

FEDERALISM, "CIVIL RIGHTS" AND BLACK PROGRESS*

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Many have become so caught up in the phenomenon of supply side economics of the Reagan administration that the debate over its implicit political philosophy is seldom heard. Yet when one examines the economic philosophies of Milton Friedman or George Gilder, it is obvious that their central preoccupation is the question of individual human freedom and their conviction that the capitalist system in its relatively pure form of unbridled entrepreneurial economic opportunity and activity is the force which promotes such freedom in abundance. So influential has been the underlying assumption that it is the reduction of government, the main fetter to unbridled economic activity, that is necessary to achieve the optimum conditions for capitalism, that an important collection of writers have taken up this concept. Illustrative of this group is David Rothman who, in his essay, "The State As Parent," suggests that,

If our predecessors were determined to test the maximum limits for the exercise of state power in order to correct imbalances, we are about to test the minimum limits for the exercise of state power in order to *enhance autonomy*. The dialogue between these two approaches now dominate social policy discussions on dependency, and a close analysis of the assumptions and records of each position may well clarify, and perhaps even advance, the debates.¹ (Emphasis added).

However, Gilder, perhaps the "purist" theorist of the lot, criticizes Friedman and company for being uncertain about either the objectives of this freedom (that is to say, what it is for), or that it is created because "it gives room for the heroic creativity of entrepreneurs."²

As has often happened historically, a group of black economists and businessmen have also adopted these ideas as functional for the achievement of black progress in America. For example, in the words of Thomas Sowell, "the issue is not that the government gives too much help to the poor. The problem is that the government creates too much harm to the poor," and elsewhere he says,

One of the problems that I see is the problem of political interventionist state. I pose it in categorical terms, as if there is some noninterventionist state. We are really talking about differences of degree. There seems to be a notion that political interventionism that produces earmarked benefits for this or that group necessarily makes those groups better off.³

Sowell's view is that the expense of bureaucracy relative to the actual cost of

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1. W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, *DOING GOOD: THE LIMITS OF BENEVOLENCE* 74 (1978).

2. G. GILDER, *WEALTH AND POVERTY* 6 (1981).

3. *The Fairmont Papers: Black Alternatives Conference, December 1980*, INST. FOR CONTEMP. STUD. 6-7 (1981).

taking care of the needs of the poor makes bureaucracy a more prohibitive factor, and that this combined with government regulations makes it a more favorable strategy to reduce government intervention and promote self-determination. Then, the reason why there is such faith in the "pure" version of black self-determination may be found in a thesis stated by Walter Williams who suggests that "there is a kind of parity in the marketplace that does not exist in the political arena."

Discriminated-against people generally do better under a system where there is a market allocation of goods and services than when there is a political allocation of goods and services. The market resembles one-man-one-vote. This means that one person's one dollar. The difference between people lies in the number of dollars they have. No such parity exists in the political arena.⁴

This view was supported by Brian Summers who, in a 1982 article in the *Lincoln Review* (a journal of black conservative opinion) said that, "at any particular time in a market economy, the range (of choices) is pretty much the same for all people," and that even though some people have greater ability to attain such choices (goods, services, jobs), "in general, these options are available for any to pursue."⁵ Indeed, the editors of the *Lincoln Review*, in attacking the 1982 Report of the U.S. Civil Rights Commission which indicated that racism was largely responsible for the lack of black economic progress, summarized the political theory of "less government" in the following terms:

The way to advance black economic progress is to remove the disincentives of the dole, eliminate government regulations which interfere with the free workings of the market, curb the power of organized labor, and stimulate investment and business expansion which will produce new jobs.⁶

The rest of the theory would be, then, that the achievement of individual economic progress through capitalism would translate into greater collective progress (freedom?) for blacks as a whole.

Again, what we appear to have in this debate over the strategy for black progress (the lack of a definition for which may be the most critical problem), is one group of theorists who begin with capitalist theory, represented by the neoconservatives and their black counterparts, and another group which desires to fill out the political legacy of the Constitution as a precondition to the direct assault upon the achievement of human rights. Now we will employ the first proposition of our analysis, which asserts that what I have characterized as the "desires" of the latter group actually amounts to an empirical proposition, tested in the historical experience of blacks in America. To begin with, we will look briefly at the nineteenth century tension between federalism and its impact upon black progress.

As the framers of the Constitution sought to create the legal basis for the union of states, they grappled with the issue of the distribution of power between the central and the state governments. At that time, the question of the way in which freedom would be protected devolved to the issue of the way in which the rights to the disposition of private property would be pro-

4. W. WILLIAMS, *THE STATE AGAINST BLACKS* 142 (1982).

5. Summer, *The Moral Foundations of Property Rights*, 3 *LINCOLN REV.* 54 n.2 (Fall 1982).

6. *Id.* at 13.

tected by the Constitution. Since blacks were a major share of that private property held by the southern states, the sectional compromise between the north and south involved the problem of the relationship between federalism and the status of blacks from the very beginning of the nation. The issue, it is generally agreed, was settled by a:

compromise by which the northern or anti-slavery portion of the country agreed to incorporate, into the Ordinance [Northwest] and Constitution, the provision to restore fugitive slaves; and this mutual and concurrent action was the cause of . . . making the constitution the more acceptable to the slave holders.⁷

Another of the constitutional provisions stated that the Congress for twenty years could not prevent the several states from participation in the slave trade by allowing the importation of slaves.⁸ And while historian Benjamin Quarles states that this had the effect of removing the slave trade from Congressional jurisdiction for that period, this, together with the rest of the compromise, had the total effect of creating the presumption that the central government was powerless to interfere with the institution of slavery, even though a federal law barring the African slave trade was promulgated as of January 1, 1808. Such ambivalence was clearly established by the behavior of the Supreme Court in the 1842 case of *Prigg v. Pennsylvania*,⁹ where it upheld the 1793 Fugitive Slave law and inferred that Congress was powerless to prohibit the interstate commerce in slaves.¹⁰ But if there was any doubt the Supreme Court reflected the early ambivalence of the Constitution toward the African, the decision of Chief Justice Taney in the *Dred Scott* case was decisive. Ruling that Congress did not possess the power to abolish slavery, in the territories, he went on to deal with the other substantive question rejecting the status of Dred Scott as a citizen on the basis of the intentions of the founding fathers.¹¹

Further evidence that the balance of power, where the federal authority over slavery was concerned, was firmly vested in the notion of the political supremacy of the states is illustrated by the platforms of political parties from 1843 (the Liberty Party), 1848 (the Free Soil Party), 1852 (the Free Soil Democrats) and 1856-1860 (the Republican Party). It was the politics of the Liberty, Free Soil and Republican Party in particular, that contained the line of progression of the political idea of abolition which resulted in helping to create the basis for the post-Civil War amendments. Nevertheless, even these platforms, as late as 1860, parroted the concept that where slavery was concerned the state laws were superior to the federal law and that, therefore, no interference by Congress was possible.¹²

What is critically important, about the post-Civil War amendments, aside from their direct impact upon the status of the African slave, is that they simultaneously related the protection of this status *to the power of the*

7. S. LYND, *Slavery and the Founding Fathers*, in *BLACK HISTORY: A REAPPRAISAL* 125 (M. Drimmer ed. 1968).

8. B. QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* 60 (1969).

9. 41 U.S. 539 (1842).

10. J. TENBROEK, *EQUAL UNDER LAW* 77 (1965).

11. *THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849-1970* 17-8 (R. Bardolph ed. 1970).

12. TENBROEK, *supra* note 9, at 136-44.

federal government, thus adding to the power of the central government over the states. It becomes important that section 2 of the thirteenth amendment to the Constitution states that "Congress shall have power to enforce this Amendment by appropriate legislation;" the fact that section I of the fourteenth amendment denies to the states the power to "enforce any law which shall abridge the privileges or immunities of citizens of the United States," "deprive any person of life, liberty or property without due process of law" or "deny to any person within its jurisdiction the equal protection of the laws;" or the fact that the fifteenth amendment gives Congress the power to enforce the right of all to vote.

Sowell says that the fact of government intervention in the lives of blacks "betrays . . . a proprietary conception of blacks somewhat at variance with the spirit of the Thirteenth Amendment."¹³ However, *the Congress* at that time, which passed the thirteenth amendment on February 1, 1865, passed the First Freedmen's Bureau Act just over one month later on March 3, 1865 which made possible the issuance to many blacks the "forty acres and a mule," and which also issued to penniless blacks fuel, food and clothing. In effect, there appeared to be an explicit recognition of the fact that to merely confer civil rights upon the newly freed black population would not enable them to begin to exercise those rights without a nearly simultaneous grant of *resources*.

In the last quarter of the nineteenth century, the balance of federal power began to swing back in the direction of the states. Beginning in 1877 with the Hayes Bargain, whereby northern and southern politicians agreed to settle the election of 1876 for Rutherford B. Hayes if the "Negro Question" were left to the southern states and the federal power in the form of troops were withdrawn. Once again, what was a central issue of political importance in the election of 1876 was decided by a shift in the balance of power which negatively effected the status of blacks. One example, is that the first civil rights bill, which had been passed by the Congress in 1875 was repealed by the Supreme Court in 1883. While it is well known that, in the words of Richard Bardolph, "the Court categorically divested Congress of any power to remedy or punish discrimination by individuals, and confined that body to correcting positive state action," in our terms, the Court struck at the extension of civil rights into human rights, roughly described by Justice Bradley (speaking for the majority) as "equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres. . .," also adding "other intercourse or business. . ."¹⁴ While Justice Harlan put up a spirited defense of the intent of Congress in passing the post-Civil War amendments, rejecting the fact of "any class of human beings in practical subjection to another class, with the power in the latter to dole out to the former just such privileges as they may choose to grant,"¹⁵ such "class" (racial) oppression intersected with the new definition of federalism providing the basis for the national sectional detente of 1877.

The status of blacks under the extended period of the sectional detente can only be described as brutal. Under the dominance of the states, the

13. *The Fairmont Papers*, *supra* note 3, at 12.

14. BARDOLPH, *supra* note 11, at 68-9.

15. *Id.* at 72.

rights of blacks were quickly restricted through state statutes and a campaign of terror and physical destruction of blacks was launched by murderous and barbaric groups and individuals as part of the new legitimate public behavior toward blacks. Politically, while a total of 22 blacks had served in the House and Senate of the U.S. since 1869, by 1901, there were no blacks left in the Congress. So effective was the disenfranchisement campaign that by 1907 the *Atlanta Constitution* (7/29) could say that "we already had the Negro practically eliminated from politics by the white primary."¹⁶

The nineteenth century, therefore, has framed the issues in such a preponderance of empirical detail that it is possible for us to treat what happens in the twentieth century as even less than a history description and more as additional data. Next we will discuss the theory of federalism in four administrations—Roosevelt, Kennedy-Johnson, Nixon and Reagan, then we will examine the status of blacks on the issue of the tension between civil rights and human rights.

TABLE 1. FEDERAL AND BLACK PROGRESS: EXECUTIVE, LEGISLATIVE AND JUDICIAL ACTIONS IN CIVIL RIGHTS AND MEASURES OF BLACK ECONOMIC PROGRESS¹⁷

Federal Actions (selected)	Percent of Growth in Black Median Income Family			Percent Growth in Gross National Product
	Years	Blacks	Black-White Ratio	
Roosevelt/Truman (1932-1952)	1939-1953	+80 ¹⁸	+18 ¹⁸	(1940-1950)
Smith v. Allwright, 321 U.S. 649 (1944) (Voting)	1947-1952	+16	+6	.65
Ex. Ord. 8802 (1941) (Jobs)				
Ex. Ord. 9981 (1948) (Military)				
Sweatt v. Painter, 339 U.S. 629 (1950) (Education)				
Henderson v. United States, 339 U.S. 816 (1950) (Transportation)				
Ex. Ord. 10308 (1951) (Federal Contracts)				
Eisenhower (1952-1960)	1953-1959	+15	+1	(1950-1960)
Brown v. Board of Education, 347 U.S. 483 (1954) (Education)				.44
Civil Rights Act (1957) (Voting)				

16. P. LEWINSON, RACE, CLASS AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 112 (1965).

17. See THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1970-1978, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, No. 80, U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 31. See also, SOCIAL INDICATORS III; SELECTED DATA ON SOCIAL CONDITIONS AND TRENDS IN THE UNITED STATES, U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS 485 1980 (1).

18. Black Male Median Wage Income of Wage and Salary Workers. *Id.* at 48.

Federal Actions (selected)	Percent of Growth in Black Median Income Family			Percent Growth in Gross National Product
	Years	Blacks	Black-White Ratio	
Civil Rights Act (1960) Voting				
<u>Kennedy/Johnson (1961-1968)</u>	1959-1969	+36	+9	(1960-1969)
Ex. Ord. 10925, 11114 (1961) (EEO)				.46
Ex. Ord. 11063 (1963) (Housing)				
Civil Rights Act (1964)				
Public Accommodations, EEO				
Civil Rights Act (1965)				
Voting				
South Carolina v. Katzenback, 383 U.S. 301 (1966)				
(Voting)				
Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)				
(Housing)				
Civil Rights Act (1968)				
(Housing)				
<u>Nixon/Ford (1969-1976)</u>	1969-1976	+16	-2	(1969-1976)
Griggs v. Duke Power Co., 401 U.S. (EEO) 424 (1971)				.45
CETA (1973) - Jobs				
Voting Rights Act (1975)				
Housing and Community Dev. Act (1974)				
Minority Business Enterprise (1969) (SBA Loan Program)				
The Philadelphia Plan (1971)				
<u>Carter (1976-1980)</u>				
Bakke v. Regents of the University of California, 438 U.S. 265 (1977) (Affirmative Action in Education)				
Supplementary CETA funding				
Ex. Or. 12232 (1980) - Education	1976-1980	+23	-3	(1976-1980) .33

Taking the two Democratic administrations together—the Carter administration is not regarded by the writer to have developed a clear conception of federalism—the approach to the utilization of the federal power was strikingly similar. Nothing in Roosevelt's background had given hint to the massive transition in emphasis between private and public responsibility he was to make as President; rather it was the fact of the new challenge of the Depression of 1929 and the four years of desperate circumstances foisted upon the nation. In his inaugural address March of 1933, there is evidence that Roosevelt was clear what conception of the federal responsibility he would adopt. He said that he "hoped that the normal balance of executive and legislative authority" would be "adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from the normal balance

of public procedure."¹⁹ He further stated that he would act swiftly within the limits of his executive authority upon the problems facing the nation, but, as is now well known, he also said he would request from Congress for "broad executive power to wage against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe."²⁰

Harold Ickes, Roosevelt's Interior Secretary, and former head of the Chicago NAACP (1922-24), wrote in his work *The New Democracy*, that Roosevelt's election had signaled a "bloodless social revolution" in the sense that he intended to uproot the "old order" and begin a new period of interdependence and cooperation.²¹ Ickes, speaking at the NAACP Convention of 1936, said that blacks would be aided by the New Deal because they were part of that class of persons favored by its policies. He further, counseled that,

If [Blacks] would use [their] political independence to win [their] 'economic freedom,' he [they] took advantage of the administrative programs aimed at assuring [them] 'equal opportunity' and a 'square deal,' if [they] utilized the increased educational facilities being offered [them] to prepare for 'the modified social and economic foundation upon which the new democracy' was being built, then Ickes foresaw a bright future.²²

Needless to say that Ickes' strategy for accomplishing the withering away of the race problem and especially the problems of blacks, was not accomplished because of the virulence of prejudice and segregation, but his recognition of the unmistakable link between the "status" and "welfare" rights and resources of blacks reaffirms an earlier fact.²³

Although two very important executive orders in 1948 and 1951 were passed by President Truman and the Supreme Court had shown definite signs of decisive action in voting, education and transportation, it was probably the effect of Roosevelt action in setting up the right agencies and in promulgating Executive Order 8802 which opened up defense industries to black employment that was responsible for improving their economic status. The data show (See Table I), for example, for the years covering the Roosevelt/Truman administration, an eighty percent increase in male wage earners income and an eighteen percent growth in the ratio of black to white male wage earner incomes. In the years covering the Truman administration, the growth is sixteen percent in median black family income and six percent in the ratio of black to white median family income. These increases are reflected in a growth of sixty-five percent in GNP for roughly the same period of the two administrations.

The Kennedy/Johnson administrations continued the theme of aggressive federal initiative or "intervention" under a concept of federalism which conceived of "cooperation" between the various levels of government as the key element. For instance, in his January 1966 economic report to Congress, Johnson sought to enhance the penetration of his social programs by devising "creative federalism." With his Advisory Commission on Intergovern-

19. THE HERITAGE OF AMERICA 1115 (H.S. Commager & A. Nevins eds. 1951).

20. *Id.* at 1116.

21. J. KIRBY, BLACK AMERICANS IN THE ROOSEVELT ERA: LIBERALISM AND RACE 30-1 (1980).

22. *Id.* at 31.

23. J. WILSON, NEGRO POLITICS: THE SEARCH FOR LEADERSHIP 185 (1960).

mental Relations and the Bureau of the Budget as lead agents, he directed all of the Cabinet agencies to "help solve social and economic problems that *neither private action nor State and local governments can solve alone*," (Emphasis added) such as problems in the areas of transportation, environmental protection, agriculture and urban decay. He went on to say that,

Recognition of the responsibilities of the Federal Government neither lessens the responsibilities nor impairs the freedoms of individuals and private groups; nor does it challenge the authority of State and local governments. The tasks involve new and growing problems of an increasingly complex and interdependent economy and society. But the Federal Government by itself cannot create prosperity, reduce unemployment, avoid inflation, balance our external accounts, restore our cities, strengthen agriculture, eliminate poverty, or make people healthy.

Only through a creative and cooperative partnership of all private interests and all levels of government—a creative federalism—can our economic and social objectives be attained.²⁴

No doubt, one of the sources of Johnson's aggressiveness was the booming economy which he describes with understandable awe. But another factor was that blacks had launched a powerful grassroots social and political movement of protests, designed to complete both the status and welfare agendas. While most have emphasized the status aspect of civil rights protests, it should not be forgotten that at the historic March on Washington of August 1963, Roy Wilkins put forth the basic demands of the event which including, among others, a fair employment practices act, a national minimum wage of not less than two dollars per hour, a "massive federal program to train and place unemployed workers," and an order prohibiting housing discrimination.²⁵ But it was Whitney Young who, as Executive Secretary of the National Urban League, urged in 1963 that the national leadership undertake to support a "massive Marshall Plan" because blacks might "wind up with a mouth full of civil rights and empty bellies, living in hovels."²⁶ The response of the "Great Society" programs alone was considerable, as the combined programs brought over 15,000 blacks into federal jobs alone.²⁷

This emphasis of both the "civil rights" movement (containing both status and welfare goals) and the federal executive view of government responsibility produced a significant increase for blacks in both areas of the movement, through the instrumentalities of executive orders, civil rights bills, Supreme Court decisions and special Congressional legislation—in short, the dominant array of the federal power. This stimulated an amazing 36 percent increase in black family median income, the highest in any one period of the twentieth century, and a nine percent increase in the ratio of black to white median family income for the period 1959 to 1969. This occurred at a time of relative growth in the GNP of forty-six percent.

As far as the Republican administrations are concerned, President Eisenhower articulated no clear concept of federalism, yet it will be seen that in general, both his administration and that of Presidents Nixon and Ford

24. 34 PUB. PAPERS 98 (Jan. 27, 1966).

25. D. LEWIS, KING: A BIOGRAPHY 226-27 (1798).

26. R. CARTER, et. al., EQUALITY 4 (1965).

27. Interview with George Butler, Acting Director, Office of Voluntary Compliance, U.S. Equal Opportunity Commission (June 2, 1976), cited in D. NEWMAN, et. al., PROTEST, POLITICS AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS 117 (1978).

yielded the *least* for blacks in both federal resources and in material gain. Nixon, however, in his first domestic report to the nation, decried the fact the nation had endured "A third of a century of centralizing power in Washington" and "social experimentation [that] has left us a legacy of entrenched programs that have outlived their time or outgrown their purposes," feeling that such federal growth had "strained our institutions and raised serious questions" about the adequacy of such programs.²⁸ Then, calling for a "drastically different approach to the way in which government power is shared between the States and Federal levels", he suggested that, "it is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the States and to the people."²⁹ It was the intention of the Nixon administration to turn over major social programs, such as social welfare, to the states to administer along with a share of the federal revenues, a proposal which initiated the revenue sharing program begun in 1971.

Nixon attempted to add substance to his rationale by fending off suggestions that his program amounted to "States rights" by saying that this concept used to be a euphemism for avoiding social problems, but that states would be given the resources to deal effectively with them.³⁰ He also added older Republican concepts:

The New Federalism also recognized the role of people of individuals doing and caring and sharing. The concept of voluntary action, of community action, of people banding together in a spirit of neighborliness to do those things which they see must be done, is deeply rooted in America's character and tradition. As we have swept power and responsibility to Washington, we have undercut this tradition.³¹

Yet the "New Federalism" severely criticized as it unfolded in practice as strongly ideologically grounded, seeking to eliminate what were considered "liberal" programs of prior Democratic administration, with at least one observer suggesting that, "the community development program must be seen, in part at least, as a major part of this retrenchment effort."³² Professor Morris goes on to say that the retrenchment is particularly critical inasmuch as, in addition to the lost financial resources of such social programs, the citizen participation mechanisms of these programs that involve citizens in program decision-making, were severely weakened.

Under the Nixon administration the "Great Society" era programs which had been in progress only five short years, were largely dismantled and a profile of race-related federal initiatives were begun that were intended to have economic effect. In short, the return to a strong emphasis upon capitalism meant the development of a racial corollary, or "black capitalism," containing a number of measures such as tax incentives for businesses to locate in inner-city neighborhoods, job training programs administered by private firms, increased availability of loans through the Small Business Administration, and "set-aside" programs such as The Phila-

28. 324 PUB. PAPERS 637 (Aug. 8, 1969).

29. *Id.* at 639.

30. 347 PUB. PAPERS 699 (Sept. 1, 1969).

31. *Id.*

32. Morris, *New Federalism and Community Development: A Preliminary Evaluation of the Housing and Community Development Act of 1974*, in THE JOINT CENTER FOR POLITICAL STUDIES 35-6 (June 1976).

delphia Plan, modeled after the Cleveland Plan. Yet, curiously, this approach resulted in an impact on black median family income of a very moderate increase of sixteen percent, and a *decrease* in the ratio of black to white median family income of two percent over the period 1969 to 1976. At the same time, although the annual rate of economic growth was not as great as in the 1960s, the total period growth was forty-five percent, or approximately the same as that in the previous two periods of Democrat and Republic administrations. In addition, there is extremely credible testimony that the revenue sharing programs, intended to bring the exercise of political power, through fiscal responsibility, closer to the local levels, had the reverse effect. Mayor Richard Hatcher of Gary, Indiana, said the following, in 1971:

Let me share with you what has happened in the City of Gary under the "New Federalism."

The 'safe streets act' was passed and funds appropriated ostensibly to fight crime in the streets. Indiana's funds were allocated to the state criminal justice planning committee for distribution. Almost none of that money reached the streets of Gary. The little money we did receive from the 'safe streets act' came mostly from the discretionary funds which were distributed directly from Washington.³³

What our very brief look at the philosophy of federalism in the Nixon-Ford administration appears to say is that altering the distribution of benefits from Washington to the localities interposes yet another level of competition, introducing the intervention of the state with its own interests which, if they conflict with those of the localities, often means that the latter loses vital resources. In addition, it is not clear through available research that the admittedly important cost of bureaucracy is offset by administering programs through the state governments.

Given the questionable performance of the "New Federalism" during the Nixon administration, it is indeed surprising that just such a theme has been selected for the Reagan administration as well. Nevertheless, on April 8, 1981, the Presidential Advisory Committee on Federalism was created by Executive Order 12303. Naming Senator Paul Laxalt (R-Nev.) as Chair, President Reagan called this a "first step in helping me to restore a proper constitutional relationship between the Federal, State, and local governments."³⁴ Returning to the theme of the need for a decentralized system based on need to provide localities with greater decision-making authority, Reagan suggested that "the Federal Government too often has treated elected State and local officials as if they were nothing more than administrative agents for Federal authority."³⁵ In an interview later in the year, however, Reagan reveals the fact that his own vision of the proper balance between federal and local authority is far more radically weighted on the side of the local governments in theory than previous Presidents had been. With regard to the concept of creating greater block grants for states, he said,

[m]y dream is that the block grants are only a means to an end. And the end is that the government, which has preempted over the years so much

33. Hatcher, *Revenue Sharing-No. 3*, THE BLACK POLITICIAN 23 (July 1971).

34. *Administration of Ronald Reagan*, WEEKLY COMP. PRES. DOC. 412 (Apr. 8, 1981).

35. *Id.*

of the tax revenue potential in this country, that we could turn back not only the responsibility to governments of tasks that I think they can perform better than the Federal Government can perform, but turn back tax sources to so that the tax source itself goes to them.³⁶

Then, following the concept of the Nixon administration almost exactly, he opines that the government has over-extended itself since the Great Depression into areas never envisioned by the Constitution's drafters, and he reaffirmed the dictum contained in the tenth amendment to the Constitution which is the basis for states' rights proponents. Also, when asked which functions he would return to the states, he also suggested that welfare would be a prime candidate. The essential doctrine is unmistakable.

The constitutional concept of federalism recognizes and protects diversity. Today, federalism is one check that is out of balance as the diversity of the states has given way to the uniformity of Washington. And our task is to restore the constitutional symmetry between the central Government and the States and to re-establish the freedom and variety of federalism. In the process, we'll return the citizen to his rightful place in the scheme of our democracy, and that place is close to his government. We must never forget it. It is not the Federal Government or the States who retain the power—the people retain the power.³⁷

In the speech from which the above passage comes, the President is providing the rationale for the massive shift in resources presaged by his first budget proposal, and it almost appears as if his scope is so profound that he is attempting to attack the New Deal and its entire historical legacy, rather than the problems of the recent past. In the process, of course, the damage to the blacks and portions of the white community has been devastating as unemployment levels rise to the highest since the Depression, business failures are at epidemic proportions, housing foreclosures are rampant, a new group of middle-class, jobless poor has arisen, educational opportunity is decreasing and racism is again rising. Despite this record, and the fact that Reagan's "New Federalism" has proceeded from the most questionable premises where the concept of federalism is concerned, the President shows only minor signs of changing direction in his 1983 State of the Union Address.³⁸

It should be pointed out that the legislative form of this concept, known as the New Federalism Act of 1983, a ninety-two page proposal, has been modified from its initial ambitious attempt to turn over such programs as welfare to the states alone with others. It now proposes to consolidate twenty-seven programs with a total cost of \$20.7 billion into three, financed from three trust funds administered by the federal treasury. The basic intent, it is said, "is to take a major share of the federal grant system and transform it into revenue sharing, to withdraw federal involvement in these activities and transfer the responsibilities to State."³⁹ At present, under the Revenue Sharing program, the federal government distributes \$4.5 billion to 39,000 counties, cities and towns. However, the National Governors Association has been insistent that the maintenance of income security is a fed-

36. *Federalism*, WEEKLY COMP. PRES. DOC. 1291 (Nov. 19, 1981).

37. WEEKLY COMP. PRES. DOC. 833 (July 30, 1981).

38. See Hill, *Economic Policies and Black Progress: Myths and Realities*, RESEARCH DEPARTMENT, NATIONAL URBAN LEAGUE (1981).

39. *Reagan Modifies "New Federalism" Plan*, New York Times, Jan. 26, 1983.

eral responsibility, so that apparently some of the largest social programs such as welfare will, for the immediate future at least, remain federally controlled. If only an alteration of the system for funding social programs was at stake, then perhaps such a program might have more support, but as we have seen, the net effect of "New Federalism" programs is to decrease financing available for some critical local programs by state level intervention, which when added to government reductions in total amount of consolidated programs, most certainly adds a negative increment to funds available. "New Federalism," then would appear to intensify the current problems created by the massive shifts of funds from the social sector into defense and corporations.

We arrive, then, at a new understanding that the most important effect of philosophies (or ideologies) concerning the federal role in the distribution of national resources may not be evaluated by the form of any such designated legislation, but in the overall approach of the President to questions of social responsibility. This President has clearly favored greater defense spending and private economic incentives while attacking civil rights and, consequently, corollary human rights programs. The attack upon civil rights has been two-pronged: first, it has involved initially damaging proposals for the Voting Rights Act renewal, which would have effectively gutted its main provisions of coverage; the President has supported tax exemptions for segregated educational institutions (known as religiously conservative "seg academics"); and there has been a strong attack on affirmative action such as the dismantling of the Office of Federal Contract Compliance Programs enforcement standards and an attempt to return to individualistic rather than "class action" strategies for dealing with employment discrimination. Secondly, there has been a weakening of the budgetary support for civil rights agencies in the Federal government. This was inevitable, considering the mood of the Administration because, as indicated the opening line of a report of the U.S. Civil Rights Commission on this subject, "The Federal Budget is an important statement of policy."⁴⁰ The report goes on to detail the damage to enforcement done to the coordination of federal civil rights activities among agencies and the systemic impact this will have in State agencies and in the private sector, as well as in litigation efforts. It concludes that a "retrogressive trend is underway," that "unresolved civil rights problems of great magnitude persist," and that, ". . . the proposed FY 83 budget is a new low point in a disturbing trend of declining support for civil rights enforcement that, unless halted, could leave our Federal civil rights laws little more than devalued pieces of paper."⁴¹

Blacks have had to suffer in this attack upon the social responsibility of government at the federal level, since, as we have demonstrated, they have been central to the great question of the distribution of national resources among groups by the local or national instruments of government. They are the neediest within the social sector and, therefore, have become the bellwether of the federal responsibility in this regard. Here, we disagree with many who, for example, have utilized the debate over the maintainance of

40. *The Federal Civil Rights Enforcement Budget: Fiscal Year 1983*, 71 U.S. COMM'N ON CIV. RIGHTS 1 (June 1982).

41. *Id.* at 64-8.

the social security system as the hallmark of the government's responsibility toward social progress, since proportionately fewer blacks are served by social security and it supports a class-undifferentiated body of whites. For example, in this debate, Senator Daniel Moynihan (D-N.Y.) said that "Social Security being so symbolic," rejected the attempt by the Administration "to discredit[s] a whole tradition."⁴²

But when the issue is more sharply joined, it is possible to see that the Reagan administration is attacking civil rights *because of the recognition of the linkage between it and human rights* or welfare resource objectives of blacks and other dispossessed peoples of color. When Burke Marshall said that "Civil Rights issues cut into the fabric of federalism" he had in mind at that time the difficulty of protecting the federal rights of civil rights workers in the south countered by the legal and police power of state governments. The eventual victory of blacks was described in heroic terms by Supreme Court Justice Abe Fortas.

It would be difficult to find many situations in history where so much has been accomplished by those who, in cold realism, were divorced from the conventional instruments of power. Negroes and the youth-generation held no office. They did not control political machines. They did not own vast newspapers or magazines or radio or television stations. But they have caused great events to occur. They have triggered a social revolution which has projected this nation, and perhaps the world, to a new plateau in the human adventure. They have forced open the frontier of a new land—a land in which it is possible that the rights and opportunities of our society may be available to all, not just to some, in which the objectives of our Constitution may be fully realized for all; and in which the passion and determination of youth may be brought to the aid of our pursuit of the marvelous ideals that our heritage prescribes.⁴³

This is a profound vision of the possibilities implicit in the revolution which blacks led, to achieve, not only civil rights, but through then both their complete civil status and human complement, on terms *at least* equal to those of other white Americans as a group.

As the demand to fulfill this larger vision requiring the massive investment of the national resources and the distribution of the federal resource in particular began to become the focus of the political struggle of the 1970s, many of those who were at the forefront of the "civil rights" struggle of the 1960s in the white community became the neo-conservatives of the 1970s and 1980s. The conflict over national resources has clearly become the definition of the success of "civil rights" rather than the continued accumulation of what might be termed "threshold rights" to political, economic and social participation.⁴⁴ Threshold rights are opportunity rights which endow those who possess them with no necessary compliment of resources. That is why it is surprising to have such questionable proposals which result only in threshold rights stand as viable proposals for black progress. Thomas Sowell's comment that government intervention "betrays . . . a proprietary conception of Blacks somewhat at variance with the spirit of the Thirteenth

42. *Social Security Commission and its Partisan Divisions*, The New York Times, Dec. 20, 1982 at B17.

43. Fortas, *The Rights and Limitations*, in THE AMERICAN POLITICAL REALITY 235 (M. Ottensoser & M. Sigall eds. 1972).

44. See Walters, *Race, Resources, Conflict*, 27 SOCIAL WORK 24-31 n.1 (Jan. 1982).

Amendment."⁴⁵ However, in a decision of the Supreme Court in 1968 concerning a fair housing case (*Jones v. Mayer*),⁴⁶ the Court affirmed an important principle of the 1866 Civil Rights Act declaring equal rights by blacks to dispose of property. Justice Potter, speaking for the Court said:

Negro citizens North and South, who saw in the Thirteenth Amendment a promise of freedom . . . would be left with a 'mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.⁴⁷

Some analysts act as though the promise of the thirteenth amendment has been fulfilled. Remembering Professor Walter Williams who we have referred to as saying that "There is a kind of parity in the marketplace that does not exist in the political arena, and "that one person's dollar is the same as another person's dollar. The difference between people lies in the number of dollars they have."⁴⁸

We suggest that this view is a *naive* conception of the economic process in this country—suggesting that the market is, in a classical sense, impersonal and is not strongly influenced by the same social forces which shape the political or social systems, such as racism. Indeed, unequal access to employment and capital by blacks has been well known to have provided grossly unequal access to the market. But racists manipulation of the market itself has also resulted in such debilities as differential prices for goods for blacks and the poor in many places, unequal availability of goods to blacks (such as housing), and a gross lack of representation by blacks in the content of items in the market available for consumption by the black public (movies, black oriented consumer goods, and etc.). Of course, it should be noted that many of these factors which determine the inequalities in the market stem from the lack of participation by blacks in market management and decisionmaking roles, some would suggest, due both to the presence of racism and to the fact that the workings of capitalism tends to monopolize this control in the hands of a few individuals. Nevertheless, even Republican Gerald Ford's administration recognized that racism inhibited the fair participation of the disadvantaged in the market.

[i]n some cases, not all people can participate with equal opportunity in market activity. This may result from a variety of causes which individuals may or may not be able to control; imperfect information about a market, lack of adequate income to buy into the market, or a pattern or practice of discrimination that precludes free participation.⁴⁹

In any case, Summers, in his *Lincoln Review* article and Friedman, in the *Fairmont Papers* symposium make the case that the reduction of federal

45. *The Fairmont Papers*, *supra* note 3.

46. 392 U.S. 409 (1968).

47. BARDOLPH, *supra* note 4.

48. WILLIAMS, *THE STATE AGAINST BLACKS*, *supra*.

49. COMM. ON COMMUNITY DEVELOPMENT, ON NATIONAL GROWTH AND DEVELOPMENT, 2d REP. TO CONG. 2 (Dec. 1974). This report was submitted pursuant to section 703(a) of Title VII of the Housing and Urban Development Act of 1970.

responsibility for the social sector produces human freedom, an argument finding its origins in weak version of federalism espoused by property holders who shaped the original government. With regard to the linkage between federal responsibility to ensure fairness or protect civil rights and the impact of this upon welfare resources, this conservative definition can be construed to mean *the right to be poor in the midst of an affluent society!* Blacks are to be the only group to accept the notion that the question of freedom and liberty has not always been related to *real* access to resources, that "threshold rights" may substitute for "fairness plus resource-access."

Justice Potter Stewart's interpretation of the issue of freedom as it applied to the thirteenth amendment was a valiant attempt to extend the concept to its practical limits, given the prevailing problems of federalism in the 19th century. However, in a modern society such as the United States, not only is the mere access to threshold rights by any large group a blatant act of group discrimination, especially given the fact that blacks were prevented in the first place from the "natural" process of capital accumulation in America,⁵⁰ it is a recipe for continued social instability. The full meaning of the concept of freedom as it applies to black people is not rejected here; it means that the larger exercise of group responsibility and initiative belongs to blacks and their leadership. But in the residual area of the responsibility of government, since it has been demonstrated that the historic definition of federalism which withdraws responsibility from the social sector impacts negatively upon blacks, that definition cannot be supported by blacks, and support for continued federal government intervention is a logical response to that history.

50. Walters, *The Politics of Affirmative Action*, 6 W.J. Black Stud. 175-7 n.3 (1982).