does little to protect liberty and much to restrict government's ability to apply the Constitution's great principles to today's constitutional disputes.

No one can deny that, as Americans, we place an extremely high value on our liberty. Few of us can forget the words of Patrick Henry: "give me liberty or give me death."93 But under our constitutional system, it is not unusual or radical for our liberties to be compromised for the general good of society. All laws restrain individual liberty. The very notion that we are a nation of laws compels a recognition that our individual liberties may be compromised for the general welfare.

Mr. Reynolds seems unable to recognize, or perhaps unwilling to accept, this concept when a factor in striking the balance is race. I suspect that his difficulty derives from his inability to accept the existence of a fundamental blemish on our nation's history.94 Whatever the source of his confusion,
however, his reference to race as a "morally irrelevant characteristic"\(^95\) reflects most clearly the fact that his dogmatic allegiance to "colorblindness" has rendered him myopic and blinded him to the reality of the America in which we live; an America which, by its history, has brought race to the moral and constitutional forefront.

\(^{95}\) W. Reynolds, *supra* note 3, at 604.