

# FOREWORD

## FROM THE RIGHT TO BE LET ALONE TO THE RIGHT TO BE HELPED ALONG

Joyce A. Hughes\*

*We claim for ourselves every right that belongs to a free-born American; political, civil and social; and until we get these rights, we will never cease to protest and assail the ears of America. The battle we wage is not for ourselves, but for all true Americans. \*\**

### I. INTRODUCTION

In addition to its significance as a presidential election year, 1976, may be remembered for its bicentennial themes which were often utilized for commercial purposes. Advertising an international airline, a chubby Englishman advised television viewers, "All is forgiven. Do come home!" Unless intended to include Great Britain's former colonies like Ghana, Nigeria, and Jamaica, that invitation was not properly addressed to Black Americans. Indeed, in 1976, the question of whether to celebrate the 200th anniversary of the Declaration of Independence was debated by Black Americans.<sup>1</sup> The issue was not new, for more than a century earlier Frederick Douglas had asked, "What to the American slave, is your Fourth of July?"<sup>2</sup>

In 1976, one civil rights organization responded by holding its annual conference in Boston, the city which hosted the famous tea party of an earlier age, and there paid homage to Black founding mothers and fathers. Using the theme, *Toward a New Bill of Rights*, conferees discussed necessary additions to the list of rights enjoyed by Americans, a subject which this volume addresses from a legal perspective.<sup>3</sup> It is part of a larger drama that has been called "the rights explosion."<sup>4</sup> Yet the current play is not an original production but rather the continuation of an historical progression.

From the petition of Black slaves to the Massachusetts legislature in

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\* B.A., Carleton College; J.D., Univ. of Minnesota School of Law. Professor of Law, Northwestern University School of Law.

\*\* Statement of W.E.B. DuBois on the Niagara Movement, *as quoted in* W.E.B. DuBois: THE CRISIS WRITINGS 19-20 (D. Walden ed. 1972).

1. *Should Blacks Celebrate the Bicentennial?*, EBONY, Aug., 1975, at 35-42.

2. *The Meaning of July Fourth for the Negro*, Oration Delivered in Corinthian Hall, Rochester, N.Y., by Frederick Douglass, July 5, 1852, *reprinted in* THE VOICE OF BLACK AMERICA - MAJOR SPEECHES BY NEGROES IN THE UNITED STATES 1797-1971 at 104, 117 (D. Foner ed. 1972).

3. Rights to Representation, Family Security, Health, Economic Security, Education, and Safe Communities were discussed. See NATL. URBAN LEAGUE, TOWARD A NEW BILL OF RIGHTS (1977) (Proceedings of the 66th Annual Conference, Boston, Mass., Aug. 1-4, 1976).

4. *The "Rights" Explosion Splintering America*, U.S. NEWS & WORLD REPORT, Oct. 31, 1977, at 29-34.

1773 (demanding freedom as a natural right)<sup>5</sup> and Jefferson's articulation of inalienable rights in 1776, to the Black Declaration of Independence in 1970,<sup>6</sup> and the proposed equal rights amendment of 1972,<sup>7</sup> the "felt necessities"<sup>8</sup> of each age have prompted demands for social confirmation of natural rights, expansive interpretation of rights enumerated in the Constitution's Bill of Rights, and promulgation of new rights by statute.

In the Declaration of Independence, Thomas Jefferson identified three broad categories of rights to which mankind is endowed by the creator—life, liberty, and the pursuit of happiness. But the Constitution adopted in 1789, contained no explicit provisions conferring or protecting these rights. During the drafting period proponents of the view that rights exist naturally argued that a constitution need not be a rights-creating document, since all powers not granted to the federal government were retained by the people. Others perceived a need for guarantees against governmental infringement of the rights reserved to the people.<sup>9</sup> Ultimately the latter view prevailed and the first ten amendments were ratified in 1791, two years after the basic document.<sup>10</sup> Almost two hundred years later, following the civil war, the fourteenth amendment was adopted.<sup>11</sup> The Bill of Rights—plus the four-

5. Petition of Peter Bestes, Sambo Freeman, Felix Holbrook and Chester Joie, Apr. 20, 1773, reprinted in BLACK PROTEST HISTORY, DOCUMENTS AND ANALYSES - 1619 TO THE PRESENT 28-29 (J. Grant ed. 1968).

6. The Black Declaration of Independence, July 4, 1970, reprinted in BALSAs REPORTS, Winter, 1975, at 1. The Black Declaration is a polemical variation of Jefferson's approach, but confirms the same inalienable rights of life, liberty and the pursuit of happiness. To these it adds:

[T]he Right of the Minorities to use every necessary and accessible means to protest and to disrupt the machinery of oppression, and so to bring such general distress and discomfort upon the oppressor as to offended minorities shall seem most appropriate and most likely to effect a proper adjustment of the society.

This too is a variation of Jefferson's assertion of a right to alter or abolish a government which has become destructive.

7. The proposed twenty-seventh amendment, approved by the House of Representatives on October 12, 1971, H.R.J. Res. 208, 92d Cong., 1st Sess., 92 Cong. Rec. 35782 (1971), and by the Senate on March 22, 1972, H.R.J. Res. 208, 92d Cong. 2nd Sess., 92 Cong. Rec. 9524 (1972), states:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any Senate on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

The amendment will become part of the Constitution "when ratified by the legislatures of three-fourths of the several states within seven years from the date of its submission by the Congress." 92 Cong. Rec. 9524 (1972). See generally, Brown, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women*, 80 YALE L. J. 871 (1971).

By October 6, 1978 thirty-five states had ratified the proposed amendment, three short of the Constitutionally required percentage. Resolutions extending the deadline for ratification to June 30, 1982, were approved by the House of Representatives on August 15, 1978, H.R.J. Res. 638, 95th Cong., 2nd Sess., 95 Cong. Rec. 8597 (1978), and by the Senate on October 6, 1978, 95 Cong. Rec. 17283 (1978).

8. Oliver Wendell Holmes' famous observation that "the life of the law has not been logic it has been experience" was followed by a listing of the factors that *do* influence judicial decisions, including "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen. . . ." O.W. HOMES, *THE COMMON LAW* 1 (1923).

9. See generally RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* (1962); B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 92-118 (1977).

10. For the full text of amendments constituting the Bill of Rights, see APPENDIX A, *infra*.

11. See APPENDIX B, *infra*.

teenth amendment—form the platform from which demands for other constitutionally protected rights have been launched.

## II. THE BILL OF RIGHTS

During the nation building period which followed the Declaration of Independence, the natural emphasis was on defining the powers of the federal government.<sup>12</sup> Another major concern was with the "right to be let alone": protection for both individuals and the states against intrusive federalism. Thus, the Constitution was conceptualized on the basis of limited federal power and the Bill of Rights continued that theme with the ninth amendment's exhortation that the enumeration "of certain rights, shall not be construed to deny or disparage others retained by the people" and the tenth amendment's reservation of powers to the states or to the people.

Consistently, individual rights were generally formulated as injunctions against the government, *e.g.*: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .";<sup>13</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .";<sup>14</sup> "In suits at common law . . . the right of trial by jury shall be preserved. . . .";<sup>15</sup> and "Excessive bail shall not be required . . . ."<sup>16</sup>

Irrespective of how the rights were formulated, the United States Constitution of 1789 with its Bill of Rights is generally regarded as a magnificent monument to human liberty. Yet, there were serious deficiencies prior to the post Civil War amendments. Most patent was the exclusion of Blacks, whether slave or free.<sup>17</sup> By resolution of February 11, 1837, the House of Representatives declared "that slaves do not possess the right of petition secured to the people of the United States by the Constitution."<sup>18</sup> The judici-

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12. Article I, Section 8 contains the basic powers of the national government and § 9 sets forth the prohibitions. The basic document grants virtually no individual civil or political rights, although bills of attainder and ex post facto laws are prohibited in Art. I, § 9, and except in limited circumstances, the privilege of the writ of habeas corpus cannot be suspended. Criminal jury trials are mandated for federal courts, conviction and punishment for treason is limited, (Art. III, §§ 2 & 3), and the privileges and immunities of citizens of each state are to be respected by other states (Art. IV, § 2).

13. U.S. CONST., amend. I.

14. U.S. CONST., amend. IV.

15. U.S. CONST., amend. VII.

16. U.S. CONST., amend. VIII.

17. Without directly referring to Blacks or the institution of slavery, the 1789 Constitution effectively maintained the status quo. *See* U.S. CONST., Art. I, §2, cl. 3 ("three-fifths of all other Persons" to be counted for apportioning representatives and direct taxes); U.S. CONST., Art. I, §9, cl. 1 (preventing Congress from prohibiting prior to 1808 "the Migration or Importation of such persons" as the existing states deemed proper); U.S. CONST., Art. IV, §2, cl. 3 ("No person held to Service or Labour" in a slave holding state could become released from bondage by escape to a free state). *See generally* A. Higgenbotham, *Racism in the Early American Legal Process*, 1619-1896, 407 THE ANNALS 1 (1973) hereinafter Higgenbotham; J. FRANKLIN, *RACIAL EQUALITY IN AMERICA* (1976); LITWACK, *NORTH OF SLAVERY, THE NEGRO IN THE FREE STATES, 1790-1860* (1961).

18. W. GOODELL, *THE AMERICAN SLAVE CODE* 36 (1969), *as quoted in* Higgenbotham, *supra* note 17 at 12, n. 65. Previously, in May, 1836, the House of Representatives passed the "so-called Gag Rule providing that all petitions relating to slavery 'shall, without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon.'" B. SCHWARTZ, *FROM CONFEDERATION TO NATION - THE AMERICAN CONSTITUTION, 1835-1877*, at

ary joined the congressional interpretation when, in *Dred Scott v. Sandford*,<sup>19</sup> Justice Taney announced that “[u]nder the United States Constitution a [B]lack man had no rights which the white man was bound to respect.”<sup>20</sup>

Another deficiency was revealed when the Supreme Court held in *Baron v. Mayor of Baltimore*<sup>21</sup> that the fifth amendment’s clause, prohibiting the taking of private property without just compensation, was not binding on the states. In the Court’s view, the purpose of the Bill of Rights was to provide “security against the apprehended encoachments of the general government—not against those of the local governments.”<sup>22</sup> Thus the matter stood until the Civil War.<sup>23</sup>

### III. THE FOURTEENTH AMENDMENT

Although the question of slavery was the precipitating cause of the war between the states—the “second american revolution”—the mere cessation of hostilities could not resolve the issue. It took the post-Civil War amendments to bring Black Americans within the orbit of constitutional protection. To these were added the reconstruction civil rights statutes.<sup>24</sup> With the legal framework in place, Frederick Douglass could insist that the former slaves also had the “right to be let alone”:

The Negro should have been let alone in Africa . . . let alone when the pirates and robbers offered him for sale in our Christian slave markets . . . let alone by the courts, judges, politicians, legislators and slave drivers. . . . [Now] if you see him plowing in the open field, leveling the forest, at work with a spade, a rake, a hoe, a pick-axe, or a bill—let him alone; he has a right to work. If you see him on his way to school, with spelling book, geography and arithmetic in his hands—let him alone. . . . If he has a ballot in his hand, and is on his way to the ballotbox to deposit his vote for the man whom he thinks will most justly and wisely administer the Government which has the power of life and death over him, as well as others—let him *alone*.<sup>25</sup>

On the surface, the newly amended Constitution was adequate to the

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93 (1973). It was not until 1844 that the gag rule was rescinded. B. SCHWARTZ, *THE LAW IN AMERICA* 87 (1974).

19. 60 U.S. 393 (1857).

20. *Id.* at 412.

21. 32 U.S. (7 Pet. 243) 1833.

22. *Id.* at 247. After passage of the fourteenth amendment, local governments were prohibited from taking private property without just compensation. *See Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 266 (1897).

23. The primary injunctions on state action, prior to the fourteenth amendment, are contained in Article I, section 10. Some relate to matters more properly allocated to the central government, *e.g.* treaties, the coining of money, duties on imports or exports. Others could be categorized as strictures against interference with individual liberty, *e.g.* prohibitions on bills of attainder, ex-post facto laws and laws impairing contractual obligations.

24. *See, e.g.*, 42 U.S.C. § 1981 (The Civil Rights Act of 1877 - equal rights under the law); 42 U.S.C. § 1982 (The Civil Rights Act of 1866 - property rights); 42 U.S.C. § 1983 (Civil Rights Act of 1866 - civil action for deprivation of rights); 42 U.S.C. § 1985 (Civil Rights Acts of 1866 and 1870 - damages for conspiracies in violation of civil rights). The Civil Rights Act of 1875, 18 Stat. 335 (public accomodation) was held unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883). For reconstruction era voting rights statutes, see note 49, *infra*.

25. Frederick Douglass, *as quoted in* L. BENNETT JR., *BEFORE THE MAYFLOWER - A HISTORY OF THE NEGRO IN AMERICA 1919-1964*, at 186 (Rev. ed. 1968).

task: abolishment of slavery in the thirteenth amendment, prohibition of infringement of the right to vote because of race in the fifteenth amendment and, in the fourteenth, the establishment of the concept of national citizenship, the inclusion of privileges or immunities clause, as well as federal protection against the denial of both due process and equal protection. But the reality of reconstruction is a record of disappointment and betrayal of Black expectations.<sup>26</sup> Nonetheless, like the Bill of Rights which preceded it, the fourteenth amendment has been hailed as a magnificent achievement.<sup>27</sup>

Whether that assessment is accurate depends in part on the conception of its proper role in protecting rights and the historical period against which it is measured. In the "substantive due process" *Lochner* era, from approximately 1900 to 1937, the Supreme Court used the due process clause of the fourteenth amendment as an avenging sword to invalidate numerous regulatory statutes.<sup>28</sup> In the case from which the period takes its name, *Lochner v. New York*,<sup>29</sup> the Court struck down a New York law prescribing maximum working hours for bakers. While the fourteenth amendment was designed to reach state action, the propriety of the Court's substitution of judicial for legislative judgment has been questioned.<sup>30</sup> Also, there was the issue of whether the amendment was designed to further the cause of laissez faire commercialism. One commentator noted that "The Fourteenth Amendment was treated as a legal sanction to the Survival of the Fittest."<sup>31</sup>

The recently freed slaves fared poorly under this interpretation.<sup>32</sup> Without federal judicial protection, they were not equipped to survive the onslaught of the Black Codes, disenfranchisement, sharecropping and labor contracts, mob violence and lynching.<sup>33</sup> State enforced apartheid was sanctioned in *Plessy v. Ferguson*,<sup>34</sup> notwithstanding the equal protection clause. In the *Slaughter-House Cases*,<sup>35</sup> the Court effectively emasculated the privileges immunities clause. For Blacks seeking civil and political rights and others seeking protection for fundamental personal rights, substantive due process had little meaning.

If at the midpoint of the twentieth century one were to have tried to reconstruct American constitutional history solely through inspection of Supreme Court opinions, one might well have imagined that the Civil War

26. See R. W. LOGAN, *THE BETRAYAL OF THE NEGRO* (1965). See generally, J. H. FRANKLIN, *FROM SLAVERY TO FREEDOM* (4th ed. 1974); L. M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 440-41 (1973); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (2nd Rev. ed. 1966); C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-1888* (1971).

27. See the papers delivered at a conference celebrating the amendment's centennial year, *THE FOURTEENTH AMENDMENT* (B. Schwartz, ed. 1970).

28. See authorities collected in *TRIBE, AMERICAN CONSTITUTIONAL LAW* 441 nn. 23-25 (1978). Tribe notes that "[w]hile the Supreme Court invalidated much state and federal legislation between 1897 and 1937, more statutes in fact withstood due process attack in this period than succumbed to it." *Id.* at 435.

29. 198 U.S. 45 (1905).

30. See *TRIBE, supra* note 28 at 436 nn. 6 & 7, 446 n. 2 & 3.

31. B. SCHWARTZ, *THE LAW IN AMERICA* 142 (1974).

32. In *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886), the Supreme Court held that corporations are "persons" entitled to the protection of the fourteenth amendment.

33. See generally L. MILLER, *THE PETITIONERS - The Story of the Supreme Court of the UNITED STATES AND THE NEGRO* (1966) [hereinafter *THE PETITIONERS*]; Higgenbotham, *supra* note 17 at 14-17.

34. 163 U.S. 537 (1896).

35. 16 Wall 36 (U.S. 1873).

had been fought chiefly over the question of freedom for the possessors of capital. . . . Only in some obscure way would the war be understood to have had any bearing on the legal, political and social capacities of the forcibly expatriated African slaves.<sup>36</sup>

#### IV. THE RIGHT TO BE LET ALONE

Notwithstanding its emphasis on economic freedom, the *Lochner* era Supreme Court also evidenced sympathy for non-economic liberties. A 1923 decision, *Meyer v. Nebraska*<sup>37</sup> overturned the conviction of a parochial school teacher for violating a state statute mandating the use of English in all instruction and prohibiting the teaching of foreign languages prior to the eighth grade. Observing that "the individual has certain fundamental rights which must be respected,"<sup>38</sup> the Court held that the rights of an educator to instruct and, of parents to engage him to teach their children, were protected by the due process clause.

Litigants faced with circumstances similar to *Meyer* have attempted to bring state conduct within the Bill of Rights' orbit by claiming that the fourteenth amendment was intended to incorporate the first ten amendments.<sup>39</sup> Another approach argues from the premise that "implicit in the concept of ordered liberty"<sup>40</sup> are certain inalienable fundamental personal rights which must be protected notwithstanding the failure of the Constitution to explicitly enumerate them.

Although the first approach has had champions among the Supreme Court justices,<sup>41</sup> the majority has rejected the notion of wholesale incorporation. However, on an ad hoc basis it has used selected provisions of the Bill of Rights to regulate state conduct.<sup>42</sup> So too, on a case by case basis it has found certain fundamental personal rights to be implicitly governed by the concept of due process.<sup>43</sup> The existing list may be expanded in the future as Americans continue to articulate new dimensions of the "right to be let

36. J. LIEBERMAN, MILESTONES! 255 (1976).

37. 262 U.S. 390 (1923).

38. *Id.* at 401.

39. See *Adamson v. California*, 332 U.S. 46 (1947). See generally A. Avins, *Incorporation of The Bill of Rights: The Crosskey - Fairman Debates Revisited*, 82 HARV. L. REV. 1 (1968); Black, *Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970); Brennan, *The Bill of Rights and The States*, 36 N.Y.U. L. REV. 761 (1961); Fairman, *Does the 14th Amendment Incorporate The Bill of Rights? - The Original Understanding*, 2 STAN. L. REV. 5 (1949); Holmes, *The 14th Amendment and The Bill of Rights*, 7 SO. CAR. L. Q. 596 (1955).

40. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) overruled by *Benton v. Maryland*, 392 U.S. 925 (1969).

41. See *Adamson v. California*, 332 U.S. 46, 74-75 (Black, J. dissenting, joined by Douglass, Murphy, and Rutledge, JJ.). See generally, Yarborough, *Justice Black, The Fourteenth Amendment and Incorporation* 30 U. MIAMI L. REV. 231 (1975); Mykkeltvedt, *Justice Black and the Intentions of the Framers of the Fourteenth Amendment's First Section: The Bill of Rights and the States*, 20 MERCER L. REV. 432 (1969).

42. See generally, Comment, "Selective Incorporation" in the 14th Amendment, 73 YALE L. J. 74 (1963). For a catalogue of Bill of Rights provisions which have been incorporated see TRIBE, AMERICAN CONSTITUTIONAL LAW 567-568, nn. 7-24 (1978).

43. See Comment, *Implying Constitutional Rights*, *infra*; See also, Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973); Symposium, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973). Symposium, *Recent Developments in Individual Rights*, 1973 DUKE L. J. 1036.

alone". Recent claims include the right to remain unborn,<sup>44</sup> to die,<sup>45</sup> to wear long hair,<sup>46</sup> and to be eccentric.<sup>47</sup> Even the rights of nonhuman animals have been discussed.<sup>48</sup>

Undaunted by restrictive interpretations of the post-Civil War amendments and statutes, Black Americans continued the quest for legal recognition of their inclusion into the family of *homo sapiens*. The path to the Supreme Court has been etched by Blacks seeking constitutional interpretations that would require states to extend to them the right to vote,<sup>49</sup> to serve on juries,<sup>50</sup> to the writ of habeas corpus,<sup>51</sup> as well as the rights of equal access to public facilities,<sup>52</sup> educational institutions<sup>53</sup> and housing.<sup>54</sup>

44. See *Park v. Chessin*, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977), *modifying* 88 Misc. 2d 222, 387 N.Y.S.2d 205 (1976), *noted in* 27 BUF. L. REV. 537 (1978); 44 MO. L. REV. 167 (1978).

45. In *Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *noted in* 18 U. FLA. L. REV. 591 (1976). *See also*, Comment, *The Right to Die a Natural Death: A Discussion of In Re Quinlan and the California Natural Death Act*, 46 U. CIN. L. REV. 192 (1977); M. Sullivan, *The Dying Person - His Plight and His Right*, 8 NEW ENG. L. REV. 197 (1973).

46. *Kelley v. Johnson*, 425 U.S. 238 (1976).

47. *See* Comment, *The Right of Eccentricity*, 29 HAST. L. REV. 519 (1978).

48. *See* Comment, *Rights for Nonhuman Animals: A Guardianship Model for Dogs and Cats* 14 SAN DIEGO L. REV. 484 (1977).

49. Following adoption of the fifteenth amendment in 1870, Blacks flocked to the ballot box and were often represented in state legislatures and the Congress. *See generally*, L. BENNETT, *BLACK POWER, U.S.A. - HUMAN SIDE OF RECONSTRUCTION 1867-1877* (1967); M. CHRISTOPHER, *BLACK AMERICANS IN CONGRESS* (2d ed. 1971). Federal statutory enforcement of non-discrimination in voting was attempted in the Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140, which provided criminal penalties for interference with the franchise. Amended in 1871 to provide for federally supervised elections, Act of Feb. 28, 1871, ch. 99, 16 Stat. 433, the federal scheme was abandoned when in 1894, most provisions of the Enforcement Act were repealed. Act of Feb. 8, 1894, ch. 25, 28 Stat. 36.

After the Hayes - Tilden compromise of 1877 white political supremacy was reestablished as various measures were adopted to limit the franchise to white males. These measures included literacy tests, the poll tax, and white primaries. These, and other devices, were frequently challenged. On the white primary, see *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Grovey v. Townsend*, 295 U.S. 45 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). The poll tax was challenged by a white litigant in *Breedlove v. Shuttles*, 302 U.S. 277 (1937), *overruled by* *Harper v. Virginia Board of Election*, 383 U.S. (1966). In *Schnell v. Davis*, 336 U.S. 933 (1949) the Court struck down Alabama's Boswell amendment which required potential voters to "understand and explain" the Constitution to state registrars.

50. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879); *Neal v. Delaware*, 103 U.S. 370 (1880); *Bush v. Kentucky*, 107 U.S. 110 (1882); *Andrews v. Swartz*, 156 U.S. 272 (1895); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Akins v. Texas*, 325 U.S. 398 (1945); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Swain v. Alabama*, 380 U.S. 202 (1965). *See generally*, THE PETITIONERS, *supra* note 33 at 232-245; Kuhn, *Jury Discrimination: The Next Phase*, 41 SO. CAL. L. REV. 235 (1968); Note, *Fair Jury Selection Procedures*, 75 YALE L. J. 322 (1965).

51. *Moore v. Dempsey*, 261 U.S. 86 (1923).

52. *See, e.g.*, *Mitchell v. United States*, 313 U.S. 80 (1941); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Henderson v. United States*, 339 U.S. 819 (1950); *Gayle v. Browder*, 352 U.S. 903 (1956); *Evers v. Dwyer*, 358 U.S. 202 (1958); *Boynton v. Virginia*, 364 U.S. 454 (1960); *Bailey v. Patterson*, 369 U.S. 31 (1962). *See generally*, D. BELL, *RACE, RACISM AND AMERICAN LAW 195-218* (1973); THE PETITIONERS, *supra* note 33 at 365-374.

53. *See, e.g.*, *Cumming v. Richmond Co. Bd. of Educ.*, 175 U.S. 528 (1899); *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45 (1908); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); *Fisher v. Hurst*, 333 U.S. 147 (1948); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950). *See generally*, Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470 (disparities of separate schools); THE PETITIONERS, *supra* note 33 at 333-346.

It may seem incongruous to align the Black quest for Supreme Court protection with the effort of other Americans to be left alone. Yet, the record reveals that both prior to and subsequent to the landmark decision in *Brown v. Board of Education*,<sup>55</sup> Blacks generally sought to be treated as "mere citizens" unrestrained by the burden of being the "special favorite" of discriminatory state laws.<sup>56</sup> Even the significant federal civil rights statutes passed during the decade of protest, were designed primarily to permit Blacks to partake of the same freedoms enjoyed by white citizens. For example, the Voting Rights Act of 1965,<sup>57</sup> did not alter the basic constitutional framework under which the state controls qualifications for voting in state elections.<sup>58</sup> Title VII of the Civil Rights Act of 1964,<sup>58a</sup> guaranteed equal opportunity in employment but did not establish a right to earn a living. The Fair Housing Act of 1968,<sup>58b</sup> is comprehensive in prohibiting racial dis-

54. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953). See generally, McGovney, *Racial Residential Segregation*, 33 CAL. L. REV. 5 (1945) (history of judicial response to racially restrictive housing covenants).

55. 347 U.S. 483 (1954).

56. In the Civil Rights Cases, 109 U.S. 3 (1883), Justice Bradley held the 1875 public accommodations Civil Rights Act unconstitutional and asserted that Blacks needed no special protection:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected.

*Id.* at 25. Miller's observation that Bradley's 'witles dictum' was 'bankrupt of reality' requires no further comment. THE PETITIONERS, *supra* note 33 at 391.

57. Voting rights were addressed by statute in 1957 as amended in 1960, 1964, 1965 and 1975. See The Civil Rights Act of 1957, 71 Stat. 634, 43 U.S.C. §§ 1971, 1975 (d); the Civil Rights Act of 1960, 74 Stat. 86; 42 U.S.C. § 1971 *et seq.* as amended; The Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. § 1971 *et seq.*; The Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973 *et seq.* as amended; The Voting Rights Act of 1975, 89 Stat. 400, all codified in 42 U.S.C. § 1971 *et seq.* See generally, Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. (1965), U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975), D. BELL, RACE, RACISM AND AMERICAN LAW 129-158 (1973).

58. Under Art. I, § 2 the states are empowered to determine who is qualified to vote for members of the House of Representatives. The seventeenth amendment contains an identical delegation for federal senatorial elections. Moreover, under Art. I, § 4, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State" although Congress is empowered to usurp state rules.

State options have been curtailed by the fourteenth amendment's penalty of reduced representation where the vote is denied to males over twenty one years of age, the fifteenth amendment's prohibition against denying the vote because of race, color or previous condition of servitude, the nineteenth's ban on disenfranchisement because of sex, the twenty-fourth's bar against poll taxes and the twenty-sixth's lowering the minimum voting age to eighteen for federal elections.

That the states retain broad power over elections is confirmed by *Lassiter v. Northhampton County Board of Elections*, 387 U.S. 105 (1967) 360 U.S. 45 (1959) upholding a state English language requirement for voting; *Sailors v. Board of Education* 387 U.S. 105 (1967) in which the Court made it clear that there is no constitutional right to have a state election. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court held unconstitutional a congressional attempt to lower the voting age for state elections to eighteen.

58a. The Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. § 1971, *et seq.* is comprehensive, covering Voting (Title I); Public Facilities (Title III); Public Education (Title IV); Federally Assisted Programs (Title VI); Equal Employment Opportunity (Title VII); and Housing (Title VIII).

58b. The Fair Housing Act of 1968, 82 Stat. 81, 42 U.S.C. § 3601 *et seq.* (1978).

crimination, but provides no remedies for those without sufficient funds to compete in the marketplace.

Without detracting from the importance of the Civil Rights Movement and the legislation it spawned, after the last march was over and the ink was dry on the last bill, it became apparent that rights without funds did not cure the disadvantage of being Black—or poor—in American society.<sup>59</sup> To fill this gap, it is necessary to consider moving beyond what Justice Brandeis deemed to be “the right most valued by civilized men”<sup>60</sup>—the “right to be let alone”—and toward the “right to be helped along.”

## V. THE RIGHT TO BE HELPED ALONG

The announcement of the Black Manifesto in May, 1969, provides a convenient date to mark the initiation of modern Black demands for distributive justice.<sup>61</sup> James Forman's call for reparations to Blacks from white churches and synagogues has a conceptual connection to earlier events, including Franklin Roosevelt's New Deal and to subsequent claims by individual litigants for affirmative governmental assistance in the pursuit of life, liberty and happiness.

The nation was attempting to recover from the crash of 1929, when Roosevelt campaigned for the presidency in 1932. In a speech to a prominent San Francisco club, he enunciated the philosophy which underlay legislative efforts to rearrange economic rights:

The Declaration of Independence discusses the problem of government in terms of a contract. . . . Under such a contract rulers were accorded power and the people consented to that power on consideration that they be accorded certain rights. The task of statemanship has always been the redefinition of these rights in terms of a changing and growing social order.<sup>62</sup>

The social order at the beginning of Roosevelt's New Deal legislation included a Supreme Court committed to limiting governmental power to regulate commercial conduct. Consistent with that philosophy, the Court

59. See, E. Friedenberg, *Our Class-Biased Bill of Rights*, CIVIL LIBERTIES REV., at 62-76 Oct./Nov. 1976.

60. Dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.

61. James Forman, former President of SNCC (Student Non-Violent Coordinating Committee) interrupted services at New York's Riverside church on Sunday, May 4, 1969 to read a statement which had been approved by the National Black Economic Development conference. The Manifesto is reprinted in BITTKER, *THE CASE FOR BLACK REPARATIONS* 161-75 (1973). See generally, Collins, *The United States Owes Reparation to Its Black Citizens*, 16 HOW L. J. 82 (1970); Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. REV. 1063 (1968), *Symposium on Reparations*, 2 REV. OF BLACK POLITICAL ECON. 1 (1972); A. SCHUCHTER, *ECONOMIC REPARATIONS: THE BLACK MANIFESTO AND ITS CHALLENGE TO WHITE AMERICA* (1970).

62. Address by Franklin D. Roosevelt at the Commonwealth Club, San Francisco, California, Sept. 23, 1932, reprinted as *The Philosophy of Government*, in GREAT AMERICANS SPEAK 166; 179 (J. Pomfret, ed. 1968).

invalidated F.D.R.'s National Industrial Recovery Act,<sup>63</sup> left retired working persons to fend for themselves by barring statutory old age pensions<sup>64</sup> and, in 1936, struck down a law establishing minimum wages.<sup>65</sup>

Less than a year later, in *West Coast Hotel v. Parrish*,<sup>66</sup> the Court acknowledged the changed social order caused by the "recent economic experience," reversed itself, upheld a state minimum wage law and abandoned *Lochner*. Similarly, other New Deal legislation received the Court's approval<sup>67</sup> and [p]ositive government intervention came to be more widely accepted as essential to economic survival. . . .<sup>68</sup> Roosevelt could claim that certain "economic truths" had become "self-efficient" by 1944, when he proposed "a second Bill of Rights under which a new basis of security and prosperity can be established for all, regardless of station, race or creed."<sup>69</sup> Among the rights included were:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation.

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and combination by monopolies at home or abroad.

The right of every family to a decent home.

The right to adequate medical care and the opportunity to achieve and enjoy good health.

The right to a good education.<sup>70</sup>

Like Roosevelt's New Deal and Economic Bill of Rights, President Kennedy's New Frontier, President Johnson's War on Poverty and President Carter's New Spirit were at least rhetorically responsive to growing visions of a helping government.

Since the great depression, federal and state legislators have taken significant steps to help citizens overcome inherent group or individual disadvantage,<sup>71</sup> to repair the damage done by random misfortune<sup>72</sup> and to

63. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), (Invalidating Title I of NIRA). See also, *Panama Refining Co. v. Ryan*, 293 U.S. 389 (1935).

64. *Railroad Retirement Board v. Alton R. R.*, 295 U.S. 330 (1935) (Invalidating mandatory pension system for interstate railroads).

65. *Moorehead v. New York ex rel Tipaldo*, 298 U.S. 587 (1936).

66. 300 U.S. 379 (1937).

67. See, e.g., The Social Security Act cases: *Carmichael v. Southern Coals Co.*, 301 U.S. 495 (1937); *Steward Machine Co., v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937) (old age benefits); *United States v. Darby* 312 U.S. 100 (1941) (Fair Labor Standards Act); *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937) (National Labor Relations Act).

68. *TRIBE*, *supra* note 28 at 446-47.

69. Message from the President of the United States on the State of the Union, Jan. 11, 1974, H. R. Doc. No. 377, 78th Cong., 2nd Sess., 90 Cong. Rec. 57 (1944).

70. *Id.* at 57.

71. See, e.g., Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §2000 *et. seq.*, prohibiting discrimination in employment on the basis of race, religion, national origin and sex. See also, Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Section 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS L. REV. 25 (1977); Symposium on the Rights of the Handicapped, 50 TEMP. L. Q. 941 (1977).

72. Statutes providing compensation for crime victims have been enacted in several states. See, e.g., CAL. GOVT. CODE §§13958 - 13872 (1977); MD. ANN. CODE Art. 26A, 771-17, as amended (1973); MINN. STAT. §299B.01 *et. seq.* (1977). See generally, Brooks, *The Case for Creating Compensation Programs to Aid Victims of Violent Crimes*, 11 TULSA L. J. 477 (1976); Carington, *Victim's Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 477 (1977).

compensate for erratic or uneven economic distributions.<sup>73</sup> Procedural due process decisions of the Supreme Court have also dulled the edge of disadvantage. Typical of this class of cases is *Griffin v. Illinois*,<sup>74</sup> requiring free transcripts for indigent criminal defendants where essential for appellate review; *Gideon v. Wainwright*,<sup>75</sup> mandating the appointment of counsel for indigents in felony cases; *Goldberg v. Kelley*,<sup>76</sup> ordering that administrative hearings be provided prior to termination of welfare benefits, and *Boddie v. Connecticut*,<sup>77</sup> which invalidated filing fees for indigents in a marriage dissolution action. Recent literature includes discussions of rights to know,<sup>78</sup> to a decent environment,<sup>79</sup> to treatment,<sup>80</sup> to light,<sup>81</sup> and to municipal services.<sup>82</sup>

In sum, the "rights explosion" was moved beyond the right to be let alone to the right to be helped along. Moreover, it is not directed solely to private philanthropy as was the Black Manifesto, but to governmental institutions. The inevitable consequence of honoring these new demands, according to some commentators, is that society will move away from equal protection of the law to equality of result.<sup>83</sup> In light of these demands, the question has been posed: "Will the Bill of Rights and its enforcement machinery prove adequate in a society in which the new equality is pressed to the extreme?"<sup>84</sup> The answer is still unfolding.

## VI. THE NEW BILL OF RIGHTS

The present inquiry is prompted by contemporary social needs, identified in Hubert H. Humphrey's valedictory message, the changed emphasis of the civil rights movement, articulated in the essay by Vernon E. Jordan Jr. and by the increased focus on international human rights, summarized by Arthur J. Goldberg. As the reviews of *Simple Justice* and *From the Black Bar: Voices of Equal Justice* reveal, Black American litigants and lawyers

73. Workmen's compensation laws and governmental aid to families with dependent children represent attempts to equalize the economic status of citizens, although they are not always justified explicitly on such grounds.

74. 351 U.S. 12 (1954).

75. 372 U.S. 335 (1976).

76. 397 U.S. 254 (1970).

77. 401 U.S. 371 (1971). *But see*, *United States v. Kras*, 409 U.S. 434 (1973).

78. *See* Comment, *The Constitutional Right to Know*, 4 HAST. C.L.Q. 108 (1977), (access to government information); Note, 34 WASH. & L. L. REV. 1115 (1977), (right to know and school board censorship of book acquisitions).

79. *See* Beckman, *Right to a Decent Environment Under the Ninth Amendment*, 46 LAB BULL. 415 (1971); Klepsch, *Aspects of a Constitutional Right to a Habitable Environment*, 49 IND. L.J. 203 (1975).

80. THE RIGHT TO TREATMENT FOR MENTAL PATIENTS (S. Golann & W. Fremou, eds. 1976); McNulty & White, *The Juvenile's Right to Treatment: Panacea or Pandora's Box*, 16 ST. CL. L. REV. 745 (1978); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARZ. L. REV. 1 (1977).

81. W. THOMAS, A. MILLER & R. ROBBINS, *OVERCOMING LEGAL UNCERTAINTIES ABOUT USE OF SOLAR ENERGY SYSTEMS*, (1978), (right of access to sunlight).

82. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

83. Lodge, *Equality of Result, Not Equality of Opportunity*, Across the Board, Mar., 1978; B. SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 225-30 (1977). *But See*, Hughes, *Equality in Fact v. Equality of Opportunity*, 23 WAYNE L. REV. 1 (1977).

84. B. SCHWARTZ, *supra* note 83 at 230.

have often played leading roles in shaping the contours of legally recognized rights. Yet contemporary demands for rights have come from all segments of the population. The quest is not limited to civil rights or simple equal protection, but includes demands for affirmative governmental action in areas such as those discussed in this issue—health, housing, education, rehabilitation and economic parity. Acknowledgment of and protection for these rights would benefit Black Americans because of their disproportionate presence among persons who are; poorly housed; in failing health; undereducated; incarcerated or with limited access to the economic mainstream. Nonetheless, the rights examined are not premised solely upon theories of redress for racial discrimination, but upon a broader conception of the role that constitutionally guaranteed rights can have in promoting a more equitable social order.

The word “right” is, of course, ambiguous. On the one hand, it signifies a power in its possessor to prevent others from intruding upon its free exercise. On the other hand, a “right” can mean entitlement to specific goods, services or positive action by governmental authorities or private entities. These definitions illustrate the distinction between the “right to be let alone” and the “right to be helped along.” They also underscore the dichotomy between the original Bill of Rights and modern notions of distributive justice. As Archibald Cox observed:

The original Bill of Rights was essentially negative. It marked off a world of the spirit in which government should have no jurisdiction; it raised procedural barriers to unwarranted intrusion. It assumed, however, that in this realm, the citizen had no claim upon government except to be let alone.<sup>85</sup>

Already engrafted upon this original notion is the right to be helped along, the current “political theory . . . acknowledges the duty of government to provide jobs, social security, medical care, and housing . . . .”<sup>86</sup> However, as the discussions in this issue demonstrate, the provision of such services is based predominantly on statutory authorization rather than through constitutional interpretation. Previous approaches to implying constitutional rights are outlined in a Comment in this issue. In brief, there are models and precedents for implying rights not specifically enumerated in the Constitution and its existing Bill of Rights, where fundamental personal interests are at stake, where necessary to protect explicit rights, where a natural right can be found to exist, or where, upon analysis, the nexus between the asserted right and a nonconstitutional interest is shown to be proximate. Another Comment in this issue, evaluates the option of reviving the privileges or immunities clause of the fourteenth amendment as a foundation for newly created rights.

Whether or not the Supreme Court embraces existing theories for implying rights or revives the privileges or immunities clause, is determined both by the conceptual climate both in the broader society and within its own chamber. The latter became decidedly more chilly toward judicial activism with the transfer of authority from the Warren Court to the Burger

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85. Cox, *The Supreme Court, 1965 Term-Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966).

86. *Id.*

Court. Indeed, "optimism is not warranted"<sup>87</sup> for a New Bill of Rights emanating from the Court as presently constituted. Thus, in three recent cases litigants who sought to achieve a minimal degree of economic parity and to establish housing and education as fundamental rights were unsuccessful.

*Dandridge v. Williams*,<sup>88</sup> upheld a state regulation limiting the maximum monthly public welfare payment to \$250 per month, regardless of family size or level of need. While acknowledging that the regulation denied "the most basic economic needs of impoverished human beings"<sup>89</sup> the Court concluded that distribution of welfare benefits does not "affect . . . freedoms guaranteed by the Bill of Rights."<sup>90</sup> *Lindsey v. Normet*,<sup>91</sup> involved Oregon's forcible entry and detainer statute, which allowed a substantially shorter period (two to six days) for defendant's response than prevailed for other civil actions, limited the tenant's defenses and required an appeal bond from a losing defendant tenant. Upholding all but the bond provision, the Court said, "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill."<sup>92</sup>

In *San Antonio Independent School District v. Rodriguez*,<sup>93</sup> it was argued that the equal protection clause was violated by the Texas scheme of school finance which permitted school districts to raise funds beyond the minimum state allocation per pupil through a local property tax which could not exceed a designated percentage of assessed valuation. The yield from the maximum percentage of assessed valuation in property—poor districts was less than that from property—rich districts, resulting in gross disparities in educational spending. The Court upheld the system and education was denied status as a constitutionally protected right.

*Dandridge*, *Lindsey* and *Rodriguez* notwithstanding, the call to move toward a New Bill of Rights is not an exercise in futility. This effort thus shares a kinship with those "Prophets with Honor" whose dissents later became the majority view in a subsequent era.<sup>94</sup> Regardless of the climate within the Supreme Court chambers, the biographies of the persons highlighted in the Dedication, *These Do We Honor*, demonstrate that the social climate can be warned by persistent advocacy of a cherished goal. Of course there are analytical pitfalls in the terrain leading toward a New Bill of Rights, some of which are noted throughout this issue. Moreover, there are cogent arguments against the judicial activism that is essential to launch a constitutionally based expansion of rights. They have been documented elsewhere and need not be recounted here.

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87. Reid, *Optimism is not Warranted: The Fate of Minorities and the Economically Poor before the Burger Court*, 20 How. L. J. 346 (1977). See also, Morrison, *Rights without Remedies: The Burger Court takes The Federal Courts out of the Business of Protecting Federal Rights*, 30 RUT. L. REV. 841 (1977).

88. 397 U.S. 471 (1970).

89. *Id.* at 485.

90. *Id.*

91. 405 U.S. 56 (1972).

92. *Id.* at 74.

93. 411 U.S. 1 (1973).

94. A. BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSIDENTS IN THE SUPREME COURT* (1974).

However, several questions should be raised even if definitive answers cannot be supplied. Thus, it is useful to inquire: How should one distinguish among the various claimed rights? Of what benefit is a constitutionally protected right? Is there not a negative fiscal impact concomitant with affirmative rights to governmental services? How will constitutionally protected rights to liberty fare if the right to equality of affirmative services becomes paramount?

In *Rodriguez*, the Court exhibited concern over the first question. Responding to the argument that the right to education is essential to exercise explicitly granted rights, the Court asked:

How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment.<sup>95</sup>

The obvious answer is that courts are in the business of making rational distinctions, where none can be made, then similar treatment is mandated. If judged by importance and need, the minimal requirements are for those items necessary to pursue life, liberty and happiness: These are health, education, housing, and either the right to earn a living or an alternative form of economic security.

The benefits from establishing a constitutional right are both procedural and substantive. In the first instance, elevation of a claim to the status of a fundamental constitutional right results in a procedural advantage. Governmental action challenged on equal protection grounds would be subject to strict judicial scrutiny.<sup>96</sup> Only when compelling governmental interests can be advanced will a fundamental right fall. If, on the contrary, no fundamental right or interest is at stake, only a rational relationship must be shown to justify the governmental measure.<sup>97</sup> Because strict scrutiny often results in invalidation of governmental action, the procedural advantage is transformed into a substantive advantage. In the second instance, the establishment of a right permits its possessor to participate in designing—or more accurately, redesigning—governmental action affecting that right. Assuming a governmental measure is invalidated by a court at the behest of the right's possessor, the permissible parameters for subsequent action in that area will be molded by the court's decree, prior to which the holder of the right will have had an opportunity to be heard. It might be argued that the proper forum for such a hearing is the legislature or some other rulemaking entity, rather than a court. Yet minority groups and minority interests often lack the ability to force the political process to accommodate their interests. For these groups and interests, the judicial forum has proven to be an essential thread in the fabric of our representative democracy.<sup>98</sup>

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95. 411 U.S. at 35.

96. *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 79 (1965).

97. *Railway Express Agency, Inc. v. N.Y.*, 336 U.S. 106 (1949), (equal protection clause); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), (due process clause).

98. See Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769, 784-85 (1971); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1120, 1125 (1969).

Redesign of a regulatory measure which conflicts with a constitutional right should make it less intrusive or more equal. In *Rodriguez*, for example, a revised system of school finance might have equalized the amounts spent to educate children in rich and poor districts. But if the Court had invalidated the system under review, would Texas have been prohibited from dismantling its entire public school program, assuming it were politically feasible to do so? Arguably the state would not have been so constrained if the decision were based on the equal protection clause. Herein lies a pitfall for rights to affirmative governmental services, premised upon traditional constitutional precepts. Protection is linked to governmental action. If the state fails to act, directly or indirectly, it has not intruded upon a right or provided goods or services in an unequal manner. For the Court to require government to act, it must first find a duty.

*Hawkins v. Town of Shaw, Mississippi*,<sup>99</sup> is instructive. That case involved a challenge to the municipality's failure to supply equal public services to Black neighborhoods. The court held the neglect in provision of services had clear overtones of racial discrimination and thus violated equal protection. However, the majority cautioned that "Federal Courts are reluctant to enter into the field of local government operations" and that "we do not imply or suggest that every *disparity of services* between citizens of a town or city creates a right of access to the federal courts for redress."<sup>100</sup> In a concurring opinion, Judge Wisdom disagreed that the opinion was confined to the facts of the case and said, "By our decision in this case, we recognize the right of every citizen regardless of race to *equal municipal services*."<sup>101</sup> Dissenting, Judge Roney argued that the court's decision was based upon the principle "that every citizen has a right not to be denied services because of race, and that any *denial of services must have occurred only as a result of the nonracial resolution of all the competing influences* in the politics of self-government."<sup>102</sup>

All of the quoted opinions in *Hawkins*, although disagreeing *inter se*, suggest that it is the racially based denial of services or inequality in services that forms the basis for constitutional action. Indeed, Roney's dissent illuminates the critical analytical hurdle for any advocate of a constitutionally imposed duty of government to act to ensure the life, liberty and pursuit of happiness by its citizens. Of course, there are Supreme Court cases mandating government expenditures to assist litigants to traverse the judicial process, such as *Griffin v. Illinois*,<sup>103</sup> and *Boddie v. Connecticut*.<sup>104</sup> Decisions of this genre are important to form the doctrinal bridge from traditional equal protection analysis to rights to affirmative governmental services.

Of major concern is the substitution of a judge's view on how scarce public resources ought to be allocated, for that of an elected lawmaker. Then too, one wonders whether rights to personal freedom of choice, such as

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99. 437 F.2d 1289 (5th Cir. 1971), *aff'd on rehearing*, 461 F.2d 1171 (5th Cir. 1972), *cert. denied*, 426 U.S. 245 (1975). See generally, Lineberry, *Mandating Urban Equality: The Distribution of Municipal Public Services*, 53 TEX. L. REV. 26 (1974).

100. 461 F.2d 1171, 1173 (5th Cir. 1972), (Emphasis supplied).

101. *Id.* at 1175, (Emphasis supplied).

102. *Id.* at 1182, (Emphasis supplied).

103. 351 U.S. 12 (1954).

104. 401 U.S. 371 (1971).

that championed in the Note in this issue on the *Right to Family Life*, would necessarily be threatened by affirmative constitutional rights. The concerns are legitimate; their resolution will unfold with the ebb and flow of arguments by advocates of a new conception of rights and their adversaries. However, the discussions contained in this volume are philosophically in tune with Laurence H. Tribe whose treatise on constitutional law is reviewed herein:

Most of the worry about how far judges may go, however genuine it may be and however fashionable it is again becoming, strikes me as rote unreality, profoundly misconceived in light of the inevitable social and cultural constraints on judicial intention and impact. . . . The inescapable boundaries of societal context and consciousness argue not that judges should restrain themselves still further, but that they must raise distinctive voices of principle. . . . [T]he highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect Union' between right and rights within that charter's necessarily evolutionary design.<sup>105</sup>

This issue, then, is designed to add a new dimension to the current social context and consciousness and to spur the course of constitutional evolution toward a New Bill of Rights.

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105. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iv (1978).